Property Outline

Spring 2016

**Five Theories of Property:**

1. **First Possession Theory**: If you were there first, you get to keep it.
2. **Labor Theory**: When a person missed his own labor with natural resources (which were unowned), he acquired property rights in the mixture. Only applicable to property which is unowned.
3. **Utilitarianism Theory**: Property is recognized in order to maximize the overall happiness of society. Ownership gives a person the security they need to use the property effectively.
   1. **Law and Economics Theory**: Property is seen as an efficient method of allocating resources in order to maximize wealth (happiness). Measured by willingness to pay. Three basic features which a system of property rights must have for an optimal economy: (1) universality—all valuable scarce resources must be owned by someone; (2) exclusivity—to incentivize the owner to improve the property (if anyone can come on property or take it, no incentive to improve); and (3) transferability--
4. **Republican Theory**: Ensure democracy. Provides owners with the the economic security necessary to make political decisions that serve the common good.
5. **Personhood Theory**: Facilitate personal development.

**Property Rights:**

* **The right to exclude**: Trespass. The law generally protects an owner’s right to exclude others from his property, subject to privileges such as consent and necessity. Other exceptions to the right to exclude may exist, depending on the jurisdiction.
* **The right to transfer**: Alienability. Although the law favors the free alienation of property, an owner’s right to transfer is sometimes limited for public policy reasons. The law regulates what can be transferred, how transfers are made, and who can transfer or obtain property.
* **The right to use/possess**: An owner is normally entitled to use her property as she wishes, as long as she does not injure the rights of others. The spite fence and nuisance doctrines help define the limits of the right to use.
* **The right to destroy**: The scope of an owner’s right to destroy is unclear. In practice, the law rarely intervenes to prevent destruction. But concern arises when an owner seeks to destroy property that has substantial value to society, and some courts have limited this right.

**Adverse Possession**

1. **ROL:** If an owner does not, within the statutory period, take legal action to eject a possessor who claims to adversely possess the land, the owner is therefore barred from bringing suit for ejectment and title to the property then vests in the adverse possessor.
2. **Justifications**
   * Public interest in “quieting title” to land by cutting off old claims—provides occupant with security of title, thus encouraging productive use of land.
   * Correct minor title defects
   * Encourage development
   * Protect personhood
3. **Elements** 
   * Actual possession
   * Exclusive possession
   * Open and notorious possession
   * Hostile and adverse possession
   * Continuous possession
   * For the statutory period
4. **Actual possession**
   * Majority: Claimant must physically use the land in the same manner that a reasonable owner would.
   * Minority: Specifies the particular conduct that constitutes actual possession.
     1. When adverse possession is premised on a mere claim of right, the claimant must cultivate, improve, or substantially enclose the property.
     2. Claimant who holds color of title can meet the requirement easier by cutting firewood or timber for fences.
   * Depends on the nature, character, and location of the land and the uses to which it may be devoted.
   * Exception: Constructive possession
     1. Color of title—exists when an adverse possessor has a claim to the land based on a defective document that purports to transfer title, such as an invalid deed or will. The claimant with color of title is deemed to be in constructive possession of the entire parcel. So they can acquire title by adverse possession to the entire parcel, not just the part they had actual possession/physical possession over.
5. **Exclusive** 
   * Possession must not be shared with either the true owner or the general public.
   * Claimant’s possession may be shared with third parties, provided that the nature of that sharing is consistent with how an owner of land generally behaves (leasing)
   * A group can collectively have exclusive possession (wife and husband)
6. **Open and Notorious** 
   * Claimant’s possession must be visible and obvious, so that if the owner made a reasonable inspection of the land, he would become aware of the adverse claim.
   * Must be sufficient to put the owners on notice that their title is being challenged.
     1. Examples: Clearing brush, cultivating crops, posting signs.
7. **Hostile and Adverse Possession**
   * Objective Test:
     1. Possessor’s belief about who owns the land is irrelevant. If the possessor uses the land as a reasonable owner would—*without permission from the true owner*—this element is satisfied.
     2. Question asked: did the true owner authorize the possession?
   * Good Faith Test:
     1. The possessor must innocently—but mistakenly—think that they are the true owner.
     2. Reflects the justification of curing minor title defects.
   * Bad Faith Test (Intentional Trespass Test):
     1. The adverse possessor must (1) know that he does not actually own the land and (2) subjectively intended to take title from the true owner.
8. **Continuous Possession**
   * The claimant’s possession must be as continuous as a reasonable owner’s would be given the character, location, and nature of the land.
   * Tacking:
     1. The adverse possession of predecessors may be added (tacked) if privity exists between the adverse possessors.
     2. Privity arises when one claimant transfers possessory rights to another. This transfer is most commonly made by deed.
     3. No privity exists between successive trespassers.

**Estates and Future Interests**

**Terminology**

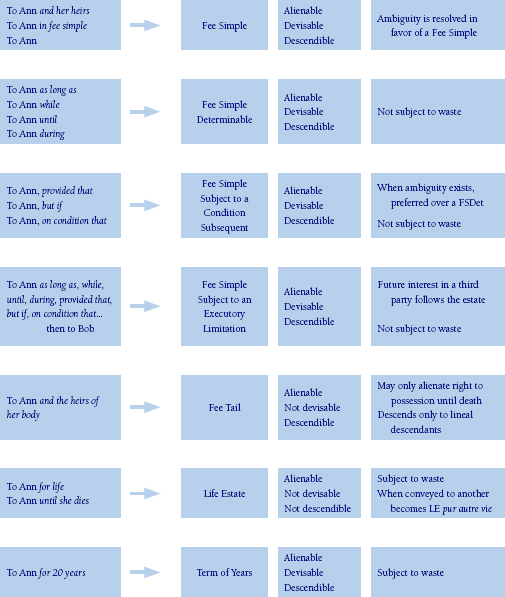
* Freehold estate: viewed as “owning land”
* Nonfreehold estate: viewed as forms of “leasing” land.
* Estate: a legal present possessory interest that entitles its owner to the immediate possession of real or personal property.
* Methods of Transfer
  + Transfer by deed: a living person may transfer real property by deed. The complete transfer if called a conveyance or grant.
    - *Grantor:* the person making the transfer
    - *Grantee:* recipient of the transfer
  + Transfer by will: property of a decedent may be transferred by will. The complete transfer is called a devise.
    - *Testator/Testatrix:* the person who contains the devise
    - *Devisee:* the recipient of the devise
  + Transfer by intestate succession: is a person dies without a will, her property will be distributed according to states statutes. The complete transfer is called intestate succession.
    - *Descend:* the verb that describes the transfer of real property
    - *Heir:* the recipient of the real property
* Words of Purchase: identifies the person who now owns the estate. (“to A”)
* Words of limitation: identifies the type of estate the grantee is receiving (“and his heirs”)

**Present Possessory Interests**

1. **Fee Simple Absolute** 
   * *Ex: “to A” or “to A and his heirs”*
   * Absolute ownership. No future interest attached.
   * Freely devisable, descendible, and alienable.
2. **Life Estate**
   * *Ex: “to A for life”, or “to A until she dies”*
   * Alienable. Not devisable, not descendible.
   * Duration is measured by the lives of one or more specified persons (usually the grantee).
   * *Life estate pur autre vie:* the duration of the life estate is measured by the life of a person other than the grantee.
   * Accompanied future interest:
     1. reversion in the grantor; or
     2. remainder in a 3rd party
   * Life tenant entitled to all ordinary use and profits from the land.
   * Life tenant must not commit waste:
     1. Voluntary or affirmative waste: results from an affirmative act that significantly reduces the value of the property.
     2. Permissive waste: results from the failure to take reasonable care to protect the waste.
     3. Ameliorative waste: results from an affirmative act that leads to a substantial change in the property and *increases* its value.
3. **Fee Tail**
   * *Ex: “to A and the heirs of her body”*
   * Freehold estate whose duration is measured by the lives of the lineal descendants of a designated person.
   * Partly alienable (life estate), not devisable, descendible.
   * Accompanying future interests:
     1. One in the lineal descendants of A for as long as A’s bloodline continued. If A had children🡪 vested remainder. If A did not have any living children at the time of the conveyance🡪 contingent remainder.
     2. O retains a reversion. (when A’s bloodline ends)
   * Fee tail male: limited to male lineal descendants
   * Fee tail special: limited to lineal descendants from a particular wife
4. **Fee Simple Defeasibles**

A fee simple that may continue forever or may end upon the occurrence of some future event.

* + **Fee simple determinable**
    1. *Ex: to A “as long as”, “while”, “until”, “during”*
    2. **ROL:** a defeasible fee simple that automatically expires at the time when a particular event occurs, immediately giving the transferor the legal right to possession.
    3. Accompanying future interests:
       1. Possibility of reverter. Can only be retained in the transferor. Automatically becomes possessory upon the happening of the stated condition.
          1. Common law—possibility of reverter was not devisable or alienable.
          2. Modern law—possibility of reverter is alienable, devisable, and descendible in most jx.
    4. Alienable, devisable, descendible. But the durational condition continues to apply to the transferee.
  + **Fee simple subject to condition subsequent**
    1. *Ex: to A “provided that”, “but if”, “on condition that”*
    2. **ROL:** a defeasible fee simple
    3. Accompanying future interests:
       1. Right of entry (power of termination): can only be retained by the transferor or his heirs.
          1. When condition occurs, transferor can elect to re-enter the property.
          2. Common law—not alienable or devisable.
          3. Modern law—right of entry is alienable, devisable, and descendible.
    4. Freely alienable, devisable, and descendible. Transferee is bound by the condition.
  + **Fee simple subject to executory limitation** 
    1. *Ex: to A “as long as”, “while”, “during”, “provided that”, “but if”, “on the condition that”…….AND THEN TO B.*
    2. A defeasible fee simple that is followed by a future interest in another transferee (not in the grantor).
    3. Accompanying future interest:
       1. Executory interest, held by another transferee.
          1. Alienable, devisable, and descendible.
    4. Alienable, devisable, and descendible. Transferee is subject to condition.
    5. Not subject to waste

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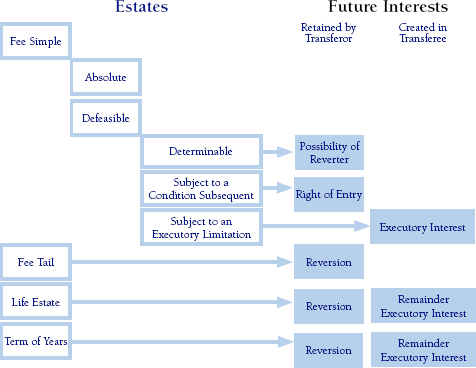
**Future Interests Retained by the Transferor**

1. **Reversion**
   * A transferor retains a reversion when she conveys a smaller vested estate than the one she has.
   * Ex: transferor has a fee simple absolute and conveys a *life estate or a term of years*.
2. **Possibility of Reverter**
   * The future interest retained by the transferor who holds a fee simple absolute, but conveys a *fee simple determinable*.
3. **Right of Entry** 
   * The future interests retained by the transferor who holds a fee simple absolute, but conveys a *fee simple subject to a condition subsequent*.

**Future Interests Created in a Transferee**

**Remainders:** a future interest in a transferee that: (1) is capable of becoming possessory immediately upon the expiration of the prior estate; and (2) does not divest (cut short) any interest in a prior transferee.

1. **Indefeasibly Vested Remainder** 
   * A remainder is vested if (1) it is created in an ascertainable person (a person who is alive and identifiable) and (2) is not subject to a condition precedent other than the natural termination of the prior estate.
2. **Vested Remainder Subject to Divestment**
   * A vested remainder that is subject to a condition subsequent. (you get it automatically when the prior interest ends, but if something happens, then you don’t get it).
3. **Vested Remainder Subject to Open**
   * A vested remainder held by one or more living members of a group or class that may be enlarged in the future.
   * Not a precondition.
   * The size of the holder’s share in uncertain.
4. **Contingent Remainder**
   * If a remainder is not vested, it is contingent.
   * A remainder that is either (1) given to an unascertainable person, or (2) subject to a condition precedent.
   * The remainder is not ready to become possessor *until* the event occurs.
5. **Executory Interest** 
   * A future interest in a transferee that must divest another estate or interest to become possessory.
     1. Springing executory interest: an executory interest that follows an interest in the transferor.
     2. Shifting executory interest: an executory interest that follows an interest in a transferee.

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**Rules Furthering Marketability**

1. **Rule of Destructibility of Contingent Remainders:** 
   * **Rule:** any contingent remainder that has not vested at the termination of the preceding freehold estate is destroyed.
   * Elements:
     1. A contingent remainder
     2. Does not vest before the preceding freehold estate ends.

1. **Shelley’s Case Rule:** 
   * **Rule:** if a freehold estate is given to a person and, in the same instrument, a remainder is given to their heirs of that person, he takes both the freehold estate and the remainder.
   * If O conveys *“to A for life, then on A’s death to A’s heirs.”* If A is alive, then merges and A has a fee simple absolute.
   * Elements that must be satisfied for the rule to apply:
     1. One instrument
     2. Creates a freehold estate in a transferee, and
     3. A remainder in that transferee’s heirs
     4. Both interests are legal or equitable.
2. **Doctrine of Worthier Title:** 
   * **Rule:** If a grantor creates a remainder or an executory interest in his own heirs, the grantor retains a future interest in himself rather than creating a future interest in those heirs.
   * Ex: O conveys “*to G for life, and then to O’s heirs.”*
   * Elements:
     1. A conveyance creates a remainder or executory interest
     2. In the grantors heirs
   * The contingent future interest in the heirs (who are unascertainable at the time) becomes a vested future interest in the grantor (who is ascertainable).
3. **Rule Against Perpetuities**

* **Rule:** No interest is good unless it must vest, if at all, no later than 21 years after some life in being at the creation of the interest.
* What Interests the Rule Applies to:
  1. Contingent remainders
  2. Vested remainders subject to open
  3. “Contingent” executory interests.
* How to Apply Rule:
  1. Identify the contingent interests
  2. List the lives in being
  3. Consider whether anyone can be born who might affect vesting
  4. Kill off all of the lives in being at some future date. Add 21 years.
  5. Ask yourself, “is there any possibility that the contingent interest will vest after this point?”
     + If yes, then it is void.
     + If no, then it is valid.
* An executory interest with no limit on time within it must vest, violates RAP.
* A gift to an open class conditioned on members surviving to age beyond 21 years, violates RAP.
* Modern Reforms:
  1. Wait-and-see
     + Under this approach, an interest is void if it does not actually vest within “a life in being plus 21 years.” The validity of the interest is not determined at creation, but by events that *actually happen* in the future. O conveys Greenacre “to B for life, then to M’s first child to reach 30.” Under the common law rule, the first child’s contingent remainder is void because there is a possibility of remote vesting. However, under a wait-and-see approach, the contingent remainder is a valid interest *if* it vests within the perpetuities period. Therefore, if M has a son, S, and S reaches 30 (within 21 years of B’s or M’s death), S’s interest is valid under the wait-and-see approach.
  2. Uniform Statutory Rule Against Perpetuities
     + Under this approach, an interest is valid if it satisfies the common law rule *or* if it actually vests within 90 years after its creation. Applying USRAP to the above example, even though the first child’s interest does not meet the requirements of the common law approach, it still would be valid if S reached 30 within 90 years of O’s conveyance. USRAP also contains reformation provisions that allow courts to rewrite the instrument to allow for vesting within the 90-year period.
  3. Cy pres
     + Under this approach, courts rewrite the language of the conveyance so that the future interest no longer violates the common law rule in order to honor the transferor’s presumed original intent. The rewriting should be “as near as possible” to the transferor’s intent. In our example, a court could reform the grant to read, “to B for life, then to M’s first child who reaches 21.” By reducing the age to 21, there is no possibility of remote vesting under the common law rule. No child of M can reach age 21 *more than* 21 years after M’s death.

**Chapter 6: Concurrent Ownership and Marital Property**

**Concurrent Ownership**

* A present estate in real or personal property can be simultaneously owned by two or more persons, each holding the right to concurrent possession.

**Types of Concurrent Ownerships**

1. **Tenancy in Common**
2. **Ex:** *“O conveys to A and B”*
3. **ROL:** an estate where each co-owner of the estate holds an undivided, fractional share in the entire parcel of land; and each is entitled to simultaneous possession and enjoyment of the whole parcel.
4. **Notes:**

* each co-tenant owns an individual part, each has the right to possess the whole.
* Each interest is divisible, descendible, and alienable.
* The presumption favors tenants in common.

1. **Rights and Duties of Co-Tenants**

* **Possession**
  + Each co-tenant is entitled to possess and enjoy the whole property.
  + If one co-tenant wrongfully excludes another from possession of whole or any part, then there is a wrongful ouster.
* **Rent from Co-Tenant in Exclusive Possession**
  + A co-tenant in exclusive possession is not liable to the other co-tenant *unless* ouster.
* **Rent from 3rd Party**
  + A co-tenant who leases all or part of premises to 3rd party must account to co-tenants providing them their fare share of rental income. Each cotenant is entitled to a pro rata share of rents received from a third person using the land.
* **Profit Off Land:** 
  + When a cotenant sells a portion of the concurrent tenancy’s assets, she is required to compensate her cotenants for their proportionate share of the net profits.
  + A cotenant may remove natural resources on the property without the consent of the other cotenants, but must account to his cotenants for a proportionate share of any profits derived from the extraction.
* **Partition:** 
  + Partition means the division of the land held in tenancy into the cotenants’ respective fractional shares. If the land cannot be fairly divided, then the entire estate may be sold and the proceeds appropriately divided.
  + Partition in kind is the preferred method of partition because it leaves cotenants holding the same estates as before and does not force a sale on unwilling tenants.
  + A party desiring to compel partition through sale is required to demonstrate (1) that the property cannot be conveniently partitioned in kind (2) that the interests of one or more of the parties will be promoted by the sale, and (3) that the interests of the other parties will not be prejudiced by the sale.
* **Maintenance and Operating Expenses**
  + Co-tenants are expected to split costs.
* **(Optional) Repairs and Improvements** 
  + You cannot go to the court for contribution, but you get a credit when the property is sold.
  + Upon partition, a cotenant who improves property is entitled to a credit for the added property value produced by the improvement. If there is a partition in kind, the court will usually assign the improved portion of the property to the improving cotenant.
* **Accounting Action:** 
  + An equitable action in which a cotenant seeks to obtain his share of the rents or profits generated by the property.
* **Contribution Action:** 
  + A cotenant seeks reimbursement from her cotenants for expenses she has paid for the operation or maintenance of the property.
  + If one tenant pays more than their pro rata share of mortgage or tax payments, then they can recover the excess in a contribution action.
* **Waste:** 
  + Co-tenant cannot commit waste (voluntary, permissive, ameliorative).
* **Adverse Possession:** 
  + Unless ousted by the other co-tenant, one co-tenant in exclusive possession for a statutory adverse possession period can NOT acquire title to the exclusion of others.
* **Ouster:** 
  + Because Paul ousted Ivy, he is liable to Ivy for Ivy’s pro rata share of the rental value of his occupancy. A rental value of $1500 per week for six weeks amounts to $9000. Ivy’s pro rata share would be $4500.

**II. Joint Tenancy**

1. **ROL:** joint tenants have the right to use and possess the whole property. Each tenant has a *right of survivorship.* When one party dies, their interest in the estate is removed and the other party automatically becomes the sole owner.
   * Because of the right of survivorship, a joint tenancy is not devisable or descendible.
   * Grantor must clearly express the right of survivorship.
   * *O conveys Greenacre “to A and B as joint tenants with right of survivorship.”*
2. **Creation:** At common law, a joint tenancy is created only when the four unities of time, title, interest, and possession are present:
   * **Time:** all joint tenants must acquire their interests at the same time. If A and B obtain their interests on different days, the unity of time is absent.
   * **Title:** they must acquire title by the same instrument. If A and B obtain their interests by different deeds, the unity of title is missing.
   * **Interest:** they must have the same shares in the estate, equal in size and duration.
   * **Possession:** they must have equal right to possess, use, and enjoy the whole property.
3. **Severance** 
   * **Partition:** 
     1. Voluntary agreement, partition in kind, forced sale.
     2. Any tenant in common or joint tenant has the right to sue for partition of the property (for any reason or for no reason at all). The law will not force these cotenants to remain in a concurrent tenancy. The partition action will end the cotenancy and distribute its assets.
   * **Sale:** 
     1. If one joint tenant transfers her interest, the joint tenancy is severed. The transfer breaks the unities of time and title; the right of survivorship is destroyed; and the grantee becomes a tenant in common with the other concurrent owners.
     2. If there are more than 2 joint tenants, the non-transferring ones remain joint tenants.
   * **Mortgage:** 
     1. Majority Rule (Lien Theory): mortgage will not sever the joint tenancy.
     2. Minority Rule (Title Theory): mortgage or lien will sever the joint tenancy.

**III. Tenancy by the Entirety**

1. **Characteristics:** 
   * Only married couples can hold property in tenancy by the entirety.
   * Like a joint tenant, each tenant by the entirety has an undivided right to use and possess the whole property and a right of survivorship
   * Severance:
     1. Tenancy by the entirety cannot be severed unilaterally by conveying to a third party. Can only be severed by death, divorce, or the agreement of both spouses.
     2. Creditors of only 1 of the spouses cannot touch the tenancy.
     3. In most jurisdictions that recognize tenancies by the entirety, one spouse cannot unilaterally encumber his interest. Neither spouse has a separate divisible interest that can be reached by creditors or conveyed to third parties.

**Marital Property**

1. **Common Law Foundation**
   * Dower is the right of the surviving spouse to a life estate in 1/3 of all freehold land that was owned by the deceased spouse during marriage and inheritable by that spouse’s issue.
   * Reflected profound gender bias. Upon marriage, a woman lost the ability to own, manage, and dispose of her property—except for her clothing and jewelry. The law gave the husband an estate *jure uxoris* in all of the wife’s lands. He could use, mortgage, or sell his wife’s property; it could also be reached by his creditors. A married woman could not even enter into contracts or execute other legal documents. Accordingly, the husband controlled all the family property. In return, the wife was entitled to her husband’s protection and support.
   * Dower: If a husband died common law gave the widow a dower: a life estate in 1/3 of all the freehold land that was (a) owned by her husband and (b) inheritable by his issue. The wife’s dower rights could not be cancelled during the marriage; they remained “attached” to property, even if it was conveyed to a third party, unless she voluntarily released them.
     1. Dower provides the surviving spouse a life estate in one-third of all the freehold land which was possessed by the husband during the marriage and inheritable by his issue.
2. **Separate Property System**
3. **Rights During Marriage**
   * Property is separately owned by the spouse who acquires it.
   * Under this system, the creditors of a particular spouse can only attach the separate property of that spouse.
4. **Rights at Divorce**
   * Most separate property states mandate equitable distribution of the property owned by each spouse. This requires a court to divide the property in a just and fair manner, considering factors such as incomes, their standard of living, their contributions during the marriage, their age and health, any special needs, and the length of the marriage.
   * The property subject to equitable distribution is usually defines as any property acquired with the earnings of either spouse during the marriage.
5. **Rights at Death** 
   * Most states offer the surviving spouse a forced share of the decedents estate.
   * The survivor has a choice, (a) take under the decedent’s will or (b) receive a defines portion of the decedent’s estate (usually 1/3 or 1/2 share).
     1. Upon the death of a spouse, the surviving spouse may choose to either take under the decedent’s will or receive a forced share (aka elective share) in the decedent’s estate.
6. **Professional Degrees**
   * Majority: Courts often view professional degrees and licenses as intellectual achievements that only potentially assist in the future acquisition of property. They themselves are not considered marital property.
7. **Community Property System**
8. **Rights During Marriage**
   * All earnings during the marriage—and all assets acquired from those earnings—are owned by both spouses equally.
   * Each spouse holds an equal, undivided share in the community property.
   * Neither can transfer their share to a third party.
   * There is no right of survivorship.
   * Property acquired before the marriage, after the marriage, by gift or inheritance remains the separate property of the individuals.
9. **Rights at Divorce**
   * all community property is divided between the spouses.
10. **Rights at Death** 
    * At death, the decedent may devise her half of the community property and all her separate property as she desires.
    * The other half of the community property belongs to the surviving spouse.
11. **Tenancy by the Entirety**
12. **Characteristics** 
    * At common law, every conveyance to a married couple was presumed to create a tenancy by the entirety. Today, only half of the states recognize this cotenancy. In states where it is still permitted, the tenancy by the entirety may offer significant protection from creditors.
    * In a majority of jurisdictions that recognize tenancies by the entirety, one spouse cannot unilaterally encumber his interest. As the Sawada court stated, neither spouse has a separate divisible interest in the property that can be conveyed to third parties or reached by creditors.
13. Case: *Swada v. Endo*
    * Fraudulent Conveyance: Trying to convey property before death, divorce, etc.. to avoid it being given to spouse or someone else in regards to a case.
    * Policy: interests of family trump the interests of a creditor.
14. **Unmarried Couples (Palimony)**
15. **Generally**
    * The palimony contract may be oral and usually is because “[p]arties entering this type of relationship usually do not record their understanding in specific legalese….”
    * The contract may also be express or implied. Consequently the existence of the contract and its terms are ordinarily determinable not merely by what was said but primarily by the parties’ “acts and conduct in the light of…[their] subject matter and the surrounding circumstances.”
    * Promises for services cannot be enforced against the deceased’s estate.
    * *Roccamonte* held that one cohabitant can have enforceable rights in the property of the other, even without an express contract. Undertaking a way of life in which two people commit to each other provides the consideration.
16. **Reimbursement Alimony**
17. **Generally**
    * Not intended to support a former spouse, but rather to provide restitution.
    * Generally awarded only after short marriages of young couples, because they have little property to divide and neither spouse has an income large enough to support the other.
    * Some states limit reimbursement alimony to marriages shorter than 5 years.
      1. Majority: a spouse’s professional degree is NOT marital property.
      2. Minority: a spouse’s professional degree IS marital property

**Chapter 8: Selling Real Property**

**Three major steps in a typical real property sales transaction:**

1. **Purchase contract:** the parties negotiate and sign a written purchase contract, and prepare to consummate the transaction.
2. **Closing:** the contract is fully performed at the closing; the buyer pays the purchase price, the lender advances the loan funds, and the seller transfers title.
3. **Title Protection:** the buyer protects her title through title covenants a title opinion based on a search of public land records and/or a title insurance policy.

**Purchase Contract**

1. **Typical Purchase Contract**

* The contract is usually a standard, preprinted form supplied by a real estate broker. The parties fill in the blanks to customize it.
* The contract sets forth the price, method of payment, time for performance, various conditions, and other terms.
* Once contract is signed, parties prepare for closing.
  + The seller’s title is examined.
  + The condition of the property is evaluated
  + The buyer obtains financing from a bank or other lender
  + An escrow is opened to consummate the transactions
  + Various documents are prepared, including the deed, mortgage, promissory note, and escrow instructions.
* Issues/legal problems that can arise during the period before closing:
  + Statute of Frauds
  + Marketable title
  + Equitable conversion
  + Seller’s duty to disclose

1. **Statute of Frauds**
2. **In General:**

* As a general rule, an oral agreement for the sale of an interest in real property is not enforceable. A contract must meet these essential requirements:
  + Essential terms: the essential terms of the contract (usually the identity of the parties, the price, and the property description) must be set forth in writing.
  + Writing: the writing can be a formal contract or an informal contract.
  + Signature: the writing must be signed by the party *sought to be bound*.

1. **Types of Property Descriptions**

* Government Survey: refers to the Government’s Public Land Survey System (PLSS).
  + Divides land into six mile square townships. Townships are subdivided into 36 one square mile sections. Sections are usually divided into subsections.
* Mets and Bounds: describes parcels using distances and directions. Based largely on visible topographic features.
* Subdivision Map

1. **Doctrine of Part Performance**
   * An oral contract for the sale of real property may be enforced if the buyer:
     + (1) takes possession;
     + (2) pays at least part of the purchase price; and
     + (3) makes improvements to the property.
   * The doctrine of part performance allows a court to enforce an oral agreement if the buyer has paid all or part of the purchase price, made substantial improvements, and/or taken possession. Essentially, these acts provide objective evidence of the agreement.
   * Most jurisdictions require you have at least two of the factors.
2. **Equitable Estoppel** 
   * An oral contract may be enforced if:
     + (1) one party acts to his detriments in reasonable reliance of another’s oral promise; and
     + (2) serious injury would result if enforcement is refused.
3. **Marketable Title**
4. **In General** 
   * In every contract for the sale of real property, the seller expressly or impliedly promises that she will deliver marketable title (also known as merchantable title), unless the contract specifies otherwise.
   * The title does not need to be perfect, it is considered marketable if a reasonable prudent purchases would pay fair market value for the property.
   * Marketable title concerns the *title* of the property, not the *physical condition* of the property.
   * A marketable title to real estate is one which is free from reasonable doubt, and a title is doubtful and unmarketable if it exposes the party holding it to the hazard of litigation.
   * Almost any private encumbrance causes title to be unmarketable. Conversely, statutes, ordinances, and other public restrictions do not make title unmarketable.
5. **When Title is Unmarketable**
   * The seller’s property interest is less than the one she purports to sell
     + Adverse possession
   * The seller’s title is subject to an encumbrance
     + Zoning violations—only if property violates the ordinance.
     + The mere existence of zoning ordinances or other public encumbrances does not render title unmarketable.
   * There is reasonable doubt about either the first or second
6. **Encumbrance**
   * A claim or liability that is attached to property or some other right and that may lessen its value, such as a lien or mortgage; any property right that is not an ownership interest. An encumbrance cannot defeat the transfer of possession, but it remains after the property or right is transferred.
7. **Insurable Title**
   * A title insurance company would be willing to insure at normal rates. An insurable title standard may provide less protection than a marketable title standard.
8. **Record Title** 
   * The title that appears in the public land records.
     + Does not protect against title defects that are not reflected in the public record—such as adverse possession.
9. **Equitable Conversion**
10. **Executory Period:** 
    * The period between the contract signing and the closing.
11. **Equitable Conversion Generally**
    * The buyer is deemed the equitable owner of the land until the close of escrow unless the contract specifies otherwise.
    * Traditional Doctrine of Equitable Conversion: once the purchase agreement is signed, the buyer is considered the equitable owner and bears the risk of loss.
    * A contract may contain a provision that specifies who bears the risk of property damage during the executory period. Absent such a provision, many states place the risk on the buyer through the doctrine of equitable conversion.
    * Under the doctrine of equitable conversion, the seller’s interest in the house is treated as personal property and the buyer’s interest is treated as real property. The buyer is viewed as the equitable owner of the property once the contract is signed, while the seller is viewed as the equitable owner of the purchase price.
    * *Bush Grocery Kart Inc. v. Sure Fine Market, Inc.:* The vendee under a contract for the sale of land, being regarded as the equitable owner, assumes the risk of destruction of or injury to the property *where he is in possession,* and the destruction or loss is not proximately cause by the negligence of the vendor. In the absence of a right of possession, a vendee of real property that suffers a material casualty loss during the executory period of the contract, through no fault of his own, must be permitted to rescind and recover any payments he had already made.
12. **Duty to Disclose**
13. ***Caveat Emptor*** 
    * “buyer beware”—the seller of real property has no duty to disclose defect to the buyer.
    * The buyer had the complete responsibility to assess the condition of the premises.
    * The seller was only liable if he:
      + Affirmatively misrepresented the condition of the property
      + Actively concealed its defects
      + Owed a fiduciary duty to the buyer
14. **Modern Jurisdictions** 
    * **Majority Rule:** In most jurisdictions, the seller of residential real property is obligated to disclose defects he knows about that (a) materially affect the value of the property and (b) are not known to or readily discoverable by a buyer.
    * ***Stambovsky* Rule**: Where a condition which has been created by the seller materially impairs the value of the contract and is peculiarly within the knowledge of the seller or unlikely to be discovered by a prudent purchaser exercising due care with respect to the subject transaction, nondisclosure constitutes a basis for rescission as a matter of equity.
    * Implied Warranty of Quality: Another exception to the caveat emptor doctrine in many states is the implied warranty of quality. Under this approach, the developer of newly-constructed residential property—like houses in a subdivision—impliedly warrants that the property is fit for its intended use. Thus, the developer may be liable even if he has no actual knowledge of defects in the houses he sells.
      + There is a duty to disclose. Seller is obligated to disclose the condition of the piping because he knows about it, it materially affects the value of the property, and it is not a condition that is readily discoverable. Piping is hidden in walls and the foundation. It is not easy to access.
15. **Duty to Disclose Off-Site Conditions** 
    * Seller is liable for nondisclosure of off-site physical conditions known to it and unknown and not readily observable by the buyer if the existence of those conditions is of sufficient materiality to affect the habitability, use, or enjoyment of the property and, therefore, render the property substantially less desirable or valuable to the objectively reasonable buyer.
    * The *Strawn* court specifically limited its holding to builder-developers of residential real estate and brokers representing them. Builder-developers are liable for nondisclosure of off-site physical conditions known to them and unknown and not readily observable by buyers if these conditions materially affect the use of the property.

**The Closing**

1. **Typical Closing**

* The buyer pays the purchase price to the seller, and executes a mortgage and promissory note for the lender;
* The lender advances the loan funds; and
* The seller transfers title to the buyer by delivering a deed

1. **The Deed**

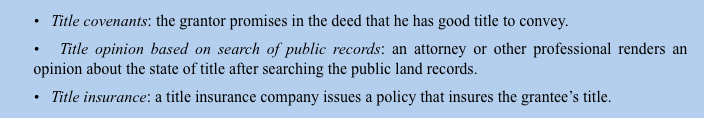
* The deed is only effective when it is *delivered.*
* An undelivered deed—even if signed by the grantor—conveys nothing.
* Delivery is an act manifesting an intent to make a present transfer of real estate.
* A deed induced by fraud is voidable by the grantor. A forged deed is void, transferring no interest to the grantee.
* Statute of Frauds:
  + Deed must be in writing
  + Contain essential terms (identities of the grantor, grantee, description of property, and words showing intent to convey title)
  + Signed by the grantor
* Death Escrow:
  + In the normal escrow, the grantor deposits the deed with a neutral third party, who is instructed to deliver the deed to the grantee at the closing. But suppose the grantor gives a deed to his attorney and then directs her to deliver the deed to the grantee *only when the grantor dies*. Is this an effective delivery? Or an invalid attempt to transfer title in the future? Most jurisdictions find an effective delivery on these facts if the grantor is unable to retrieve the deed.
* Beneficiary Deed:
  + Several states have authorized a novel type of deed: the beneficiary deed (also called the transfer on death deed). This deed allows an owner of real property to designate the beneficiaries she wants to receive the property upon her death; it is revocable by the grantor during her lifetime. By signing and recording a beneficiary deed, the owner causes her interest to be automatically conveyed to the listed beneficiaries upon her death. The property is not part of the decedent’s estate and therefore does not go through probate, avoiding those costs and delays.
* Revocable Deed:
  + Suppose Juanita hands Brigid a deed that expressly provides that Juanita can revoke the grant at any time in the future. Is this a valid transfer? In many jurisdictions, the answer is “yes.”

1. **Conveyance**
2. **In General:**
   * Delivery is essential to make a deed operative; it requires that the grantor intend the grantee receive an immediate interest in the property.
   * A future interest is a present interest (possession is delayed) and satisfies the delivery requirement of transferring an immediate interest.
   * Once delivery is satisfied, the location of the deed is immaterial.
   * A deed does not need to be recorded in order to be legally effective between the original parties.
   * A deed is effective only if it is delivered and accepted. Even though acceptance is usually presumed (whether or not the grantee is aware of the gift), a grantee has the right to refuse to accept the deed.
   * Delivery is an act manifesting intent to make a present transfer. Manual transfer of the deed to the transferee is unnecessary as long as there is present intent.
3. **SOF**
   * The Statue of Frauds requires more than donative intent for conveyance of land. There must be a writing signed by the party to be bound.
4. **The Mortgage**
5. **In General**
   * A mortgage is the conveyance of an interest in real property as security for performance of an obligation.
   * A *promissory note* is a contract by which the borrower promises to repay the loan on certain terms and conditions.
   * Execution formalities: at a minimum, (a) the material provisions of the mortgage (names of parties, description of secured property, words manifesting intent to use property as security, etc.) must be set forth in a written document executed by the mortgagor and (b) the mortgage must be delivered to the mortgagee.
     + Usually residential loans mad by institutional lenders utilize standard mortgage forms developed by the Federal National Mortgage Association (FNMA, Fannie Mae) and the Federal Home Loan Mortgage Corporation (FHLMC, Freddie Mac).
     + Mortgage loans are typically created by local lenders who then sell these loans on the *secondary market*—usually to Fannie Mae or Freddie Mac—in order to obtain capital to make additional loans.
   * Foreclosure: The process in which the lender sells the property and uses the proceeds to pay off the loan.
6. **Mortgage Theories**

* Title Theory: (common law)
  + The mortgage is the transfer of title to the mortgagee until the debt is repaid. The mortgage has the theoretical right to take possession of the secured property—and thus obtain its rents and profits—without foreclosure.
* Lien Theory: (modern law)
  + The mortgage is seen as a mere lien on the secured property. the mortgagee merely holds a security interest, not title; the mortgagee is entitled to foreclosure on the property if a default occurs, but is not entitled to possession before the foreclosure.
* Intermediate Theory: (due-on-sale clause)
  + The mortgagee is entitled to possession of the property only upon the mortgagor’s default but before foreclosure is completed.

1. **Deed of Trust**
   * Involves three parties.
   * The borrower (trustor) executed a written instrument conveying legal title to a neutral third party (the trustee), as a security for an obligation owed to the lender (the beneficiary).
   * If the trustor paid off the loan, the trustee would reconvey title.
   * If the trustor defaulted on the debt, the trustee would conduct an auction sale of the property; after the sale the trustee would repay the beneficiary and affected creditors and distribute any remaining sales proceeds to the trustor.
   * Came about because it used to be the only way to foreclose through a nonjudicial sale.
2. **Installment Land Contract** 
   * When a typical installment and contract is used the means of financing the purchase of property, legal title to the property remains in the seller until the buyer has paid the entire contract price or some agreed-upon portion, at which time the seller tenders a deed to the buyer.
   * Equitable title passes to the buyer when the contract is entered. The seller holds nothing but the bare legal title, as security for the payment of the purchase price.
   * An alternative to the mortgage. In this type of contract, the buyer promises to pay the purchase price in installments over a set period of time (for example, 15 years). The buyer (*vendee*) is allowed to take possession of the property, but the seller (*vendor*) retains title until all payments are made. Normally, the installment land contract is used when a buyer lacks the down payment or the credit rating necessary to obtain a traditional loan secured by a mortgage. It may also be useful for a seller because she can reach a larger pool of potential buyers and potentially obtain an above-market price
   * Traditionally, the installment land contract included a clause that provided for forfeiture of the land and all payments made if the buyer missed even one payment.
3. **Foreclosure Process** 
   * **Judicial Foreclosure:** specialized type of lawsuit. Begins when the summons and complaint are served on the mortgagor and junior lienholders, and ends with a judgment authorizing foreclosure.
   * **Nonjudicial Foreclosure:** mortgagee notifies the mortgagor that the loan is in default and allows him the opportunity to pay the debt; if the loan is not repaid within a set time (usually 90-120 days), the mortgagee is entitled to hold a foreclosure sale.
     + Advanced notice is given to the mortgagor, junior lienholders, and the public.
     + Sale is conducted in a public location.
     + Auctioneer reads the notice of sale aloud and then calls for bids. The mortgagee typically bids the amount of the remaining loan balance (a credit bid) and is not required to bid with cash.
     + Once the property is sold and the purchase price is paid, the auctioneer delivers the deed to the successful bidder.
     + If the sales price is more than the loan balance, the surplus is distributed first to any junior lienholders and then to the mortgagor.
     + If the sales price is less than the loan balance, the mortgagee may seek a **deficiency judgment** against the mortgagor in most states.
     + *Antideficiency Laws:* some states restrict the mortgagee’s ability to obtain a deficiency judgment, such as where (1) the mortgage encumbers an owner-occupied residence or (2) the mortgagee has used nonjudicial foreclosure.
   * The secured creditor may sell any or all of the real estate that is subject to the security interest in it’s then condition or after any reasonable rehabilitation or preparation for sale. Every aspect of the sale, including the method, advertising, time, place, and terms, must be commercially reasonable.
     + This is an objective test.
4. Other Mortgage Remedies
   * Reinstatement
     + In most states, the mortgagor can quickly pay any missed payments and avoid foreclosure.
   * Equitable redemption
     + In addition, every state allows the mortgagor the opportunity to avoid foreclosure by repaying the loan in full before the sale occurs.
   * Deed in lieu of foreclosure
     + Allows the mortgagor to avoid foreclosure by conveying title to the property to the mortgagee as part of a negotiated settlement.
   * Statutory right of redemption
     + In some states, the mortgagor may redeem the property from the successful bidder after the foreclosure sale within a set period of time. To exercise this statutory right of redemption, the mortgagor must pay the sale price, plus interest and costs.
5. **Remedies for Breach**
6. **Specific Performance** 
   * An equitable remedy that requires the breaching party to perform the contract.
   * Specific performance is granted only if one can prove that monetary damages are inadequate.
7. **Damages**
   * The non-breaching party can obtain damages, usually calculated as the difference between the contract price and the fair market value on the date of the breach.
8. **Rescission** 
   * The innocent party may rescind the contract and receive restitution. Rescission restores the parties to their original positions.

**Title Assurance**

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1. **Title Covenants**
2. **In General** 
   * Title Covenants: express promises by the grantor about the state of title.
3. **Common Deeds Used Today**
   * General warranty deed: the grantor warrants title against all defects, whether they arose before or after he obtained title.
     + Provides the best protection because the grantor promises the title is free form all defects at the closing, regardless of when they were created.
   * Special warranty deed: the grantor warrants title against all defects that arose after he obtained title.
   * Quitclaim deed: the grantor makes no warranties about title, so the grantee receives only what the grantor has, if anything.
     + Provides no assurances at all.
4. **Specific Title Covenants Contained in General and Special Warranty Deeds**
   * **Covenant of Seisin:** a promise that the grantor owns the estate he purports to convey.
     + This covenant is breached if the grantor purports to convey a fee simple but only owns a life estate.
   * **Covenant of Right to Convey:** a promise that the grantor has the right to convey title.
     + This covenant is breached if the grantor is a trustee who lacks the authority to transfer title to the trust property.
   * **Covenant Against Encumbrances:** a promise that there are no encumbrances on the title, other than those expressly listed on the deed.
     + Breached if there is a prior mortgage on the property.
   * **Covenant of Warranty:** promise that the grantor will defend the grantee against any claim of superior title.
     + If a third party holds better title that the grantee does, the grantor must defend the grantee’s title.
   * **Covenant of Quiet Enjoyment:** a promise that the grantee’s possession of the property will not be disturbed by anyone holding superior title.
     + Breached is the grantee is evicted because of a defect in her title.
   * **Covenant of Further Assurances:** a promise that the grantor will take all future steps reasonably necessary to cure title defects that existed at closing.
   * **Present Covenants:**
     + Seisin, right to convey, and against any encumbrances. They are breached, if at all, at the moment the deed is delivered. Provide much the sale assurance as the implied covenant of marketable title.
     + Traditionally, present covenants did not run with the land. A present covenant was breached, if at all, at closing. Any such breach created a cause of action which could not be assigned at common law.
   * **Future Covenants:** 
     + Warranty, quiet enjoyment, and further assurances. Breached after the closing—most commonly when the grantee is actually or constructively evicted by a third party holding superior title.
     + Only future covenants customarily would run with the land to remote grantees.
   * **Marketable Title Doctrine v. Title Covenants:** 
     + Marketable title doctrine applies to defects discovered *before* closing.
     + Title covenants protect against defects discovered *after* the closing.
5. **Title Option**

* The second method of of title assurance.
* **How to Search Title:** 
  + In order to determine the state of title, the searcher must (1) *locate* the recorded documents that affect title to the parcel and then (2) *evaluate* their legal significance.
  + The recorder’s office will use one of two systems: (1) the *grantor-grantee index*, which is organized by the names of the parties to the transaction; or (2) the *tract index*, which is organized by the parcel involved.
  + **Grantor-Grantee Index:** The most commonly used method is the grantor-grantee index. Under this system, every recorded document is indexed in two places: the grantee index and the grantor index. In the grantee index, each entry is organized alphabetically by the grantee’s last name; the grantor index is organized by the grantor’s last name. Along with the parties’ names, an index entry will contain the type of instrument, the time of recordation, the location of the recorded document (for example, a volume and page number), and a brief description of the property involved.
  + **Tract Index:** In a jurisdiction with a tract index, the search process is simple. Each parcel of land is assigned a unique identifier, sometimes called a *parcel identification number*. Every document affecting that parcel is typically filed in a folder under its unique number. A title searcher can simply examine the documents in the folder to assess the state of title.

1. **Recording Acts**
2. **General**

* **First-in-time:** As a general rule, the person whose interest was created first prevails. But virtually all states recognize a major exception to this principle: the bona fide purchaser doctrine.
* **Bona fide purchaser:** Purchase the property and take without notice. The recording acts create special protection for the subsequent bona fide purchaser, which supersedes the first-in-time rule.
* **Shelter Rule:** Created to protect the seller’s right to sell. C is protected b/c he takes without notice and is the first to sell. So if B came in and announced notice then C would be deprived of his right to sell and we want to protect him from that.

1. **Different Recording Acts** 
   * **Race:** the person *who records first* has priority
   * **Notice:** the subsequent *bona fide purchaser* has priority
   * **Race-Notice:** the subsequent *bona fide purchaser who records first* has priority.
     + In a race-notice jurisdiction, the common law presumption of first-in-time is reversed by (i) a subsequent bona fide purchaser (ii) who properly records first.
   * **Zimmer Rule:** (minority) a subsequent purchaser is deemed to have “recorded” his conveyance only if all prior conveyances in his chain of title are properly recorded.
   * Defects that cause recording systems to suffer:
     + They do not conclusively establish title; and
     + Even purchasers who scrupulously search the records may lose title due to unrecorded interests that are outside the scope of the recording acts.
   * Title Registration: the government assumes the role of title assurer by maintaining an authoritative registry of title.
2. **Chain of Title Problems** 
   * **Wild Deed:**

S conveys to B, who does not record.

B conveys to C.

C records.

S conveys to D.

D records.

* Case: *Board of Education of Minneapolis v. Hughes*
  + **Deed Recorded Too Late:**

S conveys to B, who does not record.

S conveys to C, who has actual knowledge of B.

C records.

B records.

C conveys to D.

D records.

* D will not discover B’s interest because the S-B deed was recorded at a point when D is no longer searching under S’s name. The deed was recorded too late and does not provide notice. D owns the property
  + **Deed Recorded Too Early:**

S owns Greenacre.

B conveys to C.

C records.

S conveys to B.

B records.

B conveys to D.

D records.

* D will not discover C’s interest because the B-C deed was recorded at a point when D is not looking under B’s name. The deed was recorded too early, so D owns the property.
  + **Deed from a Common Grantor:**

S owns Greenacre and Forestacre.

S conveys Greenacre to B, granting an easement to cross Forestacre for the purpose of accessing Greenacre.

B records.

S conveys Forestacre to C, who is not aware of the easement.

C records.

* About half of the states require that C expand his search to include all properties deeded out by a common grantor. See Guillette v. Daly Dry Wall, Inc., 325 N.E.2d 572 (Mass. 1975) (subsequent purchasers are bound by restrictions contained in deeds their neighbors received from a common grantor). In this case, C would examine all deeds from S—including B’s recorded deed—and have notice of the easement. Earlier in this chapter, Luthi v. Evans acknowledged that Mother Hubbard clauses may not impart constructive notice to subsequent purchasers.

1. **Notice**
2. **Actual Notice**
   * Knowledge of a prior interest. A person who knows that a prior interest exists has actual notice.
3. **Record Notice (Constructive Notice)**
   * Notice of any prior interest that would be revealed by an appropriate search of the public records affecting land title.
4. **Inquiry Notice** 
   * Based on a purchaser’s duty to investigate suspicious circumstances.
   * If a purchaser has actual notice of facts that would cause a reasonable person to inquire further, he is *deemed* to know the additional facts that inquiry would uncover *whether he inquired or not.*
   * Notice from possession:
     + In most states, if a person other than the grantor is in possession, the purchaser is usually obligated to inquire about the possessor’s rights.
   * Notice from reference in recorded document:
     + A reference in a recorded document to an unrecorded document is sufficient to give inquiry notice.
5. **Imputed Notice**
   * Arises from a special relationship between two or more persons; if one has actual knowledge of a fact, the others are also deemed to know the fact.
6. **Title Insurance**
7. **Generally**
   * Basic Concept: if the buyer suffers a loss from a title defect that existed on the effective date of the policy, he receives compensation from the title company.
     + Covers certain off-record defects such as forged deed in chain of title. A title opinion does not protect against that.
     + Usually provided by state-regulated insurance companies which have substantial assets to cover losses.
       - Attorneys who prepare a title opinion usually have less.
     + A title insurance company is contractually obligated to pay claims under the policy.
       - Must prove negligence with a title opinion.
     + Most insurance companies use standard policy forms prepared by the American Land Title Association (ALTA).
     + Two basic policies: owner’s policy and lender’s policy.
8. **Basic ALTA Owner’s Policy**
   * Cover page: setting forth the scope of coverage provided.
   * Schedule A: stating the name of the insured party, the maximum amount insured by the policy, and the estate that is insured.
   * Schedule B: listing specific items that are excepted from coverage for this property.
   * Exclusions: listing specific items that are excluded from coverage for all properties.
     + A potential risk that the company is unwilling to cover in *any* policy, such as encumbrances created or agreed to by the insured party.
   * Conditions: specifying procedural requirements, such as the time and manner for making claims.
     + Specifying procedural requirements, such as the time and manner for making claims.
9. **Title Insurance Imposes Two *Obligations on the Insurance Company*** 
   * Duty to Defend: requires the company to pay the attorneys fees and costs necessary to protect the owner’s title as guaranteed by the policy.
   * Duty to Indemnify: obligates the insurer to compensate the owner if a loss occurs.

**Chapter 9: Private Land Use Planning**

**Overview**

**Easements**

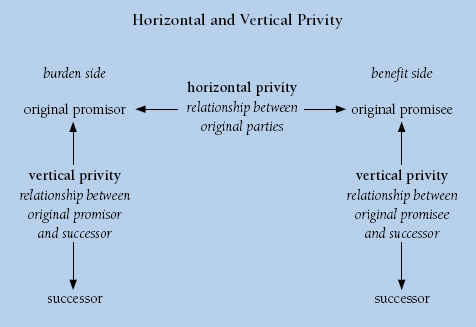
1. **Terminology**

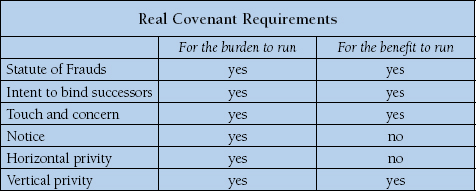
* **Easement:** a nonpossessory right to use the land of another person most commonly created to allow one owner to travel to their land.
* **Property:** 
  + Dominant tenement or dominant land: the land benefited by the easement.
  + Servient tenement or servient land: the land burdened by the easement.
* **Parties:**
  + Dominant owner: the easement holder.
  + Servient owner: the owner of the servient tenement.
* **Appurtenant or in Gross:**
  + Appurtenant easement: benefits the holder in her use of a specific parcel of land, the dominant tenement. (most are appurtenant)
  + Easement in gross: not connected to the holder’s use of any particular land; rather, it is personal to the holder. (Fox hunting easement. Not connected to or adjoined to any property to which the easement is attached).
    - In many jurisdictions, an easement in gross cannot be transferred unless it serves a commercial purpose.
* **Affirmative or Negative:** 
  + Affirmative easement: allows the holder to perform an act on the servient land. (most are affirmative)
  + Negative easement: allows the holder to prevent the servient owner from performing on act on the servient land.

1. **Express Easement**
2. **Generally**
   * An easement which is voluntarily created by the servient owner, usually in a deed.
   * Can only be created in a writing that satisfies the Statute of Frauds.
   * Includes:
     + Will identify the parties
     + Describe the servient land and the dominant land (if any)
     + Describe the exact location of the easement on the servient land
     + State the purposes for which the easement may be used.
3. **Express Easement by Grant**
   * Arises when the servient owner grants an easement to the dominant owner.
4. **Express Easement by Reservation** 
   * Arises when the dominant owner grants the servient land to the servient owner, but retains or reserves an easement over that property.
     + Traditionally could only be reserved in favor of the dominant owner. Most modern decisions allow this easement to be reserved in favor of a third party.
5. **Implied Easement by Prior Existing Use**
6. **Elements** 
   * Severance of title to land held in common ownership
   * An existing, apparent, and continuous use of one parcel for the benefit of another at the time of the severance; and
   * Reasonable necessity for that use.
7. **Cases:** 
   * *Millbrook Hunt, Inc. v. Smith*
8. **Easement by Necessity**
9. **Elements: (Must Be Present at the Time of Severance)**
   * Severance of title to land held in common ownership
   * An existing, apparent, and continuous use of one parcel for the benefit of another at the time of severance;
   * Reasonable necessity for that use
10. **Justifications for the Easement by Necessity:** 
    * The implied intent of the parties
    * The public policy favoring the productive use of land.
11. **Traditional Approach:**
    * Strict Necessity: the dominant parcel must lack a legal right to access to a public road at the time that title is severed.
    * Under the traditional view, strict necessity requires that the parcel be landlocked at the time title is severed.
    * Under the traditional view, water access defeated strict necessity.
12. **Modern Approach:**
    * The modern view is that water access is insufficient for the effective use of land given modern reliance on automobile transportation, and thus does not preclude strict necessity.
13. **Cases**
    * *Berge v. State of Vermont*
14. **Prescriptive Easement**
15. **Elements**
    * Open and Notorious;
    * Adverse and Hostile;
      1. Most jurisdictions presume adversity when the rest of the elements are present or when specific evidence on the issue is lacking.
    * Continuous; and
    * For the Statutory Period
16. **Cases**
    * *O’Dell v. Stegall*
17. **Easement by Estoppel (or Irrevocable License)**
18. **Elements**
    * Landowner allows another to use his land, thus creating a license;
    * The licensee relies in good faith on the license, usually by making physical improvements or by incurring significant costs; and
      1. The licensor must know or reasonably expect that the licensee will rely on the license to her detriment.
    * The licensor knows or reasonably should expect such reliance will occur.
19. **Cases:** 
    * *Kienzle v. Myers*
20. **Interpreting Easements**
21. **Negative Easements**
22. **Generally**
    * Negative easement: an easement that entitles the dominant owner to prevent the servient owner from performing an act on the servient land.
    * Conservation easement: restricts the development and use of the servient land in order to preserve open space, farm land, historical sites, or wild and undeveloped land. the most common negative easement. Authorized by legislation in nearly all jurisdictions.
      + Servient owner usually conveys the easement to a land trust or other conservation group and may continue to use the land as permitted by the easement.
23. **Terminating Easements**
24. **Methods of Termination** 
    * *Abandonment:* An easement is abandoned when the dominant owner ceases to use it and affirmatively manifests his intention to relinquish it.
      1. in order to establish an abandonment there must be in addition to nonuser, acts by the owner of the dominant tenement conclusively and unequivocally manifesting either a present intent to relinquish the easement or a purpose inconsistent with its future existence.
    * *Condemnation*: condemnation of the servient land also terminates the easement. In this event, the easement holder is entitled to just compensation.
    * Estoppel: an easement ends if the servient owner substantially changes his position in reasonable reliance on the holder’s statement that the easement will not be used in the future.
    * *Merger*: if one person obtains title to both the easement and the servient land, then the easement terminates under the doctrine of merger.
    * *Prescription*: using the same standard for acquiring a prescriptive easement. Thus, if the servient owner blocks use of the easement in an open and notorious, adverse and hostile, and continuous manner for the prescriptive period, the easement ends.
    * *Misuse*: in some jx, if the holder seriously misuses the easement, it may be ended through forfeiture.
    * *Release*: the easement holder may release the easement to the servient owner by executing and delivering a writing that complies with the statute of frauds.

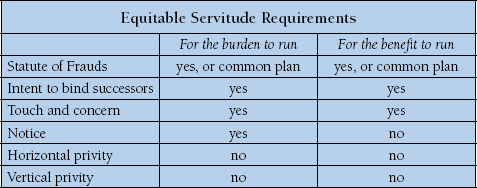
**Land Use Restrictions**

1. **Real Covenants** 
   1. **ROL:** a real covenant is a promise concerning the use of land that benefits and burdens the original parties to the promise and their successors; the remedy for breach is damages.
   2. **Generally** 
      * Every real covenant has two sides: the burden and the benefit.
      * Burden: the duty to perform the promise.
        + 6 elements must be proven for the burden of the promise to bind the promisor’s successor.
      * Benefit: the right to enforce the promise.
        + 4 elements are generally required for the benefit to run to the promise’s successors.
   3. **Six Elements** 
      * **Compliance With the Statute of Frauds**
        + The covenant must be contained in a document that satisfies the statute of frauds.
      * **Intend to Bind Successors**
        + The original parties must intend to bind their successors. The needed intent is usually found in the express language of the document, but it may also be inferred for circumstances.
      * **Touch and Concern** 
        + The covenant must “touch and concern” land. It must relate to the enjoyment, occupation, or use of the property.
          - A purely monetary obligation does not touch and concern.
      * **Notice**
        + The successor must have notice of the covenant. This requirement is satisfied by actual notice, record notice, or inquiry notice. (not required for the benefit to run)
      * **Horizontal Privity** 
        + concerns the relationship between the original parties to the promise. U.S. has a split of authority regarding this point: (not required for the benefit to run)
          - *mutual interests:* in most states, the horizontal privity requirement is met where the original parties have mutual simultaneous interests in the affected land (e.g. landlord and tenant; cotenants; owners of the dominant and servient lands for an easement).
          - *Successive interests:* in almost all states that require horizontal privity, this element is satisfied by a grantor-grantee relationship between the original parties, so that they have successive interests in the affected land.
          - *No requirement:* an increasing number of states have abandoned the requirement; this is the modern trend.
      * **Vertical Privity** 
        + Concerns the relationship between an original party to the promise and his successor.
          - Test: vertical privity exists only if the successor receives the entire estate that the original party had.

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1. **Equitable Servitudes** 
   1. **ROL:** an equitable servitude is a covenant that, regardless of whether it runs with the land at law, equity will enforce against the assignees of the burdened land who have notice of the covenant. The remedy for breach is an injunction.
   2. **Necessary Elements**

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* 1. **Traditional Rule for Horizontal Privity:** only landlord and tenant had horizontal privity.
  2. **Modern Rule for Horizontal Privity:** landlord and tenant, cotenants, express easement servient and dominant land, successive interests (grantor-grantee).
  3. **Common Plan Exception:** 
     + Where a developer mas manifested a common plan to impose uniform restrictions on a subdivision, all lots are burdened and benefited by the restrictions even if they do not appear in the chain of title to every lot.

1. **Restatement Approach (Modern Trend for Equitable Servitudes)**
   1. **Generally** 
      * The Restatement combines the real covenant and the equitable servitude into one doctrine: the covenant that runs at law.
   2. **A Servitude Arises When:** 
      * the owner of the property to be burdened intends to create a servitude;
      * he enters into a contract or conveyance to this effect that satisfies the Statute of Frauds; and
      * the servitude is not arbitrary, unconstitutional, unconscionable, or violative of certain public policies (e.g., it cannot unreasonably restrain alienation).

**Common Interest Communities**

1. **ROL:** a common interest community is a private residential development (a) where all properties are subject to comprehensive land use restrictions known as CC&Rs and (b) which is governed by a homeowners association.
2. **Enforcing Restrictions**
   1. **Reasonableness (Are the Restrictions Reasonable?)**
      1. ***Nahrstedt* Test:** 
         1. Is the restrictive servitude (the restriction) arbitrary? (arbitrary—it doesn’t serve any purpose)
         2. Does the restriction violate fundamental public policy?
            1. Free speech, right to privacy
         3. Is the harm disproportionate to the benefit? (Weigh the benefit against the harm)
      2. **Restatement Approach:** A provision is enforceable as long as (1) the owner intends to create a servitude, (2) the statute of frauds is satisfied, and (3) none of the defenses to enforcement apply.
         1. A servitude is valid unless it is illegal or unconstitutional or violates public policy. A servitude violates public policy if:
            1. It is arbitrary, spiteful, or capricious
            2. Unreasonably burdens a fundamental constitutional right
            3. Imposes an unreasonable restraint on alienation
            4. Imposes an unreasonable restraint on trade or competition
            5. Or is unconscionable

* 1. **Abandonment** 
     1. The party opposing the enforcement must prove that existing violations are so great ass to lead the mind of the average person to reasonably conclude that the restriction in question has been abandoned. Two parts:
        1. Objective Test: analyze the violation as to the number of them, the nature, and the severity.
        2. Prior enforcement efforts and possible realization of the benefits.
  2. **Changed Conditions**
     1. As a general rule, a restrictive covenant may be discharged if there has been acquiescence in its breach by others, or an abandonment of the restriction.
     2. In addition, changes in the character of a neighborhood may result in the discharge of a restrictive covenant.
     3. Where changed or altered conditions in a neighborhood render the strict adherence to the terms of a restrictive covenant useless to the dominant lots, we will refrain from enforcing such restrictions.
        1. The relevant inquiry concerning changes to the immediate neighborhood is whether such changes alter or eliminate the benefit that the restriction was intended to achieve.

1. **Governing the Development**
   1. **Typical CIC Declaration**
      1. Maintain the common area of the CIC
      2. Enforce the CC&Rs
      3. Adopt and enforce rule to supplement the CC&Rs
      4. Collect assessments from the unit owners
      5. Take such other action as are necessary to administer the CIC
   2. **Scope of Judicial Review Regarding HOA Litigation**
      1. Business judgment rule: (Minority)
         1. Some courts reason that the homeowners association is akin to a corporation.
         2. Under this approach, the association is not liable if the board make the decision in good faith and rationally believed that it was appropriate.
      2. Reasonableness standard:
         1. Most courts use this standard.
         2. Under this approach, the association is required to act reasonably in the exercise of its discretionary powers.
   3. **Interpreting CC&Rs**

The modern view is that a CC&R provision “should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding the creation of the servitude, and to carry out the purpose for which it was intended.”

* + 1. **Board’s Power to Make Discretionary Decisions** 
       1. Did the board act within the scope of their power?
       2. If so, was their action reasonable?
          1. Business Judgment

Did they have a proper purpose?

Was it reasonable?

* + - * 1. Majority—Restatement: was it objectively reasonable?
    1. **Board’s Power to Enforce Regulations**

**Nuisance**

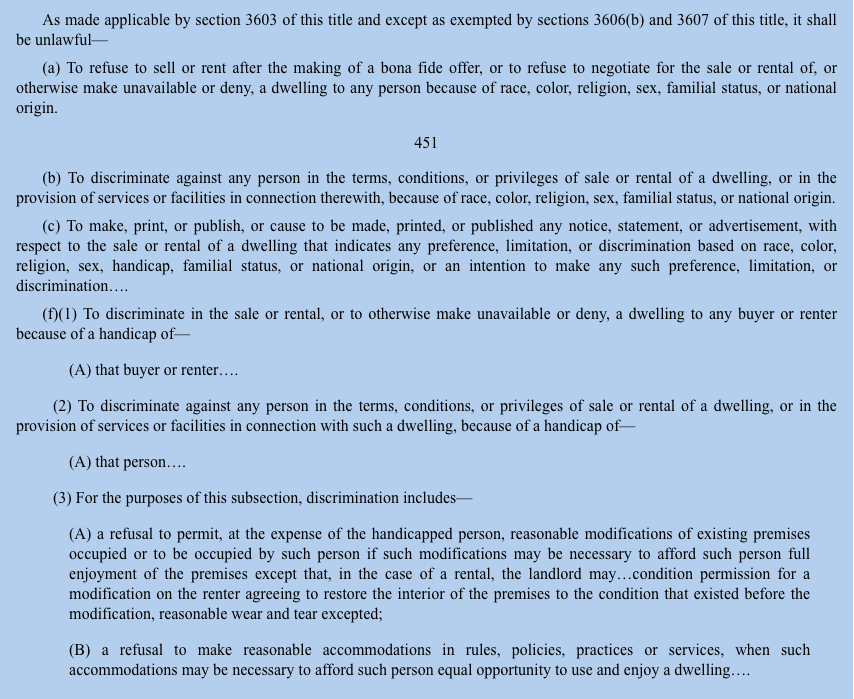
1. **In General** 
   1. Private Nuisance: (Restatement) a nontrespassory invasion of another’s interest in the private use and enjoyment of land.
   2. Public Nuisance: improper interference with a right common to public.
   3. Plaintiff in private nuisance case must establish that the defendant’s conduct resulted in an intentional, nontrespassory, unreasonable, and substantial interference with the use and enjoyment of the plaintiff’s land.
2. **Elements** 
   1. **Intentional**: The defendant’s conduct is intentional if he acts for the purpose of causing the harm or he knows that the harm is resulting or is substantially certain to result from his conduct.
   2. **Nontrespassory**: The interference must not involve any physical entry onto the land of another. For example, noise, vibration, light, and odors are all viewed as nontrespassory invasions.
   3. **Unreasonable**:
      1. *Gravity of the Harm Test:* the defendant’s conduct is unreasonable if it causes substantial harm, regardless of the social utility of the conduct. *Boomer v. Atlantic Cement Co., Inc.*
      2. *Restatement Standard:* conduct is unreasonable if the gravity of the harm outweighs the utility of the conduct.
         1. Gravity of Harm:
            1. The extent of the harm involved
            2. The character of the harm involved
            3. The social value that the law attaches to the type of use or enjoyment that is invaded
            4. The suitability of the particular use or enjoyment invaded to the character of the locality
            5. The burden on the person harmed of avoiding the harm
         2. Utility of Conduct
            1. The social value that the law attaches to the primary purpose of the conduct
            2. The suitability of the conduct to the character of the locality
            3. The impracticability of preventing or avoiding the invasion.
      3. *Multifactor Test:*
   4. **Substantial Interference**: There must be a “real and appreciable invasion of the plaintiff’s interests.”
   5. **Use and Enjoyment of Land:** The defendant’s conduct must interfere with the use and enjoyment of land, e.g., causing physical damage to the property or personal injury to occupants.

**Chapter 7: Leasing Real Property**

**Creating a Tenancy**

1. **Selecting the Tenant**

**Fair Housing Act of 1968**

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* 1. **Fair Housing Act of 1968, p. 451**
     + Exemptions: The anti-discrimination provisions of the Fair Housing Act (42 U.S.C. § 3604(a), (b), (f)) do not apply to two types of property: (1) “rooms or units in dwellings containing living quarters occupied…by no more than four families living independently of each other, if the owner…occupies one of such living quarters as his residence”; and (2) any single-family house sold or rented by an owner if he does not own more than three houses and does not use a real estate broker or agent in the sale or rental.
  2. **Civil Rights Act of 1866:** All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.
  3. **Prima Facie Case of Discrimination:** showing: (1) that he is a member of a protected class and Defendants knew or suspected that he was; (2) that he applied for and was qualified to rent the property in question; (3) that Defendants rejected his application; and (4) that the property remained available thereafter. Plaintiff must provide sufficient evidence to show that he was “rejected under circumstances which give rise to an inference of unlawful discrimination.”

***Neithamer* Burden shifting test:**

* + - Once Plaintiff establishes a prima facie case
    - The burden shifts to Defendants to articulate some legitimate, nondiscriminatory reason for their rejection of Plaintiff’s application. If Defendants satisfy this burden,
    - Plaintiff must show either that Defendants’ reasons are pretext or that material facts are disputed, precluding summary judgment.

1. **Selecting the Estate**
   1. **Four Nonfreehold Estates**
   * **Term of Years Tenancy:** The term of years tenancy has a fixed duration that is agreed upon in advance (such as six months, two years, or 100 years). Once the term ends, the tenant’s possessory right automatically expires, and the landlord may retake possession of the premises.
   * **Periodic Tenancy:** The periodic tenancy is automatically renewed for successive periods unless the landlord or tenant terminates the tenancy by giving advance notice.
     + Suppose that L leases Greenacre “to T from month to month, beginning July 1, 2015.” In order to end this tenancy, either L or T must give one month’s advance notice to the other.
   * **Tenancy at Will:** The tenancy at will has no fixed ending point. Rather, it continues “only so long as both the landlord and the tenant desire.”
     + If L leases Greenacre to T “for as long as both of us wish,” this creates a tenancy at will.
     + Often the tenancy at will arises by implication, without an express agreement.
     + At common law, either the landlord or the tenant could end the tenancy without any advance notice to the other.
     + Modern, most states require advance notice to end this tenancy, usually equal to the period of time between rent payments.
     + Terminable by either party.
     + The tenancy terminates automatically if either party dies, the tenant abandons possession, or the landlord sells the property.
   * **Tenancy at Sufferance:** created when a person who rightfully took possession of land continues in possession after that right ends. It arises from the occupant’s improper conduct, not from an agreement.
     + Suppose that L and T enter into a 12-year term of years tenancy for Greenacre on January 1, 2005. The tenancy ends at midnight on December 31, 2016, but T wrongfully continues in possession, becoming a holdover tenant. The common law gave the landlord two options in this situation: (1) treat T as a trespasser and evict him; or (2) renew T’s tenancy for another term.
     + Today most states have abolished or limited the second option, in order to avoid unfairness to the tenant. For example, some states require the payment of double rent during the holdover period, while others limit the length of the renewed tenancy to no more than one year.
   * License: a personal privilege to use the land of another for some specific purpose. A licensee’s rights are minimal compared to tenants’ rights.
2. **Negotiating the Lease**

* Three aspects of lease negotiations that merit special attention:
  + **Statute of Frauds:** a lease of real property for a term of more than one year cannot be enforced unless it is in writing. Month-to-month periodic tenancy is exempt.
    - The lease or another document must contain the key lease terms (parties, property, duration, and rent) and be signed by the party against whom enforcement is sought.
  + **Standard forms:** the landlord and tenant usually negotiate the key terms of a residential lease, but the typical tenant is then asked to sign a preprinted standard lease form, without any meaningful opportunity to negotiate the other terms.
  + **Rent control:** in a few states, local ordinances may limit the amount of rent that a residential can charge, especially in large cities. A typical rent control ordinance establishes a base rent for each unit, and then allows the landlords an automatic increase for all the units each year.

**Condition of the Premises**

1. **The Challenge of Substandard Housing**
2. **Constructive Eviction** 
   1. Generally:
      1. Common law acknowledged that each lease included an implied covenant of quiet enjoyment—a promise by the landlord that he would not wrongfully interfere with the tenant’s possession. Wrongful conduct by the landlord that substantially interfered with the tenant’s beneficial use and enjoyment of leased premises was deemed a constructive eviction.
         1. Both action and lack of action can constitute “conduct” by the landlord which amounts to a constructive eviction
      2. Under these circumstances, the tenant could vacate the premises and end the lease, thus avoiding liability for future rent.
   2. Wrongful Conduct: an omission is wrongful where the landlord….
      1. (1) fails to perform an obligation in the lease,
      2. (2) fails to adequately maintain and control the common area,
      3. (3) breaches a statutory duty owed to the tenant,
      4. (4) fails to perform promised repairs, or
      5. (5) allows nuisance-like behavior.
   3. By the Landlord: generally, a tenant cannot assert constructive eviction due to the acts of third parties.
      1. Exception: if the landlord has a legal right to control the third party conduct.
   4. Procedural Steps: In general, a tenant seeking to rely on constructive eviction must notify the landlord about the problem, give the landlord a reasonable period to fix the problem, and then vacate the premises.
      1. Constructive eviction cannot exist where the tenant does not surrender the property. They must vacate the premises within a reasonable time. The tenant bears the burden of proving that he did abandon the premises within a reasonable time after the untenantable condition occurred. If the tenant fails to vacate within a reasonable time, the tenant is considered to have waived the landlord’s breach of covenant.
   5. **How to determine if there was a constructive eviction:** 
      1. The landlord intended that the tenant no longer enjoy the premises, which can be inferred from the circumstances.
      2. The landlord committed a material act or omission which substantially interfered with use and enjoyment of the premises for the leased purpose.
      3. The act or omission permanently deprived the tenant of use and enjoyment of the premises. (permanent = ongoing)
      4. After notifying the landlord of the problem and giving the landlord a reasonable amount of time to fix the problem, the tenant abandoned the premises within a reasonable. period of time after the act or omission.
   6. “Substantially interferes”:
3. **Implied Warranty of Habitability**
   1. **Rule:** doctrine that protects residential tenants from defecting housing conditions. Usually does not apply to commercial leases.
   2. **Standards:** 
      1. Bare living requirements and fit for human occupancy. (ex. Failure to supply water or heat).
      2. It is based on the theory that the residential landlord warrants that the leased premises are habitable at the outset of the lease term and will remain so during the course of the tenancy. The warranty applies to written and oral leases…and to single-family as well as to multiple-unit dwellings.
      3. Does not require the landlord to maintain the premises in perfect condition at all times and it does not preclude minor housing violation or other defects.
      4. Landlord will not be liable for defects caused by the tenants.
   3. **Tenant’s ability to deal with breach:** 
      1. Withhold rent: This is usually the most effective remedy because, as the Wade court observes, it gives the landlord an incentive to repair the premises. In most jurisdictions, the tenant may withhold all rent, even for a partial breach of the warranty. Some courts recommend that rent be paid into an escrow fund under judicial control. Why wouldn’t the landlord just evict the tenant for nonpayment of rent? The answer is simple: breach of the implied warranty is a defense to an eviction action.
      2. Repair and deduct: In many states, the tenant may withhold rent and use these funds to repair the defects.
      3. Sue for damages: The tenant may sue for damages while remaining in possession or after vacating the premises. Courts differ widely on the appropriate measure of damages. For example, in Hilder the Vermont Supreme Court used “the difference between the value of the dwelling as warranted and the value of the dwelling as it exists in its defective condition.” Using this standard, the tenant was awarded all of the rent she had paid during the tenancy. Compare this standard to the “percentage diminution” test adopted in Wade.
   4. **Remedies for breach:** 
      1. General damages recoverable in the form of rent abatement or reimbursement to the tenant are more difficult to calculate.
         1. Fair rental value of the premises as warranted less their fair rental value in the unrepaired condition. Under this approach, the contract rent may be considered as evidence of the value of the premises as warranted.
         2. Another measure is the contract rent less the fair rental value of the premises in the unrepaired condition.
   5. **How to determine if there has been a breach:** 
      1. Substantial compliance with building and housing code standards will generally serve as evidence of the fulfillment of a landlord’s duty to provide habitable premises.
      2. Evidence of violations involving health or safety, by contrast, will often sustain a tenant’s claim for relief.
      3. Just because the housing code provides a basis for implication of the warranty, a code violation is not necessary to establish a breach so long as the claimed defect has an impact on the health or safety of the tenant.
      4. Three Approaches:
         1. General standard: habitable, health and safety.
         2. Code violation = implied warranty breached.
         3. Modern – General standard, plus a code violation can be evidence of a breach, but is not determinative of a breach.

**Transferring the Tenancy**

1. Two ways a tenant can transfer their interest: Assignment and Sublease
2. Assignment
   1. Majority Approach—Objective Test: did the tenant transfer his right of possession for all of the remaining lease term (assignment) or not (sublease)?
   2. Common law: If the instrument purports to transfer the lessee’s estate for the entire remainder of his term it is an assignment, regardless of its form or of the parties’ intention.
   3. Privity of estate between the lessor and lessee is terminated. Privity of contract still remains unaffected.
3. Sublease
   1. ROL: a transaction whereby a tenant grants an interest in the leased premises less than his own, or reserves to himself a reversionary interest in the term.
   2. Common law: if the instrument purports to transfer the lessee’s estate for less than the entire term—even for a day less—it is a sublease, regardless of its form or of the parties’ intention.
   3. The privity of estate and privity of contract are not affected by a sublease.
4. Clauses Requiring Lessor’s Consent to Transfer Lease:
   1. Sole discretion clause: The lease might provide that L may refuse consent for any reason whatsoever in his “sole discretion.”
   2. Reasonableness clause: The lease might provide that L may refuse consent only on a commercially reasonable basis. For example, L might deny consent if Z has a bad credit record.
   3. No standard in lease: The lease might require L’s consent, but contain no standard to guide L’s decision; such a provision is called a silent consent clause.
      1. Majority: where a lease contains an approval clause (a clause stating that the lease cannot be assigned without the prior consent of the lessor), the lessor may arbitrarily refuse to approve a proposed assignee no matter how suitable the assignee appears to be and no matter how unreasonable the lessor’s objection.
      2. Minority (and Holding): where a lease provides for assignment only with the prior consent of the lessor, such consent may be withheld only where the lessor has a commercially reasonable objection to the assignment, even in the absence of a provision in the lease stating that consent to assignment will not be unreasonably withheld.
      3. Restatement: A restraint on alienation without the consent of the landlord of a tenant’s interest in leased property is valid, but the landlord’s consent to an alienation by the tenant cannot be withheld unreasonably, unless a freely negotiated provision in the lease gives the landlord an absolute right to withhold consent.
   4. Reasonableness:
      1. Minority: when a lease provides for assignment only with prior consent of the lessor, such consent may be withheld only where the lessor has a commercially reasonable objection to the assignment.
         1. Factors that the trier of fact may properly consider in applying the standards of good faith and commercial reasonableness are: financial responsibility of the proposed assignee; suitability of the use for the particular property; legality of the proposed use; need for alteration of the premises; and nature of the occupancy, i.e., office, factory, clinic, etc.
      2. Majority: the lessor may arbitrarily refuse to approve a proposed assignee no matter how suitable the assignee appears and no matter how unreasonable the lessor’s rejection.
      3. Examples of commercially reasonable objections:
         1. (1) the sublessee would compete with another tenant, an existing grocery store;
         2. (2) the sublessee planned to install kitchen equipment which would require alterations in the building structure;
         3. (3) food odors could travel from the sublessee’s store through the ventilation system to spaces occupied by other tenants; and
         4. (4) deliveries to the sublessee could interfere with deliveries to the landlord’s own business in the same building.

**Ending the Tenancy**

1. **Early Common Law**
   1. Lease covenants were seen as independent of one another. If one of the parties breached, the other party could sue for damages, but they could not terminate the lease.
2. **Abandonment** 
   1. Restatement: An abandonment of the leased property by the tenant occurs when he vacates the leased property without justification and without any present intention of returning and he defaults in the payment of the rent.
      1. If the tenant vacates the premises with justification—for example, due to constructive eviction—no abandonment occurs.
   2. Landlord’s options when the tenant abandons the premises:
      1. Sue for all rent: L could keep the premises vacant until the lease term expired, and then sue T for all the accrued rent.
      2. Terminate the lease: L could treat T’s abandonment as an implied offer of surrender and terminate the lease.
      3. Mitigate damages and then sue for rent: L could mitigate his damages by reletting the premises to another tenant, retaining that rent, and then suing T for the balance.
3. **Eviction** 
   1. If landlord is entitled to evict tenant he can do it in two ways:
      1. *Use self-help*: L could retake possession through self-help by physically entering the premises and causing T to leave, as long as L used only a reasonable amount of force. (traditional view)
         1. common law—you could kick out a tenant without going through judicial process, as long as the eviction was peaceable.
      2. *Sue the tenant:* L could sue T, secure a judgment ordering T’s eviction, and have the judgment enforced by a law enforcement officer. (modern requirement)
         1. Modern trend is that the landlord’s only remedy is to evict the defaulting tenant through judicial process.
   2. Good Faith:
      1. In a minority of jurisdictions, a residential landlord may evict (or refuse to renew a term of years tenancy) a periodic-tenant only for good cause.
      2. Landlord can only evict if they can establish a legitimate reason (ex. Tenants fails to pay rent, intentionally injures the premises, engages in criminal activity on premises, repeatedly causes unreasonably loud noises that disturb other tenants)
4. **Retaliatory Eviction:** 
   1. ROL: Landlords are not free to evict a tenant in retaliation for housing complaints.
      1. The goal of the code to maintain safe and sanitary housing would be frustrated if tenants could be evicted in retaliation for reporting a violation.
   2. Was the tenant’s conduct protected?
      1. The core activity protected under this doctrine is the tenant’s exercise of rights to secure decent housing.
      2. Covered tenant conduct typically includes complaints about housing conditions to the landlord or government agencies, rent withholding for breach of the implied warranty of habitability, use of the repair-and-deduct doctrine, and similar actions.
      3. A number of jurisdictions also protect tenants forming or joining a tenant’s union or similar organization.
   3. Evidentiary presumption:
      1. If the landlord takes prohibited action (eviction, raising rent) within a certain period (usually 90 days to a year) after the tenant engages in protected conduct, the action is presumed to be retaliatory.
      2. The burden then shifts to the landlord to show that the eviction was legitimate. If they do, then
      3. The plaintiff has to prove that the eviction was in fact retaliatory.

**Chapter 4: Intellectual Property**

**Introduction**

1. **Common Law**
   1. Basic Rule: absent some special exception, the law does not recognize intellectual property rights.
2. **Three Types of Intellectual Property**
   1. Copyrights: Copyright law protects original works of authorship, such as books, computer programs, plays, sculptures, and songs.
   2. Patents: Patent law protects new inventions, such as cell lines, machines, and medicines.
   3. Trademarks: Trademark law protects words, names, and other symbols which are used by merchants to distinguish their goods and services from those offered by others.
3. **Similarities Between the Three Types of Intellectual Property**
   1. All arise under first-in-time system for allocating entitlements.
   2. All provide the owner with essentially the same set of property rights, principally the right to exclude.
   3. All are governed by federal law.
   4. Many people can use it at the same time without interfering with each other’s use.
   5. Most intellectual property is a public good—a good that can be consumed without reducing any other person’s consumption of it.

**Copyrights**

1. **Copyright Basics**
   1. Why copyright law exists? to serve a specified utilitarian goal: to promote the progress of science and the useful arts. Copyright protection serves this goal by giving authors an incentive to produce works that will benefit the public.
   2. Owner of a copyright rights:
      1. Right to exclude
      2. Right to transfer
      3. Right to effectively destroy it by abandoning it
   3. How Long a Copyright Lasts
      1. 1976 Copyright Act: the author’s life + 50 years.
      2. CTEA (1998): basic copyright term is equal to the author’s life + 70 years.
   4. **Three Requirements for a Copyright:** 
      1. **Originality**
         1. The work must be independently created, not copied from another source. It must also possess at least a minimal degree of creativity.
         2. Originality standard: originality is not a stringent standard; it does not require that facts be presented in an innovative or surprising way. It is equally true, however, that the selection and arrangement of facts cannot be so mechanical or routine as to require no creativity whatsoever. The standard of originality is low, but it does exist
      2. **Work of Authorship**
         1. Eight categories of “works of authorship” are recognized by statute: (a) literary works (including computer programs); (b) musical works; (c) dramatic works; (d) pantomimes and choreographic works; (e) pictorial, graphic, and sculptural works; (f) motion pictures and other audiovisual works; (g) sound recordings; and (h) architectural works. Because these categories are only illustrative, analogous works may also qualify for protection.
      3. **Fixation** 
         1. The work must be written, recorded, or otherwise embodied in some physical form. Thus, it must be “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” 17 U.S.C. § 101.
2. **Infringement** 
   1. **Elements to Establish Infringement** 
      1. ownership of a valid copyright,
      2. copying of constituent elements of the work that are original
      3. the copy was an improper appropriation
   2. Fair Use:
      1. Most important defense in copyright law. The doctrine allows minor use of a copyrighted work where the use does not materially affect the rights of the copyright owner.
      2. Parodies usually fall under the fair use exception
   3. 17 U.S.C. § 107: [T]he fair use of a copyrighted work…for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
      1. (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
         1. commercial publications, as opposed to nonprofit, weigh against the finding of fair use.
         2. The crux is whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.
      2. (2) the nature of the copyrighted work;
         1. does the copyright holder have an interest in confidentiality?
         2. Law recognizes a greater need to disseminate factual works than works of fiction.
      3. (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
      4. (4) the effect of the use upon the potential market for or value of the copyrighted work….
         1. if you can show actual damages, your case it stronger.

**Patents**

1. **Basics**
   1. Federal law authorizes the issuance of a patent to anyone who “invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof.” 35 U.S.C. § 101.
      1. the term “manufacture” in § 101 in accordance with its dictionary definition to mean “the production of articles for use from raw or prepared materials by giving to these materials new forms, qualities, properties, or combinations, whether by hand-labor or by machinery.”
      2. “composition of matter” has been construed consistent with its common usage to include “all compositions of two or more substances and…all composite articles, whether they be the results of chemical union, or of mechanical mixture, or whether they be gases, fluids, powders or solids.”
   2. An applicant must meet five requirements in order to obtain a patent: (a) patentable subject matter; (b) utility; (c) novelty; (d) nonobviousness; and (e) enablement.
      1. **Patentable subject matter:** Four categories of inventions qualify for a patent: “any…process, machine, manufacture, or…composition of matter.” Abstract concepts, mathematical algorithms, scientific principles, and physical phenomena cannot be patented.
      2. **Utility:** A patent may be issued only for a “useful” invention—one which offers actual benefit to humans. Because virtually any invention provides some sort of minimal benefit, this element is rarely at issue.
      3. **Novelty:** Only a “new” (or novel) invention may be patented. The PTO will examine the prior art—all inventions, patents, publications and the like that predated the application—to determine if the invention is novel.
      4. **Nonobviousness:** An obvious invention does not qualify for protection. If the differences between the invention and the “prior art” before the application date “would have been obvious…to a person having ordinary skill” in the area, the PTO will deny the application.
         1. (1) the “scope and content of the prior art;”
         2. (2) the “differences between the prior art and the claims at issue;”
         3. (3) the “level of ordinary skill in the pertinent art;” and
         4. (4) “secondary considerations” such as commercial success or the failure of others.
      5. **Enablement:** The patent application must describe the invention in such detail as to “enable any person skilled in the art to which it pertains…to make and use the same.”
2. **Infringement** 
   1. Two ways a patent holder can seek to establish patent infringement
      1. Demonstrating that *every* element of a claim is literally infringed, or
      2. Demonstrating that *every* element of a claim is infringed under the doctrine of equivalents.
   2. Infringement under the doctrine of equivalents:
      1. the patent owner bears the burden of proving that the accused product has the “substantial equivalent” of every limitation or element of a patent claim….Put another way, the patent owner must show that the accused product “performs substantially the same overall function or work, in substantially the same way, to obtain substantially the same overall result as the claimed invention.”
         1. What is the function?
         2. How is it done?
         3. What are the results?

**Trademarks**

1. **Trademark Basics**
   1. A trademark is any “word, name, symbol, or device” that is used to identify and distinguish the goods sold by one person from those of others. 15 U.S.C. § 1127. A word, name, symbol, or device so used in connection with services is a service mark.
   2. Goals of trademarks:
      1. to protect consumers from being deceived into purchasing shoddy goods or services
      2. to provide an incentive for the trademark owner to produce quality goods or services by ensuring that the goodwill behind his mark will be protected.
   3. **Three elements are required for a valid trademark:** (a) distinctiveness; (b) non-functionality; and (c) first use in trade. While federal registration provides certain benefits, it is not required; an unregistered trademark is valid.
      1. **Distinctiveness:** A mark must distinguish the goods or services of one person from those offered by another person. Some types of marks are considered more distinctive than others.
      2. **Non-functionality:** Trademark law does not protect a product feature that is functional, because this area is governed by patent law. In general, a feature is functional if it is vital to the use or purpose of the article.
      3. **First use in trade:** As the Supreme Court explained long ago, “[t]he right to a particular mark grows out of its use, not its mere adoption.” Thus, the first person to use a mark for a good or service in a particular geographic market generally obtains rights to use the mark in that market, unless another person has already registered the mark. Note that the federal Lanham Act requires first use in “commerce,” which is narrower than “trade.”
   4. Categories of Trademarks:
      1. An arbitrary or fanciful mark is one that indicates nothing about the good or service; this is the strongest type of mark (e.g., “Exxon”).
      2. The next strongest type is the suggestive mark, which merely suggests information about the good or service, thus requiring the observer to use her imagination (e.g., “Roach Motel” for an insect trap).
      3. Finally, the weakest type is the descriptive mark, which merely describes the good or service (e.g., “Coca-Cola,” which was originally made with coca leaves and kola nuts). A descriptive mark is not protected unless it has acquired a secondary meaning, that is, the public associates the mark with the source of a particular good or service.
      4. A term that is frequently used as the name for a certain type of goods or services is generic, and thus not eligible for protection.
2. **Infringement and Dilution** 
   1. The plaintiff in a trademark infringement action must prove that:
      1. (1) she holds a valid and enforceable trademark with priority over the defendant’s claim to the mark; and
      2. (2) the defendant used the mark in connection with goods or services in a manner likely to cause confusion or to deceive consumers.
   2. Lanham Act by adopting the Federal Trademark Dilution Act, which provides protection against the use of a mark that is likely to cause dilution of a famous trademark.
      1. Basic test:
      2. Rogers Test: literary titles do not violate the Lanham Act unless the title has no artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless the title explicitly misleads as to the source or the content of the work.
      3. Dilution: unauthorized use of a mark that weakens the distinctiveness of the mark (“blurring”) or harms the reputation of the mark.
         1. Usually occurs when customers are not confused about the source of the product.
         2. Dilution exemptions:
            1. Comparative advertising
            2. News reporting and commentary
            3. Noncommercial use

**Chapter 10: Land Use Regulation**

1. **Constitutionality of Zoning** 
   1. Rational Basis Test: a law is unconstitutional only if it is “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”
      1. Modern courts still use the rational basis test to evaluate the constitutionality of a land use regulation unless the law discriminates against a suspect class (such as one based on race) or impairs a fundamental right (such as freedom of religion), when the strict scrutiny test is used instead.
   2. A law is constitutional only if it is narrowly tailored to accomplish a “compelling state interest”—a higher standard than a mere “rational basis.”
2. **Typical Zoning Ordinance** 
   1. The typical zoning ordinance is adopted by a city or county as a legislative act. It has two basic components:
      1. (a) the text of the ordinance; and
      2. (b) maps that implement the ordinance.
3. **Nonconforming Uses**
   1. Zoning regulations regulate only future development, not existing uses.
      1. Prior noncomforming uses are allowed to continue when the zoning is enacted.
      2. The owner of nonconforming use has the right to pas on that protected status to a buyer.
      3. Any frontal attack on existing uses might be unconstitutional, particularly as a “taking” of property without compensation in violation of the Fifth Amendment. In fact, nonconforming uses “tend to continue and prosper because of the artificial monopoly accorded them by the law.”

**Chapter 12: Eminent Domain**

1. **Defining Public Use**
   1. Public use: The public use requirement is clearly satisfied when government takes land so that it may be physically used by the public or by government employees. More broadly, the Supreme Court has held that the requirement is satisfied if a taking serves a public purpose.
      1. Narrow construction: “public use” could be taken quite literally to mean physical use by members of the public
      2. Broad construction: “public use” would simply require that the project provide some public benefit, regardless of who physically uses the land
   2. Fifth Amendment: imposes two restrictions on government’s power to take private property by eminent domain:
      1. Must be taken only for public use
      2. Just compensation must be paid to the owner
   3. Three Tests:
      1. **Rational basis test:** there must be a legitimate government objective and the law has to be rationally related to the legitimate objective.
      2. **Intermediate scrutiny test:** must be an important government objective, and the law must be substantially related to the important objective.
      3. **Strict scrutiny test:** must be a compelling government objective, and the law must be narrowly tailored to the compelling government objective.
   4. *Hawaii Housing Authority v. Midkiff*
      1. Public Use Test: the constitutional requirement is satisfied if the legislature rationally could have believed that the act would promote its objective. The objective must be rationally related to a conceivable public purpose.
         1. It is only the taking’s purpose, not its mechanics, that must pass scrutiny under the public use clause.
         2. The Constitution forbids even a compensated taking of property when executed for no reason other than to confer a private benefit on a particular private party.
            1. A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void.
   5. *Kelo v. City of New London*
      1. Court deferred to the legislative and agency judgment that the area “must be planned as a whole” for the plan to be successful….The Court explained that “community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis-lot by lot, building by building.”
      2. “[I]t is only the taking’s purpose, and not its mechanics,” we explained, that matters in determining public use
      3. Promoting economic development is a traditional and long accepted function of government. There is, moreover, no principled way of distinguishing economic development from the other public purposes that we have recognized.

**Chapter 13: Takings**

1. **5th Amendment Takings:** 
   1. No taking of private property for public use without just compensation. 5th Amendment is not a grant of power, rather a limitation on power.
   2. This prohibition is applicable to the states through the 14th Amendment.
2. **Two Kinds of Takings:** 
   1. Possessory Takings: occurs when the government confiscates or physically occupies property.
   2. Regulatory Takings: occurs when the government’s regulation leaves no reasonable economically viable use of the property.
3. **“Public Use” Limitation:** 
   1. ROL: basis for government taking of property pursuant to its power of eminent domain so that the property taken may be utilized for the benefit of the public at large.
   2. A use will be held to be “public” as long as it is rationally related to a legitimate public purpose (e.g. health, welfare, safety, moral, social, economic, political, or aesthetic ends). The government may even authorize a taking by a private enterprise, as long as the taking will redound to the public advantage (e.g. railroads and public utilities).
      1. *Kleo v. City of New London:* a taking is for public use so long as the government acts out of a reasonable belief that the taking will benefit the public, and taking private property to promote economic development has long been accepted as a public use.
      2. *Midkiff:* the forced, compensated transfer by a state of title to land from landlords to tenants to reduce the concentration of fee ownership in the state is a taking related to a public use.
4. **Possessory Taking**
   1. A taking will almost always be found if there is an actual appropriation or destruction of a person’s property or a permanent physical invasion by the government or by authorization of law.
      1. *Loretto v. Teleprompter Manhattan CATV Corp.:* ordinance requiring landlords to allow installation of cable TV in their rental units but limiting to $1 the fee landlords could charge for this access.
         1. Rule: a permanent physical occupation of private property authorized by the government constituted a taking of property to which just compensation is due under the 5th Amendment.
      2. *Kaiser Aetna v. U.S.:* Requirement that public be given free access to a privately developed waterway.
   2. Emergency Exception—a taking is less likely to be found in an emergency situation, even when there is destruction of property.
      1. *Miller v. Schone:* the government does not effect a taking when it decides to destroy one class of property in order to preserve another class of property that it deems of greater value to the public. (additionally, it is not a taking when government regulates property to prohibit nuisances). Apple tree case.
5. **Regulatory Takings** 
   1. In General:
      1. *Pennsylvania Coal v. Mahon:* while private property may be regulated to a certain degree, a taking under the 5th Amendment will be found if the regulation results in a severe diminution of value. At a certain magnitude, there must be an exercise of eminent domain and compensation to sustain the regulatory act. While considerable deference is to be given to the legislature’s judgment, each case will turn upon its particular facts.
      2. The government would not be able to function if it had no compensate every person whose property values decreased because of government action, but if the regulation goes too far, it will be recognized as a taking.
      3. Government regulation is not a taking simply because it decreases the value of a person’s property, so long as it leaves reasonable economically viable uses.
      4. Deciding if something is a taking involves the nature and extend of the interference with rights in the parcel as a whole, not discrete parts of the parcel (like air rights). *Penn Central*
      5. *Palazzolo v. Rhode Island:* a property owner who takes title after a government regulation restricts the property’s use can assert a taking claim for the property.
         1. A regulatory restriction that allows a property to retain 6% of its total development value, where the permitted use is a substantial residence, does not constitute a total taking of the property.
   2. General Criteria to determine whether a regulation is a taking:
      1. The economic impact of the regulation on the claimant
         1. Diminution alone cannot establish a taking, even if some land owners are burdened more than others.
         2. TDRs lessen the amount of economic impact of the regulation. *Penn*
      2. The extent to which the regulation has interfered with investment-backed expectations, and
      3. The character of the government action
   3. Nuisance Exception:
      1. A regulation adopted under the police power to protect the public health, safety, or welfare is not a taking as defined by the 5th amendment, even if it reduces the value of the property.
      2. If the government can justify the regulation by saying they are removing a nuisance, the regulation will not be considered a taking. *Lucas.*
6. **Exactions** 
   1. The government can require exactions—a requirement that the developer provide land or fees to offset the impacts of the project—as a condition of discretionary land use approvals.
   2. An exaction will be a taking unless:
      1. There is an essential nexus between the exaction and a legitimate state interest, and
      2. The exaction is roughly proportional to the project’s impact.
   3. *Nollan v. California Costal Commission:* the court found no essential nexus between the view problem and an easement allowing the public to walk along the beach behind the house. Abridgement of property rights through police power must be a substantial advancing of a legitimate state interest.
   4. *Dolan:* exactions imposed by a municipality’s permit conditions must be roughly proportionate to the impact of the proposed development. There was an essential nexus between preventing flooding and limiting the development in a flood plain, and between traffic reduction and providing alternative means of transportation.
7. **Takings Analysis**
   1. Does the government action constitute a physical invasion of private property? If so,
      1. Was there a permanent physical invasion and, therefore, a taking per se? *Loretto* 
         1. Includes when government gives public access to private property. *Nollan v. California Costal Commn.*
      2. Was there a temporary physical invasion in which the harm to the owner outweighs any public benefit conferred? Balancing test
      3. Was the government’s action either arbitrary or disruptive of basic expectations?
   2. Has the government regulated the use of private property? if so,
      1. Is there a taking because the regulation striped the property of all use or value? *Lucas* 
         1. Temporary regulation that denies the owner all economically beneficial use of the land is usually not a taking. *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency.*
      2. Is there a taking because the regulation substantially diminished the value of the property?
         1. Economic impact of the regulation
         2. Extent to which the regulation has interfered with investment-backed expectations
         3. Character of the government action
      3. If the regulation caused a taking, does the nuisance exception apply?
   3. Has the government attached to a building permit a condition that would have effected a taking had the condition been imposed outright? (Exaction). If so, the condition amounts to a taking unless the following two inquiries are answered in the affirmative:
      1. Does the condition bear an essential nexus to a legitimate government purpose?
      2. Are the nature and extend of the condition roughly proportional to the impact of the proposed development?