I. What is Property and How Is it Acquired?
   A. Acquisition by Discovery and Capture (and the Tragedy of the Commons)
      1. *Johnson v. M’Intosh*
         1. Discovery ➔ European nations had agreed that whoever discovered an area first would have proper title to it (first-in-time)
            --subject to rights of Indians to possess and occupy
         2. Europeans had exclusive right to transfer title; pre-emptive right ➔ purchase or conquer land from the Indians
            --Europeans gave themselves these rights

Why should we care that the law is set/settled? Why should precedent matter?
   --people make choices/decisions based on the rules that are out there
   --certainty and clarity eliminates risk; can transact subject to them and around them
      --for land ➔ clear title facilitates transactions
      --if judges go back and forth on decisions, then legitimacy of the court would be compromised
      --allows progress in law ➔ respond and adapt to new challenges
      --consistency/fairness—everyone subject to the same rules
      --not fair to change the rules of the game after the fact
      --rent seeking ➔ seek to have the rules changed (in your favor)

First-in-time—why does it matter at all?
   --(Marshall did not really wrestle with this question, but big theme in this class)
      1. Certainty and security—you’re first, you win
         -Minimizes conflict—people respect the idea
         -Fairness—shouldn’t have to forego claim when someone else comes
      2. Creates incentives to be productive—incentive to be 1st
      3. Sometimes things just need to be settled—takes a pretty strong justification to overturn what we are already doing
      4. It may just be easier than other ways of organizing things—needs to be aspect of consent (others have to agree to first-in-time)
      5. It’s a clear evidentiary device—“I possess it”

Concerns:
   1. Nothing ethically self-evident that first-in-time should necessarily win the day
   2. What if one person is good and faster than everyone else and gets everything? ➔ doesn’t account for distributional considerations
   3. If starting from scratch, then helps those who currently possess

John Locke and the Labor Theory of Property
   --first to do what? First to mix labor with the land (or other item) and thereby make it my own/my property; can state it as “you work hard”
Radin—property takes on our self, because we are so intertwined with itÆproperty as personhood

2. *Pierson v. Post*
   The first of pursue, so long as pursuit was reasonably likely to result in capture
   - actually have to do enough of pursuit to have your labor rewarded
   - notice—have to be doing enough in pursuit to put everyone on notice that you are pursuing the fox
   - don’t want pursuit to be lacksadazical—have to be comfortable in thinking that you will catch the fox
   - might be problematic if you rest on a mere possibility giving you a property interest in somethingÆneed more than a more possibility (reasonable likelihood)

   Majority—promoted certainty and preserving peace & order
   - Certainty—promotes certainty by clear-cut rule: if you kill or mortally wound is clear (as opposed to pursuing, as many people could be pursuing the animal)

3. *Ghen v. Rich*
   Clearly have notice here—the bomb-lance had markings on it to show who killed the whale; also important that this is the only way to kill the whale
   --comparing to Pierson, they are doing all they can to kill whale, just can’t capture it once it is killedÆargument would be that killer deserves it and with finder’s fee, the finder has incentive to turn it in
   --notice and reward of laborÆmust reward doing the best you can do

Final thought on rule of capture
- constructive possessionÆtreat you as if you had possession even if you didn’t—goal is to deter trespassing
  --why do we care about deterring trespassing?
  --secures your interestÆgives you security and comfort to develop the property and put forth the hard effort to acquire the property in the first place
  --if goal is to ensure that assets are in the hands of those who value them most, then property rights help to ensure that only transactions are to those who value them most (and not to trespassers)
  --encourages voluntary exchanges; people are able to use more important resources (don’t have to spend time & money to ensure that you have no trespassers); privacy; incentive to create things that other people want

*Commons, Externalities, and Coase Theorem*

ExternalitiesÆexists whenever some person makes a decision without taking full account of the effects of the decision
---cost or benefits that occur when someone in engages in an activity, but fall on or enjoyed by a 3rd party/someone else
--Pollution—impose costs on other people that you don’t have to bear the costs of it
--Problem of externalities \( \rightarrow \) overproduction— if they don’t take costs into account, then they will engage in too much of it
--Positive externalities \( \rightarrow \) when you engage in activity that creates benefits for other parties
--Problem—don’t have enough of it (underproduction) \( \rightarrow \) person engaging in the activity only does as much of it as they want to do
--Efficiency issue here: reallocate resources to maximize social welfare

How do we solve this externality problem?
- try to find a way for individuals to internalize these externalities—take into account these things when deciding to engage in the activity
--one way to do this is by allocating property rights
--Pollution Example
--give factory owners the right to pollute or give neighbors the right to clean air
--if you give factory owners the right to pollute, the neighbors can try to buy the right to pollute from the factory owner
--once you have offered the $$$, you don’t have externalities, as factory owner would now know about the pollution; the factory owner might still pollute, but no externalities now

Coase Theorem
--the initial allocation of property rights does not matter to the ultimate outcome; presupposes no transaction costs
--our example—whether we give right to pollute to factory owner or the right to neighbors for clean air, the result will be the same amount of pollution after negotiation
--Assume neighbors have a right to clean air; Factory owner benefits $100, neighbor loses $50
--factory should offer between $50-100 and neighbor should accept anything $50 or above and pollution will happen
--Assume factory owner has right to pollute—neighbor would offer up to $50 for clean air, but factory won’t accept less than $100—once again, pollution will happen
--society is better off having factory pollute (pollution is the efficient result) \( \rightarrow \) benefit of $50 to the community as a whole

--Problem when factory owners have right to pollute
-Free Rider Problem—everyone enjoys the benefit and thus looks for someone else to pay for clean air
--it is fine as long as others are willing to pay for the clean air
--Problem is it should be everyone’s strategy to try to free ride
--Problem when neighbors have right to clean air
--the factory owner has to buy everyone’s right to clean air
--the last neighbor to sell would have all the leverage; leads everyone to hold out to try to be last and negotiate for more and more and deal doesn’t get done

Tragedy of Commons (Demsetz)
--lots of externalities b/c each person gets entire benefit, but only bears a portion of the costs (everyone with a right to the resource shares in the costs)

How might society solve the Tragedy of the Commons?
--agree amongst selves to preserve the resource

Æ Problems: don’t know all the members; have problems with enforcing it; what to do with holdouts/free-riders

B. Alternative Theories of Property Rights

Goffman—what really matters is not what you have, but the ability to have—gives me control over it and over someone else, sense of dignity, autonomy, and self-worth

Æ important to being a person and having your personhood respected

Radin—property as personhood
--we become attached to certain things and define ourselves through this things
--personal and fungible property
--personal--embodies who you are and your personhood
--fungible—no emotional component; none of your person wrapped up in this property
--money is just a fetish; money is quintessential type of fungible property

Friedman—without economic freedom, there is no political freedom
--capitalism (dispersed economic power) which can provide a counterweight to political freedom
--separates economic and political power, and allows one to offset the other

Sunstein—need stability
--Constitution allows stability, certainty (like Johnson case— incentives to be productive)
--much more general point: completely reliant on the government if they give you everything
--Main point: making people less dependant on the state furthers democratic political system

C. Property in One’s Person
1. *Moore v. Regents*
   Majority hold—plaintiff could not get damages for conversion, but could for the breach of fiduciary duty and lack of informed consent
   --if they held doctors liable for conversion, then this would create impediment for research
   --he didn’t expect to retain the property, so he didn’t have interest in it once it was removed

   liability rule—government can take your property as long as they provide just compensation
   property rule—my property unless you pay me a price am I willing to take for it

D. Bundle of Rights
   (see Moore)

E. Acquisition by Find
   General rule is that owner’s who lose their property retain their ownership rights unless they intentionally relinquish them
   --Lost property--unintentionally parted with the property; doesn’t have any idea where it is--when found, subsequent finder has title over everyone else but true owner
   --Private place vs. Public place
   --if a lost item is found in a public place, the finder trumps the owner of the premises
   --private place, the owner of the premises trumps
   --Abandoned property—true owner intentionally relinquishes claim to the item
   --finder is entitled to the property (even over the owner)
   --Misplaced property—intentionally place it somewhere, but forget about it
   --premises owner has rights over finder
   --we have a higher expectation that the true owner will recall where they placed it and try to get it back
   --goal is to facilitate return to true owner
   --creates disincentive to find misplaced property and incentive to find lost property

F. Adverse Possession
   Why do you have right to not transfer if you don’t want to?
   1. encourages incentives to be productive
   2. “big dog”—fend people off→don’t want people to have to do this
   --risk of violence; diversion of resources
   3. property as personhood—if they take it, they are denying you your personhood (Raden)
   4. concern that if someone takes your stuff, they might not value it more than you→property should be in the hand of those who value it the most
   --encourages voluntary exchange—person who values it more should get it

   Elements that need to be satisfied to get adverse possession:
1. Actual entry giving exclusive possession to adverse possessor (must actually physically enter land and must be exclusive in that it is not shared with actual owner)
   --primary purpose of this:
   1. triggers the statute of limitations to eject someone
   2. serves a notice function (notice to owner that someone is laying claim to the property, b/c they are on it)
   3. helps us to understand the scope of the claim of the adverse possessor

2. Open and notorious—give adequate notice to the true owner that adverse possessor is laying claim
   --Why is notice important? So true owner will have notice and can take appropriate action

3. Adverse or hostile
   --what work is this doing? Can’t be on the property with the permission of the actual owner (i.e. tenant living there under contract with landlord)
   --this would effect how landowners treat guests and visitors on their property
   -3 mental states of adverse possessor:
   1. Entirely irrelevant
   2. Adverse possessor thought they were on land they owned (mistake)
   3. Adverse possessor knew they didn’t own the land (wrong-doer)

4. Continuous
   --don’t have to be there all the time, but need to be using the property as a normal owner would
   --helps ensure: notice; that land is being used productively

5. Statute of limitations
   --possession must be some significant period of time (whatever statute says)
   --reward to labor element—if adverse possessor has been using the land for awhile, can reward

Justifications for adverse possession:
1. Reward adverse possessor for productive use of land
2. On the other hand, does true owner really care about the land if they haven’t checked up on it? (punish landowners who are sleeping on their rights)
   --the owner can avoid this result pretty readily
   1. show up every once in awhile and kick off any trespassers
   2. can put up sign that allows people to be on their land (and thus permission is given)

Can you tack onto the adverse possession period of some prior possessor? Yes, if there is privity of estate between adverse possessors (here--transfers of interest from prior adverse possessor to subsequent adverse possessor)

II. The System of Estates (excluding Leaseholds)
A. Possessory Estates

4 Major Categories of Interest:

1. Fee Simples (Fee Simple Absolute)
2. Defeasible Fees
   3 types:
   1. Fee Simple Determinable—future interest: has possibility of reverter
   2. Fee Simple subject to condition subsequent—future interest: right of entry
   3. Fee Simple subject to executory limitation—future interest: executory interest
3. Life Estates
   2 future interests:
   1. Reversion
   2. Remainder
      a. Contingent
      b. Vested
4. Lease-hold Interests (landlord-tenant → doing this later in course)

Fee Simple
--largest possible aggregation of rights with respect to land
--comprises full ownership
--endures forever
--no restrictions on alienability → law will not enforce restrictions on alienability of fee simples
Example of transfer of fee simple—“From O to A” (assumed to be fee simple)

Defeasible Fees
--may last forever, but it may come to an end (because of the happening of an event or failure for some event happen)
--like fee simple: inheritable, divisible, alienable
--can’t transfer it as a fee simple
--when “event” happens, holder of future interest takes possession and present interest terminates

Fee Simple Determinable—ends automatically upon a specified event and transfers possession automatically back to grantor or heirs
--future interest in grantor is called “possibility of reverter”
   --Example: “From O to A, as long as used for school purposes”
   "From O to A, unless ceases being used as an opera house”
   --Fee Simple to A; possibility of reverter to O
   --Magic words: “as long as”, “during”, “while”, “unless”

Fee Simple subject to condition subsequent—future interest is right to retake (right of entry) by grantor
--very similar to fee simple determinable → both provide that on the happening of some event (or nonevent) that interest of present possessor terminates
   --holder of possibility of reverter automatically gets title back in fee simple determinable
right of entry—doesn’t automatically pass—future interest holder has to notify present interest holder that they plan to retake property

--Examples: “O to A, but if anything other than school purposes O shall have right to entry for condition broken”
--magic words: “right of entry”, “right to retake”

Fee Simple subject to executory limitation—future interest is executory interest in some 3rd party

--only difference from fee simple determinable where future interest is in grantor—otherwise they are the same
--this is automatic—automatically goes to 3rd party when condition ceases to be satisfied
--Executory interest⇒any interest of a 3rd party which cuts short the interest of some present possessor
--Examples:
  --“O to A, but if property ceases to be used as baseball field, then to B”
    --A has fee simple subject to executory limitation
    --B has executory interest, that becomes possessory automatically if not used as a baseball field
  --“O to A, so long as A uses property as a baseball field”⇒Fee Simple Determinable
    --“O to A, but O shall have right to re-take if A fails to use as baseball field”⇒Fee Simple subject to condition subsequent

LIFE ESTATES
--estate that expires upon death of person who holds the estate
--right to possess the property for as long as you (grantee) are alive
--“O to A for A’s life”
--future interest—reversion or remainder

Reversion—future interest in grantor
Remainder—future interest in 3rd party

Reversion, remainder—can transfer them just like other future interest
-“O to A for life”—gives A a life estate; reversion to O
  --if O dies before A, when A dies, property goes to O’s heirs
-“O to A for life, then B”—give A life estate; remainder to B
  --if B dies before A, then B’s heirs take property
-“O to A for life, then B if B survives A”—A has life estate; B has contingent remainder, but doesn’t necessarily become possessory; O has reversion; if B gets land, then it is a fee simple

Reminders:
1. Vested—remainder belongs to a certain person who is known and no conditions that need to be satisfied
--Example—“O to A for life, then B”—B has vested remainder
Types of Vested Remainders:
A. Absolutely vested—“O to A for life, then B”

B. Vested remainders subject to open (aka vested remainders subject to partial divestment)
   --remainder held by a class that can increase in size
   --Example—remaining born children; “O to A for life, then to the children of B”
      --creates open vested remainder to B’s children
      --vested b/c living children are certain, but open because B could have more children
      --if B had no children at the time of conveyance, then it would be a contingent remainder
      --if B never has children, reverts back to O
      --once B’s children dies, it goes to their heirs, not back to O
   -Rule of Convenience—normally, child of B risks divestment if B has another child
      --tendency of courts to close the class once any member is able to take possession

C. Vested remainders subject to divestment
   --remainder person can be divested by later happening of some event
      --“O to A for life then to B, but if B drops out of law school, then to C”
      --gives B vested remainder subject to divestment
      --gives C executory interest
      --“O to A for life then to B, but if B quits being high school teacher, then to C”

2. Contingent
   --if it belongs to uncertain person or some condition has to be satisfied for future interest to become possessory
   --“O to A for life then to B if she has graduated law school”
      --B has contingent remainder, b/c she has not graduated from law school yet
      --If B has not graduated from law school when A dies, O has reversion, but O’s interest is divested if later B graduates from law school
      --“O to A for life, then to first child of B”
      --contingent remainder if B had no children at the time of the grant (thus we don’t know who it goes to when grant made)

Doctrine of Waste
--with any future interest, holder of present interest cannot waste property (have to take care of property; can’t use up all the resources)
--the way the present possessor wants to use the land might conflict with how future possessor might want to use the estate, and the present possessor might not want to take into account future possessor’s interest
   --thus, don’t want present possessor to use the land destructively
B. Future Interests (see above)

C. Concurrent Estates (Co-ownership)

CONCURRENT OR CO-OWNERSHIP
--Multiple interests in land at the same points in time (whereas estates and land have multiple interests, but at different points in time)

3 types:
1. Tenancy in common
2. Joint tenancy
3. Tenancy by the entirety

Tenancy in common
--separate but undivided interest in the property—each tenant owns an undivided share of the whole
--each tenant owns the right to possess the entire property, but ownership interest is fractional
--fractional determines benefits and burdens, but can split these as owners see fit
--can be unequal interests
--interest is alienable, transferable, inheritable → person who receives it gets the same interest as grantor
--tenants in common have no rights of survivorship
   “O to A & B” → A & B would take as tenants in common
   --If A conveys interest to C, then B & C would be tenants in common together
   --B dies, B’s heirs would be tenants in common with C

Joint Tenancy
--main difference from tenancy in common is the right of survivorship
   --right of survivorship—if one tenant dies, their rights go to the other tenants automatically
   --why would you want right of survivorship? Don’t have to go through probate → saves you time and $
   --conceptualize joint tenants as a single owner
   --each joint tenant owns an undivided whole
   --A & B own house as joint tenants—B owns property when A dies
   --4 unities, but now many jurisdictions don’t require these

   1. Time—interest must be acquired at the same time
   2. Title—all must acquire title by the same instrument
   3. Interest—all must have equal, undividable share
   4. Possession—each must have a right to possession of the whole
      --a joint tenant can sever joint tenancy relationship, thus creating tenancy in common
      --can’t will it away, because it evaporates upon death

Tenancy by the entirety
--only about half the states still have this—joint tenants do most of the work of tenancy by the entirety
--joint tenancy available for married couples
--additional (5th) unity of marriage
--can’t unilaterally sever a tenancy by the entirety
--can be ended by divorce

Examples
1. “O to A, B, & C as joint tenants” (each has a 1/3 interest)
   --A conveys interest to D
   --B dies leaves H as heir
   --Who owns what? D owns 1/3, C owns 2/3 as tenants in common
     --A breaks up joint tenancy by conveying to D, making tenancy in common
     --However, B & C are still joint tenants, but D and B & C are tenants in common
     --When B dies, interest goes to C by rights of survivorship; H gets nothing
       --If D dies, D’s heirs take interest

2. “A and B as joint tenants”
   --A conveys 6-year lease to C
   --A dies after 3 years, devising all property to D
   --If you are D, what do you want to argue?
     --that lease to C broke up the joint tenancy and made it a tenancy in common
       (however this is not true)
     --If you are B lease is inadequate to sever a joint tenancy
       --D doesn’t get anything
       --might also argue that lease was only with A; A’s gone and B says you can’t stay
       --C might say they had right to property for six years
       --some jurisdictions say B is subject to remaining terms of lease; some say that B can reject the remaining terms of the lease

Partition in kind—each party gets piece of land due to percentage
Partition in sale—sell property and divide proceeds due to percentage
   --Partition in kind supposedly preferred by courts, but often see partition in sale in actuality

Some arguments for favoring partition in kind:
   --people might live or have business on the property (Radin we should be hesitant to move people)
   --concern about inherit undercompensation
     --courts could set a floor to try to address this concern
   --fewer transactions costs in dividing than in selling
     --might be concerns if one of the current owners is one of the bidder’s is in the sale
I’m in position, you shouldn’t treat that lightly

The notion of ouster
--co-owners have right to occupy property—what happens when one owner is denied right to property? Is it enough just to ask to go on the property or does it have to be physically kept off the premises?
--must have to physically keep you off
--what remedy might you seek for being kept off?
--seek rent for exclusive use that other party had
--might seek judicial partition (in kind or by sale)

Constructive ouster—impracticable for co-tenant to occupy simultaneously (physically or emotionally)

III. Leaseholds: Landlord-Tenant Law
A. Leasehold Estates
  4 principle tenancies, usually generalized by how long they last:
  1. Term of Years
     --lasts for any fixed period of time (jurisdiction may impose a maximum) or any period that is ascertainable (even by a formula)
     --“I lease to you for six months”
     --terminates at the end of the lease automatically
     --if tenant doesn’t leave, landlord can evict (with help of authorities)
  2. Periodic Tenancy
     --fixed duration that automatically repeats itself (“O to A from month to month”)
     --need notice of termination, otherwise continues on
     --year to year, need to give half-year’s notice
     --month to month, need month notice
  3. Tenancy at Will
     --no fixed period—endures until so long as landlord and tenant desire
     --terminates when either party wants to (terminates when either party dies)
     --notice—traditionally didn’t need any, but now need 30-day notice
     --starts to look a lot like a month to month periodic tenancy
     --traditional view—it 1 party could terminate it, then so could the other party (mutuality of termination)
     --what’s wrong with mutuality of termination?
  4. Tenancy at Sufferance
     --occurs when tenants wrongfully stay after lease ends
     --terms of holdover: are identical to previous lease (up to 1 year)
     --double rent in some jurisdictions for holdovers
     --should be somewhat punitive to tenant; discourages people to holdover

LEASES IN GENERAL
--2 big points
1. Leases are being treated more and more like contract
2. Concerns about bargaining power—function of competition
--competitive market place—contract should have fair terms

B. Subleases & Assignments

Question of alienability

1. landlord’s right to transfer landlord’s interest
   --landlord is free to sell his property, subject to an existing lease (lease runs with the land—new landlord has to keep tenant)
   --what might tenant be concerned about if landlord sells property?
     --new owner’s perception of ambiguities might change
     --vision for options in the future might disappear/change
     --tenant might ask for right of first refusal or opt-out clause if new owner (change of control provision)

2. Tenant’s transfer of his/her interest
   --general default is that tenant can transfer their interest (except transfer at will)
     --question comes up if need landlord’s consent for transfer

Ways a tenant can transfer their interest

1. Assignments—tenant transfers entire interest for the entire term ➔ all assignments, terms are binding on assignee
   --when an assignment, Tenant 2 and the landlord are in privity of estate, but not privity of contract
   --burden to pay rent, etc. is on T2; T2 is directly liable to landlord
   --T1 and landlord are in privity of contract, but not privity of estate after the assignment
   --landlord can continue to sue T1 (the original tenant) for any default under the lease
   --T2 can enter into a side agreement with landlord, giving those two a privity of contract

2. Sub-leases—tenant transfers less than the entire interest to T2
   --privity of estate and contract
   --T2 and landlord ➔ have neither privity of estate or privity of contract
   --T1 and landlord ➔ nothing has changed; still have privity of estate and contract
   --landlord can sue directly T1 for failure to pay rent (just like in assignment), but cannot sue T2
   --T1 however can still sue T2

-Restrictions on ability of tenant to alienate (assign or sublease)
   --these restrictions in a lease are generally enforceable
     --it’s landlords property and they have a strong interest, so they should have control over it
   --many leases though don’t have outright prohibitions ➔ need landlord’s consent to assign/sublease
     --when can landlord withhold consent? Must landlord have reasonable basis for withholding consent or does he have absolute ability to withhold consent?
--with consent, T1 after an assignment might try to say that the assignment destroyed the privity of contract however this is not the rule; with landlord’s consent, T1 still stays on the hook, only get T1 off the hook if landlord expressly says so

C. Tenant Who Defaults
D. Landlord’s Duties
   WARRANTY OF HABITABILITY
   -like constructive intent, has ideas of contracts in it

   --implied warranty of habitability—most courts also say tenant can’t waive this

   -What is it?
   --requires that landlord provides premises that are minimally habitable
       --breach if premises considered uninhabitable by reasonable person
   --generally has not been extended to commercial leases

   -Remedies for tenant
   1. Terminate lease and vacate
   2. Withhold rent (all or some)
   3. Sue for damages—can include for discomfort, annoyance, etc.; can also sue for damages from rent already paid or rent for a new lease that you had to take; may also sue for punitive damages if willful or wanton breach
   4. Repair it yourself and deduct it from your rent
   5. Sue for injunction requiring the landlord to repair

   -Why have it?
   1. Tenants need the protection—tenants are uninformed, lack bargaining power; tenants expect that premises will be habitable
   2. Negative externalities—don’t want buildings with fire hazards, lead paint, etc.

   Difference from Constructive Eviction
   --with Constructive eviction you have to leave the premises, but with warranty of habitability you don’t have to leave the premises

E. Tenants Duties
F. Rent Control
   General goal: Affordable housing
   --Radin: helps people retain their housing
       --personhood—there personhood is more important than a few more dollars in the landlord’s pocket
       --sense of community can develop—not good just for the community, but for everyone

   --Criticism:
   1. Reduce housing/apartment stock (housing shortage) supply less than demand because of rent control
2. Hurting the people that you are trying to help—exclude people from the marketplace