Property, Petherbridge, Fall 2016

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I. **The Acquisition of Property Right & Some Theories of Property**
   A. **What is property?**
      a. Interest in a thing, tangible or intangible, protected against invasion by others.
      b. Bundle of rights: right to possess, the right to use, the right to exclude, right to transfer
   B. Theories of Property
      a. Blackstone—Occupancy Theory/Principle of First in Time
         1. Greed eventually led to scarcity and the institution of private property became necessary to preserve peace.
            a. When there are few people, resources are plentiful. Populations grow and transient property develops. Now there are less resources
         2. Taking possession of an unknown thing is the only way to acquire ownership of it, being first justifies ownership.
         3. *Pierson v. Post* - (Killing the fox being pursued)
            a. **The Capture Rule in General:** The first person to take possession of an unowned thing owns it.
            b. Demonstrates the **rule of capture**: **mere pursuit does not constitute possession of a wild animal; one must wound, circumvent or otherwise ensnare it so as to deprive it of its natural liberty and subject it to control of pursuer to have property in it** (***actual possession***).
               - Post never actually had property in the fox he was hunting because he had not deprived it of its natural liberty nor subjected it to control. Therefore, Post's claim against Pierson for killing and taking the fox while Post was in pursuit of it does not constitute a valid legal claim and decision was reversed.
      b. Locke's Labor Theory
         1. You gain the right to possess something once you put some labor into it. He believed that at the very least, you possess property in your body, and therefore you own the labor of your body.
            a. Therefore, when you add you labor to property that it unclaimed, you then possess it.
      c. Jeremy Bentham - Utilitarianism
         1. Decisions about property should be based on what would create the most benefit from a good.
            a. We should decide to either have a rule or not based on what's best for the most people.
         2. Result of scarcity; we must protect what we possess. Everyone wants this protection for his own property so upholds property in others.
      d. Harold Demsetz—Economic Efficiency
         1. theory of when property rights will emerge – when it is economic to internalize externalities (harm or benefit to others that the owner does not consider when deciding how to use his property because it does not directly impact him)
            a. Tragedy of the Commons: individuals acting according to their own self-interests will deplete some common resource; not enough property rights
            b. Tragedy of the Anticommons: too many property rights will prevent a resource from being used because of a coordination breakdown
         2. Externalities: a consequence or side effect of one's economic activity, causing another to benefit without pay (positive) or to suffer without compensation (negative).

II. **Possession by Creation & Intellectual Property**
   A. General rule: Absent some special common law or statutory right a "man's property is limited to the chattels which embody his invention" (*Cheney Brothers* - Stealing Silk designs)
   B. Common Law Rights
      i. Rights in News (Quasi Property Right):
         a. *INS v. Associated Press*- the articles could be copyrighted but not the information they contained. Stressing that D was appropriating material that P had acquired through the investment of labor, skill, and money the court held that P had a temporary "quasi property" right in its news for so long as the news retained commercial value.

III. **Copyright**
   A. Anything created after 1978 is protected for the life of the author + 70 years, and term cannot be renewed.
   B. Policy: to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusively right to their respective writings and discoveries. Very utilitarian.
      i. Encourages people to engage in expressive works by protecting them to allow for some kind of reward (profit, recognition, etc.)

C. Copyright attaches to **original works of authorship, fixed in a tangible medium of expression** (note: just because you find a new medium of expression to "fix" the work, doesn't mean you can copy it).

D. Three Copyright elements:
   1. ***Originality***: independent creation of the author, demonstrating a minimal degree of creativity
   2. ***Work of authorship***: literary, musical, dramatic, architectural, pictorial, graphic, motion picture, or similar work
   3. ***Fixation***: work must be fixed in some kind of tangible medium (ex: printed on a page, on a CD, a canvas, human skin, or computer hard drive).

E. **Fact/Expression Dichotomy -** facts are not copyrightable but expressive elements in a factual compilation may be, but the protection will be thin (*Feist v. Rural* - phone directories)
   a. Facts are not copyrightable, but assortments of facts are so long as they are compiled or arranged in an original or creative manner. (Facts are not copyrightable, expression is).
   b. Protection in factual compilations depends on original arrangement of facts -> need independent creation and minimal creativity

F. **Idea/Expression Dichotomy -** ideas not copyrightable, but expression is (*Baker v. Selden*-bookkeeping system)
   a. Selden created accounting ledgers to execute a system of bookkeeping, Baker used similar ledger, Court held there was no infringement because there was no difference between the idea and the expression of the idea. Copyright can't attach to ideas, the ledgers were just reflection of the idea of the accounting system (formulas)

G. **Merger or Idea/Expression Inseparability -** the idea is so closely tied to its expression that there is no way to protect the expression (*Morrissey v. P&G* - sweepstakes rules)
   a. Where there is only one or but a few ways of expressing an idea, courts may find that the idea behind the work merges with its expression, resulting in work that is not copyrightable subject matter.
   b. Morrissey sued Proctor & Gamble for copyright infringement of his description of a sweepstakes contest; court held that because the expression of the rules of the contest are essentially the rules of the contest, they could not be considered separately. There were different ways to express the rules, but so few ways that allowing copyright over one of them would prevent anyone from expressing the rules (they are one in the same).

H. **Conceptual Separability**
   a. If design elements reflect a merger of aesthetical and functional consideration, the artistic aspects of a work cannot be said to be conceptually separable. *Conversely*, where design elements can be identified as reflecting the designer's artistic judgment exercised independently of functional influences, conceptual separability exists. (*Brandir v. Cascad*e - bike rack)
      i. Brandir created the ribbon rack bicycle rack; Cascade copied; court held there was no copyrightable expression in the bicycle rack because there was no conceptual separability. Applying the test, if Brandir changed the "ribbonness" of the bike rack, it wouldn't function as the same bike rack.
         - Useful article: one having an intrinsic utilitarian function not merely to portray the appearance of the article or to convey information; an article which is normally part of a useful article is considered a useful article.
      ii. Policy: court does not want to limit use of functional things through copyright protection
         - Hypo: Mickey Mouse phone? Yes, copyrightable, Mickey can be said to be separate from the phone, reflecting artistic expression apart from functionality of the phone.
         - Hypo: 80s belt buckle w/ polka dots? Yes, copyrightable in the expression of the belt buckle – they didn't have to choose particular half-moon shape, polka dots, thickness, size, etc. to make it function as a belt buckle—be able to articulate the aesthetic elements and how they are separate from the function elements = conceptually separable = if so, the expressive part is copyrightable.

I. **Copyright Infringement**
   a. In order to successfully sue for infringement, need to prove:
      1. That the person suing owns the copyrighted property
      2. That the person accused admits to copying the property or there is evidence that there was copying
         - Need to have access to the property in question
         - There has to be substantial similarities between the alleged copy and the original
            - If there's no access, then the similarity has to be so striking that there is no question it is the same.
      3. That the copying amounts to improper appropriation
         - Substantial similarity, with respect to the protected expression, in the eyes of an ordinary observer. (*Arnstein v. Porter* - accused of stealing music)
            - Also Moscow on the Hudson & New Yorker, copyright infringement found because the poster was substantially similar to the magazine cover (*Steinberg v. Columbia Pictures*)
         - The point of CR is to promote arts by protecting it, but if it wasn't the good stuff that got taken, then there was no harm.
   b. Limits on Copyright Enforcement
      i. There are some things within a copyrighted material that can be copied (*Nichols v. Universal Pictures* - Jew and Irishman plot).

- Specific elements can be copyrightable, but the more abstract the material, the less likely it is to be protected by copyright.
    - Actual lines from the script are copyrightable, but the general themes probably wouldn't be (boy falls for girl, families don't get along).

c. Fair Use Defense

i. Copyrighted works can be copied or reproduced for use in education, news, criticism, and other similar uses.

ii. There is a 4-part test that looks to see if a person's use of copyrighted material is covered under fair use (*Harper & Row v. The Nation* - the Ford memoir).

1. The purpose and character of the use (i.e. if used for education or for commercial use)
2. The nature of the copyrighted work
3. The amount and substantiality of the portion used in relation to the entire copyrighted work.
4. The effect of the use upon the potential market value of the copyrighted work.

iii. Fair use allows for copying and use of copyrighted material when that use is for public advancement, but the copying doesn't harm the original owner as to amount to infringement.

IV. Patents

A. Structure of the Patent System

a. The patent office examines the patent applications to see whether it should be granted.

b. Patents are a private enforcement system -> i.e. you have do something if you think your patent is infringed upon.

B. 35 U.S.C. § 101 - Inventions patentable: Any new, useful and non-obvious process, machine, manufacture, or composition of matter, or any new and useful improvement thereof

⭐ a. **Patent Elements**

i. **Patentable subject matter**

ii. **Novelty**

iii. **Utility**

iv. **Non-obvious**

C. Non Patentable Subject Matter

a. Laws of nature

b. Physical phenomena

c. Abstract ideas

D. Patentable Subject Matter

a. Living Things

i. Rule: living things are patentable if they are the subject of human innovation (*Diamond v. Chakrabarty* - Oil bacteria)

b. Composition of Matter/Purified Substance

i. Rule: a purified substance is patentable if it is novel, non-obvious and has utility (*Parke-Davis v. H.K. Mulford* - purified goat adrenaline).

c. Processes

i. Rule: a law of nature, as applied and used in new patentable subject matter, does not preclude the new subject matter from patentability (*Diamond v. Diehr* - Formula within process for curing rubber).

E. Patent Infringement

a. 35 U.S.C. § 271—Infringement of a Patent

i. Except as otherwise provided in this title, whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent.

⭐ b. **How to determine infringement:**

i. Define the invention, by properly interpreting the claims (i.e. perform claim construction).

ii. Compare the constructed claims of the patented invention to the accused invention. If each and every claim element is present on equivalently created, then there is infringement.

c. **Literal Infringement**: all elements of claim are exactly the same (even if you add more elements)

i. Rule: Absence of even one element of a patent's claim from the accused product means there can be no finding of literal infringement (*Larami v. Amron* - Super Soaker Case).

ii. Ex: pencil

- Device for writing comprising of:
    i. A wooden cylinder with a hollow core;
    ii. Said hollow core containing material comprising of 90% graphite and 10% clay;
    iii. Eraser material attached to one end of the wooden cylinder

d. **Infringement by the Doctrine of Equivalents**

i. Ex: pencil now has 85% graphite and 15% clay – still infringement, you'd have to prove it's substantially and obviously better to win

e. Experimental Use Defense

i. A patent can be legally infringed upon without punishment if it's only done "for amusement, to satisfy idle curiosity, or for strictly philosophical inquiry." (*Madey v. Duke* - Laser Lab)

1. Disqualified from the defense if the use is in any way commercial in nature.

V. Trade Secrets

A. Elements to a Trade Secrets Claim
   1. It has to be a secret
   2. Misappropriation of the secret
      i. Did someone acquire, use, or disclose a secret that came from improper means or a breach of confidence.

B. **Trade Secret:** Info that derives **a.** independent economic value, actual or potential, from not being generally known to, and **b.** not being readily ascertainable by proper means by, people who can obtain economic value from its disclosure, and is **c.** subject to reasonable efforts to maintain its secrecy.
   a. Independent Economic Value
      i. Ways to show Independent Economic Value
         a. Effort and money that have been spent to keep it a secret
         b. The amount of effort others are using to steal it
         c. Actual profits it is helping to generate
         d. Increase in competitor's profits who may have stolen the secret
         e. Amount of money spent to create the secret
   b. Proper Means - i.e. exceptions to a trade secret.
      i. Discovery by independent invention;
      ii. Discovery by "reverse engineering" (acquisition of product to reverse engineer must have been obtained by fair and honest means)
         a. Rule: must show that products were improperly obtained and reverse engineered to show trade secret misappropriation (*Kadant v. Seeley* - Hired employee to get secret, but claimed to reverse engineer)
            i. Seeley hired former Kadant employee, claimed he breached confidentiality and gave trade secrets; P did not provide enough evidence that D improperly obtained and reverse engineered the products—former employee could have reverse engineered in the time between employment at both companies and the release of the product by the former.
      iii. Observation of the item in public use or on public display
      iv. Obtaining the trade secret from published literature
         a. Improper Means
            i. Bribery, theft, misrepresentation, breach or inducement of breach of duty to maintain secrecy, or espionage through electronic or other means
            ii. Rule from *DuPont v. Christopher* - Arial Photography
               - If whoever has the secret takes reasonable means to protect it given the circumstances and someone overcomes those means to get the secret, the actions taken were improper and therefore stole the secret.
            iii. Rule from *Smith v. Dravo* - Shipping Containers
               - If P's trade secret is disclosed to D without an NDA through a business relationship, there was a promise of trust in the relationship, and that the trade secret can't be used in direct competition with P. Given their relationship, D had a duty to maintain the secret.
   c. Reasonable Efforts to Maintain Secrecy
      i. Rules from *Metallurgical v. Fourtek* - Zinc Furnace Improvements:
         a. A method/process/etc. that is generally known, as employed within a specific industry wherein it is not generally known, can still be a trade secret.
         b. Trade secret holder can divulge information to a limited extent without destroying secret, so long as information disclosed to further holder's economic interests. (Secrecy need not be absolute).
      ii. Ways to show Reasonable Efforts to Maintain Secrecy
         a. Limits on physical access to information
         b. Disclosure agreements, confidential releases
         c. Giving information only to select people (those least likely to disclose—background and credit checks, etc.)
         d. Levered to what you're protecting (stronger for nuclear missile vs. pizza recipe)
         e. Subjective beliefs that a secret is a secret (i.e. you wouldn't take all these measures if you didn't think it was secret to protect)

C. Why use a trade secret instead of patenting it?
   - Patents last 20 years, but trade secrets last indefinitely as long as its kept a secret
   - Patents can be expensive to litigate and enforce, but trade secrets are free
   - Not everything is patentable, but many of those things can be kept secret, and would therefore be protected.
   - A patent is a roadmap to infringement because it would detail exactly what your secret is.

D. Why Protect Trade Secrets?
   - Promotes morality in business by establishing a floor for expected ethical behavior.
   - Promotes efficient economic behavior because companies would spend more on espionage and protecting against espionage instead of innovating new products or ideas on their own.
   - If they weren't protected, it would dampen people's motivation to invent things.

VI. Real Property & The Right to Exclude

A. Right to Exclude
   a. Important for psychological reasons and economic reasons
      i. Reduces transaction costs and encourages investment in property
   b. There is a Constitutional Right to exclude others and to enjoy peaceful possession of your property (*Jacque v. Steenberg Homes*-moved mobile home across land without permission)
   c. Actual harm is done in every trespass because of the loss of one's right to exclude
   d. Rule: property rights do not extend infinitely above the surface (no *ad coelum)*; owner owns as much of the space above his property as he uses, but only so long as he uses it (*Hinman v. Pacific Air Transport* - Planes flying low disturbed farmer)

B. **Trespass:** interference with possession

C. **Intentional trespass**: any intentional intrusion that deprives another of possession of land, even if only temporarily

D. Damages
   a. Types of Damages
      i. **Compensatory:** actual damages for proven injury or loss
      ii. **Nominal:** trifling sum awarded when there is legal injury suffered but nothing else to be compensated; fixed for breach of contract, no regard to the amount of harm
      iii. **Punitive:** in addition to actual damages when D acted with recklessness, malice, or deceit
         - "Quasi-criminal" to penalize wrongdoer, make example and deter blameworthy conduct
   b. Nominal damages can support an award of punitive damages (*Jacque v. Steenberg Homes)*

E. Equity
   a. Offers remedies that aren't in law already, injunctions instead of monetary damages; when damages can't be measured; couldn't calculate damages; more fair.
   b. *Baker v. Howard County Hunt Club*-hounds interrupted rabbit experiment and trespassed; easy to get injunctions against repeated trespass
      i. Lots of power in judge's hands, could be unfair, undemocratic
      ii. **Unclean hands doctrine:** equity doesn't help people who acted without virtue
      iii. **Estoppel:** prevents person from changing position in transaction once another reasonably relies on initial position (induced reliance)
      iv. **Laches**: lawsuit can be disallowed because it took too long to bring action, but up to judge's discretion

F. **Exceptions to Right to Exclude**
   a. Necessity
      i. Necessity justified entries on land and interferences with personal property which would otherwise have been a trespass.
      ii. Allows you to trespass in trying to save/protect one's goods or property especially in cases of preserving human life (*Ploof v. Putnam*-moored boat in storm to protect family and property, act of God).
   b. Custom
      i. Hunting on unenclosed and unimproved lands is custom, precluding trespass. (*McConico v. Singleton*-hunted on unenclosed and unimproved land)
   c. Public Accommodation
      i. The more an owner opens property to public use, the more they forfeit the right to exclude (*Uston v. Resorts* - Card counter)
      ii. No specific rule or exception in public places, but some guidelines are:
         1. If someone is disrupting regular or essential business operations and/or
         2. Disorderly or otherwise dangerous persons
   d. Public Policy
      i. One cannot use their property rights to injure the rights of others (*State v. Shack*-migrant workers not allowed access to Gov't services)
   e. Human Body Parts
      i. When a person's tissues are extracted as part of a medical procedure, the patient does not continue to "own" the extracted materials, so as to control how they are used for scientific and commercial purposes (*Moore v. Regents*-took spleen and patented cells from research).
   f. Deceased's Rights
      i. When a will wishes for property to be destroyed, the public policy concerns may outweigh the deceased's property rights (*Eyerman v. Mercantile Trust* - Razing house in a will)
   g. It impossible to abandon real property
      i. Title in real property can be sold or transferred, but not abandoned (*Pocono Springs Civic Ass'n v. MacKenzie* - Tried to abandon lot)

VII. Nuisance

A. Private Nuisance = A private nuisance is non-trespassory conduct that causes a **substantial interference** with the private use and enjoyment of land and is either (i) **intentional and unreasonable** or (ii) **unintentional but negligent**, reckless, or resulting from an abnormally dangerous activity. *Adams v. Cleveland-Cliffs* - distinguishes between trespass and nuisance.
   a. Substantial Interference

1. If a reasonably sensitive property owner would consider it to be a substantial harm then it is. (no allergies or other special exceptions. E.g., drive-in-theatre sues amusement park saying that the lights from the park is a nuisance. However, the theatre is unusually sensitive (as opposed to reasonably sensitive). Not a nuisance!
2. Character of the Harm
    i. Depreciation of property value - (*Estancias Dallas Co. v. Schultz* - large air conditioner next to home)
        - E.g., in psychological nuisances like cemeteries depreciation of neighboring values may be the underlying factor.
    ii. Discomfort
        - *Morgan v. High Penn Oil* – noxious odors, from HP, that made Morgan sick and hindered his use and enjoyment of his property was considered substantial harm.
    iii. Fear of Harm (*Arkansas Release Guidance v. Needler* - Halfway house in neighborhood)
        - E.g., a half way house. Some courts have held that this is not a nuisance because it has a high social value and the fear of harm is speculative.

b. Intentional and unreasonable conduct
    1. Intentional if:
        i. Person knows his conduct will cause or is substantially certain to cause the nuisance and still acts.
            i. *Morgan v. High Penn Oil Co.* – High Penn operated a refinery next to Morgan and court ruled that HP knew or should have known that its operation would produce noxious gases for Morgan.
    2. Unreasonable if:
        i. The gravity of the harm outweighs the social benefits of the action.
        ii. Factors: the extent and character of harm, social value of D's use, suitability to locality in question, burden on P of avoiding harm vs. social value of D's conduct, impracticality of D preventing harm.
c. Unintentional (Negligent, reckless, inherently dangerous) – Don't see many
    1. Focuses entirely on actor's conduct – whether it falls below standard of care to establish negligence, etc. e.g., storage of explosives

B. Recovery for Nuisance
    i. No nuisance: Continue the activity
        1. Example – if the utility is greater than the harm, there is no nuisance, therefore the activity continues
    ii. Nuisance: Give injunction
        1. Example – *Estancias Dallas Corp v. Schultz* – courts deemed the air conditioner tower a nuisance to Schultz and allowed an injunction to stop the activity
        2. High transaction costs- if transaction costs are really high, the right as initially allocated would probably not be transferred, even though it would be to society's economic advantage. For this reason, some courts have decided that damages are more appropriate in this case.
    iii. Nuisance: Pay damages and continue the activity
        1. "Balancing the Equities" to determine if an injunction is appropriate.
            a. An injunction seems appropriate if the harm to the plaintiff outweighs the social utility of defendant's conduct, where the D can avoid the harm without undue hardship, or where the P's conduct is suited to the locale and the D's conduct is not.
            b. Monetary damages seem appropriate where D provides significant social utility, and it cannot prevent the nuisance.
            c. Ex: *Boomer v. Atlantic Cement Co.*
                i. Considered remedies:
                    1. Granting injunction, but postponing effect to allow research on technology that would prevent the emissions. But Tech unlikely to be developed in short run. Also, would give Ps immense and unfair economic leverage over Atlantic.
                    2. Chosen path: directing the trial court to grant an injunction to be vacated when Atlantic paid permanent damages to Ps. In effect, awarded P compensatory damages in lieu of injunction. This shifted the "balancing" standard from liability analysis into remedy analysis. Economic principles: allocates resources to the most valuable use. Damages award was the cheapest method of resolving conflict between the parties, thereby maximizing overall utility. Cuts out transaction costs for settlements (attorney fees).
                ii. Problem – (Dissent) – permanent damages destroy incentive to improve conditions.
    iv. Nuisance or not: Give injunction but have (P) pay the (D) indemnity for relocating
        1. Example – *Spur Industries, Inc. v Del E. Webb Development* – Spurs owned a cattle feed and Del made developments within the same area. Both grew closer to each other and Del realized a nuisance from the smell and flies associated with Spur's cattle feed. Because Spur was there before Del, a traditional injunction seemed unfair to the court. Therefore, they ordered an injunction but made Del pay for the costs of relocating Spur's cattle feed (indemnifying).

VIII. Subsequent Acquisition of Property Rights

A. Finders

a. To establish ownership of an unowned object or to be a finder, a person must have the intent to possess the unpossessed object and perfect the possession (i.e., capture it). (*Pierson v. Post*)
b. As a general rule, a finder establishes rights in a found object superior to all except the rightful owner or a previous possessor. (*Armory v. Delamirie* - Chimneysweep found Jewel)
c. Categories of "Found"
    1. Abandoned: where Owner voluntarily and intentionally relinquishes ownership with the intent to give up title and possession, e.g., throw a broken necklace in the trash; becomes common property subject anew to the rule of capture
    2. Lost: where Owner unintentionally and involuntarily parts with possession, e.g., a ring falls through a hole in a pocket
    3. Mislaid: where Owner intentionally places property somewhere and forgets where it is, e.g., places a wallet on bar and leaves without remembering to pick it up
d. **General rules:**
    i. **Finder is entitled to lost objects found in a public place.**
        - *Bridges v. Hawkesworth*(from Hannah v. Peel): lost banknotes found on the floor of a public business, finder had rights over shop owner.
    ii. **Objects buried in or attached to the ground belong to the landowner.**
        - *Elwes v. Briggs Gas Co.* (from Hannah v. Peel): owner of land leased to gas company entitled to prehistoric ship found buried in ground.
        - *Staffordshire Water Co. v. Sharman* (from Hannah v. Peel): property owner given rights to ring found by contractor-employee cleaning pond
    iii. **Lost objects found in a house owner has never possessed belong to finder.**
        - *Hannah v. Peel*: D never occupied house, which was requisitioned to military. P found brooch laid on top of a windowsill, court gave property to P.
            - Other factors included that P commendably reported found brooch, gave to authorities, waited for owner to reclaim, and D had no prior knowledge of it.
    iv. **Shop owner entitled to mislaid objects found in public area of shop.**
        - *McAvoy v. Medina*: purse mislaid in waiting area of barber shop goes to shop owner because true owner more likely to recover from him than the finder.

IX. Gifts

A. 3-part test for a legal gift:
    a. Intention to give the gift
    b. Delivery of the gift
    c. Acceptance of the gift
B. Intention
    - Must reflect present, voluntary transfer of interest at the time gift is made
    - Donor can make an inter vivos gift but retain a life estate in it so long as there is clear and convincing evidence of donative intent at the time the gift was made (*Gruen v. Gruen* - painting given to son)
C. Delivery
    a. Traditionally, if a gift can be handed over, it must be. However, some states have statutes that always allow for symbolic delivery through writing.
        i. Constructive delivery can suffice for property that cannot be actually delivered, e.g., a key to a locked piece of furniture for everything that would typically be in a piece of furniture like that. (*Newman v. Bost* - Maid given furniture and keys on owner's death bed)
    b. Types of delivery
        i. Actual delivery - the actual item that is being gifted is psychically handed over to the recipient.
            a. I hand a watch to the recipient
        ii. Constructive delivery - delivery of an item, like a key, that will open the gift.
            a. Delivery of a key to a piano. The piano is too large to physically deliver, so handing over the key that opens it satisfies delivery.
        iii. Symbolic delivery - handing over symbolic of the property given.
            a. Handing a piece of paper saying "I give my piano to Bob, signed Brendan".
D. Acceptance
    a. Acceptance of a gift is presumed upon delivery, unless express refusal or the gift is a bucket of radioactive waste and nobody in their right mind would accept it; gifts of value are presumed to be accepted.

X. Accession

A. When one takes wrongful possession of personal property in good faith and adds value to that property, title vests in the wrongful possessor. But the original owner is entitled to compensation for the value of the property in it's original form (*Wetherbee v. Green* - D made hoops out of P's timber without his permission).
B. Fixtures

- *Strain v. Green* - D sold P a house, but took some of items out (water heater, Venetian blinds, light fixtures, large mirrors), claiming that they were personal property, and not fixtures that were included with the house.
- 3 part test for determining if something is a fixture, or personal property
    1. Actual annexation to the reality.
    2. Application to the use or purpose to which the part of the reality with which it is connected is appropriated.
    3. The intention of the party making the annexation to make a permanent accession to the freehold.
- If you go onto someone else's land and build something, it becomes a fixture, and the landowner will own the improvement even if they were not the one who made the improvement.
    - *Producers Lumber v. Onley Building Co.* - D mistakenly built a home on P's land without permission. When they couldn't come to an agreement on a settlement for the house, D decided to demolish the house without P's consent. Court found that P was entitled to damages and the value of the house.

C. *Nebraska v. Iowa* - Part of the boarder between Nebraska and Iowa is the Missouri River, and because it is a river, the boarder is constantly changing. The court had to determine whether the river's change was due to accretion or avulsion. Court held that even though the river moved quickly and caused fast erosion, it was just a speedy accretion. Therefore the border should remain in the center of the river, and move as the river moves.
    a. Accretion - A gradual change. The boundary between the parcels remains in the center of the river, and therefore moves as the river moves.
    b. Avulsion - A sudden, violent change, such as a flood or large rainfall that would cause the river to suddenly drastically change. The border is the original boundary line in the center of river before the drastic change.

XI. Adverse Possession

A. Running of statute of limitations on a claim that a person might have to eject someone for trespass
    - Use date of when adverse possessor first took possession of land and satisfied the four elements

B. Policy reasons: want to encourage the use of land, punish those sleeping on their rights, encourages investment in productive use of property, quieting title, getting rid of stale claims, reduces disputes, redistributes property

C. Once you establish right by AP, can't get rid of it or disclaim it; can voluntarily give it to someone else or another AP

D. 4 Elements to Satisfy Adverse Possession

- **1) Actual and exclusive**
    - Must have actual possession so that the true owner of the lad would be able to sue you for trespass.
    - Need to have excluded others from the property.
    - Improving, cultivating or enclosing the land are objective ways for an adverse possessor to show that they are acting as a true possessor
        - *Van Valkenburgh v. Lutz* - D bought a parcel of land with an open lot next door. D built a trail across the open lot, built a shed, and cultivated a garden on it. Years later P bought the open lot, and tried to kick D off of it. Court held that D lacked the requisite mental state to satisfy adverse possession because he never actually thought that he owned the land, but rather was just using it.
            - Color of Title - When someone claims title based on a written instrument, it is easier to get the whole property, rather than just what you improved. If the document describes a parcel, but you only use part of it, at the end of the statutory period you would get the whole parcel that the document describes, not just the improved portion.
            - Claim of Title - If no written instrument, then after the SoL runs, you just get title to the area that you possessed, not the entire property.
- **2) Open and notorious**
    - Notice to landowner that land is being taken/his rights are being violated
        - Allows for landowner to exercise rights to eject AP
    - Constructive notice works too - objective test, so if reasonable person would have notice, the owner should have known.
    - Aggressive trespasser: know it's not your land but go on it and treat it like it's yours anyways.
    - Good faith improver: adjacent to land and boundaries are unknown .
    - In some jurisdictions, owner needs actual knowledge - not open and notorious where encroachment is on a small area and intrusion is not clear and self-evident.
- **3) Adverse / Hostile, Claim of Right / Title**
    - Connecticut Doctrine (Majority) - Your state of mind is not relevant; you don't need to intend to adversely possess land as long as all of the elements are satisfied.
        - *Manillo v. Gorski* - D's house encroached 15 inches onto P's property. Court held that even though D didn't intend to adversely possess the 15 inches, intent to trespass is not necessary to satisfy hostility and open and notorious elements necessary for adverse possession.
    - Maine Doctrine (Minority) - You need the intent to adversely possess property and can't just be mistaken like *Manillo*.
- **4) Continuous for statutory period**

- Can come and go, but should be consistent over a period of time
- **Rule**: the sort of entry and possession that will ripen into title by AP is use of the property in the manner that an average true owner would use it under the circumstances, such that neighbors and other observers would regard the occupant as a person exercising exclusive dominion.
    - *If forced out of land, SoL doesn't start over, but have to add time you weren't there
    - *If one element stops, have to start over SoL
    - Can use land/home seasonally if customary use of land and tack on possession of previous AP.
        - *Howard v. Kunto* - Previous owner sold land to D, but the title was erroneous (Was for the neighboring tract of land, not the parcel on which the house and dock were located). Then P ordered a survey of the area, and realized that everyone was possessing property different from that which their titles described. P brought suit against D to quiet title. Court said that previous owners could tack their time together as long as they had privity in order to satisfy adverse possession.
            - Tacking - Continuing adverse possession when the property is possessed by a subsequent owner, but there must be privity between the two parties
            - Privity - Successive, mutual relationship between 2 parties. There must be some reasonable connection between the successive occupants of real property as to raise their claim of right above the status of the wrongdoer or trespasser.

○ Disability Tolling of Adverse Possession

- If you have a disability (minor age, insanity, imprisoned) at the time when an adverse possessor enters your land, the SoL will start to run normally, but it cannot be satisfied until 5 years after you are cured of the disability.
    - Normally you have 10 years to eject a trespasser, but if you can't because of disability, then you get an extra 5 years from the time the disability is removed in which you can bring that cause of action.
- You need to be afflicted by the disability at the time the adverse possessor first takes possession so that the statutory time begins to run. If they adversely possessed the land before you were disabled, and then you later become disabled, it does not toll the SoL.
- You cannot tack disabilities.

○ Adverse Possession of Chattel

- *O'Keefe v. Snyder* – P didn't declare her paintings missing until 30 years after she discovered they were missing. 4 competing rules: Discovery is default, but know all 4.
    1. Strictly apply SoL - starts when owner dispossessed (Trial Court's Holding)
    2. Apply elements of Adverse Possession (Appellate Court's Holding)
    3. Discovery rule (Default rule) - If you exercise due diligence to recover and find your property, the statute of limitations will not run until you discover who is possession of your chattel. The SoL begins to run when the original owner knows through the exercise of due diligence 1) the existence of the cause of action, and 2) the identity of the person in possession of the chattels.
        a. Once paintings are discovered missing, O'Keefe has to exercise due diligence in locating the paintings; if she does so, then statute does not begin to run. Burden on O'Keefe to show that she used due diligence. Generally, as long as true owner discovers thing is gone and they use reasonable efforts to recover the thing, statutory period tolls until they first know or should have known through the exercise of due diligence who to sue / where the stolen goods are.
    4. NY Rule - SoL does not start until owner demands return.

XII. Concurrent Interests

A. Inheritance

a. A **fee simple estate** is owned forever, but people don't live forever so you can divide ownership by giving ownership for finite periods of time

- Presumption is fee simple—conveyance of the largest estate possible unless a contrary intention appears (try to determine testator's intent)

b. **Life estate**: possessory estate that expires upon the death of a specified person (always followed by a future interest—all we discussed was a **remainder interest**, see above re: *Gruen* in gifts)

c. Other terms

1. Heirs: people who receive property after owner dies (can't have heirs until you die)
2. Issue: lineal descendants (children, grandchildren, great grandchildren, etc.)
3. Ancestors: parents, grandparents (usually take as heirs if decedent leaves no issue)
4. Collateral: blood relatives who are neither issues nor ancestors
5. Escheat: property goes back to the state if there are no heirs to receive it

d. Order of interests: divided by surviving spouse and issues/ancestors/collaterals, if none, escheats

- Ex: O owns Blackacre, has two children A (daughter) and B (son). B dies testate, devising all property to his W. B survived by 3 children, B1 (daughter), B2 (son), B3 (daughter). A1 (son) born to A. Then O dies intestate. In 1800 England, Blackacre would go to B2. Modern American law, B was not an issue to O because he

predeceased, so leaving his property to W did not count for Blackacre because he had not inherited yet. Therefore, A would get half and B1, B2 and B3 split the other half.

- Ex: if O conveyed Blackacre to "A and her heirs" then A died intestate, Blackacre might escheat if there were no collaterals (parents, spouses, brothers/sisters, nieces/nephews, uncles/aunts, cousins)
- Ex: if O conveyed Blackacre to "A for life, remainder to B and her heirs" and B then died intestate without heirs, followed by A, Blackacre escheats because A's interest ended with his life (wouldn't pass to any heirs A might have).

B. Co-Ownership

a. **Tenancy in common**

- Tenants have separate, undivided, conveyable/descendible interest in property
  - Each tenant in common owns an undivided share of the whole
- No survivorship rights: interest of a co-owner does not automatically continue after another co-owner dies. Co-owner must go through probate to figure out who owns what.
  - Example: A & B tenants in common. B conveys to C, so A & C tenants in common. A dies intestate, then A's heir is tenant in common with C.
- Default rule is that if concurrent property rights are ambiguous, court favors tenancy in common over joint tenancy

b. **Joint Tenancy**

- Each owner has distinct share but also owns undivided whole and has right to possess entire property.
  - There must be an explicit intent to create a joint tenancy, otherwise it will default to a tenancy in common.
- Yes Survivorship rights: the other joint tenants get to divide the deceased's share amongst them share upon his death.
- Example: A & B joint tenants and B dies, A gets remaining share
  - Avoid probate since other tenant gets land when one dies
- Modern Rule: can create joint tenancies in unequal shares if you want and can create joint tenancies even without all unities satisfied; also emphasizes grantor's intent.

c. Severing Joint Tenancy

- You can sever joint tenancy by granting property to yourself
  - *Riddle v. Harmon* - Mrs. Riddle & husband owned property as joint tenants. Mrs. R wanted her half to be conveyed through a will, so she had deed written up to herself to sever joint tenancy so she could then transfer it through will to someone else. Court said her voluntary conveyance from herself as joint tenant to herself as tenant in common w/ her husband was supported by the intent in the plain language of her deed and the reasons for calling this invalid were archaic.
  - Mortgage does not destroy joint tenancy.
    - *Harms v. Sprague* - John and William Harms owned property as joint tenants. John mortgaged his interest to Carl Simmons in order to secure a loan made by them to John's friend, Charles Sprague. John died while the loan was unpaid. The court held that (1) there was no severance of the joint tenancy, and (2) Harms owned the farm in entirely free of mortgage to Simmons.
  - Lien theory: future interest created with lien but extinguished at death
    - Title theory: joint tenancy severed since giving over legal title/mortgage (voluntary conveyance)
    - Brother's interest extinguished at death just like mortgage
- Partitioning Co-Ownership
  - *Delfino v. Vealencis* - P had a 69% share and D had a 31% share of a tenancy in common. P wanted to sever the tenancy in common, and partition the land by sale, and they would buy out D's share so they could develop the land. P wanted a partition in kind so that they could continue to live on the land.
    - Two factors the court considers to decide if partition by sale is appropriate:
      1. the physical attributes of the land are such that a partition in kind is impracticable or inequitable.
      2. the interest of the owners would be better promoted by a partition by sale.

A. Physical division of property: **partition in kind** (preferred method)

- Courts will order this unless party can prove either that physical partition is impossible/extremely impractical or that it isn't in the best interest of all the parties (economic costs/subjective costs).

B. Sale and division of land and proceeds: **partition by sale**

- Rural, undeveloped land is most likely candidate
- After sale, net proceeds are divided among owners in proportion to interests
- In absence of express evidence of unequal shares, courts presume that each owner is entitled to an equal share of the proceeds

C. Rents / Ouster

a. *Spiller v. Mackereth* - P and D owned a building as tenants in common. When the lessee vacated the property, D took the property and used it as a warehouse. P demanded that D pay him the rental value for half the building or vacate half the building so he could use it.
    - Court held that of each on the tenants in common have the right to use the full property without paying rent, but one co-tenant must honor a demand from the other who wishes to use the property as well.
    - But if one co-tenant is "ousted" by the other and denied the ability to use the joint property, then the ousted co-tenant is entitled to compensation.
b. *Swartzbaugh v. Sampson*- wife didn't want husband to lease some of the land that they owned in a joint tenancy for a boxing ring
    - joint tenants do not have an action to cancel leases made by lessor joint tenant; joint tenant can convey, mortgage or lien his share of property. When one co-owner leases the property, he doesn't sever the tenancy.

XIII. Private Control of Land Use (Servitudes)

A. 3 Types of servitudes: Easements and Equitable Servitudes and American Real Covenants
B. Servitudes
- Exist to address nuisances before they happen
- Two types of servitudes:
    1. **Easements**: two parties coming together to allow for one parcel to use a neighboring parcel; a privilege to use the land of another
        - May be affirmative or negative
            - Affirmative: entitles its holder to do a physical act on the land of another (most easements)
                - ex: B's land is landlocked by W's land. W grants B an easement over his land to get to road
                    - B is the dominant estate - the one using another's land (benefiting)
                    - W is the servient estate - serving the others land (burdened)
            - Negative: enables its holder to prevent the owner of land from making certain uses of that land
                - ex: A owns a two story house. Sells part of land in front (B) which is lake adjacent but wants to keep lake view so requires they can only build a one story house on B.
        - May be either appurtenant or in gross
            - Appurtenant: any owner can use the easement; benefits run with the land
                - If it is a benefit which can only accrue to one who is in possession of a particular parcel, the easement must be appurtenant
            - In gross: easement has benefit person to its holder, not tied to the land
    2. **Covenants** (equitable servitudes or real covenants - essentially the same as negative easements)
        - Historically, equitable servitudes gave equitable awards and real covenants were awards in law - now all merged so it doesn't really matter which you have
- Pros and Cons of servitudes
    - Pros: allows people to obtain more precisely what uses they want; leads to efficiency
    - Cons: artificial price changes because of easement; difficulty in understanding easements and their scope (a notice problem!)

C. Easement
a. Must be in writing through a deed signed by the grantor.
b. The grantor's intent is the only thing that matters in determining if an easement was granted.
    - Courts should first look at the language in the deed then at the circumstances surrounding the conveyance when determining intent.
    - *Willard v. First Church*- Original owner let the church use his lot for parking, and then when he sold the lot, he made sure that the easement for parking on Sundays was included in the deed. When that new owner sold the property to P, he did not include the easement in the deed. Since the original owner intended for the easement to continue when he sold the property originally, the court held that it was valid because the property was only sold with the condition that the church be able to use it for parking.
    - If you buy property in good faith without knowledge of the easement, then the easement is not binding. Notice is necessary to bind successors to an easement.
c. Implied Easements (exceptions to general rule that easements must be expressed in the deed)
    - Easement by Estoppel - *Holbrook v. Taylor*- P had been using road on D's land while building his house and also improved the road by graveling and widening, but after a dispute, D cut off P's access to the road. The court held that because P allowed D to use and improve the road after building of the house was complete, D did not have right to revoke the license to use the road.
        - Easement is implied when you let someone do something on your land for long enough.
    - 2 Other Types of Implied Easements
        - Easements from prior existing use

- Easements of necessity

D. Equitable Servitude

- *Tulk v. Moxhay* - The original owner sold Leicester Square to P, but the deed contained a covenant that said that the center garden should be kept up and no buildings should be built on it, and this covenant would be binding on all successive owners of the Square. When he sold the Square to D, the deed did not contain the covenant, but D knew about it. The court held that even though the covenant was not in the deed, because D knew about it and there was an intention for the covenant to bind all subsequent owners, he must honor it.
    - A party purchasing property may not receive rights to the property greater than the seller's.

E. Negative Restrictive Easement

- *Sanborn v. Mclean* - Original landowner created a residential development with some restrictions (how far the homes had to be from the street, home height, only residential buildings, ect.). Years later, D tried to build a gas station on one of the parcels, but P, a neighbor, enjoined the building, claiming that he was violating the restrictions laid out by the original developer. These restrictions were in the original deeds to some of the parcels, but not in later deeds, including the one for D's parcel. The court held that even though the restriction was not in D's deed, the restrictions should still apply because they are implied due to them being included in the initial deeds.
    - If one parcel is restricted, and the restriction seems to benefit all the other parcels around it, then all the benefited parcels are also restricted in the same way (reciprocal negative easement).
    - When one plot in a development has a restriction, it is implied that this restriction would apply to all of the other plots even if it is not written into the deed.

XIV. Legislative Control of Land Use

A. Zoning

a. Creation of Zoning Laws

- *Village of Euclid v. Amber Reality Co.* - P's land was divided based on zoning laws into three separate sections with different use restrictions. He has both U-2 which is one of the most restrictive zones and U-6 which allows for pretty much anything to be built. P took a 75% reduction in land value because of restrictive use in U-2 section and sues saying that zoning ordinances in general are unconstitutional. SCOTUS said that zoning is constitutional when the restrictions are reasonable and are done to promote public health, safety, morals, or general welfare and are derived from the state's police powers.
    - Makes sense to be able to head off nuisances; nuisance avoidance rationale.

b. Variances - If zoning causes an undue burden on someone, they can grant a deviation from the regular zoning.

c. Special Exceptions - contrary to the zoning plan, but will be allowed if it meets certain criteria - e.g. setting up a school in a residential neighborhood. The zoning plan would not normally allow for it, but it would probably be ok in this case.

d. Zoning restrictions can amount to a regulatory taking.

- *PA Northwestern Distributors v. Zoning Hearing Board* - P opened an adult bookstore, but soon after, the city zoning board passed an ordinance that prohibited adult bookstores from operating in certain areas where it was previously allowed, including the area where P had just opened their store, and demanded that they move or bring their store into compliance. The court found that this zoning amounted to a legislative taking, and therefore the zoning would not be enforced.

e. Zoning Limits

- *State ex. Rel. Stoyanoff v. Berkeley* - D wanted to build an ultra modern house in a very conservative neighborhood with mostly Tudor and Colonial style homes. D's building permit was rejected for not conforming with the surrounding homes because they claimed unsuitable structures would be detrimental to the stability of property values and the welfare of the community.
    - The Court held that aesthetic regulations are for a legitimate purpose because they are directly related to the general welfare of the community and therefore a valid exercise of police power.
- *City of Ladue v. Gilleo* - D put up an anti war sign on her lawn, but the city said she had to take it down because it did not comply with the city's ordinance against such signs. The city had zoning laws that said that only sale signs, business or home identification signs and safety hazard warning signs were allowed. The court held that the ordinance was unconstitutional because it foreclosed on a means of communication without any substitute and also because the restriction was broader than reasonably necessary to achieve a significant government purpose other than speech regulation.
    - Also, political signs are an effective and important for citizens to express their first amendment rights to free speech, especially in their community.
- *Village of Bel Terre v. Boraas* - Village ordinance that says that more than 2 people that are not related by blood, marriage, or adoption cannot live together in a single family home. 6 college student rented a house, and were told that they were violating the ordinance. The court held that the ordinance was constitutional because it was not arbitrary (designed to reduce noise and traffic, and to make it a better area for raising a family).

- Dissent - the rights to privacy and association were harmed by the ordinance, and the ordinance does not represent a compelling and substantial state interest. Its an attempt to use land use regulation to keep out people that the community doesn't want around. The rights of privacy and association are greater than the purported policy goals of the ordinance, so the board has not shown that the village's interest is compelling enough to merit the infringement of people's constitutional rights.

B. Takings
   a. 5th Amendment
      - "…nor shall private property be taken for public use, without just compensation" = takings clause
      - Just compensation - fair market value at the time of taking, i.e. what could the property be sold for?
      - Inverse Condemnation - when the gov. says they're *not* taking your land, but they are doing something that makes you feel like they are taking it (restricting you somehow), you sue for inverse condemnation.
      - This is the constitutional baseline - the minimum level of protection for property owners (Constitutional floor).
   b. *Kelo v. City of New London* - D in an effort to revitalize the city, approved a development project which used eminent domain to seize properties. The Land was to be conveyed to Pfizer. P's property was not blighted, but it was still taken with the other rundown properties. P and other owners challenged the project, claiming that it did not satisfy the "public use" requirement of the 5th Amendment.
      1. Rational Basis Review - Majority - Stevens
         - The public use requirement is satisfied because the development is for a public purpose. Use rational basis to determine whether it is rational for the legislature to see the development as a public use. If so, the taking is ok.
      2. Meaningful Rational Basis Review - Concurrence - Kennedy
         - Slightly stricter. Although courts should be deferential to legislative judgments, they should still engage in a sufficient factual inquiry to determine that eminent domain programs are not being used to unfairly advantage one private group over another.
      3. Dissent - O'Connor
         - This economic development taking here is not a public use.
         - There are 3 types of acceptable uses.
            1. Government Ownership - taking property for public ownership, such as for public roads (like taking land for a post office)
            2. Common Carrier - Taking property from a private person and transferring to another private party but for common use by the public (like train tracks for the railroad company; stadiums)
            3. Private Ownership for a Public Program - *Berman*, *Midkiff* - taking property for private ownership in the context of some sort of a public program.
      4. Dissent - Thomas
         - Need to go by the letter of the law. Therefore, government ownership and common carrier are ok, but private ownership for a public program like in *Berman* and *Midkiff* are not ok.
   c. *Berman v. Parker* - Parts of Washington D.C. were super run down, so congress decided to use eminent domain to revitalize parts of the city. Most of the buildings taken were super run down and gross, but P's department store was taken as well even though it was in relatively good condition. Court said that it didn't matter because the area was run down overall and redoing the whole area was done for a legitimate public purpose.
   d. *Hawaii Housing Authority v. Midkiff* - Very few landowners in HI, so government made the large landlords sell their rental properties to their lessees. This was designed to reduce housing prices and promote the general welfare of may citizens. Court said that this was not a taking because eliminating an oligopoly is a good use of the state's police power to protect public interests.

C. Regulatory Takings
   a. Anytime the government authorizes a permanent physical occupation, it's a taking. Especially if it restricts the owner's right to exclude.
      - *Loretto v. Teleprompter Manhattan* - P is landlord and D is a cable TV company. NY law provides that landlord must permit company to install cables on property for a set payment amount ($1). D installed cables along a portion of the roof and side of the building where nothing else was mounted or placed. The court held that this permanent occupation of the landlord's property was a taking, and therefore P was entitled to compensation.
         - The dissent says that this is a slippery slope because then ordinances that mandate fire extinguishers or smoke detectors would be a taking under the same logic. Majority disagrees, claiming that those ordinances are not a 3rd party coming in an taking property, but rather is just a safety requirement.
   b. If government regulates property to reasonably abate activities that are common law nuisances, there is no taking and no compensation owed.
      - *Hadacheck v. Sebastian* - P bought land outside of LA specifically for the fact that it had great clay deposits for making bricks , and he invested a lot of time and money into machinery to mine the clay and make the bricks. When the city of LA expanded to include his land, he became subject to an LA City ordinance that banned

brickmaking within the city limits. By being unable to make bricks, the value of his land was reduced by 90%. The court held that this ordinance was intended to regulate a nuisance being caused by an otherwise lawful business, and therefore it was not a taking even though it significantly reduced the value of his land. The property wasn't being physically taken from him, just his ability to make bricks on it. He could still mine the clay and ship it somewhere else to make the bricks.

c. If a regulation destroys almost all the value of the property in a manner unjustified by a sufficient public interest, it is a taking.
    - Balancing Public Benefits and Private Costs - it will be a taking if the public benefit is not enough to outweigh the harm to the property owner from the regulation.
        - *Pennsylvania Coal Co. v. Mahon* - Coal company sells surface rights to homeowner, but retain the right to mine the coal under the land. PA enacts regulation that says that a mining company cannot mine under the land if it risks the structures above (can't remove the "support estate" = the land directly under the structure of the home). Court held that the statute was a taking because it burdened the coal mining operation so much that it caused a significant diminution in value of their property without protecting any public interest.
            - There was not a significant enough public interest to be protected to merit this diminution in value of the property, which is what differentiates it from *Hadacheck*.
d. If a regulation imposes an opportunity loss, preventing the owner from realizing the benefits of a contemplated future interest, it is not a taking.
    - *Penn Central v. New York City* - D enacted a Landmarks Preservation Law which prevented P from constructing an office building above Grand Central Station. P claimed that the regulation was a taking because it prevented them from being able to use the air rights above their property. The court, using the 3 part test below, determined that there was no taking because P was currently making money on the property and also they could transfer their air rights to another property that they owned in the area, just not on top of Grand Central Station.
        - 1) the regulation did not have a severe economic impact because they could transfer air rights to another property,
        - 2) the RIBE is continuing the normal operations of the station which would not change at all with the regulation, it was an expansion that was prevented by the regulation, and
        - 3)the character of the action was done to protect a landmark and this was being done across the city; the city didn't just single them out and prevent them from building -> these regulations impacted buildings throughout the city.
    - 3 factors for when a taking requires compensation:
        1. Economic impact of the regulation
        2. Extent to which the regulation has interfered with the owner's reasonable investment-backed expectations
        3. Character of the governmental action
e. Trade secrets are property that can be taken.
    - *Ruckelhaus v. Monsanto* - 1972 Amendments allowed the EPA to consider data submitted by one applicant for registration in support of another application pertaining to a similar chemical provided that the subsequent applicant offered to compensate the original applicant for use of their information. In 1978, Congress passed new amendments that did away with the protections for trade secrets. Monsanto argued that the provisions were a taking of property without just compensation that interfered with the company's reasonable investment-backed expectations. The court held that between 1972 and 1978, there was a reasonable investment-backed expectation, so the use of their trade secrets between these years were takings. If the government told you they wouldn't disclose your secrets, and then they do = taking -> because you had reasonable investment-backed expectation.
        - Prior to 1972 - Monsanto could not have had a reasonable investment-backed expectation because there was no promise that the secrets would be safe. Therefore no taking.
        - Between 1972 and 1978 - there was a reasonable investment-backed expectation because the law allowed companies to designate things as trade secrets so that they would be protected. Therefore possibly a taking.
f. There is a taking if a regulation is found to have eliminated all economic value from some property, unless the regulation is justified under a background principle of property law.
    - *Lucas v. SC Coastal Council* - P buys expensive vacant beachfront plots of land, but shortly thereafter, SC passes a law that said that the property could not be developed with habitable structures. Court held that this was a taking because the regulation eliminated all economic value from the property and there was no justification under a background principle of property law (e.g. nuisance) for the regulation.
g. You can assert a takings claim even if the regulation was in place before you bought the property.
    - *Palazzolo v. Rhode Island* - P owned marshland, but there was a regulation that prevented him from developing the land. The regulation was in place when P bought the land, but the court still allowed him to

make the claim. However, the court held that P could not have a reasonable investment-backed expectation because he knew about the regulation before buying the land. The court then did the *Penn Central* analysis for his claim, but it still failed and did not amount to a taking.

h. Temporary restrictions on property are not takings that require just compensation under the 5th Amendment.

- *Tahoe Sierra v. Tahoe Regional Planning Agency* - D put a moratorium on development for 32 months in Tahoe while they conducted an environment study. The court did the *Penn Central* analysis because the nature of the taking is not a physical occupation, but rather just a temporary moratorium on development. The court held that a temporary moratorium on development imposed for the purpose of developing a comprehensive land-use plan does not constitute a taking of property for public use requiring the payment of just compensation under the Fifth Amendment.

D. Exactions

a. Local government measures that require developers to provide goods and services or pay money (impact fees) as a condition to getting project approval.

b. A condition that would be a taking, if imposed in isolation, is not a taking, when attached as a condition of issuance of land use permit under an otherwise valid regulation if the government can prove the condition is substantially related to the government's valid regulatory objective

c. **Rule**: There must be an essential nexus (logical connection) between the permit condition and the legitimate state interest. Courts have stricter scrutiny for legislative exactions than for takings.

- *Nollan v. California Coastal Commission* -D refused to grant a permit unless P consented to an easement permitting unrestricted public use of P's beachfront, claiming that the new house would block the public's view of the beach from PCH and psychologically bar "access" causing them not to go. A condition placed on the approval of a building permit that acts as a taking will be treated as such, requiring the government to provide just compensation for acceptance of said condition. Here, if D had required the P to create an easement on their land, without attaching the condition to their permit, this action would constitute a taking. There was not a close enough relationship between the state's desire and the easement.
  - There was no nexus because the easement to move along the beach, but they claimed that they needed the easement so that people could see from PCH that they could walk to the beach. The easement that they asked for probably wouldn't do a good job of furthering their goal.

d. **Rule**: There must be a rough proportionality between the public benefit of the permit condition and the public harm caused by the development. The city needs to show an individualized evidence that the condition and the alleviated harm are connected.

- Even if it satisfies the "essential nexus" text, it is a taking unless the government proves that the nature and scope of the condition are roughly proportional to the impact of the proposed development on matters that the underlying regulation addresses.
- *Dolan v. City of Tigard* - P wanted to expand her store, but as a condition for the building permit the city required that she dedicate part of her lot for a public greenway and help with drainage. The Court concluded that the conditions satisfied the "essential nexus" test of *Nollan* because the prevention of flooding and the reduction of traffic congestion were legitimate public purposes of the underlying regulation and the required regulations were substantially related to those purposes. However, the city was unable to show that there was proportionality because the harm to Dolan was greater than the benefits to the public and the city from the greenway and the drainage.

- *Koontz v. St. John's Water Mgmt. Dist.* - validates whether you can exact money or services as opposed to an easement, but the nexus and proportionality still have to be satisfied. Was the $50,000 that the were asked to pay tied to alleviate the potential harm that was going to be caused by the development? You can fund a wetlands project somewhere other than the project site.