Chapter 1

I. Theories of Property Rights
   A. Locke
      1. Labor Theory of Property: Unowned Thing + Labor = property
      2. Crime against nature to waste things, thus can’t take more than can use
   B. Blackstone
      1. Property rights come from nature: temporary possession rights exist, also common pool goods
      2. Problem: no incentives for people to make/build/create more because rights to object not secure; everyone fighting over goods. Solution: individual property rights over substance of item, not just use of item
   C. Reich
      1. Property used to be a source of liberty. After Industrial Rev., private property grew, became way to abuse and influence others
   D. Demsetz
      1. Property rights develop to internalize externalities when the gains of internalization become greater than the costs of internalization
      2. Ways to internalize costs
         a. bribe/contract
         b. regulation
         c. tort
         d. purchase
      3. Free-rider, tragedy of the commons, etc.
   E. Goals of property
      1. Privacy
      2. Division into public and private spheres
      3. Common good
      4. Encourages productivity
      5. Enhances efficiency
      6. Stability of civilization
      7. Allocation of scarce resources
      8. Dispute resolution

II. Possession
   A. Acquisition by Discovery (unowned things)
      1. First in time, first in right
      2. Johnson v. M'Intosh: first in time does not gain right – public policy reasons
   B. Acquisition by Capture (unowned things)
      1. Actual Possession → Pierson v. Post: must mortally wound an animal to claim it as your possession. First in time means possession (or intent and ability to possess) not first to follow animal. To “own” must possess.
      2. Custom → Ghen v. Rich: Whaling case. Possession usual rule. However, custom should govern when: (1) it is longstanding (old rules are ones that we know will work) and (2) it governs the entire industry and (3) limited application and will not disrupt general understanding of mankind
3. Public policy → Keeble v. Hickeringill: constructive possession of any animal on your land – thus, it is your property
4. Rule of capture for wild animals: Possession through mortal wounding and evidence of intent to possess; actual physical possession; or constructive possession for animals currently on your land.

C. Acquisition by creation (unowned things)
1. If you create something, you are first in time, so it is yours to exploit
2. But only retain right in the thing that embodies your invention. Others are free to imitate (news is quasi property – can’t copy if in competition, but fragrance, scarf design, etc. can be copied). International News Service v. Associated Press, Cheney Brothers v. Doris Silk Corp.
3. Conflict b/w inefficiency by monopoly and unfairness in allowing copycats to reap what they haven’t sown, which would deter creation.
4. Internet:
   a) Anticybersquating Consumer Protection Act – prohibits people from acquiring domain names with bad faith intent to profit from the acquisition
   b) Virtual Works v. Volkswagen: If a company has a bad faith intent to profit from the use of a domain name of a common association of the domain name to another company, the company is acting in bad faith and thus cannot use the name under the ACPA

D. Right to Include/Exclude
   a) Jacque v. Steenberg Homes – Def. trying to deliver a home. Easiest way to do is across pl. property. Pl. forbids. Ct. upheld homeowner’s right to exclude others from his land b/c of exclusive enjoyment of his own land
   b) State v. Shack: homeowner right to exclude did not supersede tenant’s right to reasonable access by a visitor (a gov’t employee)

E. Acquisition by Find (lost or mislaid property)
1. Abandoned property:
   a) Armory v. Delamirie: (Pl., a chimney sweep, found a jewel, took it to def. shop, who, under the guise of weighing it, took out the stones. Ct held the finder of item has property rights over subsequent finders
   b) Trespassers are not rewarded with the fruits of their wrongful behavior
   c) Intention to relinquish is imperative in defining abandoned property
2. Lost or mislaid property:
   a). Finder’s title is good against all others except the true owner, prior finders, and (sometimes) the owner of the land where the object is found.
   b). invitee finders must surrender the found property to the landowner; employees must surrender property to employer.
   c) If object embedded in soil, landowner wins
d). Homeowner’s awarded ownership over property found in their home. However, if the homeowner has never moved in to the home, he does not have constructive possession of the home, and thus, the finder wins (Hannah v. Peel – Def. never occupied his house. Soldiers quartered there. One, pl., found brooch and wanted to keep it. Court held for pl.)
e). Mislaid property goes to the landowner. There is a difference between lost and mislaid property. *(McAvoy v. Medina* – pl, a customer in def. barbershop, picked up a purse on a table. The pl. told the def. to keep it, and if no one claimed it, return it to him. Court held that barber should keep it because he was the person in best position to return it to the true owner)

F. Acquisition by Adverse Possession
1. If true owner of land fails to start legal proceedings to remove a person who adversely possesses his land within the period of time of the statute of limitations, the true owner is forever barred from removing the adverse possessor
2. Five elements for adverse possession (NACHOE)
   a). Actual – must actually take possession of the land
   b). Open and notorious – must be detectable to true owner (owner know or have reason to know that someone is on his land)
   c). Exclusive
   d). Continuous – as would a true owner
      i) *Howard v. Kunto* – adverse possession of a summer home. Kunto only occupied the home in the summer, under color of title (defective deed). Howard, true owner, claimed that since Kunto was only there in the summer, not continuous. Court ruled since normal use of the property was only summer use, and occupier made that use, he has adversely possessed.
      ii) adverse possessor can tack on previous owners possession, as long as the property was adversely possessed through entire time period.
      iii) owner’s possession automatically tacked on.
   e). Hostile – without owner’s consent and with an intention to remain; does not mean with malice
      i) adverse possessor must have a good faith belief that she owns the occupied property (criticized b/c rewards lazy owner and penalizes productive occupier)
      ii) knows the property is not his but intends to claim it nevertheless (rarely used today – rewards tresspassers)
      iii) state of mind irrelevant: (1) lack of permission; and (2) occupier acts and statements appear to be claims of ownership (majority rule)
3. *Manillo v. Gorski:* if encroachment is by mistaken knowledge of where the boundary lies, the encroacher can gain title through adverse possession; When the encroachment of an adjoining piece of land is of a small area and the fact of an intrusion is not clear, the owner is not presumed to have knowledge of the adverse occupancy, and thus, the encroacher does not gain title through adverse possession.
   a) Maine doctrine not used: the occupier is not possessing adversely if she occupied under a good faith mistaken belief that the land is not hers, but she would not have occupied if she knew the true facts
   b) Maine doctrine a minority rule – encourages perjury
3. Statute of limitations does not start running if disability exists when the cause of action accrued until after the disability is removed.
   a) disability: unsound mind, imprisonment, minor

4. Policy reasons for adverse possession.
   a) If true owner doesn’t care enough about his possession to protect it, he deserves to lose it.
   b) Adverse possessor has probably expended time, energy and money to make land productive so he should be rewarded.
   c) Promotes efficient resolution of disputes.

5. Extent of property acquired through adverse possession.
   a) Entry without color of title: adverse possessors only acquire the land they have actually physically possessed.
   b) Entry under color of title (deed that looks good but is defective): adverse possessors get all of the land described in the defective deed, so long as it is a single parcel and the possessor has occupied a significant portion of the parcel. Possessor lacks color of title if he does not believe, in good faith, that his deed is defective.

III. Personal Property
   A. Bailment
      1. Definition: legitimate possession of personal property by someone who is not the owner of the property.
      2. Bailee is to care for the property.
      3. Bailor is entitled to receive the property back and is obligated by contract to pay any contractual fees.
      4. Example: Dry cleaners.

   B. Acquisition by Gift
      1. Requirements
         a) Donative intent
            i) Intent to transfer title, not just possession.
         b) Delivery
            i) By deed.
            ii) Symbolic delivery – when physical delivery is impossible or impractical (e.g., letter).
            iii) Constructive delivery – handing over a key or some object to open up access to the subject matter of the gift.
            iv) Physical delivery.
            v) Rationale for delivery requirement
               - Making an abstraction a reality.
               - Objective manifestation of intent.
               - Objective evidence of acceptance.
         c) Acceptance.
      2. Gifts divided into two categories
         a) Inter vivos – gifts given during life.
            i) Irrevocable.
         b) Causa mortis – in contemplation of impending death.
i) revocable if the donor recovers from illness or threat causing the donor to make the gift in contemplation of death

3. Constructive delivery must only be used for things that are impractical to deliver physically. *Newman v. Bost:* if item is physically deliverable, it must be. On this deathbed, gave keys to bureau. Court held that Julia was entitled to collect on insurance policy locked in the bureau because Jack could have physically delivered the policy and did not.

4. *Gruen v. Gruen:* inter vivos gift can be made even if donee never takes physical possession, when donor intends to maintain life estate in the item. (Father wanted to give son a Klimt painting, but wanted to hold onto it during his life. A series of letters evidencing intent to donate and acceptance.)

**Chapter 2 – Freehold Estates**

I. Fee simple absolute
   A. Feudalism origin
   B. Perpetual duration – no end
   C. Created by, “To A and A’s heirs,” although today no magic words nec.
   D. Freely alienable, inheritable through intestacy, and can be delivered by will

II. Fee Tail
   A. “To A and the heirs of his body.” If O conveyed Blackacre to A and the heirs of his body, A has a fee tail. If A conveys Blackacre to B and B’s heirs, B does not have a fee simple absolute, but rather possession of Blackacre until A’s death, at which point A1, A’s son, gets possession
   B. Virtually extinct now
   C. Lasts until all of the lineal descendants of A have died – until the end of the bloodline. Followed by a future interest.

III. Life Estates
   A. Possessory estate that expires on the death of the specified person
   B. Freely alienable (during life of grantee)
   C. Always followed by a future interest
   D. In cases of ambiguity, favor fee simple over life estate
      1. *White v. Brown* – ambiguous intent in a gift causa mortis of Jessie Lide’s home. Tennessee S.C. held that intent was to give a fee simple absolute, there being no evidence to the contrary. Court held that the “no sale” requirement was invalid as an attempt to restrain alienation of a fee simple absolute, rather than a life estate.
   E. Judicial Responses to the inflexibility of the life estate
      1. Construction: try to implement the grantor’s intent, but if ambiguous, can interpret it to be more flexible (fee simple absolute)
      2. Judicial sale: courts can sometimes order the sale of the life estate and the remainder and dived the proceeds b/w the life tenant and the remaindermen, but it must be the best interests of ALL of the parties
         a) equitable necessity: *Baker v. Weedon* – life estate tenant wanted to sell land so she could live comfortably, but the remaindermen were opposed,
based on economic waste. Why sell the land now when you can get much more in a few years? Court only allowed some of the property to be sold to provide for Anna’s (life estate) reasonable needs but not the entire property.

b) waste avoidance: courts may also order a sale when it is necessary to avoid waste (destruction or deterioration of the underlying property)

F. Waste

1. Waste: actions of the life tenant that permanently impair the property’s value or the interest of the future interest holders. L should not be able to use the property in a way that unreasonably interferes with F”s expectations.

2. Affirmative waste
   a) life tenant acts affirmatively to damage land permanently
   b) voluntary waste
   c) example: life tenant burns the bard, cuts down the timber, and removes the gravel

3. Permissive waste
   a) when life tenant fails to act reasonably to protect the deterioration of the land
   b) involuntary waste
   c) example: failure to fix a leaky roof

4. Ameliorative waste
   a) when the life tenant acts affirmatively to change the principal use of the land and increases the value of the land
   b) Only actionable when (1) it is clear the grantor intended for there to be no change in the use, and (2) the property may still be used in the fashion the grantor intended.

IV. Defeasible Fees

A. Defeasible fee: subject to termination upon the happening of a specified event

B. Three types:

1. Fee Simple Determinable
   a) terminates automatically when the specified event occurs
   b) language in the grant must manifest intent for the land to revert back upon the occurrence of the event
   c) If the grant goes back to the grantor, it is called a possibility of reverter. If it goes to a third party, it is an executory interest and is called a fee simple subject to executory limitation.
   d) possibility of reverter exempt from rule against perpetuities
   e) magic words: so long as, until, during or while

- Mahrenholtz v. County Board of Trustees: even though grantor did not expressly call the grant a fee simple determinable, the language use clearly establishes the grant as such (Huttons convey land to be used for school purposes only, otherwise would never to the grantors. Reversion conveyed to Jacqmains, then to Mahrenholz. Land ceases to be use for school purposes. Hutton (son) conveys prop rights to Mahrenholz, who seeks to claim rest of the land from school. Issue: fee simple determinable, or
subject to condition subsequent? IL law says cannot transfer right of entry inter vivos. 

f) freely transferable but the nature of the estate and its limitation stays the same
e) Problem: If a suit is not brought after automatic possibility of reverter, a new title can result through adverse possession

2. Fee Simple subject to condition subsequent
   a) terminates only when the holder of the power of termination exercises it
   b) id language: “provided, however,” “but if,” “but in the event,” “on condition that”
c) leftover called a **power of termination** or **right of entry**
d) right of entry exempt from rule against perpetuities
e) freely transferable and inheritable, and may be devised by will
f) in ambiguity, courts favor fee simple subject to condition subsequent
g) **Mehrenholtz v. Board of School Trustees** – great difference between fee simple determinable and fee simple subject to condition subsequent

3. Fee simple subject to an executory limitation
   a) When remainder vests to a third party after the occurrence of a specified event
   b) subject to rule against perpetuities

4. Some problems with defeasible fees
   a) restraint on alienation
      i) **Mountain Brow Lodge No. 82 Independent Order of Odd Fellows v. Toscano** – Toscano gave the Odd Fellows a lot adjacent to its existing building, but in the deed, he restricted its use only to an Odd Fellows Lodge, and that sale or transfer would result in a reversion to Toscano. The no-sale or transfer restriction was an invalid restraint on alienation but the court upheld the restriction because Toscano meant to convey a determinable fee.
   b) defeasible fee or covenant

5. Restraints on Alienation
   a) Forfeiture – forfeiture of estate if alienation is attempted
   b) Disabling – disables the owner by depriving him of any to transfer the estate
c) Promissory – purports to extract a promise from the transferee that she will not alienate the property
d) generally void
e) a total restraint on alienation of a fee interest is void – economic efficiency
f) some partial restraints on alienation are valid but most are void. Valid when for a reasonable purpose and limited in duration.
g) restraints on life estates – usually upheld

**Chapter 3 – Future Interests**

I. What are future interests?
A. presently existing property interest to a future right of possession
B. Can be created in the transferor or the transferee

II. Future Interests retained by the grantor/transferor
A. Reversion: when a grantor conveys a lesser estate than what he owned, a reversion in the grantor is created.
   1. Reversions are always vested when created.
   2. Freely transferable
B. Possibility of reverter: created when the grantor conveys his estate upon a limitation (an event not occur, an event occur) and expires automatically when the event occurs (fee simple determinable)
   1. At common law, could only be inherited and could not be transferred inter vivos or by will. Today, most states allow free transfer.
   2. Not subject to rule against perpetuities and thus, can endure forever
   3. Can never be created in a grantee – always goes back to grantor
   4. Can endure forever because (1) triggering limitation may never occur, (2) vested upon creation so immune from Rule Against Perpetuities
   5. Magic words: “So long as…,” “while…,” “during…,” or “until…”
C. Right of entry
   1. created whenever the grantor retains the power to cut short the conveyed estate before its natural termination (fee simple subject to condition subsequent)
   2. Can only be created in the grantor
   3. Can endure forever because (1) triggering limitation may never occur, (2) vested upon creation so immune from Rule Against Perpetuities
   4. Magic words:  provided however,” “but if,” “upon condition that”
      a) The grantor must expressly reserve a right to reenter and retake the premises
   5. Does not end automatically – the grantor must do something to get back the property
   6. NOT TRANSFERABLE through an inter-vivos conveyance; it is inheritable

III. Future Interests created in grantee
A. Remainders: Becomes possessory upon the natural expiration of the preceding possessory estate (vested or contingent)
   1. Remainders never effect the estate that comes before them – how to distinguish b/w remainder and exec. interest.
B. Vested remainders
   1. created in a known or ascertainable person
   2. Not subject to any condition subsequent
   3. Indefeasibly vested remainders
      a) certain to become and remain possessory
      b) cannot be divested in whole or part
   4. Vested remainders subject to complete divestment
      a) created in a known or ascertainable person
      b) not subject to a condition precedent, but subject to a condition subsequent, that, upon occurrence, will completely divest the remainderman of his interest.
      c) vested
d) can be transferred inter vivos, devised, or inherited

5. Vested remainder subject to partial divestment (or subject to open)
   a) remainder created in a class of people, at least one of whom is
      ascertainable and presently entitled to possession as soon as the preceding
      estate expires.
   b) open – group can get larger
   c) class closes when:
      i) physically – when no longer possible to have new entrants
      ii) rule of convenience: when any member of the class is entitled
         to take possession

C. Contingent Remainders
   1. remained created in an unknown or unascertained person or that has a
      condition precedent to ultimate possession
   2. The condition must be expressed
   3. Can have alternative contingent remainders
   4. Transferable
   5. Contingent remainder always followed by a contingent remainder.
   6. Law has a preference for a vested remainder.

D. Executory interests
   1. operates to cut short the estate that comes before it
   2. Any future interest in a transferee that is not a remainder is an executory
      interest
   3. Two kinds:
      a) shifting: future interests in a grantee that divest another grantee’s
         possessory or vested future interest. Held by another transferee from the
         grantor
      b) springing: divest the grantor’s vested interest at some future time.
         Held by the grantee that cuts short the grantor’s interest.
   4. Holder of an executory interest cannot sue the life tenant for waste
      a) HYPO: Holder of an executory interest cannot sue the life tenant for waste
         • O to A for life, then to B; but if B marries D, then to E
           o B has a vested remainder subject to an executory interest
           o E has a shifting executory interest
           o If A commits waste, B can recover (b/c holder of a
              remainder) but E cannot
   5. Able to come into legal being through the Statute of Uses (before only through
      equity)

E. Rule against Perpetuities
   1. Destroys any future interest that could remain uncertain of ultimate possession
      after the elapse of a certain amount of time
   2. Said to promote the free marketability of property and to ensure property is
      controlled by the living, rather than by the desires of the dead
   3. **Exact words:** No interest is good unless it must vest, if at all, not later than 21
      years after some life in being at the creation of the interest
   4. The rule: A future interest is void unless all uncertainty as to whether it will
      ultimately become possessory is removed no later than 21 years after the end of
some life in being at the creation of the interest. Interest must vest, if at all, no later than 21 years after some life in being.
  a) no interest in any member of a class is good unless the interest of every possible member of the class is good – If the gift to one member of the class might vest too remotely, the whole class gift is void. For the class gift to be vested under the Rule, the class must be closed.
  b) must prove will vest or fail to vest within period
  c) tests the validity at the moment of creation
5. Vesting: An interest is vested when it either has become possessory or has vested in the interest
6. Validating Lives: need to identify a person on the effective date of the grant whose life can serve to validate the interest.
7. What it applies to or does not apply to
  a) Applies to all contingent future interests (executory interests, contingent remainders, vested remainders subject to partial divestment), vested remainders in a class (since gift does not vest in any one member until the class is closed)
  c) Does not apply to defeasible fees, and future interests created in the grantor (reversions, possibilities of reverter, right of entry), present possessory estates, fee simple, and all reversionary interests
8. Fertile octogenarian: rule presumes anyone of any age can produce a child
9. Unborn widow: refers to the unknown person who, at the time of A’s death, is married to him, but is not necessarily A’s wife at the time of the draft.
10. Attempts to reform
    a) Wait-and-see: statute adopted in ½ the states. Evaluates the validity of future interests as events actually unfold
    b) USRAP: validates any interest that will vest within 90 years of its creation
11. Jee v. Audley: always presume fertile octogenarian. Here, the grant will vest too remotely, even though 83 year old female will not have children – assume she could, therefore void

Chapter 4 – Concurrent Ownership and Marital Interests

I. Tenancy in Common
   A. separate but undivided interests in the same property
      1. fractional interest
      2. each entitled to use and possess the entire property, but cannot exclude fellow owners from using
      3. can have unequal shares
   B. Alienable, divisible, inheritable
   C. In ambiguous cases, tenancy in common presumed
II. Joint Tenancy
   A. Right of survivorship: upon the death of a joint tenant, the interest of the deceased tenant terminates.
   B. Each tenant owns an undivided share in the same interest
C. Each tenant with equal share
D. When one tenant dies, the share held by the remaining joint tenants increases proportionately
E. Four unities
   1. Time: each tenant must acquire his interest at the same time
   2. Title: all tenants must receive their interests under the same instrument
   3. Interest: each tenant must have an identical interest in the property
      a) can have fraction in joint tenancy and other fraction in tenancy in common, but joint tenancy fraction must meet all four unities
   4. Possession: upon creation, each must have the same rights of possession of the whole property. After creation, tenants can allocate possession as they like
F. Creation: can’t be ambiguous (presumption of tenancy in common)
G. Severance: joint tenant may destroy at any time by conveying his interest → tenancy in common
   1. if a joint tenant conveys his interest to a third party or to another joint tenancy, the joint tenancy is severed as to that interest, but the other joint tenants are still joint tenants of the remaining portion.
   2. A mortgage does not sever the joint tenancy if it is by one person because the lien is connected with the deceased’s interest and dies with him, leaving only the previously unencumbered tenant (Harms v. Sprague – Pl. and brother took title as joint tenants, brother and friend buy a house together. Brother, to pay for house, pledges his interest as mortgage. He dies and leaves friend (def.) as executor of estate. Does lien survive death?)
   3. At common law, if one joint tenant leased his interest the joint tenancy was severed because the unity of interest was destroyed. Today, most jurisdictions do not regard joint tenancy to be severed by one tenant’s lease of his interest.
   4. Joint tenancy can be severed by agreement, as long as the intention is clearly manifested.

III. Tenancy by the entirety
   A. Like joint tenancy but only available to husband and wife
   B. Requires the 4 unities plus a 5th, the unity of marriage – husband and wife seen as one person
   C. Cannot be severed by one party – both parties must convey
   D. Right of survivorship
   E. Neither spouse may alienate
   F. Termination by death, divorce, or conveyance by both parties
   G. About half of the states recognize tenancy by the entirety

IV. Rights and Obligations
   A. Partition
      1. joint tenant or tenant in common may demand partition for any reason
         a) partition in kind: physical division
            i) preferred method
            ii) not done if it is impossible or impractical or not in the best interests of all parties (Delfino v. Valencias – Pl. and def. are tenants in common with unequal sections. Pl. wants to build subdivision, def. wants to remain in garbage business; Ct. holds no
partition by sale in this case). “Best interest” prong includes economic costs or gains involved as well as subjective costs imposed on a tenant by sale.

b) **partition by sale**: sale and division of the proceeds
   i) when it is impractical or impossible to physically divide the estate
   ii) net proceeds are divided among the co-owners in proportion to their ownership interests
   iii) agreement not to partition is enforceable if (1) it clearly manifests the parties’ intent not to partition and (2) its duration is limited to a reasonable period of time

B. Exclusive possession by one owner
   1. Because each co-owner has right to possess all of the property, exclusive possession is valid if it is agreed upon
   2. Liability to co-tenants for rent
      a) majority rules is there is no liability to co-tenant for rent if exclusive possession, unless (1) ousted co-tenant, (2) fiduciary duty; (3) agreement to pay rent
      b) **Spiller v. Mackereth** (Pl. and def. own commercial buildings as tenants in common. Pl. took possession of entire building and used it as a warehouse. Def. demanded he either vacates or pays rent. Held: Reverse order fro rent b/c pl. neither denied def. was owner nor prevented def. from moving in and taking possession.
      c) if renting to a third party, co-tenant obligated to his co-tenants to share the rents

C. **Swartzbaugh v. Sampson**
   1. Lease by a single joint tenant to a third party is not a nullity, but is valid

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**Chapter 5 – Leasehold Estates**

I. Statute of Frauds → leases over one year must be written

II. Lessee has all of the rights of possession that a fee owner has – may recover for invasion through ejectment, trespass, nuisance

III. Types
   A. **Term of years**: a lease for a single, fixed term of any length
      1. Term must be set out clearly in the lease
      2. Terminates automatically at the end of that period
      3. If for less than a year, can be oral
      4. If it does not comply with Statute of Frauds, becomes a tenancy at will
   B. **Periodic tenancy**: lease for a recurring period of time that continues until either party gives notice (month to month, year to year)
      1. Notice: equal to the period or 6 months
      2. Death of landlord or death of tenant has no effect on the lease
   C. **Tenancy at Will**: no fixed time period, lasts as long as both parties desire and can be terminated at any time by each party (or when one of the parties dies)
1. unilaterally terminable lease is not at tenancy at will; it is a determinable tenancy (*Garner v. Gerrish* – pl. leases house to def. with def. power of termination whenever he wants. Pl. dies, and executor tries to end lease. Court allows lease to be unilaterally terminable, but it is not a tenancy at will – determinable life estate)

2. Landlord terminates by giving notice. A tenant terminates by giving notice or abandoning the property.

3. At common law, no notice necessary but now some states require notice

D. Holdovers (tenancy at sufferance): a tenant that stays in possession after the term of the lease has expired; unlawful

1. Landlord can evict and recover damages for lost possession, OR
   a) damages measured by the reasonable value of the property for the holdover term plus any special damages (ex. damage to the premises)

2. Landlord can bind the holdover to a new term as tenant
   a) Deters holdovers
   b) Most states treat the new tenancy as a periodic tenancy. Some treat the new tenancy as a term of years for a maximum of one year. A small number treat it as a tenancy at will.
   c) the provisions of the old lease apply to the new leasehold.
   d) one a landlord elects a new term, the election is irrevocable – the landlord cannot change his mind.

   i) *Crechale & Polles, Inc. v. Smith*: pl. leased premises to def. for 5-year term. B/f term ended, parties discussed a short-term extension of the term to accommodate pl. Pl. wrote letter to def. to confirm the oral agreement. Def. responded, denying any such extension, and demanding pl. to vacate on schedule. Smith stayed on and tendered rent for 1 mo. which was excepted by def. He then vacated, after giving suf. notice of termination. The court held that the letter constituted the end of the lease. Def. subsequent acceptance of the rent → new periodic tenancy

3. There is no holdover so long as the tenant’s continued possession is the product of circumstances beyond the tenant’s control (common law: any bit of time after the old term regardless of reason, was a holdover)

4. Landlord must chose his remedy within a reasonable time.

IV. Delivery of possession

A. English Rule: obligation of landlord to deliver actual possession

1. Duty to evict holdovers

2. Liable to new tenant for lack of possession

3. Tenant remedies:
   a) terminate the lease and recover damages
   b) adhere to the lease and withhold rent for the time he is out of possession and recover damages

4. Disadvantages:
   a) makes it harder for landlord to lease property while tenant in possession
   b) wrongdoer is trespassing new tenant, not landlord

5. Advantages
a) incentive for landlord to get people not paying rent off of the land
b) landlord with more power to get non-paying people off the land
c) landlord more likely to know that there is a holdover
d) tenant unlikely to sign lease if know there is a holdover

B. American Rule: a landlord is not obligated to deliver actual possession – burden of eviction on the new tenant entirely
   1. Hannan v. Dusch: Def. leased premises to pl. When the date for the lease to begin arrived, the old tenant had not moved out, so pl. could not take physical possession. The VA SC held that the landlord’s obligation was only to deliver legal right to possession, not actual physical possession.
   2. Landlord not responsible for wrongful possession of the premises
   3. Tenant remedies
      a) can treat holdover as a trespasser and evict and recover damages
      b) can renew the holdover to another term
   4. Landlord remedies – no remedies, but some jurisdictions allow the landlord to choose one of the tenant’s remedies
   5. Advantages
      a) landlord should not have special obligation to get rid of third party
      b) easier for landlord to immediately rent property if don’t have to worry about holdover
      c) clearer rule
   6. Disadvantages
      a) tenant unlikely to sign lease if they know there is a holdover

C. A tenant has no obligation to take possession

V. Subleases and Assignments
   A. Assignment:
      1. places the assignee in privity of estate with the landlord (the assignee and the landlord are liable to each other for performance of the lease)
      2. Assignee is personally responsible for performance of the obligations in the lease
      3. Privity of contract still exists b/w assignor and lessor.
      4. Occurs when the assignor conveys his entire remaining estate to the assignee
      5. In order to run with the estate:
         a) intent – original parties must intend for the promise to bind the assignee
         b) privity: The assignee must be in either privity of estate or privity of contract with the party enforcing the promise or against whom the promise is sought to be enforced
         c) touch and concern: the promise must touch and concern the assigned estate (the benefit or burden must touch and concern the assignee’s estate)
      6. The landlord and tenant must clearly agree to release each other from the contractual promises – explicitly
   B. Sublease: does not create privity of estate b/w landlord and subtenant
      1. subtenant only liable to sublessor for performance of the sublease and has no claim against landlord for his failure to perform
      2. Only has the right to possession as long as the sublessor is not under default on the master lease
3. Occurs when the original tenant transfers anything less than his entire remaining interest in the lease.

C. In both cases, assignor or sublessor remains in privity of contract with the landlord and is liable for performance of the original lease.

D. Distinguishing between the two:
   1. Look at (1) parties intentions; and (2) the substance of the transaction, to determine whether any given transfer is a sublease or an assignment.
   2. **Ernst v. Conditt**: Pl. leased land to Rogers, in lease that required pl. consent for assignment or sublease. Rogers took possession and build go-cart track on premises, and then agreed to sell business to def. Pl. consented to the “subletting” of the premises to def. under express condition that Rogers was liable for performance of the lease. Def. ceased paying rent. Pl. sued def. for unpaid rent. TN appeals court held that despite words used, parties intended there to be an assignment because Rogers gave up his entire interest in the lease.

E. Landlord must act reasonably when denying consent to transfer (Restatements), but limited to commercial leases only
   1. **Kendall v. Ernest Pestana, Inc**: Def. was the lessor of a hanger space which required consent to any assignment or sublease. Bixler, the tenant, agreed to sell his business to pl., including assignment of the leasehold. Pl. was financially stronger and richer than Bixler. Def. refused to consent to the assignment unless the rent was increase and more onerous terms were imposed. Pl. sued def., claiming refusal to assign was unreasonable and unlawful restraint on alienation. CA SC held that in a commercial lease, a landlord may only withhold consent to transfer when the landlord has a commercially reasonable objection

VI. Tenant responsibilities
   A. Tenant must pay the rent and avoid waste.
   B. Other responsibilities are defined by the lease.
      1. Waste avoidance
         a) duty to repair
         b) duty to avoid damage
   2. Refrain from illegal uses
   3. Duty not to commit nuisance

VII. Landlord’s remedies
   A. Rent accelerations: clause in lease making the entire balance of the term immediately payable upon tenant default under the lease
   B. Security deposits: security for tenant’s performance of her lease obligations
   C. Eviction: landlord is permitted to terminate the lease and evict the tenant for non-payment of rent and occasionally for breach of other lease covenants
      1. Must notify the tenant and give a reasonable time to cure the default
      2. Landlord must give tenant minimal notice before filing a suit
      3. Ejectment
         a) at common law, landlord was entitled to use reasonable force to oust the tenant himself
         b) American jurisdictions splintered on this remedy
         c) A slender minority of states forbid self-help.
i) **Berg v. Wiley:** Def. leased to Berg for use as a restaurant in a lease that required written permission to alter the structure, and gave pl. right to retake possession upon default. Pl. restaurant violated health code and she began to remodel w/o written permission. Def. told pl. if the violations were not corrected in 2 weeks he would retake possession. 15 days later, violations uncorrected, Def. changed the locks. MN SC held that the only lawful means to dispossess a tenant who claims possession is through a judicial process. Self-help ➔ risk of violence and breach of the peace.

d) reasonably forceful self-help allowed in other states and some states limit self-help to peaceful ouster

D. Tenant abandonment: if tenant abandons, landlord may

1. accept and terminate the lease
   a) damages: transactional costs of finding a new tenant, plus shortfalls b/w rentals for the remainder of the surrendered lease

2. reject and leave the premises untouched
   a) do not impose duty to mitigate damages on landlord
   b) can recover what rent he would have received.

3. reject but retake possession on behalf of the tenant
   a) either voluntarily or pursuant to a duty to mitigate damages
   b) **Sommer v. Kriedel:** landlord has a duty to mitigate damages once a tenant has abandoned. Burden of proof on landlord to show that he exercised reasonable attempt to relet the apt.

4. Many states hold that landlord has a duty to mitigate damages, and thus cannot chose the second option

VIII. Tenant Remedies and Landlord Responsibilities

A. Quiet Enjoyment: a landlord has a duty imposed on him to avoid wrongful actual eviction or constructive eviction of the tenant

1. actual eviction: a tenant who is wrongfully and totally physically ousted from the entire premises may terminate the lease with no further liability and is no longer obligated to pay rent.

2. actual eviction from any part of the premises entitles tenant to abate rent until tenant is restored to full possession

3. constructive eviction: if the landlord or someone else substantially interferes with the tenant’s use and enjoyment of the premises so that the intended purpose of the occupation is frustrated; physical eviction has not occurred.

   a) elements

   i) wrongful action or failure of the landlord
   ii) substantial material deprivation of the tenant’s use and enjoyment of the premises so the premises are unsuitable for occupancy for the purpose for which they are leased
   iii) complete vacation of the premises by the tenant

   b) tenant may move out and terminate the lease with no further liability

   c) b/f vacating, the tenant must give the landlord a reasonable chance to fix the problem
d) **Reste Realty v. Cooper**: Def. leased office space on the first floor of pl. building. Def. office would periodically flood with water running of pl. driveway. The problem was so severe she could not conduct normal business. Tenant remained in possession after the floods b/c landlord promised that it would be fixed. When it became apparent that the problem would not be fixed, tenant abandoned. Court held constructive eviction. If she had known of the problem b/f the lease, however, then she waived her rights to a claim.

B. **Warrant of Habitability**: residential lease with warrant that the premises are habitable – at inception of the lease and continued obligation to repair as necessary (growing minority view)

1. implied and cannot be waived
2. tenant remedies for breach
   a) terminate and leave (and can also recover damages)
   b) stay and withhold rent
   c) stay and repair (and deduct cost of repairs)
   d) stay and recover damages (abatement or deduction of rent)
   e) stay and defend: remain and plead breach of implied warranty as a complete defense to an eviction action based on failure to pay rent b/c after notifying landlord of breach, no further rent obligations

3. **Hilder v. St. Peter**: Pl. rented an apt. from def. that was filthy, no locking door, plumbing leaked through walls and ceiling causing plaster to fall, no functioning electrical outlets, broken sewer line that filled basement with sewage, etc. VT SC held breach of implied warranty of habitability
4. Criticism:
   a) bad for the poor b/c costs of rent will increase
   b) reduces no. rental hosing

C. **Retaliatory Eviction**

1. Traditionally, landlord’s motive for eviction irrelevant
2. Today, most jurisdictions hold that a landlord may not evict a tenant in retaliation for the tenant’s reporting a housing code violation
   a) tenant has burden to prove retaliatory motivation
   b) available only to a tenant that is not in default

D. **Tort liability of landlords**

1. Pre-existing dangerous conditions
   a) latent defects: B/c only the landlord would know of a concealed defect, common law imposed a duty to warn the tenant of their existence. If tenant occupied, he assumed the risk and acquired a duty to correct the condition
   b) public use: a landlord is liable to the public for injuries occasioned by a defect existing at the inception of the lease which is known to the landlord, if the premises are intended for use by members of the public, the landlord knows or has reason to know that the tenant will probably not correct the defect b/f admitting the public, and the landlord has failed to use ordinary care to correct the default.
2. Generally, no liability for dangerous conditions that occur after the tenant has taken possession.

Chapter 8 – Nuisance

I. No person may use his land in an unreasonable manner that substantially lessens another person’s use and enjoyment of his land
   A. Nuisance per se: nuisance at all times, all circumstances, places
      1. extremely dangerous activities: blasting, nuclear testing, etc
      2. Immoral or illegal activities: prostitution, drug sales, etc.
   B. Nuisance accidents
      1. Right thing in the wrong place
      2. Not unreasonable dangerous
      3. Lawful

II. Public Nuisance
   A. interferes with the rights of the entire public

III. Private Nuisance
   A. substantial interference with private rights to use and enjoy land by (1) intentional and unreasonable conduct or (2) unintentional negligent, reckless, or dangerous conduct.
   B. Intentional Conduct: must be unreasonable
      1. Balance of harm and social utility – the gravity of the harm inflicted by the activity must outweigh the benefit to society to be considered an unreasonable activity. Looks at:
         a) extent of the harm
         b) character of the harm
         c) social value of the use
         d) sustainability of the location
         e) burden of avoiding the harm
         f) whether it causes serious harm and the actor could compensate that and similar harm without going out of business
      2. Unreasonable if the activity causes serious harm and the actor could compensate for that and similar harm without going out of business
      3. If substantial harm is inflicted, the court sometimes ignores the balancing test
   C. Unintentional conduct
      1. When the actor does not know nor has reason to know his actions interfere with other’s use and enjoyment of the land
      2. Must pose an unreasonable risk to others – because either the actor is careless or the action is inherently dangerous
   D. There must be substantial interference to the average person. It does not matter if the pl. is particularly sensitive
   E. Morgan v. High Penn Oil: Def. operated an oil refinery than emitted noxious odors several times each week for a 2 mile radius. Pl. sued to enjoin operations, alleging the odors made him ill and deprived him of use and enjoyment of his property. NC SC found for pl. and applied rule that activity is a nuisance if it is either intentional and unreasonable or unintentional produced by negligence, recklessness, or extremely
dangerous activity. Def. had reason to know that its operation would produce noxious odors and the ct. assumed its use was unreasonable.

IV. Remedies
   A. The more valuable use should get the entitlement (economic efficiency argument)
   B. Some give by first in time – coming to the nuisance (fairness)
   C. No nuisance →
       1. continue the activity
   D. Nuisance
      1. enjoin and abate the activity
         a) Estancias Dallas Corp. v. Schultz: Pl. constructed an apt. complex next to def. residence. To save $40 K the pl. located its air conditioning unit 5 feet from def. lot line, 55 ft. from his house. The air conditioner was very noisy and disrupted def. use of his home. To change the location of the ac would cost $100 K to $200 K. AC is nec. to rent apt.s in Dallas. Def. house worth $25 K. Court held that AC was a nuisance and entered injunction of further use.
         b) would have made more economic sense to charge pl. somewhere b/w $25 k and $150,000.
      2. Pay damages and continue the activity
         a) permanent damages awarded – amt. to sufficiently compensate for all past and future injury from the continuance of nuisance.
         b) Boomer v. Atlantic Cement: Def. factory produced dirt, noise, smoke, and vibration that interfered with many neighbors use and enjoyment of land. NY Ct of App held that it was a nuisance and awarded damages instead of an injunction because factory of more valuable use.
   E. Nuisance or not: enjoin the activity but award damages to the enjoined actor.
      1. Occurs when
         a) pl. asserts that his activity is more valuable
         b) unclear whether the challenged activity is a nuisance or equity favors and unadorned injunction
         c) it is unlikely that the pl. is able or willing to acquire use right in the market
      2. Spur v Del Webb: Pl. had a cattle lot in rural AZ that generated enormous amnts. of manure, attracting insects, causing noxious odors, but no one objected b/c no neighbors. Later, def. created Sun City, a retirement city, and expanded it so it was close enough to the pl. lot to make the uses incompatible. AZ CT enjoined pl. from further operation but required def. to pay a reasonable amount of the cost of moving or shutting down. Def. came to the nuisance.
   F. Each user’s desired use prevents the other use from occurring. Each use produces externalities

Chapter 9 – Servitudes

I. Introduction
   A. Definition: servitudes are private arrangements concerning the use of land that as title and possession of the burdened land passes from the initial contracting party to new owners and possessors.
B. A servitude that gives a person a right to use someone else’s land in a specific and limited manner is an easement or a profit.
C. A servitude that consists of a promise that a landowner will use her own land in a specific way is either a real covenant or an equitable servitude.

II. Easements
A. An easement is an interest in land that entitles the holder to use land owned by another
B. In cases of ambiguity, most courts employ a rebuttable presumption that a grant is an easement.
C. Easements are appurtenant or in gross; affirmative or negative
   1. Easement Appurtenant:
      a) benefits the owner of another parcel of land, rather than conferring a personal benefit. The benefited parcel is the dominant estate and the burdened parcel is the servient estate.
      b) In ambiguous cases, courts prefer to find easements to be appurtenant.
      c) freely transferable
   2. Easements in gross:
      a) Benefits its owner personally, and not as an owner of the land.
      b) Commercial easements in gross are assignable and non-commercial easements in gross are not assignable unless the parties intend to permit assignment
   3. Affirmative easement: Permits a person to use the servient estate in a certain way
   4. Negative easements: confers only the right to prevent specified uses of the servient estate. It confers no right to use the servient estate.

C. Profits
1. Profit is the right to take a natural resource or crop from the land of another.
2. Profits are always in gross and are freely transferable

D. Licenses
1. Permission to enter the licensor’s land
2. May be oral or written and are revocable at any time
3. In ambiguous cases, courts prefer to construe a license over a easement in gross because easements in gross are difficult to eliminate
4. Generally not assignable
5. Irrevocable licenses. A license can become irrevocable by:
   a) intention: if the licensor expressly makes the license irrevocable
   b) equitable estoppel: If a license is granted and the licensee reasonably relies on it, making improvements on the property, equity requires that the licensor be estopped from revoking the license until the value of the improvements has been exhausted.
      i) Holbrook v. Taylor: Pl. allowed def. to use a roadway across his property for def. to reach his own property. Def. used access roadway to build a home. Pl. knew of this and did not object. Pl. later blocked the road with a steel cable. The ct. held the pl. was equitably estopped from revoking the license.
   c) license “coupled with an interest”: when a license is tied together with some other independently legally recognized interest, the license is...
irrevocable until that other interest is vindicated. (ex. payment requiring delivery of good – license to enter and deliver)

E. Creation of Easements:

1. By grant: must be in writing, signed by the grantor
   a) reservation in favor of grantor
   b) reservation in favor of a third party
      i) common law did not recognize validity of a easement in favor of a third party
      ii) Majority of courts do not hold these valid, but some do.
      iii) *Willard v. First Church of Christ, Scientist*: McGuigan conveyed lot to Peterson that purported to hold an easement for parking during church hours for the benefit of the adjacent church. Peterson conveyed the lot to pl. under a deed that did not mention easement. Pl. sought to quiet title to lot. CA SC held that common law rule frustrates clear intent of grantor and aids people like Peterson.

2. By estoppel: like license by estoppel.

3. By implication:
   a) Implied by prior use:
      i) a *common owner* of land must use some part of it for the benefit of the remaining part and then divide ownership of the “quasi-dominant” and “quasi-servient” estate
      ii) must be *reasonably necessary* for use and enjoyment of the quasi-dominant estate
         - *Van Sandt v. Royster*: sewers that ran across lot; Ct. held that an easement by reservation had been created – absolute necessity
      iii) the prior use must be *continuous*
      iv) the parties must *intend to continue* the use at division
      v) at division, the use must be *in existence*
      vi) at division, the use must be *apparent*, which does not necessarily mean that it is visible

   b) implied by necessity
      i) An easement is implied by necessity only when an owner divides his property in such a way that one of the resulting parcels is left without access to a public roadway
      ii) easement is implied for right of way b/w landlocked parcel and the roadway
      iii) the necessity must be present at the time of severance and at the time easement is asserted.

   - *Othen v. Rosier*: Hill owned a parcel of land, which he sold in bits and pieces over time. One of the parcels was landlocked and was eventually acquired by pl., who habitually used a roadway crossing def. land to reach a public road. Def. built a levee to impound water, making the roadway impassable at times. Pl. sued to enjoin def.
from further interference with his right of way. TX SC held to easement by necessity b/c no proof that Hill had conveyed def. property (to a predecessor), it was that conveynance that landlocked pl. property. Pl. has an easement by necessity across some property, but not def. iv) if the necessity is ever removed, the easement implied by necessity terminates

4. Easements by prescription
   a) analogous to adverse possession
   b) elements
      i) actual
      ii) open and notorious – readily observable to a true owner
      iii) continuous – as continuous as a lawful user would make of the easement
      iv) hostile – must not be permissive use
      v) exclusive – does not depend on someone else’s claim
   c) negative easement and easements upon public land are not permitted to be prescriptive easements
   d) public prescriptive easements
      i) generally, public can get prescriptive easement if all of the elements are present, although some states do not allow public prescriptive easements
      ii) sometimes implied dedication: owner intends to dedicate property to public use but evidence of intent from (1) long standing public use, (2) owner’s failure to halt use
      iii) custom – immemorial usage w/o interruption
      iv) public trust doctrine: water and beach front below the mean high tide mark is held by the state in public trust – *Matthews v. Bays Head Improvement Assn.*: beachfront owners must give public access to use of privately-owned dry sand areas as reasonably necessary

5. By eminent domain
   a) gov’t takes part of land to put to public use
   b) for example, make a passway for power co.

III. Real Covenants
   A. Real covenant: a contractual promise about land use (that land will be used, or not used, in a specific way) that runs with an estate in land so that it binds subsequent owners of that estate
   B. Remedy: damages or an injunction to compel performance of the promise.
   C. Creation: must be in writing and may not be creating by implication or prescription
   D. Enforceability by or against successors
      1. Burden of running with the land
         a) intent: parties must have intended the burden to run
         b) horizontal privity: privity of estate b/w the original parties is required for burden to run, but not benefit. Many courts have discarded this requirement
c) vertical privity: privity of estate b/w the original promisor and the successor to the promised estate is required for both the burden and benefit to run
d) touch and concern the land: the promise must effect the use and enjoyment of the land, or must affect the advantages and burdens of land ownership
e) notice: successor must have notice

2. Benefit running with the estate in land
   a) intent: must have intent
   b) vertical privity (but not horizontal privity)
   c) touch and concern the land

IV. Equitable servitudes
   A. Introduction:
      1. a promise about the land use that will be enforced in equity against a successor to the burdened estate who acquired it with notice of the promise.
      2. Dif. b/w real covenants and equitable servitudes
         a) remedy for an equitable servitude is an injunction, not damages
         b) neither horizontal nor vertical privity of estate is needed for the burden or benefit of equitable servitude to bind to successors
         c) equitable servitude may be created by implication in some states, but never will a real covenant
   3. Origin: Tulk v. Moxhay: Tulk sold Leicester Sq. to Elms, who promised that he or his assignees would not build on Leicester Sq. With knowledge of the covenant, def. bought property and proposed to build on it. Horizontal privity was lacking so burden of covenant would not run. Tulk obtained an injunction. Ct. held that b/c def. bought the property and knew of the covenant, it would be unfair not to enforce it.
   B. Creation – almost always in writing, some states allow for by implication
   C. Enforceability against successors:
      1. intent for the covenant to run to benefit or burden successors
      2. notice
         a) actual notice: knowledge of the servitude
         b) record notice: if the covenant is recorded, constructive notice is satisfied.
      3. Touch and concern
      4. Privity not required
   D. Enforceability by third parties
      1. sometimes land owned by a third party can assert the benefit of a covenant if the third party is an intended beneficiary of the covenant

V. Racial restrictions
   A. Racial covenants not enforceable b/c unconstitutional
   B. Shelly v. Kraemer: Fitzgerald conveyed a residence to pl. (Af. Am). Kraemer sought to enjoin Shellys from occupying their new home b/c property was burdened by covenant restricting use to Caucasians and restricting use by Negros or Mongolians. US SC held that a state’s refusal to permit a willing buyer and seller from transferring title solely b/c race of one of the parties was in violation of equal protection clause of 14th Am.
VI. Common Interest Communities
   A. Covenants recorded on the master deed
      1. burden all units in the development
      2. invalidated when they are arbitrary, violate public policy, or interfere with the
         exercise of a fundamental constitutional right, or if unreasonable
      3. Nahrstedt v. Lakeside Village Condominium Assoc.: restriction that allowed
         no animals to be kept in any unit. Pl. moved in with three cats. Def. demanded
         their removal. CA SC held that the restriction was reasonable b/c it did not
         violate public policy and was not wholly arbitrary and did not impose a burden
         that outweighed any benefit. Pl had constructive notice of restriction.
   B. Covenants imposed by homeowner’s associations:
      1. valid if reasonable

Chapter 10 – Zoning

I. Zoning basics
   A. Zoning is the use of gov’t power to regulate land use
   B. Zoning laws divide a political jurisdiction into specific separate geographic areas and
      impose limits on the permissible uses of land within each area.
   C. Objectives
      1. to prevent incompatible uses
      2. to increase values by minimizing conflicting uses
      3. to channel development into patterns to serve larger social goals.
   D. In general, zoning is constitutionally valid.
      1. Village of Euclid v. Ambler Realty Co.: Euclid, OH comprehensive zoning
         ordinance that restricted the permissible uses of property, limited the heights of
         structures, and imposed minimum lot size requirements for certain types of
         structures held to be valid. The law’s objective—minimizing land use conflicts to
         prevent nuisances from occurring – was a legitimate exercise of the state’s police
         power because its content was neither unreasonable nor arbitrary.

II. Authorization for zoning
   A. Enabling Legislation.
      1. Most zoning laws are adopted at the local level, although some states have
         statewide regulations
      2. Local zoning law is void unless it conforms to the state’s enabling act – the law
         authorizing localities to engage in zoning.
      3. If a local zoning law violates some express provision of the enabling act or it
         deals with matters not authorized by the enabling act, the law is void to that
         extent. It is ultra vires, beyond the authority given the locality under the zoning
         act.
   B. Comprehensive Plan
      1. The Standard Act (the common enabling act) requires zoning decisions be
         made in accordance with a comprehensive plan for the city.
      2. Zoning laws are specific ways to implement the vision of the comprehensive
         plan.

III. Nonconforming uses
A. When zoning is introduced some existing land uses will not be in conformity with the uses permitted under the new zoning law.
B. Forced phase-out
   1. Specifies a period in which the nonconforming use must cease (amortization period).
   2. Majority rule: valid if reasonable. Reasonableness depends on
      a) the length of the amortization period
      b) the nature of the use
      c) the character and location of the structure
      d) the effect on the user’s business (portion affected, salvage value, depreciation, etc.
   3. Minority rule: Invalid per se
      a) PA Northwestern Distributors, Inc. v. Zoning Hearing Board: Moon Township, Pa adopted zoning ordinance that extensively regulated the location of stores that sell pornography. One effect of the ordinance was the pl. store was illegal. The zoning board permitted 90 days in which to cease operations. The PA SC held that amortization and discontinuance of a lawful pre-existing non-conforming use is per se confiscatory and in violation of the constitution.
      b) a concurring judge thought that the ordinance was void b/c it was unreasonable – it did not provide adequate time for the elimination of the non-conforming use.
   4. Usually, zoning ordinances stipulate that the nonconforming use cannot expand beyond the precise boundaries of the existing use. Thus, a successful, growing business will be forced to move if it is located as a nonconforming use.
   5. If the non conforming use is destroyed or abandoned, permission to continue the nonconforming use terminates. Any replacement structure or new use must conform to the zoning laws.

IV. Limits on zoning power
A. Zoning is an exercise of police power limited by
   1. the U.S. Constitution
   2. Valid Federal law preemptive of the local zoning law
   3. the relevant state constitution
   4. the relevant state law (zoning enabling act, judicial doctrines)
B. Aesthetic zoning:
   1. Traditionally held to be beyond the scope of the police powers – beauty is subjective, thus gov’ts should not regulate.
   2. Have been upheld based on lower property values
   3. Architectural Review – conditioning land use permit on:
      a) the conformity of the proposed structure to the existing character of the neighborhood
      b) the likelihood the proposed structure will not cause substantial depreciation of neighboring property values
      c) State ex rel. Stoyanoff v. Berkeley: Ladue, Mo enacted an architectural review ordinance designed to preserve property values and maintain Ladue’s conventional neo-colonial architecture. Def. proposed a
pyramidal, flat-topped, modern home. The proposal was rejected. The MO SC upheld the Ladue law, reasoning that architectural review is for the general welfare. The rejection of the design was reasonably related to the preservation of land values and the prevailing aesthetic sense of the community.

d) *Anderson v. City of Issaquah*: Anderson owned a parcel on Gilman Dr. and wished to construct a retail commercial building on the site. An Issaquah city ordinance req. approval of the design commission b/f building. The commission was charged with ordinance to approve designs that were compatible with neighboring structures, harmonious, interesting, etc. The commission to Anderson his design did not meet image of Issaquah. He made changes and still no approval. He was told to drive up and down the st. for ideas to look at good and bad examples. The commission never approved building. Ct. held that denial deprived Anderson of due process b/c statute required persons of ordinary intelligence to guess at its meaning.

4. Aesthetic zoning and free speech:
   a) zoning based on content of speech held unconstitutional unless necessary to accomplish a compelling gov’t objective
   b) zoning that is content-neutral is generally upheld if it reasonably serves an important gov’t interest and leave open ample alternative channels of communication
   c) *City of Ladue v. Gilleo*: in order to minimize visual clutter, Ladue banned all signs except for sale signs, business or home identification signs, and a few others. Def. placed a “Peace in the Gulf” sign in her window. Court held that ban on signs void b/c its near-total prohibition on signs failed to leave an alternative means of communication open. A narrower prohibition of signs would have been valid (if it left open ample alternative channels of communication)