Property

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1.1 Subsequent Possession

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1.2 Possessory Estates

1. Fee simple absolute:
   (a) Potentially infinite.
   (b) Common law: "and his heirs."
   (c) Inheritance: first issue, parents, collaterals.
2. Fee tail:
   (a) Descends to grantee's lineal descendants.
   (b) Common law: "and the heirs of his body."
   (c) When it ends, it reverts to the grantor's heirs.
   (d) Only five states recognize it. Others convert the language into some kind of life estate or fee simple.
3. Life estate:
   (a) Today, most are created in trust.
   (b) Future interest holders can sue to prevent waste. *Woodrick v. Wood.*
   (c) If a conveyance is ambiguous, courts prefer to interpret it as creating a fee simple. *White v. Brown.*
4. Leasehold estate:
5. Defeasible estate:
   (a) Ends prior to its natural endpoint when a specified event occurs.
   (b) Used mainly to control behavior or land use.
   (c) Three types:
      i. *Fee simple determinable*: durational. Ends automatically. Future interest: possibility of reverter.
      ii. *Fee simple subject to condition subsequent*: conditional. *May* be cut short. Future interest: right of entry.

iii. *Fee simple subject to executory limitation*: a third party transferee has the right to take possession of the property if conditions are satisfied. Future interest: executory interest.

6. Restraints on alienation:
   (a) *Disabling*: a grantee cannot transfer his interest.
   (b) *Forfeiture*: a grantee loses his interest if he attempts to transfer it.
   (c) *Promissory*: a grantee promises not to transfer his interest. Enforceable through contract remedies.
   (d) A use restriction creates a valid FSSCS even if it effectively creates an absolute restraint on alienation. *Mountain Brow Lodge v. Toscano.*

1.3 Future Interests

1. Remainder, executory interest, reversion, possibility of reverter, right of entry.
2. Restatement (Third) reforms:
   (a) All five interests are combined as "future interests."
   (b) It reduces the traditional categories—indefeasibly vested, vested subject to complete defeasance, vested subject to open, and contingent—to two: vested and contingent.
3. Class gifts to to a class that is still open to new members is classified as **subject to open**—e.g., "to A for life, and then to B's children."
4. **Future interests in the transferor**:
   (a) **Reversion**: grantor's vested interest after transferring a **vested estate of a lesser quantum**. E.g., when O conveys "to A for life," O has a reversion.
   (b) **Possibility of reverter**: grantor's vested interest after carving out a **determinable estate of the same quantum**. It almost always arises when carving out a **FSD** out of an FSA. E.g., when O conveys "to A so long as used for school purposes," O has a possibility of reverted.
   (c) **Right of entry**: grantor's vested interest when he transfers a **FSSCS**. E.g., O conveys "to A, but if it ceases to be used for school purposes, O can reenter and retake the premises."
5. **Future interests in the transferee**:
   (a) **Remainder**:

i. **Vested**: (1) given to an ascertained person and (2) not subject to a condition precedent. " . . . waits politely until the termination of the preceding possessory estate . . ."[1]

A. *Indefeasibly vested*: cannot be divested. E.g., "to A for life, then to B and her heirs." B has an indefeasibly vested remainder.

B. *Subject to divestment*: vested, but can be divested if an event happens. E.g., "to A for life, then to B and her heirs, but if B does not survive A, to C and his heirs."[2] B has a vested remainder subject to divestment.

C. *Vested subject to open* (or *subject to partial divestment*): later-born children can share in the gift. E.g., "to A for life, then to A's children and their heirs." At the time of the conveyance, A has one child, B. B has a vested remainder subject to open because A could have more children before she dies.

ii. **Contingent**: (1) given to an unascertained person or (2) contingent upon an event other than the natural termination of the preceding estates. E.g., "to A for life, then to the heirs of B." The remainder is contingent because the heirs of B cannot be ascertained until B dies.[3]

(b) **Executory interest**: divests or cuts short an interest in another transferee (*shifting*) or divest the transferor in the future (*springing*).

i. E.g., "to A and his heirs, but if A dies without issue surviving him, to B and his heirs." B has an executory interest, which can only become possessory by divesting A.[4]

ii. Vests automatically, like a possibility of reverter, but *not* like a right of entry.

(c) **Executory interest vs. remainder**: "The difference between taking possession as soon as the prior estate ends and divesting the prior estate is the essential difference between a remainder and an executory interest."[5]

6. **Transferability**: there were historical limitations, but, today, most states (with a few exceptions) allow inter vivos transfer of possibility of reverter and right of entry.

7. **Trust**: the trustee holds legal title to the trust property and manages it for the benefit of the beneficiaries, who hold equitable title. Trusts can be **inalienable** and **beyond the reach of creditors**. *Broadway Natl.*

[1] Casebook p. 258.
[2] Casebook p. 261 example 8.
[3] Casebook p. 260 example 5.
[4] Casebook p. 268.
[5] Casebook p. 259.

Bank v. Adams and Gray, "Restraints on Alienation of Property." This system can perpetuate wealth inequality, but it can also protect indigent trustees.

8. **Rules furthering marketability by destroying contingent future interests**:

   (a) **Doctrine of destructability of contingent remainders**:

      i. "A legal remainder in land is destroyed if it does not vest at or before the termination of the preceding freehold estate."[6]

      ii. E.g., O conveys "to A for life, then to B if B reaches 21." If A dies before B is 21, B's interest is destroyed.

      iii. **Merger**: "if the life estate and the next vested estate in fee simple come into the hands of one person, the lesser estate is merged into the larger."[7]

         A. E.g., O conveys to A for life, remainder to B. If A conveys her life estate to B, the life estate merges into B's remainder, giving B a fee simple.

         B. E.g., O conveys to A for life, and then to B if B survives A. A conveys his life estate to O. The life estate merges with O's fee simple, giving O a fee simple and destroying B's contingent remainder.

   (b) **Doctrine of worthier title**:

      i. If O conveys to A for life, and then to O's heirs, the remainder in O's heirs is invalid and O gets a reversion. Plugged a feudal tax loophole; mostly obsolete today.

   (c) **Rule against perpetuities**:

      i. The rule applies only to interests that are **not vested at the time of conveyance**: contingent remainders, executory interests, and class gifts.

      ii. Gray: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."[8]

      iii. Analyzing an RAP problem:

         A. Identify the interests.

         B. Will each interest vest within the perpetuity period of *any* **life in being plus 21 years**? If you can *prove* that it will, then the interest is valid. But if you cannot prove the existence of scenario where it would vest, the interest is invalid.

[6] Casebook p. 281.
[7] Casebook p. 282.
[8] Casebook p. 285.

C. If one or more interests is invalid, what is the remedy for the violation of the RAP?[9] (The typical remedy is to strike the invalid remedy, but see the reforms below.)

iv. Examples:

A. Valid: O transfers land "in trust for A to life, then to A's first child to reach 21." A is the validating life. The interest in A's first child to reach 21 will necessarily vest prior to A's life plus 21 years. Since you can prove that the interest must vest within this period, the remainder is valid.[10]

B. Invalid: O transfers land "in trust to A for life, then to A's first child to reach 25." The interest will not necessarily vest before after A's life plus 21 years. Thus, the remainder is invalid.

C. Invalid: to A and his heirs so long as used for school purposes, and then to B and his heirs. The interest will not necessarily vest or terminate within A or B's lifetimes.

v. The RAP does not apply to reversionary interests, including possibilities of reverter. *Brown v. Independent Baptist Church of Woburn.* (But it should—this is a loophole.)

vi. The *Klamath Falls* problem: O conveys "to A and his heirs so long as used as a library, and then to B and his heirs." B's remainder is invalid because it it is not certain to vest or fail within 21 years after the death of A or B. But O can get around this problem by conveying an FSD to A and then transferring the possibility of reverter. This is valid because the RAP does not apply to interests in the transferor (reversion, possibility of reverter, right of entry). *City of Klamath Falls v. Flitcraft.* So maybe the RAP *should* apply to those interests.

vii. A future interest is invalid under the RAP even if it actually vests within the perpetuities period. *The Symphony Space, Inc. v. Pergola Properties, Inc.* (The USRAP abolished the application of the RAP to options and other commercial transactions.[11])

viii. Justifications:[12]

A. Increase alienability and productivity.

B. Limit wealth concentration.

C. It's socially undesirable for people to have assured incomes because it limits social Darwinism.

ix. Reforms:

A. *Cy pres*: the court rewrites an instrument to avoid an RAP violation in a way that conforms to the transferor's intent.

[9] Reader p. 73.
[10] Casebook pp. 286–87.
[11] Casebook p. 304.
[12] See Simes, "Public Policy and the Dead Hand."

B. *Wait-and-see*: the interest is not invalid if it actually vests within the statutory period. Cf. *Symphony Space* above.

C. *USRAP*: like wait-and-see but with a fixed 90 year period.

x. **Perpetual trust**: many states have exempted trusts from the RAP.

1.4 Co-Ownership

1.4.1 Types and Creation

1. **Tenancy in common**: separate but undivided interests. No survivorship rights. Unlike at common law, the tenancy in common is favored over the joint tenancy.

2. **Joint tenancy**: owners are regarded as a single owner. Both have a right of survivorship. Requires four unities (time, title, interest, possession). Any joint tenant can unilaterally sever the joint tenancy by severing one of the unities.

3. **Tenancy by the entirety**: like joint tenancy, but with the fifth unity of marriage. It exists in about half the states.

4. Today, a conveyance or devise to two or more unmarried persons is **presumed to create a tenancy in common** (while English common law favored the joint tenancy). In states that recognize it entirety, many presume that a conveyance to a married couple creates a tenancy by the entirety.[13]

1.4.2 Severance

1. A joint tenant can unilaterally sever the joint tenancy by conveying his interest to a third party.

2. A joint tenant can also unilaterally convert the joint tenancy to a tenancy in common. Early common law required a joint tenant to use a straw. Today, most courts allow a joint tenant to convey his interest directly to himself. *Riddle v. Harmon.*

3. If A, B, and C are joint tenants, and C conveys his interest to D, A and B remain joint tenants among themselves. D owns a one-third interest as a tenant in common, while A and B each have a one-third interest as joint tenants. If A dies, B and D will be tenants in common, with B having two thirds and D one third.

4. If one cotenant conveys a lease, does that sever the joint tenancy?

[13] *Understanding Property* p. 135.

(a) Courts are divided on whether conveying a lease severs the joint tenancy. In *Tehnet v. Boswell*, the California Supreme Court held that the lease is valid but does not sever the joint tenancy. In this case, the *Boswell* approach would mean that C's lease would end upon A's death, and D would have nothing because A had no separate interest to convey. Thus, B would have sole possession.[14]

(b) In other states, a lease does sever the joint tenancy. In this case, after the lease, A and B would own Blackacre as tenants in common. Upon A's death, A's interest passes to D, leaving B and C as tenants in common. C's lease would remain, with D as the landlord.

5. Some courts hold that a mortgage effects a severance. The modern trend is that mortages do not sever joint tenancies because they create a lien and do not destroy unity of title. *Harms v. Sprague*.

6. A spouse cannot unilaterally end a tenancy by the entirety (except by murder).[15] But the husband can transfer lifetime possession, subject to the wife's right of survivorship.

1.4.3 Relations among Concurrent Owners

1.4.3.1 Right to Possession

1. Each cotenant has an **equal right to possession of the whole property**.

2. The one major exception is **ouster**. Ousted cotenants can recover their pro rata share of the fair rental value of the use by the cotenant in possession. *Spiller v. Mackereth*.

3. A cotenant (either a joint tenant or tenant in common) can lease to another without the other cotenants' consent, but the lessee's interest cannot exceed the lessor's interest as a cotenant. *Swartzbaugh v. Sampson*.

4. The majority rule is that a cotenant in exclusive possession is not liable to the other cotenants for rent.

5. Some argue that it makes more sense today to require cotenants in possession to pay rent to the other cotenants under some circumstances, e.g., if the cotenants acquire the property by devise or intestate succession and the other cotenants are already living somewhere else.[16]

[14] *Understanding Property* p. 144.
[15] *Understanding Property p. 135.*
[16] *Understanding Property* p. 140–41.

1.4.3.2 Right to Rents and Profits

1. If a third person pays to rent the land, **each cotenant is entitled to a pro rata share of rents**.
   (a) The **Statute of Anne** provided that "a tenant in common actually receiving rents, issues and profits might be compelled to account for the excess over his proper share."[17]
2. If a cotenant refuses to pay, the other cotenants can bring an **accounting action** to recover their shares.
3. Cotenants are entitled to pro rata shares of profits from natural resources.

1.4.3.3 Liability for Mortgage and Tax Payments

1. **All cotenants are obliged** to pay their share of mortages, taxes, assessments, and other payments that could give rise to a lien on the property.
2. If one tenant pays more than his share, he can recover the excess in a **contribution action**.
   (a) Should the amount a cotenant can collect in contributions be offset by the value of his use of the property? The court in *Baird v. Moore* said no. given the circumstances.
3. However, in most states, a cotenant in sole possession cannot recover for these payments unless they exceed the reasonable rental value. So if the cotenant in possession spends $20,000 per year on mortgage payments, but the fair rental value for the year is $30,000, the cotenant cannot win contributions.

1.4.3.4 Liability for Repair and Improvement Costs

1. **Cotenants cannot recover contributions for repairs or improvements** because (1) cotenants may disagree on the scope and necessity of the work and (2) if the law allowed contribution actions for repairs or maintenance, courts would have to adjudicate minor disputes.
   (a) The ***Mastbaum* rule**: "A tenant in common who is in sole possession of the common property is under a duty to his co-tenants to preserve the property by making needful, ordinary repairs, and paying taxes, mortgage interest and insurance premiums."[18] But the general rule is that the cotenant who made the repairs cannot collect contributions from other cotenants.
   (b) Some courts will allow contribution as justice requires. *Baird v. Moore*.

[17] Reader p. 122.
[18] Reader p. 121.

2. Upon **partition or an accounting for rent**, a cotenant can recover credit for the **excess costs** of repairs (i.e., costs beyond his share).
   (a) For improvements, in an accounting action, the improver is credited with the increased rental value attributable to the improvements. In a partition action, courts will try to give the improved portion of the property to the cotenant to paid for it, and if that is not possible, it will award a cotenant a credit for the **added property value** (but not for the actual expense).
   (b) Example: A and B are cotenants. A builds a building at a cost of $10,000. Upon partition, the property is sold for $55,000, with the land worth $30,000 and the building worth $25,000. If they split it down the middle, each would get $27,500. But A should get the entire value of the building. So, they each get half of the value of the land ($15,000), and A gets the entire value of the building in addition ($25,000). In total, A gets $40,000 and B gets $15,000.
   (c) Courts favor partition in kind over a partition sale if it is practical and serves the parties' interests. *Delfino v. Vealencis*.

1.4.3.5 Liability for Waste

1. Cotenants are liable to other cotenants for waste.
2. Courts treat natural resource profits as sources of income to be divided among cotenants.

1.5 Marital Interests

1. At common law, a woman moved under *cover* at marriage. Husband and wife became one. " . . . the husband had the right of possession to all of the wife's lands during marriage, including land acquired after marriage."[19] The husband owned all of the wife's personal property acquired before or during marriage except clothing and jewelry.
2. **Married Women's Property Acts** removed the disabilities of coverture, giving married women control of their property acquired before or during marriage. But women still primarily worked inside the home, so the MWPAs had limited effect in addressing gender inequality.
3. **Protection from creditors**: an estate held in tenancy by the entirety is immune from the claims of each spouse's separate creditors. *Sawada v. Endo*.
4. Should we keep the tenancy by the entirety?
   (a) Community property states (e.g., CA) have gotten rid of it.
   (b) The tenancy by the entirety has "enjoyed an undeserved reprieve . . ."[20]

[19] Casebook p. 360.
[20] *Understanding Property* p. 136.

It remains mainly because of the exemption from creditors.

(c) Most states have laws protecting **homestead rights**, which puts the family home beyond the reach of creditors.

(d) See 'The Policy of Exempting a Tenancy by the Entirety from Creditors' below.

5. **Termination of marriage by death**:

   (a) Common law:

      i. **Dower**: the wife gets a one-third life estate (in terms of value, not acreage) in the husband's qualifying real property. The property is subject to dower if it would be *possible* for issue to inherit it—so freehold estates (FSA, fee tail) are eligible, but life estates and joint tenancies are not.

         A. **Inchoate dower**: while the husband is alive, the wife has an interest in property eligible for dower. He can't transfer it without her consent, nor can creditors reach it. Applied only to real property.

      ii. **Curtesy**: the husband gets a full life estate in the wife's freehold property (FSA, fee tail), but only if the marriage produced issue (to give husbands an incentive to procreate).

      iii. Both have been successfully challenged as violating equal protection. Dower and curtesy exists in only four states, and in three of them curtesy has been abolished and dower has been extended to husbands.

   (b) **Elective forced share**:

      i. The surviving spouse can (1) abide by the decedent's will or (2) take a share of the decedent's property (usually half or a third).

      ii. In some states, the share varies with the duration of the marriage.

      iii. Loophole: it does not apply to property that the decedent conveyed while still alive, even if conveyed a day before death.

6. **Termination of marriage by divorce**:

   (a) Common law:

      i. Property was divided according to who held title.

      ii. If the wife wasn't at fault, she could collect alimony for life.

   (b) Today, all common law states (i.e., not community property) use **equitable distribution**, with a trend towards equal distribution. There are three types:

      i. **Divide all property**, regardless of time or manner of acquisition.

      ii. Divide all property **acquired during marriage**, regardless of manner.

iii. Divide all property **acquired during marriage from earnings**.[21]

(c) Alimony has largely disappeared, except "rehabilitative alimony."

(d) Most states treat professional degrees as non-marital property. *In re Marriage of Graham.* Some states adopt the opposite rule, but this can be problematic if the degree holder remarries and becomes obligated to give earnings to both spouses. See J. Thomas Oldham, "Putting Asunder in the 1990s"

(e) Some states have held **celebrity status** to be marital property. *Elkus v. Elkus.*

7. **Community property**:

(a) Adopted in nine states (including California), plus Alaska as an elective community property state.

(b) Earnings of each spouse are owned equally in undivided shares.

(c) There is no tenancy by the entirety in community property states.

(d) Neither spouse can convey his or her undivided share, except to the other spouse. Neither spouse can unilaterally convert community property into separate property.

(e) All other property (e.g., acquired before marriage, or acquired by gift, devise, or descent) is separate.

(f) Couples can agree to transmute community property to separate property.

(g) Spouses have equal managerial authority unless the title is only in one spouse's name or if one of the souse is operating a business on the property. If the husband and wife are equal managers, **the creditors of either can reach the community property**.

(h) **Divorce**: *equitable* division; sometimes *equal* division.

(i) **Death**: each spouse can transfer by will half of community property and all of his or her separate property. If one spouse dies intestate, that spouse's share passes to the surviving spouse.[22]

(j) **Migrating couples**: when couples move, their property retains its status as community property or common law property.

(k) What happens when couples mix separate property with community property? States differ. See 'Mixing Community Property with Separate Property Problems.'

8. **Uniform Marital Property Act**: it basically creates a community property system, but it doesn't call it that. It has only been adopted in Wisconsin.

[21] Casebook p. 370 and Gilbert pp. 199–200.
[22] Casebook p. 390.

1.6 Landlord-Tenant Law

1.6.1 Leasehold Estates

1. **Term of years**: fixed period of time.
2. **Periodic tenancy**: continues for succeeding period until the tenant or landlord gives notice.
3. **Tenancy at will**: no fixed period.
4. Holdovers:
   (a) Arises when a tenant remains in possession after termination of the tenancy.
   (b) The landlord can evict or consent. If the landlord cashes subsequent rent checks, a periodic tenancy usually arises, with the term based on the original lease. *Crechale v. Polles, Inc. v. Smith.*

1.6.2 Delivery of Possession

1. *American rule*: no covenant to deliver possession. *Hannah v. Dusch*
2. *English rule*: there is a covenant.

1.6.3 Subleases and Assignments

1. **Assignment**:
   (a) Conveys the entire term, leaving no interest or reversion in the assignor.
   (b) A leases to B. B assigns to C.
      i.
      ii. **B and C**: privity of contract.
      iii. **A and B**: privity of contract but *not* privity of estate.
      iv. **A and C**: privity of estate but *not* privity of contract. The privity of estate continues until C reassigns his interest to another, until C vacates the premises, or the lease terminates.
   (c) A and C are bound to covenants that run with the land (if the requirements are met to enforce the real covenant or equitable servitude).
   (d) **Rent liability**: if B and C stop paying rent, A can recover from either, because B is obligated under privity of contract and C is obligated under privity of estate.
   (e) **Successive assignment**: if C assigns his interest to D, he is no longer in privity of estate with A, so he his not liable to A for rent. However, if C **expressly assumed the obligations** of the original lease between A and B, he would still be liable.

2. **Sublease**:
   (a) Transfers the lessee's estate for less than the entire term.
   (b) A leases to B. B subleases to C.
      i. **A and B**: privity of estate and privity of contract.
      ii. **B and C**: privity of estate and privity of contract.
      iii. **A and C**: no privity.
   (c) B is liable to A if C breaches the terms of the original lease between A and B.
   (d) The obligations between B and C are governed by the sublease, not the original lease.
   (e) **C is not liable to A for rent** because there is no privity between A and B.
3. At common law, any transfer for less than the lessee's entire term—even by just one day—created a sublease. Today, courts tend to follow the parties' intentions.
4. Policy and practice problems: see main section.

1.6.4 Termination

1. **Surrender**: to end the lease early, T surrenders the property and L accepts the surrender.
2. **Abandonment**: what are the landlord's remedies?
   (a) Leave the premises vacant and sue later for rent.
   (b) Mitigate by reletting and suing for the difference. There is a trend towards mandatory mitigation. *Sommer v. Kridel.*
   (c) Terminate the lease (i.e., accept the tenant's implied surrender).
3. **Self-help eviction**: the common law allowed landlords to resort to peaceable self help, but some courts hold that the landlord had to use a judicial process. *Berg v. Wiley.*
   (a) Policy: see 'Notes on *Berg v. Wiley.*'
4. **Ejectment** was an action to recover from a tenant in breach. It was slow. Landlords generally use summary eviction proceedings instead.
5. **Summary Eviction Proceedings**:
   (a) Summary proceedings allow quick resolution of tenancy disputes. They exclude issues not related to the tenancy, though some allow tenants to raise problems with the conditions of the premises.
   (b) But, summary eviction procedures can still be costly and time-consuming.

(c) Landlords argue that judges unfairly draw out the process because of a bias towards tenants. Tenants argue that they can't afford lawyers. Would better access to attorneys improve tenants' rights or create more burdens on landlords?

6. **Other Remedies Available to the Landlord**:

(a) The landlord can sue for back rent and damages caused by the tenant's breach.[23] If the landlord wants to recover rent for the remainder of the term of the lease, anticipatory breach concepts may apply.[24]

(b) Landlords can also recover damages from **security deposits** and **rent acceleration clauses**.[25]

1.6.5 Condition of the Leased Premises

1. **Common Law**:

(a) The common law rule was **caveat lessee**. The landlord was not liable for repairs.

(b) If the lease assigned repair duties to the landlord, **independence of covenants** meant that if the landlord breached the duty to repair, the tenant still had to pay rent.

(c) There was a **furnished home exception**. See *Ingalls v. Hobbs*.

(d) Landlords are not strictly liable for the condition of the premises, but they can still be liable under ordinary negligence. *Peterson v. Superior Court*.

2. **Quiet Enjoyment and Constructive Eviction**:

(a) **Constructive eviction**: landlord's wrongful conduct that interferes with the tenant's enjoyment and beneficial use.[26] Common law recognized an **implied covenant of quiet enjoyment**. *Bruckner v. Helfaer*.

(b) Landlord's wrongful conduct:

i. **Act**: e.g., making noise.

ii. **Omission**: e.g., failing to provide hot water or make repairs. At common law, wrongful omissions occurred when the landlord breached a statutory duty or one of the few common law duties (e.g., latent defects, repair of common areas).

iii. Some courts have found constructive eviction when the landlord renders the property "substantially unsuitable" for the leased purpose or "seriously interferes" with beneficial enjoyment. *Reste Realty Corp. v. Cooper*.

[23] Casebook p. 479.
[24] Casebook p. 480.
[25] Casebook pp. 480–81.
[26] *Understanding Property* p. 235.

iv. There is a split of authority on whether the landlord is liable for **third party conduct**, though the trend is towards liability if the landlord had the legal right to control the third party's conduct.[27]

3. **Illegal Lease**:

   (a) Tenants can argue that leases for unsanitary premises are illegal because they violate housing regulations. Unlike actions based on quiet enjoyment and constructive eviction, the illegal defense is advantageous for tenants because they can withhold rent while fending off eviction actions.

   (b) The doctrine "is a dead letter," but tenants can now rely on the implied warranty of habitability.[28]

4. **Implied Warranty of Habitability**: see below.

1.6.6 The Implied Warranty of Habitability

1. The landlord must repair the premises regardless of the provisions of the lease.

2. A breach occurs when a **reasonable person would find the premises uninhabitable** or when the property violates housing codes.

3. "[W]e now hold expressly that in the rental of any residential dwelling unit an implied warranty exists in the lease, whether oral or written, that the landlord will deliver over and maintain, throughout the period of the tenancy, premises that are **safe, clean and fit for human habitation**."[29] *Hilder v. St. Peter.*

4. **Waiver**: most jurisdictions view waiver as contrary to public policy. *Knight v. Hallsthammer.*

5. Some courts (e.g., California in *Hilden*) require notice to the landlord.

6. The landlord is not liable for defects the tenant causes. Some jurisdictions impose a duty on the tenant to mitigate.[30]

7. The Restatement (Second) requires tenants to mitigate damages even if the landlord is at fault for the breach.

8. The implied warranty applies only to residential leases, not commercial leases.

9. **Tenant's remedies**:

[27] *Understanding Property* p. 258.
[28] Casebook p. 492.
[29] Casebook p. 496.
[30] Reader p. 169.

(a) **Remain in possession and withhold rent**:

i. The landlord cannot sue for unpaid rent or to evict, since the tenant can raise the defense of the breach of the implied warranty. Some jurisdictions require the tenant to put the rent in an escrow account. The tenant can usually withhold the **full rent**, though the landlord could later recover partial back rent owed.[31]

(b) **Remain in possession and "repair and deduct"**: many jurisdictions allow it, though not all.

(c) **Remain in possession, pay rent, and sue for damages**:

i. the tenant can recover excess rent paid. how much? there is a split:

A. *agreed rent vs. market value "as is"*—but this effectively amounts to waiver if the tenant paid reduced rent from the outset.

B. *market value "as warranted" vs. market value "as is"*.

C. *percentage diminution in agreed rent*: the court determines a percentage that reflects the tenant's loss of use. the tenant does not need to establish fair market value.

(d) **Terminate lease and sue for damages**. Damages are calculated according to one of the formulas above.

10. **Policy**:

(a) Pro:[32]

i. Caveat lessee does not suit the needs of poor urban tenants. Urban tenants lack the skills to repair the premises on their own, and the shortage of affordable housing makes it unlikely that they will be able to negotiate with landlords.

(b) Con:

i. It imposes extra costs on landlords, which they pass on to tenants. Some tenants will be unable to afford the higher rent, so they will be forced out of the housing market.

ii. Allowing tenants to waive the implied warranty respects their autonomy and improves marketplace efficiency.

1.6.7 The Problem of Decent Affordable Housing

1. **Mechanics of rent control**: see course reader p. 191.

2. **Policy**: see course reader pp. 195–202.

3. The economic case against rent control (*Chicago Board of Realtors, Inc. v. City of Chicago*):

[31] *Understanding Property* p. 266.
[32] *Understanding Property* pp. 262–63.

(a) Chicago passed an ordinance codifying the implied warranty of habitability. Posner argued that ordinances that artificially decrease the cost of housing (rent control) or artificially increase the cost of landlords (implied warranty) causes supply to fall, hurting poor tenants. American economists often agree, finding rent control ordinances to be counterproductive.[33]

(b) Defenders of rent control argue that that the economic analyses are unreliable or irrelevant.[34]

1.7 Servitudes

1. See inside.

[33] Casebook p. 511.
[34] Casebook p. 512.

§ 2 Subsequent Possession

2.1 Finders

1. **Bailment**: Voluntary or involuntary delivery of personal property to another, e.g., dropping of laundry at the laundromat (voluntary) or losing a jewel in a chimney to be later found by a chimney sweep (involuntary—*Armory*).

2. **Trover**: "forced purchase"[35]—action for recovery of damages for conversion of personal property, generally measured by the property's value—e.g., the chimney sweep could recover the value of the jewel, but not the jewel itself. *Armory*.

3. **Replevin**: action for recovery of personal property that the defendant wrongfully took. *Anderson*.

4. In finders cases, courts weight the relative strength of the finder's claim to the property against his opponent's claim to that property.

5. **Relativity of title**: TO > F1 > F2. "It's more mine than yours."

2.1.1 Prior Possessor Prevails: *Armory v. Delamirie*

The finder's right of ownership trumps all but the original owner's right (or earlier finders' rights).

1. A chimney sweep found a jewel in a chimney. He brought it to a goldsmith for appraisal, who offered a small amount of money, and when the sweep refused, returned the socket without the jewel.

2. The chimney sweep brought a trover action against the goldsmith. The court found for the chimney sweep, holding that a finder has a right to ownership above all but the property's rightful owner.

3. **Winkfield Doctrine**: In cases of voluntary bailment, the bailor (i.e., the original owner) does not have an action against the present possessor if the bailee has recovered in full from the present possessor.[36]

   (a) The justification is that it's not fair to the present possessor to be doubly liable.

   (b) Courts often apply the Winkfield Doctrine, but not always.

   (c) Bailees have a duty to take care of the property. If a wrongdoer takes the property and the bailee recovers in trover, it's an open question whether the bailee should also have to take care of the money in case the true owner (bailor) wants it back.

[35] Casebook p. 99.
[36] Casebook p. 99.

   (d) Should Winkfield apply to involuntary bailment?
      i. In voluntary bailment, the true owner consents to the bailee's possession, and the bailee represents the owner's interests in the property against wrongdoers. In involuntary bailment, there's no such consent.

4. Earlier finders' rights trump later finders'.

5. Applies to both real and personal property.

6. Why should prior possessors prevail?
   (a) Effort in finding the property.
   (b) Reliance on the property once acquired.
   (c) Emotional attachment.
   (d) Cultural habit (vs. other cultures, e.g. Japan, where turning in found property is the norm).
   (e) Predictability of the law. Finders should know their obligations.

7. What if the jewel's true owner appeared at the goldsmith's and demanded return?
   (a) What are the rights of the goldsmith against the true owner?
      i. Since he has already paid full damages to the bailee (the chimney sweep), the *Winkfield* doctrine bars the bailor's claim against the goldsmith (the present possessor).
   (b) What are the rights of the goldsmith against the present possessor?
      i. The goldsmith has already compensated the chimney sweep, so he has no rights against him.
   (c) What are the rights of the true owner against the goldsmith?
      i. As above, the *Winkfield* doctrine bars recovery by the bailor (the true owner) from the wrongdoer (the goldsmith) once the wrongdoer has compensated the bailee (the chimney sweep).
   (d) What are the rights of the true owner against the present possessor?
      i. The true owner can recover the value of the jewel from the present possessor (the chimney sweep).

8. Should courts be more willing to grant replevin to the prior possessor than to grant money damages?
   (a) It should depend on the property and the prior possessor's attachment to it. If the prior possessor values it for its monetary value, the court should be more willing to grant trover. But if the prior possessor has some other attachment to the object, the court should be more willing to grant replevin.

2.1.2 Relative Rights: *Anderson v. Gouldberg*

The plaintiff's property right must only be valid relative to the defendant's right. Property rights are relative.

1. Plaintiffs harvested lumber while trespassing and took the logs to the defendants' mill, where the defendants took them.

2. The court found for the plaintiffs, holding that the plaintiff's right to the property must only have been lawful against the defendant, not all possible parties. The fact that the plaintiff may have originally obtained the property illegally is irrelevant to its right to the property relative to these defendants.

2.1.3 Landowner's Rights to Found Property: *Hannah v. Peel*

Landowners do not have rights to property that others found on their property if the landowner was not in physical possession of the premises—but "the authorities are in an unsatisfactory state."

1. The house of defendant, Peel, was requisitioned, released, and requisitioned again. Peel never occupied the house. Plaintiff Hannah, one of the soldiers stationed there, found a brooch in a window frame. He turned it over to the police. Two years later, the original owner had still not showed up, so the police gave the brooch to Peel, who sold it for 66*l*.

2. Hannah argued that he had a right to possession above all others except the original owner's, and the original owner could not be located (*Armory*).

3. The court reviewed conflicting precedent, concluding that "the authorities are in an unsatisfactory state. . . ":[37]

   (a) *Bridges v. Hawkesworth*: A shop customer found a package of bank notes and turned it over to the shopkeeper. Nobody claimed the package, and the customer sued to recover from the shopkeeper. The court, following *Armory*, found for the plaintiff.

   (b) *South Staffordshire Water Co. v. Sharman* A pool cleaner found two rings in the mud. The court held that "if something is found on [an owner's] land, whether by an employee of the owner or by a stranger, the presumption is that the possession of that thing is in the owner of the locus in quo."[38]

   (c) *Elwes v. Brigg Gas Co.*: A gas company with a 99 year lease discovered an ancient boat buried in the soil. The court held that the lessors would have had a right to the boat if it had been a mineral (presumably because their purpose for using the land was to draw minerals

[37] Casebook p. 106.
[38] Casebook p. 105.

from it). But it held that the boat was a chattel and that, since the original owner was long gone, the landowner had the stronger right. The landowner's obliviousness was irrelevant: "In my opinion it makes no difference, in these circumstances, that the plaintiff was not aware of the existence of the boat."[39]

4. The court held that Peel was "never in possession of the premises," and therefore he did not have prior possession of the brooch."

2.1.4 *Popov v. Hayashi*

Normally, if a possessor can prove by a preponderance of the evidence that he has a stronger claim than the defendant, he wins the entire property. But *Popov* stands for the proposition that each possessor's interest in the property is proportional to the strength of their claims. When their claims are roughly equal, as they were here, equitable division is the right solution. Physical control is not always the bottom line.

2.2 Adverse Possession

1. "Squatters' rights." Lay people often see it as "a variety of rip-off."[40]

2. A is the true owner. Adverse possession happens when B becomes the possessor without A's consent. B might be the owner or have other rights (e.g., easement).

3. **Four elements of adverse possession**:

   (a) Actual entry giving exclusive possession (to trigger the statute of limitations and to stake out the property being claimed).

   (b) Open and notorious possession (to penalize the owner for sleeping on his rights; the test of notoriety is objective).

   (c) Possession that is adverse.

   (d) Possession that is continuous for the statutory period (but not literally constant—it need only match the average owner's use).

   (e) (Sometimes: payment of property taxes.)

4. **Color of title**: evidence (like a written deed) that appears to establish title but actually does not (e.g., because the original seller lacked a valid title, or because the seller was not competent to transfer the property).

5. **Tacking**: joining consecutive periods of possession by multiple people as a single period of possession.[41]

[39] Casebook p. 105.
[40] Casebook p. 119.
[41] See *Howard v. Kunto* and reader p. 30 problem IV.

   (a) Can be *by* a series of adverse possessors or *against* a series of owners.
   (b) Tacking usually requires **privity in estate**. There is no privity when:
      i. A2 forced A1 off the property.
      ii. A1 abandoned his claim and A2 just happened onto the property.

6. **Ailing title**: say A enters adversely on O1's land. Five years later, O1 transfers the property to O2. A can tack against O2—so, if the statutory period for adverse possession is ten years, A only needs to occupy the property for another five years. Since from O2's perspective the statutory period appears to be only five years, O2 has acquired an ailing title.
7. **Disabilities**: some disabilities render property owners incompetent to transfer ownership of their property, e.g., dementia.
   (a) A disability is immaterial unless it existed at the time when the cause of action accrued (i.e., when the adverse possessor first. took possession of the land).
   (b) Traditionally, the three Is: infancy, insanity, imprisonment.
8. **Relation back**: the adverse possessor acquires a "new title" that relates back to the time of the original entry. It comes up most often when the owner tries to recover back rent payments from the adverse possessor. Once the adverse possessor acquires a title, he is considered to have been the owner from the time of his original entry—thus, the original owner is not entitled to back payments.
   (a) Once the owner no longer has the power to eject the adverse possessor, he also no longer has the power to recover the rental value.
   (b) One exception is the Colorado legislation passed in reaction to the Dick-and-Edie controversy.
9. **Life estate**: an estate held only for the duration of a person's life.
10. **Fee simple absolute**: an estate of indefinite or potentially infinite duration.
11. Statutes of limitation vary between three and 30 years, but usually run between six and 10.[42]
12. Adverse possession doctrine is a mix of judge-made law (e.g., the open and notorious requirement) and statutory law (e.g., time period requirements).
13. **Adverse possession of personal property**:
   (a) It exists, and is in many was the same doctrine as adverse possession for real property.

[42] Casebook p. 120 n. 4. Peterson mentioned that it may be as high as 60 years for undeveloped land in New Jersey.

(b) The main difference is that it's easy to check on land; not so much with personal property, even if the use is open and notorious (e.g., works of art). Hence the **discovery rule**, which provides that the statutory period for possession does not begin until the owner knows (or should know) about the adverse possession.

14. Synonyms: adversity, hostility, claim of right.

15. **Standards for adversity**:

    (a) If you're there with permission, it's not adverse. (E.g., pasture owners will put up "permission to graze here" signs.)

    (b) **Objective test** (most courts):

        i. Intent is irrelevant.

        ii. Often, the occupant is required to *appear* to be claiming the land as her own.

        iii. Prof. Helmholz study: even in jurisdictions that use the objective test, courts usually find a way to make bad faith possessors lose. There's a disconnect between stated law and reality.

    (c) **Subjective test** (some courts):

        i. Good faith is required (you thought the land was yours); or

        ii. Good faith is ok, but not required; or

        iii. A *lack* of good faith is required—a "mentality of thievery." This appears to be the majority's view in *Lutz*.

16. Questions:

    (a) What justifies the doctrine of adverse possession? What is the ideal proposal? Is that proposal internally consistent?

        i. See below, "Possession and the Common Law Method."

    (b) Is it fair, always, that a person who makes better use of property should be entitled to become its owner?

    (c) If you "steal slowly," does that make it ethical?

    (d) Does notice to the owner matter? What are the owner's duties? Does it matter whether the notice is real or constructive?

    (e) When is B in possession of A's property?

    (f) Why does the legal system recognize B's possession?

    (g) Does it matter whether the owner had notice of B's possession?

    (h) How long should the statute of limitations be? Five years, 100 years?

    (i) What should be the standard for adversity? See competing definitions above.

    (j) Do we want land to be put to productive use?

i. Sprankling v. Posner.

(k) Is it worth having a doctrine of adverse possession at all? If not, what would you tell a family who's been living in a house for thirty years, but it turns out that the earlier owner (say, an ancestor) did not have a valid title?

(l) If you use the good faith standard for adversity, should the good faith be reasonable?

(m) Should adverse possessors have to pay fair market value to the true owner?

(n) Should adverse possessors have to pay property taxes?

(o) How much land should you get in an adverse possession claim?

(p) Should adverse possessors be allowed to tack against multiple owners?

i. Yes—mere "paper delivery" should not restart the statute of limitations. The opposite would be unfair to the adverse possessor.

(q) How should the disability doctrine work? Should there be an extension for disabled owners? How long? What types of disability qualify? What would happen if the law contained no disability provisions? How should the law handle disabilities that occur after the adverse possessor's entry? Should natural disasters count as disabilities?

(r) Can a first adverse possessor sue to eject a second possessor, even if the first adverse possessor does not yet have title?

i. Yes.

(s) What counts as continuous use?

i. The standard is the normal owner's behavior—e.g., if the property is a summer beach house, the adverse possessor need only occupy it during the summer.

ii. What could the owner do to interrupt occupation?

A. Eject by court action (the strongest).

B. Ask the occupant to leave.

C. Grant permission.

(t) Should color of title be part of adverse possession law? Under what circumstances, if at all?

i. Color of title does not exist in England. In the US, it developed in the context of the frontier. Does it still make sense today?

(u) Is the complexity of color of title doctrine an argument against its existence?

(v) Problems:

i. B acquires a new title that **relates back** to the date of the event that started the statute of limitations running. For instance, by the rule of increase, the owner of an animal owns that animal's offspring. If B takes possession of A's cow, and then the cow has a calf, and then B gets title to the cow by adverse possession, B also owns the calf—even though the calf was born before B had title to its mother.[43]

ii. Suppose you live in a house you inherited long ago. If somebody way back in the family tree acquired the property by adverse possession (inadvertently or not), should you be entitled to possession? Where would you stand without the law of adverse possession?

2.2.1 Powell on Real Property § 91.01

1. Every American jurisdiction has a statute of limitations beyond which the owner of land can no longer recover the land from another's possession.

2. Adverse possession "rests upon social judgments that there should be a restricted duration for the assertion of 'aging claims,' and that the passage of a reasonable time period should assure security to a person claiming to be an owner."[44]

2.2.2 Ballantine, *Title by Adverse Possession*

1. " . . . the doctrine apparently affords an anomalous instance of maturing a wrong into a right . . . "[45]

2. It's not about the merit of the possessor, but the demerit of the one out of possession. We want people to use land in a useful way.[46]

3. The purpose of adverse possession is to "automatically quiet all titles which are openly and consistently asserted, to provide proof of meritorious titles, and correct errors in conveyancing."[47]

2.2.3 Holmes, "The Path of the Law"

1. Why have adverse possession? Loss of evidence and desirability of peace are secondary. It mainly rests on the interests of the possessor, not the interests of the absent owner.

2. "A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be

[43] Casebook p. 119 n. 2.
[44] Casebook p. 117.
[45] Casebook p. 117.
[46] Casebook p. 117.
[47] Casebook p. 117.

torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man."[48]

3. What are Holmes's justifications for adverse possession?[49]

   (a) **Economics**: Holmes was invoking diminishing marginal utility of income.

   (b) **Psychology**: Holmes was anticipating prospect theory, which holds that people are more upset by losing something in hand than by forgoing the opportunity to realize an equivalent gain.

   (c) **Morality**: the new possessor depends on the property, and it's wrong for the original owner to establish and then cut off that dependence.

2.2.4 Sprankling, "An Environmental Critique of Adverse Possession"

1. The "development model" of adverse possession, which holds that land should be developed, rested on assumptions that might have been appropriate in England, where the property in question would have been down the road. But it is less appropriate in the U.S. where there are large tracts of undeveloped land.[50]

2.2.5 *Van Valkenburgh v. Lutz*

1. Timeline:

   (a) 1912: the Lutzes bought lots 14 and 15 in Yonkers. Mr. Lutz cleared a "traveled way" on lots 19–22.

   (b) 1920: the Lutzes cleared their lot and built a house. They also partially cleared lots 19–22 and built a small house for Mr. Lutz's brother, Charlie.

   (c) 1928: Mr. Lutz became a fulltime farmer and handyman.

   (d) 1937: the Van Valkenburghs bought lots nearby.

   (e) 1946: bad blood developed between the Lutzes and Van Valkenburghs.

   (f) April 14 1947: the Van Valkenburghs bought lots 19–22 and told the Lutzes to clear their things and buildings.

   (g) July 21, 1947: Mr. Lutz agreed to clear off the property but claimed a prescriptive right (i.e., right to use—in this case, an easement). The Van Valkenburhgs built a fence across the easement. The Lutzes sued.

[48] Casebook p. 118.
[49] Casebook pp. 118–19 n. 1.
[50] Reader p. 17.

(h) January 1948: the trial court ruled for Lutz, granting him a right of way. Affirmed on appeal in June.

(i) April 1948: the Van Valkenburghs brought suit to eject Lutz for failing to remove his belongings from lots 19–22. Lutz argued that he had acquired title by adverse possession for upwards of thirty years (the statutory period was 15 years). The trial and appellate courts found for Lutz.

2. Judge Dye (in the Court of Appeals):

   (a) Under the New York statute, adverse possession required occupation under a "claim of title," which required proof that the premises were (1) protected by a substantial enclosure or (2) "usually cultivated or improved."[51] Thus the key issue here was whether the land was usually cultivated or improved.

   (b) Lutz met neither of these requirements.

   (c) In the previous action, Lutz conceded that the Van Valkenburgh's legal title conferred actual ownership. He made this concession in order to establish the basis for his easement claim. He cannot now disavow that claim.

   (d) Reversed.

   (e) Peterson: the court here appears to require that occupant *intend* to occupy the land and take ownership. Under this definition of adversity, the occupant should be openly hostile.

3. Judge Fuld, dissenting:

   (a) There is ample evidence showing that Lutz occupied and cultivated the land.

   (b) The fact that Lutz knew that he did not have a title to the property makes no difference as long as he intended to acquire and use the property as his own.

   (c) Lutz disclaimed his title *after* the statute of limitations period had run for adverse possession. Thus, he had a valid title. A valid title cannot be transferred by oral disclaimer, but only by "the formalities prescribed by law."[52]

   (d) The land need not be entirely cultivated. Lutz's partial cultivation was enough.

4. The court held Lutz's structure built for Charlie on lots 19–22 did not count because he knew he wasn't building it on his own land. It appears to argue, therefore, that you can only adversely possess land that you think belongs to you.

[51] Casebook p. 126 § 40 in footnotes.
[52] Casebook p. 129.

5. **States of mind**:
   (a) **Objective standard** (state of mind is irrelevant): when the new occupant enters the property, the owner has a cause of action. Shouldn't the statute of limitations run at this point?[53]
   (b) **Good faith standard** ("I thought I owned it"): courts often grant title to good faith trespassers but not to trespassers who know the land does not belong to them.[54]
   (c) **Aggressive trespass standard** ("I knew I didn't own it, but I intended to make it mine"): to qualify as adverse possessors, occupants must intend to take the property for themselves. Courts sometimes require the occupant to compensate the owner for the fair market value of the property.
6. *Lutz* was overturned in *Walling v. Przybylo*, which held that there can be a claim of right even if the adverse possessor knows that the land belongs to someone else.
7. Later, the New York legislature passed a statute that defined the claim of right requirement as "a reasonable basis for the belief that the property belongs to the adverse possessor or property owner, as the case may be"—i.e., good faith is required.

2.2.6 Boundary Disputes

1. **Doctrine of agreed boundaries**: if the boundary is uncertain, an oral agreement between neighbors is enforceable if they accept the line for a long time.[55]
2. **Doctrine of acquiescence**: long acquiescence is evidence of an agreement fixing the boundary line.[56]
3. **Doctrine of estoppel**: the first neighbor makes representations about the property line that the second neighbor relies on. The first neighbor is estopped from denying the validity of his earlier statements or acts.[57]
4. **Innocent improver**: someone mistakenly builds on land belonging to another.[58]
   (a) Common law: harsh. Everything goes to the owner of the land.
   (b) Modern courts might force a conveyance of the land at market value from the owner to the improver. The landowner may also have the option to buy the improvement.

[53] Casebook p. 132.
[54] Casebook pp. 132–133.
[55] Casebook pp. 140–41.
[56] Casebook p. 141.
[57] Casebook p. 141.
[58] Casebook p. 141.

   (c) Generally no relief if the encroachment is trivial.
   (d) What if the encroachment takes up a significant part of the land? In *Amkco Ltd., Co v. Wellborn*, the court developed a two-part test:
      i. Plaintiff must show irreparable hardship if relief were denied.
      ii. Plaintiff's hardship is balanced against the defendant's hardship.

5. In cases of intentional encroachment, courts usually require removal of the offending structure, no matter the cost.

6. What if A builds a fence three feet across the line into B's property and occupies the land for the statutory period?[59]
   (a) Can B successfully sue to eject A? No—the doctrine of acquiescence means that A now has a valid claim of ownership over those three feet of land.
   (b) If A believed the fence was on the property line, should it matter whether A intended to claim the land all the way up to the fence, or only up to the actual property line?
   (c) What if A wins title by adverse possession, but to avoid a hassle, moves the fence back three feet? What if three years later A changes her mind and wants to move the fence back?—If three years is enough to satisfy the time period requirement for the doctrine of agreed boundaries, A should lose.

2.2.7 Color of Title and Constructive Adverse Possession

1. **Claim of title**: a means for the adverse possessor to express the requirement of hostility or claim of right.[60]

2. **Color of title**: a claim founded on a defective or invalid written instrument—e.g., the grantor doesn't own the land or is incompetent to grant a transfer. Rarely, but occasionally, required for adverse possession claims. Sometimes it confers a shorter statute of limitations.[61] It may also affect how much land you can claim.

3. Must the adverse possessor have a good faith belief in the validity of the title?
   (a) Sometimes this question is sorted out in statutes, sometimes in case law. Doubts about the validity are sometimes allowed.

4. **Constructive adverse possession**: adverse possession of only a portion of the land under color of title is *constructive* possession of the entire land. The advantage is that activities that establish adverse possession extend to the boundaries specified in the deed.[62]

[59] Problem 1 on syllabus, 1/14/2013.
[60] Casebook p. 134.
[61] Casebook pp. 134–35.
[62] Casebook p. 135.

(a) Physical possession prevails over constructive adverse possession.[63]

(b) It matters how much of the property the adverse possessor actually possesses. There is no bright line, but generally the adverse possessor must occupy the land "in reasonable proportion" to the total area. Courts often consider the circumstances of the possession as well.

5. O owns a 100-acre farm. A entered the back 40 acres under color of an invalid deed from Z for the entire 100 acres. A occupied and improved the land for the period required by the statute of limitations.[64]

(a) A brings suit to evict O, arguing constructive adverse possession. What result?—A should be able to adversely possess the 40 acres that she has occupied and improved, but not the other 60 acres, unless O has not occupied or improved his part of the land.

(b) What if O had originally acquired the farm by adverse possession under color of title? Should the outcome be different?—No—O's claim was valid once he satisfied the requirements for adverse possession.

2.2.8 Interruption of Continuity

1. A and B occupy adjacent property. B built a fence twenty-five feet in on his side. A occupied the 25-foot strip for fifteen years. In the process of rebuilding his gas station, B tore down the fence, stored building materials in the 25-foot strip, and then rebuilt the fence in the same spot.[65]

(a) Should B's actions have interrupted the continuity of A's adverse possession?

i. No. Many courts impose a high threshold for interruption of occupancy. For instance, conducting a survey of the property lines often isn't enough. The interruption should be open and notorious. It also matters whether the adverse possessor knows he's on someone else's land.

ii. But, the cases are inconsistent. Some courts might hold that B's actions (storing materials on the strip) were "an act of dominion."

2.2.9 Color of Title, Tacking, and Seasonal Use: *Howard v. Kunto*

First, tacking is allowed for two adverse possessors in privity with each other. Second, seasonal use satisfies the requirements for adverse possession if the ordinary use of the property is seasonal.

[63] See reader p. 29 problem III.
[64] Casebook p. 135 n. 1.
[65] Problem 3 on syllabus, 1/14/2013.

1. There were three adjacent fifty-foot-wide lots on the Hood Canal. The Kuntos bought what they thought was the middle lot from McCall, which contained the house that the Kuntos then inhabited. It turned out that the Kuntos' deed actually described the lot directly to the west.

2. The Howards, wanting to subdivide their lot, undertook a survey. It turned out that the Kuntos' house was on the Moyer's deeded property (in the middle) and that the Moyers' house was on the Howards' deeded property (to the east).

3. The Howards and Moyers swapped ownership of their deeded land, leaving the Howards in control of the land on which the Kuntos' house was located.

4. Up until this point, neither Moyer nor his predecessors took possession of the land actually possessed by the Kuntos.

5. Howard successfully sued to quiet title over Kunto. The trial court denied Kunto's claim of adverse possession because (1) there was not continuity of possession to permit tacking and (2) possession was not continuous because it involved only a summer occupancy. Thus there were two issues on appeal:

   (a) Is summer occupancy of a summer home continuous?

   (b) Is tacking allowed when the claimant's predecessors also held title to property A but mistakenly occupied property B?

6. Holding:

   (a) Possession by the Kunto and predecessors exceeded the ten-year statutory period for adverse possession.

   (b) Summer occupancy is continuous because the standard is the conduct of ordinary owners. In this case, ordinary owners would occupy a summer house only during the summer.

   (c) Generally, tacking is allowed if successive possessors are in privity. The reason is that squatters should not be able to profit from trespassing.[66] But in this case, because all occupants acted in good faith on an erroneous deed, privity should not be required. Tacking is allowed here.

   (d) Kunto's title to the property where their house is located is quieted. Reversed.

7. What about Howard? Is he left without property?

[66] Casebook p. 146.

2.2.10 Problems on Color of Title

1. Opal owned lots 1-4. It sold the lots to A, but the deed was invalid because the company president had not signed off. A occupied and improved lot 1 for the period prescribed by the statute of limitations. B entered lot 2.[67]

   (a) What rights does A have against B and against Opal under N.Y. Civ. Prac. Act § 38 (cultivated/improved or substantially enclosed)?[68]

      i. Against B: A cannot remove B. A did not cultivate, inclose, or improve lot 2, so it has no claim of title.

      ii. Against Opal: A can maintain title on lot 1 but on none of the others because A did not cultivate, inclose, or improve any lots but lot 1.

   (b) What rights does A have at common law?

      i. Against B: the common law has no requirement for cultivation, improvement, or inclosure. Since A held title to all four lots and occupied them for the statutory period, A's claim of title is valid.

      ii. Against Opal: same.

   (c) What if the property had not been divided into lots?

      i. Constructive adverse possession would have given A a valid claim to the entire property. The claim would have been valid against both B and Opal.

2. X and Y own lots 1 and 2, respectively. Neither is in possession. The lots are conveyed by invalid deed from Z to A, who occupies lot 1 for the statutory period. A sues X and Y to quiet title for lots 1 and 2.[69]

   (a) What result?

      i. A wins against X because A met the requirements for adverse possession on lot 1. But A loses against Y because A has not met the statutory requirements for adverse possession of lot 2.

   (b) Would it matter if X had executed the deed?

      i. No. A still did not adversely possess lot 2.

   (c) Would it matter if X had executed the deed and A had entered lot 2?

      i. Yes—in that case, A would have a valid claim of title against Y for lot 2. But A would not have a valid claim of title against X for lot 1 because the deed was invalid for lot 1 and A did not adversely possess it.

[67] Problem #1 in syllabus, 1/16/2013.
[68] Casebook p. 125 in footnotes.
[69] Problem 2, p. 135.

2.2.11 Problems on Tacking

1. Assume a ten year statute of limitations.[70]

   (a) In 1994, A enters adversely on O's property. O dies in 1995, leaving a will that gives the property to B for life, remainder to C. B dies in 2010 without ever having entered onto the property. Who owns the property?

      i. A. A acquired an FSA in 1994.

   (b) O dies in 1995, leaving a will that devises the property to B for life, remained to C. A enters adversely in 1996. B dies in 2010. Who owns the property?

      i. C. A entered the property *against B*, who held a life estate. When B died, the title went to C. A must then adversely possess against C for the entire ten year statutory period.

         A. Principle: the adverse possessor acquires the title of the owner at the time of the adverse possessor's original entry. **The adverse possessor acquires the property interest she enters against.**

         B. As an owner, if all you have is a life estate, you have nothing to leave your heirs.

2.2.12 Problems on Disability

1. O's disability must have existed when the adverse possessor originally took possession of the property.

2. O owns the property in 1984. A enters adversely on May 1, 1984. The age of majority is 18. The statutory period is 21 years, unless the owner is disabled, in which case the AP must still reach the 21-year period and can then gain ownership ten years after the removal of the disability.[71]

   (a) O is insane in 1984. O dies insane and intestate in 2007.

      - O's heir, H, is under no disability on 2007.
         i. 2017. The adverse possession accrues at the point when the owner is no longer disabled.
      - (b) O's heir, H, is six years old in 2007.
         i. 2017. O's disability was removed in 2007. A acquires ownership ten years after the removal of the disability. Therefore, A acquires ownership in 2017.

   (b) O has no disability in 1984. O dies intestate in 2002. O's heir, H, is two years old in 2002. When does A acquire title by adverse possession?

[70] Casebook p. 149 problems 2–3 at top. See reader p. 33.
[71] Casebook p. 149 nn. 1–3.

i. 2005. A's cause of action accrued in 1984. The statutory period ends in 2005. O's death in 2002 does not reset the clock, even though H is "disabled."

(c) O is five years old in 1984. In 1994 O becomes mentally ill and dies intestate in 2009. O's heir, H, is under no disability. When does A acquire title by adverse possession?

i. 2007. O's initial disability was removed in 1997. A must wait ten years after the removal of the disability. Therefore, A acquires ownership in 2007.

2.2.13 Adverse Possession against the Government

1. Common law: no adverse possession against the government.
2. Some states have adopted changes to the common law rules.[72]
3. Should government land be treated differently for purposes of adverse possession?

2.2.14 Problem on Relation Back

1. In 1990 A enters adversely upon land owned by O. In 2011 O brings suit to eject A from the land, to recover mesne profits (the reasonable rental value of the land) for the years 2006 to 2011 and to recover certain improvements to the land made by B in 2008—improvements which, under the law of accession, would be awarded to the owner of the land. The statute of limitations in action to recover possession of land is 20 years; in an action for mesne profits, 5 years. What should O recover?[73]

2.2.15 Possession and the Common Law Method

1. Easy cases: (1) true owner's claim against a trespasser, (2) good faith possessor's claim against a neglectful owner. But cases are often more ambiguous—e.g., a bad-faith trespasser vs. a careless owner, or a good faith possessor against a disabled owner. The common law accommodates these cases poorly.
2. The common law generally deals with these cases monolithically—all or nothing. But there are alternatives:
   (a) Equitable division (cf. *Popov v. Hayashi*).
   (b) Equitable escheat: vesting title in the state.
   (c) Land bank, where bad-faith adverse possessor's claims are put and then given to good-faith adverse possessors.
   (d) Require the adverse possessor to pay market value to the owner.

[72] Casebook p. 150.
[73] See syllabus problem #1, 1/18/2013.

2.2.16 Policy: Perspectives on Private Property

1. **First occupancy theory**: all land was originally held in common. The institution of private property was needed to keep the peace among claimants. Law protects "whatever an individual has managed to get hold of . . . "[74]

2. **Labor-desert theory**: Locke: "by occupying something one mixes his labor with it."[75]

3. **Personality theory**: Hegel: "property is the *embodiment* of personality, my inward idea and will that something is to be mine is not enough to make it my property; to secure this end occupancy is requisite."[76]

4. **Utilitarian theory**: Bentham: "Property is nothing but a basis of expectation, the expectation of deriving certain advantages from a thing which we are said to possess, in consequence of the relation in which we stand to it."[77] Property law broadens the range of things we can enjoy.

5. **Critical legal studies**: recurring themes:

   (a) Private property rests on coercive use of public authority.

   (b) Legal principles—such as minimizing costs—can never be politically neutral.

   (c) Legal principles are indeterminate. In a legal dispute, only one side can be based on legal principles. For instance, if someone bequeaths property to another under certain conditions, the heir's freedom of disposition of the property is constrained. Whose freedom prevails? Both parties rely on the principle of freedom of disposition. The outcome must therefore be based on something other than legal principle, presumably politics.

   (d) Collective ownership is common.

   (e) Should we have rigid rules or flexible standards? These debates mask deeper tensions, e.g., between social solidarity and guarded isolation.

   (f) Property rights should be conditional and provisional.

[74] Reader p. 133.
[75] Reader p. 39.
[76] Reader p. 41.
[77] Reader p. 41.

§ 3 Possessory Estates

1. **Freehold estate**: normal feudal tenure.
2. **Nonfreehold estate**: lease.
3. "It is revolting to have no better reason for a rule than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from imitation of the past."—Holmes.[78]
4. Two types of estates in land:
   (a) Present possessory estates.
   (b) Future interests.
5. Today, the estate system makes clear (1) what property is being transfered and (2) what sort of ownership is being transferred, measured in the duration of the transferee's interest.[79]

3.1 Up from Feudalism

3.1.1 Tenure

1. The feudal system began under William the Conqueror's social system (Norman Conquest, 1066). Land tenure was a central feature, in which "one's position was defined in terms of one's relationship to land."[80] All were subservient to the king.
2. **Tenants in chief** held land in exchange for specific services to the king, usually military, e.g., furnishing knights.
3. The tenant in chief often provided his services by **subinfeudation**, by which lower tenants provided services or subinfeudated lower tenants in turn—so, a feudal pyramid developed.
   (a) King → Tenant in chief → Mesne[81] lord → Tenant in demesne.
   (b) Each layer owns the services of the layer below.
4. The Domesday Book recorded each tract of land in England and the services by which the land is held.

[78] Casebook p. 183.
[79] Casebook p. 191.
[80] Casebook p. 185.
[81] Pronounced "mean."

3.1.2 Feudal Tenures and Services

1. Three major types of tenure with accompanying services:
   (a) Military tenure: **knight service** (providing men to fight for the king, or the money equivalent), **grand sergeantry** ("splendid court life and pageantry"[82]).
   (b) Economic tenure: **socage** (intended to provide subsistence for overlords; e.g., money, agriculture, maintenance, or other economic services). Every land grant included a service, even if nominal like annual delivery of a midsummer rose.
   (c) Religious: **frankalmoign**.[83]
2. There were also unfree tenures granted to villeins (peasants), who initially had no legal protection, although courts eventually recognized their holdings as on an equal footing with others.

3.1.3 Feudal Incidents

1. **Incidents**: a tenant's duties and liabilities to his lord.
2. **Homage and fealty**: ceremonial allegiance.
3. **Aids**: financial demands in emergencies, e.g., paying a ransom to the lord's captors.
4. **Forfeiture**: if a tenant breached his oath or refused to perform feudal services, he may forfeit his land to the lord. For high treason, he forfeits his land to the king.
5. When a tenant dies:
   (a) **Wardship and marriage**: the lord can hold the land for the tenant's underage heirs. The lord could also sell the heir in marriage.
   (b) **Relief**: the heir has to pay the lord to take control of his inheritance.
   (c) **Escheat**: if a tenant dies without heirs, the land goes to the heirs.

3.1.4 Avoidance of Feudal Incidents

1. Tenants developed ways of evading feudal incidents. Suppose a tenant, T, holds land from L by knight service. T subinfeudated to T1, "reserving as service one rose at midsummer."[84] T was still responsible for knight service to L, but the subinfeudation devalued the incidents due to L of warship, marriage, relief, and escheat.
2. Subinfeudation ended with the Statute Quia Emptores in 1290.[85]

[82] Casebook p. 186.
[83] Casebook p. 187.
[84] Casebook p. 189.
[85] Casebook p. 190.

3.1.5 The Decline of Feudalism

1. Quia Emptores prohibited subinfeudation in fee simple, but it required lords to allow tenants to transfer their land to others (with the same obligations due to the lord). It had two major consequences:
   (a) Established a principle of **free alienation** of land.
   (b) Existing mesne relationships disappeared, so that most land was eventually held directly from the crown.
2. Wages rose over time, giving peasants increased independence and legal rights.

3.2 The Fee Simple

1. Tenants have **status** as (1) tenant of the fee or (2) tenant for life.
2. Over time, status became **estate**, defined by the length of time it may endure.
3. **Fee simple** (short for fee simple absolute) estates can endure forever.

3.2.1 How the Fee Simple Developed

1. **Heritability**: under feudalism, land was not owned, but held by the possessor as as tenant of another. The tenant's holding (**fee** or **fief**) could not be inherited, although the lord would often give it to the heir on payment of relief. Heritability of land gradually arose as a right over time.
2. **Alienability**: By the end of the thirteenth century, Quia Emptores ensured that the fee was freely alienable during the tenant's life.
3. **Fee simple estate**:
   (a) Alienability allowed tenants to pass land to others and their heirs, causing holdings to become **freehold estates** that were not terminable at the lord's will.[86]
   (b) **Estate in land**: e.g., a fee simple—a legal abstraction that we treat as a physical thing (it can be given, sold, bequeathed; creditors can seize it). Estates "vest, divest, merge, are destroyed, shift, spring."[87]
4. "The fee simple absolute is as close to unlimited ownership as our law recognizes. It is the largest estate in terms of duration. It may endure forever."[88]

[86] Casebook p. 193.
[87] Casebook p. 193.
[88] Casebook p. 194.

3.2.2 Creation of a Fee Simple

1. At early common law, a fee simple was created by conveying land **"to A and his heirs."**

2. "And his heirs" are only **words of limitation**, meaning that the heirs do not take as "purchasers," i.e., they do not have an interest in the land. They have an interest only after A's death.

3. "To A" are **words of purchase**, meaning A is the grantee.

4. Adding "and his heirs" is no longer necessary to create a fee simple, but lawyers still do it out of habit and caution.

3.2.2.1 Problems on Fee Simple Creation

1. In 1600, O conveys property "to A for life, then to B forever." What estates do A and B have? If A dies and then B dies, who owns the property? What if the conveyance happens in 2002?[89]

   (a) If the conveyance happened in 1600, A and B would both have life estates, because "to his heirs" was not included. If A and B both died, The land would revert to O.

   (b) If the conveyance happened in 2002, A would have a life estate and B would have a fee simple absolute (because "to his heirs" is no longer required to create a fee simple absolute). If A and B both died, B's heirs would own the land.

2. O conveys property to "to A and her heirs." A's only child, B, runs up large bills. B's creditors can attach B's property to satisfy their claims. Does B have an interest in the property, reachable by B's creditors? What if A wants to sell the property and take a trip around the world—can B stop her?[90]

   (a) B does not acquire an interest in the property until A's death. So, B's creditors cannot reach the property, and B cannot stop A from selling the property.

3.2.3 Inheritance of a Fee Simple

3.2.3.1 Heirs

1. Heirs are intestate successors. A living person has no heirs. Heirs are identified only if the person dies intestate.

2. In all states today, the surviving spouse is an intestate successor. The size of the spouse's share depends on other survivors.

[89] Casebook p. 194 problem 1. See reader p. 36, I and II.
[90] Casebook p. 195 problem 3.

3. Statutes of descent prefer heirs in this order (after spouses):
   (a) First issue.
   (b) Parents.
   (c) Collaterals.

3.2.3.2 Issue

1. "Issue" = descendants—children, grandchildren, and on down.
2. "Per stirpes" = "by the stocks," meaning if a child of the decedent dies before the decedent but leaves children who survive, the child's share goes to the child's children.
3. Until 1925, rules of primogeniture controlled inheritance. Children born out of wedlock were *filius nullius*.

3.2.3.3 Ancestors

1. Parents take as heirs if the decedent leaves no issue.

3.2.3.4 Collaterals

1. Collateral kin are people related by blood who are neither descendants nor ancestors—brothers, sisters, nephews, nieces, uncles, aunts, and cousins.

3.2.3.5 Escheat

1. If a person dies without heirs, the property goes to the state.

3.2.4 Problems on Inheritance of a Fee Simple

1. O has two children, A (daughter) and B (son). B dies testate, leaving all of his property to W, his wife. B is survived by B1 (daughter), B2 (son), and B3 (daughter). A1 (son) is born to A. O then dies intestate.[91]
   (a) Who owns the property in England in 1800?
      i. B2, under primogeniture.
   (b) Who owns the property under modern American law?
      i. A gets one-half and B1, B2, and B3 each get one-sixth. W gets nothing because when B devised his property to A, he had no interest in O's property to devise.

[91] Casebook p. 196 problem 1, reader p. 196.

3.3 The Fee Tail

1. If O has an FSA, he can create a fee tail by conveying "to A and the heirs of his body." "The fee tail descends to A's lineal descendants ('heirs of the body') generation after generation" and expires when all of A's descendants are dead.[92]

2. When the fee tail ends, the land reverts to the grantor's heirs by reversion, or, if specified, to another branch of the family.

3. Originally, a tenant in fee tail could alienate his possessory interest for his lifetime, but he could not affect his issues' rights to the land after his death. Now, a fee tail tenant can simply convey a fee simple by deed.[93]

4. The trouble with fees tail is that they restrain alienation.

5. Jefferson convinced the Virginia legislature to abolish the fee tail and primogeniture. Today, it exists only in DE, ME, MA, and RI. "The fee tail has been replaced by the life estate as a device for controlling inheritance."[94]

6. Today, what kind of estate is created through language that would have traditionally created a fee tail ("to A and the heirs of his body, and if A dies without issue to my daughter B and her heirs")? Some states create a life estate, but most fall into **two categories**:[95]

   (a) A gets a fee simple. Neither A's issue nor B take anything.

   (b) A gets a fee simple, and B gets a fee simple only if A dies without heirs.

7. The Restatement (Third) does not recognize the fee tail.

3.3.1 Problem on Fees Tail

1. O conveys land "to A and the heirs of her body, and if A dies without issue, to B and his heirs." A then conveys "to C and heir heirs." A then married D and has a son E. A dies intestate and is survived by O, B, C, D, E.[96]

2. Who owns the land in Massachusetts?

   (a) C in FSA. Massachusetts is one of four states that continues to recognize the fee tail. After O's conveyance, A has a fee tail and B has a vested remainder in fee simple absolute. (Here, the phrase "if A dies without issue" means "if the fee tail ends because A has no more

[92] Casebook pp. 198–99.
[93] Casebook pp. 200–201.
[94] Casebook p. 201.
[95] Casebook p. 201.
[96] Syllabus problem 1, 1/25/2013.

lineal descendants." In effect, the conveyance means "to A and the heirs of her body, remainder to B and his heirs.") A then conveys the property "to C and his heirs." Under Massachusetts law, a fee tail tenant can convey fee simple absolute. So, C gets the property in fee simple absolute.

3. Who owns the land in states that fall into category one (above)?

   (a) C in FSA. In the first category of states, O's conveyance gives A a FSA, which A transfers to C.

4. Who owns the land in states that fall into category two (above)?

   (a) C in FSA. In the second category, O's conveyance gives A a FSA subject to being divested by B if A dies without surviving issue—i.e., A has a FSSEL and B has the executory interest. When A conveys to C, she cannot convey more than she owns. So, C has the same FSSEL. When A dies *with* surviving issue (E), the executory limitation is destroyed, giving C ownership in FSA.

5. If E had predeceased A, who would now own the land in these states?

   (a) In category one, A would have an FSA, which she could transfer to C in FSA. So, C owns the property in FSA.

   (b) In category two, A would have a FSSEL and B has the executory interest. After A's conveyance to C, C has the same FSSEL, because A cannot convey more than she owns. When A dies without surviving issue, C's FSSEL is divested by B's executory interest. So, B now owns the property in FSA.

3.4 The Life Estate

1. At common law, the life estate had two important consequences:

   (a) The grantor could control the land after the grantee's death, allowing the life estate to supplant the fee tail as a device to control inheritance.

   (b) Trust management for life tenants developed.

2. Today, most life estates are created in trust.

3. "Every life estate is followed by a future interest—either a reversion in the transferor or a remainder in a transferee."[97]

4. Pros and cons of life estates:[98]

[97] Casebook p. 202.
[98] Casebook p. 215.

   (a) *Sale*: it might become advantageous to sell the land at some point, but the life estate holder will not be able to sell it until all future interest holders consent (or until a court orders the sale—*Baker v. Weedon*).
   (b) *Lease*: the life tenant may want to lease the property beyond his lifespan.
   (c) *Mortgage*: banks usually don't lend on life estates.
   (d) *Waste*: taking minerals or cutting timber might be considered waste and therefore blocked.
   (e) *Insurance*: life tenants are under no duty to insure buildings on the land.

5. Waste occurs when the life tenant unreasonably interferes with the future interest holder.[99] Some actions change the property but substantially increase its value—see *Woodrick* below.

3.4.1 Ambiguous Life Estates: *White v. Brown*

When a conveyance is ambiguous as to whether it creates a life estate or a fee simple, courts should interpret it as a fee simple.

1. People:
   (a) Mrs. Jessie Lide, a widow with no children.
      i. Twelve nieces and nephews—the defendants.
   (b) Evelyn White, sister-in-law of Jessie Lide.
      i. Her daughter, Sandra White Perry.
      ii. The Whites lived with Jessie Lide for several decades.
2. Facts:
   (a) February 15, 1973: Jessie Lide died, leaving a handwritten will, which included the words "I wish Evelyn White to have my home to live in and not to be sold."[100]
3. Evelyn White brought suit with her daughter Sandra, arguing that the will gave her a fee simple. The defendants argued that it conveyed only a life estate, leaving the remainder to them under the rules of intestate succession.
4. The language of the will was unclear about the type of estate it created, so the court looked to Lide's intent. The words "to live in" indicated an intent to convey a fee simple absolute. The phrase "not to be sold" also "does not evidence such a clear intent to pass only a life estate as is

[99] Casebook p. 217.
[100] Casebook p. 203.

sufficient to overcome the law's presumption that a fee simple interest was conveyed.[101]

5. "Accordingly, we conclude that Mrs. Lide's will passed a fee simple absolute in the home to Mrs. White."[102]

6. Judge Harbison, dissenting:

   (a) Lide "knew how to make an outright gift, if desired."[103] But here, Lide intentionally created a limitation, and it should have been interpreted as creating a life estate.

3.4.2 Restraints on Alienation

1. The rule against direct restraints on alienation dates to at least the fifteenth century.[104]

2. There are four justifications:

   (a) Restraints make property unmarketable, which may prevent it from being put to good use.

   (b) Restraints perpetuate concentrations of wealth.

   (c) Restraints discourage improvements on land.

   (d) Restraints prevent owners' creditors from accessing the land.

3. Three types:

   (a) **Disabling restraint**: a grantee cannot transfer his interest. *White v. Brown.*

   (b) **Forfeiture restraint**: a grantee loses his interest if he attempts to transfer it.

   (c) **Promissory restraint**: a grantee promises not to transfer his interest. If valid, it is enforceable by the contract remedies of damages or an injunction.

4. Second Restatement: absolute restraints are void, but conditional restraints (e.g., limited to certain people or for a certain time limit) are valid if reasonable.

[101] Casebook pp. 205–06.
[102] Casebook p. 206.
[103] Casebook p. 206.
[104] Casebook p. 208.

3.4.3 Rights of Contingent Remainder Holders: *Baker v. Weedon*

Courts can force the sale of land in which there are future interests if the sale is "necessary for the best interest of all the parties."[105]

1. People:
   (a) John Weedon.
      i. First wife: Lula Edwards.
         A. Kids: Florence Baker, Delette Jones.
            - Florence Baker's children: Henry Baker, Sarah Lyman, Louise Heck (appellants).
            - Delette Jones adopted a daughter, Dorothy, who had not been heard of for years.
      ii. Second wife: Ella Howell.
         A. Child: Rachel. Both Rachel and Ella were dead at the time of the dispute.
      iii. Third wife: Anna Plaxico. No children.
2. Facts:
   (a) 1905: John Weedon bought Oakland Farm.
   (b) 1915: John Weedon married Anna Plaxico. John and Anna worked together on the farm.
   (c) 1925: Weedon had little contact with his daughters Florence and Delette. He wrote a will excluding his daughters and bequeathing all of his property to Anna. The will stipulated that if Anna died without issue, the property would go to his grandchildren—so, the grandchildren had contingent remainders.
   (d) 1932: John Weedon died.
   (e) 1933: Anna Plaxico remarried.
   (f) 1955: Anna stopped working on the farm because of her age and began renting it out. She had no children.
   (g) 1964: The highway department wanted to buy the farm so it could expand the freeway. It located Florence Baker's three children, who were until then unaware of any inheritance.
3. Anna brought suit against the grandchildren to have the property (minus the house) sold so that the court could invest the money and live off the interest. The question was whether a court can order the sale of land in which there are future interests. The lower court held in her favor.

[105] Casebook p. 214.

4. The court here held that courts generally have the power to direct a judicial sale of land, but the scope of the power is not well defined. The sale must be "necessary for the best interest of all the parties, that is, the life tenant and the contingent remaindermen."[106]

5. In this case, selling the property would result in great financial loss for the remaindermen (Florence's three children). Reversed with an order to sell only as much land would be necessary to meet Anna's financial need.

3.4.4 Rights of Remainder Interest Holders: *Woodrick v. Wood*

Future interest holders can sue to prevent waste in life estates. However, acts that increase the property value do not constitute waste.

1. Catherine and George Wood owned several pieces of land, including lot 105. George died in 1987. In his will, he left all of his property to Catherine Wood, and provided that upon her death, the property should be divided between Sheridan Wood and Patricia Woodrick. Sheridan conveyed his interest in lot 105 to Catherine.

2. Catherine Wood had a life estate and a 75% remainder interest in lot 105 and full ownership in fee simple of lot 106. Patricia Woodrick had a 25% remained interest in lot 105.

3. The Woods wanted to raze a barn on lots 105 and 106. Patricia Woodrick sued to enjoin them. The trial court held for the Woods.

4. Can the holder of a remainder interest prohibit the life tenant from destroying structures on the land?

5. Injunctions were available to those with remainder interests to prevent waste. At common law, "anything which in any way altered the identify of lease premises was waste."[107] But Ohio did not recognize the common law rule.

6. "The relevant inquiry is always whether the contemplated act of the life tenant would result in dimunition of the value of the property."[108] Here, removing the barn would actually increase the property value. Affirmed.

3.4.5 Seisin

1. Seisin[109] is possession of a certain kind with certain consequences. For instance, tenants seised of the land were responsible for feudal services.

2. Before 1536, a freehold estate could only be transfered through the ceremony of **feeoffment with livery of seisin**.[110]

[106] Casebook p. 214.
[107] Casebook p. 219.
[108] Casebook p. 220.
[109] Pronounced "season."
[110] Casebook p. 221.

3.5 Leasehold Estates

1. "Leasehold estates are nonfreehold possessory estates."[111] Early property law distinguished between the tenant's physical possession and the landlord's seisin, but the distinction is no longer relevant.

3.6 Defeasible Estates

1. "Poof."

2. A **defeasible** estate ends prior to its natural endpoint when a specified event occurs. For instance, a normal life estate ends when the life tenant dies, but a *defeasible* life estate ends when a condition in the conveyance is satisfied—e.g., O conveys property to A "so long as the property is only used for residential purposes."[112] That estate would end automatically when it is no longer used for residential purposes.

3. Defeasible fees are mainly used to control land use ("this land can only be used for school purposes") or behavior ("this land is yours as long as you don't drink").

4. Three types:

   (a) **Fee simple determinable**: ends automatically when a stated event happens. The language must include a "durational aspect"—for instance, "*so long as* the land is used for school purposes."[113]

      i. *Future interest*: **possibility of reverter**—O, the transferor, or his heirs retain the future interest. It arises because O has transferred less than his entire interest when he creates a determinable fee. The conveyance back to O happens automatically.

   (b) **Fee simple subject to condition subsequent**: "a fee simple that does not automatically terminate but *may be cut short* or divested at the transferor's election when a stated condition happens."[114] It is created by conditional language—"but if," "provided," "on condition that."

      i. *Future interest*: **Right of entry** (or power of termination)—O can exercise his right to reclaim possession of the property, but there will not be an automatic conveyance.

   (c) **Fee simple subject to executory limitation**: created when another defeasible fee creates a future interest in a third party, rather than the original transferor.

[111] Casebook p. 222.
[112] Casebook p. 223.
[113] Casebook p. 223.
[114] Casebook p. 224.

i. *Future interest*: **executory interest**—the third party has the right to take possession of the property if the conditions of the defeasible fee are met.

3.6.1 *Transferability of Future Interests: Mahrenholz v. County Board of School Trustees*

This case turned on the court's interpretation of the original conveyance. If it had created a FSD, the possibility of reverter could have been transferred, and the Mahrenholzes would have had a valid interest. But if it had created a FSSCS, the right of entry could not have been transferred because it had not been exercised, and in Illinois at the time, rights of entry were not alienable.

However, in most states today, rights of entry and possibilites of reverter are fully alienable. See "Transferability of Future Interests" below.

1. Timeline:
   (a) March 18, 1941: the Huttons conveyed 1.5 acres (the "Hutton School grounds") out of 40 acres to the school district. The deed provided that "this land to be used for school purpose only; otherwise to revert to Grantors herein."[115]
   (b) July 1941: the Huttons conveyed the remaining 38.5 acres to the Jacqmains. The deed also purported to convey the reversionary interest in the 1.5 acres that had been conveyed to the school.
   (c) July 18, 1951: Mr. Hutton died intestate.
   (d) February 18, 1969: Mrs. Hutton died intestate. The Huttons' only legal heir was their son Harry.
   (e) October 9, 1959: the Jacqmains conveyed the 38.5 acres and the reversionary interest in the 1.5 acres to the Mahrenholzes.
   (f) May 30, 1973: the school stopped holding classes at the school that was built on the land. The school district continued to use the buildings for storage.
   (g) May 7, 1977: Harry Hutton conveyed to the Mahrenholzes all of his interest in the Hutton School land. The document was filed on May 7, 1977. On September 6, Hutton disclaimed his interest in the property in favor of the Mahrenholzes.
2. The Mahrenholzes sued to quiet title to the school property in themselves. The trial court dismissed the complaint, holding that the conveyance from the Huttons to the school district created a fee simple subject to a condition subsequent followed by the right of entry for condition broken, rather than a determinable fee followed by a possibility of reverter.[116]

[115] Casebook p. 226.
[116] Casebook p. 227.

3. "The basic issue presented by this appeal is whether the trial court correctly concluded that the plaintiffs could not have acquired any interest in the school property from the Jacqmains and Harry Hutton."[117]

4. The type of defeasible fee created by the original conveyance to the school board is in dispute. It depends on how the court interprets the language in the conveyance. But the only two possible future interests that could have been created are (1) a possibility of reverter or (2) a right of reentry. Neither of these future interests are transferable inter vivos under Illinois law, so "the trial court correctly ruled that the plaintiffs could not have acquired any interest in that property from the Jacqmains by the deed of October 9, 1959."[118]

5. The next question is whether the Mahrenholzes could have acquired an interest in the Hutton School grounds directly from Harry Hutton. It depends on the language of the original 1941 deed conveying the land from the Huttons to the school district. The Mahrenholzes argued that it created a fee simple determinable followed by a possibility of reverter. The defendants argued (and the trial court held) that it created a fee simple subject to a condition subsequent followed by a right of reentry for condition broken.

6. Neither future interest is alienable or devisable, but both are inheritable.

7. Critically, if Harry Hutton had a right of reentry, he did not own the school property until he exercised his right. But if he had a possibility of reverter, the property became his automatically as soon as it was no longer used for school purposes. So, the Mahrenholzes could only have an interest in the property if Harry had acquired a possibility of reverter, not a right to reentry.

8. The difference between a fee simple determinable and a fee simple subject to condition subsequent hangs on the terminology. Words with a durational aspect (so long as, while, until) would have created a fee simple determinable. Words creating a condition (upon condition that, provided that) would have created a fee simple subject to condition subsequent.

9. Here the court held that the word "only" was intended to create a fee simple determinable followed by the possibility of reverter. Thus, when the property was no longer used for school purposes, Harry Hutton automatically became the owner. It was therefore possible that he could have conveyed his interest to the Mahrenholzes, though the appellate court here left that issue for the trial court to resolve.

[117] Casebook p. 227.
[118] Casebook p. 227.

3.6.2 Transferability of Future Interests

1. At common law, possibility of reverter and right of entry descended to the heirs of the owner of the interests. But neither interest was transferable during the owner's life. This was because a possibility of reverter was viewed as a possibility, not a transferable thing. Similarly, a right of entry was not a thing, either—instead, it was like a right to sue, which was not transferable. In some cases, attempted transfer destroyed the future interest.[119]

2. Today, most states (with a few exceptions) allow inter vivos transfer of possibility of reverter and right of entry.

3.6.3 Problems on Defeasible Estates

1. Does it make sense to continue the distinction between the fee simple determinable and the fee simple condition to condition subsequent? The distinction turns on subtle differences in language ("so long as" vs. "upon condition that").

   (a) California and Kentucky have abolished the fee simple determinable by statute. In those states, language that would have created a fee simple determinable now creates a fee simple subject to condition subsequent.[120]

   (b) The draft of the Third Restatement abolishes all three defeasible fees. It replaces them with the "fee simple defeasible," defined as "a present interest that terminates upon the happening of a stated event that might or might not occur."[121]

3.6.4 Restraints on Alienation and Use Restrictions: *Mountain Brow Lodge No. 82, Independent Order of Odd Fellows v. Toscano*

A use restriction creates a valid FSSCS even if it effectively creates an absolute restraint on alienation.

1. The Toscanos conveyed the land to Mountain Brow Lodge in 1950 "for the use and benefit of the [Lodge] only; and in the event that the same fails to be used by the second party or in the event of sale or transfer by the second party of all or any part of said lot, the same is to revert to the first parties herein, their successors, heirs or assigns."[122]

2. The Lodge apparently stopped using the land for Lodge purposes. The Toscanos' heirs argued that the conveyance created a FSSCS and was enforceable. The Lodge argued that it created an absolute restraint on alienation and was void.

[119] Casebook p. 232.
[120] Casebook p. 233.
[121] Casebook p. 233.
[122] Casebook p. 237.

3. The trial court held for the Toscanos' heirs.

4. On appeal, the court separated the restraint on alienation, which it held to be void, and the use restriction, which it held to create an enforceable FSSCS.

5. The dissent argued that the use restriction, which only allowed I.O.O.F. Lodge No. 82 to use the land, was effectively identical to a restraint on alienation and should have been held void.

3.6.5 Review Problems

1. O conveys Blackacre "to A and her heirs, but if Blackacre is used for any purpose other than agriculture, then O has the right to re-enter and take possession." What is the state of the title?[123]

   (a) A has a FSSCS and O has a right of entry.

2. Take the facts of the problem above. Suppose several years after the conveyance, A begins residential construction on Blackacre. O died and devised her entire estate to B. What is the state of the title?

   (a) In most states, rights of entry and possibilities of reverter are devisable and inheritable (with a few exceptions—e.g., *Mahrenholz*).[124] Here, O devised her right of entry to B. B now has the option to exercise his right of entry, but until he does, A continues to have ownership in FSSCS. If the right of entry was *not* devisable, it would belong to O's heirs, because a right of entry is descendible in all states.

3. O conveys Blackacre "to A and her heirs so long as Blackacre is used for residential purposes only." What is the state of the title?

   (a) Language of a durational aspect ("so long as") creates a fee simple determinable with a possibility of reverter in the transferor. So, A has a FSD and O has a possibility of reverter.

4. Take the previous facts. Suppose after the conveyance, A begins construction of a factory on Blackacre. O has died and devised her entire estate to B. What is the state of the title?

   (a) As above, in most states, possibilities of reverter are devisable, so B has the possibility of reverter. As soon as A stops using Blackacre for residential purposes, her interest ends (technically, her fee simple determines). B then automatically becomes the owner of Blackacre in FSA. If the possibility of reverter had not been devisable, the O's heirs would have owned Blackacre in fee simple as tenants in common.

[123] Casebook p. 251.
[124] Casebook p. 232.

5. O conveys Blackacre "to O and her heirs on condition that if Blackacre is used for any other purpose than agriculture, then to B."

   (a) O has a FSSEL. B has an executory interest.

6. Take the previous facts. After the conveyance, A begins construction of a factory. B has died and devised her entire estate to C. What is the state of the title?

   (a) Executory interests are devisable by will, so C has the executory interest. When A begins construction of the factory, C's executory interest automatically takes effect. So, C owns Blackacre in FSA.

7. O conveys Greenacre "to A and her heirs. A promises, on behalf of her heirs and assigns forever, that Greenacre shall be used solely for agricultural purposes." What is the state of the title?

   (a) A's promise is a covenant, but it does not make the fee subject to a condition or limitation. A owns Greenacre in FSA.

8. Take the previous facts. After the conveyance, A begins construction of a factory. What is the state of the title when A begins construction? What remedies does O have?

   (a) There is no forfeiture, though O might be able to win damages or an injunction under covenant rules.

§ 4 Future Interests

1. "A future interest is not a mere expectancy, like the hope of a child to inherit from a parent. A future interest gives legal rights to its owner. It is a **presently protected property interest**, protected by the court as such."[125]

2. Five types: remainders, executory interests, reversions, possibilities of reverter, and rights of entry.

3. Restatement (Third) reforms:

   (a) It categorizes all five simply as "future interests."[126]

   (b) It reduces the traditional categories—indefeasibly vested, vested subject to complete defeasance, vested subject to open, and contingent—to two: vested and contingent.

   (c) Class gifts to to a class that is still open to new members is classified as subject to open.

4.1 Future Interests in the Transferor

4.1.1 Reversion

1. A reversion is "the interest remaining in the grantor, or in the successor in interest of a testator, who transfers a **vested estate of a lesser quantum** than that of the vested estate which he has."[127]

2. "[A]ll reversions are retained interests, which remain vested in the transferor."[128]

3. Example: if O has a fee simple and conveys a life estate to A, O has a reversion, which takes effect when A's life estate ends.

4. There is no such thing as a "possibility of reversion."

4.1.2 Possibility of Reverter

1. "A possibility of reverter arises when an owner carves out of his estate a **determinable estate of the same quantum**."[129]

2. It almost always arises when carving a fee simple determinable out of a fee simple absolute.

3. Example: O conveys property "so long as it is used for school purposes." When it is no longer used for school purposes, it reverts to O.

[125] Casebook p. 254.
[126] Casebook p. 272.
[127] Casebook p. 255.
[128] Casebook p. 255.
[129] Casebook p. 256.

4.1.3 Right of Entry

1. "When an owner transfers an estate subject to condition subsequent and retains the power to cut short or terminate the estate, the transferor has a right of entry."[130]

2. Example: O conveys land "to the school board, but if it ceases to use the land for school purposes, O has the right to reenter and retake the premises."

4.2 Future Interests in Transferees

4.2.1 Remainders

1. A remainder is "a future interest that waits politely until the termination of the preceding possessory estate, at which time the remainder moves into possession if it is then vested."[131]

4.2.2 Vested and Contingent Remainders

1. **Vested**: if (1) given to an ascertained person and (2) not subject to a condition precedent.

   (a) *Indefeasibly vested*: "to A for life, then to B and her heirs." B has an indefeasibly vested remainder because it is certain to become possessory and cannot be divested.

   (b) Remainders can also be vested but subject to being divested if an event happens. For instance, "to A for life, then to B and her heirs, but if B does not survive A, to C and his heirs."[132] B has a vested remainder in fee simple subject to divestment.

   (c) If later-born children are entitled to share in the gift, the remainder is *vested subject to open* (or *vested subject to partial divestment*).[133] For instance, "to A for life, then to A's children and their heirs." A has one child, B. B has a vested remainder subject to open.

2. **Contingent**: if (1) given to an unascertained person or (2) contingent upon an event other than the natural termination of the preceding estates.

   (a) Example: "to A for life, then to the heirs of B." The remainder is contingent because the heirs of B cannot be ascertained until B dies.[134]

[130] Casebook p. 257.
[131] Casebook p. 258.
[132] Casebook p. 261 example 8.
[133] Casebook p. 260.
[134] Casebook p. 260 example 5.

(b) Example: "to A for life, then to B and his heirs if B survives A."[135] The condition precedent is B's survival of A. The remainder is contingent on satisfying this condition.

3. More examples:

   (a) O conveys "to A for life, then to B and her heirs if B survives A, and if B does not survive A, to C and her heirs." O has a reversion in fee simple. B and C have **alternative contingent remainders**.[136]

   (b) O conveys "to A for life, then to B and her heirs, but if B does not survive A, then to C and her heirs." B has a *vested* remainder, not a contingent remainder. C has a shifting executory interest.[137]

4.2.3 Executory Interests

1. "An executory interest is a future interest in a transferee that must, in order to become possessory,

   (a) divest or cut short some interest in another *transferee* (this is known as a **shifting executory interest**), or

   (b) divest the *transferor* in the future (this is known as a **springing executory interest**)."[138]

2. Example: O conveys "to A and his heirs, but if A dies without issue surviving him, to B and his heirs." B has an executory interest, which can only become possessory by divesting A.[139]

3. "The difference between taking possession as soon as the prior estate ends and divesting the prior estate is the essential difference between a remainder and an executory interest."[140]

4. An executory interest can be created only in a transferee.[141]

5. Executory interests vest automatically–i.e., the holder of the interest does not need to do anything for it to take effect. It's like a possibility of reverter but *not* like a right of entry (even though it can be created by a condition rather than a durational limitation).

[135] Casebook p. 261 example 6.
[136] Casebook p. 261 example 7; reader p. 63.
[137] Casebook p. 261 example 8; reader p. 63.
[138] Casebook p. 264.
[139] Casebook p. 268.
[140] Casebook p. 259.
[141] Casebook p. 269.

4.2.4 Review Problems on Future Interests in Transferees

Identify the present estates and future interests.

1. O conveys "to A for life, then to B for life, then to C's heirs." All are alive at the time of the conveyance. C is unmarried and has two living children, X and Y.[142]

   (a) A has a life estate. B has a vested remainder for life. C's unascertained heirs have a contingent remainder in FSA.

2. O conveys "to A upon her first wedding anniversary." A is alive and unmarried. O is also alive.

   (a) A has a springing executory interest in FSA. O has a FSSEL. Upon A's anniversary, she automatically gains title in FSA. (It's springing because it divests the transferor, rather than another transferee.)

3. O conveys "to A for 10 years, then to such of A's children as attain 21." A and O were alive at the time of the conveyance. A had two children, X and Y, ages 17 and 20.

   (a) A has a term of years, followed by a contingent remainder in which X and Y have an interest. O has a reversion in fee simple.

4. Take the previous facts. Assume X later reaches the age of 21 but Y is still under 21. A and O are still alive. A's ten year term has not expired.

   (a) X has a vested remainder in fee simple subject to open. A has a term of years followed by a vested remainder. O has no reversion because the vesting of X's remainder divested O. Y has a shifting executory interest in fee simple which will vest when Y reaches 21. (It's shifting because it divests another transferee.)

5. Take the previous facts. Assume that X dies at 22 when Y is 19. O is still alive.

   (a) X's vested remainder in fee simple subject to open passes to his heirs or devisees, who have the exact same interest. A has a term of years subject to a vested remainder. O has no reversion because the vesting of X's remainder divested O. Y has a shifting executory interest in fee simple which will vest when Y reaches 21. (It's shifting because it divests another transferee.)

6. O conveys "to A for life, then to A's children." A and O are alive at the time of the conveyance. A has one child, X.

   (a) A has a life estate. X has a vested remainder subject to open. A's unborn children have a shifting executory interest in fee simple.

[142] Casebook p. 271.

7. Take the previous facts. Assume A has another child, Y, and then A dies survived by X, Y, and O.

   (a) X and Y's interestes become indefeasibly vested upon A's death. X and Y are tenants in common.

8. O conveys "to A for life, then to B and her heirs; but if B marries Z, then to C and his heirs."

   (a) A has a life estate. B has a vested remainder that is subject to complete divestment. C has a shifting executory interest in FSA. There is no reversion because B's remainder is vested.

9. O conveys Blackacre "to A for life, then to B and her heirs so long as Blackacre is organically farmed."

   (a) A has a life estate. B has a vested remainder in fee simple determinable. O has a possibility of reverter in FSA.

10. O conveys a sum of money "to A if she graduates from college." A is not yet enrolled in college.

    (a) O has a FSSEL. A has a springing executory interest in FSA. A's interest will vest when she graduates, divesting O.

4.3 The Trust

1. Trusts distinguish between legal and equitable titles. The trustee holds legal title to the trust property and manages it for the benefit of the beneficiaries, who hold equitable title.

2. Settlors of trusts can protect the beneficiaries' interests by making the trust inalienable. " . . . trusts can be drafted in such a way that trust beneficiaries have no power to transfer or borrow against their trust interests, and creditors have no power to reach those interests to satisfy beneficiaries' debts."[143]

4.3.1 Trusts and Creditors: *Broadway Natl. Bank v. Adams*

Trusts and their payments can be beyond the reach of creditors.

1. Charles Adams's brother set up a trust fund to give regular paymens to Charles. One of its terms put the income beyond the reach of Charles's creditors. One of them sued here to recover a debt from Charles.

2. The question was whether a trust could be inalienable and beyond the reach of a trustee's creditor.

[143] Casebook p. 275.

3. Generally, restraints on alienation are invalid. But the court held that restraints on alienation of trusts are not against public policy. Moreover, it does not defraud creditors because creditors should be aware of the status of the trust when they extend credit. "Under our system, creditors may reach all the property of the debtor not exempted by law, but they cannot enlarge the gift of the founder of a trust, and take more than he has given."[144]

4.3.2 Gray, "Restraints on Alienation of Property"

1. There are many other objections to inalienable life estates (like the one in *Broadway*, above) other than that they defraud the creditors of the life tenant. Grown men should fend for themselves. Inalienability of trusts leads to a "privileged class."[145]

4.4 Rules Furthering Marketability by Destroying Contingent Future Interests

4.4.1 Doctrine of Destructability of Contingent Remainders

1. "A legal remainder in land is destroyed if it does not vest at or before the termination of the preceding freehold estate."[146] Destroying contingent remainders increases alienability.

2. Not all jurisdictions follow the DDCR.

3. Example: O conveys to A for life, then to B if B reaches 21. Upon A's death, if B is not 21, B's interest is destroyed.

4. **Merger**: "if the life estate and the next vested estate in fee simple come into the hands of one person, the lesser estate is merged into the larger."[147]

   (a) Example: O conveys to A for life, remainder to B. If A conveys her life estate to B, the life estate merges into B's remainder, giving B a fee simple.

   (b) Example: O conveys to A for life, and then to B if B survives A. A conveys his life estate to O. The life estate merges with O's fee simple, giving O a fee simple and destroying B's contingent remainder.

4.4.2 The Doctrine of Worthier Title

1. If O conveys to A for life, and then to O's heirs, the remainder in O's heirs is invalid and O gets a reversion.

[144] Casebook p. 278.
[145] Casebook p. 279.
[146] Casebook p. 281.
[147] Casebook p. 282.

2. Originally, the doctrine promoted alienability and plugged a feudal tax loophole. Today, it is mostly obsolete.[148]

4.4.3 The Rule Against Perpetuities

4.4.3.1 The Common Law Rule

1. The rule resulted from a struggle between landowners and judges. They settled on a period of "lives in being plus 21 years thereafter."[149]

2. Gray: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."[150]

3. The rule applies only to interests that are **not vested at the time of conveyance**: contingent remainders, executory interests, and class gifts.

4. The interest must *vest or terminate* within the perpetuities period (life in being plus 21 years).[151]

5. Applying the rule:

   (a) Is the interest vested at the time of the conveyance? The rule applies only to interests that are **not vested at the time of conveyance**. In other words, the rule applies to only three interest: contingent remainders, executory interests, and class gifts.

   (b) Will the interest vest within the perpetuity period of *any* **life in being plus 21 years**? If you can *prove* that it will, then the interest is valid. But if you cannot prove the existence of scenario where it would vest, the interest is invalid.

6. The 21 year period is pegged to a **validating life** (or measuring life or life in being), defined as "someone who can affect vesting or termination of the interest."[152] The person used as the validating life **must be alive at the time the interest is created.**

7. Basic examples (see the end of this section for more complicated problems):

   (a) Valid: O transfers land "in trust for A to life, then to A's first child to reach 21." A is the validating life. The interest in A's first child to reach 21 will necessarily vest prior to A's life plus 21 years. Since you can prove that the interest must vest within this period, the remainder is valid.[153]

[148] Casebook pp. 284–85.
[149] Casebook p. 285.
[150] Casebook p. 285.
[151] Casebook p. 286.
[152] Casebook pp. 286–87.
[153] Casebook pp. 286–87.

   (b) Invalid: O transfers land "in trust to A for life, then to A's first child to reach 25." The interest will not necessarily vest before after A's life plus 21 years. Thus, the remainder is invalid.

   (c) Invalid: to A and his heirs so long as used for school purposes, and then to B and his heirs. The interest will not necessarily vest or terminate within A or B's lifetimes.

8. The "presumption of life fertility" assumes that anyone can have a child at any time—hence the "fertile octogenarian" and the "precocious toddler."[154]

9. "A dozen healthy babies": grantors will name a dozen infants in the hopes that at least one of them will live long, thereby providing a measuring life that maximizes the total perpetuities period.

10. Class gifts follow the **all-or-nothing rule**, which holds that "if a gift to one member of the class might vest too remotely, the whole class gift is void."[155] A gift is not vested until the interests of *all members* of the class have vested.

    (a) The **rule of convenience** can cut off new entrants to a class. For instance, say T devises Blackacre to A's children that reach 25. A has two children, 22 and 26. The gift is invalid under the RAP because A may have another child, Z, and right after, A, X, and Y may all die, so Z's interest would not vest within a measuring life plus 21 years. But, the rule of convenience would allow the class to close at T's death, which would prevent Z from being a member of the class, but it would make T's conveyance valid under the RAP.

4.4.3.2 RAP Examples

1. "To A and his heirs so long as used for school purposes, and then to B and his heirs." The conveyance is invalid because it may not vest until more than 21 years after the deaths of A and B.

4.4.3.3 Analyzing a RAP Problem

1. Identify the interests.

2. Is each interest valid under the RAP?

3. If one or more interests is invalid, what is the remedy for the violation of the RAP?[156]

[154] Casebook p. 288.
[155] Casebook p. 289.
[156] Reader p. 73.

4.4.3.4 Possibilities of Reverter under the RAP: *Brown v. Independent Baptist Church of Woburn*

The RAP does not apply to reversionary interests, including possibilities of reverter.

1. Sarah Converse died in 1849. Her will included two provisions regarding the land she wanted to devise:
   (a) *Executory devise*: to the Independent Baptist Church of Woburn, so long as they keep their faith and use the land as a church, and then to "my legatees hereinafter named."[157]
   (b) *Residuary gift*: everything else to her husband for life, and then to her legatees.
2. The husband died in 1864. The church stopped functioning as a church in 1939.
3. The parties agreed (1) the church had a fee simple determinable and (2) the executory devise to the legatees was void for remoteness, because it might not come into being until long after any life in being plus 21 years.
4. Since the executory interest was void, the question was what should become of the possibility of reverter upon the termination of the church's determinable fee.
5. The court held that Converse's possibility of reverter passed to the legatees under the residuary gift. " . . . the rule against perpetuities does not apply to reversionary interests of this general type, including possibilities of reverter."[158]
6. Simes and Smith argue that she had no possibility of reverter to devise when she died, because the possibility of reverter is not created until the determinable fee is created.[159]
7. Leach: it is wrong the RAP should apply to executory interests but not possibilities of reverter. Here, the exemption of the possibility of reverter from the RAP meant that the title was unmarketable, which was likely a significant factor in the church's demise.[160]

4.4.3.5 "Six Feet Under and Overbearing"

1. The "incentive trust" allow wealthy benefactors to control the behavior of benefactees—for instance, awarding an inheritance only when the benefactee gets married.[161]

[157] Reader p. 73.
[158] Reader p. 76.
[159] Reader p. 73.
[160] Casebook p. 77.
[161] Reader p. 79.

4.4.3.6 *City of Klamath Falls v. Flitcraft*

The RAP does not apply to interests in the transferor (reversion, possibility of reverter, right of entry), allowing transferors to circumvent the RAP by conveying an FSD and then transferring the possibility of reverter to someone else.

1. Facts:
   (a) 1925: The Daggett-Schallock Investment Company conveyed land to the city of Klamath Falls for use as a site for a city library ("so long as"—a fee simple determinable). Upon termination, the land should pass to Fred Schallock and Floy Daggett (or their heirs and assigns).
   (b) 1927: The corporation was dissolved.
   (c) 1969: The city stopped using the land for a library. The city asked the court to adjudicate the rights of the parties under the deed.
   (d) 1970: The defendants conveyed their interests to Flitcraft.
2. Issue: "Does the title to the land remain in the city or did the termination of use as a library cause title to pass to the descendants of the shareholders of the donor-corporation (now dissolved)?"[162]
3. The trial court held that the title was vested in the city because Schallock and Daggett's interest was void under the RAP. The appellate court affirmed, holding that the gift over to Schallock and Daggett was void because the city *could* have maintained a library on the site forever (i.e., longer than any life in being plus 21 years).
4. The next question was whether the grantor corporation retained a possibility of reverter. The appellate court held that although Schallock and Daggett's executory interest was void under the RAP, the corporation retained a possiblity of reverter, which was *not* void (*Brown v. Independent Baptist Church of Woburn* and others).
5. But "the corporation was civilly dead without a successor to whom the possibility of reverter could descend."[163] The court held that Daggett and Schallock, as the corporation's sole shareholders, were entitled to receive the corporation's remaining assets—including the possibility of reverter in question. Therefore, the possibility of reverter in the land belongs to the defendants (here, all rights were consolidated to Marjorie Flitcraft).
6. In 1925, how should Daggett-Schallock's lawyers have advised the company to carry out its desire to have the land forfeited back to Schallock and Daggett after it was no longer used for library purposes?
   (a) They could have used a two-step transaction: (1) create a FSD and (2) transfer the possibility of reverter to Schallock and Daggett.

[162] Reader p. 91.
[163] Reader p. 93.

i. This is a major loophole. Why should you be able to get around the RAP like this? Maybe interests in the transferor (reversion, possibility of reverter, right of entry) should also be subject to the RAP.

4.4.3.7 *Jee v. Audley*

1. In his will, Edward Audley left £1000 to his wife, and upon her death, to his niece Mary Hall "and the issue of her body." Then it should go to the daughters of John and Elizabeth Jee.
2. Audley's wife died. Mary Hall was about 40, with no husband or children. The daughters of the Jees sued to secure the £1000 upon Hall's death.
3. The question was "whether the limitation to the daughters of John and Elizabeth Jee was not void as being too remote."[164]
4. Can any of the following be valid measuring lives?
   (a) *Edward Audley*: no. Mary Hall might die more than 21 years after Audley.
   (b) *Edward Audley's wife*: no. Mary Hall might die more than 21 years after Audley's wife's death.
   (c) *Mary Hall*: No. The Jees might have
   (d) *John or Elizabeth Jee*:
   (e) *One of the four Jee daughters*:

4.4.3.8 *The Symphony Space, Inc. v. Pergola Properties, Inc.*

A future interest is invalid under the RAP even if it actually vests within the perpetuities period.

1. 1978: Broadwest sold a building to Symphony Space for the below-market price of $10,010. Broadwest leased back the commercial portions of the building for $1 per year, while Symphony retained the theater portion. The purpose of the agreement was to allow Symphony Space, a nonprofit, to claim a property tax exemption for the entire building.
2. The parties signed several other documents dated December 1, 1978:
   (a) A deed conveying the property from Broadwest to Symphony.
   (b) A lease to Broadwest from 1979 to 2003 for $1 per year.
   (c) A 25-year mortgage between the two parties.
   (d) An option agreement giving Broadwest the exclusive right to repurchase all of the property.

[164] Reader p. 95.

3. The option agreement was in question here. It allowed Broadwest to repurchase the property up to 2003, or 24 years after the initial agreement.
4. 1981: Broadwest transferred its interests to Pergola.
5. 1985: Pergola tried to exercise its option to buy back the property. Symphony claimed the option was void under the RAP. (The property had been designated a historical landmark and its value had increased significantly.)
6. The trial court held that the option was void under the RAP.
7. The court here reasoned that applying the RAP to commercial land options hinders the owner's incentive to improve the property and hinders its alienability. Nonetheless, the RAP had to apply to such options unless the legislature decided otherwise.[165]
8. Because the option could have vested beyond the perpetuities period, it was invalid.
9. (The USRAP abolished the application of the RAP to options and other commercial transactions.[166])

4.4.3.9 "Postscript on the Rule Against Perpetuities"

1. *Lucas v. Hamm*: attorneys who misapply the RAP are not liable for malpractice.

4.4.3.10 L. Simes, "Public Policy and the Dead Hand"

1. The RAP has several conventional justifications:[167]
   (a) By furthering alienability, it increases the productivity of property and increases wealth in society. But this justification no longer holds because of changes in capital investments and other areas of law.
   (b) It limits undue concentration of wealth. But taxes better serve this purpose.
   (c) It is socially undesirable for some people to have assured incomes, because those who are unable to sustain themselves on their own should not survive. But the rest of modern society also helps their survival.
2. There are two more convincing reasons:
   (a) It strikes a fair balance between the desires of current and future generations.
   (b) We want the living, not the dead, to control the world's wealth.

[165] Casebook p. 297.
[166] Casebook p. 304.
[167] Reader pp. 101–02.

4.4.3.11 The Perpetuity Reform Movement

1. Early reforms shifted the focus to the actual facts at the end of the life estate—but this reform did not account for purely technical violations.
2. Some reforms addressed specific technical issues, e.g, the unborn widow and the fertile octogenarian.
3. ***Cy pres***: courts will rewrite an instrument to avoid a RAP violation in a way that conforms to the transferor's intent.
4. **Wait-and-see**: even if an interest is invalid under the common law RAP, it becomes valid if it ends up vesting within the RAP period.
5. **Uniform Statutory Rule Against Perpetuities**: like wait-and-see but with a fixed 90 year period—a "permissible vesting period."[168]
6. Many states have exempted trusts from the RAP, leading to the rise of the perpetual trust.

4.4.3.12 Dukeminier & Krier, "The Rise of the Perpetual Trust"

1. State legislation permitting perpetual trusts has undermined the RAP.
2. *The generation-skipping transfer tax*:
   (a) The federal estate tax applies to any property interest transferred by will, intestacy, or survivorship to another person, except spouses and charities.
   (b) People would avoid the estate tax through life estates. For instance, T could devise his property in trust to A for life, then to A's children for their lives, and then have the principal divided among A's grandchildren. The estate tax would apply at T's death but not at the death of A or A's children.
   (c) Congress closed this loophole with the Generation-Skipping Transfer (GST) tax in 1986.[169] The GST is due if the estate passes to the next generation upon the owner's death (e.g., it's due at A's death when the property passes to A's children).
   (d) However, Congress also raised the exemption to $1 million (to rise to $3.5 million by 2009). So a transferor can create a tax-exempt trust of $1 million through successive life estates for as long as the state perpetuities law allows (e.g., lives in being plus 21 years under the common-law RAP; or 90 years under USRAP).
3. *State legislation*: Since 1986, at least 20 states have passed legislation allowing perpetual trusts by abolishing the RAP, because loosening the rules allows the states to attract investment.

[168] Casebook p. 308.
[169] Casebook p. 311.

4. Abolishing the RAP in the case of perpetual trusts leads to several problems:[170]

   (a) *The problem of inalienability*: perpetual trusts may restrict alienability, but a well drafted trust will make the assets freely marketable.

   (b) *The problem of first-generation monopoly*: the RAP strikes a balance between the interests of the initial owner and the interests of future generations.

   (c) *The future of perpetual trusts*: Congress will be responsible for the future of the trust system.

4.4.3.13 Silverman, "Amid Congressional Scrutiny, Huge Sums Pour into States that Allow "Dynasty Trusts""

1. More than $100 billion has flowed into perpetual "dynasty trusts."[171]

4.4.3.14 Reforming the Rule Against Perpetuities

1. What concerns is the RAP designed to address? Are these concerns serious?[172]

   (a) The RAP developed as a limitation on gifts of contingent future interests to family members. It aimed to enhance marketability of property, which facilitated productive use and helped limit concentration of wealth. It struck a balance between the interests of the dead and the living.[173]

   (b) What's wrong with "dead hand control"?

      i. Dead hand control is the ability of landowners (or property owners) to control their possessions after they die. Such control can hinder the property's marketability by creating uncertainty in title. There is also a moral dilemma in allowing a single, mortal person to control property for all time. Finally, dead hand control can serve to consolidate wealth and perpetuate income inequality, although estate taxes might mitigate this effect.

2. How close is the fit between the RAP's provisions and the concerns it is designed to address?

   (a) It generally achieves its goal, but sometimes it leads to absurd results, like the cases of fertile octogenarian and the precocious toddler. It can also lead to results that are clearly contrary to the conveyor's intent, as in the case of the unborn widow.

[170] Casebook pp. 313–15.
[171] Casebook p. 315.
[172] See syllabus 2/11/2013.
[173] *Understanding Property* p. 201.

(b) Why is the possibility of remote vesting problematic?

i. Remote vesting hinders marketability by creating uncertainty in the title.

(c) What does the "vested" or "contingent" nature of a future interest have to do with concerns that underlie the RAP?

3. How could the concerns underlying the RAP be addressed in other ways? What would an alternative rule look like?

(a) *Wait-and-see*: if the interests actually does vest within the RAP period, it is valid.

(b) *Cy pres*: allow courts to rewrite invalid conveyances to conform to the RAP while honoring the conveyor's intent.

(c) *USRAP*: in addition to the common law RAP period, you can establish a uniform 90-year vesting period, which enhances certainty and clarity.

(d) Remove the distinction between vested and contingent interests. See *Woburn Church*, where possibility of reverter was absurdly excepted.

(e) *Trusts*: contingent future interests are rare today. Moreover, most contingent future interests in property are equitable, not legal, and the trustee has a duty to invest trust assets productively.[174]

(f) The "dozen healthy babies" manoeuvre allows lawyers to name several infants in the conveyance in hopes of maximizing the RAP period. This trick does not further the goals of the RAP. The rule should be reformed to require measuring lives to be somehow logically connected to the conveyance.

4.4.3.15 Problems on the Rule Against Perpetuities

1. O conveys "to A for life, then to B if B attains the age of 30." B is now two years old. Is the interest valid?[175]

(a) Yes. You can use B as the measuring life because B was alive when the interest was created. If you use B as the measuring life, the interest will vest within the period of the life in being plus 21 years.

2. O conveys "to A for life, then to the first child of A to reach the age of 30." A's oldest child is B, age two. Is the interest valid?[176]

(a) No. A might die tomorrow, which would mean that B's interest would not vest until A's life plus 28 years.

[174] *Understanding Property* pp. 209–10.
[175] Casebook p. 289 problem 1.
[176] Syllabus 2/6/2013 problem 2 (p. 464, problem 2). See reader p. 73.

3. O conveys "to A for life, then to A's widow, if any, for life, then to A's issue then living." Is the conveyance valid?[177]

   (a) No. The only relevant lives are A and A's widow:

      i. *A*: no. A's widow could live more than 21 years, which would mean that A's issues' interest would vest after A's life plus 21 years.

      ii. *A's widow*: no. This is the **unborn widow problem**. A's widow may not be alive at the time the interest is created, so A's widow is not a valid measuring life.

4. Assume the same facts as the previous question, but suppose the conveyance were "to A for life, then to A's widow, if any, for life, then to B and his heirs."[178]

   (a) Yes. B has a vested remainder in fee simple absolute. The RAP only applies to non-vested interests.

5. O conveys land "to the school board so long as it is used for school purposes."[179]

   (a) The school board has a FSD. O has a possibility of reverter, which is exempt from the RAP. Future interests retained by the transferor—reversions, possibilities of reverter, and rights of entry—are considered vested and are exempt.

6. T devises property "to A for life, then to A's children for the life of the longest liver of A's children, then to B if A dies childless." Is B's interest valid?[180]

   (a) Yes. B's interest will vest or fail upon A's death.

7. T devises property "to A for life, then to A's children for the life of the longest liver of A's children, then to B if A has no grandchildren then living." Is B's interest valid?[181]

   (a) No. You can't use any of A's children as the measuring life because some of A's children may not be born at the time of the devise. A is invalid as a measuring life because some of A's children may live for more than 21 years past A's death. You can't use B as the measuring life because B may die more than 21 years before his interest vests, which would mean that B's heirs' interest would not vest until more than 21 years after the measuring life.

[177] Syllabus 2/6/2013 problem 2 (p. 464, problem 4). See reader p. 74.
[178] Syllabus 2/6/2013 problem 2 (p. 464, problem 4). See reader p. 74.
[179] Casebook p. 291 ex. 33.
[180] Reader p. 87 problem (a).
[181] Reader p. 87 problem (b).

8. T devises property "to A for life, then to A's children for the life of the longest liver of A's children, then to B's children." Is B's children's interest valid?[182]

   (a) Yes. Use B as the measuring life. B's children's interest will vest upon his death. This is a class gift, but it is valid because the class closes upon B's death.

9. T devises property "to A for life, then to A's children for the life of the longest liver of A's children, then to B's children then living."[183]

10. T devises property "to A for life, then to A's children for the life of the longest liver of A's children, then to A's grandchildren." Is A's grandchildren's interest valid?[184]

    (a) No. You can't use A as the measuring life because you can't prove that the interest will vest within 21 years of A's death. You can't use any of A's children as the measuring life because some of them may not yet be born. You can't use A's grandchildren because some of them may not yet be born either.

11. T devises property "to A for life, then to A's children for the life of the longest liver of A's children, then to T's grandchildren." Is T's grandchildren's interest valid?[185]

    (a) Yes. If T has any children at the time of the devise, you can use them as a group of measuring lives. The remainder will vest upon the death of T's last surviving child. If T does not have any children at the time of the devise, then T's grandchildren have already been born, so there is no possibility of remote vesting.

12. O conveys Blackacre "to the school board, but if it ceases to use Blackacre for school purposes, to A and her heirs." A's interest is invalid under the RAP. The school board owns Blackacre in FSA.[186]

4.4.3.16 Sample Exam Question

O, owner of Blackacre in fee simple absolute, devised Blackacre "to A and his heirs so long as the property is used for a non-profit lending library for children, but if the property is not used for such a library or ceases to be used for such a library, then B and his heirs, successors or assigns have the right to re-enter and re-take the premises."[187]

[182] Reader p. 88 problem (c).
[183] Reader p. 88 problem (d).
[184] Reader p. 89 problem (e).
[185] Reader p. 89 problem (f).
[186] Casebook pp. 291–92.
[187] Assignment sheet 6, 2/13/13.

B would have been O's sole heir if O had died intestate.

Blackacre is a 10-acre parcel of land with a house on 1/4 of an acre. After O died, A converted the house into a non-profit lending library for children and used it as such a library for 5 years. A then sold the property to C, who converted the building back into a residence and used it for residential purposes. C was an elderly man who seldom emerged from his home and never used the rest of the property.

Twenty years after C acquired the property from A, C died, devising Blackacre "to D for life, then to E and his heirs if E survives D, and if E does not survive D, to F and his heirs."

In this jurisdiction, the statutory period for recovery of possession of real property is 15 years, and the common-law Rule Against Perpetuities has not been modified.

Who owns what interests in Blackacre?

1. O's initial conveyance to A was an **ambiguous conveyance**. It could have given A either a FSD or FSSEL. Courts generally resolve ambiguous conveyances in favor of optional rather than automatic forfeiture. But in this case, both possibilities involve automatic forfeiture, so the court would have to use its discretion to choose one or the other. Then, it would rewrite the instrument to remove the ambiguity.

2. Option 1: **A has a FSD** because of the durational language ("so long as the property is no longer used as a non-profit lending library").

   (a) A's interest is valid under the RAP because it is vested.

   (b) O's devise to A in FSD gave O a possibility of reverter. Upon O's death, O's future interest passed to B, his sole heir. So, **B has a possibility of reverter**. The facts here are analogous to *Brown v. Independent Baptist Church of Woburn*, where the court held that possibilities of reverter are exempt from the RAP. Thus, B's possibility of reverter is valid under the RAP.

   (c) After five years, A sold the property to C. The title automatically transferred to B because of B's possibility of reverter. But, B did not take physical possession of the property. C remained in physical possession of 1/4 of an acre (out of 10 acres total). C possessed the property for twenty years. The statutory period for adverse possession was fifteen years. Did C meet the requirements for adverse possession?

      i. *Actual entry giving exclusive possession*: yes—C acquired what he thought was a title to the land, and he physically occupied it and used it as his home.

      ii. *Open and notorious possession*: yes—although C was reclusive, he openly used the 1/4 of an acre as a residence. The policy behind this requirement is to penalize owners for sleeping on

their rights. B had a duty to check whether anyone was living in the building.

iii. *Possession that is adverse*: yes—C occupied Blackacre without B's consent.

iv. *Possession that is continuous for the statutory period*: yes.

v. Depending on the jurisdiction's rules, C may have been required to pay property taxes.

vi. **C adversely possessed Blackacre**. Because he occupied the land under color of title, constructive adverse possession entitled him to ownership of the entire 10 acres, with a few possible exceptions:

A. If the jurisdiction has a "reasonable proportion" requirement, C may not be entitled to ownership of the full 10 acres.

B. We don't know the details of C's deed. If the jurisdiction follows the objective test, C's understanding of the deed and his intentions are irrelevant. But if the jurisdiction follows the subjective test, we would have to address his understanding of the deed and his intentions. Some courts (like the *Lutz* court) require a "mentality of thievery," but others require good faith.

3. Option 2: **A has a FSSEL** because the devise created a future interest in a third party. **B has an executory interest.**

   (a) B's executory interest is **not valid under the RAP**. A and B are the only possible measuring lives, and it's not possible to prove that B's interest will vest within the life of either A or B plus 21 years. For instance, the property may be used as a non-profit lending library for the next two hundred years.

   (b) The court would strike the invalid clause, after which **A owns Blackacre in FSA.**

   (c) After five years, A sold Blackacre to C. **C owns Blackacre in FSA**. It doesn't matter how C used the property.

4. Under both options, **C owns all of Blackacre in FSA.**

5. C died, conveying Blackacre to D for life, then to E and his heirs if E survives D, and if E does not survive D, to F and his heirs.

6. **D has a life estate** and **E and F have contingent remainders**. Both E and F's remainders are valid under the RAP because both are certain to vest or terminate within 21 years of D's death.

§ 5 Co-Ownership and Marital Interests

5.1 Common Law Concurrent Interests

5.1.1 Types, Characteristics, and Creation

1. Three main types:
   (a) **Tenants in common**: separate but undivided interests.[188]
      i. Example: O conveys property to A and B.
      ii. The interest of each is descendable and may be conveyed by deed or will.
      iii. No survivorship rights—i.e., the interests are distinct even if one owner dies.
      iv. Each tenant owns an undivided share of the whole.
   (b) **Joint tenants**: regarded as a single owner.[189]
      i. Both have a right of survivorship—so if one dies, that tenant's interest is simply extinguished.
      ii. Four unities are required:
         A. *Time*: all interests must be acquired or vest simultaneously.
         B. *Title*: all interests must be acquired by the same instrument or by joint adverse possession.
         C. *Interest*: all must have equal undivided shares and identical interests measured by duration.
         D. *Possession*: each must have a right to possession of the whole. After the joint tenancy is created, one joint tenant can voluntarily give exclusive possession to another.
      iii. If any unity is lacking, a tenancy in common is created.
      iv. If any unities are later severed, the joint tenancy becomes a tenancy in common. Any one joint tenant can unilaterally convert a joint tenancy into a tenancy in common by conveying his interest to a third party.
   (c) **Tenancy by the entirety**: created only in husband and wife.[190]
      i. Requires the four unities, plus a fifth—marriage.
      ii. Today it exists in less than half the states.
2. Common law favored joint tenancies over tenancies in common. Today, the situation is reversed.
3. Historically, A and B could not hold joint tenancy if they occupied unequal shares. This rule is mostly ignored today.[191]

[188] Casebook p. 319.
[189] Casebook p. 320.
[190] Casebook p. 321.
[191] Casebook p. 324.

5.1.1.1 Problems on Creation of Joint Tenancies

1. O conveys property to A, B, and C as joint tenants. Subsequently A conveys his interest to D. Then B dies intestate, leaving H as his heir.[192]

   (a) What is the state of the title?

      i. When A conveyed his interest to D, he severed the joint tenancy, creating a tenancy in common among B, C, and D. When B died intestate, his interest passed to his heir, H. So C, D, and H have a tenancy in common.

   (b) What if B had died leaving a will devising his interest to H?

      i. The result should be the same. A's conveyance severed the joint tenancy, creating a tenancy in common among B, C, and D. B then devised his interest to H, leaving a tenancy in common among C, D, and H.

2. A and B own Blackacre in joint tenancy. A conveys a 10-year term of years in Blackacre to C. After five years, A dies, devising all of his property to D. What are B's rights?[193]

   (a) Courts are divided on whether conveying a lease severs the joint tenancy. In *Tehnet v. Boswell*, the California Supreme Court held that the lease is valid but does not sever the joint tenancy. In this case, the *Boswell* approach would mean that C's lease would end upon A's death, and D would have nothing because A had no separate interest to convey. Thus, B would have sole possession.[194]

   (b) In other states, a lease does sever the joint tenancy. In this case, after the lease, A and B would own Blackacre as tenants in common. Upon A's death, A's interest passes to D, leaving B and C as tenants in common. C's lease would remain, with D as the landlord.

5.1.2 Severance of Joint Tenancies

5.1.2.1 Problems on Severance of Joint Tenancies

1. Is unilateral severance fair? What sort of notice should be required?

   (a) Unilateral severance respects each co-owner's rights by allowing each to control how his share is used. However, unilateral severance creates opportunities for fraud. For instance, one tenant could secretly sever the joint tenancy by conveying his interest to a third party; but if the other joint tenant dies first, the survivor destroys the secret deed and claims sole title.

[192] Casebook p. 322 problem 1.
[193] Syllabus 2/15/2013.
[194] *Understanding Property* p. 144.

(b) Therefore, joint tenants should be required to provide notice of severance to the other joint tenants.

2. Suppose that A and B (who are joint tenants) sign a written agreement giving B the rentals from and possession of the land for her life. Does the agreement destroy the unity of possession?[195]

   (a) " . . . an agreement between joint tenants that merely provides that one of them will occupy the common property does not effect a severance."[196]

   (b) A and B remain joint tenants. Upon A's death, B becomes the sole owner.

5.1.2.2 Unilateral Termination of Joint Tenancy: *Riddle v. Harmon*

Joint tenants can unilaterally sever the joint tenancy without resorting to common law rituals.

1. Mrs. Riddle owned property in joint tenancy with her husband. She tried to sever the joint tenancy by conveying to herself a one-half interest.

2. The trial court refused to recognize the severance. It quieted title to the property in her husband.

3. "An indisputable right of each joint tenant is the power to convey his or her separate estate by way of gift or otherwise without the knowledge or consent of the other joint tenant and to thereby terminate the joint tenancy."[197]

4. Some common law jurisdictions required the joint tenant to convey his interest to a third party "strawman" (e.g., a lawyer), who would then convey it back.

5. Held: "there is little virtue in steadfastly adhering to cumbersome feudal law requirements."[198] The severance was valid.

5.1.2.3 Mortgage and Severance: *Harms v. Sprague*

Mortages do not sever joint tenancies because they do not destroy unity of title.

1. William and John Harms were joint tenants. During his life, John Harms mortgaged his interest in the joint tenancy to Carl and Mary Simmons. On his death, John Harms devised all of his property to Charles Sprague.

[195] Casebook p. 334 problem 3.
[196] *Understanding Property* p. 145.
[197] Casebook p. 325.
[198] Casebook p. 327.

2. William Harms brought suit against Sprague to quiet title, asserting his right of survivorship. He also named the Simmonses as defendants. Sprague counterclaimed, claiming a right to the property as a cotenant.

3. The main issue was whether John Sprague's mortgage of his interest severed the joint tenancy. A secondary issue was whether the mortgage survived John Harms's death as a lien on the property.

4. The trial court held that the mortgage severed the joint tenancy and that it survived as a lien. The appellate court reversed, finding that William Harms owned the entire property.

5. The court's reasoning turned on whether the mortgage was a lien or title. Precedent held that a lien would not sever a joint tenancy but a title would. The court held that mortgages are liens. " . . . we find that a joint tenancy is not severed when one joint tenant executes a mortgage on his interest in the property, since the unity of title is preserved."[199] Further, the mortgage did not survive, because it rested on John Harms's interest, which expired at his death.

5.1.3 Relations Among Concurrent Owners

1. On the one hand, the law treats cotenants as independent actors. For instance, one cotenant cannot enter into a contract on behalf of another.

2. On the other hand, cotenants sometimes owe fiduciary duties to other cotenants. But generally, cotenants do not have a duty to safeguard the rights of other cotenants.

5.1.3.1 Right to Possession

1. Each cotenant has an **equal right to possession of the whole property**.

2. The one major exception is **ouster**. Ousted cotenants can recover their pro rata share of the fair rental value of the use by the cotenant in possession. *Spiller v. Mackereth*.

3. A cotenant (either a joint tenant or tenant in common) can lease to another without the other cotenants' consent, but the lessee's interest cannot exceed the lessor's interest as a cotenant. *Swartzbaugh v. Sampson*.

4. The majority rule is that a cotenant in exclusive possession is not liable to the other cotenants for rent.

5. Some argue that it makes more sense today to require cotenants in possession to pay rent to the other cotenants under some circumstances, e.g.,

[199] Casebook p. 333.

if the cotenants acquire the property by devise or intestate succession and the other cotenants are already living somewhere else.[200]

5.1.3.2 Right to Rents and Profits

1. If a third person pays to rent the land, **each cotenant is entitled to a pro rata share of rents**.
    (a) The **Statute of Anne** provided that "a tenant in common actually receiving rents, issues and profits might be compelled to account for the excess over his proper share."[201]
2. If a cotenant refuses to pay, the other cotenants can bring an **accounting action** to recover their shares.
3. Cotenants are entitled to pro rata shares of profits from natural resources.

5.1.3.3 Liability for Mortgage and Tax Payments

1. **All cotenants are obliged** to pay their share of mortages, taxes, assessments, and other payments that could give rise to a lien on the property.
2. If one tenant pays more than his share, he can recover the excess in a **contribution action**.
    (a) Should the amount a cotenant can collect in contributions be offset by the value of his use of the property? The court in *Baird v. Moore* said no. given the circumstances.
3. However, in most states, a cotenant in sole possession cannot recover for these payments unless they exceed the reasonable rental value. So if the cotenant in possession spends $20,000 per year on mortgage payments, but the fair rental value for the year is $30,000, the cotenant cannot win contributions.

5.1.3.4 Liability for Repair and Improvement Costs

1. **Cotenants cannot recover contributions for repairs or improvements** because (1) cotenants may disagree on the scope and necessity of the work and (2) if the law allowed contribution actions for repairs or maintenance, courts would have to adjudicate minor disputes.
    (a) The ***Mastbaum* rule**: "A tenant in common who is in sole possession of the common property is under a duty to his co-tenants to preserve the property by making needful, ordinary repairs, and paying taxes, mortgage interest and insurance premiums."[202] But the

[200] *Understanding Property* p. 140–41.
[201] Reader p. 122.
[202] Reader p. 121.

general rule is that the cotenant who made the repairs cannot collect contributions from other cotenants.

(b) Some courts will allow contribution as justice requires. *Baird v. Moore*.

2. Upon **partition or an accounting for rent**, a cotenant can recover credit for the **excess costs** of repairs (i.e., costs beyond his share). For improvements, courts will try to give the improved portion of the property to the cotenant to paid for it, and if that is not possible, it will award a cotenant a credit for the **added property value** (but not for the actual expense).

   (a) Example: A and B are cotenants. A builds a building at a cost of $10,000. Upon partition, the property is sold for $55,000, with the land worth $30,000 and the building worth $25,000. If they split it down the middle, each would get $27,500. But A should get the entire value of the building. So, they each get half of the value of the land ($15,000), and A gets the entire value of the building in addition ($25,000). In total, A gets $40,000 and B gets $15,000.

   (b) Courts favor partition in kind over a partition sale if it is practical and serves the parties' interests. *Delfino v. Vealencis*.

5.1.3.5 Liability for Waste

1. Cotenants are liable to other cotenants for waste.

2. Courts treat natural resource profits as sources of income to be divided among cotenants.

5.1.3.6 Partition in Kind: *Delfino v. Vealencis*

Partition in kind should take priority over a partition sale if it is practical and serves the parties' interests.

1. The plaintifs, Angelo and William Delfino, owned property as tenants in common with the defendant, Helen Vealencis. The Delfinos sought a partition sale.

2. The trial court held that a partition in kind would cause "material injury" and ordered a sale.

3. The Supreme Court of Connecticut held that a partition sale should happen only if partition in kind is unworkable.

4. In this case, "a partition in kind would clearly be practicable. . . ."[203]

[203] Casebook p. 341.

5. The trial court also held that a partition in kind would prejudice the parties. The Delfinos argued that Vealencis's garbage business would hurt the prospects of using the land for residential development. The court here disagreed.

6. Reversed.

5.1.3.7 Problem on Partition in Kind

1. A and B are heirs of their father, who owned one item both A and B very much want—his old rocking chair. They cannot agree who is to have the chair. A brings a partition action. What relief should the court award?[204]

   (a) A and B own the chair as tenants in common. The chair cannot be partitioned in kind, so there must be a partition sale. Both attach equal value to the chair, so the one with more money will probably get it by paying more for it.

5.1.3.8 Ouster: *Spiller v. Mackereth*

Cotenants are not liable for rent to other cotenants unless they deny the other cotenants the right to enter.

1. John Spiller and Hettie Mackereth owned property as tenants in common. Spiller began using the structure as a warehouse. Mackereth demanded that Spiller vacate half of the warehouse or pay half of the rental value. Spiller refused.

2. The trial court awarded the rental value to Mackereth.

3. The general rule is that "in absence of an agreement to pay rent or an ouster of a cotenant, a cotenant in possession is not liable to his cotenants for the value of his use and occupation of the property."[205]

4. Here, there was no prior agreement to pay rent. Was there also ouster? The plaintiff argued that the defendant's refusal to pay after receiving the letter demanding rent counted as ouster. The court followed the majority rule in holding that a cotenant cannot be liable for rent until he denies his cotenants the right to enter.

5. There was no ouster. Reversed.

[204] Casebook p. 347 note 7.
[205] Casebook p. 348.

5.1.3.9 Cotenants' Right to Lease Their Shares: *Swartzbaugh v. Sampson*

A cotenant (either a joint tenant or tenant in common) can lease to another without the other cotenants' consent, but the lessee's interest cannot exceed the lessor's interest as a cotenant.

1. John and Lola Swartzbaugh were joint tenants of sixty acres on Orange County. In February 1934, John Swartzbaugh leased part of the property to Sampson, over the objections of Lola Swartzbaugh. Sampson gained exclusive possession of the property.

2. In June 1934, Lola Swartzbaugh brought suit against John Swartzbaugh and Sampson. The question before the court was, "[c]an one joint tenant who has not joined in the leases executed by her cotenant and another maintain an action to cancel the leases where the lessee is in exclusive possession of the leased property?"[206]

3. In England, at least, a lease by one joint tenant destroys unity of title and possession, thereby severing the joint tenancy. But the adoption of this rule in the US "seems doubtful."[207]

4. *Stark v. Barrett*: "conveyance by one tenant of a parcel of a general tract, owned by several, is inoperative to impair any of the rights of his cotenants." The conveyance to the grantee is valid, but it does not supersede the interests of the other joint tenants—so, for instance, if the land is partitioned and the grantee's tract is then no longer controlled by the grantor, the grantee's interest evaporates.[208]

5. Thus, leases by cotenants (both joint tenants and tenants in common) are valid to the extent that the lessee's interests do not exceed the lessor's as a joint tenant.[209]

6. " . . . the foregoing authorities force the conclusion that the leases from Swartzbaugh to Sampson are not null and void but valid and existing contracts giving to Sampson the same right to the possession of the leased property that Swartzbaugh had. It follows that they cannot be cancelled by plaintiff in this action."[210]

7. What could Mrs. Swartzbaugh's lawyer have done?

    (a) Actions against Sampson:

        i. Seek partition—but that would allow Sampson to stay on the land.

[206] Casebook p. 352.
[207] Casebook p. 352.
[208] Casebook p. 353.
[209] Casebook p. 354.
[210] Casebook p. 354.

ii. Assert her right as a joints tenant and move in with him.
iii. Allow people onto the property—e.g., undermine his business by letting people in for free.
iv. If he ousts her, she can win an injunction or damages.

(b) Actions against Mr. Swartzbaugh:
i. Prove that he was mentally incompetent, which would void the lease to Sampson.
ii. Share in the rent under the Statute of Anne—but Sampson only paid $15/month, so she would only get $7.50.
iii. Partition, either in kind or sale. It would terminate the joint tenancy and destroy her right of survivorship. If it were partitioned in kind and Sampson's portion happened to end up in Mrs. Swartzbaugh's half, his lease would go poof—but courts are unlikely to take that route.

8. Lesson: pick your co-owners (and your spouses) with care.

5.1.3.10 Contribution for Maintenance: *Baird v. Moore*

When a cotenant in sole possession spends money to maintain the property—repairs, taxes, mortgage payments, and so on—can she recover contributions from the other cotenants? Many courts have said no, but this court said yes.

1. The plaintiff owned a tenancy in common with her brother, Herbert—an "impecunious young man."[211] Herbert died. The defendant was Herbert's wife, who became the administratrix of his estate.

2. The plaintiff had maintained the property and paid off a mortgage. (She had been taking care of their mother and maintaining the house while Herbert cavorted.) She sued for contribution from Herbert's estate. The defendant argued that Herbert should not be liable for maintenance costs after he left, because at that point plaintiff derived value as the sole cotenant in possession.

3. The trial court denied contribution for the plaintiff's expenses after the point when she became the sole cotenant in possession.

4. The trial court followed the ***Mastbaum* rule**: "A tenant in common who is in sole possession of the common property is under a duty to his co-tenants to preserve the property by making needful, ordinary repairs, and paying taxes, mortgage interest and insurance premiums."[212] It read the rule to mean that a cotenant in sole possession could not recover contributions from other cotenants. The court here reversed: "the mere fact of possession by the cotenant making advances for the benefit of

[211] Reader p. 121.
[212] Reader p. 121.

the common estate should not preclude reimbursement by contribution from the cotenants sharing in the benefits by preservation of the common property."[213]

5. Should the cotenant in possession's recovery be offset by the value of his use and occupation?

   (a) The **Statute of Anne** provided that "a tenant in common actually receiving rents, issues and profits might be compelled to account for the excess over his proper share."[214] The rule traditionally applied narrowly to scenarios where the cotenant in possession actually collected rent from third parties.

   (b) A cotenant need not pay other cotenants to occupy the property. But when the cotenant in possession seeks to recover contribution for maintaining the property, "many courts deemed it equitable that the occupying tenant give credit for the value of his use and occupation."[215]

   (c) But the setoff rule is not absolute. First, the cotenant in possession has not ousted the others. Second, why should you have to pay rent for property you own? Third, payments (repairs, taxes, etc.) benefit all cotenants.

   (d) So, does *Mastbaum* allow the plaintiff (the cotenant in possession) to recover for expenses, or should there be a setoff for the value of her use of the property?

   (e) The circumstances of this case would make it "grievously inequitable to require plaintiff to offset against the just and ratable contribution by defendant toward the expenses and maintenance of the property after [his departure] . . . "[216]

5.1.3.11 Problems on Accounting for Benefits and Recovering Costs

1. If a cotenant leases to a third party, the Statute of Anne requires him to distribute payments received to the other cotenants in proportion to their shares. But what if the cotenant leases only his share, rather than giving the lessee exclusive occupancy?[217]

   (a) Under the Statute of Anne, the leasing co-tenant is not required to compensate the other co-tenants for more than his share. So if he only rents his share, he is not required to compensate his co-tenants.

[213] Reader p. 122.
[214] Reader p. 122.
[215] Reader p. 123.
[216] Reader p. 124.
[217] Casebook p. 357, note 2.

2. When repairs are necessary, some jurisdictions allow a cotenant to make the repairs and collect contributions from his cotenants as long as he gave notice. But in most jurisdictions, he has no right to contribution unless there is an agreement between cotenants, because the other cotenants have a right to participate in determining how much to spend, etc. Given that justification, "how is it that the cotenant receives a credit for reasonable repairs in a partition or accounting action . . . ?" [218]

5.2 Marital Interests

1. Two systems of marital property emerged out of medieval Europe:
   (a) *English*: husband and wife have separate ownership interests.
   (b) *Continental*: community property. Husband and wife are one, with indivisible interests.
2. Most states adopted the English common law system. Ten states have adopted a community property system. During the twentieth century, the trend was towards community property.

5.2.1 The Common Law Marital Property System

5.2.1.1 During Marriage (The Fiction that Husband and Wife Are One)

1. At common law, a woman moved under *cover* at marriage. Husband and wife became one. " . . . the husband had the right of possession to all of the wife's lands during marriage, including land acquired after marriage." [219]
2. Married Women's Property Acts removed the disabilities of coverture, giving married women control of their property.

5.2.1.2 Married Women's Property Acts

1. Typical acts provided that a property a women acquired before or during marriage remained her own.[220]
2. MWPAs often fail to bridge gender gaps, however, because women are still more likely to stay at home, or if they work, to earn significantly less then men. Despite MWPAs, women are still more likely to have fewer property interests than men.[221]

[218] Casebook p. 358, note 4.
[219] Casebook p. 360.
[220] Reader p. 126.
[221] *Understanding Property* p. 151.

5.2.1.3 Effects of the MWPA on Tenancy by the Entirety: *Sawada v. Endo*

What effects do the Married Women's Property Act have on common law marital property rights?

Held: an estate held in tenancy by the entirety is immune from the claims of each spouse's separate creditors. So, you can protect your family home from creditors by holding it in a tenancy by the entirety.

1. Facts:
   (a) November 30, 1968: Kokichi Endo injured Masako and Helen Sawada in a car accident. Endo was uninsured.
   (b) Summer/fall 1969: the Sawadas sued Endo.
   (c) July 26, 1969: Kokichi Endo and his wife conveyed their house, which they owned as tenants by the entirety, to their sons. They no longer had an interest in the property after the conveyance, but they continued to live there.
   (d) January 19, 1971: the Sawadas won damages, but Endo refused to pay. The Sawadas brought second suit to set aside the conveyance of the Endo home as fraudulent.
2. The trial court refused to set aside the conveyance.
3. The issue on appeal was "whether the interest of one spouse in real property, held in tenancy by the entireties, is subject to levy and execution by his or her individual creditors."[222]
4. The court surveyed different states' treatment of tenancy by the entireties, dividing them into four groups:
   (a) *Group 1*: same as common law. The husband has exclusive control. In these states, the MWPA did not apply to tenancy by the entirety. (These states have all since changed their approach.)
   (b) *Group 2*: the MWPA was meant to make the wife's rights equal to her husband's. Therefore, the interest of the debtor spouse can be conveyed, subject to the other spouse's contingent right of survivorship. (There are other possible gender neutral solutions—e.g., groups 3 and 4, below).
   (c) *Group 3*: the MWPA means that the estate is not subject to the debts of either spouse. An attempted conveyance by either spouse is void.
   (d) *Group 4*: the MWPA means that each spouse's right of survivorship is alienable and attachable by creditors.

[222] Casebook p. 362.

5. The court here decided to join group 3, holding that neither spouse's interest in an estate by the entireties is subject to the claims of creditors of either spouse. The reason is that husband and wife are legally unified. They have a single ownership interest in a tenancy by the entirety. "Neither husband nor wife has a separate divisible interest in the property held by the entirety that can be conveyed or reached by execution."[223]
6. This is not unfair to creditors because in extending credit, "the creditor presumably had notice of the characteristics of the estate which limited his right to reach the property."[224]
   (a) But: in this case, the "creditors" didn't know that they were dealing with tenants in the entirety.
7. Endo's conveyance to his sons was valid because it was not subject to attachment by his creditors.

5.2.1.4 Problems on Marital Property During Marriage

1. Should we get rid of tenancies by the entirety?
2. There is no TiC in CA because it's a community property state.
3. Since *Sawado*, the last three adherents to classical tenancy in common (MA, MI, NC), have "enacted legislation to give equal rights to husband and wife in a tenancy by the entirety."[225]
4. The exemption from creditors is probably the main reason why tenancies by the entirety remain.
5. Which creditors can reach the interest of a debtor spouse in a tenancy by the entirety?
   (a) *United States v. Craft*: the IRS can attach liens to property held in tenancy by the entirety because federal law determined the relevant property rights.
   (b) *Craft* carries implications for other federal issues, e.g., bankruptcy, forfeiture after criminal conviction.[226]

5.2.1.5 Homestead Rights

1. "Most American states have laws designed to preserve the family home (or homestead) from the claims of creditors. . . . These laws have the purpose of securing shelter for the family and giving it some measure of stability and independence; to achieve this purpose the rights of creditors are sacrificed."[227]

[223] Casebook p. 364.
[224] Casebook p. 365.
[225] Casebook p. 367.
[226] Casebook pp. 368–369.
[227] Supplement p. 125.

5.2.1.6 The Policy of Exempting a Tenancy by the Entirety from Creditors

1. In most states, creditors of one spouse cannot reach a tenancy by the entirety becuase one spouse cannot assign his or her interest.
2. What policies does this rule serve?
   (a) The rule protects the interests of one spouse from the mistakes of another. It wouldn't be fair to hold one spouse liable for the other's costly errors.
3. Is it fair to creditors?
   (a) The court in *Sawada* argued that the rule is not unfair to creditors because creditors should have known the status of the estate before extending credit. This policy makes sense when the creditor voluntary extends credit. In *Sawada*, however, the Sawadas inadvertently became Endo's creditors because he injured them in a car accident and they won tort damages against him. His home appears to have been his only significant asset, and the Sawadas did not have the opportunity to assess his creditworthiness before ecoming his creditors. In this case, the fact that Endo's estate was unreachable left the Sawadas with no compensation for their injuries.

5.2.1.7 Termination of Marriage by Death of One Spouse

1. Common law:
   (a) *Dower* (the wife's right): a surviving widow takes a life estate in one-third (in terms of value, not acreage) of the all of the husband's freehold land.[228]
      i. For dower to attach, issue born of the marriage must be able to inherit the property. For instance, dower does not attach to life estates or property held in joint tenancy.
   (b) *Curtesy* (the husband's right): a widower is entitled to a life estate in his wife's real property held in freehold estate. Unlike dower, the husband gets the right only if there is a child from the marriage.
   (c) Both have been successfully challenged as violating equal protection. Dower and curtesy exists in only four states, and in three of them curtesy has been abolished and dower has been extended to husbands.
2. The modern elective forced share:
   (a) Forced share legislation gives the surviving spouse an elective share in all property that the decedent spouse owned at death. The surviving spouse can renounce the will and elect to take a statutory share, usually one-half or one-third.

[228] Casebook p. 385.

i. The surviving spouse asks: what property was subject to the husband's probate estate? Then: the surviving spouse can choose to be entitled to a fractional share of the probate estate (usually one-half or one-third).

ii. It usually comes up when the surviving spouse has been cut out of the will.

iii. Spouses can remove property from the probate estate in several ways—e.g., by holding it in joint tenancy with someone else.

(b) An alternative to the traditional forced elective share approach: the Uniform Probate Code.

5.2.1.8 Problems on Termination of Marriage by Death of One Spouse

1. During O's marriage to W, O conveys property to A and B as joint tenants.[229]

   (a) O dies. Is O's widow, W, entitled to dower?

      i. Yes. W retains her dower right unless she consented to give it up. She has a life estate in one third of the property, and A and B's joint tenancy shrinks by one third.

   (b) Suppose that A dies survived by his wife, X. Does X have a right to dower in the property?

      i. No. A and B own the property as joint tenants. Dower does not attach to property held in joint tenancy. B would be the sole owner, subject to W's life estate.

   (c) A conveys his interest in the property to C. A dies survived by his wife, X, who did not join in the deed to C. Is X entitled to dower in the property? If C dies, is C's widow, Y, entitled to dower?

      y/n By conveying his interest to C, A severed the joint tenancy with B, so B and C became tenants in common.

2. H dies in a state that gives the surviving spouse a choice of dower or an elective forced share of one-half of the decedent's property passing by will or intestacy. During his life H took out a life insurance policy in the face amount of $60,000 payable to W. H and W also bought a house, worth $60,000 at H's death, and took title as joint tenants. H dies owning Blackacre, worth $90,000, stocks and bonds worth $20,000, and a $10,000 savings account. H's will bequeaths all his estate to his daughter by a first marriage, D.[230]

   (a) How is H's estate distributed?

[229] Casebook p. 386 problem 1.
[230] Assignment sheet 8, 2/25/2013.

i. The life insurance policy is not part of H's freehold estate, so W gets the $60,000. Similarly, the $60,000 house was not part of the probate estate, so W gets the house by right of survivorship.

ii. The remainder includes Blackacre ($90,000), $20,000 in investments, and a $10,000 savings account.

A. If W chooses dower, she takes a life estate in one third of H's freehold land, or $45,000. She does not get the investments or savings.

B. If W chooses the elective forced share, she gets half of H's probate estate, which includes all of the remainder. So she would get ($90,000 / 2) + ($20,000 / 2) + ($10,000 / 2) = $60,0000.

(b) If you were advising H before he died, how would you advise him to carry out his wishes?

i. H should have conveyed Blackacre, his investments, and his savings to his daughter before his death.

5.2.1.9 Termination of Marriage by Divorce

1. At common law, upon divorce property remained with the spouse holding the title. Property in TiC or JT remained so, and property held in TbE was converted into a TiC because of the destruction of the unity of marriage. The husband usually owed the wife alimony.

2. Recent divorce law reforms (e.g., no fault) have led to **equitable distribution**, in which the court divides property in a way it thinks is fair.[231]

3. Equitable division statutes usually only allow courts to divide **marital property**.

4. Alimony has also largely disappeared, except where necessary for the other spouse to become self-sufficient ("rehabilitative alimony").[232]

5. Sometimes equal (not just equitable) division is required, but not always.

5.2.1.10 M.B.A. as Non-Marital Property: *In re Marriage of Graham*

1. During a six year marriage, the wife supported the husband while he earned a bachelor's degree and an M.B.A. After divorce, she claimed that the M.B.A. was marital property and that she was entitled to a share of its value.

2. The trial court found that education can be marital property. It awarded $33,134 to the wife.

[231] Casebook p. 370.
[232] Casebook p. 370.

3. The appellate court reversed, holding that an education is not property, though it could be "considered in determining maintenance or in arriving at an equitable property division."[233]

4. The court here held that property is everything that has an exchange value. Degrees have no exchange value, so they are not property. The court could, in theory, take it into account when calculating alimony or the division of marital property—but here, the wife sought neither, so there was no way to account for the value of her contribution.

5. Judge Carrigan, dissenting: the M.B.A. was the couple's most valuable asset. The wife had made a significant investment in it. The issue is not the degree itself, but the increased earning capacity it gave the husband. It would be fair to compensate the wife for her contribution.

5.2.1.11 Celebrity Status as Marital Property: *Elkus v. Elkus*

1. The plaintiff became a famous opera singer during her marriage with the defendant. The question was whether her celebrity status was marital property.

2. The trial court held that it was not marital property.

3. The court here found that the husband had contributed substantially to the wife's career (as photographer, voice coach, and more). New York conceptualized marriage as an "economic partnership." The plaintiff's celebrity status increased her earning capacity, which earlier cases held to be within the scope of marital property. The court here held that celebrity status would have to be marital property to be consistent with the "economic partnership" concept of marriage.

5.2.1.12 J. Thomas Oldham, "Putting Asunder in the 1990s"

1. New York developed a system in which "human capital accumulations" (e.g., professional degrees) are counted as marital property, valued by the increase in lifetime earning capacity. Upon divorce, the person with the degree must compensate the other spouse for the value of the increased earning capacity. But if the degree holder remarries, the earnings will also be counted as marital property of the second marriage. The degree holder's earnings would then be counted twice.

5.2.2 The Community Property System

1. Nine states (including CA) have community property systems, with Alaska as an elective community property state.

[233] Casebook p. 372.

2. " . . . the fundamental idea of community property is that *earnings* of each spouse during marriage should be owned equally in undivided shares by both spouses."[234]

3. All other property is separate—e.g., property acquired before marriage, property acquired by gift, devise, or descent, and property owned by one spouse by agreement of both spouses.

5.2.2.1 Community Property Compared with Common Law Concurrent Interests

1. In community property states, there is no dower, curtesy, or tenancy by the entirety.[235]

2. Neither spouse can convey his or her undivided share, except to the other spouse. Neither spouse can unilaterally convert community property into separate property.

3. Upon death, each spouse can dispose of half of the community property by will. There is no right of survivorship. Usually (but not always), if one spouse dies intestate, that spouse's share passes to the surviving spouse.[236]

5.2.2.2 Management of Community Property

1. Community property can only be conveyed to a third person as an undivided whole. But which spouse has the authority to manage the property?

2. Today, all community property states give both spouses equal managerial authority. Usually either spouse can manage the property, but in certain cases only one can—for instance, if the title is only in one spouse's name, or if one of the spouses is operating a business on the property.

3. If the husband and wife are equal managers, the creditors of either can reach the community property.

5.2.2.3 Mixing Community Property with Separate Property Problems

1. Community property states are not in agreement about what happens when separate property is mixed with community property. For instance, what happens when the wife buys property before marriage and pays 1/3 of the installments, and both spouses pay the remaining 2/3 after marriage?

2. There are several approaches:[237]

[234] Casebook p. 388.
[235] Casebook p. 389.
[236] Casebook p. 390.
[237] Casebook p. 392.

(a) *"Inception of right" rule*: the house is the wife's separate property because it was separate when she signed the purchase contract.

(b) *"Time of vesting" rule*: the house is community property because it vests once all the installments are paid (here, during marriage).

(c) *Pro rata rule (California)*: the community payments "buy in" a pro rata share of the title.

5.2.2.4 Migrating Couples

1. When couples move, their property retains its status as community property or common law property.

§ 6 Landlord-Tenant Law

6.1 Leasehold Estates

6.1.1 The Term of Years

1. Lasts for a fixed period of time.
2. Some states set upper limits.

6.1.2 The Periodic Tenancy

1. Continues for succeeding periods until the tenant or landlord gives notice.
2. Common law rules required six months' notice to terminate a year-to-year tenancy. For shorter periods, notice of termination must equal the period, or six months—whichever is less (i.e., the notice period cannot exceed six months).

6.1.3 The Tenancy at Will

1. No fixed period. It endures as long as the landlord and tenant want.
2. Some modern statutes have notice requirements.

6.1.4 Problems on Leasehold Estates

1. On October 1, L leases Whiteacre "to T for one year, beginning on October 1." T moves out the following September 30 without giving notice. What are L's rights?[238]
   (a) T has a term of years. T has no obligation to give notice. L has no remedy.
2. What if the lease had been "from year to year, beginning October 1"?
   (a) T has a periodic tenancy. Under the common law rules, T was required to give notice of termination six months in advance. L should be able to recover.
3. What is the lease had been for no fixed term "at an annual rental of $24,000, payable $2,000 per month"?
   (a) T has a tenancy at will. T was under no obligation to give notice, unless there was a state statutory notice requirement. L may also argue that the "annual rental" provision established a term of years or a periodic tenancy.

[238] Casebook p. 422 problem 1.

6.1.4.1 "Lease for Life": *Garner v. Gerrish*

1. Gerrish rented from Donovan under a lease that allowed him to terminate at any time. Donovan died a few years later. The executor of his estate, Garner, tried to remove Gerrish.
2. Garner argued that the lease created a tenancy at will because it did not set a definite term. Gerrish argued that he had a tenancy for life.
3. The trial court granted summary judgment to Garner and the appellate court reversed.
4. The early common law was that the landlord and tenant must have had equal rights. For instance, it wasn't allowable for the tenant to have a right of termination but not the landlord. But, this rule has been mostly discarded.
5. Held: " . . . the lease expressly and unambiguously grants to the tenant the right to terminate, and does not reserve to the landlord a similar right. To hold that such a lease creates a tenancy terminable at the will of either party would violate the terms of the agreement and the express intent of the contracting parties."[239]
6. The *numerus clausus* principle forbids parties and courts from developing new types of estates. Does the court here sanction the creation of a new type of estate, the "lease for life"?

6.1.5 The Tenancy at Sufferance: Holdovers

1. Arises when a tenant in possession remains in possession after termination of the tenancy.
2. At common law, landlords had two options: eviction or consent.
3. What happens when a holdover tenant gives rent checks to the landlord and the landlord cashes them?
   (a) Usually it creates a periodic tenancy or a term. The period can be based on the period in the original lease or on how rent was calculated in the original lease.[240]
4. States have adopted varying legislation addressing holdover tenants. Some specificy the length of the holdover tenancy. Others convert it to a tenancy at will. Still others may demand double rent.
5. The common law rule aimed to protect the rights of incoming tenants and the landlord's right to predictable terms. On the other hand, penalties imposed on holdover tenants often far exceed the injury to the landlord or the incoming tenant.

[239] Casebook p. 425.
[240] Casebook p. 427.

6.1.5.1 *Crechale v. Polles, Inc. v. Smith*

6.2 The Lease

1. An instrument that resembles a lease might in fact create something else, like a license or a life estate. The difference matters because leases give specific rights to the landlord and tenant.

2. A lease is both conveyance and contract. Courts often invoke contract principles in addressing lease disputes.

6.3 Delivery of Possession

6.3.1 No Implied Covenant to Deliver Possession: *Hannah v. Dusch*

1. Dutsch leased to Hannah for a 15-year term. Another tenant was occupying the land when Hannah was supposed to move in.

2. The question was whether the landlord is responsible for removing trespassers and wrongdoers at the beginning of the lease term. Is there an "implied covenant to deliver possession"?[241]

3. The "English rule": there is a covenant. The "American rule": no covenant.

4. The court here followed the American rule, holding that Hannah had a remedy against the wrongdoer but not against the landlord.

6.3.2 Problems on Delivery of Possession

1. L and T execute a lease for a specified term. T takes possession and pays rent for several months. T then learns that L had earlier leased the premises to another tenant for the same term. T remains in possession but stops paying rent. L sues T for unpaid rent; T counterclaims for rent already paid. What result?[242]

   (a) T has a term of years. As long as the other tenant did not displace T, T was in possession and he should be bound by the terms of the lease. L's other lease has not affected T's interests.

6.4 Subleases and Assignments

6.4.1 Overview

1. By default, landlords and tenants can convey all or part of their interests to third parties, though most leases today prevent tenants from conveying their interest without the landlord's consent.[243]

[241] Casebook p. 439.
[242] Casebook p. 442 problem 2.
[243] *Understanding Property* p. 276.

2. An **assignment** transfers the tenant's entire lease to a third party. A **sublease** transfers *part* of the tenant's interest to a third party.[244]
3. The common law rule is that if the tenant conveys his **entire interest**, he has created an assignment. If he conveys anything less, even by a day, he has created a day, he has created a sublease. The trouble with this rule is that it ignores the parties' intent.[245]
4. If T conveys his entire interest but retains a **contingent right of reentry**, has he created a sublease or assignment? Most jurisdictions still find it to be an assignment, though some courts find it to be a sublease on the theory that the tenant has not conveyed his entire interest. *Ernst v. Conditt* (finding a sublease).
5. Some courts will follow the parties' intent, regardless of whether the tenant conveyed his entire interest.[246]

6.4.2 Privity of Contract and Estate

1. **Privity of contract** exists between two parties who have entered into a contract.
2. **Privity of estate** exists between two parties as a result of the conveyance of an estate.

6.4.3 Assignment

1. A leases to B. B assigns to C.
   (a)
   (b) **B and C**: privity of contract.
   (c) **A and B**: privity of contract but *not* privity of estate.
   (d) **A and C**: privity of estate but *not* privity of contract. The privity of estate continues until C reassigns his interest to another, until C vacates the premises, or the lease terminates.
2. A and C are bound to covenants that run with the land (if the requirements are met to enforce the real covenant or equitable servitude).
3. **Rent liability**: if B and C stop paying rent, A can recover from either, because B is obligated under privity of contract and C is obligated under privity of estate.
4. **Successive assignment**: if C assigns his interest to D, he is no longer in privity of estate with A, so he his not liable to A for rent. However, if C **expressly assumed the obligations** of the original lease between A and B, he would still be liable.

[244] *Understanding Property* p. 276.
[245] *Understanding Property* p. 277.
[246] *Understanding Property* p. 278.

6.4.4 Sublease

1. A leases to B. B subleases to C.
   (a) **A and B**: privity of estate and privity of contract.
   (b) **B and C**: privity of estate and privity of contract.
   (c) **A and C**: no privity.
2. B is liable to A if C breaches the terms of the original lease between A and B.
3. The obligations between B and C are governed by the sublease, not the original lease.
4. **C is not liable to A for rent** because there is no privity between A and B.

6.4.5 Policy

1. The historic reasons for the distinction vanished with feudalism, so some scholars have argued that public policy supports abolishing the distinction.[247]
   (a) Under contract law, a transferee who accepts the benefit of a contract is impliedly bound to perform its obligations. Why exempt land contracts?
   (b) The sublease can pose a trap. The parties may have intended to create a legal relationship between A and C—for instance, to require C to pay rent directly to A.
2. The main reason for keeping the distinction is freedom of contract. We should allow sophisticated parties to determine the liability they want to incur. A transferee should be able to avoid direct liability to the lessor if the lessor has consented to subleasing.

6.4.6 Assignment or Sublease: *Ernst v. Conditt*

1. Ernst leased to Rogers for a term of one year and seven days. One of the terms of the lease was that Rogers could not assign or sublet without Ernst's permission.
2. Rogers built a racetrack and other improvements. The lease stipulated that at the end of the term, Rogers would remove all above-ground improvements.

[247] *Understanding Property 283.*

3. A month after signing the lease, Rogers sold the racetrack business to Conditt. Conditt and Rogers negotiated a lease extension with Ernst. The modification granted subletting permissions to Conditt but held that Rogers would remain liable for performance of the original terms of the lease (i.e., removing improvements).

4. Conditt stopped paying rent. Ernst demanded payment of past rent from Conditt if Conditt did not remove the improvements from the property. Conditt did not reply, so Ernst sued.

5. Ernst argued that the agreement between Ernst, Rogers, and Conditt *assigned* the lease to Conditt, which meant that Conditt was primarily liable to Ernst.

6. Conditt argued that the agreement was a *sublease*, and that therefore Rogers was directly liable to Ernst.

7. The trial court held that the agreement was an assignment and so Conditt was directly liable to Ernst.

8. The revised agreement involving Conditt specifically used the word "sublet." It held Rogers responsible for performance of the original lease's terms. Finally, Rogers retained a reversion.

9. The general rule is that an assignment conveys the entire term, leaving no interest or reversion in the assignor. In this case, however, Rogers retained an interest, so the conveyance was a sublease.

   (a) Common law rule: "If the instrument purports to transfer the lessee's estate for the entire remainder of his term it is an assignment, regardless of its form or the parties' intention. Conversely, if the instrument purports to transfer the lessee's estate for less than the entire term—even for a day less—it is a sublease, regardless of its form or of the parties' intention."[248]

   (b) Modern rule: follow the parties' intention.

10. Held: under both the common law rule and the modern rule, the conveyance from Rogers to Conditt was a sublease, not an assignment. Therefore, Conditt is not directly liable to Ernst. Reversed.

6.4.7 Problems on Subleases and Assignments

1. L leases to T for a term of three years at $1,000/month. One year later T "subleases, transfers, and assigns" to T1 for "a period of one year from date." Neither T nor T1 pays rent.[249]

   (a) What rights does L have against T?

[248] Casebook p. 446.
[249] Casebook p. 448 problem 3(a).

i. T retained an interest in the property, so his conveyance created a sublease with T1, not an assignment. T is therefore directly liable to L for rent.

(b) What rights does L have against T1?

i. L has no rights directly against T1.

2. L leases to T for three years at $1,000/month, with a clause that indicates that T agrees to pay rent before the first of each month. It also prevents T from subletting or assigning without L's permission. Six months later, T, with L's permission, transfers to T1 for the balance of the term. T1 pays rent directly to L for several months and then defaults. L sues T for the rent due. What result?[250]

(a) T's conveyance to T1 was an assignment because T did not retain an interest. (Under the modern rule, it might be considered a sublease if T's intention was to convey a sublease rather than an assignment.) After the assignment, T is no longer directly liable to L for rent. L has to recover directly from T1.

3. L leases to T for three years at $1,000/month with a promise to pay rent in advance of the first of each month and to keep the premises in good repair. Six month later T conveys her entire interest to T1, who agrees to assume all covenants in the original lease between L and T. Three months later T1 assigns his entire interest to T2, and three months after that T2 assigns his entire interest to T3. T3 defaults on rent payment and fails to keep the premises in good repair. L sues T, T1, T2, and T3. What are the liabilities of the four tenants to L and to each other?[251]

s not liable, but T1, T2, and T3 all are.

6.5 Termination

6.5.1 Surrender

1. To end the lease early, T surrenders the property and L accepts the surrender.

6.5.2 Abandonment

1. The landlord had three remedies at common law:(1) leave the premises vacant and sue later for rent; (2) mitigate by reletting and suing the original tenant for the unpaid balance; or (3) terminate the lease. There is a trend towards requiring mitigation.

[250] Casebook p. 449 problem 3(b).
[251] Casebook p. 449 problem 3(c).

2. **Leave premises vacant and sue later for rent**: the landlord continues the lease, honoring the tenant's right to possession but requiring payment of rent.

3. **Mitigate by reletting**:

   (a) Does the landlord relet on the *tenant's* behalf or the *landlord's* behalf (which would eliminate T's rent liability)? It depends on the landlord's intent.

   (b) There is a modern trend towards mandatory mitigation. *Sommer v. Kridel*.

   (c) The landlord should "treat the apartment in question as if it was one of his vacant stock." *Sommers v. Kridel*. Relevant factors include advertising, showing to potential tenants, and rent relative to comparable properties.

4. **Termination**: at common law, the tenant's abandonment was seen as an implied offer of surrender, which the landlord could accept. This would terminate the tenant's liability for future damages—but in most states today, the tenant is still liable for damages (i.e., the difference between the rental value in the lease and fair market value).[252]

6.5.2.1 *Whitehorn v. Dickerson*

6.5.2.2 *Sommer v. Kridel*

1. The modern trend is to require landlords to mitigate by finding a new tenant, but at common law there was no duty to mitigate.

6.5.3 Self-Help Eviction

6.5.3.1 *Berg v. Wiley*

The common law allowed landlords to resort to peaceable self help, but the court here held that the landlord had to use a judicial process.

1. Facts:

   (a) November 11, 1970: Wiley leased to Phillip Berg for 5 years on the condition that he would not remodel the premises without permission.

   (b) Early 1971: Berg transferred his interest to his sister Kathleen.

   (c) May 1971: Kathleen opened "A Family Affair Restaurant."

[252] *Understanding Property* p. 300.

(d) July 15, 1973: the date by which Wiley demanded remedies for health code violations and remodeling. Berg closed the restaurant for remodeling, but it was unclear whether she intened to reopen it.

(e) July 16, 1973: Berg entered and changed the locks. torts.

(f) August 1, 1973: Wiley relet the property to another tenant.

(g) December 1, 1975: the lease was due to expire.

2. Berg remodeled the restaurant without Wiley's permission and operated the restaurant in violation of health codes.[253]

3. Berg brought suit for lost profits and other tort damages. Wiley asserted the affirmative defenses of abandonment and surrender, and he counterclaimed for his own damages.

4. The trial court found that the lockout had been wrongful. It awarded Berg $31,000 for lost profits and $3,540 for loss of chattels. It also found that Berg had neither abandoned nor surrendered the premises.

5. Held:

   (a) The jury was correct in finding no surrender or abandonment.

   (b) Was Wiley's self-help repossession wrongful?

      i. Minnesota state law held that a landlord can resort to self-help when he is **legally entitled to possession and the means are peaceable**.

      ii. The trial court held that Wiley's entry was not peaceable, and even if it had, landlords should resort to judicial process rather than self-help.

      iii. The appellate court here agreed that Wiley's means were not peaceable. The court also agreed with the trial court's rejection of the common law self-help rule in favor of a rule requiring landlords to use judicial process.

      iv. Wiley's reentry was both non-peaceable and wrongful as a matter of law.

6.5.3.2 Notes on *Berg v. Wiley*

1. The common law rule allowed the landlord to resort to self-help in reentering, but he risked criminal penalties for forcible entry.[254]

2. One criticism of the trend away from allowing self-help is that landlord will pass the costs of litigating against deadbeat tenants on to tenants who pay their bills on time.

[253] Casebook pp. 460–61.
[254] Casebook p. 465.

3. Should self-help be allowed for commercial but not residential leases? Should the parties be allowed to negotiate in the lease whether self-help is available?

4. Does self-help violate due process?

6.5.4 Ejectment

1. Ejectment was an action to recover from a tenant in breach. It was slow. Landlords generally use summary eviction proceedings instead.

6.5.5 Summary Eviction Proceedings

1. Summary proceedings allow quick resolution of tenancy disputes. They exclude issues not related to the tenancy, though some allow tenants to raise problems with the conditions of the premises.

2. But, summary eviction procedures can still be costly and time-consuming.

3. Landlords argue that judges unfairly draw out the process because of a bias towards tenants. Tenants argue that they can't afford lawyers. Would better access to attorneys improve tenants' rights or create more burdens on landlords?

6.5.6 Other Remedies Available to the Landlord

1. The landlord can sue for back rent and damages caused by the tenant's breach.[255] If the landlord wants to recover rent for the remainder of the term of the lease, anticipatory breach concepts may apply.[256]

2. Landlords can also recover damages from **security deposits** and **rent acceleration clauses**.[257]

6.6 Condition of the Leased Premises

6.6.1 Common Law

1. The common law rule was **caveat lessee**. The landlord was not liable for repairs.

2. If the lease assigned repair duties to the landlord, **independence of covenants** meant that if the landlord breached the duty to repair, the tenant still had to pay rent.

[255] Casebook p. 479.
[256] Casebook p. 480.
[257] Casebook pp. 480–81.

6.6.1.1 Furnished House Exception: *Ingalls v. Hobbs*

1. At common law, "there is an implied contract that a furnished house let for a short time is in proper condition for immediate occupation as a dwelling."[258]

2. Other exceptions to the common law no-duty rule: (1) the landlord had to disclose **concealed defects** and (2) the landlord could not **fraudulently misrepresent** the premises.

6.6.1.2 No Strict Liability for Landlords: *Peterson v. Superior Court*

1. Landlords are not strictly liable for injuries resulting from the condition of the premises, but they are still liable under ordinary negligence.

6.6.2 Quiet Enjoyment and Constructive Eviction

1. **Constructive eviction**: landlord's wrongful conduct that interferes with the tenant's enjoyment and beneficial use.[259] Common law recognized an **implied covenant of quiet enjoyment**. *Bruckner v. Helfaer*.

2. Landlord's wrongful conduct:

   (a) **Act**: e.g., making noise.

   (b) **Omission**: e.g., failing to provide hot water or make repairs. At common law, wrongful omissions occurred when the landlord breached a statutory duty or one of the few common law duties (e.g., latent defects, repair of common areas).

   (c) Some courts have found constructive eviction when the landlord renders the property "substantially unsuitable" for the leased purpose or "seriously interferes" with beneficial enjoyment. *Reste Realty Corp. v. Cooper*.

   (d) There is a split of authority on whether the landlord is liable for **third party conduct**, though the trend is towards liability if the landlord had the legal right to control the third party's conduct.[260]

6.6.2.1 Quiet Enjoyment: *Bruckner v. Helfaer*

1. "There is an implied covenant, in every lease, for quiet enjoyment . . . and such covenant may be breached by a constructive eviction."[261]

[258] Reader p. 148.
[259] *Understanding Property* p. 235.
[260] *Understanding Property* p. 258.
[261] Reader p. 159.

6.6.2.2 "Seriously Interferes": *Reste Realty Corp. v. Cooper*

1. Constructive eviction occurs when "any act or or omission of the landlord . . . renders the premises substantially unsuitable for the purpose for which they are leased, or which **seriously interferes** with the beneficial enjoyment of the premises"—e.g., a repeatedly flooded basement.

6.6.3 Illegal Lease

1. Tenants can argue that leases for unsanitary premises are illegal because they violate housing regulations. Unlike actions based on quiet enjoyment and constructive eviction, the illegal defense is advantageous for tenants because they can withhold rent while fending off eviction actions.

2. The doctrine "is a dead letter," but tenants can now rely on the implied warranty of habitability.[262]

6.6.4 Implied Warranty of Habitability

6.6.4.1 Overview

1. The landlord must repair the premises regardless of the provisions of the lease.

2. A breach occurs when a **reasonable person would find the premises uninhabitable** or when the property violates housing codes.

3. "[W]e now hold expressly that in the rental of any residential dwelling unit an implied warranty exists in the lease, whether oral or written, that the landlord will deliver over and maintain, throughout the period of the tenancy, premises that are **safe, clean and fit for human habitation**."[263] *Hilder v. St. Peter.*

4. **Waiver**: most jurisdictions view waiver as contrary to public policy. *Knight v. Hallsthammer.*

5. Some courts (e.g., California in *Hilden*) require notice to the landlord.

6. The landlord is not liable for defects the tenant causes. Some jurisdictions impose a duty on the tenant to mitigate.[264]

7. The Restatement (Second) requires tenants to mitigate damages even if the landlord is at fault for the breach.

8. The implied warranty applies only to residential leases, not commercial leases.

[262] Casebook p. 492.
[263] Casebook p. 496.
[264] Reader p. 169.

6.6.4.2 Tenant's Remedies

1. **Remain in possession and withhold rent**:
   (a) The landlord cannot sue for unpaid rent or to evict, since the tenant can raise the defense of the breach of the implied warranty. Some jurisdictions require the tenant to put the rent in an escrow account. The tenant can usually withhold the **full rent**, though the landlord could later recover partial back rent owed.[265]
2. **Remain in possession and "repair and deduct"**: many jurisdictions allow it, though not all.
3. **Remain in possession, pay rent, and sue for damages**:
   (a) The tenant can recover excess rent paid. How much? There is a split:
      i. *Agreed rent vs. market value "as is"*—but this effectively amounts to waiver if the tenant paid reduced rent from the outset.
      ii. *Market value "as warranted" vs. market value "as is"*.
      iii. *Percentage diminution in agreed rent*: the court determines a percentage that reflects the tenant's loss of use. The tenant does not need to establish fair market value.
4. **Terminate lease and sue for damages**. Damages are calculated according to one of the formulas above.

6.6.4.3 Implied Warranty of Habitability in California: *Green v. Superior Court*

1. At common law, landlords had no duty to keep leased premises in a habitable condition.
2. In *Hinson*, a California appellate court held that landlords are bound by an implied warranty of habitability. The California Supreme Court here affirmed.
3. Sumski, the landlord, sued Green, the tenant, for unlawful detainer. Green admitted failing to pay back rent, but he defended on the ground that Sumski had failed to keep the property in habitable condition. The small claims court found for the landlord.
4. The Superior Court judge found that the "repair" and "deduct" provisions of Cal. Civ. Code § 1941 were Green's exclusive remedies.[266]
5. The transformation of the landlord-tenant relationship:

[265] *Understanding Property* p. 266.
[266] Reader p. 162.

(a) At common law, the lessee's covenant to pay rent was considered independent of the lessor's duties—so the lessee was bound to pay rent even if the landlord didn't maintain the premises.

(b) Today, most renters acquire living space in a building, not farmland.

(c) Apartment buildings are complex, making them difficult to inspect and repair.

(d) Renters are also unlikely to be able to make home repairs themselves.

(e) " . . . the mechanism of the 'free market' no longer serves as as a viable means for fairly allocating the duty to repair leased premises between landlord and tenant."[267]

(f) Affirm *Hinson*'s holding that there is an implied warranty of habitability.

6. The "repair and deduct" provision was not an exclusive remedy.

7. Tenants can raise the implied warranty of habitability as an affirmative defense to actions for unlawful detainer, as in this case.

8. The tenant's duty to pay rent is now mutually dependent on the landlord's duty to maintain the premises.

9. How to determine what counts as "habitable"? Broken blinds and minor water leaks do not make property uninhabitable, but lack of heat and hot water do.[268]

10. Damages should be measured as the difference between fair rental value as warranted and fair rental value of the actual conditions during the tenant's occupancy. For instance, if fair rental value would have been $500/month, but the lack of hot water reduced the value to $300, the tenant who paid $500 can recover $200. " . . . the body of private property law . . . more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical."[269]

6.6.4.4 Waiver of the Implied Warranty of Habitability: *Knight v. Hallsthammar*

1. The defendant tenants complained to their landlord. When the plaintiffs became the new owners, they announced a rent increase, and the tenants said they would not pay rent until repairs were made.

2. Does a tenant who complains about living conditions waive the landlord's breach of the implied warranty of habitability by continuing to live there? No.

[267] Reader p. 163.
[268] Reader p. 176 n. 64.
[269] Reader p. 168.

3. The tenant does not waive the breach even if he knew of the defects when he chose to move in.[270]

4. A landlord's breach exists whether or not he has had "reasonable time" to make repairs.[271]

5. Judge Clark, dissenting:

   (a) Landlords and tenants should be free to enter into contracts for leases that might not meet habitability standards. For instance, in a warm climate, a tenant might want to save money by not having heat.

6.6.4.5 Fit for Human Habitation: *Hilder v. St. Peter*

1. "[W]e now hold expressly that in the rental of any residential dwelling unit an implied warranty exists in the lease, whether oral or written, that the landlord will deliver over and maintain, throughout the period of the tenancy, premises that are **safe, clean and fit for human habitation**."[272]

2. The tenant must provide notice. There warranty cannot be waived.

6.6.4.6 Questions on the Implied Warranty of Habitability

1. In *Green v. Superior Court*, what reasons did the California Supreme Court give for recognizing an implied warranty of habitability? Was the Court's theory that a landlord and a residential tenant implicitly bargain that the rental unit will be habitable throughout the tenancy? [273]

2. In California, does a breach of the implied warranty of habitability occur when the premises become uninhabitable, or when the landlord receives actual or constructive notice of the problem, or when the landlord fails to repair the problem within a reasonable period of time after receiving notice? (Be sure to review *Peterson v. Superior Court* as well as reading *Knight v. Hallsthammar*.)[274]

3. When do you think a breach should be found and why? Should the landlord be viewed as offering an implied warranty that the premises will be habitable throughout the tenancy, or should liability be based on fault?[275]

[270] Reader p. 173.
[271] Reader pp. 173–74.
[272] Casebook p. 496.
[273] Syllabus 3/18/2013 problem 1.
[274] Syllabus 3/18/2013 problem 2.
[275] Syllabus 3/18/2013 problem 2.

6.6.4.7 Policy

1. Pro:[276]
   (a) Caveat lessee does not suit the needs of poor urban tenants. Urban tenants lack the skills to repair the premises on their own, and the shortage of affordable housing makes it unlikely that they will be able to negotiate with landlords.
2. Con:
   (a) It imposes extra costs on landlords, which they pass on to tenants. Some tenants will be unable to afford the higher rent, so they will be forced out of the housing market.
   (b) Allowing tenants to waive the implied warranty respects their autonomy and improves marketplace efficiency.

6.6.5 Retaliatory Eviction

6.6.5.1 *Edwards v. Habib*

1. Proof of a retaliatory motive is a defense to an eviction action.

6.7 Rent Control: The Problem of Decent Affordable Housing

6.7.1 Introduction

1. **Mechanics of rent control**: see course reader p. 191.

6.7.2 Policy

1. See course reader pp. 195–202.

6.7.3 The Economic Case against Rent Control: *Chicago Board of Realtors, Inc. v. City of Chicago*

1. Chicago passed an ordinance codifying the implied warranty of habitability. Posner argued that ordinances that artificially decrease the cost of housing (rent control) or artificially increase the cost of landlords (implied warranty) causes supply to fall, hurting poor tenants. American economists often agree, finding rent control ordinances to be counterproductive.[277]
2. Defenders of rent control argue that that the economic analyses are unreliable or irrelevant.[278]

[276] *Understanding Property* pp. 262–63.
[277] Casebook p. 511.
[278] Casebook p. 512.

§ 7 Servitudes

1. Servitudes create interests in land that bind and benefit the parties to an agreement and their successors.[279]
2. There is much functional overlap between the doctrinal categories of servitudes. Is it necessary?
3. Modern servitudes are products of the nineteenth century, following the enclosure movement and urbanization.
4. The Restatement (Third) combines all three servitudes—easements, real covenants, and equitable servitudes—into the "servitude."
5. Homeowners associations often act as shadow governments, imposing regulations that would be unconstitutional if they were public law.
6. Covenants often arise in leases. For instance, a promise to pay $1,000/month in rent is a covenant.
7. Some uses for covenants:
   (a) To exclude, especially on the basis of wealth and race.
   (b) To preserve affordable housing—e.g., covenants to require affordable rental rates.
   (c) To conserve.
   (d) To provide assurances to property owners.

7.1 Easements

1. Types:
   (a) Express.
   (b) Licenses.
   (c) Implied by prior existing use, by necessity, by prescription.
   (d) Negative.
2. **Affirmative easement**: the right to perform an act on servient land.[280]
3. **Negative easement**: forbids a landowner from doing something that might harm his neighbor.
4. **Easement appurtenant**: grants a right to the owner of the land that benefits from the easement to make use of another's land, i.e., it benefits the land belonging to the easement owner. Usually transferable.

[279] Casebook p. 763.
[280] Casebook p. 767.

5. **Easement in gross**: grants a right to some person, regardless of ownership of land, to make use of another's land, i.e., it benefits the easement owner directly.
6. If the parties' intent is unclear, courts resolve the ambiguity in favor of creating an easement appurtenant.
7. **Dominant tenement**: the property that the easement benefits.
8. **Servient tenement**: the property to which the easement applies.

7.1.1 Express Easements

1. **By grant**: created when a grantor conveys an easement to another person.
   (a) Must be in writing, identify the grantor and grantee, show intent to create an easement, describe the affected land, and be signed by the grantor.
2. **By reservation**: created when a grantor conveys land to another but reserves an easement in it.
   (a) The requirements are identical to express easements by grant.
   (b) At common law, an easement could not be reserved in a third party, but many courts have departed from this rule. *Willard v. First Church of Christ, Scientist.*

7.1.1.1 Express Easement for a Third Party: *Willard v. First Church of Christ, Scientist*

Unlike at common law, grantors can create easements in third parties.

1. McGuigan owned lots 19 and 20. She allowed churchgoers to park in lot 20. She sold lot 19 to Peterson. Peterson wanted to resell it, so he listed it with Willard, a realtor. Willard wanted to buy lots 19 and 20, so Peterson conveyed both to him by deed in fee simple.
2. But, Peterson did not own lot 20 when he agreed to convey it to Willard, so he offered to buy it from McGuigan. She was willing to sell as long as the church could continue to use the lot for parking. The deed from McGuigan to Peterson for lot 20 included an easement for church purposes.
3. Willard then received the deed for lot 20 from Peterson, which did not contain the language creating the easement, though Peterson told Willard that the church would want to use the lot for parking.
4. Willard learned of the easement several months later. He sued to quiet title against the church.

5. The trial court held that McGuigan and Peterson intended to convey an easement, but that it was invalid because of the "common law rule that one cannot 'reserve' an interest in property to a stranger to the title."[281] The rule was based on a feudal desire to limit conveyances by deed in favor of conveyances by livery of seisin.

6. Many courts have found ways of circumventing this rule, and at least two states have discarded it.[282]

7. Willard argued that the old rule should nonetheless apply because grantees and title insurers relied on it, but the court found no evidence to support his claim.

8. " . . . in the instant case the balance falls in favor of the grantor's intent, and the old common law rule may not be applied to defeat her intent."[283]

7.1.1.2 Policy

1. Express easements protect landowners' autonomy and facilitate efficient use of land.

7.1.2 Licenses

1. **License**: permission to allow the licensee to do something that would otherwise be a trespass—e.g., plumbers, dinner guests.

2. Licenses are revocable. Easements are not.

3. However, there are two circumstances in which a license is not revocable:

   (a) A license coupled with an interest, e.g., the right to harvest timber from the grantor's land.

   (b) A license can become irrevocable under the rules of estoppel (i.e., when the licensee spends significant money or labor, and the licensor knows or reasonably expects that the licensee will rely on the license). *Holbrook v. Taylor*.

7.1.2.1 Irrevocable Licenses by Estoppel: *Holbrook v. Taylor*

If the licensee has made substantial improvements in reliance on the license, the licensor is estopped from revoking the license.

1. Facts:

   (a) 1942: The Holbrooks bought the property in question.

[281] Casebook p. 769.
[282] Casebook p. 771.
[283] Casebook p. 772.

(b) 1944: The Holbrooks granted permission for a road to be cut to haul coal from a mine.

(c) 1949: The mine closed and the road was no longer used.

(d) 1957: The Holbrooks built a house and leased it. The Holbrooks and the tenants used the road.

(e) 1961: The tenant house burned down and was not rebuilt.

(f) 1964: The Taylors bought property next to the Holbrooks' and built a house. Until 1965, the Holbrooks gave permission for the Taylors to use the road.

2. Precedent supported the view that "a right to the use of a roadway over the lands of another may be established by estoppel."[284]

3. After 1965, it was disputed whether the Taylors used the road by permission or claim of right. The Taylors argued that it was used by them and others without the Holbrooks' permission.

4. In 1970, the Holbrooks apparently wanted to require the Taylors to buy the land containing the road for $500.

5. The court held that several factors—the right to get to their home, the use of the road for construction, and improvements—granted an irrevocable license by estoppel to the Taylors to use the road.[285]

7.1.3 Easements Implied by Prior Existing Use

1. Requirements:[286]

   (a) **Severance of title** of land held in common ownership.

   (b) An **existing, apparent, and continuous use** when severance occurs.

   (c) **Reasonable necessity** at the time of severance.

2. **Quasi-easement**: occurs when an owner uses one part of his land as if it were an easement. It's not an easement because you can't have an easement in your own land. But it can become an easement if you convey the quasi-servient tenement. *Van Sandt v. Royster.*

7.1.3.1 Easement Implied by Prior Existing Use: *Van Sandt v. Royster*

An easement by reservation is valid when the prior use was reasonably apparent.

[284] Casebook p. 775.
[285] Casebook p. 777.
[286] Casebook p. 785 and *Understanding Property 532.*

1. Bailey owned three adjacent lots. She built an underground sewer to connect the lots to a public sewer on the street. Van Sandt, the plaintiff, acquired the lot closest to the road (lot 19). Royster, the defendant, acquired the adjacent lot (lot 20).
2. Van Sandt discovered that his basement was flooded with sewage. He sued to prevent the defendants from draining their sewage across his land.
3. The trial court found an appurtenant easement, holding for defendants.
4. On appeal, Van Sandt argued that there was never an easement created in his land, and if there was, he took the premises free from any easement because there was no actual or constructive notice.[287]
5. Royster argued that Bailey (the original owner of the lots) created an easement by implied reservation when she severed the lots. Royster's backup theory was that he had a valid easement by prescription.
6. **Easement by grant**: an owner grants an easement to another. It favors the grantee.[288]
7. **Easement by reservation**: an owner conveys part of his property to a grantee but retains an easement by reservation. It favors the grantor.
8. The court considered various approaches to the differences between easements by implied grant and implied reservation.
   (a) Some courts: unless implied by necessity, a grantor should not be able to reserve an easement by implication.
   (b) Other courts: there should *never* be an implied easement by reservation.
   (c) Still others: there is no difference between an implied reservation and a grant.
   (d) This court: necessity is a factor in determining whether the easement was implied by reservation, but it is not determinative. Here, the implied reservation was permissible.
9. The court here held that an owner cannot have an easement in his own land, but he can have a "quasi-easement" if one part of the land is necessary for the benefit of another. It held that an implied reservation exists when the grantee knew or reasonably should have known of the prior use. It doesn't matter whether the use was visible to the naked eye as long as the use was reasonably apparent (e.g., underground sewers).
10. Because the court held that there was a valid easement by reservation, it did not reach the question of whether there was a prescriptive easement.
11. Affirmed.

[287] Casebook p. 780.
[288] See *Understanding Property* p. 530.

7.1.4 Easements by Necessity

1. The easement is **necessary** for the enjoyment of the land, and the necessity arose upon **severance** of the dominant and servient parcels.[289] *Othen v. Rosier.*

2. Necessity might be a factor in establishing whether an easement is implied from an existing use, but the two are distinct.

   (a) Old rule: "**strict necessity** is required for implied easements in favor of the grantor."[290] At least one jurisdiction has required prior use, not recognizing necessity as sufficient.

   (b) Most jurisdictions: only **reasonable necessity** is required, regardless of whether the easement is implied in favor of the grantor or grantee.

3. An easement by necessity is implied either because of **public policy** (access to landlocked land) or **the parties' intent** (presumably the grantor intended the land to be accessible).[291]

7.1.4.1 Easement by Necessity: *Othen v. Rosier*

1. Othen owned land that could only access the public highway by crossing Rosier's land. The Rosiers maintained a road which they used for farming needs and which Othen used to access his land.

2. The Rosiers constructed a levee that flooded the road, rendering it unusable. Othen sued for an injunction to recognize an easement.

3. The trial court held that Othen had an easement by necessity.

4. The appellate court reversed, finding that there was no easement.

5. Before the Supreme Court of Texas, Othen claimed an easement both of necessity and by prescription. (An easement by prescription arises from adverse use for a certain period—like adverse possession, but creating an easement rather than a possessory right; see *Van Valkenburgh*).

   (a) *Easement of necessity*: no. An easement of necessity arises when an owner severs two parcels, making it necessary to cross one parcel to access the other. It *only* arises when the sevrance causes the land to be landlocked. In this case, Hill owned Othen's and the Rosiers' land as well as the surrounding land. Upon severance, there might have been several other ways to access Othen's lot. Othen failed to show that use of the road on the Rosiers' lot was *necessary*, rather than merely *convenient*.[292]

[289] Casebook p. 785.
[290] Casebook p. 785.
[291] Casebook pp. 792–93.
[292] Casebook p. 789.

(b) *Easement by prescription*: no. An easement by prescription arises from adverse use. Othen's use of the Rosiers' road was not adverse because it was permissive and therefore constituted a license.[293]

6. Othen did not have an easement because he failed to prove that access to the Rosiers' road was necessary. Affirmed.

7. Othen could have successfully argued (1) that there was an implied easement by reservation on the basis of prior use (but Texas does not allow easements by implied reservation without necessity), or (2) that he had a license to use the road that had become irrevocable through estoppel.

7.1.4.2 Problems on Easements by Necessity

1. A owns five tracts of land. Lots 1–4 surround lot 5. A purchased each lot from O in separate, successive transactions. A dies intestate, leaving lot 1 to B, 2 to C, 3 to D, 4 to E, and 5 to F (so F has the landlocked lot). There is no mention of an easement for F on lot 5. F sues the owners of lots 1–4, claiming an easement by necessity. What result?[294]

   (a) The takeaway is the importance of timing in creating easements. In the first part of the problem, A acquired lot 1, then lot 2, then lot 3, and so on. At some point, A owned lots 1–3 and O owned 4 and 5. At that point, O had a quasi-easement from lot 5 through lot 4. When he conveyed lot 4 to A, lot 5 became landlocked, and O retained an implied easement by necessity (by reservation) through lot 4.

   (b) As to the second part, in which a court gives each lot to a separate person, has no clear answer. None of the lots is a better candidate than the others for an easement by necessity. No case has ever addressed this question.

7.1.5 Easements by Prescription

1. Similar to adverse possession, but leading to use, not possession. Use must be **open and notorious**, **adverse and under a claim of right**, **continuous** for the statutory period, and **exclusive** (meaning distinct from the general public's use, but not necessarily exclusive of the true owner).

2. *Fiction of the lost grant*: "[i]f use was shown to have existed for 20 years, it was presumed that a grant of easement had been made and that the grant had been lost." The presumption could not be rebutted by evidence that there had been no grant, but a minority of states (departing from the English common law rule) hold that it *can* be rebutted by evidence of non-acquiescence. It granted an easement after 20 years of adverse use

[293] Casebook p. 791.
[294] Casebook p. 793 problem 2.

on the fiction that the owner had made a grant.[295] The lost grant theory confuses acquiescence and permission.

3. **General public**: most states recognize a public prescriptive easement if the general public meets the adverse use requirement, but it can be negated by evidence of permissive use).

4. California has a safe harbor statute that prevents a prescriptive easement from arising if the landowner posts signs with specific language granting rights to pass at entrances or at regular intervals.[296]

   (a) But signs can still be ambiguous. It's better to get users to agree in writing to permission to pass.

7.1.5.1 Problems on Easements by Prescription

1. Say A built a road across O's land in 1982. In 1994, O writes a letter telling A to stop using the road. A ignores O's letter and continues to use the road until 2002. The prescriptive period is 20 years.[297]

   (a) Does A have a prescriptive easement under the lost grant theory?

      i. Yes. O's letter did not interrupt A's continuity of possession. Since A used the road for 20 years, A acquires a prescriptive easement under the lost grant theory.

   (b) Does A have a prescriptive easement under the adverse use theory?

      i. "In a jurisdiction not following the fiction of the lost grant, to prevent a prescriptive easement from being acquired, the owner must effectively interrupt or stop the adverse use."[298] O's letter is insufficient to interrupt A's adverse use, so A acquires a prescriptive easement.

   (c) What if instead of writing a letter, O put up a fence blocking the road?

      i. O's action would have interrupted A's use. Prescriptive easements, like adverse possession, require continuous use. A would not have a prescriptive easement. But if A tore down the fence and continued to use the road without interruption, he would acquire a prescriptive easement.

2. A owns a house next to a golf course. Every day, several golf balls end up on his lawn, and golfers come to retrieve them.[299]

[295] Casebook p. 795.
[296] Cal Civ. Code § 1008.
[297] Casebook p. 796.
[298] Casebook p. 796.
[299] Casebook p. 797.

(a) If this continues, will the golf course acquire a prescriptive easement? (Assume the golfers' actions are attributable to the course.)
   i. Yes, because course's licensees will have met the requirements. (This presumes that the golf course's licensees can acquire a prescriptive easement for the golf course.)

(b) What could A do to prevent a prescriptive easement?
   i. He could post a sign giving golfers permission to retrieve their balls, which would negate the adverse use requirement (though he may not want to because he would expose himself to tort liability).
   ii. He could kick the golfers off his property each time they come to retrieve their balls, which would interrupt continuity.
   iii. He could put up a big, electrified, barbed wire fence to keep them out.

7.1.6 Negative Easements

1. "A negative easement is the right of the dominant owner to stop the servient owner from doing something on the servient land."[300]

2. English courts recognized **four types** of negative easements, preventing a neighbor from blocking windows, blocking air, removing support from a building, and interfering with water flow.

3. American courts accepted the English restrictions on the creation of new negative easements, though there are persuasive policy reasons in favor of the opposite approach.[301]

4. American courts have recognized a few new negative easements, including the right to an unobstructed view and the right to sunlight (for solar energy).

7.1.6.1 No Implied Easement for Light and Air: *Fontainebleu Hotel Corp. v. Forty-Five Twenty-Five Inc.*

Negative easements can't arise by prescription (but they could in England).

1. The Fontainebleu Hotel wanted to construct an addition that would have blocked sunlight from the Eden Roc's pool. Eden Roc sought an injunction, alleging that the addition would interfere with an implied easement protecting its light and air.[302]

2. The court held that there is no precedent for finding an easement for light and air. Eden Roc had no cause of action.

[300] Casebook p. 842.
[301] Casebook p. 843–45.
[302] Reader p. 215.

7.1.7 Scope

1. The scope of an easement depends mainly on the parties' intent.
2. It can also depend on the circumstances surrounding the creation of the easement, whether the easement is express/implied/prescriptive, and the purpose of the easement.[303]

7.1.8 Transfer

1. **Appurtenant**: the benefit automatically transfers because the easement is attached to the dominant parcel. The burden also automatically transfers unless:[304]
   (a) the transferee qualifies for protection against an express easement as a bona fide purchaser (i.e., one who purchased without notice of a third party interest), or
   (b) the owner of the dominant tenement agrees to release the easement.
2. *In Gross*: generally freely transferable, although there have been historical limitations.

7.1.8.1 *Miller v. Lutheran Conference & Camp Ass'n*

7.1.9 Termination

1. There are several ways an easement can end:[305]
   (a) The easement owner can agree to **release** it.
   (b) The easement can **expire** at the end of a stated period or upon the occurrence of a stated event (as with a defeasible easement).
   (c) It can **merge** if the easement owner acquires the servient estate.
   (d) It can end when the **necessity ends**.
      i. Easements implied by necessity end when the necessity ends. [306] However, easements by prior existing use *do not* end when the necessity ends.[307] So it's more advantageous for the owner of the dominant tenement to establish an easement by prior existing use, rather than by necessity.
   (e) **Estoppel** (the owner of the easement indicates that he'll no longer use it, and the owner of the servient tenement reasonably relies on that representation).

[303] See *Understanding Property* p. 545 ff.
[304] *Understanding Property* p. 548.
[305] Casebook p. 841–42.
[306] Casebook p. 794 n. 3.
[307] Peterson mentioned this in class on 4/5/13.

(f) **Abandonment**, which requires intent to abandon and an act evidencing intent.

(g) It can end by **condemnation** if the government exercises its eminent domain power to take a fee interest in the servient estate (or vice-versa)—a.k.a. **unity of title**.

(h) It can end by **prescription** if the servient owner wrongfully and physically prevents the easement from being used for the prescriptive period.

2. Traditionally, courts could not modify easements according to changed conditions (though they could change real covenants and equitable servitudes), though this is changing (e.g., with the Restatement Third).

7.2 Real Covenants

7.2.1 Basic Fact Pattern

1. A owns lots 1 and 2. A sells lot 2 to B with a deed in which B promises to use the land only for residential purposes; or, A and B reach a contractual agreement.

2. B conveys his lot to C; or, A conveys his lot to D; or both.

7.2.2 Definition

1. A real covenant is a land use promise that benefits and burdens the original parties and their successors. It is enforceable in an action for damages.

2. It runs with an estate in land, not the land itself.

3. If a promise meets the requirement, it can be enforced either as a real covenant or an equitable servitude.

4. It can be affirmative (a promise to act) or negative (a promise to refrain).

5. It shares many features with the negative easement, including the promise to refrain and damages as the remedy. But courts recognize only a few types of negative easements—promises to not block windows, air, or water, and to not remove support for buildings—while real covenants are not limited in scope.

7.2.3 History

1. At early common law, A could enforce the contract against B as a personal covenant. But the benefits and burdens of the personal covenant did not apply to the successors of A or B because contract rights and duties were not assignable.

2. Courts developed real covenants and equitable servitudes to extend the benefits and burdens of land use covenants to successors.
   (a) Real covenants developed in courts at *law* for actions for *damages*.
   (b) Equitable servitudes developed in courts in *equity* for actions for *injunctions*.
3. English law courts were hostile to restraints on land, so the law of real covenants developed into an "unspeakable quagmire."[308] Equity courts were willing to tolerate land use restraints in the interest of fairness, so the law of equitable servitudes was relatively straightforward.
4. American courts have blurred the distinctions between real covenants and equitable servitudes. The Restatement (Third) combines both into the "servitude."

7.2.3.1 Egan, "The Serene Fortress"

1. Americans increasingly live in gated communities, governed by private covenants.[309]

7.2.4 Creation and Enforcement

7.2.4.1 Scenario 1: Original Promisee vs. Promisor's Successor

1. The original promisee (A) seeks to enforce a promise against the promisor's successor (C). Does the *burden* run?
2. It must be in **writing**. A written declaration from a subdivider is enough.
3. It must show that the parties **intent for the *burden* to bind successors**. Intent can be explicit ("to his heirs and assigns") or inferred ("the land shall be used only for residential purposes").
4. The covenant **"touch and concern"** the *burdened* land.
5. **Courts are split** on whether the covenant must also touch and concern the *benefited* land.
   (a) If the *benefit* is in gross, the burden will not run.[310] This led to the enactment of conservation easement statutes (because conservation easements, which are generally in gross, would not be enforceable).
      i. Restatement (Third): The burden *will* run when the benefit is in gross.

[308] *Understanding Property* 557.
[309] Casebook p. 922.
[310] For policy issues, see p. 875.

(b) Covenants *restricting* the use of land (i.e., *negative* covenants) have almost always been held to touch and concern.[311]

(c) But courts are wary of enforcing *affirmative* covenants (e.g., to maintain property or pay money), because (1) they don't want to issue orders requiring continuing judicial supervision, (2) they may impose large personal liabilities on successors, (3) if unlimited in time it resembles feudal service or perpetual rent, and (4) affirmative covenants clog titles.[312]

(d) Covenants to pay dues to homeowner associations are almost always enforced.[313]

(e) "The touch and concern requirement has been criticized as being vague and unpredictable, based upon obscure reasoning, and interfering with the intent of the parties."[314]

(f) The Restatement (Third) supersedes the touch and concern requirement and assumes that covenants are valid unless it violates public policy. It allows subsequent invalidity based on changed circumstances.[315]

6. The original covenanting parties (A and B) must be in **horizontal privity**. American courts follow three standards:

   (a) **Mutual interests**: A and B are (1) landlord-tenant or (2) owners of the dominant and servient tenements of an easement. A's conveyance to B in fee simple absolute does *not* meet this requirement.

   (b) **Successive interests**: horizontal privity arises when the covenant is created from a transaction conveying land from A to B—e.g., A conveys one of his lots to B with a deed containing a covenant. This is the US majority rule.

   (c) **No horizontal privity required**.

7. **Vertical privity** is required for the *burden* to bind the promisor's successors (here, D). It arises when the promisor conveys his *entire estate*, but not less than that (e.g., a life estate or term of years). *Old Dominion Iron & Steel Corp. v. Virginia Electric & Power Co.*

8. Successors must have **notice** (actual, record, inquiry, or imputed).

   (a) Under the traditional rule, no notice was required.

   (b) But today, every state has a **recording act**, which *may* well protect purchasers without notice (but they wouldn't be protected if it's a *race notice* jurisdiction.)

[311] Casebook p. 873.
[312] Casebook p. 873.
[313] Casebook p. 874.
[314] Casebook p. 874.
[315] Casebook pp. 874–75.

7.2.4.2 Scenario 2: Promisee's Successor vs. Original Promisor

1. The promisee's successor (C) seeks to enforce a promise against the original promisor (B). Does the *benefit* run?
2. The original covenant must be **in writing**.
3. The original parties must **intend** that the *benefit* (though not the burden) will run to successors.
4. The covenant must **"touch and concern"** the *benefited* land. It does *not* need to touch and concern the *burdened* land.
   (a) For example, A, a utility company, promises B that it will provide electricity to B and his heirs. B sells to C. The benefit will run to C, even though the burden is in gross.
5. There must be **vertical privity**.
   (a) There is vertical privity even if the promisee's successor received less than the promisee's entire interest (e.g., the benefit runs to lessees or life estate holders). *Old Dominion Iron & Steel Corp. v. Virginia Electric & Power Co.*
6. **Horizontal privity**: courts are split (see scenario 1 above: mutual interests, successive interest, or no horizontal privity required).
7. **Notice** is not required.
8. Example: A and B agree in writing to keep 90% of their front yards as grass. A sells his lot to C. B paves his yard. C can win damages against B.

7.2.4.3 Scenario 3: Promisee's Successor vs. Promisor's Successor

1. The promisee's successor (C) seeks to enforce a promise against the promisor's successor (D). Do *both* the benefit and burden run?
2. The analysis is the same as above.

7.2.5 Scope

1. Focus on context. Courts will give a reasonable interpretation to a covenant under the circumstances.
2. For instance, courts have different interpretations of "single-family residence" restrictions—but that's ok because contexts vary. E.g., does the restriction refer to architectural forms or to functional use?
3. There are no limits as long as the agreement touches and concerns the land.

7.2.6 Termination

1. **Public policy**: courts will not enforce covenants that violate statutes or general public policy.
2. **Release**: the parties can agree on an expiration date or agree to release their rights. State statutes might also limit duration or require periodic re-recording.
3. **Eminent domain** and other government actions.
4. **Merger** (e.g., the owner of the benefited land gains possession of the burdened land).
5. **Abandonment**: the person entitled to the benefit **demonstrates intent** to abandon the covenant.
6. **Changed conditions**: the covenant becomes unenforceable when the benefits cannot be substantially realized without inequity.
7. Anti-discrimination statutes.
8. If the **statute of limitations** has expired, parties cannot sue on breach of covenant (but it's important to determine whether a single breach or multiple breaches are involved).
9. **Estoppel** (if the jurisdiction allows it; it's an equitable remedy).

7.2.7 Remedies

1. Only damages.

7.2.8 Problem on Horizontal Privity

1. A, B, C, and D, neighboring landowners, decide that they will mutually restrict their lots to single-family residential use only. They sign an agreement wherein each promises on behalf of himself, his heirs and assigns that his lot will be used for single-family residential purposes only. This agreement is recorded in the county courthouse under the name of each signer. A sells his lot to E. E builds an apartment house on his lot.[316]
   (a) B, C, and D sue for damages. What result?
      i. If the jurisdiction requires privity of estate, B, C, and D will lose. Privity of estate can be created only through a conveyance. A contract isn't enough.[317]
   (b) Suppose that C rather than E had built the apartment house. Is E entitled to damages against C?

[316] Assignment sheet #14, 4/15/2013.
[317] See problem from pp. 851–52, above.

i. The question is whether the benefit of the covenant runs to E. Courts are split on the requirement of horizontal privity for the benefit of a real covenant to run. If the court applies the mutual interest test or the successive interest test (as most do), then A and C were not in horizontal privity, so the benefit does not run to E, and E would lose. However, if the court does not require horizontal privity for the benefit to run, E will win.

(c) Suppose that A, B, C, and D, in order to preserve their views over hillside lots, had agreed that no building taller than 20 feet would be erected on any lot. A sells his lot to E, who erects a 30-foot building. C argues that the agreement creates a negative easement. What result in a suit by C against E for damages?

i. It is not a negative easement because protecting a view is outside the scope of negative easements. If the agreement stands, it has to be a real covenant. But A and C were not in horizontal privity. Horizontal privity is required for the burden to run to E. C will lose.

7.2.9 Problem on Vertical Privity

1. Everyone seems to agree that vertical privity is required for a covenant to run with the land at law. What does vertical privity mean? Recall that a real covenant runs with the estate in land ("like a bird on a wagon"); it is not, like an easement or equitable servitude, considered to be an interest in the land itself. Consider the following problem:

2. O, owner of a 20-acre tract, conveys one acre of the tract to A. The deed, which is duly recorded, contains a covenant that A, and his heirs and assigns, will not use the one-acre tract for nonresidential purposes.[318]

(a) B, an adverse possessor, ousts A and remains in adverse possession for the period of the statute of limitations. B then erects a drive-in restaurant. O sues B for damages. What result?

i. O loses because A and B are not in vertical privity.

(b) A devises his tract to B for life. B erects a pizza parlor. O sues B for damages. What result?

i. O loses because A and B are not in vertical privity. A and B are not in vertical privity because A did not convey his *entire estate* to B.

(c) O leases his property to X. A builds a pizza parlor. X sues O for damages. What result?

i. X wins. O and X are in vertical privity because, for the benefit of a real covenant to run, the vertical privity requirements are

[318] Assignment sheet #14, 4/17/13.

relaxed such that vertical privity exists if O transfers less than his entire estate (e.g., a term of years or a life estate).

7.2.10 Policy

1. English law courts restricted real covenants out of fear that restraints on land would limit productive use. Today, courts recognize that land use restraints can enhance productive use—e.g., limiting neighborhoods to residential use keeps property value high. Still, land use restrictions can limit productive use—e.g., 99 lots have been converted to office buildings, while 1 adjacent lot can only be used for agriculture.

2. Real covenants respect parties' liberty and autonomy.

3. The horizontal privity requirement is obsolete, and anyway, parties can easily evade it through a straw.

4. The "touch and concern" requirement frustrates the intent of the parties. On the other hand, it promotes efficient use by preventing burdens that impair marketability, and it protects owners' expectations by ensuring a relationship between the benefit and the burden.

5. Most agree that the vertical privity requirement should be relaxed. Should a successor be able to avoid the burden because he has a 99-year lease, rather than an estate in FSA? On the other hand, it might make sense not to burden a tenant with a one-month term of years.

7.2.10.1 Berger, "A Policy Analysis of Promises Respecting the Use of Land"

1. The **intent** requirement relates to the parties' state of mind. The **touch and concern** requirement relates to whether the average person would expect that the promise would run with ownership. The parties' intent is often unclear, so courts often unwittingly apply the same standard ("what most parties would expect") twice.[319]

2. Physical acts on the premises:

   (a) Promises between landlords and tenants to perform physical acts—e.g., the tenant's duty to keep the property in good repair or to vacate upon sale, or the landlord's duty to provide heat and water—are usually binding and enforceable on the parties and their successors.

   (b) Promises to supply utilities touch and concern if the utilities come from the promisor's land. Otherwise, the burden does not run.

   (c) Promises *not* to use the land in a particular way also touch and concern.

[319] Reader p. 249.

3. Promises to pay money:

   (a) If the promise to pay money is related to the land—e.g., a covenant to pay rent—the benefit and burden run.[320]

7.2.10.2 Reichman, "Toward a Unified Conception of Servitudes"

1. Courts will not enforce a promise against successors if the promise does not touch and concern the land.

2. The reason is that "the permanent attachment to land of merely personal obligations is likely to frustrate the objectives of a private land holding system."[321]

3. Personal promises can quickly become inefficient upon transfer. Our system **enhances efficiency** by requiring the "aspiring beneficiary" to renegotiate the agreement with successors.

4. Our system **safeguards individual freedom** by preventing successors from being bound by personal agreements—e.g., "adherence to ideologically prescribed modes of behavior" or promises to buy from a specific supplier.

7.2.10.3 French, "Toward a Modern Law of Servitudes: Reweaving the Ancient Strands"

1. Notice:

   (a) It promotes efficiency by helping purchasers make informed decisions. It promotes fairness by protecting purchasers from surprises.

   (b) A purchaser who **records an instrument of title** is protected against prior interests created by unrecorded titles.

2. Intent:

   (a) It promotes fairness by preventing successors from unfair burdens and windfalls. It promotes efficiency by helping a purchaser assess restrictions and liabilities.

7.2.11 Defeasible Fees as Land Use Controls

1. Defeasible fees (FSD, FSSCS, FSSEL) can be used to control land use.

2. The remedy for breach of a defeasible fee is forfeiture. The remedy for breach of a servitude is damages, an injunction, or enforcement of a lien.

[320] Reader p. 250.
[321] Reader p. 251.

3. Defeasible fees are infrequently used today for land use controls (except as gifts), because they make the land purchase risky and unmortgageable, deterring buyers.[322]

7.2.12 Benefit of a Real Covenant Running to Lessee: *Old Dominion Iron & Steel Corp. v. Virginia Electric & Power Co.*

1. Old Dominion's (O's) corporate grandfather conveyed an island to O's corporate father (F). It also conveyed the connecting bridge to Vepco (V) via a deed which included a covenant that allowed F and its successors to use the bridge and required V to maintain and repair it.

2. The city (C) acquired title to the island. It then leased it to O.

3. A storm destroyed the bridge. O sued V for damages (i.e., transportation costs).

4. There were two covenants in the original deed: (1) O's right to use the bridge and (2) V's obligation to repair and maintain it.

5. Could O, as C's lessee, enforce the *benefit* of the covenant against V?

   (a) Yes. For the *benefit* of real covenant to run, vertical privity is established if the successor acquired *any interest* in the promisee's estate. (By contrast, for the *burden* to run, vertical privity is established only if the successor acquired the promisor's *entire interest*.)

6. O wins.

7.2.13 Benefits in Gross: *Caullett v. Stanley Stilwell & Sons, Inc.*

1. The defendant conveyed the property to the plaintiffs. The deed contained a covenant providing that the grantors (the defendant) "reserve the right to build or construct the original dwelling or building on said premises."[323] The deed indicated that the agreement was a covenant running with the land.

2. The plaintiffs sued to quiet title, arguing that no covenant existed. The defendant responded that the covenant was a primary condition of the sale.

3. The trial court held the covenant was unenforceable and should be stricken from the deed.[324]

4. The issue on appeal was whether the covenant was an enforceable restriction of the plaintiffs' land.

[322] Casebook p. 876.
[323] Reader p. 255.
[324] Reader p. 256.

5. The plaintiffs argued (1) that the covenant was too vague to be enforceable and (2) it was a personal covenant (i.e., in gross to the defendants) and thus the burden does not run.

6. The defendant argued that it was an ordinary property restriction intended to benefit the defendant and its land.

7. **Vagueness**: vague covenants are unenforceable because the limit free transferability of land. This covenant was too vague to be enforced.

8. But even if it weren't too vague, it still would not be enforceable either as a real covenant or as an equitable servitude, because:

   (a) The covenant did not **touch and concern** the plaintiffs' land. Things that satisfy the touch and concern requirement include limiting use to residential purposes, minimum setbacks, architectural form requirements, and minimum costs of future dwellings.[325] But this was "at best a personal arrangement," serving only to benefit the defendants. Although the agreement may be enforceable as as contract, it is not a covenant running with the land.

   (b) Even if it did touch and concern the plaintiffs' land, it would still be unenforceable as a covenant running with the land, because:

      i. The benefit was "clearly personal" (i.e., in gross) to the defendant. It did not affect its land in any way.

      ii. When the *burden* is in gross and the *benefit* attaches to land, the covenant runs with the land.

      iii. But when the *benefit* is in gross and the *burden* attaches to land, the covenant *does not* run with the land.[326]

9. Some jurisdictions have allows equitable servitudes to run with the land even when the benefit is in gross—but not this court.

7.3 Equitable Servitudes

7.3.1 Basic Fact Pattern

1. Same as with real covenants. When do the benefits and burdens of a promise run to successors?

2. Enforced in actions for injunctions, not damages.

7.3.2 Definition

1. An equitable servitude is a land use agreement that benefits and burdens the original parties and their successors. It is enforceable in actions in equity (for injunctions).

[325] Reader pp. 256–57.
[326] Reader p. 257.

2. Equitable servitude vs. real covenant:
   (a) The standard for enforcing an equitable servitude is easier to meet.
   (b) A broader range of defenses applies to equitable servitudes (see defenses below).
   (c) The remedy is an injunction, not damages.
3. Equitable servitudes are interests in land. Unlike real covenants, they attach to the land itself, not to the estate in land (an equitable servitude "sinks its tentacles into the soil").[327]

7.3.3 History

1. See real covenants.

7.3.3.1 Origin: *Tulk v. Moxhay*

1. Tulk owned the vacant piece of ground in Leicester Square and several surrounding houses. In 1808, he sold the garden to Elms with a deed containing a covenant that Elms and his heirs and assigns would maintain the land as a garden and not build any buildings.
2. After several conveyances, Moxhay gained possession of the land. His deed said nothing about the covenant, but he admitted that he had purchased the land with notice of the original covenant.
3. Moxhay wanted to build on the land. Tulk sued for an injunction, which the Master of the Rolls granted.
4. Moxhay argued that the burden of Elms's covenant did not pass to subsequent owners.
5. The court here held that if the original covenant is to have any value, it must be enforceable against subsequent purchasers.

7.3.4 Creation and Enforcements

7.3.4.1 Scenario 1: Original Promisee vs. Promisor's Successor

1. The original promisee (A) seeks to enforce a promise against the promisor's successor (C). Does the *burden* run?
2. The promise must be **in writing or implied from a common plan**.
3. The original parties must **intend for the *burden* to bind successors**.
4. The promise must **"touch and concern"** the *burdened* land. **Courts are split** on whether the promise must touch and concern the *benefited* land.

[327] Casebook p. 857.

   (a) Most courts hold that the burden will not run if the *benefit* is in gross, although some do. See *Caullet v. Stanley Stilwell & Sons, Inc.* (holding that for both real covenant and equitable servitudes, the burden does not run if the benefit is in gross—but acknowledging that some jurisdictions take the opposite view regarding equitable servitudes).[328]

5. The successor must have **notice**, actual or constructive (record, imputed, or inquiry).

   (a) The notice requirement is **limited to purchasers** (i.e., buyers or lessees). It does not apply to donees (i.e., those who receive an interest by gift, devise, or inheritance). This could be problematic if the donee didn't know about the covenant and, for built a house in violation of the covenant. So maybe the notice requirement should be expanded to include donees.

   (a) In England, promises are unenforceable against successors who lack notice. *Tulk v. Moxhay*.

   (b) Inquiry notice can be sufficient. *Sanborn v. McClean*.

6. **Horizontal and vertical privity are not required**.

7.3.4.2 Scenario 2: Promisee's Successor vs. Original Promisor

1. The promisee's successor (C) seeks to enforce a promise against the original promisor (B). Does the *benefit* run?

2. The promise must be **in writing or implied from a common plan**.

3. The original parties must **intend for the *benefit* to bind successors**.

4. The promise must **"touch and concern"** the *benefited* land. It does *not* need to touch and concern the *burdened* land.

   (a) The burden can be in gross. *Caullet v. Stanley Stilwell & Sons, Inc.*

5. There are **no notice or privity requirements**.

7.3.4.3 Scenario 3: Promisee's Successor vs. Promisor's Successor

1. The promisee's successor (C) seeks to enforce a promise against the promisor's successor (D). Do *both* the benefit and burden run?

2. The analysis is the same as above.

7.3.5 Scope

1. Same as for real covenants.

[328] Reader pp. 257–58.

7.3.6 Subdivisions

1. A subdivision developer wants to bind all lots to a covenant restricting use to residential purposes. He includes the covenant in each deed. But what if he forgets to include the covenant in some of the deeds? Can it still be enforced as an implied covenant?

   (a) A common scheme creates an implied reciprocal covenant that binds successors. *Sanborn v. McClean.*

   (b) Some states reject the common scheme approach. In those states, successors can still enforce the covenant as third party beneficiaries. *Snow v. Van Dam.*

7.3.6.1 Implied Burden, the Implied Reciprocal Negative Equitable Servitude, and the "Common Plan": *Sanborn v. McClean*

The first lot sold in the subdivision contained a covenant in the deed. But the deeds for the remaining lots do no mention the covenant. Can residents enforce the implied covenant against an owner who had no notice?

The court here said yes. This is the majority rule. "If the owner of two or more lots, so situated as to bear the relation, sells one with restrictions of benefit to the land retained, the servitude becomes mutual, and, during the period of restraint, the owner of the lot or lots retained can do nothing forbidden to the owner of the lot sold."[329]

1. The McLeans wanted to build a gas station on the back of their lot. Their neighbors, the plaintiffs, alleged that the gas station would violate the restriction on the lots on the street that they could only be used for residential purposes, as evidenced by restrictions on 53 of the 91 lots. They argue that defendants' lot was subject to a reciprocal negative easement.[330]

2. The McLeans argued that no restrictions appeared in their chain of title and that they purchased without notice of a reciprocal negative easement.

3. **Reciprocal negative easement** (but really, an implied reciprocal servitude): "If the owner of two or more lots, so situated as to bear the relation, sells one with restrictions of benefit to the land retained, the servitude becomes mutual, and, during the period of restraint, the owner of the lot or lots retained can do nothing forbidden to the owner of the lot sold."[331] It must start from a common owner.

   (a) The court calls this a negative easement, but they really mean negative equitable servitude.

[329] Casebook p. 860.
[330] Casebook pp. 859–60.
[331] Casebook p. 860.

   (b) This is also an imprecise definition because not all covenants are mutual.

4. Although his title was silent on restrictions, Mr. McLean was put on inquiry notice, i.e., he could not avoid noticing the uniformity of the residences on the street, and "the least inquiry" would have alerted him to the existence of a reciprocal negative easement (i.e., negative equitable servitude). The original covenant was implied by the original scheme. Each buyer was subject to the implied reciprocal promise.

5. Held: The McLeans were not allowed to build their gas station. Any construction so far had to be torn down or repurposed for residential use.

7.3.6.2 Implied Benefit and Third Party Beneficiaries: *Snow v. Van Dam*

A subdivider, S, sells a lot to A in 2012, to B in 2013, and to C in 2014. Each deed contains a covenant to benefit "S and his successors." If C breaches, can A win an injunction?

In states that follow the "common plan" approach from *Sanborn*, the implied covenant binds all owners in the subdivision, so A wins.

But some states (e.g., Massachusetts and California) reject the common plan approach. The *Van Dam* solution holds that A can win as a third party beneficiary of the covenant between S and C.

1. Facts:

   (a) September 5, 1906: Luce acquired title. Soon after, he transferred it to Shackelford.

   (b) The northern part of the land (including the part later owned by Van Dam) was marshy and deemed "unsuitable for building and worthless."[332]

   (c) 1907: the lower tract was subdivided into around a hundred lots for summer residences, all owned by the plaintiffs.

   (d) July 18, 1907–January 23, 1923: almost all of the lower lots were sold. Almost without exception, the deeds contained restrictions that "only one dwelling house shall be erected or maintained thereon at any given time which building shall cost not less than $2500 and no outbuilding containing a privy shall be erected or maintained on said parcel without the consent in writing of the grantor or their heirs."[333]

   (e) January 23, 1923: Shackelford conveyed the three northern marshy lots (C, D, and E) to Robert C. Clark, subject to similar restrictions.

[332] Reader p. 236.
[333] Reader p. 236.

(f) February 18, 1923: Clark conveyed lot D to Van Dam, subject to the earlier restrictions, but creating no new restrictions.

(g) June 15, 1923: Shackelford conveyed the remaining southern lots to J. Richard Clark, subject to similar restrictions as the other southern lots.

(h)

2. Van Dam, an aspiring victualer, built a building to sell ice cream, etc. The plaintiffs (the other residents) sued for an injunction.

3. Issue: who had the right to win an injunction against Van Dam?

4. The trial court enjoined Van Dam from building non-residential buildings on its land.[334]

5. To be attached to land, a restriction must be intended to benefit a dominant estate. If there's no dominant estate, it's a personal contract that does not attach to the land.

6. The restriction in the conveyance of lot D did not specify whether it benefited a dominant estate. In the absence of express statements, courts can infer an intention that a restriction benefit a dominant estate. That inference can arise from "a scheme or plan for restricting the lots in a tract undergoing development to obtain substantial uniformity in building and use. The existence of such a building scheme has often been relied on to show an intention that the restrictions imposed upon the several lots shall be appurtenant to every other lot in the tract included in the scheme."[335]

7. A scheme existed in this case. Because of the scheme, all plaintiffs are entitled to relief. (Cf. *Sanborn*, where there was no explicit restriction on the land in question.)

8. The scheme included the northern land because every entrant to the lower land must pass through it. Also, all of the plans for the housing development included the northern land.

7.3.7 Termination

1. In addition to the termination options under real covenants, equitable doctrines may also apply to equitable servitudes: changed conditions, acquiescence, estoppel, laches, relative hardship, unclean hands.[336] These are *always* available in actions in equity, but courts are split on whether they are allowable in actions for damages.

[334] Reader p. 235.
[335] Reader p. 237.
[336] See *Understanding Property* pp. 590–91.

7.3.8 Remedies

1. Only injunctions.

7.3.9 Policy

1. The requirements for equitable servitudes are less controversial than those for real covenants.

2. The Restatement (Third) combines both into the "servitude."[337]

7.3.10 Problems on Equitable Servitudes

1. Barnes owns a lot immediately to the south of Zamiarski's lot. Barnes sells his lot to Lewek, subject to a restriction that he will not build anything within ten feet of the northern property line (bordering Zamiarski's lot). Later, Kozial takes possession of Lewek's lot. He wants to build within ten feet of the line. Zamiarski sues for an injunction. What result?[338]

   (a) It depends on whether the court requires privity of estate to enforce the covenant in favor of a third party beneficiary. Zamiarski and Kozial are not in horizontal or vertical privity. If the court does not require privity, Zamiarski wins.

7.4 Covenants Running with the Land and Landlord-Tenant Law

1. Covenants in leases are a **subset** of covenants running with the land. Every covenant in a lease (e.g., a covenant to pay rent) is a covenant running with the land, so the analysis is the same.

2. Assume L is the landlord, T is the original tenant, and T1 is the sublessee or assignee.

3. T's obligation to pay rent is a covenant running with the land.

   (a) However, the Restatement (Third) does not apply its servitude rules to covenants in leases.

4. **Example**: L leases to T. T **assigns his entire interest** to T1 (so T1 is an assignee). Can L sue T1 for damages for unpaid rent?

   (a) Analyze the problem as a real covenant. Does the burden run to T1?

      i. Writing? Yes.

      ii. Intent? Yes.

      iii. Touch and concern? Yes.

[337] See *Understanding Property* pp. 592–94.

[338] Reader p. 239 note 2.

iv. Horizontal privity? Yes, under the mutual interest standard (because L and T are in a landlord-tenant relationship).

v. Vertical privity? Yes (because T conveyed his *entire interst* to T1).

A. "Privity of estate" between landlords and tenants is shorthand for the existence of *both* horizontal and vertical privity. If either is missing, there is no privity of estate.

vi. Notice? Yes.

(b) So yes, the burden runs to T1, so L can recover unpaid rent by enforcing the burden of the original covenant between L and T.

5. **Example**: L leases to T. T **sublets** to T1 (so T1 is a sublessee). Can L sue T1 for damages for unpaid rent?

(a) The analysis is the same as the prior example. But here, there is **no vertical privity** between T and T1 because T did not convey his entire interest. So the burden of the covenant does not run to T1, and L cannot sue T1 to recover for unpaid rent. (In other words, L and T1 are not in privity of estate).

6. **Example**: L leases to T. The lease includes a covenant preventing pets. T sublets to T1. T1 gets a cat. Can L sue for an injunction to remove the cat?

(a) Analyze the problem as an equitable servitude. There is no vertical privity requirement, so L wins. L would win regardless of whether T1 is a sublessee or an assignee.

7. **Example**: L made a promise to T. Can T1 enforce that promise against L? I.e, does the **benefit** run to T1?

(a) At law: yes, because the vertical privity requirement for the benefit to run is relaxed.

(b) In equity: yes, because there is no vertical privity requirement. Courts sometimes get this wrong, because a landlord *cannot* enforce the burden of a covenant against an assignee (see above)—but the courts are confused and wrong.

7.5 Covenants Running with the Land and the Rule against Perpetuities

1. Covenants running with the land allow dead hand control. For instance, a covenant restricting a lot to single-family residences could bind successors for centuries. Why doesn't the rule against perpetuities apply?

2. (The remedy for defeasible estates is forfeiture, while for covenants it's damages or an injunction.)

3. One explanation is that covenants generally enhance marketability, while defeasible estates do not. But why should there not be limits on dead hand control via covenants?

   (a) The **changed conditions** doctrine may make covenants unenforceable after a certain period of time. See 'Termination' under 'Real Covenants' above.

   (b) Some states have **statutory time limits** on the duration of covenants.

   (c) USRAP exempts commercial transactions from the rule against perpetuities, so in commercial contexts, there is no inconsistency between defeasible estates and covenants running with the land.

§ 8 Eminent Domain and Regulatory Takings

1. Fifth Amendment: " . . . nor shall private property be taken for public use, without just compensation."[339]
2. Regulation: zoning.
3. Taking: eminent domain.

8.1 Eminent Domain

1. "Eminent domain is the power of government to force transfers of property from owners to itself."[340]
2. Rationales:[341]
   (a) Sovereign states had original and absolute ownership of property, prior to private ownership.
   (b) Royal prerogative in feudal times.
   (c) Eminent domain is an inherent attribute of sovereignty.
3. Why compensate?
   (a) Moral imperative.
   (b) Guard the propertied classes against redistribution of wealth.
4. Efficiency arguments on the power to take and the obligation to compensate: see casebook pp. 1063–65.

8.2 The Public-Use Puzzle

1. The Takings Clause limits eminent domain to "public use." What counts as public use?

8.2.1 Economic Development as "Public Use": *Kelo v. City of New London*

Economic development is a "public use."

1. The City of New London initiated an economic development plan that required it to take petitioners' property (15 houses in all). The petitioners argued that the taking violated the "public use " restriction in the Takings Clause.[342]

[339] Casebook p. 1061.
[340] Casebook p. 1061.
[341] Casebook p. 1062.
[342] Casebook p. 1067.

2. The Superior Court granted a restraining order for some of the properties and denied relief for others.
3. The Connecticut Supreme Court held that all of the takings were valid.
4. Justice Stevens:
   (a) Does a city's taking for the purpose of economic development satisfy the public use requirement?
   (b) "Public use" should be interpreted broadly as "public purpose"—i.e., the property need not be available to the entire general public as long as the use confers a public benefit.
   (c) *Berman v. Parker*: the Court upheld a redevelopment plan for a blighted area, over the objection of the owner of a store that was not blighted, because the area "must be planned as a whole."[343]
   (d) *Hawaii Housing Authority v. Midkiff*: the Court upheld a taking to reduce the concentration of land ownership.
   (e) Here, the taking was valid because it was part of an economic plan as a whole.
   (f) Economic development is a "public use."
5. Justice Kennedy, concurring:
   (a) There might need to be a higher standard of review for takings that favor private parties with only incidental public benefits.
6. Justice O'Connor, dissenting:
   (a) The majority's holding would allow any taking as long as there is an incidental public benefit. This benefits those with disproportionate influence in the political process.

8.3 Physical Occupations and Regulatory Takings

1. How does a government take property?[344]
   (a) Attempt negotiations.
   (b) At trial, the government establishes its condemnation authority. The court can grant the government permission to enter and inspect, and it can require a deposit.
   (c) Jurisdictions vary on whether a jury is required. If it is, the jury sets the compensation amount.
   (d) The government then pays compensation plus interest.
   (e) Condemnees cannot recover litigation expenses. They can appeal.

[343] Casebook p. 1069.
[344] Casebook p. 1081.

8.3.1 *Nollan v. California Coastal Commission*

1.

§ 9 Themes

1. Dividing up ownership—over time, among multiple people, . . . —and why?
2. Types of property holders, and their rights and obligations.
3. What the rule *is* vs. what the rule *should be*. Much of property law is uncertain and contested.
4. What is property? Things; rights; ideas (e.g., IP); relationships, especially with regard to economically valuable resources.
5. "Property is everything which has an exchangeable value . . . "[345] What about property that has no exchange value?
6. Precedent vs. policy.

[345] *The Slaughter-House Cases*, 83 U.S. 36, 127 (1873) (Swayne, J., dissenting).