Acquisition

I. Acquisition by Discovery (Johnson v. M’Intosh)
   A. Title is first received by discovery
   B. Title must be then perfected by occupation and improvement

II. Acquisition by Capture
   A. Pursuit alone does not give title (Pierson v. Post)
   B. Possession is required and sufficient to establish title
      1. Actual physical possession (Pierson v. Post) OR
      2. Constructive possession
         a. mortal wounding while pursing with the intent to kill (Pierson v. Post) OR
         b. animals on your land whether you know it or not (Keeble v. Hickeringhill)
         c. Can only have one constructive, so if you don’t own the land, you must have actual possession
   C. Where an industry could not exist without it, custom can replace possession requirements (Ghen v. Rich)
      1. The custom governs the entire industry
      2. The custom has discrete magnitude of limited application – not to extend beyond industry, does not affect other general rules of society
      3. The custom is long standing

NB – Also, look at Demsetz’ externalities and Coase Theorem – absent transaction costs, parties will bargain around the rule to achieve the most allocatively efficient outcome.

III. Acquisition by Creation
   A. Copying is generally allowed, but actions that infringe upon the creator’s rights for commercial or personal benefit are not allowed
      1. cannot “reap what you have not sown”
      2. Creator has property interest in the physical thing he created, but not in the idea, unless the is common law or statutes to the contrary
      2. Exceptions:
         a. Patents - protect invention; granted for novel, useful, and non-obvious processes or products
         b. Trademarks - protect words & symbols of a co., product, service lost when abandoned or become generic
         c. Copyrights - protect expression of ideas, not the idea itself
         d. Style is not protected, but imitation is

IV. Acquisition by Find
   A. Possession is required
      1. physical control
         a. constructive possession will satisfy physical control
            i. Only get 1 constructive (Hannah v. Peel)
         b. finds by agents give constructive possession to employer
         c. you only get one constructive
      2. intent to assert dominion over the object
   B. Finder has title to the chattel against all the world except the true owner (Armory v. Delamirie)
1. Damages determined as most valuable object of similar characteristics when original object is not reproduced (Armory v. Delamirie)

C. Prior possessor prevails over subsequent possessor

D. In disputes between a prior wrongful possessor and an honest subsequent possessor, courts regularly prefer the honest subsequent possessor

E. Owner of property has constructive ownership of the things in, on, or under land, if he has actual ownership of the property (Hannah v. Peel)

F. Title of mislaid property in public place goes to the owner of locus in quo, as against all but true owner (McAvoy v. Medina)
   1. Mislaid property is intentionally placed but then forgotten

G. Title of lost or abandoned property in public place goes to finder, as against all but true owner (Armory v. Delarimie)

H. Problem with lost/mislaid distinction is that it rests on an assumption that cannot be proven

H. Bailment
   1. Bailment = rightful possession by the Bailor (customer) against the Bailee (dry cleaner)
   2. Needed to facilitate valet parking, dry cleaning, etc…

V. Acquisition by Adverse Possession

A. Actual possession
   1. Best way to show this is be on the land, perhaps put up a fence

B. Open and Notorious
   1. Reasonable person must be able to recognize the adverse possessor is claiming the land
   2. The actual owner need not be aware of someone claiming their land

C. Exclusive
   1. Sole physical possession or occupancy without permission by the person claiming adverse possession – enforcing adverse possessor’s rights to the land

D. Continuous
   1. Continued w/o interruption or abatement by the adverse possessor by avoiding:
      a. Physical eviction, OR
      b. Successful court eviction order
   2. Seasonal continuity, if normal, satisfies (Howard v. Kunto)

E. Hostile
   1. This possession is held out as my possession as against all the world
   2. Your possession must be irreconcilable with all others in the world
   3. Permissive use is not sufficient (lease/rent)

F. Other
   1. Must have all the elements for the length required statute of limitations
   2. Maine Doctrine = requires hostile intent (Mannillo v. Gorski)
      a. Favors the intentional wrongdoer over the honest, mistaken entrant
   3. Connecticut Doctrine = says state of mind is irrelevant (Mannillo v. Gorski)
      a. Most courts have abandoned Maine, gone with Connecticut
4. Tacking = purchaser of property gets to keep the time a previous “owner” adversely possessed the land through privity = mutual interest in transfer of land (Howard v. Kunto)

5. Disability = the statute of limitations is tolled when the true owner is disabled AT the beginning of the adverse possession
   a. Total time is longer of 21 years or time already put in plus 10 years
   b. A disability that starts during the adverse possession doesn’t count
   c. Disabilities: owner is imprisoned, under 18, or insane

6. Can’t adversely possess against the government

7. Why is adverse possession a good thing?
   a. Encourage productive use of land – if someone uses land that has been idle for a long period of time they become owner of the land
   b. Correct errors – give settled expectations on how to resolve problems
   c. Quite titles – when we know who owns what, easier to sell things
   d. Psychic expectation in owning things you have had for a long time

VI. Acquisition by Gift
   A. Donative intent
   B. Delivery
      1. Manual
         a. always sufficient
         b. if chattel can be handed over, it must be (Newman v. Bost)
      2. Constructive
         a. manual giving of a key that opens the thing
      3. Symbolic
         a. handing over a piece of paper
         b. rarely/never sufficient
         NB – wrenching evidence that makes it clear to donor and everyone else that the gift is being given
   C. Acceptance
      1. acceptance is assumed whenever the chattel has value
   D. Other
      1. Donative intent and delivery need not occur in any order
      2. When a life estate in the chattel is keep, actual manual delivery is not required because that is silly (symbolic delivery will suffice) (Gruen v. Gruen)
      3. A gift is irrevocable

Possessory/Freehold Estates
I. Fee Simple Absolute
   A. The whole estate in land – entire bundle of sticks
   B. Characteristics
      1. Sell/convey/alienate
2. Heritable
3. Created by “To A and his heirs” or “To A”

C. Heritability
   1. Intestate Succession $\approx$ consanguinity $\approx$ kinship
      a. Heirs are people who survive the decedent and who are designated as intestate successors under the state statute of intestate decent
      b. Issue, ancestors, then collateral (down, up, over)
      c. Used to be primogeniture (all to 1st male child), now per stripes
      d. At common law, no adoption
      e. If you cannot find any blood kin, the property escheats to the State

II. Fee Tail
   A. Created to keep land, the major source of wealth, in the family
   B. Characteristics
      1. Created by “To A and the heirs of his body”
      2. Similar to a life estate, holder cannot alienate
      2. Follows the rules of primogeniture
      3. Scans the family tree to find the next son to inherent
   C. Doesn’t exist any more; if anyone tries to create a fee tail, the law recognizes it as a fee simple
      1. Presumption against b/c it was thought to perpetuate a landed aristocracy
   D. Subject on Rule Against Perpetuities

III. Life Estate
   A. Possessory interest for your life, then reverts to someone else
   B. In ambiguous cases btw fee simple and life estate, the courts assume fee simple
   C. Not heritable, only alienable for person’s life
      1. B/c the life estate is not heritable, an heir to the holder of a life estate gets nothing
   D. Whenever a life estate is created, a remainder is always also created
   E. Life estate pur autre vie
      1. Life interest measured by the life of another

IV. Presumptions in ambiguous cases
   A. 3 Presumptions that the court makes when confronting ambiguous requests (White v. Brown)
      1. Look at words of the will and the circumstances surrounding the will in ambiguous cases to figure out what the intent was
      2. In a close case, as between fee simple and life estate, fee simple wins, b/c we like fee simple
      3. Read the will in such a way to dispose of as much stuff as possible, presumption against partial intestatecy

V. Life interest and remaindermen and Theory of Waste (Baker v. Weedon)
   A. Balancing of interests when two or more people have either concurrent or consecutive interests in land
      1. Co-tenants OR life estate and remaindermen
   B. One user of the property should not be able to use the property to the detriment of the other user/s
C. Weigh the relative merits of the two “owners” with respect to the strength of their relative ownership interests

D. For present v. future, the longer a person has an interest in the land OR the more certain a claim on the land, the stronger the interest

E. More interest = more protection, less interest = less protection
   1. More interest \(\Rightarrow\) more likely to internalize externalities, protect land

F. 2 types of waste:
   1. Affirmative/Voluntary
      a. Where liability/waste arise from affirmative or voluntary acts that decrease the value of the property
      b. Open Mines Doctrine – if the mine is opened by the grantor, the life estate can continue to mine, if not opened, grantee cannot mine
   2. Permissive
      a. Negligence - acts that reduce the value of the land, failure to do something that reduces the value of the land
      b. But, life tenant is only required to keep up the land to the extent that he receives enough revenue to keep up the land

VI. Defeasible Fees (Mahrenholz v. Cty. Bd. of Sch. Trustess)
   - Type of fee simple interests, freehold interests in land, that is something less than a fee simple; distinguishable from fee simple absolute.
   - Can terminate if and when certain circumstances occur

A. Fee Simple Determinable
   1. Fee simple that could last forever, but which never the less terminates automatically the moment a certain event, stated in the grant, occurs
   2. Automatic reversion upon condition subsequent to grantor
   3. Created by, “As long as”, “Until”, “While used for”, etc…
   4. Interest remaining with/created in O is called a possibility of reverter
   5. Reversion = “Possibility of reverter” is a future interest and it always remains with the grantor

B. Fee simple subject to condition subsequent
   1. The fee does not automatically terminate once the condition occurs
   2. Once the condition subsequent occurs, the reversionary interest has the right of entry to enter the property and take the land
   3. Created by “upon condition that”, “provided that”, “but if”, etc…

C. Comparisons
   1. In both of these cases, fee simple determinable and fee simple subject to a condition subsequent the reversion always goes to the grantor or his heirs, never goes to a third party
   2. At common law, neither possibility of reverter nor right of entry were transferable inter vivos or divisible via a will only passed via intestate succession
   3. Now, in most states, reversionary interest is a property interest that is freely alienable
   4. In an ambiguous case, the law prefers fee simple subject to condition subsequent over a fee simple determinable
a. Because the fee simple subject to a condition subsequent requires the grantor to do something to take

D. Distinction important because
   1. Statute of Limitation and Adverse Possession
      a. In a fee simple determinable, the statute of limitations begins to run the moment the event/condition occurs and the reversion occurs
      b. The statute of limitation only runs in a fee simple subject to condition subsequent only when the right of entry is exercised, doesn’t run if the right of entry hasn’t been exercised
   2. Mesne (mean) profits
      a. If there was a fee simple determinable, once the condition occurred, the land automatically reverted to the grantor and if later the grantor came to claim the land, he could sue the tenant for rent for the time the tenant was on the land following the occurrence of the condition
   3. Possibility of reverter is going to become transferable sooner than a right of entry, because possibility of reverter is automatic v. non-automatic
   4. Alienability

VII. Future Interests
   • = Property right to the use and enjoyment to a piece of property/land at a future time
   • All of the property rights in a piece of land must be add up to a fee simple absolute
   • Future interests retained by grantor:
     o Reversion – follows a life estate
     o Possibility of Reverter – follows a fee simple determinable
     o Right of Entry – follows a fee simple subject to condition subsequent
   • Future interests created in a grantee:
     o Vested remainder
     o Contingent remainder
     o Executory interest

1) Reversion
   • granter has fee simple and gives away something less than fee simple and he doesn’t create a defeasible fee
   • grantor doesn’t need to explicitly create a reversionary interest in the deed, if something less than a fee simple is given, what remains is reversion, created by operation at law, in the grantor
   • reversions are always vested, whether expressly created or created by operation of law
   • reversions are freely alienable, both inter vivos and at death
     o reversions are transferable during life
     o reversions are divisible or heritable at death

2) Possibility of reverter
   • fee simple – fee simple determinable = possibility of reverter
   • residual interest created in grantor when grantor creates a fee simple determinable

3) Right of entry
   • AKA “power of termination”
• To A, on the condition that, but if it…. O has the right to reenter and retake”
• Grantor creates a fee simple subject to condition subsequent
• Grantor retains a right of entry

Interests created in grantee
• future interest that is capable of becoming possessory immediately upon the
termination of the preceding estate
• core example = “To A for life, then to B and his heirs”
  o B has a vested remainder in fee simple
• is not necessary that a remainder be certain of future possession, only that it could
become possessory immediately upon termination of preceding estate
• remainder can be fee simple, life estate, estate for a term of years, fee tail
• all remainders are freely alienable, just like reversion, whether vested or contingent
  o Transferred inter vivos
  o Divisible by will
  o Descend by principle of intestate succession
• all remainders must be created in a transferee who is not the transferor, third party,
not grantor
• the remainder must be created at the same time and with the same interest as the
estate that precedes it
• it must be limited that it must become possessory immediately upon termination of
the preceding estate
• preceding estate must be something less than that which O owns in order for there to
be something to pass in remainder
• all remainders can be classified as either vested or contingent
• presumption in ambiguous cases between vested and contingent, the law prefers
vested remainders

4) Vested remainder
• must have two things
  o 1) must be given to an ascertained person
  o 2) must not be subject to a condition precedent
• ascertained and no condition precedent
• condition precedent is some condition that has to happen before the person can take,
before it vests
• however, the natural expiration of the prior estate is not a condition precedent, the law
presume mortality
  o To A for life, then to B = creates a vested remainder, B is an ascertained
  person and no condition other than A’s death is required, but A’s death is
  presumed
• Vested remainders become possessory immediately after expiration of prior estate, if
not, executory interest
• Within vested remainders there are three types – that deal with how defeasible they are
  o 1) Indefeasibly vested remainder
    • certain to vest regardless of what happens
    • “To A for life, then to B”
2) Vested remainder subject to partial divestment
- where there is a gift to a “class” of people
- “To A for life, then to B’s children”
- where B has some children, X and Y, but B is still around
- The gift is to B’s children and at the time of the grant
- The share that X and Y get can be reduced by B having another child Z

3) Vested remainder subject to complete divestment
- a fine distinction between it and a contingent remainder
- a remainder can be vested as long as the person is ascertained and there is no condition precedent to the vesting, however a vested remainder can be divested by a condition subsequent
- remainder defeasible interest then goes to a third party
- the language of the grant makes the difference (example 8 on p. 276)
- difference between vested remainder subject to complete divestment and contingent remainder is largely an issue of punctuation
- condition precedent = contingent remainder
- condition subsequent = vested remainder subject to complete divestment
- if the grant is made at the same time, without commas, the condition is a condition precedent and not a vested remainder subject to complete divestment (example 6 on p. 275)

p. 276 – if you have a vested remainder subject to complete divestment, the interest that follows (in third person) is always an executory interest, it cannot be a contingent remainder

5) Contingent remainder
- unascertained and condition precedent
- all remainders that are not vested
- the only interest that follows a contingent remainder is a contingent remainder
- future property interest made contingent upon some condition precedent other than the previous owner OR future property interest given to an unascertained person
- the law prefers vested over contingent remainders

Reasons why we care about vested v. contingent:
- a vested remainder accelerates into possession whenever and however the preceding estate ends – don’t have to wait for condition precedent to end
- assignability – used to matter, but doesn’t matter today because all future interests are fully assignable
- destructibility of contingent remainder – in the past, at common law, a contingent remainder was destroyed if it could not become possessory, this doesn’t exist any longer
- Rule Against Perpetuities – this rule applied to contingent remainders but not vested remainders, attack against the “dead hand” problem, some jurisdictions have abolished the rule, but some still have it

NB – #1 is definition, #2 don’t matter any more, therefore the real reason we care about this is #4
6) Executory interest
   • Ascertainable person and condition precedent
   • an executory interest is a future interest, in an ascertainable person, created in a
     transferee that must divest a already vested interest to become possessory
   • must has ascertainable person
   • this is just like defeasible fees – hypothetical third type (1 = possibility reverter, 2 =
     right of entry) of defeasible fee that goes to a third person
   • an executory interest can divest a transferor in the future (O) or divest the transferee
     (A)
   • two kinds of executory interests
     o 1) Shifting
       • divests a transferee (A)
       • shifts the interest from one transferee to another transferee
       • interest that follows a vested remainder subject to complete divestment
     o 2) Springing
       • divests the transferor (O) in the future
       • grantor doesn’t say who gets it now, but does say who gets it in the
         future based on some condition
     • this distinction doesn’t really matter, no legal difference between the two
   • always indestructible and always freely divisible/heritable

Roadmap for future interest:
Way to figure out this taxonomy:
   • First, is it an interest in land?
   • Then, is it a present interest or a future interest?
     o If present interest:
       • fee simple, life estate, fee tail…
     o If future interest:
       • Is it created in grantor?
         • Reversion
         • Possibility of reverter
         • Right of entry
       • Is it created in grantee?
         • Remainder
           o Vested
             1) Ascertainable person, AND
             2) Not subject to condition precedent
             • Three types of vested remainder
               o Indefeasibly vested
               o Vested subject to partial
                 divestment
               o Vested subject to complete
                 divestment
           • Contingent
             • Unascertainable and/or condition precedent
• Executory interest
  - Ascertained and condition precedent

- Interest is created, globally, when the document is created/written
- Label interests at the moment they are created!
- Divesting, vesting, contingent, etc. happens in subsequent time, until Rule Against Perpetuities ends the time

VIII. Rule Against Perpetuities (Jee v. Audley)
A. Rule restricting the ability to remotely control future interests, “dead hand”
B. Purpose – promote alienability and marketability of land
C. “Lives in being plus 21 years”
D. “No interest is good unless it must vest, if at all, not later than 21 years after some life in being at the time of creation of the interest” – Grey
E. If it is possible that an interest might vest at some point after the death of the last person alive at the time of the creation of the interest, the future interest is invalid
F. Rule of logical proof:
  1. If you can think of some case, any case, no matter how bizarre, in which the future interest might vest outside of the rule period, lives in being plus 21 years, then the future interest is invalid
G. What actually happens is irrelevant
  1. The rule is not a “what did happen” test
  2. It is a “what might happen” test
H. The evaluation of the grant to determine validity occurs at the time of the grant
  1. However, you do look at who is alive at the time of the grant at the creation of the grant and take that into account
  2. Take the facts as they stand at the moment of conveyance, and then apply the rule to the future interests
I. To apply the rule:
  1. Look for a measuring life, validating life
    a. A person who is alive at the time of the grant, (lives in being) who can prove by logic that future interest will vest or fail within that person’s death plus 21 years
    b. Lives in being – people born after the creation are not lives in being
  2. Give everybody a child, then kill at the lives in being and wait 21 years and see if the future interest will vest
J. Who can be a measuring life? – it can be anyone, but that is not very helpful, so we try to find measuring lives whose lives and actions can affect the vesting of a grant dependant on a condition precedent
  1. Has to be either:
    a. A person identified by name – “Bob”
    b. By status – “Bob’s wife”
    c. Someone whose existence is implied by the grant – “Bob’s child”
K. If a grant is revocable, the Rule Against Perpetuities does not apply until the grant becomes irrevocable
1. Hence the life in being must be someone alive (life in being) when the grant become irrevocable (typically by grantor’s death or by period of time)

2. Pay attention to inter vivos gift v. testamentary gift

L. To be good, a future interest must vest within 21 years after the end of the last measuring life.

M. If the future interest is invalid, strike out that future interest, and read the rest of the grant

N. The rule is really about conditions precedent

O. Any person is legally eligible to have children at any age under any circumstances

P. Assume that adopted children are not heirs

Q. Scope of the Rule Against Perpetuities, these 3 only:

1. All contingent remainders, whether person or class
   a. whether the contingent remainder is in a person – “Bob”
   b. whether the contingent remainder is in a class – “Bob’s children”

2. Vested remainders in a class, only – “then to B’s children”
   a. applies to remainder subject to partial divestment
   b. subject to a class gift because a class gift is not considered in any one member of the class, for rule purposes, until the class is closed
      i. the class gift to A’s children does not close until A dies, because it is only that when A dies, that the class is closed
      ii. Any person is considered eligible to have children at any age under any circumstances – fertile octogenarian

3. Executory interest, both shifting and springing

R. Rule Against Perpetuities does apply to:

1. Present possessory estate
   a. No fee simple, no present interest is under the rule, because it is already vested

2. All reversionary interests
   a. Simple reversion, possibility of reverter, right of entry
   b. Because the part of fee simple that is the reversion, was never given away by O; it was vested before and it remained vested

3. Vested remainders in an individual – “Then to B”

S. Exemptions of Interests in Transferors

1. Where you have defeasible fees, fee simple determinable and subject to condition subsequent always pass the rule because the reversion is always retained by the grantor and is vested.

T. How do we get around the Rule Against Perpetuities

1. Create a fee simple determinable (to the school board as long as the school is used for school purposes) – this conveyance is not subject to the rule because a fee simple determinable is not subject to the rule

2. Then, give the possibility reverter to someone else – not subject to the rule because the interest is vested as well as freely alienable

U. Class gifts

1. We describe future interests in members of a class as vested, subject to open
2. For rule purposes, a class gift is not vested until all members of the class are ascertained.
3. The easiest example of a class gift that is subject to the rule are children, that class remains open until the parent dies.

V. Perpetuities Reform:
1. Done because the rule has some problems: too hard, the application of the rule is in front of application of policy goal.
2. Wait-and-See for the Common Law Perpetuities Period
   a. If a conveyance violates the rule, you don’t automatically strike out that section; you wait and see and if the interest doesn’t vest or fail, you bring a lawsuit and the court applies the rule.
3. Wait-and-See for 90 years
   a. Arbitrary period, picked because it approximates the rule.
   b. If the conveyance violates the rule within 90 years, then you bring suit and the court applies the rule.
4. Cy pres
   a. Law French for “ahh, fudge it.”
   b. If the conveyance violates the rule, the courts are given the power in equity to redraft the grant to conform the grant to the rule as close as possible to the grantor’s intention.
5. Abolish the Rule Against the Perpetuities
   a. At the behest of trust companies and/or rich people.

IX. Concurrent Interests
= 2 or more people have rights to the same property at the same time (concurrent interest)

A. Tenancy in common
1. Basic form of co-ownership.
2. Courts will presume tenancy in common in ambiguous cases.
3. No magic words are needed to create tenancy in common.
4. Have separate but undivided interests in a piece of property.
5. Descendible, can be transferred (by deed and/or will), freely alienable.
6. Each tenant owns and has the right to possess an undifferentiated interest in the property.
   a. Tribe and trees hypo.
7. Example: A and B are tenants in common of Blackacre.
   a. If A dies, his interest in the tenancy in common can be transferred by will, say to D. Then B and D are tenants in common.
   b. If A dies intestate and is survived by 2 children, E and F; B, E, and F are all tenants in common. BUT, E and F only have a 25% each interest in Blackacre.
8. Tenants in common have undifferentiated interests in land, therefore they have the right to possess the whole.
9. One tenant in common can occupy the whole without paying, UNLESS: (Spiller v. Mackereth)
   a. Agreement to pay rent, OR
   b. Ouster.
i. Ouster – adverse possession (Doesn’t meet ouster def. on adv. poss. b/c there is no hostility)

ii. Ouster – liable for rent when
   (a) wrongful dispossession, OR
   (b) exclusion of someone from property (request by co tenant is denied)
      (1) after clear request for entry, party excludes co tenant from property
      (2) Minority Rule: A cotenant in exclusive possession must pay rent to cotenants out of possession even in the absence of ouster

c. Ouster = actual denial of tenant in common’s right of entry (demand or actually try to enter) by other tenant in common (Majority Rule)
   i. Reasons for ouster requirement:
      (a) Prevents windfall to lazy cotenant who does not demand rent or entry
      (b) Encourages productivity, encourages best use of land
   ii. Encourages parties to deal with one another – in this case, the law wants to encourage this interaction so people can figure this issue out on their own
      (a) Different than other situations where law discourages conflict by discouraging interaction

10. 1 cotenant has the right to use to the entire possession and therefore he can convey this real property interest to another person to stand in the cotenant’s shoes against other cotenants (Swartzbaugh v. Sampson)
   a. 1 cotenant can lease land to another person and that person stands in the cotenant’s shoes (offensively), but if the other cotenant attempts to and is prevented from entered, there is ouster and then she can get rent (lessee stands in cotenant’s shoes defensively)

11. Can’t adversely possess against a cotenant
   a. B/c both parties have a right to possess all the land, there is no hostility

12. If it is practical to know who the cotenants are, the lessee should be required to get permission from both cotenants (Harms v. Sprague)

B. Joint Tenancy
1. Oldest form of concurrent interest, feudal origins
2. Difference in substance = right of survivorship
   a. If A and B own Blackacre as joint tenants, and B dies, A owns 100% of Blackacre.
3. Right of survivorship is the distinguishing factor of joint tenancy
4. Must satisfy the four unities of joint tenancy – p. 340
   1. Time - A & B’s interest must be created at the same time
   2. Title - A & B’s interest must be created by the same document (same piece of paper)
3. Interest - However many people there are in the joint tenancy, each interest must be identical, equal, and undivided
4. Possession - Each of the joint tenants must have the right to possess the whole

5. Joint tenancies are disfavored
   a. Require magic words to create
   b. “To A and B as joint tenants with right of survivorship and not as tenants in common” will always suffice
   c. “To A and B as joint tenants with right of survivorship” may suffice, but is ambiguous
   d. “To A and B jointly” will never suffice

6. Severance = process by which a joint tenancy can be converted to a tenancy in common
   a. A joint tenancy only exists as long as the four unities exist
   b. Severe by:
      i. Any joint tenant can sever the joint tenancy by transferring the property to someone else
         (a) If A gives to C, the joint tenancy is severed btw A and B, and A and C become tenants in common b/c time and title fail
      ii. If there are 3 joint tenants: A, B, and C. If one of the joint tenants severs, A gives to D. D is in tenancy in common with B and C who are still joint tenants.

7. Joint tenancies are popular in the states where they are allowed because they avoid probate. Really liked where husband and wife hold, because when one dies, the interest transfers without taxes and wills

8. Does the mortgaging of one joint tenants interest in a property sever the joint tenancy?
   a. Under Title Theory of Mortgage – yes, b/c title is transferred
   b. Under Lien Theory of Mortgage – no, b/c title is not transferred, only a lien/encumbrance placed on title (Harms v. Sprague)

9. Common law vanishing theory – a joint tenant’s interest in property vanishes immediately upon his death, along w/ any encumbrances thereon

10. The act of one joint tenant cannot bind or prejudicially affect the rights of his cotenants without express or implied authority or consent

11. If it is practical to know who the cotenants are, the lessee should be required to get permission from both cotenants (Harms v. Sprague)

C. Tenancy by the entirety
   1. Can only be created by a husband and wife
   2. Just like a joint tenancy except there is a fifth unity, unity of marriage
   3. Cannot sever
      a. Neither spouse can sever the interest and defeat the tenancy by the entirety without the other’s permission
      b. Both spouses must consent to transfer of the property or anything else that would sever the tenancy
4. Divorce is the only way to end tenancy by the entirety btw 2 living people a. Then the people become tenants in common

D. What happens when the co-tenants disagree about how to use the property?
   1. If you cannot agree you have the right of partition
   2. Partition = right whereby an joint tenant or tenant in common can ask the court to divide up the property
   3. Forced judicial sale with the proceeds to be divided according to interest
   4. In tenancy by the entirety, there is no partition a. Can only divorce or die

5. Types of partition: (Delfino v. Vealencis) a. Partition in Kind
   i. Court preference for partition in kind over partition by sale, reflects view that real property is unique and b/c sale of one’s property w/o his consent is an extreme exercise of power warranted only in clear cases
   ii. Done by drawing a line, this side is mine, that side is yours

b. Partition by Sale
   i. Should order partition by sale when:
      (a). The physical attributes of the land are such that partition in-kind is impractical or inequitable
      (b). The interests of the owners would be better promoted by partition by sale
      (c). Burden on requesting party to show that partition by sale is better/needed

Non-freehold Estates
I. Leasehold Estates
   A. Generally
      1. b/c evolved from estates in land without seisen
      2. Leasehold estates = lower than life estates b/c even life estates had seisen
      3. Fee simple absolute is the best, lowest is non-freehold estate

   B. This distinction persists today:
      1. Leases are estates in real property
      2. A lease isn’t real property, it is personal property – “chattels real”

   C. All lease hold estates have 3 features in common
      1. Estate in the tenant
      2. Reversion in the landlord
      3. Right of exclusive possession and enjoyment of the use of land by tenant

   D. Many, but not all have a fourth:
      4. Actually have a lease

   E. A lease itself is not necessary to have a leasehold estate; nice, but not essential

II. Four basic kinds of leasehold interests:
   A. Tenancy for a Term of Years
      1. Estate lasts for a period of time and then terminates at a specified time
      2. Must be a fixed period of time (need not be just 1 year or etc…)
      3. Estate must automatically terminate at the end, but can terminate earlier
4. No notice is necessary when the estate will terminate because everyone knows when the estate will terminate.  
5. The death of the landlord or tenant will have no effect on the lease.  
6. Examples = “To A for 5 years” or “To A till Oct. 14, 2005”  
7. Statute of Frauds applies to all leases and especially applies to a tenancy for a term of years  
   a. Therefore, a tenancy for term of years for longer than 1 year must be in writing.  
   b. Most jurisdictions will permit oral leases for less than a year.  
   c. If you have an oral lease for greater than a year fails, it because of the Statute of Frauds and therefore there is a presumption that the lease becomes/is a tenancy at will.  
   d. But, payment of rents can convert the presumption toward a tenancy at will into a periodic tenancy.  

B. **Periodic Tenancy**  
1. Fixed, but repeating (month-to-month or year-to-year, etc…)  
2. Goes for a period of time and then repeats.  
3. If notice of termination is not given, the lease will automatically repeat  
   a. No action = lease continues forever.  
4. How much notice must you give to landlord if you are a tenant holding a lease of period tenancy, at common law:  
   a. If you had a 1 year lease, you had to give 6 mo. notice to the end of the 1 year term (by June 31 for lease terminating Dec. 31)  
      i. If you fail to do this, your lease repeats and is terminated in 1.5 yrs.  
   b. If lease is less than year, notice must be given equal to the length of the lease, but not more than 6 mo.  
   c. Replaced with 30 days general notice for any periodic tenancy less than 1 year, in some jurisdictions  
   d. If you terminate, but don’t give sufficient notice, the termination is effective upon the next renewal period after termination.  
5. The death of the landlord and/or the death of tenant have no effect on the periodic tenancy.  
6. Created by “To A for year to year, month to month, etc…”  

C. **Tenancy at Will**  
1. Both/either the landlord or tenant can terminate at any time (bilaterally terminable)  
2. Tenancy of no fixed period; endures as long as both landlord and tenant agree.  
3. Terminated by either party OR when either party dies  
   a. Because this is a personal relationship, when one party dies, the personal relationship ends and therefore the tenancy at will ends.  
4. Must to have a bilateral power of termination – both parties must have the power to terminate or by definition is not a tenancy at will.  

D. **Tenancy at Sufferance**  
1. Occurs when tenants remains in possession after expiration of the lease.
2. Creates a hold-over tenant

3. Landlord has two options:
   a. Treat tenant as trespasser \(\rightarrow\) evict and sue for lost rent, OR
   b. Consent to creation of new tenancy
      i. Expressly create new tenancy
      ii. Impliedly create new tenancy – by operation of law
         (a) If a landlord cashes a rent check for a period after expiration of the lease, most jurisdictions will assume an implied periodic tenancy for not more than 1 year
         (b) If the rent check is for a month, the holdover period is month-to-month

c. Once the landlord chooses trespasser or new tenant, he can’t change his mind (Crehale & Polles, Inc. v. Smith)

E. Exception for unilaterally terminable leases
1. A unilateral power of termination can be included in a lease via the terms of a lease for a periodic term or for a tenancy for term of years
2. Life tenancy determinable - terminable only at the will of the tenant – this is a unilateral power of termination, nothing happens to this estate when landlord dies, this estate can only end when: (Garner v. Garrish)
   a. Tenant dies
   b. Tenant ends the lease
   c. Tenant fails to pay rent
3. At common law, the power to terminate in a unilaterally terminable lease can only be held by the grantee/tenant
4. Old common law required livery of seisen to make a lease unilateral, but Garner v. Gerrish abolished the livery of seisen requirement to make unilaterally terminable leases

III. Other leasehold information
A. Form leases
1. No bargaining, just fill in names and prices
   a. Criticism = lease is unconscionable & unequal bargaining power
   b. Defense = form is mkt forces working to reduce transaction costs

B. Possession
1. Lease gives an implied covenant of right to possession to tenant
2. Common law: landlord has no duty to tenant other than deliver possession – caveat lessee
3. It is tenant’s responsibility to oust third party trespassers
4. Possession (Hannan v. Dusch)
   a. English rule – implied covenant of lease that landlord will put tenant in actual possession
   i. Policy supports:
      (a) Landlord is more likely to know about holdover tenant and is more likely to successfully oust/evict the hold over – more efficient
Tenants aren’t likely to sign leases if they know there are holdovers
Reflect the intent of the parties
Landlord has more incentive to get the holdover off the land

b. American rule - implied covenant of only right to possession, but no duty to put tenant in possession
i. Policy supports:
(a) English rule makes it difficult for a landlord to effectively lease property when there already is a tenant because the tenant could holdover
(1) Not convincing?
   a. Not really b/c the holdovers are not really third parties
   b. Landlord should know that there are people there
   c. Jurisdictions with the English rule are able to lease property
(b) Btw old tenant, new tenant, and landlord, the wrongdoer is the holdover – the old tenant. The law should place burden on the wrongdoer, therefore, we shouldn’t place a burden on the landlords
(c) Virginia has a cause of action called unlawful detainer. Tenant already has sufficient remedies to help himself, therefore there is no reason to shift burden to landlord. Gives a lawful tenant the right to evict a holdover tenant. The reason is to mitigate the problems that could result from the imposition of the American Rule. As a practical matter, the tenant can actually evict an unlawful tenant
(2) Self help – generally discouraged, use lawyer, not sword

ii. Remedy
(a) The new tenant can terminate the lease and sue landlord for damages, OR
(b) Keep the lease but not pay rent for the time out of possession, OR
(c) Use unlawful detainer

c. American courts went with American Rule
i. Clearer – better at defining who owns what and what the duties are
ii. But, in real life the English rule seems better – holds up better under scrutiny, better for people to make leases; proof = leases exist in England

C. Subleases and Assignments
1. **Sublease** = Lease from lessee to another person, not the landlord, of less than the entire estate

2. **Assignment** = Lease from lessee to another person, not landlord, of the entire remaining estate

3. Generally, if a lease is silent as to whether assignment or sublease is possible, the law assumes that the tenant can assign or sublease the property
   a. Approval clause – gives the landlord the right to consent to sublease or assignment
   b. Forfeiture clause – gives the landlord to right to terminate the sublease or assignment if there is no consent

4. Where a commercial lease is silent as to the landlord’s ability to withhold consent, only a rational, articulable, and commercially reasonable reason can justify the withholding of consent for a sublease or assignment (Kendall v. Pestana)
   c. **Majority rule** = common law rule = landlord is able to withhold approval arbitrarily
      i. Property law critique – landlord can do what he wants – landlord personal selected the tenant therefore the landlord should be able to select any subsequent tenant
         (a) Not an absolute right – i.e. Doctrine of Avoidable Consequences
      ii. Contract critique - the lessee could have bargained for reasonableness clause
      iii. Precedent (Jurisprudential reason) – stare decisis – says that the court should follow this rule b/c previous agreements were made in reliance on this principle.
         (a) The court says that in this jurisdiction this rule hasn’t been adopted, therefore there is only minimal stare decisis consequences to adopting the minority rule.
   iv. Economic Fairness Argument - Lessor has the right to realize any increased value in his property.
      (a) Landlord trying to get more than was bargained for
   d. **Minority rule** = consent may only be withheld for commercially reasonable objections
   e. Court adopts the minority rule based on 2 critiques of the majority rule: (Kendall v. Pestana)
      i. Property – lease as conveyance
         (a) Restraints on alienation are generally disfavored, court will construe restraints strictly
         (b) Commercial reasonable objections still protect the lessor’s reversionary interest
         (c) Therefore, adopting the minority rule doesn’t hurt the landlord
      ii. Contracts – lease as contract
(a) There should **good faith and fair dealings** inherent in every contract

(b) In the context of approval clause, this idea of good faith and fair dealing = only withholding consent for commercially reasonable standards

5. Two different approaches to determine a sublease v. assignment (Ernst v. Conditt)
a. Decide whether there is a sublease based on whether the lessee conveyed less than the entire remaining estate (quantum of the estate) – Formalistic, most common, OR
   i. If entire amount = assignment
   ii. If less than entire amount = sublease
b. Look to **intent of the parties** – Instrumentalist, less common
   i. Look to the doc. to see if the words “sublease” or “assignment” are used
   ii. Even though the choice of words is important, the words used are NOT determinative

6. Privity of estate = “Property law privity”
a. = mutual or successive relationship to the same property right
b. Ex. – relationship btw: lessor and lessee, buyer and seller
c. Does the property interest pass from one person to another?
d. All subtenants, whether sublessee or assignee, are in privity of estate with the lessor (landlord)
e. What happens to relationship btw lessee and landlord?
   i. Sublease
      (a) Lessee has given part of the estate to the subtenant, but because he has only given away part of his interest, he retains some interest in the premise
      (b) Lessee remains in privity of estate with landlord
   ii. Assignment
      (a) Lessee has given away all of the estate, so the assigning tenant, because they no long have any interest in the land, is no longer in privity of estate with the landlord

7. Privity of contract
a. Connection or relationship between two parties to a contract
b. Parties to an original lease are in privity of contract
c. Sublease
   i. 2 parties to the sublease are also in privity of contract
d. Assignment
   i. 2 parties to the assignment are also in privity of contract
e. Subtenants are not of privity of contract with the landlord
   i. In the absence of an agreement btw subtenant and landlord there is no privity of contract

D. Abandonment and Landlord rights
1. First question = Did the tenant abandon?
2. Landlord’s options if tenant had not abandoned or voluntarily surrendered the premises: (Berg v. Wiley)
a. Old common law rule = landlord may rightfully use self-help to retake land if [1] landlord is legally entitled to possession, AND [2] landlord’s reentry is peaceful
   i. Law disfavors the use of self-help to dispossess a tenant because of the likelihood of breach of peace/self help is never peaceful
b. Modern trend = self help is never available, b/c self help is never peaceful; therefore, landlord’s only option is judicial action
3. Landlord’s options if tenant has abandoned
a. Landlord has 3 (now 2) options under common law after tenant abandonment: (Sommer v. Kridel)
   i. Accept surrender and relieve tenant of any further liability
   ii. Landlord could retake possession on behalf of tenant for purpose of mitigating damages, re-rent premises
   iii. Landlord could do nothing and send a bill each month and then at the end bring a law suit for the whole thing
      (a) Under modern law, #3 doesn’t exist – b/c of duty to mitigate

E. Illegal Lease Doctrine
1. Illegal lease = lease in significant violation of housing regulations, like no water or heat, and this violation is due to defects on the premise for which the landlord has actual or constructive knowledge
2. Illegal Lease Doctrine voids the lease
3. Leasehold version of an unconscionable contract, refusal by the court to enforce a contract made in violation of public policy
4. The tenants is treated as tenant at sufferance
5. Advantages:
   a. No constructive eviction involved
   b. No abandonment requirement
   c. Therefore, tenant may remain
   d. Tenant can stay, without paying rent during litigation
6. Better when used, by tenant, as a defensive action, than as offensive action

F. Implied Covenant of Quiet Enjoyment (Reste Realty Corp. v. Cooper)
1. Majority rule = Implied into every lease by operation of law
2. Two elements:
   a. Landlord will warrant or guarantee that the tenants will not be disturbed in possession of the premises by any other person with a superior legal right to the property. If any other person disturbs the tenant, the landlord promises to defend the tenant.
      i. Related to the implied duty to deliver the tenant into possession (Hannan v. Dusch)
   b. Landlord covenants that the landlord will not evict the tenant either actually or constructively
i. A constructive eviction takes place where an act or omission (depends on absence of presence of landlord duty) by the landlord or his agent results in a substantial interference in the tenant’s use and enjoyment of the property.
   (a) Failure to heat, failure to prevent flooding

3. At common law, generally, landlord has no duty to control other tenants
   a. New position, by signing an agreement and moving into a residential community, the tenants promises not to disturb other tenants, for both landlord’s and other tenant’s benefits

4. Commercial AND residential leases are bound by covenants of quiet enjoyment

5. Ambiguity as to whether tenant must actually leave before tenant can recover

6. Requires a permanent interference = permanent, recurring event that causes substantial interference w/ quiet use and enjoyment of the property

7. Waiver – a tenant can waive the covenant of quiet enjoyment
   a. Express waiver before signing the lease
   b. Constructive waiver = if tenant inspects the premises and takes as it (strictly construed – tenant must have seen flooded basement)
   b. Constructive waiver = if a tenant sits on his rights to assert breach/constructive eviction for an unreasonable amount of time

G. Constructive Eviction (Reste Realty Corp. v. Cooper)
1. Breach of covenant of quiet enjoyment: 
   a. Act or omission by the landlord that makes the premises substantially unusable for the purposes that they were leased for
   b. Permanent or regularly recurring event that causes substantial interference

2. If breach of the covenant of quiet enjoyment ➔ constructive eviction

2. If constructive eviction ➔ tenant can vacate w/o further liability for rent

2. Tenant must abandon in order to escape liability for rent

3. The court in Hilder v. St. Peter says the doctrine of constructive eviction is no longer viable (don’t need to abandon to escape rent liability)
   a. Starts to eliminate the doctrine of quiet enjoyment in this VT
   b. Opens the door to eliminate the doctrine of quiet enjoyment in residential leases

H. Implied Warranty of Habitability (Hilder v. St. Peter)
1. There is an implied warranty of habitability in every residential lease and every lease by a merchant
   a. Common law: landlord has no duty to tenant other than deliver possession – caveat lessee
   b. Change from past to now, tenants are now unable/less able to repair the premises
      i. Caveat lessee situation no longer applies
   c. Today we have urbanized tenants who are not as able to fix things
d. Market for residential housing has changed – tenants now look for heat, water, clean basement, etc…

→ therefore, the court says that there an implied warranty of habitability for all residential leases

2. Unwaivable – cannot waive the implied warranty of habitability
3. Provides for all essential facilities, even if the tenant agrees to fix things
4. Warranty of habitability is the floor of minimally accepted standards
5. Assumption of risk by tenant inspection does NOT negate warranty of habitability
6. Considerations (trot out all 7):
   a. Violation of housing code = prima facie evidence of violation of warranty
      i. Must be substantial violation of code, not just technical vio.
      ii. Only look to parts of the housing code that protect people
   b. Although the warranty covers latent defects, to USE as:
      i. Sword = tenant must first show that the tenant disclosed the defect to the landlord and gave the landlord an opportunity to fix the problem
      ii. Shield = as a defense, the tenant does not need to disclose defects to landlord or give opportunity to fix
   c. Regular contract remedies are available to the tenant
      i. All of the remedies you can get in contract, a tenant can get in violation of warranty of habitability
      ii. Damages = value of dwelling as warranted – value of dwelling in its current condition
      iii. This pushes up the minimum rent b/c landlords cannot offer property as is, instead they have to fix and offer with package of recognized goods and services
   d. Tenant can collect damages for discomfort and annoyance from breach of implied warranty of habitability
   e. Tenants can withhold rent when there is a breach
      i. Puts the burden of bringing suit on the landlord – more able/better position to sue
      ii. Implicit here is that eviction is not required to evoke breach of warranty of habitability
   f. If tenant notifies landlord of defect and the landlord fails to act in a reasonable amount of time, the tenant can go ahead and repair the damage and send the landlord a bill for the reasonable cost of the repair.
   g. Punitive damages
      i. Available in appropriate cases – appropriate case is when the breach is of such a willful and wanton or fraudulent nature
         (a) The standard for punitive damages is very similar to the standard for breach of warranty, therefore in
almost all implied warranty of habitability the tenant can get punitive damages

ii. OR, when landlord is manifesting personal ill will toward the tenant

7. Difficult to define the standard for warranty of habitability b/c
   a. It is difficult to define the minimum standard of human habitation
      i. Reasonable standard only takes you so far…

I. Differences btw implied warranty of habitability & covenant of quiet enjoyment
   1. Applicability: Warranty only applies to residential leases held by commercial landlords (Lofts at Lafayette Square)
   2. Eviction: Do not have to leave the premises to evoke warranty
   3. Waiver: Warranty is unwaivable
   4. Scope: Warranty applies to health and safety aspects (more narrow than covenant)

Nuisance
I. Generally
   A. = judge-made tort doctrine that regulates the use of land
      1. = improper use your property that interferes with another’s use of his land
      2. = any substantial non-trespassory invasion of another’s interest in the private use and enjoyment or land by any type of liability forming conduct
   B. 2 steps with nuisances
      1. First, determine if there is a nuisance
      2. Second, if nuisance, award remedy – damages or injunction
   C. 2 different kinds of nuisance (Morgan v. High Penn Oil)
      1. Nuisance per se
         a. Thing that is always a nuisance, regardless of time or application
            i. Immoral, indecent, illegal activities – brothels, open air crack and gun markets
      2. Nuisance per accidens
         a. Something that become a nuisance not because it is always a nuisance, but becomes a nuisance by operation or location; could fix the nuisance by moving, changing, or rebuilding it
            i. Right thing in the wrong place
   D. Public v. Private distinction
      1. Public nuisance = affects the public at large – community nuisance
         a. i.e. loud noises, houses of prostitution
      2. Private nuisance = use of land the interferes with another’s individual’s use of his specific piece of land
         a. i.e. – Keeble v. Hickeringhill

II. Establishing Nuisance Liability
   A. In order to give rise to nuisance liability, an interference with the use and enjoyment of land must be substantial AND, EITHER intentional and unreasonable OR the unintentional result of negligent, reckless, or abnormally dangerous activity (Morgan v. High Penn Oil)
   B. 2 types of Private nuisance (Morgan v. High Penn Oil)
      1. Intentional
a. When intentionally committing an unreasonable act
b. Act becomes actionable when:
   i. Unreasonable under circumstances in the particular case:
      (a) Action for the purpose of causing nuisance, OR
      (b) Actor knows nuisance results from his conduct, OR
      (c) Actor knows that nuisance is substantially certain to result from conduct

2. Unintentional
   a. Becomes actionable when conduct is negligent, reckless, or ultrahazardous

C. Unreasonableness standard
1. Factors to determine reasonableness:
   a. Intent
   b. First in time
   c. Are there methods that could mitigate the nuisance?
      i. Is there any easy way to fix the problem?
   d. Harm to person suffering nuisance
      i. Level of harm
   e. Level of importance of nuisance to person committing nuisance
   f. Social interest
   g. What the surrounding uses of the land are
      i. Which party is more out of place?
   h. Whether the activity involves observable effects that an ordinary person would find offensive

2. Most courts will look to totality of circumstances

3. Majority Rule – (Morgan v. High Penn Oil; Jost)
   a. Question of magnitude - unreasonableness means past a certain point, something becomes unreasonable
      i. Unreasonableness on scale, from bad to not too bad

4. Minority Rule - Restatement
   a. Doesn’t look to magnitude
   b. Utilitarian – asks whether the gravity of the harm outweighs the utility of the conduct
   c. Balancing the level of the harm against the social usefulness of the activity
   d. Don’t care about peoples’ feelings, only look to utility

II. Nuisance Remedy
A. If you successfully state a claim of nuisance, get damages or injunction
B. A person who intentionally creates or maintains a private nuisance is liable for the resulting injury to others regardless of degree of care or skill exercised by him to avoid injury (Morgan v. High Penn Oil)
C. Allow “selling” of injunction to encourage parties to bargain/negotiate to come to a private solution – Coase implications
D. Think about cheapest mitigator, but cost of mitigation is not determinative
E. 4 requirements for preliminary injunction = balancing of equities (Estancias v. Schultz)
1. Likelihood of success on the merits
2. Harm to the defendant
3. Harm to the plaintiff
4. Harm to the public

F. Balancing of equities for injunction (Estancias v. Schultz)
   1. Injunction is an equitable remedy and equity is all about fairness; therefore
      the court uses fairness to balance the equities

G. 4 possible ways to resolve a nuisance
   1. Abate the activity by granting injunctive relief
      a. Typical nuisance case – (Morgan v. High Penn, Estancias)
   2. Let activity continue, but require the payment of damages
      a. The activity is helpful/public necessity and the balance of hardship
         favors the def. significantly, but it is unfair to punish an innocent
         neighbor – (Boomer v. Cement Co.)
   3. Let the activity continue by denying all relief
      a. Coming to the nuisance – person has acted wrongfully in creating
         the nuisance
      b. No nuisance, irrational/unreasonable sensitivity
      c. Opposite of #1
   4. Abate the activity if the pl. pays damages
      a. (Spur v. Del Webb)
      b. Odd cases, coming to the nuisance, pl. is at fault, but there is an
         overriding public interest in abating the nuisance
      c. Opposite of #2

H. Comparison of giving injunction (Estancias) or awarding damages (Boomer)
   1. In Estancias, homeowner has the choice between injunction and settlement
      a. When pl. wins, they get injunction
      b. Then when things get bad for the def. and there is an implicit
         “bride” for the def. to approach the pl. for settlement
   2. In Boomer, the def. company was given the choice between injunction and
      settlement
      a. Gives the enjoined person the right to purchase the right to infringe
         on other people’s property rights
      b. Criticism = this is pay as you go property infringement
   3. From an economic point of view, the Boomer decision is better
      a. Market based damages, more efficient than Estancias, because the
         market governs
      b. But there is the potential for under-compensation if the market
         would not take into account certain benefits of the property to the
         owner
      c. From an allocative perspective, in Estancias, the efficient result is
         to let the air conditioner run – so there is a possibility of getting an
         efficient result if the parties bargain around the rule, but there is
         possibility/potential for extortion – over-compensation
4. Boomer guarantees an efficient result, but this might be undercompensation because the market may not take specific benefits to the homeowners into account

5. Estancias does not guarantee an efficient result, but might lead to an efficient result if the parties bargain around the rule, but this could lead to over-compensation due to extortion

III. Coming to the nuisance – 2 types
A. Existing community of sensitive users and the nuisance is placed in the middle of those people – Nuisance comes to the sensitive people
   1. Likely the court will find nuisance and evict the nuisance from the sensitive area
      a. Unless is a strong finding of necessity, there will be an injunction
      b. Even if you don’t get the injunction for some public or (rarely) private reasons you will get damages
B. Sensitive community moves toward the nuisance (Spur v. Del Webb)
   1. Nuisance per accidens – before the sensitive party came, the nuisance wasn’t a nuisance
      a. The only reason there is a nuisance is because the sensitive party moved to the nuisance (Spur v. Del Webb)
C. Moving into the vicinity of a nuisance does not completely bar a suit for damages or injunctive relief, but it is a “relevant factor”
   1. To facilitate growth and expansion, the cities will grow and the blameless feedlot owners will be displaced – so be it…
D. All injunction cases deal with issue of equity and the court has great latitude to craft a flexible solution
E. Coming to the nuisance deals with the unclean hands doctrine
   1. The person seeking the injunction shouldn’t be the bad guy/villain to get an injunction

Servitudes
I. Servitudes generally
   A. = private land use controls
   B. 2 categories – Easements and Covenants
II. Easements
   A. Easement (little e), profits, and ~ licenses
   B. easements = right to enter the land in possession of another and do something
      1. enter and use
   C. profit = right to enter the land in possession of another and take something
      1. enter and take
   D. easements and profits are not estates in land, but they are interests/rights in land – therefore they overlap with estate system
      1. Therefore, you can have easements for life, defeasible, etc…
   E. General rule, when you own fee simple, and the law is clear that you cannot own an easement on your own land
      1. No easements created, old easements destroyed
      2. The union of dominant and servient tenements destroys any easements
III. 3 ways to classify easements
A. Appurtenant or In gross

1. appurtenant = when the easement is created it is attached to a piece of land other than the one it runs on, allows the use of; where it benefits the owner of the other piece of land
   a. Requires 2 pieces of land
   b. Dominant tenement – land whose owner is benefiting
      i. The owner of this piece of land = dominant tenant
   c. Servient tenement – land that is burdened
      i. The owner of this piece of land = servient tenant
   d. This nomenclature also applied to profits

2. in gross = easement that is intended to benefit the owner of the land, but are intended to exist without a dominant estate
   a. E owns the easement not by virtue of owning land
   b. Easement belongs to X as a person, not as an owner of land
   c. X is dominant tenant, Y is a servient tenant
   d. There is no dominant tenement
   e. Typically a profit is in gross

3. Differences btw appurtenant and in gross
   a. Easements appurtenant cannot be detached from the dominant tenement without the permission of both the dominant tenant and the servient tenant
   b. Easements in gross can be alienated without consent of the servient tenant – can sell the easement in gross

4. Ambiguous cases
   a. Courts prefer easements appurtenant

B. Classified by means of creation

1. Easement by prescription
   a. Same as acquisition by adverse possession
   b. Test = whether use of easement satisfies the adverse possession elements (NACHOE) – (Holbrook v. Taylor)
      i. Exclusivity is always different than adverse possession exclusivity b/c the easement sits on another person’s land and therefore the other person will likely also use that land
         (a) Here exclusivity means not “open to the public”
         (b) Can’t have the same claim to the land as the owner, if the owner claims fee simple, the person looking for an easement cannot claim fee simple
      ii. Hostility means using the land in absence of license or permission; not hostility to owner’s ownership, just hostile to the owner’s ability to use the land
   c. In order to defeat a claim of prescriptive easement, the owner has to stop the person from using the land
   d. You can stop the statute of limitations by giving a license, but this will not stop the person from doing it and the prescriptive use will continue
e. The public can get a prescriptive easement if an owner allows the public to use the land
   i. Worse than a private easement, b/c anyone can use the land
f. Remedy at law

2. Easement by express provision
   a. By deed or will

3. Easement by implication
   a. Prerequisite = must show that both plots of land were owned by one person at some point and then divided
   b. Easements that are not written down
   c. Don’t have to comply with the Statute of Frauds
   d. 2 basis types:
      i. Quasi easement
         (a) Easement implied by an existing use (Van Sandt v. Royster)
         (b) Requires one owner to have owned both parcels of land at the same time, at some point
         (c) If one person uses another part of his own land to get to the road, then the servient tenement is sold to a 3d party the quasi easement becomes an implied easement
         (d) Buyer must have been on notice of quasi easement when he purchased
         (e) Creation of quasi easement is at the discretion of the court sitting in equity
         (f) Factors:
             1. Use of easement is apparent
             2. Use of quasi easement is continuous and/or permanent
             3. Whether the use of land is reasonably necessary to the enjoyment to the quasi dominant tenant
         (g) A quasi easement persists indefinitely b/c it is based on existing use
             1. ➔ better than easement by necessity
      ii. Easements implied by necessity (Othen v. Rosier)
         (a) Factors pl. must show:
             1. There was unity of ownership of the alleged dominant & servient estates, AND
                a. Must have easement created before a piece of land is divided and then the land is divided such that part of the land is deprived of access to a road
             2. The roadway is a necessity, not a mere convenience, AND
a. Must be necessary to go through the alleged servient tenement for the alleged dominant tenant to get to the road, etc.

3. The necessity existed at the time of severance of the 2 estates
   a. Necessity must be shown explicitly
   b. If not at time of severance, use estoppel

   (b) Standard of what is a necessity is unclear
   (c) Doesn’t tell where the easement should go
   (d) Typically, located to cause the least damage
   (e) Generally, does not require compensation
   (f) Easement by necessity terminates when the necessity ends

   (g) If you can’t get to a road, you have necessity

4. Easement by estoppel
   a. Person has permission and license to use land + reasonable reliance in the form of substantial investment in a land = the law makes the license irrevocable/binding, AKA easement
      i. The land owner is estopped from revoking
      ii. It would be unjustly enriched to not estop
      iii. Can’t have easement created by both estoppel and prescription b/c the permission element is incompatible and adverse possession is an action at law, estoppel is equity
   b. Remedy at equity

5. Easement by eminent domain

NB. A person cannot win on both (a person can only win on one or the other) arguments b/c the estoppel argument rests on a theory of a license and permission, while the prescription argument rests on adverse possession – can’t have both license and adverse possession b/c permission defeats hostility

C. Classification based on difference btw easements and profits
   1. Similarities
      a. How created, classification, both can be appurtenant or in gross
   2. Basic distinction
      a. Easement gives only the right to use, with no right to take anything from it
      b. Profit gives the owner of the profit the right to take something from the land AND includes the implied right to come and take the profit (easement like rights)

IV. Assignability and Transfer of Easements
   A. Easements appurtenant cannot be detached from the dominant tenement w/o the permission of the dominant tenant and servient tenant
      1. Easement appurtenant is attached to a fee simple and fee simples are freely alienable
2. B/c the easement is tied directly to the dominant tenement, when the land is sold, the easement comes with it b/c there is no severance

B. Easements in gross are not tied to any dominant tenement and are freely alienable
1. Basically they are already severed easements appurtenant
2. At common law, easements in gross were not assignable
3. Today, the unassignability of easements in gross is questioned
   a. Commercial easements in gross are freely alienable
   b. Personal easements in gross are generally freely alienable
      i. 1 clear exception: recreational easements are generally not assignable
   c. When in doubt, look to the intention of the parties in creating the easement
      i. This explains the appurtenant/gross and … dichotomy

V. Distinction btw affirmative and negative easements
A. Affirmative easement = allows the holder to do something on the land or another
   1. Use someone else’s road, sewer
B. Negative easement = takes away from the owner of a servient tenement the right to do something (detach a right/stick in the bundle from a fee)
   1. Example: A agrees not to build any structures that would impede B’s view of the ocean; A has a negative easement against B
   2. Follow with the land
   3. Freely alienable
   4. BUT, English and American courts have been reluctant to expand the category of negative easements
   5. Example: negative easement by prescription – would lock in the current use of land forever
   6. Conservation easement – created by statute
      a. Example: historical preservation restrictions
   7. Presumption against negative easements
C. To get around this fear of negative easements, courts have developed covenants

VI. Licenses
A. Not an interest in land, it is a right to use land
B. Oral licenses are enforceable b/c they are not covered by the Statute of Frauds
C. Agreement btw two people that a person can come on the land and do something
D. Defense to the tort of trespass
E. Licenses are interests in people, not interests in land
F. License exist until the license is revoked or the licensee dies
G. Generally, freely revocable at any time
H. Exceptions to freely revocable
   1. License coupled with interest (prescription)
      a. A license connected to an interest in land is irrevocable
         i. If A has the right to enter into Blackacre and hunt, A has an interest in the land (profit) A has an implicit license to enter and complete his profit
   2. Estoppel
      a. when you see estoppel – think equity
b. License + reliance in the form of substantial investment

c. License lasts for as long as the injustice that would result if the license were revoked lasts

d. Estoppel does not depend on who actually owns the land, it depends on the existence of the reliance on the license by the owner such that the license cannot be revoked

e. Effectively, a sort of conversion from a license to an easement

f. The easement can only be used to repair the investment, but the easement cannot be used to expand the investment

g. If the investment burns down, the investment is gone, therefore the investment requiring the estoppel is gone and we are back to the original situation and the user must ask for permission again – destruction of the investment is the implied limit of estoppel (Restatement)

h. Estoppel is not a full-blooded property interest

i. All estoppel can to is prevent a licensor from revoking a license, thereby keeping a license open because it has been substantially relied upon

I. A revocable license is functionally the same as an easement
   1. Social guest, landscapers, maids, cable guy
   2. Permission to remain is freely revocable at any time

VII. Covenants
   A. “Real” covenants, and equitable servitudes = negative easements
   B. Real covenants are actions at law, that pre-date the courts of equity
   C. B/c real covenants are actions at law, damages were only damages
      1. l. Therefore, the law creates equitable servitudes that were enforceable at equity, see below
   D. Real covenant = contract btw two land owners that one of them will or will not do something in regard to the land
      1. As btw promisor and promisee, normal contract law applies
      2. Under normal contract doctrine, a personal contract is not enforceable against assignees = successors in interests
   E. Running with the land = allows the enforceability of a contract created btw people by those people’s assignees
   F. Requirements for the covenant to run with the land, at common law:
      1. Covenant must be in writing
      2. Covenant must have intent that the covenant will run with the land
      3. Covenant must touch and concern the land
         a. Covenant must increase the value or usefulness of the land to the promisee or decrease the value or usefulness of the land to the promisor
      4. Must be privity of estate
         a. Privity of estate = must be some sort of successive in land to the original covenanter parties
            i. 2 Kinds of privity
               (a) Horizontal – btw original parties
Vertical – btw promisor/promisee and assignee

G. Covenant is more than a contract b/c it can run with the land, but it is less than an interest in land (future interest, fee simple, easement, leasehold interest, right below leasehold interest)

H. Covenants are not an interest in land the way easements are

I. Equity will not enforce any restrictive covenant that violates public policy (Shelley v. Kraemer)

J. Covenants will be upheld/valid unless unreasonable
   1. Reasonableness determined in relation to the development as a whole, don’t care about the effect on a particular owner (Nahrstedt v. Lakeside Village Condo. Assoc., Inc.)
      a. If the burdens of the rule on all the owners outweigh the benefit to all, the restriction is invalidated as unreasonable
   2. Justifications
      a. Achieve stability and predictability
      b. Reduce litigation costs
      c. Reduce policing costs to the association
      d. Protect the social fabric of the common interest property
   3. Criticism
      a. Arbitrary, unreasonable
      b. Home ownership central to the American experience, central to the nature of American society, and should not be allowed to be frittered away by homeowners associations

VIII. Running of benefits and burdens in covenants

A. Courts are more willing to let benefits run than to let burdens run
   1. Notice is a big issue
   2. More fair to let benefits run b/c benefit is included in price
   3. Policy reason:
      a. As long as B still owns the land, it is fair to let the benefit run to D against B who actually made the promise
      b. But, when B sells to C, it is less fair to let the burden run from B to C because then A or D can enforce a promise that C didn’t agree to

B. Privity
   1. = formalistic, property reasons concerning differences in running of benefits and burdens
   2. Horizontal
      a. Btw A and B
      b. Analogous to privity of estate in leaseholds (Ernst v. Conditt)
      c. = successive relationship in an interest in land
      d. For A and B to be in horizontal privity, Blackacre must be granted from A to B or B to A
      e. Generally, you must have horizontal privity for the burden to run
      f. Generally, you don’t need horizontal privity for the benefit to run
      h. Assume horizontal privity is required unless told otherwise
         i. Restatement eliminates the requirement of horizontal privity for the covenant to run
3. Vertical
   a. Vertical privity is required for all covenants to run at law
   b. For the burden to run, the successor has to have an estate of the same duration of the predecessor (Ernst v. Conditt rule)
      i. Same rule in the rule for subleases – sublease v. assignment
   c. For the benefit to run, all that is necessary is that some part of the estate is the same – just needs to be some fragment of the original estate

C. Many covenants are rendered unenforceable
   1. B/c there are so many technical requirements, many covenants are rendered unenforceable over time with conveyance from person to person

IX. Equitable servitudes
   A. 2d means of getting around problems w/ real covenants to privately restrict property use
      1. First, negative easements, then covenants to get around court’s dim view of negative easements, then equitable servitudes to get around court’s dim view of covenants
   B. Conceptual difference btw equitable servitudes and real covenants
      1. Equitable servitudes are interests in land – property interest
         a. It is a piece of the fee
         b. Interests in land that are enforceable at equity
         c. In the end, an equitable servitude is a property interest/right
         d. Conceptually an equitable servitude is indistinct from a negative easement
            i. Equitable servitude = negative easement
      2. Real covenants are not interests in land – contract doctrine
         a. Not part of the fee
         b. Real covenant law is an attempt to use and expand contract law to create a private land use regime
         c. At the end of the day, a real covenant is a contract
   C. Practical differences btw equitable of servitudes and real covenants = different elements
      1. Equitable servitudes requires:
         a. Writing
         b. Intent to run with the land binding on subsequent owners
         c. Touch and concern
         d. Notice (Tulk v. Moxhay)
            i. Replaces privity
            ii. Notice of restriction from the deed or recorded that is written
            iii. A person who takes a piece of land with notice of the land use restriction, cannot be permitted in equity to violate that restriction
      2. Real covenants require:
         a. Writing
         b. Intent to run with land
c. Touch and concern
d. **Privity of Estate** – horizontal or vertical depending

D. Restatement - intended to eliminate difference btw real covenant and equitable servitude

E. Equitable servitude uses:
   1. Big picture issues of what the land will be used to issues of what color your front door can be to what kind people can live there…

F. Given the tremendous power of private land use controls, there is a potential for abuse

G. Tension, therefore, btw power of private land use controls and public policy of not restricting/creating a society that we don’t like

H. Validity and Restrictions on servitudes - Restatement, 3d, of Property (p. 886)
   1. A servitude is valid unless:
      a. Illegal or unconstitutional or violates public policy, OR
      i. Similar to touch and concern requirement for covenants
      b. Unreasonably burdens a fundamental constitutional right (Shelley v. Kraemer)

**Zoning**

I. Zoning generally
   A. Where covenants and equitable servitudes end, zoning begins
   B. Zoning = attempt by public law to regulate land use.
   C. Central question = to what extent do we want to allow zoning?
      1. How much authority in land use control can be vested in zoning boards?
      2. How much authority should we vest in zoning boards?

II. Euclidean zoning (Village of Euclid v. Ambler Realty Co.)
   A. Zoning in a general sense in constitutional and legal
      1. Analogy to nuisance law
      2. Expands “scope” of nuisance law through gov’t regulation rather than through litigation
      3. Done via Police power = power of state and local gov’t to regulate for the health, safety, and welfare for the people
         a. Residual power not held by the Federal gov’t
      4. Just like nuisance, taking without compensation is ok
   B. Most common form
   C. Classifications based on use classification (residential, commercial, etc…), height classification, area restrictions (regulate population density)
      1. 6 classifications of uses – single-family → heavy industrial
      2. As the number gets higher, the more permissive uses
   D. Cumulative classifications – can have U-1 in U-5
   E. Policy supports:
      1. Children
      2. Property values
      3. In the view of more policy makers this is an attractive way to live
   F. Effect = privilege single family structures in residential areas
      1. Similar to Garden City Movement (p. 953), social theory goals of:
         a. Separation of uses
b. Protection of single family home
c. Low rise development
d. Medium density of population

G. Consequences of this social theory:
1. Urban sprawl
   a. More cars, more traffic, more parking, more sedentary lifestyle
   b. Stable, suburban environments
   c. Lower crime, cleaner
   d. Small town values, community values
   e. Segregation

III. Non-conforming use
A. No clear law, but courts generally are against amortization (PA Northwestern Distributors v. Zoning Hearing Board)
B. Sufficiently long amortization period might be OK

IV. Aesthetic Zoning
A. Aesthetic zoning upheld on argument of protection of property values, not on legitimacy of aesthetic zoning itself (State ex rel. Stoyanoff v. Berkeley), held:
   1. Zoning statutes delegates the responsibility of general welfare to zoning boards
   2. Power to protect property values is within the general welfare
   3. Most courts have read Euclid to stand for protecting property values
   4. Not arbitrary or irrational to take aesthetic factors in account, BUT aesthetic factors alone cannot be considered, must consider other things
B. Zoning boards can zone for beauty, but not by itself; the zoning board must also zone for other things, not just beauty
C. Must give adequate standards and guidance (Anderson v. City of Issaquah)

V. Free Speech Implications (City of Ladue v. Gilleo)
A. Zoning can affect speech issues, zoning boards must be sensitive to this
B. Zoning ordinances cannot be under-inclusive
   1. Restrict too little speech; target specific forms of expression or content
   2. Would allow the gov’t to shape the political debate by deciding which topics cannot be discussed
C. Zoning ordinances cannot be over-inclusive
   1. Should not have chilling effect on speech
   2. Should not eliminate valuable forms of expression
   3. Would allow the gov’t to shape the political debate by deciding which topics can be discussed

Policy and General Course Concepts
I. First in Time = First in Right
A. Idea that being first, temporally, justifies a right
B. Possession and First in Time can be in tension (Pierson v. Post; Ghen v. Rich; Virtual Works v. Volkswagen of America)
C. First in time AND true owner trump subsequent possession

II. Presumption against/disfavor of restraints on alienation
A. Presumption against fee tail
B. Rule Against Perpetuities
C. Subleases and Assignments (Kendall v. Pestana)
   1. Alienability is good thing
      a. However, restrictions on alienability are legal, especially where they are protection of the landlord’s reversionary interest.
      b. But we still don’t like restraints on alienation. Therefore, we will construe restraints on alienation strictly
D. Land use controls
III. Property as a relational idea
A. A person “owns” property in relation to some person (not to object)
IV. Externalities – Demsetz (Instrumentalist – laws should create good results)
A. Externality = cost of an activity where that cost is not taken into account by the person engaging in the activity
B. Property rights are an instrument of society
C. Derive their significance from the fact that they help a man form those expectations which he can reasonably hold in his dealings with others
D. Property rights develop to internalize externalities when the gains of internalization become larger than the cost of internalization
E. Depends on information/bargaining costs
F. Problem:
   1. Depends on allocative/distributive efficiency
   2. All Demsetz says is private property rights will solve the over-consumption problem – Tragedy of the Commons, Tribe and Trees ex.
V. Coase Theorem
A. In the absence of transaction costs, the parties will bargain around the rule, whatever that rule is, to come to the most allocatively efficient result
B. Nuisance consequences
   1. In many nuisance situations, parties will not bargain around the rule to achieve the most allocatively efficient result
      a. People have special affinity for their home
      b. Special animosity toward nuisances near their home
   2. The way to rectify nuisance results with Coase Theorem is to classify animosity btw the parties as a transaction cost
VI. Problems with communal ownership
A. Communal ownership encourages over-consumption – Tribe/Forest hypo
B. Tragedy of the commons
B. Solution = private property rights
C. B/c the owner internalizes some/many externalities
VII. Fairness and Justice
A. Very powerful argument, jurists are aware of cosmic justice and fairness
VIII. Should the same rules/protections exist in commercial and residential leases?
A. Ability to withhold approval of sublease or assignment (Kendall v. Pestana)
B. Duty to mitigate precluding landlord from not accepting surrender of lease, sending bill each month and then suing for full amount at end of lease only applies to residential lease held by commercial landlords (Sommer v. Kridel)
C. Commercial AND residential leases are bound by covenants of quiet enjoyment (Reste Realty v. Cooper)