

Concept of Property

What is property?

- **Positivist View**→Law creates property (DOMINANT)
 - Without law, there is no property
- **Naturalist View**→Property exists without law.
- **Property = Rights among people that concern things.**
- Real Property
 - Land, buildings, trees
 - Personal Property
 - Everything else
 - Intangible/movable property
 - Chattel
 - You can pick up and take away
 - Intangible Property
 - Patent/copyright
 - Real Property Rights
 - Exclude
 - **Each owner has a broad right to exclude any other person from his property**
 - Trespass
 - Unprivileged
 - Intentional
 - Physical intrusion
 - On other's property
 - Sufficiently tangible
 - Damage not required
 - Conversion
 - Wrongful possession of another's rightful personal property
 - Actual interference required
 - Must have title

- Public Policy Values – values goods, increases efficiency, encourage labor and improvements in society.
 - General Rule – property is freely transferable.
- Possess/Use
 - **Property owners have an absolute right to use their property any way they wish**
 - Private Nuisance
 - Intentional
 - Non-trespassory
 - Unreasonable
 - Gravity of harm v. utility
 - Substantial interference
 - With use and enjoyment of land
- Destroy

Five Theories of Property

- **(1) First Possession Theory**
 - “First Come, First Serve”
 - Examples
 - Parking space on a public street
 - Seat in a crowded theatre
 - Place in a long line
- **(2) Labor Theory**
 - “If I made it, it’s mine”
 - Each person is entitled to the property produced through his own labor
 - Made the most sense in America → Creation of value
 - Potential Limitations
 - Almost everything is almost owned
 - Ex. Adverse Possession
- **(3) Utilitarian Theory**
 - *Dominant Theory*
 - Maximize Social Happiness

- Distribute and define property rights that best promotes the welfare of all citizens, not just those who own property – property is a means toward an end – overall happiness
- Law and Economics Approach
 - Views land only as a commodity in commerce
 - Property is an efficient method of allocating valuable resources to maximize one facet of societal happiness (wealth).
- Economy Full Level of Production
 - Universality (All valuable, scarce resources must be owned by someone)
 - Exclusivity (Owner can exclude others)
 - Transferability (Can sell/buy/rent property)
- **(4) Republican Theory**
 - Property facilitates democracy, can exercise independent political judgment
 - Relationship between property and democracy
 - Status of citizen implies a measure of independence from government power
 - Everyone should have some private property
 - If private property doesn't exist → citizens are dependent on the good will of gov't officials
- **(5) Personhood Theory**
 - Facilitate personal development, property is necessary for individuals' personal development – need control over resources in the external environment
 - Emotional connection to tangible things
 - An object is closely related to one's personhood if its loss causes pain that cannot be relieved by the object's replacement
 - Extension to one's self- merits special protection

Capture Rule

- Property Rights in Wild Animals

- Common Law Capture Rule: property rights in wild animals are only obtained through *physical possession*.
 - Doesn't apply to domesticated/tame animals...

Pierson v. Post

- **Facts**
 - Post went hunting on uninhabited land with his dogs
 - Pierson knew the fox was being hunted so he killed it before Post could
- **RULE**
 - Mere pursuit of an animal does not give one a legal right to it
 - Animal must be captured or killed to constitute possession
- **Notes**
 - First possession theory
 - Chose **actual capture standard** (need to actually kill or capture a wild animal to acquire title) over **probable capture standard** (inevitability of success).
 - Rights end when a wild animal escapes/is released into the wild...
 - Dissent → Used the personhood theory
 - Instrumentalism
 - The law should serve as an instrument of social change
 - Majority → Formalism
 - The judge mechanically derives the appropriate rule from existing authorities

Right of Publicity

White v. Samsung Electronics America, Inc.

- **Facts**
 - Vanna White is a hostess on "Wheel of Fortune"
 - She didn't consent to the ad that used her image and likeness
- **RULE**
 - Common Law Right of Publicity
 - (1) The D's use of the P's identity
 - (2) The appropriation of P's name or likeness to D's advantage, commercially or otherwise

- (3) Lack of Consent
 - (4) Resulting Injury
- Rule of publicity doesn't require that appropriations of identity be accomplished through particular means to be actionable (expanded rule, include things that *remind* one as of a person)
 - Not important how they appropriated their identity – just whether the D has done so
- Policy Reasons – Protecting Likeness
 - Encourage Labor
 - Reward first possession
 - Maximize societal happiness
 - Protect privacy
- Personhood Theory
- Dissent
 - Utilitarian Theory
 - Reducing too much private property is bad
 - Creativity is impossible without a rich public domain
 - Overprotection → Harmful

Adverse Possession

- Definition
 - If A occupies B's land for a long enough period while meeting certain conditions, A acquires title to the land without B's consent
- Four Justifications
 - (1) Preventing Frivolous Claims
 - special statute of limitations for recovering possession
 - (2) Correcting Title Defects
 - sometimes mistakes happen in the process of conveying title to land (ex. Property description may be wrong)
 - Protects the title of the person actually on the land
 - (3) Encouraging Development
 - promotes productive use of the land – relocates title from the idle owner to the industrious squatter

- Encourages people to use the land in a noticeable way – possibly against environmentalist values
 - (4) Protecting Personhood
 - “A thing which you have enjoyed and used as your own for a long time, takes root in your being, and cannot be torn away without your resenting the act”
 - Attached to the land...
- How It Arises
 - Quiet title action to confirm AP’s title (**Gurwit**)
 - Defense to owner’s lawsuit to recover possession (**Van Valk**)
 - Former owner can voluntarily give the AP a deed without litigation
- Six Elements
 - (1) Actual
 - Claimant must physically use the land in the same manner that a reasonable owner would, given its character, location, and nature
 - Custom matters!
 - **Exception – Constructive Possession**
 - Claimant with color of title – deemed to be in constructive possession of the entire parcel if they have actual possession of part of the land described in the deed.
 - (2) Exclusive
 - Claimant’s possession cannot be share with the owner or with the public in general
 - As exclusive as would be an owner’s normal use of the land (not always absolute exclusivity).
 - (3) Open and Notorious
 - Possession must be visible and obvious so if the owner inspected the land he would be aware of the claim
 - (4) Adverse and Hostile
 - True owner cannot authorize or consent to the possession
 - Objecting/Majority → State of Mind is Irrelevant – only ask whether the had consent
 - (1) Possessor lacked permission from the owner

- Just look at the facts, if they meet the other reqs, then they have also met this
 - (2) Claim of right → without permission (requires AP to act toward land the way an owner could act)
 - collapses w/ actual possession test.
 - If actual possession is shown, claim of right is too
 - Subjective: Good Faith → Thought he had a right to property (Minority)
 - Policy For Good Faith
 - Protects property owners
 - Does not encourage stealing and infringing on others' property
 - Without it
 - It would reward trespasser and decrease incentive to plan correctly
 - Policy Against Good Faith
 - Rewards innocent possessors who mistakenly occupied;
 - Promotes efficient land use
 - Encourages use of property and to care/inspect it
 - Looks at totality of circumstances
 - Most states *implicitly* require good faith
 - Where AP→Title, bad faith rarely exists
 - Intentional Trespass Test: AP must know that he does not own the land & must intend to take title away from the true owner
 - Land Piracy Approach
 - Maximizes economic efficiency
- (5) Continuous
 - Possession must be as continuous as a reasonable owner's would be – doesn't have to physically occupy it every second
 - Measured by the location, nature, and character of the land – **only needs to be as continuous as that of a reasonable owner**
 - Howard v. Kunto – requisite continuity is only “as ordinarily marks the conduct of owners in general in

holding, managing, and caring for property of like nature/condition.”

- Summer occupancy at beach home → Sufficiently continuous...

- **EXCEPTION – Tacking**

- Tacking with predecessor in interest – successive periods of AP by different people can be combined to satisfy the statutory duration requirement if the successive occupants are in **Privity**

- Generally in Privity when one occupant transfers his rights in the property to a successor by a deed/will...

- Howard v. Kunto

- Requirement of Privity is no more than judicial recognition of the need for some reasonable connection between successive occupants of real property so as to raise their claim of right above the status of the wrongdoer of the trespasser.
- Such a reasonable connection exists in this case...

- (6) Statutory Period

- Ranges from 5-40 years

- POSSIBLY (7) Payment of Taxes

- Some states require the AP pay all property taxes

- **Exceptions – AP**

- Minor, Incompetent or Imprisoned Owner

- Limitations period extended when the owner is unable to protect his interests due to disability

- Government Entity as Owner

- CL – Land owned by government is immune from AP
- Statutes sometimes authorize it – if the land is used for a proprietary or non-public purposes

Gurwitt v. Kannatzer

- Facts

- P’s took possession of the 17 acre tract and continued to possess it for 20 years

- Posted “no trespassing” and “no hunting” signs
- Cut firewood on the tract
- Their possession was acknowledged by all
- D told P that P didn’t have record title to the land
- P instituted a title action including the disputed land
- RULE
 - 6 elements of AP were satisfied

Van Valkenburg v. Lutz

- Facts
 - L’s purchased land where there were 4 vacant lots in a triangular shape that was “a wild natural growth of brush and small trees”
 - They reached their home by walking across the triangular parcel
 - L cleared the brush and started farming on the land; for 32 years; built a home for his brother on the land
 - VV’s purchased property next to the land
 - No one paid taxes on the triangular parcel
 - VV’s bought it from foreclosure sale; L didn’t have notice
- RULE
 - Elements of AP
 - Proof failed to establish actual occupation for such a time or in such a manner as to establish title by AP
 - Didn’t like the AP rule in rapidly developing NY

Fulkerson v. Van Buren

- Facts
 - 4.5 acres of land is at dispute; part of the land sits next to a highway; next to the highway is a church building
 - Church congregation began using the church building as their place of worship
 - Improved the building and surrounding land
- RULE
 - Church’s AP claim not met
 - Mere possession of the land is not enough to adversely possess the land

- For possession to be adverse, it is only necessary that it be hostile in the sense that it is under a claim or right, title, or ownership as distinguished from possession in conformity with, recognition of, or subservience to the superior right of the holder of title to the land
- Intention to hold adversely must be clear, distinct, and unequivocal
- **Bad Faith Approach** – needed clear, distinct, and unequivocal intent to hold the land adversely
 - Ultimate purpose of AP – maximize economic efficiency by shifting title from the current owner (who places a low value on land by not using it) to an AP (who places a higher value on the land, as shown by his use).

Tioga Coal Co. v. Supermarkets General Corp

- Facts
 - Agate Street is the strip of land at issue
 - Tioga took control of a gate controlling access to Agate Street by putting its lock on the gate
 - For 30 years, Tioga controlled ingress and egress from Agate
 - Tioga thought City owned the land, when really Supermarket owned the land
- RULE
 - If the true owner has not ejected the interloper within the time allotted for an action in ejectment, and all other elements of AP have been established, hostility will be implied, **regardless of the subjective state of mind of the trespasser.**
 - Objective Test
 - Reasons to avoid looking at mental state of AP:
 - Determining the mental state of an AP is guesswork & impossible
 - Promotes the use of land in question against abandonment
 - May involve an essentially equitable consideration that a person may have developed an attachment to the land which is deserving of protection.
 - AP doesn't need to know who the owner is...

Concurrent Ownership

- Each co-owner or *co-tenant* has the right to use and possess the entire property

Tenancy in Common

- If O conveys Greenacre “to A and B”
 - Each tenant has a common, undivided, fractional interest in the property
 - Each has the right to use and possess the **WHOLE** parcel
- Freely alienable
- Devisable
- Descendible
- Different from Joint Tenancy – no limits on right of transfer

Joint Tenancy

- O conveys Greenacre “to A and B as joint tenants with right of survivorship”
 - Each tenant has a common, undivided right to use & possess the property + **a right of survivorship**
 - When one dies – the other automatically becomes sole owner
 - When A dies, A’s interest in the estate is removed
- *One of 2 Joint Tenants may unilaterally sever the JT by conveying his interests to a third person*
 - No more right of survivorship
- NOT devisable
- NOT descendible
 - Can’t leave it in your will...
- Created only when **4 unities** are present
 - Time
 - All joint tenants must acquire their interests at the same time
 - Title
 - Must acquire title by the same instrument
 - Interest
 - Must have same shares in the estate, equal in size and duration
 - Possession

- Must have an equal right to possess, use, and enjoy the whole property
- Often used as a cheap substitute for a will – doesn't need to go through probate

James v. Taylor

- Facts
 - Taylor wanted the declaration that her mother intended to convey the property to the grantees as joint tenants
 - James (descendants of Sewell brothers) argued the deed created a tenancy in common
- RULE
 - **Distinguishing ambiguity between TIC and JT**
 - Used term “jointly and severally” – describing an estate, which is ambiguous – Look @ Statute
 - Presumption for TIC unless stated otherwise...
 - Transferability is important for policy reasons
 - **Evidence of the grantor's intention can't prevail over the statute**
 - Common Law – Presumed Joint Tenancy because right of survivorship helped eliminate fractional interests (unless expressly said otherwise)
 - Language of the deed is not sufficient to overcome the statutory presumption of tenancy in common
 - **Today:** Presumes a TIC
 - **Not a JT unless it says JT**
 - Language of the deed is not sufficient to overcome the statutory presumption of tenancy in common
- NOTES
 - Historically → Common law favored the joint tenancy because the right of survivorship helped to eliminate fractional interests
 - Today → The law presumes that the grantor intends to create a tenancy in common, absent express language to the contrary

Tenhet v. Boswell

- Facts

- Johnson and Tenhet owned a parcel of property as joint tenants
- Johnson leased the property to Defendant for 10 year period
 - With a “option to purchase”
- Johnson died 3 months later
- Tenhet sought to establish her sole right to possession of the property as the surviving joint tenant
- RULE
 - A lease does not sever a joint tenancy
 - It expires upon the death of the lessor joint tenant
 - Other party doesn’t have to honor the lease after the lessor dies...
 - Joint tenancy may only be created by express intent
 - No severance in circumstances which don’t clearly and unambiguously establish that either of the joint tenants desired to terminate the estate
 - Some states require the deed severance be recorded...
 - When joint tenant dies
 - His interest dies with him, and any encumbrances placed by him on the property become unenforceable against the surviving joint tenant
- NOTES
 - A lease doesn’t sever a joint tenancy b/c in order to sever it, it must be clearly and unambiguously established that either joint tenant wanted to terminate the estate

Severing Joint Tenancy

- Mortgage: Title or Lien
 - Title Theory
 - Mortgage is seen as the conveyance of title to the mortgagee
 - Severs the joint tenancy because it destroys the unities of time and title
 - Lien Theory
 - Mortgage is viewed as a lien to secure repayment of the debt
 - Doesn’t end the joint tenancy because the unities are preserved

Tenancy by the Entirety

- O conveys Greenacre “to A and B as tenants by the entirety”
- Each tenant has the undivided right to use and possess the property + **right of survivorship**
- Only for married couples
- Ends by
 - Death
 - Divorce
 - Agreement of both spouses
 - No unilateral breaking and no murder...
- Allows holders to partially shield assets from creditors
- Creditor of an individual spouse can’t reach tenancy by the entirety property
- **Sawada v. Endo**
 - Estate by the entirety is not subject to the claims of the creditors of either one of the spouses during their joint lives
 - Family Unit – Interests of Creditors

Partition of Property

- If parties cannot agree on how to sever the co-tenancy, any TIC or JT can sue for partition – distribute assets
- **Partition by Sale** – Sell it, split the money
 - If physical division of land is impossible, impracticable or inequitable.
- **Partition in Kind**
 - *Preferred Method*
 - Leaves co-tenants holding the same land as before, doesn’t force a sale
 - Presumption:
 - Construe partitioning sale statutes narrowly
 - Party seeking partition by sale has to meet the test
- Agreements not to partition → Allowed if **reasonable** in duration and purpose
- Partition Abuse
 - Forced partition sales, unfair disadvantage to poor/minority communities

Ark Land Co. v. Harper

- Facts

- Ark Land acquired 67.5% undivided interest in the land by purchasing the property interests of several Caudill family members
- Ark Land wanted the remaining land partitioned and sold
- **RULE**
 - In a partition proceeding in which the party opposes the sale of property, the economic value of the property is not the exclusive test for deciding whether to partition in kind or by sale
 - **Evidence of longstanding ownership, coupled with sentimental or emotional interests in the property**, may also be considered in deciding whether the interests of the party opposing the sale will be prejudiced by the property's sale
 - A partition by sale should NOT be warranted if the party who owns the land holds deep sentimental value to the land
- **This Case:**
 - Family kept their family home, Oil company could still mine the coal at relatively little economic burden

Co-Tenant Rights & Duties

- **Default Rules**
- **Rights**
 - Co-Tenants are entitled to proportionate share of **rents & profits** derived from the land
 - Co-Tenant cannot partition the land for himself
 - Each Co-T has an equal right to **possession/enjoyment** of the whole property
 - No broad fiduciary duty among Co-T's
- **Duties**
 - Each Co-T must pay his proportionate share of such **expenses**
 - Have to pay their share of a **mortgage, tax, assessments**, & other **payments** that could give rise to a lien
 - No duty to contribute to the other Co-T when **repairs & improvements** are made
 - Co-T is liable for **waste** when he uses the common space in an unreasonable manner, causes permanent injury

Esteves v. Esteves

- Facts
 - P's and D's bought a house together
 - D undertook a considerable amount of work involving repairs and improvements while he lived there for a year and a half
 - P's lived at the house for 18 years
- RULE
 - When a tenant in common has enjoyed sole occupancy of the property and seeks operating and maintenance costs from the co-tenant who has not lived on the property, equity dictates that the sole possessor allow for a corresponding credit for the value of sole occupancy
 - A Co-T in possession does not owe any rent to a Co-T out of possession, absent an ouster
 - **Ouster** – when a Co-T in possession refuses to allow another cotenant to occupy the property, liable for half the fair rental value to the other Co-T
 - Majority Rule

Severance of Joint Estates

- (1) Conveyance of JT's Entire Interest
- (2) Lease or Mortgage Executed by 1 JT
 - *Tenhet v. Boswell* → Lease didn't effect a severance
 - Mortgage traditionally transfers legal title to the mortgage, so it effects a severance
- (3) Agreement between JT's
 - Ex. Divorce
 - One just living there doesn't effect severance

Marital Property

Common Law Foundation

- Favored the husband
- Married Women's Property Acts

- Provided the wife with the same rights as a single woman to own, manage, and dispose of her property
- Sawada v. Endo – Didn't abolish tenancy by the entirety
- Most Jurisdictions – Separate Property System
 - 9 States – Community Property

Guy v. Guy

- Husband supported wife while she got her nursing degree; then she left him
- RULE
 - A professional degree obtained by a student spouse during a marriage is **not** marital property
 - Supporting spouse has a right to be compensated or reimbursed, upon proper proof, for his or her financial contributions to the professional education of the student spouse – expectation that they would prosper from the profits made with the degree
 - Majority Approach
 - Minority – Grad degrees/professional license ARE marital property
- NOTE
 - Reimbursement Alimony
 - Designed to repay or reimburse the supporting spouse for his or her financial contributions to the professional education of the student spouse

Pre-Nups

- Can avoid marital property system – Uniform Premarital Agreement Cream
 - Enforceable Unless...
 - (1) The party didn't sign voluntarily
 - (2) Agreement was **unconscionable** when made, the party did not receive “fair and reasonable disclosure” from the other party, did not expressly waive the right to receive such disclosure, and could not reasonably have learned the relevant information.

Separate Property System

- Rights During the Marriage
 - Property is separately owned by the spouse who acquires it
 - Creditors of that particular spouse can only attach the separate property of that spouse
- Divorce
 - Most separate property states require *equitable distribution*
 - Requires a court to divide the property in a just and fair manner
 - Factors to Consider
 - Incomes, standard of living, contributions during marriage, age & health, special needs, length of marriage
 - Any property acquired with the earnings of either spouse during the marriage is subject to distribution
 - Some states include property acquired before the marriage
- Death
 - Most states offer the surviving spouse a forced share of the decedent's estate
 - Survivor has a choice
 - (a) take under the decedent's will; or
 - (b) receive a defined portion of the decedent's estate, usually a 1/3 or 1/2 share

Community Property System

- Used in 9 states (including CA)
- **During the Marriage**
 - All earnings during the marriage, and all assets acquired from those earnings, are owned by both spouses equally
 - Property acquired before or after remains separate
- **Divorce**
 - All community property is divided between the spouses
 - Some states → equal share
 - Other states → assets are allocated using equitable distribution factors
- **Death**

- Decedent may devise her half of the community property and all her separate property as she desires
- Other half belongs to surviving spouse
- No forced share

Tenancy by the Entirety

- Common law → every conveyance to a married couple was presumed to create a tenancy by the entirety
- Today → Only half the states recognize this co-tenancy
- *Sawada v. Endo*
 - Followed Group III
 - The estate may not be subjected to the separate debts of one spouse only
 - Tenants by the entirety really both own everything
 - Protects the marriage and harms the creditors

Unmarried Couples

In re Estate of Roccamonte

- Roccamonte and Mary involved in an extra-marital affair spanning decades
- He told her she would be taken care of
- RULE
 - A general promise of support for life, broadly expressed, made by one party to the other with some form of consideration given by the other will suffice to form a contract
 - If such a promise has been made – court will construe & enforce it by awarding the promisee a one time lump sum for the present value of future support D promised to provide to be computed by reference to the promisee's life expectancy

Same-Sex Marriage

Varnum v. Brien

- Same Sex Marriage
 - American law doesn't provide them with legal benefits of marriage
 - Can enter into express contracts about shared property, but Roccamonte likely won't apply...
- RULE
 - Iowa marriage statute violates the equal protection clause of the Iowa Constitution
 - Iowa's same-sex marriage statute cannot withstand **intermediate scrutiny**, we need not decide whether classifications based on sexual orientation are subject to a higher level
 - Discussed and rejected objectives of prohibiting gay marriage
 - Traditional Institution of Marriage
 - Optimal procreation/rearing of children
 - Promoting stability in opposite sex relationships
 - Conservation of resources
 - Religious opposition
 - Ban on Marriage Unconstitutional
 - Not a sufficiently close fit between the statutory classification (only heterosexual couples) and the government objective

Estates and Future Interests

Historical Roots

- Free Tenures vs. Unfree Tenures
 - Free Tenures → Only held by upper class
 - Unfree Tenures → Held by peasants who worked on land, rights not protected
- Subinfeudation
 - Tenants created subtenures & contracted out incidentals owed to the King
- Statute Quia Emptores – gave tenants right to transfer their land without permission from landlord
- Recognized freehold estates or Nonfreehold estates

Modern Estates

- **Freehold**
 - Fee Simple Absolute
 - Life Estate
 - Fee Tail
- **Nonfreehold (Fee Simple Defeasible)**
 - Fee Simple Determinable
 - Fee Simple Subject to a Condition Subsequent
 - Fee Simple Subject to an Executory Limitation

Vocabulary

- **Alienable** (Can be sold/given away during owner's lifetime)
- **Devisable** (Can be transferred by will at Death)
- **Descendible** (Can pass by the laws of intestate succession if the owner dies without a will)

Estate/Future Interest

- Usually transferred in 1 of 3 ways
 - **Deed**
 - Completed transfer is called a conveyance or a grant
 - **Grantor**
 - Person who makes the transfer
 - **Grantee**
 - Person who is the recipient
 - **Will**
 - Property of a decedent may be transferred by a will
 - Completed transfer of real property is called a devise
 - **Devise**
 - Verb used to describe the transfer
 - **Testator/Testatrix → Devisee**
 - Person whose will contains the devise
 - **Testator/Testatrix → Devisee**
 - **Intestate Succession**
 - If a person dies without a will, her property will be distributed according to state statutes
 - Usually to her closest living relatives
 - **Descend**

- Verb used to describe the transfer of real property
- **Heir**
 - Recipient
- Issue & Surviving Spouse
 - If no spouse → divided among the issue
- Parents & Their Issue
 - If no parents → issue of the parents
- If none of the above:
 - Any surviving ancestors
 - Any surviving collaterals
 - Escheat – goes to state if no living relatives

Fee Simple Absolute

- Embodies the largest group of private property rights recognized by our legal system
- Holder has ALL the rights in the metaphorical bundle of sticks
 - No Future Interest
- O conveying “to B and his heirs”
 - Words of limitation
 - Describe the estate being granted
 - Words of purchase
 - Identify the grantee
 - Assume that the grantor intends to convey a fee simple unless he uses words of limitation specifically conveying a different estate
 - Favors fee alienation – most marketable estate
- **Freely alienable**
 - It can be sold or given away during the owner’s lifetime
- **Devisable**
 - It can be transferred by will at death
- **Descendible**
 - It can pass by the laws of intestate succession if the owner dies without a will
- Restraints on alienation on fee simple – void as against public policy
 - Partial restraints may be valid if they are reasonable as to the duration, scope, and purpose

Cole v. Steinhauf

- Common Law
 - A grant to a grantee “and his assigns forever” vests only a life estate in the grantee
 - Have to use the word “heirs”
 - “Assigns forever” means a life estate
 - No longer necessary

Life Estate

- Duration is measured by the lifetime of a particular person
 - When that person dies, the estate terminates
- O conveys Greenacre “To B for life”
 - O retains a future interest (reversion) that becomes possessory upon the end of B’s life estate
- Right to use/enjoy land + rents & profits
- Can’t commit waste
- Restrict right of transfer – can only transfer possession for duration of the life estate (illusory)
- **Alienable, not devisable or descindable**
 - Estate ends at the holder’s death, no interest is left to transfer
- **Future Interest → Reversion or Remainder**
 - Future interest that follows a life estate
 - Distinction turns on who holds the interest
 - O conveys “to A for life”
 - Future interest retained by a grantor in this situation is a **reversion**
 - O conveys “to B for life, then to C”
 - Future interest is held by a third party
 - Remainder

White v. Brown

- RULE
 - The intention of the testator is to be ascertained from the language of the entire instrument when read in the light of the surrounding circumstances
- Rules of Construction

- If intent cannot be determined, the court will apply a rule of construction
 - A legal principle that breaks the “tie”
- **Presumption for Fee Simple Absolute**
- Restraint on Alienation alone (i.e. “not to be sold”) doesn’t evidence such a clear intent to pass only a life estate as sufficient to overcome the presumption that it is a fee simple absolute

Restraints on Alienation

- Provision in a deed or will that prohibits or limits a future interest of the property
- 3 Types
 - **Disabling Restraints**
 - Prevents the transferee from transferring her interest
 - O conveys “to B, and any conveyance by B is void”
 - **Forfeiture Restraint**
 - Leads to a forfeiture of title if the transferee attempts to transfer her interest
 - O conveys “to B, but if B ever tries to sell the estate, then to D”
 - **Promissory Restraint**
 - Restraint that stipulates that the transferee promises not to transfer her interest
 - O conveys “to B, and B promises that she will not sell the estate”

Legal and Equitable Life Estates

- Ordinary Legal Life Estate
 - Rarely created
 - Life tenant may die at any time and thereby terminate the estate, few people want to buy or lease this estate
- Equitable Life Estate
 - Trustee holds legal title to the trust property and manages the assets as a fiduciary for the benefit of the trust beneficiaries, who hold the equitable title
 - “O conveys Greenacre to T in trust for the use of B for life, then to C”
 - T is a trustee

- Given the legal fee simply to Greenacre
 - B and C are the trust beneficiaries who have, an equitable life estate and equitable remainder, respectively
- Continually important for modern trust

Waste

- Imposes a duty on the life tenant to use the property in a manner that doesn't significantly injure the rights of future interest holders

Woodrick v. Wood

- Waste
 - Abuse or destructive use of property by one in rightful possession
- RULE
 - Life tenant has the right to make beneficial use of the property even though she would be altering the land in order to do so
- RULE
 - Acts which would technically constitute waste as defined under the common law would not be enjoined when they resulted in improving rather than injuring the property
 - **Only liable for waste if it decreases the value of the property**
 - Destroying a barn *increased* the value of the property – not waste...
 - Didn't follow common law rule → Anything that altered the identity of the leased premises

Types of Waste

- (1) Voluntary Waste – Affirmative act that reduces value of the property
- (2) Permissive Waste – Results from failure to take RC to protect the estate
- (3) Ameliorative Waste – Results from an affirmative act that leads to a substantial change in the property

Fee Tail

- Duration → determined by the lives of the lineal descendants of a particular person
 - Largely obsolete
 - Continues as long as the bloodline continues
- If O conveys Greenacre “to B and the heirs of his body”
 - Words of purchase → “to B”

- Designate the grantee
- Words of limitation → “and the heirs of his body”
 - Identify the estate as a fee tail”
- O retains a reversion
 - Will become possessory if B’s line of lineal descendants expires
- When B dies → the fee tail passes to B’s lineal descendants
- If B’s bloodline ever ends, the holder of O’s reversion receives a fee simple in Greenacre
- NOT DEVISABLE – automatically passes to the heir upon holder’s death
 - Automatically passes to the lineal heir upon the holder’s death
- Fee Tail Male
 - O conveys “to G and the male heirs of her body”
 - If G has 2 sons and 1 daughter, the sons receive the fee tail
 - Passes through only male descendants
- Fee Tail Special
 - O conveys “to G and the heirs of her body by R”
 - Created when the transferor wants to restrict the fee tail only to the descendants of the transferee who are parented by a particular person
- **Future Interest** –
 - Goes to lineal descendants of A while bloodline continues
 - O in the grantor when A’s bloodline ends...
- No Waste
- No Limited right to transfer
- Abolished in all states but 4 – usually created a fee simple everywhere else
- Holder can covert estate to fee simple by an **inter vivos** transfer
 - Disentailing the tail...

Fee Simple Defeasibles

- Fee simple that may continue forever OR may end upon the occurrence of some future event
 - Fee Simple Determinable
 - Fee Simple subject to a condition subsequent
 - Fee Simple subject to an executory limitation
- Waste doesn’t apply to fee simple defeasibles because the possible reverts/right of entry are too speculative & insubstantial to be protected

Fee Simple Determinable

- A fee simple estate that automatically ends when a certain event or condition occurs, transfers right of possession back to transferor
- Potentially infinite duration of the fee simple will be cut short if the event or condition happens
- Words of duration
 - See chart
 - “So long as” “While” “Until”
- **Future Interest → Possibility of Reverter**
 - Future interest that follows a fee simple determinable
 - Can only be retained by the transferor (or his heirs)
- Alienable, Devisable, Descendible
 - Condition applies to any transferees
- **Majority →** When the language of the deed is ambiguous, courts will generally construe the estate as a **fee simple subject to a condition subsequent...**

Fee Simple Subject to a Condition Subsequent

- May be terminated at the *election* of the transferor when a certain condition or event occurs, future interest held by transferor
 - If the condition happens, this estate does not end automatically, just creates a right of entry
 - File notice or quiet title action
 - The transferor has the power to terminate the estate by taking action
- **Future Interest → Right of Entry**
- Words of condition
 - See chart
- If O conveys “to B and his heirs provided that the land is used as a farm, and if it is not, then O may re-enter and reclaim”
 - B has a fee simple subject to a condition subsequent
 - “and his heirs” → fee simple
 - “provided that” condition subsequent
- Estate is NOT automatically terminated
 - Estate will continue in the example above until O exercises his right of entry, despite the breach of condition

- Alienable, Devisable, Descindable
 - Right of Entry is also alienable, devisable, and descendible

Fee Simple Subject to an Executory Limitation

- Defeasible fee simple estate created in a transferee that is followed by a future interest in another transferee
- Future interest is held by a THIRD PARTY → Executory Interest held by 3rd party transferee
- Words of condition/condition
 - See chart
 - “While” “So long as” “During”
- If O conveys “to B and heirs so long as it is used as a farm, then to C”
 - C holds an executory interest that may become possessory if the property is no longer used as a farm
- Alienable, Devisable, Descindable
 - Follows to any transferee
 - Executory Interest also freely A, D and D

Mahrenholz v. County Board of School Trustees of Lawrence County

- Distinguishing between FS Determinable and FSSCS
- Upon a grant of exclusive use followed by an express provision for reverter when that use ceases – **FS Determinable is created...**
- RULE
 - Common law states future interests in land by possibility of reverter or right of re-entry are inheritable, but are not transferable by will or by inter vivos conveyance
- RULE
 - The use of the word “only” in a deed followed by the words for school purpose, demonstrates a limited grant subject to a condition, thus creating a fee simple determinable
- RULE
 - The phrase, “otherwise to revert to grantors herein” coupled with the limiting word of “only” triggers a mandatory return, rather than a permissive return
- Rejected Majority Rule

Notes

- Why do courts construe the estate as a fee simple subject to a condition subsequent?
 - Social policy hates the forfeiture of estates because this interferes with marketability
- Transferring Future Interests
 - Common Law
 - The right on entry and the possibility of reverter could be transferred only through intestate succession to the holder's heirs
 - Today
 - Most Jx's allow free alienation of both interests

Metropolitan Park District v. Unknown Heirs of Rigney

- RULE
 - A grantee of such an estate may NOT acquire title by adverse possession following a breach of the condition (not adverse, title in their name until transferor uses right of entry) – but you have to declare a forfeiture within a reasonable time.
 - (1905-1965 – not a reasonable time)

Future Interests

- Right to receive possession of property at a future time
 - Still a valuable property right – can be sold/used as a security for a loan
- Can prevent current possessor from committing waste
- Only have right to **transfer**
 - Can transfer interest upon death by devise or intestate succession

(1) Retained by Transferor:

- Transferor conveys an estate to a 3rd party which is smaller than their current estate
 - Reversion
 - Possibility of Reverter
 - Right of Entry

(2) Created in Transferee:

Remainder

- A future interest in a transferee that
 - (1) Is capable of becoming possessory immediately upon the expiration of the prior estate; and
 - Guarantee possession not required – the *possibility* of possession is enough
 - (2) Does not divest (or cut short) any interest in a prior transferee
- Alienable, Devisable, Descendible
- Presumption → If wording is ambiguous, presume a vested remainder, not contingent remainder
- **Capable of Becoming Possessory**
 - O conveys Greenacre “to A for life, then to B”
 - B automatically gets possession as soon as A’s life estate ends
 - Possibility of possession is enough
 - O conveys “to B for life, then to D if D becomes president”
 - D has a remainder even if he is an 85 year old high school dropout who has never run for political office
- **Does NOT Divest**
 - A remainder “waits patiently” for the preceding estate to expire before it becomes possessory
 - O conveys “to B for life, then if D becomes president, to D”
 - D has a remainder because there is NO possibility that D can divest B’s life estate
 - His possession begins upon B’s death
 - He has to “wait patiently” for B to die before D is entitled to possession
 - O conveys “to B for life, but if D becomes president, to D”
 - “but if”
 - B holds a defeasible estate
 - Life estate subject to an executory limitation

2 Kinds:

- Freely transferable
- Can’t be conveyed by deed/will

(1) Vested Remainder: More substantial

Indefeasibly Vested Remainder/Vested Remainder

- A remainder is vested if
 - (1) it is created in an ascertainable person *and*
 - (2) it is not subject to a condition precedent other than the natural termination of the prior estate
- Example
 - O conveys Greenacre “to A for life, then to B”
 - B holds an indefeasibly vested remainder (vested remainder)
 - Remainder in an identifiable person that is certain to become a possessory estate
- Created in an ascertainable person
 - A person who is both alive and identifiable at the time of the transfer
 - Unborn child → no
 - A person’s heirs cannot be ascertained until his death
- No Condition Precedent
 - Condition precedent
 - Must be met *before* the remainder can become possessory, *other than* the natural termination of the prior estate
 - O conveys “to B for life, then to D if D becomes president”
 - D must meet a special condition
 - Becoming president
 - Before his interest can become possessory
 - His remainder is not vested

Vested Remainder Subject to Divestment

- Remainder is vested, but is subject to a *condition subsequent*
- O conveys “to B for life, then to D, but if D does not survive B, then to E”
 - D is an ascertainable person
 - His interest is not subject to a condition precedent
 - His interest is ready to become possessory *unless* a specified event occurs
 - If D dies before B
 - D’s interest will be terminated or *divested*
 - D has a vested remainder subject to divestment

Vested Remainder Subject to Open

- Vested remainder held by 1 or more living members of a group or *class* that may be enlarged in the future
- O conveys Greenacre “to B for life, then to D’s children”

- At the time, D has 2 living children, E and F
- D might have more children
- Remainders in E and F are vested because
 - (1) they are both ascertainable and
 - (2) there is no condition subsequent
- E and F may have to share the property with later-born children of D
 - E and F have a vested remainder subject to open
 - Vested remainder subject to partial divestment

(2) 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
- O conveys Greenacre “to B for life, then to the heirs of D”
 - Heirs of D aren’t ascertainable → contingent remainder
- O conveys “to B for life, and then to D if D becomes president”
 - D’s remainder is subject to the condition precedent of becoming president → contingent remainder

Distinction between Vested and Contingent Remainder

- Transfer
 - Vested remainders are freely transferable
 - Contingent remainders could not be conveyed by deed or will
- Marketability Restrictions
 - Common law restrictions
 - Designed to make land more marketable applied only to contingent remainders
 - **Vested remainder subject to divestment is not subject to marketability restrictions**

Executory Interests

- A future interest in a transferee that *must divest* another estate or interest to become possessory
- Alienable, Devisable, Descendible
- **Springing Executory Interest**

- An executory interest divests the transferor
- **Shifting Executory Interest**
 - Transferee is divested
- O conveys Greenacre “to B for life, then one year after B’s death, to D and his heirs”
 - Once B’s life estate ends → O regains a fee simple
 - 1 year later
 - When D’s future interest becomes possessory, it will *divest* O by cutting O’s estate short
 - D has a springing executory interest, not a remainder
 - D’s interest is *not* capable of becoming possessory at the expiration of B’s life estate

Estate	Future Estate	
	Created in Transferor	Created in Transferee
<i>Fee Simple Absolute</i>	N/A	N/A
<i>Fee Simple Determinable</i>	Possibility of Reverter	N/A
<i>Fee Simple Subject to a Condition Subsequent</i>	Right of Entry	N/A
<i>Fee Simple Subject to Executory Limitation</i>	N/A	Executory Interest
<i>Life Estate Absolute</i>	Reversion	Remainder
<i>Defeasible Life Estate (Term of Years)</i>	Reversion	Executory Interest
<i>Fee Tail</i>	Reversion	Remainder

Rules Furthering Marketability

- Contingent Remainders & Executory Interests harmed marketability...
 - CL restricted them to make it more marketable
- Four Doctrines
 - Rule in Shelley’s Case
 - Doctrine of Worthier Title
 - Doctrine of Destructibility of Contingent Remainders

- **Rule Against Perpetuities**

Rules Against Perpetuities

- **Limits grantor's power after death**
- O devises Greenacre "to B for life, then to C if a cure for cancer is found"
 - When will C's future interest become possessory?
 - Title uncertainty interfered with the free marketability of land
 - A buyer was unlikely to purchase Greenacre from B because it was burdened with a contingent future interest
 - Such a grant allowed an owner like O to control title to land long after his death
- **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
 - **Vesting** – point at which uncertainty is removed...
- Limits the duration of the contingent interest by providing that it must vest or forever fail within 21 years of the death of a life in being
- **Perpetuities Period**
 - Longest life from any reasonable number of lives in being plus 21 years plus any period of gestation
- **Rule of Proof**
 - A contingent interest is valid only if you can logically prove that it will either vest or forever fail to vest within the perpetuities period (a life in being plus 21 years)
 - If any possibility that the interest might vest more than 21 years from the death of the relevant lives in being, the future interest is void when created
- Only 3 interests are subject to the rule
 - Contingent remainders
 - Executory interests
 - Vested remainders subject to open
- Steps to Follow
 - (a) Identify the contingent interest
 - (b) List the lives in being
 - Include grantor as well

- People alive now we know who could take/receive property under grant/devise
- (c) Consider whether anyone can be born who might affect vesting
 - Some person yet unknown who could take/receive interest under the grant more than 21 years after all of the lives of being in Step (b) are dead.
- (d) Kill off the lives in being at some future date and add 21 years
- (e) Ask yourself, “Is there any possibility that the contingent interest will vest after this point?”
 - If yes, it is void...
 - If no, it is valid...
- Different Approaches
 - **Wait & See Approach:** Void if it doesn’t actually *vest* within period
 - **Uniform Statutory RAP:** Valid if it satisfies common law rule *or* actually vests within 90 years after statutory
 - Courts can rewrite the instrument to fit the 90 year period
 - **Cy Pres Approach:** Courts rewrite language so that the future interest no longer violates the rule to honor transferor’s intent

Jee v. Audley

- Children born after the death of the testator get a share
- Rule consider legal possibilities – not physical realities
- 70 year old could still “possibly” have kids
- Should specify “all heirs living at the time of my death”
- RULE
 - The early version of the RAP states that the limitations of a personal estate are void, unless they necessarily vest, if at all, within a life or lives in being, and 21 years and 10 months afterwards
- RULE
 - The interest is void as it was not certain to vest within 21 years after the death of some life at the creation of the interest
- Class Gifts:
 - Void if the interest might vest in any member of the class too remotely
 - Not valid as to any member unless it is valid for *all* members
 - **Closing a Class**

- Rule of Convenience- Closes when the prior estate ends and the identified class members are entitled to possession.

Savings Clauses

- Prevents potential violation of the rule by requiring that every interest must vest before the end of the applicable perpetuities period
- Ex: “Any trust created here shall terminate, if it has not previously terminated, 21 years after the death of the survivor of the beneficiaries living at the date this instrument becomes effective.”

Easements

- Types
 - Express Easement
 - Implied Easement
 - Easement by Necessity
 - Prescriptive Easement
 - Easement by Estoppel/Irrevocable License
- Non-possessory right to use the land of another person
 - A owns Greenacre
 - Access road to her land is impassible during the winter, she wants the right to travel across B’s land to get to her land
- TERMS
 - **Dominant Tenement/ Dominant Land**
 - The land benefitted by the easement
 - **Servient Tenement/ Servient Land**
 - Land that is burdened by the easement
 - **Dominant Owner**
 - The easement holder/owner
 - **Servient Owner**
 - The owner of the servient tenement
 - **Appurtenant Easement**
 - Benefits the holder in her use of a specific parcel of land, the dominant tenement
 - **Easement in Gross**

- Not connected to the holder's use of any particular land; rather, it is personal to the holder
 - **Affirmative Easement**
 - Allows the holder to perform an act on the servient land
 - A's easement is affirmative because it allows her to cross B's property
 - **Negative Easement**
 - Allows the holder to prevent the servient owner from performing an act on the servient land
 - Remains attached to the land when conveyed to a new owner unless the grantee is a **bona fide purchaser**
 - Trend – allow the transfer of an easement in gross unless the parties had a contrary intent
 - *NOTE* - Can't use the easement for others without consent of servient owner
- **Scope**
 - *Marcus Cable Associates*
 - When the grant's terms are not specifically defined, they should be given their plain, ordinary, and generally accepted meaning
 - Some flexibility allowed in interpreting scope of an easement:
 - **Manner, frequency, intensity of easement's use** may change over time with technological development if it is still for purposes for which easement was created
 - Look at whether it would fall within the purpose as we understand the words now with current technology
 - *Presault v. US*
 - Usage for trains **does not equal** usage as a recreational path...
 - Relocating Easement
 - Location of easement can be changed only **if both** servient and dominant owners agree
 - **Restatement:**
 - Can relocate as long as it doesn't significantly lessen the utility of the easement, increases burdens on the easement holder, or frustrate the purpose of the easement

Express Easements

- An easement which is voluntarily created by the servient owner, usually in a deed
- Express Easement by Grant
 - Arises when the servient owner grants an easement to the dominant owner
- 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
 - Can also be reserved for a third party

Millbrook Hunt, Inc. v. Smith

- Difference between easement and license
- **Easement**
 - An interest in land ordinarily created by a grant & is permanent in nature
 - Irrevocable
- **License**
 - Not an interest in land – just a mere personal privilege to commit some act or series of acts on the land of another without possessing any estate therein
 - Informal permission to use the land for a particular purpose
 - Revocable – not an interest in land
- **RULE**
 - An agreement is an easement if the parties sufficiently expressed their intent to reserve a permanent right to the land

Implied Easement By Prior Existing Use

Required Elements

- (1) Severance of title to land held in common ownership
- (2) An existing, apparent, and continuous use of one parcel for the benefit of another at the time of severance; and
- (3) Reasonable necessity for that use
 - Must be beneficial or convenient for the use of the dominant tenement – but not essential

Restatement Approach

- (1) Severance of title
- (2) An existing use of one parcel for the benefit of another, and
- (3) “Reasonable grounds to expect that the conveyance would not terminate the right to continue the prior use.”

Van Sandt v. Royster

- RULE
 - **An easement created by implication arises as an inference of the intentions of the parties to a conveyance of land**
 - Drawn from the circumstances under which the conveyance was made, rather than the language of the conveyance
- RULE
 - An easement is implied to protect the probable expectations of the grantor and grantee that a prior existing use will continue after the transfer
 - Where the grantee is aware of a reasonably necessary use of the grantee’s property for the comfortable enjoyment of the grantor’s property an easement by implications is created.
- Easement **need not** be visible to be apparent

8 Factor Test Determining whether the Circumstances under which a conveyance of land is made **imply an easement or a profit**

- (1) Whether the claimant is the conveyor or the conveyee
- (2) The terms of the conveyance
- (3) The consideration given for it
- (4) Whether the claim is made against a simultaneous conveyee
- (5) The extent of necessity of the easement or the profit to the claimant
- (6) Whether reciprocal benefits result to the conveyor and the conveyee
- (7) The manner in which the land was used prior to its conveyance
- (8) Extent to which the manner of prior use was or might have been known to the parties

Elements Required for an **Implied Easement by Prior Existing Use**

- (1) Severance of title to land held in common ownership
- (2) An existing, apparent, and continuous use of 1 parcel for the benefit of another at the time of severance; and

- (3) Reasonable necessity for that use

Restatement Approach

- (1) Severance of title
- (2) An existing use of one parcel for the benefit of another
- (3) Reasonable grounds to expect that the conveyance would not terminate the right to continue the prior use

RULE→ If land may be used without an easement, but cannot be used without disproportionate effort and expense, an easement may still be implied in favor of either the grantor/grantee on the basis of necessity alone.

Easement by Necessity

Elements→**Strict Necessity**

- (1) Severance of title to land held in common ownership
- (2) Strict necessity for the easement at the time of severance

Restatement Approach→**Reasonable Necessity**

- Conveyance that would otherwise deprive the land of rights necessary to reasonable enjoyment of the land implies the creation of a servitude granting or reserving such rights unless the facts show the parties had a contrary intent.
- Necessity depends on the nature and location of the property and may change over time
- Land access will almost always be necessary, even when water access is available...

Berge v. State of Vermont

- **Middle Ground Approach**
- Draw distinction between mere inconvenience & necessity
- **RULE**
 - When as a result of a division of commonly owned land, one parcel is left entirely without access to a public road, the grantee of the landlocked parcel is entitled to a way of necessity over the remaining lands of the grantor or his successors in title

- Practical access to a public road – linchpin of easement by necessity doctrine...
- Duration – lasts as long as the necessity continues

2 Justifications for the Easement by Necessity

- (1) The implied intent of the parties; and
- (2) The public policy favoring the productive use of land

2 Elements for an Easement by Necessity

- (1) Severance of title to land held in common ownership; and
- (2) Strict necessity for the easement at the time of severance

Prescriptive Easement

- Elements (Similar to Adverse Possession)
 - (1) Open & Notorious
 - (2) Adverse & Hostile
 - (3) Continuous
 - (4) For the Statutory Period (Usually the same as AP)

O'Dell v. Stegall

- **Burden** is on the party claiming a prescriptive easement
- **RULE**
 - Prescriptive easement arises through adverse possession of another person's land
- **Their Elements:**
 - (1) Adverse use of another's land (observable actions and statements by the person claiming P.E.)
 - Wrongful use, made without the express/implied permission of the owner of the land
 - (2) Adverse use was continuous & uninterrupted for 10 years
 - (3) Adverse use was *actually* known to the owner of the land, or so open, notorious, and visible that a reasonable owner would have noticed,
 - (4) Reasonably identified starting and ending point, line, and width of the land that's being adversely used...

- Difference between AP and PE
 - AP claimant occupies or possesses the disputed land, whereas one seeking a PE makes some easement like limited use of the disputed land
- **Public Trust Doctrine**
 - Navigable waters and certain related lands belonging to the government as a trustee for the benefit of the public, so if they sell it to a private owner his title subject to the public's right to use the land for fishing, navigation, swimming, etc.

Easement by Estoppel

- Called an *irrevocable license*
 - No functional difference
- Elements:
 - (1) A landowner allows another to use his land, thus creating a **license**
 - (2) The licensee **relies in good faith** on the license, usually by making physical **improvements** or by incurring significant **costs**;
 - (3) The licensor **knows or reasonably should expect** such **reliance** will occur.
- Restatement Approach
 - If injustice can be avoided only by establishment of servitude, the owner or occupier of land is estopped to deny the existence of a servitude burdening the land when:
 - (1) The owner or occupier **permitted** another to use that land under circumstances in which it was reasonable to foresee that the user would substantially change position believing that the permission would not be revoked, and the user did substantially change position in a reasonable reliance on that belief

Kienzle v. Myers

- **RULE**
 - An easement by estoppel may be found when an owner of property misleads or causes another in any way to change the other's position to his or her prejudice...

- Where an owner of land, without objection, permits another to expend money in reliance upon a supposed easement, when in justice and equity the former ought to have disclaimed his conflicting rights, he is estopped to deny the easement.
 - **Don't need to mislead/misrepresent** – just have to cause them to change their position to that party's prejudice.

Negative Easements

- Entitles the dominant owner to prevent the servient owner from performing an act on the servient land
- Most common → **Conservation Easement**
 - Restricts development & use of the servient land in order to preserve open space, farm land, historical sites, or wild and undeveloped land

Terminating an Easement

- Nonuse doesn't constitute abandonment without words/conduct manifesting an intent to relinquish it
- May terminate from its own terms

Preseault v. United States

- **RULE**
 - **Restatement 504**
 - The usual way in which such an easement ends is by abandonment, which causes the easement to be extinguished by operation of law
- In order to establish 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

Prescription

- If the servient owner blocks the use of the easement in an open and notorious, adverse and hostile, and continuous manner for the prescriptive period, the easement ends

Other Means of Termination

- Condemnation
 - Condemnation of the servient land also terminates the easement (easement holder is entitled to compensation).
- Estoppel
 - 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
- Misuse
 - If the holder seriously misuses the easement, it may be ended through forfeiture
- Release
 - Easement holder may release the easement to the servient owner by executing and delivering a writing that complies with Statute of Frauds

Land Use Restrictions

Created by process authorized by statute

Real Covenant

- Allowed the benefits and burdens of a restriction to "run with the land" from the original parties and to their successive owners
- Traditional Approach
 - A promise concerning the use of land that benefits and burdens both the original parties to the promise and their successors
 - Burden
 - Duty to perform the promise
 - Benefit
 - Right to enforce the promise

6 Elements must be proven for the *burden* of the promise to bind the promisor's successors; **but only 4 are required** for the *benefit* to run to the promisee's successors

- (1) Compliance with the **Statute of Frauds**
- (2) **Intent to Bind Successors**
 - Needed intent is found in the express language of the document – Original parties intend it...
- (3) **Touch and Concern**
 - It must relate to the enjoyment, occupation, or use of the property
- (4) **Vertical Privity**
 - Concerns the relationship between an original party to the promise and his successor
 - Exists only if the successor receives the entire estate that the original party had
- (5) **Notice**
 - Successor must have notice of the covenant
 - Actual
 - Record
 - Inquiry
- (6) **Horizontal Privity**
 - Relationship between the original parties to the promise
 - Mutual interests
 - Original parties have mutual interests in the affected land
 - Successive Interests
 - Grantor-grantee relationship between the original parties, so that they have successive interests in the affected land
 - No requirement
 - Modern trend

Deep Water Brewing, LLC v. Fairway Resources Ltd.

- Applying the Elements of Real Covenants

Equitable Servitudes

- Easier to create than a Real Covenant
- Horizontal and Vertical Privity is NOT necessary

- Difference between Real Covenant
 - **Real Covenant → Damages**
 - **Equitable Servitude → Injunction**
 - Only separate as an accident of history
- Restatement Approach – combines the two into one doctrine – The Covenant that Runs at Law
 - Servitude Arises when...
 - (1) The owner of the property to be burdened intends to create a servitude
 - (2) He enters into a contract or conveyance to this effect that satisfies the Statute of Frauds; and
 - (3) The servitude is not arbitrary, unconstitutional, unconscionable, or violative of certain public policies
 - Cannot unreasonably restrain alienation
 - No more requirement of touch & concern and Horizontal Privity
 - Vertical Privity only required for an affirmative covenant, not a negative covenant
 - Lack of notice is *a defense* to enforcement – but not required for the servitude to be valid...

	Equitable Servitude Requirements	
	<i>For the burden to run</i>	<i>For the benefit to run</i>
Statute of Frauds	Yes, or common plan	Yes, or common plan
Intent to bind successors	Yes	Yes
Touch and Concern	Yes	Yes
Notice	Yes	No
Horizontal Privity	No	No
Vertical Privity	No	No

Tulk v. Moxhay

- **RULE**
 - Since a covenant is a contract between the vendor and the vendee, it may be enforced against a subsequent purchaser who has notice of the contractual obligation of his vendor, even though it does not run with the land.
 - Equity is attached to the property by the owner – no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased.
- **Creating an Equitable Servitude**
 - Easier to create than a real covenant
- **Common Plan Exception:**
 - ES – recognized as a matter of equity
 - Where a developer has 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...
 - Factors to Consider – Does a common plan exist?
 - Sales Literature, Statements by the Developer, Percentage of Deeds containing Restrictions

Common Interest Communities

Planned Residential Development

- (a) Where all properties are subject to comprehensive private land use restrictions and
- (b) Which is regulated by a homeowners association

Created by a declaration -

(1) Homeowners Association

- Establishes the association that will administer the CIC
- Specifies the association's powers
- Provides for an elected board of directors or similar group

(2) CC&Rs

- Imposes CC&Rs or similar restrictions on all land within the CIC
 - May be enforced as real covenants or equitable servitudes

(3) Assessments

- Requires all unit owners to pay monetary assessments which finance the operation of the association

(4) Ownership Rights

- Generally provides that each unit owner holds fee simple absolute in his particular unit
- An undivided interest in *common area* of the CIC (swimming pool, tennis courts)
- Membership interest in the association

Enforcing Restrictions:

- **Three Defenses**
 - (1) Unreasonableness
 - (2) Abandonment
 - (3) Changed Conditions
- Restriction can be terminated by condemnation, estoppel, merger, prescription, or release

Unreasonableness

- **2 Categories of Use Restrictions:**
 - (1) Use restrictions set forth in the Declaration
 - (2) Rules promulgated by the Board/Association
 - Subject to a reasonableness test
- Restatement Test
 - A servitude is valid unless it is “illegal or unconstitutional or violates public policy”
 - A servitude violates public policy if it
 - (1) 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) Is unconscionable

Nahrstedt v. Lakeside Village Condominium

- Interpreting a statute – recorded pet restriction prohibiting cats and dogs but not other pets – NOT arbitrary – **rationally related** to health, sanitation, and noise concerns legitimately held...
- Presumption of Validity – to all recorded use restrictions
- RULE
 - When a restriction **bears no relationship** to the land it burdens, or violates a fundamental policy inuring to the public at large, the resulting harm will always be disproportionate to any benefit
 - Equity will not enforce any restrictive covenant that violates public policy
 - Restriction is **presumed reasonable** and will be enforced uniformly against all residents of the common interest development unless:
 - The restriction is **arbitrary**
 - Imposes **burdens** on the land it affects that substantially outweigh the restriction's **benefits** to the development's residents, or
 - Violates a **fundamental public policy**

Specific Restrictions...

- **Discrimination:** Unconstitutional and violates the FHA
- **Sex Offenders:** Upheld ban on sex offenders but expressed concern
- **Leases/Sales:** CC&R's restricting/prohibiting leasing usually enforced

Abandonment

Fink v. Miller

- Property owners who have purchased land in a subdivision, subject to a recorded set of restrictive covenants and conditions, have the right to enforce such restrictions through equitable relief against property owners who don't comply
 - BUT
 - Property owners may lose the right if the specific covenant they seek to enforce has been abandoned, rendering it unenforceable
- Test to Determine Abandonment
 - Requires the party opposing enforcement to prove that existing "violations are so great as to lead the mind of the average person to

reasonably conclude that the restriction in question has been abandoned.”

- Test is met when...
 - The average person, upon inspection of a subdivision and knowing of a certain restriction, will readily observe sufficient violations so that he or she will logically infer that the property owners neither adhere to nor enforce the restriction
 - Considerations:
 - The “number, nature, and severity of the then existing violations.”
 - If still in doubt:
 - Any prior acts of enforcement of the restriction
 - Whether it is still possible to realize to a substantial degree the benefits intended through the covenant
- Abandonment of one covenant doesn’t suggest abandonment of another similar covenant in the agreement

Changed Conditions

- General Principle→Don’t burden the land with permanent restrictions which are no longer of any advantage
- Commonly asserted in cases where a vacant lot outside the subdivision is restricted to residential use but is no longer suitable for this purpose
- *Vernon Township Volunteer Fire Department v. Connor*
 - **RULE**→Where changed/alterd conditions in a neighborhood render the strict adherence to the terms of a restrictive covenant **unless** to the dominant lots, the court will refrain from enforcing such restrictions
 - Here – 3 other liquor serving establishments located outside the subdivision doesn’t warrant a finding of changed circumstances – purpose still served.
 - *Neighborhood* as a **relative term**
 - Only immediate neighborhood
 - Consider restricted tract & adjoining tract

- Changes in immediate neighborhood doesn't automatically invalidate a RC, but they are relevant

Judicial Review of Board Decisions/Rules

- Mostly uphold rules as long as they are **reasonable** [less deferential standard]
 - More deferential if homeowner can vote...
- **Governing the Development**
 - Typical CIC declaration provides that the association will
 - (1) Maintain the common area of the CIC
 - (2) Enforce the CC&Rs
 - (3) Adopt and enforce rules to supplement the CC&Rs
 - (4) Collect assessments from the unit owners; and
 - (5) Take such other actions as are necessary to administer the CIC
- Some states disagree about **scope of judicial review** when homeowner challenges a board decision
 - **Some States → Business Judgment Rule**
 - Association is not liable if the board made the decision in good faith and rationally believed that it was appropriate
 - **Most States → Reasonableness Standard**
 - Restatement
 - Requires an association to “act reasonably in the exercise of its discretionary powers”

Schaefer v. Eastman Community Association

- Assessing the validity of an action taken by a board of directors -
- **RULE**
 - When a court is called upon to assess the validity of an action taken by a board of directors, it first determines...
 - (1) Whether the board acted within its scope of authority
 - Acts beyond scope=*ultra vires*
 - Take a broad view of their powers
 - **Rule→** As long as the action doesn't contravene either an express provision of the declaration or a right reasonably

inferable therefrom, it will be found valid, within the scope of the board's authority

- (2) Whether the action reflects reasoned or arbitrary and capricious decision making
 - Reasonableness Standard

Fountain Valley Chateau Blanc Homeowners Assoc. v. Department of Veterans Affairs

- Can't dictate how much clutter to have
- No good faith belief in a danger
- Didn't act reasonably

Nuisance

- Private Nuisance – A non-trespassory invasion of another's interest in the use and enjoyment of the land

Restatement of Torts Definition

- Private Nuisance
 - "A non-trespassory invasion of another's interest in the use and enjoyment of land"

Plaintiff must establish that the D's conduct resulted in an

- Intentional
 - D'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
- Non-Trespassory
 - Interference must not involve any physical entry onto the land of another
 - Noise
 - Vibration
 - Light
 - odors
- Unreasonable
 - Gravity of the harm test
 - D's conduct is unreasonable if it causes substantial harm, regardless of the social utility

- Restatement Standard
 - Conduct is unreasonable if the gravity of the harm outweighs the utility of the conduct
- Some use multi-factor tests
- Substantial Interference
 - Real and appreciable invasion of the P's interests
- Use and enjoyment of land
 - D's conduct must interfere with the use and enjoyment of land

Boomer v. Atlantic Cement Co., Inc.

- RULE
 - When there is a large disparity between the economic consequences of a nuisance and the cost of injunction – look at **alternative measures:**
 - Injunction, postpone effect & wait for technological advances
 - Grant injunction, conditioned on payment of permanent damages to compensate them for economic loss
- RULE
 - **Permanent damages** are allowed where the loss recoverable would obviously be small as compared with the cost of removal of the nuisance

Thomsen v. Greve

- RULE
 - One subject to liability for a private nuisance, if, but only if, his conduct is a **legal cause** of an invasion of another's interest in the private use and enjoyment of land, and the invasion is...**intentional** and **unreasonable**
 - Unreasonable Invasion – the gravity of the harm outweighs the utility of the actor's conduct
- Gravity of Harm
 - (1) 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 invaded

- (4) The suitability of the particular use or enjoyment invaded to the character of the locality; and
- (5) The burden on the person harmed of avoiding the harm
- Utility of Conduct
 - (1) The social value that the law attaches to the primary purpose of the conduct
 - (2) Suitability of the conduct to the character of the locality
 - (3) Impracticability of preventing or avoiding the invasion

Leasing Real Property

- Viewed as a hybrid governed by both **property & contract law**
- **Immutable Rules:** supersede any contrary provisions in the lease to protect tenants
- **Default Rules:** fill in gaps that the parties didn't address in the lease...

Creating the Tenancy

Selecting a Tenant

- Landlord has broad rights to exclude others – but most federal and state statutes now **prohibit discrimination**
- Federal Fair Housing Act (FHA)
 - Can't refuse to sell/rent/negotiate sale because of **race, color, religion, sex, familial status, or national origin**
 - Can't **advertise** indicating a preference or limitation based on these factors
 - Can't discriminate based on **handicap** or fail to make **reasonable accommodations** when necessary

Neithamer v. Brenneman Property Services, Inc.

- RULE
 - When a P offers no direct evidence of discrimination, his claim of discrimination under the FHA is to be examined under the burden-shifting framework of *McDonnell Douglas Corp. v. Green*
 - **BURDEN-SHIFTING FRAMEWORK**
 - P must establish a prima facie case of discrimination by showing

- (1) That he is a member of a protected class and D's knew or suspected that he was
 - (2) That he applied for and was qualified to rent the property in question
 - (3) That D's rejected his application; and
 - (4) That the property remained available thereafter
- When P establishes the prima facie case →
 - Burden shifts to D's to articulate some legitimate non-discriminatory reason for their rejection of P's application
- If D satisfies this burden, P must show either that D's reasons are pretext or that material facts are disputed
- NOTE – P's can sometimes establish a prima facie case with statistics that show that D's conduct has a **disparate impact** on a group of people in a protected class.

FHA Exemptions

- (1) Rooms or units in dwellings containing living quarters occupied by **no more than 4 families** living independently of each other if the owner occupies one of such living quarters as his residence
- (2) Any single-family house sold or rented by an owner if he owns **less than 3 houses and doesn't use a real estate broker** or agent in the sale or rental

Civil Rights Act of 1866

- All citizens of the US shall have the same right as is enjoyed by white citizens to inherit, purchase, lease, sell, hold, and convey real and personal property

State Statutes can provide greater protection

Handicap

FHA defines a "handicap" as

- (1) A physical or mental impairment which substantially limits one or more of the person's major life activities,
- (2) A record of having such an impairment, or

- (3) Being regarded as having such an impairment, but...does not include current, illegal use of or addiction to a controlled substance

Selecting the Estate

- Lease – transfers the exclusive right of possession to the tenant
 - License – minimal rights to use the land for some specific purpose
- **4 Non-Freehold Estates**
 - Term of Years Tenancy
 - Periodic Tenancy
 - Tenancy at Will
 - Tenancy at Sufferance
- Can't create new kinds of non-freehold estates
 - **Kajo Church Square, Inc. v. Walker**
 - Tenancy at will – leasehold for life is not a thing...
- Interpretation
 - When terms of a deed plainly and clearly disclose the intention of the parties – the intention of the parties must be ascertained by the court as a matter of law from the **language used in the writing**
 - Cannot use extrinsic evidence

Term of Years Tenancy

- Fixed duration agreed upon in advance
- Once the term ends, the tenant's possessory right automatically expires, and the landlord may retake possession of the premises

Periodic Tenancy

- Automatically renewed for successive periods unless the landlord or tenant terminates the tenancy by giving advance notice
- A notice must be given 6 months in advance to terminate a year-to-year lease

Tenancy at Will

- No fixed ending point
- Continues “only so long as both the landlord and the tenant desire”
- Arises by implication, without an express agreement
- Common Law

- Either the landlord or the tenant could end the tenancy without any advance notice to the other
- Today
 - Most states require advance notice to end the tenancy
- Tenancy automatically terminates 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
 - Have to have been rightfully in possession at some point, then become a **holdover tenant**
- Arises from the occupant's improper conduct, not from an agreement
- Common law → 2 options
 - (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 2nd option
- Can arise by implication (NY Squatters)

Fifth Non-Freehold Estate

- A residential landlord may evict a periodic tenant only for good cause
 - Failure to pay rent
 - Engaging in criminal activity
 - Harassing other tenants

Negotiating the Lease

- 3 Aspects
 - (1) SOF – must be in writing + have key terms + be signed by part against which enforcement is sought
 - (2) Standard forms – usually only negotiable key terms (rent & duration)
 - (3) Rent Control – some local ordinances limit the rent a landlord can charge

Delivering Possession

- Have to deliver **legal** right to possession everywhere...

Keydata Corp. v. United States

- **RULE**
 - Landlord has no obligation to secure his tenant in possession in the absence of an express undertaking
- **American RULE**
 - Landlord merely covenants that possession will not be withheld by himself or by one having paramount title
 - Remedy→Incoming tenant can sue the holdover tenant to recover possession + damages
 - No claim against landlord
- **English RULE**
 - Requires that (when the lease is silent on this point) the landlord deliver **actual possession** of the premises at the beginning of the term
 - If the lessee can't take possession because of a holdover tenant, or some other obstructing 3rd person, the landlord is in breach of his obligation
 - Remedy – Tenant can terminate lease and sue landlord for damages, or affirm the lease and collect damages once the premises are vacant...
- Restatement → Reasons in Support of English Rule
 - (1) Landlord knows the status of the possession of the leased property better than the tenant before they are entitled to be there
 - (2) Landlord knows better whether a person in possession of the leased property prior to the date their entitled to be there is properly or improperly on the leased property
 - (3) Landlord is only 1 of the 2 who can evict a person before the tenant is entitled to be there
 - (4) Landlord is the only one who had an opportunity to get assurance that the prior tenant wouldn't hold over (esp. where the date the new tenants are entitled to move in is the day the old tenants have to leave)
 - (5) Tenant will have received less than he bargained for if he must go forward with the lease and bear the cost of legal proceedings to clear the way for his entry to the property

- Here – chooses **English Rule** – made common sense
 - Disregarded the state rule in favor of the English Rule as appropriate standard for government lease
 - Can do that because the US was the D

Condition of the Premises

Substandard Housing

- Responses:
 - Development of Zoning Ordinances in 1920's
 - Adoption of housing codes which require that each dwelling meet certain minimum legal standards
 - Market failed because landlords insisted on standard form leases, refused to bargain for better terms
 - Regulation failed because tenants were scared to report for fear of a rent increase/eviction, penalty was just a small fine
 - Modern Trend → Higher Penalties

Constructive Eviction

- Special protection for tenant in defective leased premises
- Common Law Definition
 - **Wrongful conduct** by the landlord that **substantially interfered** with the tenant's beneficial use and enjoyment of leased premises was deemed a CE
 - So substantially interferes that it becomes the functional equivalent of actual eviction
 - Tenant could vacate the premises and end the lease
 - **Wrongful Conduct**= When the landlord:
 - (1) Fails to perform an obligation in the lease
 - (2) Fails to adequately maintain/control the common area
 - (3) Breaches a statutory duty owed to the tenant
 - (4) Fails to perform promised repairs
 - (5) Allows nuisance-like behavior
- *Procedural Steps*
 - Notify the landlord of the problem
 - Give LL a reasonable period of time to fix the problem
 - Vacate premises (or remain & recover damages)

Fidelity Mutual Life Insurance Co. v. Kaminsky

- P has to show
 - **(1)** D intended that he no longer enjoy the premises, which intent the trier of fact could infer from the circumstances
 - **(2)** D, or those acting for D or with its permission, committed a material act or omission which substantially interfered with the use and enjoyment of the premises for their leased purpose
 - **(3)** D's act or omission permanently deprived P of the use and enjoyment of the premises
 - **(4)** P abandoned the premises within a reasonably period of time after the act or omission
- Omission can be sufficient to establish a CE (even if the actual actions are by a 3rd party)
- Rule that landlord's aren't responsible for 3rd party actions **only** applies when the LL doesn't permit the 3rd party to act
- Question of degree

JMB Properties Urban Co. v. Paolucci

- CE → results from a landlord's failure to keep the premises in a tenable condition
- Untenantability
 - Exists when the interference with occupancy is of such a nature that the property cannot be used for the purpose for which it was rented
- Can waive claim of CE if you wait an **unreasonable length of time** after the rise of the untenable condition
 - Not required to vacate immediately – but is entitled to a reasonable time to do so...
- Factors in determining reasonableness:
 - Length of delay
 - Time required to find new location
 - Reason for staying
 - New lease
 - Opportunity to leave

Implied Warranty of Habitability

- At CL – lease was a **conveyance** and no implied warranty...
- Doctrine to protect residential tenants from defecting housing conditions
- 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 tenancy
- Uniform Residential Landlord/Tenant Act §2.104
 - Requires the LL to do whatever is necessary to put and keep the premises in a **fit and habitable condition** and imposes specific duties as well...
- *Procedural Steps*
 - Notify LL about defects
 - Allow reasonable time for LL to make repairs
 - Not required to vacate premises – can actually stay and withhold rent

Defining Habitability

- Building and housing codes
- Other states endorse more general tests
 - “Clean, safe, and fit for human habitation”

Wade v. Jobe

- Rejected caveat emptor & accepts warranty of habitability
- General standards that the landlord is required to satisfy
 - Maintain “bare living requirements”
 - Premises fit for human occupation
 - Failure to supply heat or hot water breaches the warranty
 - Minor water leaks/wall cracks don’t breach the warranty
- *Determination of whether a dwelling is habitable depends on the **individual facts** of each case*
- Substantial Compliance with housing code standards – general fulfillment of LL duty
 - Code violation can be a sufficient, **but** not necessary element of breach

Teller v. McCoy Dissent

- LL can’t make substantial renovations without passing on the costs to the tenant, and the tenant may find that he has been given more luxury than he can afford...

Breach of Implied Warranty

- Once the landlord has breached his duty to provide habitable conditions, there are **2 ways the tenant can treat the duty to pay rent:**
 - (1) Continue to pay rent → May bring affirmative action to establish breach and receive reimbursement
 - (2) Withhold the rent → Motivates the landlord to repair the premises due to deprivation of rent during default
- **Specific vs. General Damages**
 - Special Damages → When, as a foreseeable result of the LL's breach, the tenant suffers personal injury, property damages, relocation expenses, or other similar injuries
 - General Damages → Recoverable in the form of rent abatement, reimbursement of tenant, more difficult to calculate
- **Determining Amount of Rent Abatement Tenant is Owed:**
 - Best Option → **Percentage Diminution Approach**
 - Places more discretion in the court
 - Tenant recovery reflects % by which the tenant's use & enjoyment of the premises has been reduced by the uninhabitable condition

Remedies

- Traditional Property Law
 - Lessee's covenant to pay rent was viewed as independent of any covenants on the part of the landlord
- Prevailing Contemporary View
 - Tenant's obligation to pay rent is conditioned upon the landlord's fulfilling his part of the bargain
 - Once the landlord has breached his duty to provide habitable conditions
 - (1) Continue to pay rent
 - (2) Withhold the rent
 - Gives incentive to repair
 - (3) Repair and Deduct
 - Withhold rent and use it to repair defects
 - (4) Sue for damages
 - Can remain in possession or vacate

Transferring the Tenant's Interest

- Landlord and tenant are both entitled to transfer their interests to third parties
- **Assignment or Sublease**
 - If **sublease** → No Privity of estate between the new tenant and the LL
 - Old tenant liable for rent
 - 2 Separate Relationships
 - If **assignment** → Privity of estate between new tenant & LL
 - New tenant liable for rent
 - Triangular Relationship

Objective Test → Majority Approach – Common Law Approach

- Did the tenant transfer his right of possession for all of the remaining lease term (assignment) or not (sublease)?
- If they transfer their estate for its entire term, regardless of its form or the parties' intention → **Assignment**
 - Usually still counts if they only hold a contingent right of re-entry
- If one day less than their full interest → **Sublease**

Subjective Test → Modern Rule

- Distinction between assignment and sublease turns on the intent of the parties
 - *Intention of the instrument alone – look at language of the instrument read in light of the surrounding circumstances*
 - Could have sublease for the entire remaining term of the original lease

Ernst v. Conditt

- **RULE**
 - Assignment → Conveys the whole term
 - Leaving no interest nor reversionary interest in the grantor or assignor
 - Sublease → 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

- The use of the words “*sublet*” and “*subletting*” isn’t conclusive of the construction to be placed on the instrument in this case; it plainly appears that under **no context of the instrument or the facts/circumstances surrounding the execution of it did the parties intend an assignment rather than a sublease**

Landlord’s Consent to a Transfer

- 3 Governing Standards
 - (1) Sole Discretion Clause: L may refuse consent for any reason whatsoever in his sole discretion
 - *MAJORITY RULE*
 - (2) Reasonableness Clause Lease might provide tat L may refuse consent only on a commercially reasonable basis
 - *Based in Contract Law*
 - (3) No Standard in Lease: Silent Consent Clause

Silent Consent Clause

Kendall v. Ernest Pestana, Inc.

- RULE (Minority)
 - 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
- Majority Rule
 - 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
 - Sole Discretion Clause
- Lease as a contract
 - Good faith and fair dealing inherent in every contract
- If clause is silent as to the standards to apply – **use reasonableness clause**

- Determination whether a lessor's refusal to consent was reasonable is a question of fact
 - 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
 - Nature of the occupancy
- Denying on the basis of personal taste, convenience or sensibility *isn't* commercial reasonable
- Also can't deny consent to charge higher rent

Ending the Tenancy

Abandonment

- When the tenant vacates the lease premises **without justification** and without any present intention of returning, and he defaults in payment of rent
- 3 Options
 - (1) Sue for All Rent: Keep premises vacant until term expires & sue for accrued rent
 - (2) Terminate the Lease: Treat it as an implied offer of surrender and terminate lease
 - (3) Mitigate Damages & Sue for Rent: Relet the premises, retain that rent and sue T for the balance

Sommers v. Kridel

- RULE
 - A landlord has a duty to mitigate damages where he seeks to recover rents due from a defaulting tenant
 - **Have to make reasonable effort to relet the apartment- landlord has Burden of Proof to show that he did so**
 - No standard formula for measuring satisfactory efforts – case by case basis
 - Looking at leases as **contracts** – not a conveyance of property

Retaliatory Eviction

- Landlord was *traditionally free* to terminate a periodic tenancy for any reason (or no reason at all) – but law is increasingly restricting that right
 - Ex. FHA requirement for eviction

Defenses to Eviction

- **If landlord is entitled to evict:**
 - **(1) Use Self Help** – Retake possession by physically entering the premises & cause T to leave – have to use **reasonable amount** of force
 - *Berg v. Wiley*
 - The only lawful means to dispossess a tenant who has not abandoned nor voluntarily surrendered, but who claims possession and rights adverse to those claimed by landlord, is by resort to judicial process
 - **Prohibited Self Help (National Trend)**
 - Lockout – not peaceful manner
 - Quick and cheap but could lead to violence
 - **(2) Sue the Tenant** – L could sue T and secure a judgment ordering T's eviction and have the judgment enforced by a law enforcement order
 - Takes longer, more expensive (especially if contested)
- Landlord needs to give **notice in writing + one of the following reasons:**
 - Neglect/refusal to pay rent
 - Substantial damage to the premises by the T
 - Failure of the T to comply with a material term of the lease
 - Behavior of the T which adversely affects the health/safety of the other tenants or the landlord/his representatives
 - Other good cause
 - *AIMCO*
 - No good cause defense
 - Expiration of a lease is not in and of itself “**good cause**”
 - Also not a good business or economic reason because either way they need a T paying rent
 - Basically creates a leasehold for life

Hillview Assoc. v. Bloomquist

- Landlords may not engage in retaliatory eviction
- Retaliation Defense
 - Affirmative Defense
 - Statutory – differs in scope by state
- Burden-Shifting Approach
 - (1) Tenants show substantial evidence of retaliatory termination
 - (2) LL shows substantial evidence of a **non-retaliatory** reason for termination

Selling Real Property

- Concerns the right to transfer
- Role of attorneys in real property sales has evolved over time...
 - Still the main professional involved in the sale of commercial property
- **Typical sales transaction is governed by state common law principles, which vary among jurisdictions.**

Purchase Contract

- Parties negotiate and sign a written purchase contract and prepare to consummate the transaction.
- Standard, preprinted form supplied by a real estate broker
- Sets forth...
 - Price, method of payment, time for performance, various conditions, other terms...
- During this stage
 - (1) Seller's title is examined
 - (2) Condition of the property is evaluated
 - (3) Buyer obtains financing from a bank or other lender
 - (4) An escrow is opened to consummate the transaction
 - (5) Various documents are prepared – deed, mortgage, promissory note, escrow instructions, etc.
- 4 most common legal problems that arise during this period
 - (1) Statute of Frauds
 - (2) Marketable Title

- (3) Equitable Conversion
- (4) Seller's Duty to Disclose
- Statute of Frauds
 - General rule – oral agreement for the sale of an interest in real property is not enforceable.
 - **Every state has adopted SOF – requires that a contract meet...**
 - Essential Terms
 - Identity of the parties, price, property description, etc.
 - Must be set forth in writing
 - Writing
 - Formal contract or an informal memorandum
 - Must be signed by the party sought to be bound
 - Failure to comply with SOF doesn't make the contract void, just unenforceable...
 - Always applies to an instrument used to transfer an interest in real property
- **Hickey v. Green**
 - Present rule applicable in most jurisdictions – R2d Contracts §129 (1981)
 - *A contract for the transfer of an interest in land may be specifically enforced notwithstanding failure to comply with the SOF if it is established that the party seeking enforcement, in reasonable reliance on the contract and on the continuing assent of the party against whom enforcement is sought, has so changed his position that injustice can be avoided only by specific enforcement.*
 - Here – extent of Hickey's injury based on their reliance on Mrs. Green's promise and thus new obligation to convey their home to a purchaser
- *Describing the Property*
 - (1) Government Survey
 - Public Land Survey System
 - Principal Medium & Base Line, Township and Range Designation
 - (2) Metes and Bounds

- Describes using distances and directions & visible topographic features
 - Problem – local landmarks may change over time
- (3) Subdivision Map
- **Major exception to SOF – Part Performance**
 - 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
 - (3) Makes improvements to the property
 - Would only perform these actions only if a contract existed – therefore substitute for writing...
- **Another exception → Equitable Estoppel**
 - Oral contract may be enforced if
 - (1) One party acts to his detriment in reasonable reliance on another's oral promise
 - (2) Serious injury would result if enforcement is refused
- SOF in the Computer Era
 - Uniform Electronic Transactions Act (UETA)
 - Electronic document can be used to satisfy the SOF.
 - E-Sign
 - *Therefore a contract for the sale of real estate can be valid even though it is in electronic form with an e-signature.*
- Other reasons that require real property to be in writing
 - (1) Written agreements more certain than oral ones
 - (2) Not as open to misinterpretation
 - (3) Only written ones can take advantage of certain other statutes/legal rules (PE Rule for example)
 - (4) Discipline of a writing requires the parties to think about their agreement in more detail than they might otherwise
 - (5) Ceremony of writing encourages the parties to take their undertaking seriously, thus increasing the likelihood of voluntary performance

Marketable Title

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.

- DEFINITION – Title reasonable free from doubt as to its validity.
- Buyer should be able to purchase property without fear or litigation about her title
- Doesn't need to be perfect to be marketable.
- **If a reasonable/prudent purchaser would pay fair market value for the property, then the title is considered to be marketable.**
- Title is unmarketable if...
 - (1) Seller's property interest is less than one she purports to sell
 - (2) Seller's title is subject to an encumbrance
 - (3) There is reasonable doubt about either (1) or (2)
- **Lohmeyer v. Bower (18 inches off)**
 - **RULE** - *Municipal restrictions of such character, existing at the time of execution of a contract for the sale of real estate, are not encumbrances or burdens on title as may be availed of by a vendee to avoid his agreement to purchase on the ground they render his title unmerchantable.*
 - Restrictions in this case are **directly contrary to the rule and therefore constitute encumbrances rendering the title to land unmerchantable...**
 - To render the title to real estate unmarketable, the defect of which the purchaser complains must be of a *substantial character* and one from which he may suffer *injury*.
 - Facts must be known at the time which fairly raise a reasonable doubt as to the title
 - **Therefore in this case – P is exposed to the hazard of litigation to make such title doubtful and unmarketable.**
- Statutes, ordinances, and other public restrictions DO NOT make title unmarketable, even if they severely restrict the use of the property.
- Marketable title is a default standard
 - Buyer/seller may agree to any title standard that they wish
 - But if the contract does not specify a standard → the law requires marketable title
- **Physical Condition of the Property**

- Marketable title concerns the *title* to the property, not the *physical condition* of that property.
- Buyer's Knowledge – depends on the jurisdiction
- Insurable Title (one title insurance company would be willing to insure) vs. Record Title (Title that appears in the public land records)
- **Technically not required UNTIL closing.**
 - Can cure defects before closing
 - If a title problem is discovered shortly before closing, the seller has reasonable time to cure it unless the contract stipulate that *time is of the essence*.
 - Time is of the essence – failure to act within the required time is a breach.

Equitable Conversion

- During the period between the contract signing and the closing (known as the executory period) the property might be damaged or destroyed. The contract may contain a provision that specifies who bears this risk.
 - Absent such a provision, many states place the risk on the buyer through the doctrine of equitable conversion.
- *Buyer is seen 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. Thus, the buyer is still obligated to pay the purchase price even if the property is destroyed.*
- **Brush Grocery Kart, Inc. v. Sure Fine Market, Inc. (Hailstorm Damage)**
 - Changes in the rights/liabilities that occur upon the making of the contract result from the **equitable right to specific performance**
 - **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/recover any payment he had already made.**
- **Inheritance**
 - Under the doctrine of EC – the contract is still valid it can be enforced by the heirs and devisees of either party...

Duty to Disclose

Under the common law doctrine of *caveat emptor* – the seller for real property had no duty to disclose defects to the buyer.

- Buyer had the complete responsibility to assess the condition of the premises
- Seller liable only if he
 - (a) Affirmatively misrepresented the condition of the property
 - (b) Actively concealed its defects
 - (c) Owed a fiduciary duty to the buyer

Today this approach lingers in only a few states.

- **In MOST jurisdictions the seller of residential real property is obligation 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 v. Ackley

- ***A condition that impairs the value of property, known to the seller and left undisclosed to the buyer can constitute a basis for rescission of the contract.***
- Material Impairment
- Dissent → Don't disregard Caveat Emptor
 - **Mere silence does not amount to a concealment that is actionable as a fraud**

Statutory Reforms

- Statutes in many jurisdictions require the seller of residential property to provide a written disclosure statement to the buyer.

As Is Clauses

Buyer's Duty to Disclose

- Prospective buyer has no duty to disclose facts which materially affect the value of the property

Implied Warranty of Quality

- Exception to CE
 - Developer of newly constructed residential property impliedly warrants that the property is fit for its intended use.

Strawn v. Canuso (Toxic Landfill)

- Offsite v. Onsite
- **Principal factors – duty to disclose**
 - Difference in bargaining power between the professional seller of residential real estate and the purchaser of such housing
 - Difference in access to information between the seller and buyer
- Must materially affect the value of the property
 - **Objectively reasonable and informed buyer would deem material to the transaction in the sense that the conditions substantially affect the value/desirability of the property**
- Sellers/brokers DO NOT have the duty to investigate or disclose transient social conditions in the community that arguably affect the value of the property

Closing

- Contract is fully performed at the closing; the buyer pays the purchase price, the lender advances the loan funds, and the seller transfer title.

The Deed

- A deed is only effective when it is delivered.
- Delivery varies from state to state.
 - In general – grantor must manifest an intention to immediately transfer title to the grantee.
- Delivery as Intent
 - Delivery is essential to make a deed operative, but no particular ceremony is necessary. Intention is the controlling element.
 - Physical delivery not required.
 - Delivery presumed if the deed is recorded.
- **Acceptance**
 - A deed is effective only if it is delivered AND accepted. Usually acceptance is presumed even if the grantee is unaware of the gift.
 - But a grantee might refuse to accept a deed.

Rosengrant v. Rosengrant (Title to Nephew in Bank)

- It is the grantor's intent at the time the deed is delivered which is of primary and controlling importance.
 - Function of the court to weight this evidence

- *Here - employing the deed as if it were a will.*
- A valid in praesenti conveyance requires two things
 - (1) Actual or constructive delivery of the deed to the grantee or to a third party
 - (2) An intention by the grantor to divest himself of the conveyed itself

Vasquez v. Vasquez (Lawyer & Quit-Claim Deed)

- *Question is whether the grantor part with all dominion/control over the instrument at the time she delivered it to the third person with the intent that it take effect as a conveyance at the very time of delivery*
- Possession not determinative
- When a grantor delivers a deed to a third person without a reservation of a right to recall it, and instructs the third person to deliver it to the grantee on the grantor's death, he thereby makes an effective delivery as a matter of law.

Misc.

- Death Escrow – can be effective delivery if the grantor is unable to retrieve the deed.
- **Beneficiary Deed**
 - Several states have authorized a novel type of deed – beneficiary deed (also called the transfer on death deed).
 - 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.
- **Revocable Deeds**
 - Deed – expressly providing one can revoke the grant at any time in the future
 - Valid in most jurisdictions

Mortgage

Promissory Note: Contract by which the borrower promises to repay the loan on certain terms/conditions

- To minimize the risk of nonpayment, the lender will require security for the loan in the form of a mortgage or a similar instrument.

Mortgage gives the lender the right to use a special remedy if the borrower default

- *Lender may sell the property and use the sales proceeds to pay off the loan*
 - Foreclosure

- Borrower – Mortgagor
- Lender – Mortgagee
- Collect remaining amounts after sales proceeds by recovering a *deficiency judgment*
- Common law mortgage was viewed as a transfer of title from the mortgagor to the mortgagee.
 - Mortgagor remained in possession of the property, but the mortgagee held title until the loan was repaid.

Title Theory v. Lien Theory

- Lien Theory
 - Mortgage is seen as conveying only a security interest – which gives the mortgagee the right to foreclose on the property and not as the transfer of title.
 - Thus both the title and possession remains with the mortgagor until and unless foreclosure occurs.

Wansley v. First National Bank of Vicksburg (Farmers/Crops)

- Weird situation with the trustee...
- Before we will respect them for deficiency purposes, terms of a foreclosure sale must be commercially reasonable
 - Grossly inadequate to shock the conscience of the Court
- **If the secured creditor is authorized to foreclose by power of sale, after the debtor's default and upon compliance with the deed of trust or other instrument, the secured creditor may sell any or all of the real estate that is subject to the security interest in its then condition or after any reasonable rehabilitation or preparation for sale.**
 - Every aspect of sale, including the method, advertising, time, place and terms, must be commercially reasonable.

Mortgage vs. Deed of Trust

- Mortgage – 2 Parties
- DOT – 3 Parties

Traditionally – mortgagee who wanted to collect an unpaid loan would use *judicial foreclosure*

- Today most states allow *non-judicial foreclosure* if the mortgage expressly provides for a “power of sale”

- Mortgagee forecloses on property himself, conducting a sale without any judicial involvement

Foreclosure Process

- Judicial Foreclosure is a specialized type of lawsuit.
 - Ends with a judgment authorizing foreclosure
- Non-Judicial Foreclosure
 - Notifies mortgagor that the loan is in default and allows them an opportunity to pay the debt
 - Loan not repaid within a set time – mortgage is entitled to hold a foreclosure sale
- Public auction
 - If the sale price is more than the loan balance then the surplus is distributed first to any junior lienholders and then to the mortgagor.
 - If less – the mortgagee may seek a **deficiency judgment** against the mortgagor in most states

Other Mortgagor Remedies

In most states, the mortgagor can quickly pay any missed payments and avoid foreclosure – called reinstatement.

- Every state allows the mortgagor the opportunity to avoid foreclosure by repaying the loan in full before the sale occurs.
- In some states the mortgagor may redeem the property from the successful bidder within a set period of time
 - Statutory right of redemption – mortgagor must pay the sale price, plus interest and costs

Installment Land Contract

- Alternative to the mortgage
- Buyer promises to pay the purchase price in installments over a period of time.
- Buyer is allowed to take possession of the property, but the seller retains title until all payments are made.
- Title is transferred only after the buyer's final payments.

Housing Market in 2000 and After

- Use of *subprime loans*
 - Risky loans made to borrowers with poor credit, uncertain income prospects, little documentation, and often little or no down payment.
 - Adjustable rate mortgages (ARM's)
 - Low, fixed interest rate for the first few years (Teaser Rate) – reset adjustable rate for the duration of the loan – change substantially increased the amount of each monthly payment...
- Housing Bubble Burst – 2006
 - Home values fell, refinancing became difficult/impossible
 - Foreclosures

Commonwealth v. Fremont Investment & Loan

- Consumer protection enforcement action against D and its parent company claiming that in originating/servicing certain subprime mortgage loans between 2004-2007 in MA
- Four characteristics qualified as “presumptively” unfair
 - (1) Loans were ARM loans with an introductory rate period of 3 years or less
 - (2) They featured an introductory rate for the initial period that was at least 3% below the fully indexed rate
 - (3) They were made to borrowers for whom the debt to income ratio would have exceeded 50% had Fremont measured the borrower’s debt by the monthly payments that would be due at the fully indexed rate rather than under the introductory rate
 - (4) The loan to value ratio was 100% or the loan featured a substantial pre-payment penalty or a pre-payment penalty that extended beyond the introductory rate period
- 4 characteristics of the judge identified as unfair were not considered by the industry or more generally to be unfair at the time in question
- Fremont knew or should have known – unfair – 4 characteristics
- Preliminary Injunction and the Public Interest
 - Yes – strikes compromise

Title Protection

- Buyer protects her title through title covenants, a title opinion based on a search of public land records and/or a title insurance policy.

Title Assurance

- A sale of real property is actually a sale of title
- Need good title to convey
- Title Risks
 - Legally able to convey
 - Encumbrances (rights or interests held by third parties that affect the value/use of the land)
- **3 Types**
 - (1) *Title Covenants*
 - Grantor promises in the deed that he has good title to convey
 - (2) *Title opinion based on search of public records*
 - An attorney or other professional renders an opinion about the state of title after searching the public land records.
 - (3) *Title Insurance*
 - A title insurance company issues a policy that insures the grantee's title.
 - Usually use 2 methods for adequate protection

Title Covenants

- Express promises by the grantor about the state of title.
- CL: promises that the parties made in the contract ended at the closing unless they were restated in the deed
- *Doctrine of Merger* – provided that once the grantee accepted the deed all prior promises were extinguished; and the contract was “merged” into the deed.
 - Therefore – demand that grantors provide assurances of title in the deed

3 Types of Deeds commonly used today:

Differ according to the amount of protection that each provides

- General Warranty: Grantor warrants title against all defects, whether they arose before or after he obtained title.
 - BEST Protection

- Special Warranty Deed: Grantor warrants title against all defects that arose *after* he obtained title.
- Quitclaim Deed: Grantor makes no warranties about title, so the grantee receives only what the grantor has, if anything.

6 Standard Covenants

(1) Covenant of Seisin

- Promise that the grantor owns the estate he purports to convey; for example this covenant is breached if the grantor purports to convey a fee simple but only owns a life estate.

(2) Covenant of Right to Convey

- A promise that the grantor has the right to convey title, for example, this covenant is breached if the grantor is a trustee who lacks the authority to transfer title to the trust property.

(3) Covenant against Encumbrances

- A promise that there are no encumbrances on the title, other than those expressly listed in the deed; for example, this covenant is breached if there is a prior mortgage on the property.

(4) Covenant of Warranty

- A promise that the grantor will defend the grantee against any claim of superior title, for example if a third party holds better title than the grantee does, the grantor must defend the grantee's title.

(5) Covenant of Quiet Enjoyment

- A promise that the grantee's possession of the property will not be disturbed by anyone holding superior title; this covenant is breached if the grantee is evicted because of a defect in her title

(6) Covenant of Further Assurances

- A promise that the grantor will take all future steps reasonably necessary to cure title defects that existed at closing.

First 3 Covenants → Present Covenants

- They are breached, if at all, at the moment the deed is delivered.
- Provide same assurance as the implied covenant of marketable title.
 - Applies to defects discovered BEFORE closing, while **title covenants** protect against defects discovered **AFTER** closing

Last 3 Covenants → Future Covenants

- They are breached, if at all, after the closing, **most commonly when the grantee is actually or constructively evicted by a third party holding superior title.**

Brown v. Lober (Mineral Rights)

- Covenant of quiet enjoyment – prospective in nature and is breached only when there is an **actual or constructive eviction** of the covenantee by the paramount titleholder...
- *If a covenantee fails in his effort to sell an interest in land because he discovers that he does not own what his warranty deed purported to convey, he has suffered a constructive eviction and is thereby entitled to bring an action against his grantor for breach of covenant of quiet enjoyment.*
- Scott v. Kirkendall
 - Action brought for breach of the covenant of warranty by grantee who discovered that other parties had paramount title to the land in question.
 - Land vacant/unoccupied at relevant times.
 - Court rejected grantee's claim – breach of covenant of quiet enjoyment
- Moore v. Vail
 - He could have peaceably entered and enjoyed the premises without resistance. Did not guarantee him a perfect title but the possession and enjoyment of the premises.
- **Mere existence of a paramount title does not constitute a breach of the covenant.**

Breaching a Present Covenant

- Measure of damages for breach of a title covenant is normally determined by a purchase price paid by the grantee plus interest.
- However, standard for breach of the covenant against encumbrances is the lesser of (1) the amount necessary to remove the encumbrance or (2) the amount by which it reduces property value

Rights of Remote Grantees

- Traditionally, only future covenants ran with the land to remote grantees.
- Because a present covenant was breached when made, if at all, the breach created a COA – which could not be assigned at common law.

- Today – COA is usually transferable.
- But law in most states still provides that present covenants do not run to remote grantees.

Selecting the Deed

- Custom and market conditions usually dictate the type of deed that is used.
- In many states custom is for the seller to provide a special warranty deed and the buyer usually obtains additional protection by buying title insurance.

Statutory Deeds

- Statutes in many states set forth approved types of short form deeds, which simplify the drafting process.

Title Opinion Based on Search of Public Records

Attorney/professional usually conducts search – give written opinion on the state of title

- Inspect public records to learn (a) what they hold (b) whether title is subject to any encumbrances

History

- Early England – if two parties had competing claims to the same property, the person who received his interest first prevailed
- Public Land System Created in the US
 - Anyone holding an estate or interest in land may record a deed or other instrument **to give notice of his rights to the world.**
 - Modern recording statutes give special protection to a subsequent *bona fide purchaser* who acquires her title without notice of the adverse claim/pays valuable consideration

How to Search

- State law determines both the type of documents that can be recorded and how they are organized.
- **2 Systems**

- (1) Grantor-Grantee Index – organizes by the names of the parties to the transaction
 - Most commonly used
 - Along with parties' name → index entry will contain
 - Type of instrument
 - Time of recordation
 - Location of the recorded document
 - Brief description of the property involved
- (2) Tract index – organizes by the parcel involved
 - Parcel Identification Numbers
 - Every document affecting that parcel is typically filled in a folder under its unique number
- First Step – Establish chain of title for the parcel – back to a sovereign or back for 40 years...
- Second Step – Move forward in time
 - Typically the searcher examines all entries in the grantor index under each grantor's name from
 - (1) The date he received his interest until
 - (2) The date the deed conveying his interest to a grantee was recorded
- Third Step – Read documents, evaluate their legal significance, and determine the state of the title.

Even if a document is recorded – it may not give constructive notice to a searcher.

Luthi v. Evans (Mother Hubbard Clause)

- Mother Hubbard Instrument
 - Deed/other instrument in writing which is intended to convey an interest in real estate and which describes the property to be conveyed as “all of the grantor's property in a certain county.”
 - Rare, death bed transfers
- **Legislative Intent** that instruments of conveyance should describe the land conveyed with sufficient specificity to enable the register of deeds to determine the correctness of the description from the numerical index and

also make it possible to make any necessary changes in the address records for mailing tax statements.

- **Conclusion – record instruments of conveyance should describe land with sufficient specificity so that the specific land conveyed can be identified**
- Mother Hubbard clause is not the problem
 - Such a transfer is not effective as to subsequent purchasers/mortgages unless they have **actual knowledge** of the transfer
 - Grantee may take steps to protect title against subsequent purchasers if Mother Hubbard clause used in an emergency
 - Take possession of the property
 - Identify with specific description

Role of Recordation

An unrecorded deed is perfectly valid. However, recordation is important to protect the grantee from title claims made by third parties.

How Far Back?

Under marketable title acts, title defects that exist before the statutorily determined root of title are extinguished.

Recording Acts

All states begin with the CL principle of first in time

- As a general rule – the **person whose interest was created first prevails**

Purpose – good title, protecting buyers from unknown adverse claims or existing unrecorded interests

MAJOR EXCEPTION

- Bona Fide Purchaser Doctrine
 - Supersedes first in time rule

3 Basic Types of Acts:

(1) *Race*

- The purchaser who records first has priority

- Subsequent purchaser has priority over a previously created interest if she records first – even if she actually knows about that interest
- Only 2 states still have this...

(2) Notice

- The subsequent bona fide purchaser has priority
- Subsequent purchaser for value prevails if he takes without notice of a prior interest.
 - VALUE
 - WITHOUT NOTICE
- Does not have to record in order to gain priority.
- Still motivated to record quickly – fails to do so – he may lose his interest to a subsequent bona fide purchaser.
- About half of the states use notice statutes

(3) Race-notice

- The subsequent bona fide purchaser who records first has priority
- Protects the subsequent purchase for value that both takes without notice and records first.
- Another half of states use this statute.

Remember the first in time rule governs any title dispute unless the subsequent purchaser qualifies for protection under the state's recording act

- *In general – a deed or other document affecting title must be acknowledged in order to qualify for recordation*
 - Ex. Notary

Messersmith v. Smith

- **General Rule** – recording of an instrument affecting the title to real estate, which does not meet the statutory requirements of the recording law, affords no constructive notice.
- *The certificate of acknowledge on the mineral deed to Smith, while it is presumed to state the truth, is not conclusive as to the fact of actual acknowledgement by the grantor*
- At time ND used **Zimmer** Rule
 - Subsequent purchaser is deemed to have “recorded” his conveyance only if all prior conveyances in his chain of title are properly recorded.

Invalid Acknowledgments

- As a general rule – when an unacknowledged deed is entered in the public land records – it is not deemed to be recorded and thus it does not provide constructive notice.
- Where the acknowledgement appears to be valid on the face of the deed but is defective due to a hidden flaw – most states treat the deed as validly recorded.

Forgery and Fraud

- Forgery - VOID
 - Thus any subsequent grantees in that chain of title, including bona fide purchasers receive nothing.
- Deed, which is induced by fraud, is voidable by the grantor; but if the grantee conveys title to a bona fide purchaser, the subsequent purchaser prevails.

Shelter Rule

A bona fide purchaser is allowed to transfer his protection to a later grantee.

Title Registration

Recording systems suffer two major defects:

- (1) They do not conclusively establish title
- (2) Even purchasers who scrupulously search the records may lose title due to unrecorded interests, which are outside the scope of the recording acts.

Government assumes the role of title assurer by maintaining an authoritative registry of title

- To determine the state of title, purchaser simply examines the registered title

A few jurisdictions in the US utilize a type of title registration called the Torrens system.

- Each title determined by court.
- Although originally enacted in over 20 states – Torrens system has lost favor in the US
 - Several factors that contributed to its demise in the US
 - (1) Was not mandatory
 - (2) Initial judicial determination of title was expensive

- (3) Statutory and judicial exceptions undermined its effectiveness

Chain of Title Problems

If a recorded document cannot be found in a standard title search, it is considered to be outside of the chain of title and provides no notice to subsequent buyers.

4 Classic Situations – where a recorded document is outside the chain of title

- (1) Wild Deed
 - Unable to be captured by the reasonable searcher
 - May be discoverable but only if the searcher wades through every instrument in the recorder's office – unreasonable burden
 - Difference between recorded and *properly* recorded
 - Not properly recorded – no notice
- (2) Deed recorded too late
 - Wouldn't discover it because the deed was recorded too late/at a point when the searcher is no longer searching under that person's name
 - No notice...
 - However some jurisdictions mandate a more extensive search
 - Require title searcher to look under each grantor's name from the time the grantor received title until the present.
 - Thus notice – can't be a subsequent bona fide purchaser
 - Priority – first in time
 - Ultimately less efficient – because it increases the burden of searching title
- (3) Deed recorded too early
 - Same as #2 but the reverse – too early
 - In a few jurisdictions, the title searcher is required to search under each grantor's name for every year the grantor is alive.
- (4) Deed from a common grantor
 - Ex. Easement relating to the deed of another property
 - However – about half of the states require that one expands his search to include all properties deeded out by a common grantor

Board of Education of Minneapolis v. Hughes

- Deed to Hughes was recorded before the deed to D&W – though the deed from them to P was recorded before the deed to D.
- **It is settled that a deed that does not name a grantee is legally nullity, wholly inoperative as a conveyance, until the name of the grantee is legally inserted.**
- Deed which is a nullity when delivered because the name of the grantee is omitted becomes operative WITHOUT a new execution or acknowledgement if the grantee, with either express or implied authority from the grantor inserts his name in the blank space left for the name of the grantee
- *Hold that this record of a deed from an apparent stranger to the title was not notice to Hughes of the prior unrecorded conveyance by his grantor.*

Defining Recorded

- If a deed is not properly recorded, it is not considered “recorded” either
 - (1) For providing notice to a subsequent purchaser or
 - (2) For being “first-recorded.”

See Problems in Book

- Question is not who has *perfect* title but rather who has *better* title...

3 Primary Forms of Notice

- (1) Actual notice – knowledge of a prior interest

Constructive notice...since you could have learned by examining the public land records or making an appropriate investigation, even if they fail to do so...

- (2) Record notice – notice of any prior interest that would be discovered by a standard search of the public land records.
- (3) Inquiry notice – notice of any prior interest that would have been obtained by investigating suspicious circumstances

Possession of real property as constructive notice to the entire world of whatever rights the possessor has in the property

- Accordingly – prudent buyer will carefully inspect the land she is buying in order to discover any adverse claims

Raub v. General Income Sponsors of Iowa, Inc. (Poor Lady/Fraud)

- *There may still be notice to D's if circumstances are shown which would lead a reasonably prudent person to investigate the possible existence of outstanding rights hostile to the grantor's title...*
- **Possession of land by one other than the grantor is ordinarily sufficient to put parties on inquiry as to the rights of the party in possession.**
 - General Exception: Possession by the grantor of the recorded deed does not impart such notice.
 - Because occupancy, to impart notice, must be hostile to or inconsistent with that of the holder of legal title
- **One who asserts he is a BFP must prove in good faith and good faith is lacking if he knew or, as a reasonably prudent person should have known others made claims hostile to his grantor's title.**
 - Standard – knowledge of circumstances which in the exercise of common reason/prudence, ought to put a man upon particular inquiry, he will be presumed to have made inquiry and will be charged with notice of every fact which such suggested investigation would in all probability have disclosed had it been properly pursued.

Inquiry Notice Based on the Record

Sometimes information in a recorded instrument may prompt the title searcher to make further inquiries.

Title Insurance

Main method of title protection in the US

- Typical buyer will purchase a title insurance policy to **supplement** the title covenants in his deed

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.

- Most title insurance companies use standard policy forms
 - **Basic ALTA owner's policy has 5 sections**
 - (1) Cover Page
 - Setting forth the scope of coverage provided
 - (2) Schedule A

- Stating the name of the insured party, the maximum amount insured by the policy, and the estate that is insured
 - (3) Schedule B
 - Listing specific items that are excepted from coverage for this property
 - (4) Exclusions
 - Listing specific items that are excluded from coverage for all properties
 - (5) Conditions
 - Specifying procedural requirements, such as the time/manner for making claims.
- **Exclusion** - potential risk that the company is unwilling to cover in any policy, such as encumbrances created or agreed to by the insured party.
- **Exception** – problem that concerns the particular parcel, which the title company discovers by searching its computerized version of the public land records.
 - Title insurance company will not insure against this known defect – excepted from coverage – after all the purpose of title insurance is to protect the buyer against unknown risks, not KNOWN title problems...

A title insurance policy imposes two obligations on the insurance company...

- (1) 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
- (2) Duty to Indemnify
 - Obligates the insurer to compensate the owner if a loss occurs

Duty to Defend generally broader than the duty to indemnify

- Means that a title insurance company may be required to defend the owner's title even if it is not completely clear that the potential defect is covered by the policy.

Riordan v. Lawyers Title Insurance Corp. (NM Wilderness)

- Doctrine of reasonable expectations only applies where the policy terms are ambiguous

- This language is clear and unambiguous – policy language controls and the doctrine of reasonable expectations is inapplicable.
- *Policy insures against a lack of right of access, it does not insure that the Property has vehicular or any other type of access.*
 - Here – no lack of right of access to the property that would trigger coverage under the policy.
- P's rely on Marriott Case
 - Court construed "right of access" to mean "without unreasonable restriction."
 - *Thus even if the Marriott dicta were applied to this case, pedestrian access to the Property was without unreasonable restriction.*
 - Marriott's holding does not support P's position
 - Government Action Exclusion
- **P's had right of access to the property at all relevant times and were able to sell the property at a substantial profit militates against a determination that the title was unmarketable.**

Right of Access

- Phrase right of access not defined in the policy
- General rule – ambiguity in a title policy is interpreted in favor of the insured party

Marketability of Title

- A title policy insures the quality of the owner's title, not the market value of the land.
- Toxic Contamination does not render title unmarketable.

Right to Adequate Housing

- Jungle – San Jose Newspaper Article
- General Comment No. 7 – Right to Adequate Housing/Forced Evictions – 1997
- South African Case
- Open Letter – Boise, ID
- Report to UN
- Concluding Observations
- Paper – Homelessness in Ontario

- NY City Bar Proposal
- Mountain View Article
- **See all the printed paper for notes...**

Land Use Regulations

Virtually every parcel of land in the United States is subject to comprehensive regulation that limits how it may be used.

- Restrictions – complex network of ordinances and statutes
- Traditionally – an owner had complete discretion to decide how to use their land, subject only to private restrictions and nuisance law.
- A few large cities did adopt ordinances attacking specific problem, such as slaughterhouses or livery stables.

Early 20th century living conditions → ZONING

Basics of Zoning

- Early England - Idea that many evils could be eliminated by developing new, low-density towns in the countryside – each single family home in the center of its own garden
 - Regulation of land use
 - Government had the inherent police power to protect the public health, safety, morals and welfare through zoning laws.
- US – first comprehensive zoning ordinance – NYC 1916
 - Equitable Building – shadows of skyscrapers
- 1920's → tidal wave of zoning ordinances
 - Standardized Zoning Law 1922 - model law states could adopt
 - Empowered local government to adopt zoning ordinances
 - Specific the key provisions for an effective ordinance

Constitutional of Zoning

Unconstitutional interference with traditional private property rights.

- Thought conservative SC would endorse this view.
 - Ambler Realty Company and 14 other property owners banded together to finance a test case against the new zoning ordinances in Euclid, Ohio.

- Lost → **resulting opinion is the foundation of American zoning law.**

Village of Euclid v. Amber Realty Co.

- Amber Realty Company (Appellee) challenged the enforcement of a zoning ordinance on the ground that the enforcement would constitute an unconstitutional taking by devaluing his land.
- The ordinance must find its justification in some aspect of the police power, which is asserted for the public welfare. The court used the doctrine of nuisance to determine whether the zoning exclusions were proper.
 - The line, which separates the legitimate from the illegitimate exercise of power is not capable of precise demarcation. The court will use the doctrine of nuisance to determine if the zoning ordinance is legitimate.
- Whether the exclusion from residential districts of apartment houses, retail stores and shops was valid.
 - Since the apartment houses are parasitic in nature, the Appellant was within its rights to exclude them from residential, single-family homes. The desirability of a neighborhood is, in the court's opinion, greatly diminished by apartment houses.

Identifying the Euclid Test

SC used standard – *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.

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 or impairs a fundamental right – when the *strict scrutiny* test is used instead.

- SS test – law is constitutional only if it is narrowly tailored to accomplish a “compelling state interest” – higher standard than a mere rational basis.

As Applied Challenging to Zoning

SC recognized that a zoning law could be unconstitutional as applied to an individual property.

- *In practice - modern courts are reluctant to invalidate zoning ordinances on this basis.*

Impact of Euclid

Foundation of modern land use regulations in the US

- Assured that Euclid-style zoning was constitutional – cities/counties across the nation enacted zoning ordinances – many of them patterned on the Euclid model.

Key Assumption – Euclid

- Separation of uses is desirable – ultimately led to the rapid expansion of single-family subdivisions after WW2 and to modern concerns about suburban sprawl.
- Today virtually every city/county in the nation has a zoning ordinance in place.
 - *Exception – Houston, TX*

Typical Zoning Ordinance

Adopted by city/county as a legislative act

- 2 Basic Components
 - (1) Text of the ordinance
 - (2) Maps that implement the ordinance
- Ordinance text creates different types of zones where particular uses are allowed
- Zoning map shows where each zone is located

2 Step Process

- (1) City/county would adopt a comprehensive plan that sets forth its general planning goals
- (2) It would enact a specific ordinance to implement that plan.

Minority of States – follow this approach – a zoning ordinance is valid only if it is consistent with the preexisting comprehensive plan.

But for most states – not necessary for the city/county to adopt such a separate plan before adopting a zoning ordinance – ordinance itself is also the plan.

Non-Conforming Uses

Almost always, a new zoning ordinance will provide that it does not apply to lawful uses that already exist.

- These prior nonconforming uses are allowed to continue.

Thus zoning regulates future development, not existing uses.

Would be unconstitutional under 5th Amendment not to protect them

Tend to continue and prosper because of the artificial monopoly accorded to them by law

- Owner of a non-conforming use has the right to pass on that protected status to a buyer – could continue for many years.

Zoning ordinances typically restrain the non-conforming use in order to hasten its demise.

- Traditionally a non-conforming use could be terminated only if...
 - (a) The structure was destroyed
 - (b) Use was abandoned/discontinued
 - (c) Use was a nuisance
 - (d) Municipality acquired the property through eminent domain – paying fair market value.

In recent decades, a new approach has emerged → amortization

AVR, Inc. v. City of St. Louis Park (Cement Plant)

- Consideration of the following factors
 - Information relating to the structure located on the property
 - Nature of the use
 - Location of the property in relation to surrounding uses
 - Description of the character of and uses in the surrounding neighborhood
 - Cost of the property and improvements to the property
 - Benefit to the public by requiring the termination of the non-conforming use
 - Burden on the property owner by requiring the termination of the non-conforming use
 - Length of time the use has been in existence and the length of time the use has been non-conforming
- **This case does not involve denial of a conditional use permit, which is a quasi-judicial determination and therefore subject to closer scrutiny.**

- *Because the ordinance establishing a 2 year amortization period for P's plant reflects the city's consideration of the plant's useful life and an analysis of other relevant factors adopted by the city – DC did NOT err in upholding the city's two year amortization period.*

Amortization Approach

- Permitted in most jurisdictions as long as a reasonable period is allowed.
- Courts don't require mathematical certainty that the amortization period is long enough for the landowner to recover his investment
 - Rather – consider a number of factors
 - **8 factors listed in AVR case are representative of the factors that are generally considered.**

Amortization in Practice

Most commonly used to eliminate uses that are viewed as particularly objectionable such as billboards/junkyards.

- Period of 2-3 years – most common

Abandonment v. Discontinuation

Abandonment generally terminates nonconforming use.

- Occurs if the landowner both
 - (1) Intends to relinquish his right to the use
 - (2) Voluntarily ceases the use for a set period of time, varying by jurisdiction from 30 days to 2 years.

Mere discontinuance of the use is sufficient for termination, regardless of the owner's intent → In some jurisdictions

Vested Rights

In most jurisdictions, landowner in situation when zoning changes before a new project is completed acquires vested rights in the current zoning and is protected under the nonconforming use doctrine if she has already...

- (1) Acquired the necessary permits
- (2) Spent a substantial amount of money in good faith reliance.

Takings Doctrine

- Court is applying a 3 Factor Test

- (1) Economic impact of the regulation on the claimant
 - If high impact→support a takings claim
- (2) Interference with investment backed expectations?
- (3) Character of government action
 - If the government adopted a rule that was targeted at AVR, that would weigh in favor of finding a taking
 - But they applied a rule that applied to the entire city, not just AVR, when looking at the ordinance itself
 - Supports the legitimacy of their reasoning

Family Zoning

In recent years – many municipalities have adopted ordinances providing that only members of a “family” may occupy a single-family residence.

- Village of Belle Terre v. Boraas (1974)
 - SC upheld such family zoning ordinances against due process and equal protection attacks.
 - BT ordinance – apparently aimed at preventing local college students from living together – defined family as one or more persons related by blood, adoption or marriage or up to two unrelated persons.
 - Six unrelated students who had rented a house together challenged the ordinance.
 - **Court held that the ordinance was reasonable – not arbitrary, bearing a reasonable relationship to the legitimate state objective of regulating noise, parking, traffic, and other density-related problems.**
 - Dissent
 - Strict Scrutiny – abridging association/privacy – deeply personal considerations involve

Moore v. City of East Cleveland (Grandmother)

- A Cleveland statute made it a crime for a dwelling to contain members of more than one family, and limited the definition of family to a basic nuclear family. Appellant was convicted under the statute when her son, grandson, and a grandson from another child all lived with her.

- The right to live as a family unit is protected under the Due Process Clause of the Fourteenth Amendment.
 - Statute didn't advance legitimate state interests.
 - While these are legitimate goals, the statute serves them only marginally because large groups of people can still live together so long as they meet the statutory definition of a single family.
- Caution, rather than abandonment, is the proper way to move forward when the judicial branch gives enhanced protection to substantive liberties without the guidance of more specific provisions of the Bill of Rights. Clear lines cannot place the limits on substantive due process, rather an examination of the teachings of history and recognition of the basic values that underlie society should serve as guidance.
- **Dissent**
 - Appellant contends that she has a constitutional right to share her residence with whomever she pleases, but precedent in Belle Terre says otherwise.
 - Desire cannot be equated with interests previously found to be constitutionally protected. Appellant also cannot claim constitutional rights on equal protection grounds because the city's definition does not offend the Constitution.
 - The pluralities' decision extends the limited substantive contours of the Due Process Clause beyond recognition.
- Ordinance here thought to be adopted because of the influx of minorities into East Cleveland at this time – discourage integration

Unmarried Couples

Courts split on this issue

Ames Rental Property Association v. City of Ames

- Zoning ordinance, which only permits single-family dwellings in certain areas of the city.
- Family is any number of related persons or no more than 3 unrelated persons.
- **Ordinance here does not violate the EPC of the US Con.**
 - (1) Identify the classes of similarly situated persons singled out for differential treatment

- (2) Under the rational basis test – determine whether the ordinance in question is rationally related to a legitimate governmental interest.
 - Zoning ordinance is valid unless the relationship between the classification and the purpose behind it is so weak the classification must be viewed as arbitrary or capricious...
 - *Legitimate governmental interest*
 - Include promoting the health, safety, morals, or the general welfare of the community
 - Here – legitimate – promoting/preserving neighborhoods for family/children
- Not arbitrary/capricious - **Did so because groups of unrelated persons typically have different living styles in comparison to groups of related persons**
- **Dissent**
 - Ordinance regulates where no regulation is needed and fails to regulate where regulation is needed.
 - Degree of this is extreme because it is irrational to suppose the type of relationship persons residing in a home have to each other has any rational bearing on the character or behavior of those persons
 - **Ordinance distinguishes between acceptable/prohibited uses of property by reference to the type of relationship a person has with those they live with, not by the conduct of those that live in the residence.**

Group Homes

Zoning ordinances are sometimes adopted to exclude group homes from single-family districts.

- Group Home – non-profit facility usually located in residential neighborhood, that provides treatment or temporary housing for mentally ill persons, battered women, recovering addicts or other persons who require special care.

City of Cleburne v. Cleburne Living Center (1985)

- SC struck down a family zoning ordinance that excluded a group home for mentally retarded persons because it violated the EPC.

Federal Fair Housing Act also restricts the enforcement of family zoning ordinances against group homes for the handicapped.

