Richards Property Outline – Fall 2003

First in Time/ Possession/ Alienation/ Exclusion/ Occupancy

- Acquisition by Discovery/Conquest => Who is first in time? =>
  Possession v. Occupancy – *Johnson v. M’Intosh*
  - Bundle of sticks – dividing legal interests and rights in the same piece of property (Johnson only bought the right of occupancy from the Indians b/c that is the only right they had after Americans defeated them)
  - Whoever stakes claim to discovered land first, claims it as long as they maintain occupancy.
  - First in time
    - Good = clear rule, not subjective; does not promote efficiency to change things
    - Bad = unfair distribution; what does it mean to possess something?
  - Conqueror determines the rights of the conquered.

- Acquisition by Capture => What constitutes possession/ownership? =>
  First in time v. Present possession
  - Wild Animals
    - Pursuit + Mortally Wounding = deprivation of natural liberty = ownership with intent to possess
      - Ownership = possession + appropriation (the act of taking possession)
    - Actual physical possession
    - Constructive possession => Ratione soli = owner of the land has possession over the animals on it
      - People should be allowed to and not hindered from benefiting from their land
  - Possession and first in time is in conflict, how do we resolve:
    - Iron holds the whale – first to wound gets the whale
    - Fast fish/loose fish rule – possession
    - Finder’s fee – split the money between the first and possessor
      - First in time and physical possessor both benefit
  - Custom can govern when:
    - It governs an entire industry.
    - It’s of limited application and not likely to disturb the general understanding of mankind – custom is always an exception, and exception should not swallow the rule.
    - It is a longstanding custom – someone can’t just make up a custom.
  - Custom is bad b/c:
    - Factual problem – difficult to determine what the custom is
    - Under-representation - Goals of the custom makers may not represent everyone
    - Old rules aren’t thought of critically - too limited of an application
Acquisition by Creation => Freedom to Imitate v. Incentive to Invent

- Exclusive Right of Commercial Exploitation = sole right of owner to benefit financially from owner’s invention
  - Pros: rewards creator’s productive investment, consequently other people will create new products because they know they are protected economically
  - Cons: monopolies drive up prices and reduces number of people who can afford them

- News items are not covered by copyright laws
  - Can’t own the particular news, can only copyright the way in which the news is distributed
    - Idea/Expression Distinction = distinction between the facts and the expression of those facts

- News = Quasi-property, not property against the public, but property against competitors

- Congress’ solution = patents, copyrights, trademarks are all limited
  - Obvious things can’t be patented
  - Fundamental ideas can’t be patented
  - By time (copyright = life + 70 yrs; patent = 5 yrs)
    - Expressions last longer than products.
    - Copyright = 2 generations of protection

- Consumer protection – give consumers what they intend to get.
  - Virtual Works Inc. does not get to cypersquat on vw.net even if it has vw.net first b/c it prevents consumer confusion.
  - First Amendment v. Trademark law – Trademark wins where there is consumer confusion

- Right to Exclude – Balance between individual eccentricities and economic efficiency
  - Jacque v. Steenberg Homes, Inc.
    - Privacy concerns – there is a value of having a place of sanctity and self-reflection
    - Most efficient solution – condemn a section of his land to make a road out of it
  - State v. Shack - Migrant workers are marginalized therefore people should have no right to exclude from their land those who wish to help them.

- Acquisition by Find

- Armory v. Delamirie
  - Finder has rights over everyone but the true owner.
    - Reduces violent confrontation. Otherwise, the only rule for ownership is possession.
  - Bailment = rightful possession of goods by the bailee, person temporarily possessing goods, from the bailor, rightful owner of goods
    - Bailor grants right of possession to bailee
• If right of possession by bailee is not protected, then loaning things is no good.
• Finders = bailees (constructive bailment)

  o Hannah v. Peel – Finder v. Owner of locus in quo (property on which thing is found).
    ▪ Because Peel was never physically in possession of the house at any time – he had never been to the house, he does not have constructive possession over all unknown things in the house against finders who are lawfully there and not agents of the owner of the locus in quo.
    ▪ Court says you only get one constructive possession – you can’t get constructive possession of a constructive possession

  o McAvoy v. Medina – Finder v. Owner of locus in quo (a public shop)
    ▪ Mislaid property belongs to the owner of the locus in quo.
    ▪ Lost property belongs to the finder.
    ▪ Owner of locus in quo is almost always the rightful owner of everything on the locus in quo

- Acquisition by Adverse Possession (NACHOE)
  o Actual – be on it/fence it
    ▪ Affect of disability of owner on statute of limitations:
      ▪ Statute of Limitations for people w/ active disability is tolled (paused) as long as the owner of the property is under a disability when the statute begins to run in the first place.
    ▪ No adverse possession against Government
  o Open and Notorious – put actual owner on notice that someone is claiming their land, owner need not actually be aware; based on knowledge of a reasonable person or can be actual knowledge of the owner – sign next to fence saying “I own this”
    ▪ When the encroachment is small like encroachment of concrete steps, actual knowledge of the encroachment must be known by the true owner
  o Exclusive – sole physical possession or occupancy with the permission of person claiming adverse possession – no one else can be on land without adverse possessor’s permission – enforce the fence
  o Continuous – without abatement or interruption by the adverse possessor – negated by eviction by true owner
    ▪ Summer property is continuous – as long as land is used as it would normally be used, continuity is established
    ▪ Tacking time of previous owner establishes continuity as long as there is privity
      ▪ Privity = mutuality of interest with respect to property
        ▪ Agreed upon transfer of land.
        ▪ Reason of rule = not allow squatters and trespassers to retain title
- **Hostile** – under claim of rights – right to land must be adverse to all other comers – intent to make the land yours
  - Permissive use is not sufficient – if you lease something for a statutory period of time, you do not get the thing
  - 3 possible standards for state of mind of possessor:
    - Objective Standard – state of mind = irrelevant
    - Good Faith Standard – state of mind = “I thought I owned it.”
    - Aggressive Trespass Standard – state of mind = “I thought I didn’t own it, but I intended to.”

- **Acquisition by Gift**
  - **Requirements:**
    - **Donative intent** = one subjectively intends to make the transfer of property a gift, proven by oral evidence
    - **Delivery** = transfer of the property being given; requires objective act
      - Manual = always suffices, physical handing over of a gift from donor to donee
      - Constructive = handing over key or some constructive object that allows transfer
      - Symbolic = handing over of symbol (note about object)
        - Delivery of letters that outline intent to give = intent to give
      - If small chattel is capable of being physically handed over, it must be - Why?
        - Owner must know wrench of delivery – clear to donor that he/she is parting with something
        - Evidence to witnesses to make it clear
        - Giving evidence to donee that he/she has it – ownership is presumed by possession
    - **Acceptance** = gift must be accepted – assumed when gift is expensive
    - Donative intent and delivery do not have to occur at the same time
  - **3 kinds**
    - **Causa mortis** = gift in anticipation and contemplation of imminent death; if contemplation is inaccurate (i.e. you don’t die), property goes back to giver
      - Courts don’t like because it undermines policy promoting wills
      - Constructive delivery should be strictly construed in gifts causa mortis – if it can be manually delivered (like an insurance policy) then it must
        - Miss Julia gets everything the key can unlock, but not everything in the thing the key unlocks
    - **Inter vivos** = gift from someone alive and not in contemplation of death, intent to give during lifetime
      - **Life Estate** = way of dividing the temporal rights to a thing (possession over time) – usually done with land
When one gives life estate in something to someone, that someone owns the thing, but the giver retains possession until death
  - **Testamentary** = will; only good when the person is dead, intent to give after death

- **Intestate succession** = stipulates where everything goes when you die without a will
  - Children, then spouse, then parents and their issue (brothers and sisters), then to grandparents and their issue (uncles and aunts, cousins)
    - Issue then ancestors then collaterals
  - **Heirs** = people who survive the decedent and are designated as intestate successors under the state statute of intestate succession; same blood as intestate
    - Only dead people have heirs
  - **Issue** = descendants, not just children; Take first and in equal shares per child (per stirpes) – lineal consanguinity
    - **Consanguinity** = kinship, not blood relation
  - **Ancestors** = if no issue then ancestors take; people who gave birth to decedant or people who gave birth to person who gave birth to decedant
    - Collateral Consanguinity = Children of Ancestors

Freehold Estates in Land
  - Feudal Beginnings
    - **Heritability** = ability of land owner to pass their land to their heirs at death; ownership of land is perpetual
      - Allows people to have expectations in their land.
      - Before this, when tenant dies, land escheats (goes back) to the king
      - **Conveyances** = documents by which transfers of land are transferred; “to A and his heirs” = fee simple
    - **Alienability** = right of land owner to separate themselves from the land (i.e. sell, give or otherwise convey their land during owner’s life)
      - Policy for free alienation of land
    - **Fee Simple** = superior estate; closest we can come to absolute ownership (Blackstonian ownership); no one can own more than this b/c there is nothing else to own; **no restrictions of alienation** or use w/ fee simple
      - **Fee tail** – when land was the sole form of wealth, property rights were given to families ideally to perpetuity.
        - O has three children, A, B, C – “to A and the heirs of his body. If A dies without issue, then to B and his heirs. If B dies then to C and his heirs.” - Scans all branches of family for an heir
        - Holder does not have a fee simple interest. It’s more like a life estate.
        - Limits Alienability
        - Creditors can’t access fee tails
- Does NOT exist today - “To A and the heirs of his body” = fee simple today
  - Fee simple + statement of intent for property’s use = fee simple
  - “to my school to be used for school purposes”; “to A to grow petunias on”; “to live in and not to be sold” (Brown v. White)
  - Condition has no legal effect and merely places a moral obligation on the grantee
    - 3 assumptions when interpreting ambiguous will:
      - Fee simple instead of life estate if it’s a close call.
      - Investigate intent by looking at words and their context.
        - “Not to be sold” language is void b/c it attempts to place restraint on alienability on a fee simple and that’s impossible.
      - Presumption against partial intestacy → decedant wanted to give all of her property rights aware, not just some of them

- Life Estates
  - To A for life
  - Grantor/Testator retains remainder in fee simple – reversionary interest
  - Life estate pur autre vie (“for the life of another person”) = “to A for life, remainder to B.” A sells his life estate to C. C has life estate pur autre vie measured by life of A. When A dies, Blackacre goes to B.
  - Future Life Estates = “to A for life, then to B for life, then to C for life” → A has a life estate, B and C have future life estates
  - Limited rights of alienability and no rights of heritability
    - B/c holders of life estates cannot alienate their interest permanently the heirs of a possessor of a life estate cannot inherit as heirs.
  - Waste = use of property that fails to maximize value
    - Consecutive interest – present interest plus future interest
    - Present interest at the same time
    - All life tenant can do is maintain the estate – cannot change use = One user of the property should not be able to use the property in such a way to hurt the other’s use of the property
    - Court weighs interest of 2 potential owners against each other.
      - Longer or more certain person has an interest to the land, more protection against others with an interest b/c person with a larger interest is more likely to internalize externalities and use the land more productively
    - 3 kinds of waste
      - Affirmative waste = liability arises from affirmative or voluntary acts that decrease the value of the property (ie. Strip-mining, cutting all the trees, dumping nuclear waste)
        - Open Mines Doctrine – if the mines are open by the grantor, the life tenant can mine freely. If not, then not. Life tenant can’t change use.
      - Permissive waste = acts of omission by present interest holder that reduces the value of the land; negligence
Duty to repair – only ordinary repairs, not replacement
B/c you don’t keep a dam up, the dam bursts and ruins otherwise good land
Life tenant is only required to keep up the land to the extent that they can make money from the land

- **Ameliorative Waste** = life tenant’s affirmative action raises the value of the property; if changed conditions make the property relatively worthless, life tenant can tear down without liability to future interest holder
Waste in reverse - Trial court finds for Weedon on the theory of economic waste = considers present and future interests in land and when circumstances change the court has right to step in and sell property to maximize all interest in the property both present and future.
  - Court views sale as a drastic remedy – b/c of subjective interest in land

- **Defeasible Fees** = freehold interest in land that is something less than a fee simple, if something occurs then the fee simple ends
  - Restriction on use of land enforceable by forfeiture – in covenants, restriction is enforceable by damages
  - Restraining “Use” of land is not a restraint on alienation b/c it’s a defeasible fee.
    - Arguments against this:
      - Discourages improvements
      - Ends marketability.
      - Doesn’t benefit other land the way restrictive covenants do – only benefits the whims of dead people.
      - Determining heirs upon reversion is going to be very difficult.
    - Argument in favor:
      - We like charitable gifts and this encourages that
    - Tension between restraints on alienation and defeasible fees:
      - Charitable context: personal use restrictions are ok.
      - Family context: use restrictions are void
  - **Fee simple determinable** = fee simple that could last forever, but terminates automatically the moment a certain event stated in the grant occurs – language that states the grantor is conveying fee simple only until a certain event occurs and must be clear that fee simple terminates when the event occurs
    - O -> A “to my old high school as long as the land is used for school purposes”
    - “… this land to be used for school purposes only otherwise to revert to Grantors herein” – Mahrenholz v. County Board of School Trustees
    - Grantor always retains possibility of reverter
o **Fee simple subject to a condition subsequent** = fee does NOT automatically once the event occurs, the fee only terminates when O or heirs exercises right of reentry
  
  - “To the school as long as the land is used for school purposes, but if the land is not used for school purposes, the grantor has a right to reenter and retake the premises”
  - “To b and his heirs, but if the land is ever used for the sale of intoxicating liquors the grantor has the right to reenter and retake the premises.”
  - **Magic Words** = “upon condition that”; “provided that”; “but if”
  - No need to list the right of entry to get a fee simple subsequent, but it helps.
  - In ambiguous cases between determinable and subsequent, courts assume subsequent.
    - Subsequent gives the person who occupies the land notice that their fee ended.
  - Always reverts to grantor – not a third party

o Distinction between determinable and subsequent –Matters b/c:
  
  - **Statutes of Limitation – Adverse possession**
    - Statute begins to run the moment event occurs in determinable
    - Statute begins to run only when right of entry is exercised in subsequent b/c present right of possession doesn’t occur until grantor exercises right of entry.
  - **Mesne profits**
    - Determinable - B/c possessing the fee once it has determined is wrongful, the grantor to whom the land reverts is entitled to damages for as long as there is possession.
    - Condition Subsequent - Possession of fee once condition has happened, isn’t wrongful until the right of entry is exercised.

- **Future Interests** = property right to the use and enjoyment of a piece of property at a future time.
  
  o All property rights must add up to a fee simple absolute – no more, no less
  o **Vested** = heirs are certain to get it.
  o **Contingent** = heirs get it contingent on a certain event.
  o **Expectancy** = interest one has to property that will eventually be inherited (more of a hope that an interest)
    - Mere expectancy is not a future interest and consequently not a property right – interest that we have to inherit property through our parent’s will = expectancy not a property right
  o Retained by Transferor – O has this interest; not subject to RAP
    - Transfer of reversionary rights – in common law they were considered actions not property rights; now they are viewed as property rights that are freely alienable, but a few states (Illinois in Mahrenholz) retain rule that their neither transferable inter vivos nor divisible.
- **Possibility of reverter** = future interest of grantor created upon creation of fee simple determinable (fee simple – fee simple determinable), vested – not subject to RAP
  - “to B and his heirs while the building is kept in good repair.”
  - “to X corp. as long as Blackacre is used for school purposes.”
  - “to Y corp with the expectation that Blackacre is used for school purposes.” – Y has fee simple, O has nothing b/c of the word “expectation”
  - Turns into fee simple for grantor once reversion occurs
  - Freely transferable
  - “while”, “during”, “until”, “so long as”

- **Right of entry** = future interest/ reversion interest retained by grantor in fee simple subject to condition subsequent; must be exercised to retake land; Power of Termination
  - How to exercise right of entry:
    - Enter onto the land
    - File a lawsuit
    - Send them a letter, please get off my land – Statute begins to run
  - “provided however” O has a right to retake property; “but if”, “upon condition that”
  - Can NOT be transferred inter vivos by grantor – school example

- **Reversion** = when grantor gives something less than the durational estate (fee simple), but doesn’t create a defeasible fee
  - O -> A for life; Life estates
  - Grantor doesn’t need to explicitly create a reversion.
  - Always vested.
  - Freely alienable - Transferable during life (inter vivos) and divisible at death
    - **Grant** = effective immediately, irrevocable
    - **Will** = effective upon person’s death, revocable at any time before death
  - Created in Transferee

- **Remainders** = future interest that is capable of becoming possessory immediately upon termination of preceding estate.
  - Remainder does not have to be certain of possession, only that it could under circumstances.
  - Fee simple, life estate, estate in terms of years
  - Freely alienable, transferred inter vivos, divisible, descend through principle intestate succession
  - In order to create a remainder:
    - Transfer to one that is not the transferor.
    - Must be created at the same time and in the same interest as the estate that proceeds it.
Must be limited in such a way that it becomes possessory immediately upon termination of preceding estate.

Preceding estate must be less than what O owns

### Vested Remainder

- Must be given to an ascertained person
- Must not be subject to a condition precedent (condition that must happen before person can take)
  - Natural expiration of a life estate is NOT a condition precedent – law presumes mortality.
- 3 types of vested remainders
  - Indefeasibly vested – certain to vest regardless of what happens; O -> A for life then to B and her heirs
  - Vested remainder subject to PARTIAL divestment – class gift; where it is vested in a class of people (eg. to A for life then to B’s children where B has some children, but B is still around – if B has more children then some of what has been vested in the original children is divested into new child)
    - **Class gifts** = gifts to an unidentified or only partially identified collective of people; each person shares equally in the gift
  - Vested remainder subject to COMPLETE divestment – rests on a fine distinction between it and a contingent remainder; divested by a condition subsequent
    - Language of the grant (can come down to where the commas are) – “,but”
    - Analogous to defeasible fees
- Law prefers vested remainders to contingent remainders – in ambiguous case, courts will decide vested remainder
  - Vested remainder accelerates into possession whenever and however estate ends
  - All future interests are fully assignable
  - Contingent remainders used to be destructible if they could not become possessory – Abolished
  - Rule against Perpetuities – applies to contingent remainders but not to vested remainders.

### Contingent Remainder

- Given to an unascertained person – grantee is not in existence at time of grant or can’t be identified by name
  - Example 5: “to A for life, then to the heirs of B.” B is still alive. Heirs are not determined until one dies. When B dies, the remainder becomes vested.
  - “to A for life then to his widow”; A married to B – widow can’t be identified till the death
• OR Made contingent upon some condition precedent (event that has to happen before person can take) – some event other than the natural termination of a life estate
  o “to A for life then to B and her heirs if B marries before A’s death.” = contingent remainder
  o “to A for life then to B and her heirs, but if B marries before A’s death then to C and his heirs.” = vested remainder subject to complete divestment
• “To A for life, then to B and her heirs if B survives A.” – “then…. A” = one phrase, when the condition is one phrase, that is a condition precedent and consequently a contingent remainder
• In a chain of remainders, if the first is a contingent remainder, then the next is a contingent remainder.

**Executory Interest** = future interest created in a transferee (not the grantor) that must divest a prior vested interest to become possessory; cuts short estate that comes before it

• Just like defeasible fee only instead of creating reversion this creates a future interest in someone who is not the grantor.
• **Shifting Executory Interest** = Divests a transferee (A, B, etc.) in the future, follows vested interest subject to divestment
• **Springing Executory Interest** = Divests the transferor (grantor, O)

  • Always indestructible
  • Always freely alienable
  • If you have a vested remainder subject to complete divestment, the interest that follows in the third person is always an executory interest. Cannot be a contingent remainder.
  • Only executory interests can follow vested remainders. If vested remainder, then the next is executory interest.
• “From O to A, but if the property ever stops being used as a school then it goes to B.”
  o A has fee simple subject to executory interest
  o B has a shifting executory interest b/c it divests A’s (transferee) vested fee simple subject to executory limitation
  o Future interest in transferee that divests prior transferee once a condition occurs
• “From O to A and his heirs, this deed takes effect once A turns 21.”
  o O retains fee simple subject to an executory interest
  o A has a springing executory interest
• “From O to A, this deed takes effect in 3 years.”
  o A has a vested interest.
  o A’s interest is not preceded by a freehold estate in another grantee.
- **The Rule Against Perpetuities**
  - restricting the use of remotely contingent remainders to 2 generations at most (restricting the dead hand)
    - Purpose = promote alienability and marketability of land by only recognizing future interests that necessarily grant within a generation or two of the grant
    - Lives in being plus 21 years = period within which interests must vest
      - No interest is good unless it must vest, if at all, not later than 21 years after some **life in being** at the time of creation.
    - Alive at time of creation plus 21 years
    - “to A and her heirs so long as liquor is never consumed on the premises; and if liquor is ever consumed, title shall go to B and his heirs.”
      - A has a fee simple determinable subject to an executory limitation
      - B has an executory interest
      - B’s interest is void under the RAP – O retains possibility of reveter
    - Apply the rule
      - 1) Find a validating life (measuring life) – someone who is usually alive at time of grant that you can use with logic that the interest will vest or fail within 21 years of their death.
        - Having a measuring life makes the gift valid
        - Try instead to find a set of facts in which the interest might not vest.
        - People born after the grant are NOT lives in being – must have been born by time of grant
        - Give everyone a child, then kill everyone off (all the lives in being)
          - Fertile Octanarian example of Jee v. Augley – law assumes people of any age can have children
    - **Measuring life** = someone whose actions or existence can affect the vesting of the future interest
      - 1) Someone identified by a name or status
      - 2) Someone whose existence is implied by the grant
  - **Scope:**
    - Contingent Remainders – in individual, in a class
    - Vested Remainders in a class (i.e. subject to partial divestment) – “then to B’s children”; b/c a class gift is not considered vested in any one member of the class until the class is closed – only when B dies does the class close b/c we know who all of his children are
    - Executory Interest ( shifting and springing)
    - Does NOT apply to:
- Life estates – present possessory estates
- All Reversionary interests (fee simple determinable and subject to condition subsequent)
- Vested Remainders in an individual

  o Jee v. Audley – Class Gifts
    - Class gift is not vested until all members of a class are ascertained
    - Children = remain unvested for RAP purposes until parents die.
    - “from O to A for life, then to B and the issue of her body, in default of such issue to the then living daughters of John and Elizabeth Jee.”
      - A has predeceased O – A has nothing
      - B has fee simple subject to executory limitation
      - Daughters of J and E Jee who are living at the time B’s issue defaults have the executory interest that takes effect once B’s blood line runs out – Violates RAP – cross it out (Blue Pencil Test)
      - Grant ends at “and the issue of her body.”
      - Fix it by saying “to the daughters of Jee now living/then living” – closes the class

  o 3 approaches to RAP:
    - Wait and see approach – don’t strike out questionable clause automatically, you stop and wait to see if the interest vests in the statutory period.
    - Majority – wait and see for 90 years – same as above only you wait for 90 years to see if it vests in the statutory period
    - Cy pres – get as close as you can – courts have power in equity to reform the grant to provide as closely as possible the grantor’s wishes without violating the RAP
    - Abolish RAP altogether

- Concurrent Ownership = 2 or more people have ownership right to property at the same time
  
  o Tenancy in common = basic form of co-ownership; NO right of survivorship
    - Courts presume this in an ambiguous case
    - No magic words necessary
    - Separate but undivided interests in a piece of property
    - Descendible and freely alienable
    - Possession = Both own and have right to possess undifferentiated share of the whole
      - 2 tenants – A and B own Blackacre
        - If A dies, his interest can be transferred by will to D; in which case D and B are tenants in common
        - If A dies intestate and is survived by 2 children E and F, then E, F and B are tenants in common, but E and F only have 25% interest each in Blackacre.

  o Joint Tenancy
    - 3 differences between this and tenancy in common
• **Right of survivorship** = If A and B own Blackacre in joint tenancy, when A dies, B owns all of Blackacre.

• 4 unities of joint tenancy
  o **Time** = interest must be acquired or vest at same time
  o **Title** = same document must create the tenancy for both parties
  o **Interest** = interest of both parties must be identical, equal and undivided
  o **Possession** = each of the joint tenants must have equal rights to possess the land – same right for tenants in common

  ▪ Husband can sell he and his wife’s walnut grove to a boxing promoter, she has to wait for him to die severing the joint tenancy before she can kick the promoter off – Swartzburgh v. Sampson

• Joint tenancy is disfavored – need to use magic words
  o “To A and B as joint tenants with right of survivorship and not tenants in common.” – always works

  ▪ Depending on jurisdiction anything short of this may not work

  • Severance of joint tenancy = process by which joint tenancy becomes a tenancy in common by action of one of the joint tenants; involuntary

  • Joint tenancy only lasts as long as the 4 unities are in tact.
  • Conveyance - Any joint tenant can sever by transferring his property to someone else; the buyer becomes a tenant in common

• What kind of interest is the interest in property being given by the Mortgagor?
  o Property interest – the actual property itself

  ▪ Title: Equity of redemption – by giving mortgage, you convey your interest and sever the tenancy.

  o Lien – cause of action giving a claim against the property, but is not the property itself. – Harms

  ▪ Does not sever joint tenancy, just giving an interest in the title – not giving title away just put a stain on the title

  ▪ Title under lien theory doesn’t pass by giving mortgage – therefore William still owns the house with John until John dies, severing the tenancy and destroying John’s (and the bank’s) interest in the house

  • Otherwise, Charles and William own the house by tenancy in common – lien does
not survive death since it’s a joint tenancy

- 3 joint tenants – one severs, does that destroy the two remaining joint tenants tenancy?
  - No

- Avoid will procedure
- Particularly liked when spouses own in joint tenancy
- **Right of partition** = any joint tenant or tenant in common can ask a court to divide up the property; voluntary
  - In kind = Physical Partition
    - Courts prefer b/c people should be able to stay on their land (Delfino v. Valencias)
  - Sale – partition of money from sale; only when:
    - Physical attributes on land make in kind partition impracticable.
    - Owners’ interests would be better promoted by sale
      - Look at interest of ALL parties
  - **Tenancy by the entirety** = joint tenancy + fifth unity of marriage
    - ½ of the states in US do this
    - Cannot sever
      - Both spouses must consent to transfer of property or anything else that might sever
    - Divorce is the only way to sever – this creates tenants in common
  - **Ouster** = when one co-tenant takes exclusive control of the property in common and keeps the other from using it:
    - Ouster by Adverse possession – NACHOE elements.
      - No hostility, not denying co-tenancy relationship – Spiller v. Mackereth
    - General Ouster = When you exclude request by co-tenant for use and enjoyment of property after a clear, unmistakable request
      - There has to be an actual conflict – Mac has not demanded entry and been refused.
      - Encourages people to use the property for its most useful purposes
    - Minority rule for ouster
      - Co-tenant in exclusive possession is liable to the other tenant’s for rent even when there is not general ouster
  - **Accounting** – co-tenants do not have to account for or share profits from land unless:
    - Ouster
    - Agreement to share
    - Lease by co-tenant to third party - Swartzburgh v. Sampson
    - Depletion of natural resources

Leasehold Estates in Land
**Leasehold Estates** = personal interest in real property; personal property not real property

- 3 features in common:
  - Estate in a tenant
  - Reversion in the landlord (remainder in weird cases)
  - Right of exclusive possession, use and enjoyment of the land by tenant
  - (optional) Lease = personal contract between landlord and tenant

- 4 types:
  - **Tenancy for term of years** = terminates at a specified time
    - Lasts for a specified period of time and terminates automatically at the end of the period – can terminate before period expires
    - Does not need to be for years – just a specified period of time
    - No notice necessary – everyone knows when the lease terminates.
    - Death of landlord or tenant has no effect on lease for term of years
    - Statute of Frauds applies to all leases and especially to this one.
      - Only a few jurisdictions permit lease for less than a year.
      - Tenancy that does not conform to S of F becomes a tenancy at will but subsequent events convert at will to periodic tenancy
  - **Periodic Tenancy** = lease for period of time that repeats for succeeding periods until notice is given; month to month
    - Automatically extended.
    - If no notice of termination, the lease automatically continues forever.
    - For one-year lease, notice must be given six months prior to the end of the lease.
    - For less than a year – notice must be given on the length of the term no more than six months.
      - Eg. Month to month lease – notice must be given month in advance – 9 month to 9 month lease – notice must be given 6 months in advance.
    - Death does not affect lease
  - **Tenancy at will** = landlord or tenant can terminate lease at any time.
    - No fixed period and endures as long as the landlord and the tenant both desire.
    - Terminated at death of one of the parties.
    - **Bilateral power of termination** – both parties must have the power to terminate
    - Unilateral power of termination can be made part of the terms of a periodic tenancy or tenancy for term of years
    - Estate for term of years determinable = Garner v. Gerrish
Life Estate determinable – no livery of seissen necessary to create anymore

“Tenant has the privilege of termination this agreement at a date of his own choice.”
- Tenant alone can end the estate by dying, terminating his lease, or stopping payment of the rent.

“To T for as many years as L desires.”
- Old way = tenancy at will
  - Must be bilaterally determinable
- Restatement = determinable fee simple
  - Determinable by L whenever L wants

**Tenancy at Sufferance:** Holdover tenant = Landlord has 2 options:
- Treat Tenant as Trespasser
  - Evict
  - Hold tenant responsible for lost rent that landowner could have obtained had the holdover not been there.
- Bind tenant to new lease by operation of law – usually periodic tenancy for 1 year
  - Expressed
  - Implied – tenant mails checks which the landlord cashes
    - Court holds that by accepting rent for that first month Crechale establishes a month to month tenancy and not a year to year tenancy.
- When Crechale tells Smith to get out, he chose to treat Smith as a trespasser. He consequently can’t hold Smith over for a periodic tenancy.

**Duty to Deliver Possession** – Hannah v. Dusch
- Landlord has an implied obligation to deliver legal right to possession.
- Tenant is responsible to evict trespassers that come during tenancy.
- Physical possession
  - English rule – Landlord has implied delivery of physical possession.
    - Landlord would be more likely to know there is a holdover and to evict them.
    - Tenants are not likely to sign leases if they know there is a holdover.
    - Landlord has more of an incentive to remove holdovers b/c he wants to sell the property again.
- Remedies for tenant
  - Terminate lease and sue for damages
  - Retain lease, but not pay rent for any time he wasn’t in possession
  - Unlawful detainer – evict holdover and begin living there
• American rule – no implied delivery of physical possession
  o Landlord can’t be held responsible for the wrongful acts of others (i.e. the holdover)
  o English rule makes it very hard for landlord to lease property to a new tenant while a previous tenant is still in occupation
  o Virginia’s unlawful detainer action – gives lawful tenant right to evict holdover tenant
    ▪ Tenant already has sufficient legal remedies to help remove holdovers

- Subleases and Assignments - If lease is silent as to whether subleases or assignments are allowed, the law assumes they are allowed.
  o **Sublease** = lease from one lessee to someone else (not the landlord) of less than the entire lease.
  o **Assignment** = lease from a lessee to someone else of the entire lease.
  o 2 approaches for determining sublease from assignment
    ▪ Property theory => Look at quantity of the estate remaining. Entire amount = assignment; less than entire amount = sublease.
    ▪ Contract theory => Intent of parties = look at language of document; if it says sublease, then it is a sublease
      • Not limited to what word was used; should be much more contextual – meeting of the minds, etc.
  o **Privity** – Ernst v. Conditt
    ▪ **Privity of Estate** = property law privity; mutual or successive relation to the same right of property
      • Eg. between lessor and lessee, between buyer and seller of home
      • All subtenants (whether assignee or sublessee) are in privity of estate with lessor
      • If sublease, lessee gives away part of the estate to the subtenant and retains partial interest or reversion. Therefore, lessee remains in privity of estate with lessor.
      • If assignment, lessee gives away all of the estate to the assignee and retains no interest in the land. Therefore, lessee is no longer in privity of estate with landlord.
    ▪ **Privity of Contract** = connection or relationship between to parties to a contract
      • All subtenants are in privity of contract with lessee. Lessee is in privity of contract with lessor.
      • Subtenants are not in privity of contract with lessor because they haven’t signed a contract with lessor, only with lessee.
  o When there is a provision stating the landlord must give consent before a sublease or assignment is created, approval must be gotten except when:
    ▪ **Approval Clause** = clause making it necessary to get landlord’s approval before transfer can be made by lessee
• **Refusal provision** = gives landlord right to refuse lessee’s request to transfer – common law says always enforced,
  o Minority rule says only commercially reasonable objections to alienation are allowed – Restatement 2d §15.2(2) – Restricted to commercial leases
    ▪ If reasonable businessperson would say that’s a bad investment, then that’s a commercially reasonable objection.
    ▪ Otherwise, restraint on alienability = bad.

- **Tenant Default**
  o **Self-help retaking of property** = landlord goes in and physically removes defaulting tenant
    ▪ Common law rule – landlord must prove:
      • He is legally entitled to possession.
      • Means of reentry are peaceful (term of art)
    ▪ Minority rule: Self-help always encourages violent remedies (never peaceful) where there is no clear abandonment – judicial process is better
      • Summary procedure = no need for lawyers, quick procedure
    ▪ In clear abandonment, self-help is good
  o Common law: 3 options of landlord when there is abandonment:
    ▪ Accept surrender of leasehold estate and relieve the tenant of further liability
    ▪ Retake possession on behalf of tenant to mitigate damages: relet to someone else.
      • Anticipatory Breach by Repudiation – Can sue for lost rent when mitigation attempt is made.
      • **Duty to Mitigate Damages** = Sommer v. Kridel, landlord must make reasonable effort to find new tenant
        o Landlord does not have to accept insolvent new tenant
      • Do nothing, send a bill every month and at the end of the lease bring a lawsuit – modern statutes have destroyed this option

- **Duties, Rights and Remedies**
  o **Implied Covenant of Quiet Enjoyment** – implied into every lease (commercial and residential) by operation of law – 2 elements:
    ▪ Landlord guarantees tenant will not be disturbed in actual possession of premises by any other person with higher legal right of tenant. If this does happen, landlord will defend tenant. – Continuing duty to deliver right of legal possession of premises.
    ▪ Landlord guarantees that landlord will not evict tenant himself either actually or constructively.
      • **Constructive Eviction** = permanent, substantial interference with tenant’s use and enjoyment of property which occurs as a result of direct action or omission of landlord or his agents
- Permanent = Substantial interference that is permanently recurring or the defect that is causing the interference is permanent
  - Covenant can be waived:
    - By the landlord by express clause in lease
    - By tenant’s inaction – tenants can’t sit on their rights too long
  - Ambiguity over whether tenant has to abandon in order to invoke constructive eviction by breach of covenant of quiet enjoyment
  - Hard to enforce covenants when there is a tenancy at will.

- Illegal lease = refusal by court to enforce lease under terms that contradict public policy; if landlord and tenant execute a lease that are in significant violation of housing regulations due to defects of which the landlord had actual or constructive knowledge.
  - Tenant is treated as a tenant at sufferance. Landlord is only entitled to reasonable rental value of property.
  - Tenant does not have to abandon

- Implied Warranty of Habitability = landlord will deliver over and maintain, throughout the period of the tenancy, premises that are safe, clean and fit for human habitation.
  - Differs from covenant of quiet enjoyment
    - Warranty of Habitability = only applicable to residential leases by a merchant landlord
    - Warranty = tenants don’t have to leave
    - Warranty = no way to waiver this term
    - Habitability = applies to at will tenancy.
    - Habitability = covers essential equipment of the property even if tenant agrees to fix the equipment
    - Habitability = tenant who enters with knowledge of defect does not waiver right to have defect fixed.
  - Habitability
    - Violation of statute = prima facie evidence of violation of habitability unless violation is not substantial
    - Tenant must show he/she disclosed defect to landlord and gave landlord adequate time to fix defect only if tenant plans to sue landlord.
      - Cannot be used as defense against paying rent
  - Remedy = value of property warranted – value as property exists
    - Tenants can get damages for discomfort and annoyance arising from landlord’s breach of habitability
    - Tenants can withhold rent when there is a breach – abandonment is not necessary
    - If tenant notifies landlord of defect and landlord fails to act in time, tenant can fix the defect and send landlord bill for reasonable costs of fixing
    - Punitive damages if landlord is spiteful
Private Land Use Controls

- **Nuisance** = sic utere tuo ut alienum non laedus = unreasonable use of one’s land that substantially interferes with another’s use of their land; judge made controls
  - Unreasonable = Restatement: If LP > B; then it was unreasonable
    - Intent of alleged nuisance
    - First in time – Coming to the Nuisance
      - Existing community of sensitive users, and the nuisance is placed in the middle of the sensitive community => eviction is often the result unless there is a finding of necessity then there will be damages
      - Sensitive party moves to a pre-existing nuisance => nuisance per accidens; movement of sensitive party next to nuisance makes it a nuisance => generally sensitive party does not recover
    - Spur
    - How are things being ran?
    - Level of harm?
    - How important is the nuisance?
    - Probability of harm?
    - What is society’s interest?
    - Uses of land surrounding the nuisance?
    - Would reasonable person find the action in question offensive?
    - Magnitude of nuisance = Past a certain point, the thing is unreasonable and consequently a nuisance
  - Substantially interferes with another’s use of their land – other must not be using land in an overly sensitive way
  - Private v. Public Nuisance
    - **Public** = something that effects public at large, general community nuisance
      - Substantial harm caused by intentional and unreasonable conduct or by conduct that is negligent, reckless, or abnormally dangerous
      - Any member of the affected public can sue, but usually only if the suing party can show “special injury” = injury different from that suffered by other members of the public
    - **Private** = uses of land that interferes with specific parcel of land
      - Only owners of interests in land can bring suit
  - 2 kinds of nuisance
    - **Nuisance per se** = nuisance at all times and under all circumstances regardless of where it was
      - Extremely dangerous activities = explosives, etc.
      - Immoral, Illegal, Indecent = brothels, crack houses.
    - **Nuisance per accidens** = nuisance because of its location, construction or method of operation; can be fixed by moving, building it differently or operating it differently
- Intentional – intentionally using land in unreasonable way under the circumstances
- Unintentional – negligent, reckless or ultra hazardous
  - Remedy – decide who is in the right and who can move easiest
    - 4 ways nuisances can be resolved
      - 1) Abate the activity by granting injunctive relief – typical nuisance cases
      - 2) Let the activity continue if D has to pay damages – public necessity or private necessity; balance of equities favor D, but unfair to punish innocent neighbor
      - 3) Let activity continue by denying all relief – coming to the nuisance and no nuisance at all
      - 4) Abate the activity if the P pays damages – odd cases of coming to the nuisance; P is at fault but there is a strong interest in abating the activity – not really a nuisance, but balance of equities favors the P
  - Injunctive relief – balancing the equities= is benefit to P and public of an injunction > cost to D and society of an injunction?
    - 1) Likelihood of success on the merits – you have a good chance to win at trial
    - 2) Harm to defendant
    - 3) Harm to plaintiff
    - 4) Public interest
    - Fairness is key for courts of equity
    - Conditional injunction – gives Cement Co. choice between injunction or damages
  - Damages
    - Temporary Damages = allows for changing circumstances but also depends on multiple law suits
      - Permanent = encourages res judicata, does not encourage multiple law suits
    - Injunction + Del Webb paying for the P’s move
      - Disgorgement = remedy when one unlawfully benefits
      - Del Webb gets 2 benefits = cheap land + gets rid of the nuisance

- Servitudes
  - Easements = the right to enter land that is in the possession of another and do something on it – not estates in land, but nevertheless legal interests in land – easements for life, easements in fee simple, defeasible easements; right of USE
    - Runs with the land not with the parties, when use of land establishing easement stops (i.e. house with easement burns down) then easement stops
    - 3 ways to classify:
      - 1) Appurtenant or in gross
Appurtenant = when easement is created it is attached to a piece of land other than the one it runs over, it benefits the owner of the piece of land over which it runs

- Requires 2 pieces of land:
  - Dominant Tenement = land whose owner benefits; owner = dominant tenant
  - Servient Tenement = land burdened by the easement; owner = servient tenant

- **Cannot be attached without consent of both dominant and servient tenant**
  - Tied to the dominant tenement - Just as alienable as the dominant tenement is
  - Presume this in ambiguous cases

In gross = intended to benefit the owner of a piece of land existing without a dominant estate; belongs to x in person not because he is the dominant tenant

- A can come onto Blackacre and sit on the lake;
- A can come onto Blackacre and remove gravel
- Mostly profits

- **Alienated without consent of servient tenant**
  - Not tied to any dominant tenement
  - Commercial easements in gross = freely alienable
  - Personal easements are also freely alienable with 1 exception:
    - Recreational easements – hunting, fishing, camping
    - Look to intention of parties

2) Means of their creation

- Easement by prescription = long adverse use analogous to adverse possession – You have to physically stop person from using the easement or license it thus stopping statute of limitations - 2 of the NACHOE elements apply in a different way:
  - Hostility = use of easement in absence of license or inducement
    - Not to owner’s ownership, but hostility to owner’s allowance of use
  - Exclusivity – not a prerequisite; shared use, but claim has to be different from person shared with
    - Both cannot claim easement, fee simple, etc.

- Easement by express provision (deed or will)
Easement by implication – all implied easements arise from the division of one plot into smaller plots; both lands were originally part of one larger plot both owned by same person; 2 types:
- Quasi-easement = easement implied by prior existing use (Van Sandt – sewage pipes); created when one part of person’s land is used for benefit of other; Use of land has to be:
  - Apparent.
  - Continuous or permanent
  - Reasonably necessary to quasi-dominant tenant
- Easements implied by Necessity (Othen – Texas farm road)
  - Land locked parcel - It must be necessary to go through alleged servient tenement by alleged dominant tenement
  - If you cannot get to a road = necessity
    - 1 exception: navigable water can substitute for road sufficient to defeat necessity
    - Necessity does not have to be absolute impossibility
  - Terminates when the necessity ends

Easement by estoppel (Holbrook v. Taylor)
- Permission + reliance on that permission = irrevocable license
- License + investment = estoppel
- I’ve expended money. I’ve invested in $25,000 in my use of the road. Holbrook would be unjustly enriched to bar use of road after Taylor has acted in reasonable reliance upon the license.

Easement by eminent domain

3) Distinction between Easement and Profit
- Easements = the right to enter land and use it; right to walk across land or string telephone wires across it
  - A is given the right to enter upon B’s land
- Profits (usufructuary privileges) = right to enter land and take something from it
  - A is given the right to enter upon B’s land and remove something attached to the land

Affirmative Easement = forces servient tenant to do something on their land
Negative Easement = takes away right of servient tenant to do something on their land
Conservation Easement
- Can’t be created in conveyance to 3rd party under common law
  - Willard (Mormon church parking lot easement) says this rule is inapplicable in our society
- Recording acts = when you buy property or create an easement, you must disclose it, so that people know who owns what
  - (Licenses) = oral or written permission given by the occupant of land allowing the licensee to do some act that otherwise would be a trespass; NOT an interest in land, just right to use land
    - A is given the right to enforce a restriction on the use of B’s land
    - Generally revocable at any time; exceptions
      - License + interest = A has right to enter onto Blackacre (license) and hunt (interest)
      - Estoppel – equity
    - House guests have a license, so does cable guy, maid, etc.
    - Personal = dependant on whims of licensee and licensor
      - Easements run with the land and do not end when one party decides to end it

Public Trust (owned by all people) = Matthews v. Bay Head Improvement Association
- Public wants (right of way) easement over privately held land and dry sand beach to get to wet sand and the ocean
  - Court holds they have a right to cut through dry sand, but not an absolute right – they can use land owned by Association, but not privately owned
  - Association = quasi-public, therefore if it’s possible to cut through Association land to get to public land that’s ok b/c it’s functionally indistinguishable from a municipal beach
- Public also wants easement to use dry sand beach
  - Public can use dry sand beach as long as it is reasonably necessary for enjoyment of ocean
  - What about the right to exclude?
  - If Association closes shops and stops awarding leases, the court may take that land too.
- Argument against decision:
  - This is a taking from private owners for public use. Takings require compensation.
  - Economic efficiency – discourages productive use of the property.
  - Opening land up to the public makes messes.
  - This is socialism – dedication of private rights for public good.
- Argument for decision:
  - Best use of land is to let everyone use it – same policy that justifies Public Trust justifies the decision.
  - Non-discrimination principle
- Public still has to pay – not a taking
- Easement by necessity to public – no compensation necessary in easement by necessity
- Association = quasi-public organization

- Real Covenants & Equitable Servitudes
  o **Real Covenants** = K between 2 land owners that one of them will do or not do something to one’s land – damages are the remedy for breach of covenant
    - Does covenant run with the land? - Enforceable by and against assignees sometimes; more than K, but not interest in land; 4 requirements:
      - Written K.
      - **Intent** that the covenant will run with the land (_____ and my successors, assignees promise ________ and my successors and assignees to do x)
      - **Touch and concern** the land – must increase value and usefulness of land for promisee or decrease value of land for promisor
      - **Privity of Estate** – some relationship in the estate of land between successor and original covenant. B promises A that he will not build a factory on his land. B conveys to C. A conveys to D.
        - Horizontal = A ↔ B; Successive relationship to a piece of land, Blackacre must be granted from A → B or from B → A.
        - Vertical = A → D; B → C
        - Benefit = A → D; courts allow these to run much more freely than burdens b/c it may serve as consideration for the transaction between A and D – for benefit to run, all that’s necessary is that some part of the estate runs (adverse possession does not count)
        - Burden = B → C; C didn’t make any promises, so he did not consent to the burden – for burden to run, C has to have estate for same duration as B (if B has fee simple, B must convey fee simple to C – Subleases
  o Equitable Servitudes = Interests in land that are enforced in equity – part of the estate
    - Requirements:
      - **Writing**
      - **Intent** to run with land binding future successors in interest
      - **Touch and concern** the land.
      - **Notice** (replaces privity of estate) = notice of land use restriction in either deed or writing
        - Person who takes piece of land with notice of land use restriction cannot be permitted in equity to violate that restriction
      - Equity:
- No adequate remedy at law.
- P has a fairness argument.
- Injunction mitigates a harsh/unfair result.
- Restatement – treats everything like an equitable servitude
- Restatement – servitudes are **valid unless** illegal or unconstitutional or violates public policy:
  - **Arbitrary, spiteful or capricious**
  - Unreasonably **burdens fundamental constitutional rights** – Shelley v. Kraemer (whites only)
    - Equal protection clause of the 14th Amendment – violated only if the court upholds, but standing alone does not violate b/c it is performed by private individual not state
  - Any dispute resolved by judicial system = state action
    - **Lack of notice**? – No, it was recorded.
    - **Privity**? – No horizontal privity, but that’s only in law. Homeowners could not get damages, but they could still get injunction in equity.
    - **Language**? – Forbids use and occupation, but does not forbid ownership
    - **Free Alienation** – Forbids alienation to certain people
  - When you act like a government, the constitution applies to you.
    - Unreasonable **restraint on alienation**
    - Unreasonable **restraint on trade or competition**
    - **Unconscionable**
- Limits on Housing Associations - Nahrstedt v. Lakeside Village Condominium Association, Inc. (No pets)
  - Common Interest Property = communities set up for people with certain things in common; proscribe rules and regulations on how people in the community live
  - **Covenants must be upheld unless unreasonable** (not judged by individual circumstances, but by reasonableness to community)
    - Unreasonable = Benefit of Restriction to everyone in community < Burden of Restriction to everyone in community
      - Litigation costs – more plaintiffs when court has to make individualized findings
      - Allows stability of expectations of residents
      - Policing costs – homeowners associations are not good at making these kinds of determinations
      - Protects social fabric of common interest property
    - Dissent says social fabric of Nahrstedt household and social fabric of entire society will be hurt by this rule
- Cats are a quality of life issue
- Too many rules destroys the maxim that a **man’s home is his castle** – void of humanity
  - Presumption of reasonableness given to community rules is dangerous
- **Zoning** = legislative bodies controlling uses of land
  - Euclidean zoning = classification of whole town into uses (agricultural, industrial, commercial, residential), height restrictions, area restrictions (regulating population density) = Constitutional – *Euclid v. Ambler Realty*
    - Use classifications are at issue – uses range from single family dwelling (U-1) to heavy industry (U-6)
      - Cumulative – uses are allowed in all zones higher (i.e. U-1’s are allowed in U-2 through U-6)
      - Con: Reduces marketability of land
  - Social theory behind Euclidean zoning – **Garden City Movement**
    - Separation of uses
    - Protection of the single-family home – stable, suburban environments
    - Low-rise development
    - Medium-density of population – more cars, more traffic, less walking, smaller values
  - Analogy to Nuisance law – zoning expands the scope of nuisance law through government regulation instead of judicial rule
    - Both make sure land in the community is used in ways that satisfies all
    - Zoning has to be as constitutional as nuisance – some specific zoning can be unconstitutional, but in general, no
    - Police Power = residual power of States to regulate for the health, safety and morals of the people
    - **Single family dwellings are privileged**, but there is no U-1 uses in this case → judge is not concerned about this case only about zoning in general
  - **Nonconforming Use** = Pre-existing use of land that was lawful before is now no longer in compliance with new zoning laws. - PA Northwestern Distributors, Inc. v. Zoning Hearing Board (adult videos). Options:
    - **Amortization** = fade out the non-conforming use over a reasonable period of time – law has changed, get out gradually or at least change your use to bring it into conformity
      - Is 90 days enough? - No
      - Zoning may not control non-conforming uses unless:
        - Nuisance – in tension with Spur b/c here compensation would not be required whereas in Spur compensation was made.
        - Abandoned
        - Illegal – secondary effects (drugs, nasty people) are harms that must be prevented
- Taken by eminent domain upon payment of compensation
  - Taking is better than zoning?
    - Takings are expensive – compensation has to come from somewhere
      - Just tolerate non-conforming use
      - Let Nuisance law take care of it
      - Allow abandonment of non-conforming use, but once abandonment occurred, use could not be resumed
      - Forbidding maintenance of land
- Aesthetic Zoning + something else (property value or health and safety) = ok
  - Must not be arbitrary and subjective
    - Not grotesque = good standard - Ladue v. Stoyanoff
    - Harmonious (go with the feeling of main street) = arbitrary and subjective – Anderson v. City of Issaquah
- Historic Preservation
- Architecture not protected by the 1st Amendment
- Expressive Zoning – Just don’t violate the 1st Amendment – Ladue v. Gilleo
  - Signs = free speech
    - Towns can regulate physical aspects of signs b/c signs are also property and can be regulated as clutter
  - Underinclusive = can’t restrict too little speech. Have to restrict speech evenly.
  - Overinclusive = can’t restrict too much speech. Can’t unreasonably interfere with signage as an expressive medium

Policy arguments
- Common good (Utilitarian)
  - Privacy – property divides society into public and private spheres = Reich
  - Civilization/stability = clear rules
  - Control/propriety = used to maintain existing social order (rich stay rich)
  - Allocation of scarce resources
  - Promotes development of individuals
  - Stability of Expectations
  - A man’s home is his castle – private use trumps public use as long as it’s legal
- Economic Efficiency (Utilitarian)
  - Encourage and enhance productivity
  - Internalize Externalities = property rights make us aware each other
    - Externality = the cost or benefit of activity that is not borne by the person engaging in the activity; don’t need to be costs, can be positive
    - Ways to internalize externalities:
      - Contracts and bribery
        - Collective action problem
        - Free-rider = someone who lets everyone else incur the costs while they just come along for the ride
        - Transaction costs
Holdouts – someone who hikes up the price because they know that the total transaction relies on their cooperation

- Regulation
  - Oversight
  - Government gets it wrong
  - Enforcement

- Purchase
- Tort
  - Litigation

Coase Theorem = If transaction costs are sufficiently low, economic incentives are going to cause resources to be used efficiently. -> people will bargain around regulations

Locke’s Labor theory of property = Thing + Labor = Property; You own your body and the labor from it – consequentially anything that you mix your labor with, you own limited by human capacity for labor – no one can object to this right of ownership unless one takes more than one can use and it goes to waste (God is offended)