Property Outline

PART 1
1) Basic Concept
   a) Relational – you own things in relation to someone else
   b) Bundle of sticks metaphor – property rights are a bundle of sticks, you can give some property rights to others, while maintaining some in yourself
      i) Ex. – An apartment – the landlord owns the property and holds most of the sticks, but has given me the sticks that give me the right to possess, use, etc.
   c) Purpose of Property – basis of division of society into public and private spheres
      i) Privacy – my office is my own space
      ii) Common good – brings a level of organization to everything
      iii) Encourages productivity – if you receive fruits of labor, encouraged to work
      iv) Enhances productivity – if you know your house is safe, you can leave to work
      v) Stability
      vi) Maintains existing social order
      vii) Helps allocate scare resources
      viii) Promotes individual development

2) Some Property Theories
   a) Locke – Property is a common right, everyone has an interest in everything, given by God.
      i) An individual owns himself
      ii) AND the fruits of his labor
         (1) The labor theory – that the thing plus labor equals your property
         (2) Take an apple – you have expended the labor to make it your own
      iii) Take as much as you can use – if you take too much, the land is idle and it is wasteful, someone else could use it better
      iv) A person takes what his family labors for – what is the children's is the fathers, what is the servants is the persons (bartering), slaves are not "people"
      v) If you take more than you can use – hurts the common good
      vi) Justification of disparity in property ownership
         (1) People have incentive to gather and labor more than then can use
         (2) So they gather more and then barter and exchange for goods they need (ex. – apples for nuts, nuts for diamonds)
         (3) Everyone benefits by there being more apples, nuts and diamonds for all
         (4) The common stock of mankind is increased
   b) Blackstone – Property rights come from nature
      i) Use gives you temporary possession of something out of the state of nature.
         (1) Problem – doesn't encourage progress!
         (2) Everyone would fight over what they produced.
      ii) Says that possession of the thing – either by consent or labor – possession means ownership
   c) Reich – Property rights are given by government, no longer a natural right
      i) Problem – Gov’t property power is eroding the power and liberty of the individual
         (1) Grants, government contracts
         (2) Professional licenses
      ii) Gives government power to alter society by making new laws.
         (1) Property used to be liberty, but no longer, now the government has the property and individual is dependent upo the public wealth instead of private wealth.
iii) Solutions?
   (1) Substantive constitutional limits
   (2) Procedural safeguards – checks and balances
   (3) Largess to Right

3) What is Possession and When is Possession Ownership?
   a) Concept of First in Time
      i) Johnson v. Mc'Intosh – Indians had it, gave title to J, M got title from US government. Court says M has title.
         (1) Based on European discovery rules – new lands, whoever occupied it and claimed it, owned it. Justified the taking from natives by sayin their bestowal of Christianity and civilization allowed taking.
         (2) Indians had the right of occupancy (one of the sticks)
         (3) But US had the bundle. The entire property structure of the US is at stake – it has to be decided this way. DISCOVERY IS OWNERSHIP
         (4) Argues discovery – since the Indians weren't "using" (farming) the land, the discoverers could take it and put it to better use.
      ii) First in Time – Pros and Cons
         (1) Pros – settled rules maintain order, want to have a clear rule
         (2) Cons – creates an unfair distribution, not most productive (could sit on the land once you got there first)

   b) Pursuit – Possession?
      i) Pierson v. Post – Pierson kills fox at last minute and takes it. Pierson wins.
         (1) Formalism – legal forms and definitions, history to determine winner
         (2) Old cases – must have occupancy over animal to possess
            (a) Corporeal – must have injured animal
            (b) The first wounnder takes the animal!
            (c) Pursuit is NOT ENOUGH
         (3) Dissent – Instrumentalist – says no, cases used are too old, modern concept of hunting with dogs means pursuit should be possession for the continuance of the sport (LAW SHOULD DO GOOD THINGS, MAKE SOCIETY BETTER – INSTRUMENTALIST)

   c) Custom – possession by custom?
      i) Ghen v. Rich – followed local custom rules
         (1) Community depended upon whaling – deciding otherwise would undermine the entire system of whaling.
         (2) Custom should govern when
            (a) Governs an entire industry
            (b) The custom is of limited application (won't disrupt general law)
            (c) Custom is of longstanding application (knows it works)
         (3) Problems with custom
            (a) How do you determine it?
            (b) Biased by who you ask
            (c) Could run counter to greater societal goals

   d) Constructive Possession
         (1) The business was lawful and profitable – interference with someone's livelihood is tortious (instrumentalist approach)
         (2) But competition is ok – but do so fairly, by threat or scaring off, not ok
         (3) Constructive possession – K "owns" the ducks on the land while they are there. You don't physically possess the ducks, but it is just as good as physical possession.
e) Overall Rules for animal capture
   i) Mortal wounding as evidence of intent to possess
   ii) Actual physical possession
   iii) Constructive possession of animal while on your land

4) Externalities

a) What are they?
   i) Cost of activity (or benefit) that is not borne by the person engaging in the activity
      (1) Example – Richards paving driveway – smelly, noisy, cost to neighbors $1k, but cost to R is only $100 and his benefit is $500, since he doesn't bear $1k cost, he will pave the driveway. So property rights develop to internalize the cost
         (a) Contract – offer to pay so he won't pave
         (b) Purchase – make R buy everything (plots around) or U.City can own everything
         (c) Government regulation
         (d) Tort - nuisance
      ii) Property rights develop to internalize the externalities when gains of internalization outweigh the costs
      iii) But all methods of internalization have their own costs
          (1) Information costs – who is causing the problem?
          (2) Collective action – how do you get a large group to agree?
             (a) Lawyers – transaction cost
          (3) Regulations – skew the outcome, enforcement costs
          (4) Torts – litigation costs, lawyers, same enforcement costs

b) Tribesman Hypo
   i) T and inhabitants (100) own 1000 trees in common.
   ii) T owns 1/100 of each tree
   iii) If he cuts one down – he gains 99/100ths of a tree. He already had a 1/100 interest in the tree he cut, but now he has the whole thing.
   iv) Outside traders – offer to buy trees for $2 each, but worth $3. Everyone starts chopping... then realize all will be chopped, but no incentive to stop, because if T doesn't chop it down, someone else will.
   v) RESULT – Communal ownership tends to encourage overconsumption of communal property
   vi) Can't get members to agree not to chop – transaction costs, free rider, hold out, policing costs.
   vii) SOLUTION – Private ownership. If T owns 10 trees instead of 1/100th in each, then if tree is worth $3 and only offered $2, T won't sell. The cost has been internalized.

c) Coase Theorem
   i) If transaction costs are sufficiently low, then economic incentives will cause resources to be used efficiently.
   ii) Cope out – says if not efficient, because of transaction costs.
   iii) Internalization is all about allocated efficiency. But how do you get there?
       There has to be a way to determine how to divide up all the public property in the first place.
   iv) We care about distributive efficient because if no one owns anything there is little incentive to be productive (ECONOMIC ARGUMENT)

5) Acquisition by Creation
a) Give exclusive rights to those who create
   i) Yes rights
      (1) People encouraged to make new things (economic argument)
      (2) Moral argument – if you put the labor in, you should own it.
   ii) No rights
      (1) Economic – if no rights, then promotes competition, better for society,
          better products, lower prices
      (2) Want distributive justice – share the wealth.
      (3) Public good – information is for the public good, one person having it
          doesn’t devalue the value of it to others.
   iii) AP v. INS case
      (1) Creation of news – who owns it? No one, public owns it.
          (a) But property is relative – who owns it as comparing AP and INS.
          (b) Court says AP has a quasi-property interest. If INS wins, then AP has
              no incentive to get the news, if INS can steal
          (c) But if AP wins, then no competition – competition depends on
              imitation. INS might have info that makes the news better, and then AP
              has incentive to work harder to make news better.
   iv) Cheney v. Doris
      (1) D copies C’s designs and sells for less. Okay. C has no right – too difficult
          to patent each design
      (2) Limits to fact situation.

b) Property Rights in Creation – Solutions
   i) Patents – limited in time (20 years), can’t patent fundamental ideas
   ii) Trademarks
      (1) Volkswagen Case – guys took vw.net name, knowing Volkswagon would
          want it eventually. Had 1st possession
      (2) But Volkswagen owns the "VW" trademark. To give to other is
          misappropriating the goodwill of "VW"
          (a) Economic efficiency – give it to VW, promotes consumer safety and
              trust
   iii) Copyrights – protect expression of ideas (life plus 70)

6) Right to Include, Right to Exclude
   a) Jacque v. Steinberg – S wanted to cut across J’s yard to reach road.
      i) J has a right to exclude, even if most economically efficient use is for S to use
          it. J doesn’t care about money, so economic theory doesn’t work.
      ii) Reasons to enforce a private property owner’s right to exclude – PRIVACY,
          public benefit – a legal right is hollow if there are no means to enforce it! If J
          has no legal remedy, then no right and the right to exclude is fundamental to
          property rights.
      iii) What about a forced sale for the public good? How do you balance individual
          excentricity with public efficiency?
   b) State v. Shack – Farmer didn’t have right to exclude lawyers from getting to
      farmworkers who lived on the land. Certain unalienable rights

7) Subsequent Possession (by finding, gift, adverse possession)
   a) Acquisition by Find
      i) Lost Property
         (1) Armory v. Delamire – found jewel, gives it to jeweler to get appraise, jeweler
             refuses to give it back
(a) Court – allows finder to get the value of the jewel. The finder has a right against all but the true owner (relative ownership of property)

(b) Even if a thief – ok – the first thief has a right over the second thief.

(2) Why give the finder ownership rights?
(a) Law – clear rule is better than no rule
(b) Finding is a socially useful activity – brings lost items back into circulation
(c) Ownership encourages productive use of resources
(d) Right creates incentive to display – true owner might get it back

(3) Bailment – rightful possession of goods, owned by another. Ex. Valet parking a car. Here a bailment was created when boy gave jewel to jeweler.

(4) True owner comes back and jeweler already had to pay boy for jewel the jeweler took from him. No luck for jeweler. He essentially bought the boy’s rights – boy only had right of possession till true owner came back, that is what jeweler bought.

(5) Hannah v. Peel – soldier found broach, house owner never lived there, never even visited.
(a) House owner – owner of loqus in quo. Argues constructive possession (like Keeble ducks)
(b) But never physically possessed the property. Can’t claim physical possession, nor constructive – for constructive must take physical at some point. Only get to use constructive once – he "constructively possessed" the house... can’t then “constructively possess” a broach he never knew was in the house.

ii) Mislaid Property
(1) McAvoy v. Medina – customer finds wallet, gives to shopkeeper to hold for true owner. No one comes. Customer sues.
(a) Someone put the wallet there with the intent to come back.
(b) Should be with the shop owner, so when person who mislaid it comes back it will be there.
(c) But this encourages finder not to tell. And it is based on assumptions – who knows what “true intent” of person who put it there was.

b) Adverse Possession
i) At what point does ownership vest in a 2nd possessor? The adverse possessor acquires title at the time an action of ejectment would be barred by the statute of limitations.

ii) Five Elements for Adverse Possession (to get clock running on statute – when the elements are all there, then clock starts running) NACHOE – this is NACHOE property (not yo’)
(1) ACTUAL – AP has actual possession of land for the period
(2) OPEN and NOTORIOUS – Must be clear that the AP has it – gives the actual owner notice, he must be actually aware or there must be evidence that a reasonable person would know. Actual possession is usually considered sufficient notice.
(3) EXCLUSIVE – AP must be in sole, physical possession, or others only occupy with permission of the person claiming to be the AP.
(4) CONTINUOUS – No abatement or interruption in possession (no eviction, or eviction action)
(5) HOSTILE – AP must claim right to the property – "this is my property against the world". Doesn't have to be evil intent, could be by mistake. If use is permitted by true owner, then it isn't hostile.

iii) Why is AP good?
(1) Encourages land owners to productively use land
(2) Avoids contract dispute – legal ownership should reflect actual ownership
(3) Helps to protect the emotional attachment to property that grows as time continues.

iv) Examples
   (a) B wins!
      (i) ACTUAL – yes, lived on land
      (ii) OPEN and NOTORIOUS – yes, anyone would see
      (iii) EXCLUSIVE – yes, we can assume so
      (iv) CONTINUOUS – again, assume so
      (v) HOSTILE – Yes, he is claiming it as his own
   (b) B countersues to eject A. B loses!
      (i) ACTUAL – no, never went to upper half
      (ii) OPEN and NOTORIOUS – made no claim to it
      (iii) EXCLUSIVE – no
      (iv) CONTINUOUS – no
      (v) HOSTILE – no
   (c) What if statutory time is 10 years, and 5 years in, D sends a letter to A telling him that B is on his land. A sends letter to B, saying, go ahead and stay. A later returns and sues B to make him leave. Who wins? A!
      (i) ACTUAL – Yes
      (ii) OPEN and NOTORIOUS – Yes
      (iii) EXCLUSIVE – Yes
      (iv) CONTINUOUS – Yes
      (v) HOSTILE – NO!!!! – A allowed him to be there.

v) Accidental Encroachment
(1) Maine Rule – must have evil intent to be hostile
   (a) Rewards the “evil” people
   (b) Encourages “good” lawful people to perjure themselves
(2) Connecticut Rule – intent and mindset doesn’t matter
(3) Mannillo v. Gorski – accidental 15 inch encroachment
   (a) OPEN and NOTORIOUS – no, unrealistic to rule that notice arises in a case of a minor border encroachment. A true owner would have to be on constant alert.
   (b) Unfair to make accidental encroacher remove a sidewalk or home that accidentally encroaches. So “undue hardship” applies, and true owner is forced to convey the land to the encroacher. Encroacher pays fair market value (EQUITY)
   (c) A knowingly hostile possessor doesn’t win here – equity doesn’t apply to “evil” people 😊
(4) Howard v. Kunto
   (a) CONTINUITY issue
      (i) Summer home – still an uninterrupted possession since the purpose of the property was to be held in summer (must hold the property as like property would be held)
      (ii) Tacking – mutuality of interest with respect to property (if I sell to you, we are in privity of estate) need privity to tack, but court says privity should not be used to upset long periods of occupancy of those who in good faith received erroneous deed description.

vi) Statute of Limitations
(1) Persons with disability (either mental, a minor, etc.)
   (a) As long as a owner of property is under disability WHEN ENTRY OCCURS, the statute of limitations doesn’t start running till no longer under that disability.
   (b) If the disability occurs after entry – doesn’t matter.
(2) Example: action must be brought within 21 years, if disabled when entry and 21 years expires, has 10 years after disability removed, majority age 18
(a) A enters adversely on May 1, 1976,
   (i) O is insane in 1976, dies insane and intestate in 1999
       1. O's heir, H, is under no disability in 1999
          a. Doesn't matter, law treats O&H as the same, so statute doesn't start running till 1999 when H takes and is not disabled. So A must hold till 2009.
       2. O's heir, H, is six years old in 1999
          a. H does not get to tack his disability to O's. Disability has to be present in the owner at the time of entry, so now O's disability is gone, so 10 years 2009
       1. No disability, so 21 years from 1976 – 1997
       1. Can't tack the mental illness. Condition must be present at time of entry – only condition present was his minority. So turns 18 in 1989, then 10 years – 1999.

vii) CAN'T ADVERSELY POSSESS AGAINST THE GOVERNMENT

c) Acquisition by Gift

   i) A gratuitous transfer – no consideration is allowed, the donor gives to the donee.

   ii) Three kinds of gifts

      (1) Causa Mortis – gift in anticipation of death (if you don't die, it is revoked), courts don't like these, they are against the public policy of wills

      (2) Inter vivos – gift during life (no contemplation of death)

      (3) Testamentary – gift at death in a will

   iii) Three requirements for a gift

      (1) Donative intent – intent to make a gift (can be oral or written)

      (2) Delivery – transfer of the property

          (a) Why have a delivery requirement?

             (i) Makes it clear that the donor intents to give the gift, by feeling the "wrench of separation"

             (ii) Very clear and everyone knows

             (iii) Evidence to the donee that he knows it is his

          (b) Three types of delivery

             (i) Manual – always is sufficient, a physical handing over (A small chattel that is capable of being handed over, it must be)

             (ii) Constructive – like if you hand over car keys – sufficient if it is an object that you can't actually hand over (Newman court says it is ok, but it is strictly construed)

             (iii) Symbolic – a symbol is handed over; like on paper (rarely sufficient, only in extreme cases), according to Newman court, doesn't even exist

      (3) Acceptance – almost never an issue, tied to delivery, a refusal to accept frustrates delivery

   iv) The requirements do not have to happen in order.

   v) Newman v. Post – J is a housekeeper. On deathbed V gives her keys, points out furniture, says it is hers. The key unlocks a bureau he gives her. In the bureau there is a life insurance policy

      (1) Life insurance policy – Doesn't get it. Why? Question of intent – if he had really wanted to give it to her, he would have handed it over, it is capable of
being physically handed over. It isn't the normal place you would keep a policy, probably didn't know it was there.

(2) Furniture – anything the keys would unlock she gets – constructive delivery

vi) Gruen v. Gruen – painting case. Son says dad gave him the painting and retained a life estate in it (the possession). The stepmother says there was never any delivery and it was actually a testamentary gift that should have been in a will.
(1) Intent – yes, letter, present donative intent is there. He has been given a remainder interest, an undeniable and irrevokable interest
(2) Delivery – painting, physical? No physical delivery, but here looking at the circumstances, need to be flexible. He wasn't given a present right of possession, so symbolic delivery via the letter is ok. Doesn't make sense to require actual delivery, because he would just have to give it right back.
(3) Acceptance – not an issue.

PART 2 – The Estate System
PRESENT INTERESTS
1) Fee Simple

a) as close to absolute ownership as you can get, no one can have more than a fee simple estate in land

b) Two characteristics
i) Heritability – the ability of a land owner to pass land to heirs at death, ownership can be perpetual
ii) Alienability – the right of a land owner to separate themselves from the land (ie. Sell, give, etc.) at any time, either life or death

c) Creation of a Fee Simple
i) Historically – had to use "to A and his heirs"
ii) Today – no magic words required, but still used to signify a fee simple interest

d) Problems
i) O conveys to A for life, then B forever (in 1600)
   (1) A has life estate, when A dies, B has life estate, when B dies, escheats back to O (at that time no heritability)
   (2) In 2002 – A has life estate, B has fee simple when A dies
ii) O conveys to A and her heirs. A's child B is in debt. B's creditors attach to B's property to secure their claim. Does B have an interest in the land that B's creditors can reach? Can B prevent A from selling?
   (1) NO! B's creditors can't attach, B has no interest in it, not an heir till A dies. B can't prevent from selling. A has fee simple, no one else can tell A what to do.

e) Inheritance of Fee Simple
i) If A dies intestate, property goes to heirs (those who survive the deceased and designated as intestate successors under statute)
   (1) Spouses aren't heirs under common law
   (2) ISSUE – your descendents (all, not just your children) (lineal consanguinity)
      (a) Issue take first
      (b) Per stirpes – meaning if O has A and B, A has A1 and A2, A dies, O dies – then B gets 50%, A1 and A2 each get 25%
   (3) ANCESTORS – upwards, parents and grandparents (lineal consanguinity)
      (a) Ancestors take if no issue
   (4) If no issue or ancestors – collateral consanguinity take (the issue of your ancestors)
   (5) If no consanguinity – then escheats to state
(6) All of this applies only if die intestate (with no will)
(7) Problems – pg. 214

f) Fee Tail
i) No longer in existence.
ii) Would scan a family line for an heir – if O had A, B, C and dies, to A and his
heirs, then to B and his heirs, then to C and his heirs.
(1) If A dies, and then A's line eventually dies out, then fee tail kicks in and
goes to B's line, if B's line has died out, then to C's line.

2) Life Estates

a) Ensure property held by a certain person after death of the testator
b) "To A for life" – means A has life estate and O gets it back when A dies. O has a
remainder.
c) To A for life – can A sell? Can only sell his interest – which is the possession
interest. If A sells to C, C has a life estate based on A's life. Pur autre vie (based on
the life of another)
d) If unclear as to whether life estate or fee simple – PRESUME FEE SIMPLE
i) Whitney v. Brown – handwr itten will said "house not to be sold, to live in". Court
calls this a fee simple – says it isn't clear and don't want restraints upon
alienation (which "not to be sold" would be)
(1) Dissent – says if she meant to give whole she would have
(2) Illustrates pitfalls of technical lawyer rules – laypeople don't know the right
terms to use, can't always make intent clear. Result doesn't always feel
right.
ii) Rules of Presumption
(1) Fee simple unless clearly a life estate
(2) Look to the words of the will, intent of the parties
(3) Assume it is a will – there a presu mption against partial intestacy.
e) What happens where there are consecutive interests?
i) If two people have interest and want to do different things – the court will try to
balance the equities and act so as to benefit both parties in the best way.
(1) One user should not be able to use property in a way that intereferes with
the interest of the other party
(2) So use relative merits – present v. future interest – the longer the interest
or the more certain the interest, the more protection you have under the
law.
(3) Baker v. Weedon – if sell now, get money, but if sell in a few years worth
much more. But life estate person needs money now. So court says sell a
piece now and give her money. To sell entire thing now would cause great
financial loss to remainderman. (but they are really just speculating)
f) Waste
i) Affirmative waste – liability arising from voluntary acts, open mine rule
(1) Ex. – if minerals were being extracted from land when the life estate was
given, then the life estate can take as much as they want, but the life estate
possessor can't open the mine themselves
ii) Permissive waste – life tenant is only obligated to keep up the land to the
extent they receive enough income off the land to keep it up.

3) Defeasible Estates

a) A defeasible fee is a fee interest but it is something less than a fee simple
i) Conditional on some future event
ii) A fee simple plus a statement of intent is not a defeasible fee, still fee simple
(ex. – to A to be used to grow petunias, or the way the court read the will in
Whitney v. Brown)
iii) Two Types of Defeasible Fees (FEE SIMPLE DETERMINABLE and FEE SIMPLE SUBJECT TO A CONDITION SUBSEQUENT)

(1) Fee Simple Determinable
   (a) A fee interest that could last forever, but will terminate automatically
       the moment a certain event occurs.
   (b) Created by language indicating that the transferor is giving fee simple
       only til the event occurs (MUST BE CLEAR)
   (c) Look for language like "until", "as long as", "while used for"
   (d) O has a reversion interest – the "possibility of revertor" (a future
       interest)
   (e) The fee simple determinable AUTOMATICALLY terminates when the
       certain event happens

(2) Fee Simple Subject to a Condition Subsequent
   (a) A fee interest does not automatically terminate when the event occurs,
       only terminates when the grantor exercises his reversion interest – the
       right of entry
   (b) Language – "upon the condition that", "provided that", "but if"
   (c) The Reversions interests
       (i) Can't make a intervivos transfer of RIGHT OF ENTRY (Marenholtz)

(3) Why do the differences matter?
   (a) Marenholtz – if it were a FSD, then it automatically reverted and T could
       then sell, because he had a fee simple determinable, but if it were a
       FSSCS, then T never exercised his right of entry and it never reverted
       back to him.
   (b) The law makes the determination
   (c) Statute of Limitations/Adverse possession
       (i) FSD – the statute begins running when the action occurs
       (ii) FSSCS – the statute runs only when the right of entry is exercised
           1. by entering the land
           2. by filing a lawsuit
           3. by sending a letter
       (iii) Statute of Limitations does not run against the right of entry – you
           have forever to exercise your right. (right of entry is a property
           interest, not a cause of action)
       (iv) Mesne Profits – once it has been determined that possession is
           unlawful, the grantor is entitled to damages for as long as you
           wrongfully stay on the land in FSD. But in FSSCS, there is no
           wrongfull possession until exercise of right of entry.
   (v) Possibility of reverter becomes transferable sooner than right of entry

(4) Restraints on Alienation – we don't like them
   (a) Mountain Lodge – says use restriction isn't a restraint on alienation,
       could sell it, just has to be use continued.
       (i) A tension between policy against restraint on alienation and
           defeasible fees
           1. Want to encourage charitable gifts – and people want to tell the
              charity how to use the property
           2. But you want to encourage economic growth – what if the
              property becomes better suited for a different use?

4) Future Interest

   a) The right to use land at a future time –
       i) VESTED – certain to come to pass
       ii) CONTINGENT – vests when a certain event happens
       iii) Different from expectancy – expecting to inherit property is not a future interest
iv) All property rights, future and present must add up to a fee simple
   (1) In classifying
      (a) Is it an interest in land?
      (b) Is it present or future?
      (c) Is it in grantor or grantee?
      (d) If it is in grantor – is it remainder or executory?
      (e) If it is a remainder, is it vested or conditional?
      (f) If it is vested, what type of vested?

v) To determine a future interest – Look to who has the interest first! If the
original transferor (the grantor) has the interest, then you are looking at one of
the first three categories (1a-1c), if a transferree has it, looking at (2a-2c)
   (1) Retained future Interest (IN THE TRANSFEROR)
      (a) Reversion
      (b) Possibility of Reverter
      (c) Right of Entry
   (2) Remainders - Transferred future interest (IN THE TRANSFEREE)
      (a) Vested Remainder
      (b) Contingent Remainder
      (c) Executory Interest

b) Retained Future Interests
   i) Reversion – retained when the grantor has a fee simple and gives something
      less than a fee simple, not a defeasible fee
      (1) Reversions are ALWAYS vested
      (2) Transferable during life, devisable/heritable upon death (FREELY
          ALIENABLE)
      (3) In determining if O has a remainder – think about the possibilities, what
          could happen? (problems on pg. 271, notes from 10/2)
   ii) Possibility of Reverter – remains in grantor and heirs when gives a FSD is
       given
   iii) Right of Entry (power of termination) – when grantor gives a FSSCS

c) Remainders – future interest capable of becoming possessory, immediately upon
termination of the preceding estate, freely alienable, don't have to be certain
i) Creation of a Remainder
   (1) Give it to someone who is not the grantor
   (2) Created at the same time and interest as the estate which precedes it.
   (3) Limited so it becomes possessory immediately upon termination of
       preceding estate
   (4) Preceding estate has to be less than all the grantor has
   (5) ALL REMAINDERS ARE EITHER VESTED OR CONTINGENT

ii) Vested Remainders
   (1) Ascertained person
   (2) Must not be subject to a condition precedent
      (a) Natural expiration of life is not a condition precedent
   (3) Three Types of Vested Remainders
      (a) Indefeasibly vested – are certain to vest, regardless
         (i) Example – to A for life, then to B.
         (b) Vested subject to partial divestment – gift to a class of people
            (i) "class gift" example – to B's children (where B is still alive)
            (ii) Example – to A for life, then to B's children
               1. B has two children, X & Y, they have vested 50% interests,
                  subject to partial divestment, why?
               2. Because if B has 3rd child, Z, then X and Y are each divested by
                  17%, so all three now have a 1/3 interest.
            (c) Vested subject to complete divestment (difficult – small distinction
                between it and a contingent remainder)
(i) Can be vested as long as there is an ascertained person and no condition precedent, but a vested remainder can be divested by a CONDITION SUBSEQUENT – based on the language of the grant (can come down to the placement of a comma)

1. Example – to A for life, then to B and his heirs, but if B does not survive A to C and his heirs.
   a. Read to the comma
      i. To A for life – life estate
      ii. Then to B and her heirs – vested remainder (no CP and an AP)
      iii. But if... that is a condition subsequent

2. Contrast with “to A for life, then to B and her heirs if B survives A.” This is a condition precedent – there is no comma, it is all one phrase, the grant and the limitation are in one phrase and the condition precedent makes it a contingent remainder.

(iii) Vested remainders subject to complete divestment WILL ALWAYS be followed by an executory interest.

iii) Contingent Remainders
   (1) All remainders that aren't vested
      (a) Given to an unascertained person OR
      (b) Subject to a condition precedent
   (2) Example: to A for life, then to heirs of B. B is alive
      (a) Since B is alive, we don't know who his heirs are, no ascertained person. – Contingent
      (b) If B dies – then we know who the heirs are, and it becomes vested
   (3) Example: to A for life, then to B and heirs if B marries before A's death.
      (a) Ascertained person – Yes, to B
      (b) No condition precedent – NO – there is, B must marry before A's death.
         (i) Make it a vested subject to complete divestment by saying "to A for life, then to B and heirs, but if B does not marry before A's death, then to C.
      (c) Problems pg. 275, notes 10/8

iv) Why does the difference between VESTED and CONTINGENT matter?
   (1) Vested – accelerates into possession whenever and however the preceding estate ends
   (2) Assignability – used to matter, but now all are freely transferrable
   (3) Destructibility of contingent remainder – used to be that the CR was destroyed if it could not become possessory, no longer
   (4) Rules Against Perpetuities – applies to contingent remainders, but not to vested remainders!

v) Executory Interests
   (1) Similar to vester remainders subject to complete divestment and contingent remainders
   (2) Future interests created in a transferee that must divest a vested interest to become possessory. Similar to defeasible fees.
   (3) Two kinds
      (a) Shifting – divests another transferee
      (b) Springing – divests the transferor (grantor)
   (4) Some examples
      (a) To A, but if property stops being used as a school, then to B
         (i) A has fee simple subject to an executory limitation
         (ii) B has a shifting executory interest
         (iii) B's interest divests A's vested interest
(b) To A and heirs, this deed to take effect when A reaches 21
   (i) Title remains in grantor till A is 21. O has a fee simple subject to an
       executory interest
   (ii) A has a springing executory interest.
   (iii) NOT a remainder – because it is not proceeded by a freehold estate
       in another grantee (definitional)
   (iv) Problems – pg. 285, notes 10/9

5) Rule Against Perpituties

   i) Restricts use of remotely contingent future uses
   ii) Promotes alienability and marketability of land by only recognizing future
       interests that NECESSARILY will vest within 2 generations of the grantor.
       (1) The Rule – Lives in being, plus 21 years. No interest is good unless it must
           vest, if at all, not later than 21 years after some life in being at time of
           creation of the interest.
       (2) If it is possible that it might vest outside of the 21 year window, then the
           ENTIRE interest is void. Not just the one part.
       (3) Rule of logical proof – if there is ANY possibility that it won't vest within the
           21 years, then it is invalid, no matter how remote a possibility it is. What
           actually happens after the grant is irrelevant as well.
       (4) DETERMINE IT AT THE TIME OF THE GRANT
       (5) How?
          (a) Look for a measuring life, a validating life
             (i) Someone who is alive at the time of the grant
             (ii) Can be used to prove as a matter of logic that it will vest
                  necessarily within 21 years after their death
             (iii) Sometimes easier to think of it in the negative… try to come up with
                  a situation where it will not vest.
                    1. Easiest way – give everyone alive at the time of the grant a
                       child, then kill off all the lives in being, then measure 21 years.
                    2. People born after the grant are NEVER LIVES IN BEING
             (iv) The measuring life is someone whose actions/existence can affect
                  the vesting of the future interest
                  1. Identified by name
                  2. Identified by status – ex. Bob's widow
                  3. Or one whose existence is contemplated by the grant – if a
                     grandchild is mentioned in the grant, that implies there must be
                     a child too.
   iii) Applies to ALL contingent remainders
   iv) Applies to vested remainders subject to partial divestment
       (1) Why? Because a class gift is not vested in any one member of a class, for
           rule purposes, till the class is closed.
   v) Applies to executory interests
   vi) Presume any living person is capable of having a child
   vii) Example
       (1) O transfers a sum in trust “to A for life, then to A's first child to reach 21."
           (a) Lives in being – A, A's children alive at time of grant.
           (b) Will A's first child to reach 21 necessarily reach 21 within 21 years of
               A's death?
               (i) YES. Give A a child. Then kill A. A's child will reach 21 within 21
                   years of A's death. (only by 1 day, but still makes it)
               (ii) The interest is valid.
       (2) O transfers a sum in trust “to A for life, then to A's first child to reach 25."
           (a) Will A's first child to reach 25 necessarily reach 21 within 21 years of
               A's death? (assume A has no children over 25)
(i) NO! Assume A has a 24 year old and a 2 year old. Then give A a child, B. Then kill the 24 year old and the 2 year old and A. B will not reach 25 within 21 years of A's death. There is no validating life.

(b) If A has a daughter who is 27 at the time of the grant – then it is valid. A has the life estate and daughter has a vested remainder – she is an ascertained person and there is no condition precedent (she is already the first child over 25)

viii) More examples – notes 10/13, pgs.304 in text
ix) Defeasible fees always pass the rule because the reversionary interest is vested and known – it is held in the grantor.

x) Jee v. Audley – grant – From O to A for life, then to B and issue of her body for their lives, and in default of such issue, then to daughter of J & E then living.
   (1) At the time of the grant, J & E are alive – 75. A is dead. B is childless.
   (2) A is dead, no interest
   (3) B has a life estate, in fee simple subject to executory limitation.
   (4) Daughters of J & E – executory interest. Good?
      (a) NO! Why? Give B a daughter, C. Give J&E a daughter D. Kill everyone except C & D. C has a fee simple subject to an executory interest. C could live for 21 years plus more and then die without issue, then D would take, but we won't know until possibly outside of the 21 year period whether they both live for more than 21 years.
      (5) Stupid rule!!! J&E are not going to have children at age 75. So it completely defeats the purpose of the rule, which was clarity, it elevates the rule over the purpose.

xi) Perpituties Reform
   (1) Wait and see – if it doesn’t vest within 21 years, then invalid
   (2) Wait and see for 90 – if it still violates after 90 years, then invalid
   (3) Cypres – courts are given the power in equity to reform the grant.

6) Concurrent Interests
   a) Multiple present, current interests
   b) Three Types
      i) Tenancy in Common
      ii) Joint Tenancy
      iii) Tenancy by the entirety
   c) Tenancy in Common – the basic form of ownership, presumed in ambiguous cases
      i) Separate, but individed interest is property
      ii) Freely alienable
      iii) Each owns and has the right to possess an undifferentiated share of the whole.
         (1) Example – A & B are tenants in common of Blackacre
         (2) If A dies, his interest can be transferred to his heir, C, by will. So then A and C are tenants in common.
         (3) If A dies intestate, and has two children D & E, then D, E & B are now tenants in common, DE have 25% each, B has 50%.
   d) Joint Tenancy – three differences from tenancy in common
      i) Right of Survivorship – the concurrent interest dies at death
         (1) If A&B are joint tenants and B dies, then A now owns 100%
      ii) Four Unities – Time, title, interest, and possession
         (1) Time – A&B’s interest must be created at the same time
         (2) Title – have to be created in the same document
         (3) Interest – each JT must have identical interests (equal and undivided)
         (4) Possession – each must have a right to possession of the whole (same as tenancy in common)
iii) Must use MAGIC WORDS – must say "to A&B as joint tenants, with right of survivorship, and not as tenants in common." Something less might suffice, but it is risky, since there is a presumption against JT.

iv) Severance of the joint tenancy
   (1) Any joint tenant can sever the joint tenancy by transferring the property to someone else.
      (a) Example – A&B are JT. A gives his interest to C – B&C are now tenants in common. No unity of time or title.
      (b) A, B&C are JT. A gives his interest to D. D is now a tenant in common with A&B, but A&B are still joint tenants with each other.
   (2) Joint tenancy can only last while the 4 unities are present.

   e) Tenancy by the Entirety
      i) In only about half the states, can only be created between a husband and wife.
      ii) Just like joint tenancy, except there is a fifth unity – Marriage at the time the grant is made.
      iii) Can't be severed by either party – both must consent to anything that would sever the tenancy.

f) What happens when co-tenants disagree?
   i) Right of partition – where one joint tenant or tenant in common asks a court to divide property – physically divide or sell and divide profits (tenancy in entirety has no right of partition, can only end by death or divorce)

   g) Problems – Notes 10/15, book pg. 342

h) Harms v. Spraque – brothers are joint tenants, one mortgages his piece, then dies. Issue – is the joint tenancy severed with less than all of the joint tenants give a mortgage on the property? Does the mortgage survive the death of the joint tenant?
   i) Question is when you give a mortgage are you giving title over to the bank?
      (1) Court says no, a mortgage is treated like a lien on the property, you are giving a claim. If you were giving the "deed", then you are giving title, meaning the unities of title and time are broken. But just a lien – so no unity is broken and the joint tenancy is still intact.
   ii) Does the lien survive death?
      (1) No. When the brother dies, his interest is extinguished and the other brother has 100% ownership. The 1st brother's interest is the one that had the lien on it, and it is no longer in existence, so the lien must also be extinguished.

   i) Delfino v. Vealencis
      i) Sell property and splitting profits vs. Partition in kind
      (1) Sale is considered a drastic measure, only used if
         (a) The physical attributes make partition in kind impracticable
         (b) The partition in kind would be inequitable, equity would be better promoted by a sale.
            (i) How do you measure equity? Social economic value or moral, individual choice to use property as they wish?

j) Ouster
   i) When a co-tenant wants to collect rent from another co-tenant for use of the property, must show two things
      (1) The possessor must assert complete ownership of the land (adverse possession)
      (2) The possessor must refuse the other co-tenant's demands to be allowed to use and enjoy the property.
         (a) In Spiller v. Mackreth – court says M didn’t demand to be allowed to enter and use the property. Merely said "leave or pay me rent", technically there was no denial of M's right to enter.

k) When a co-tenant gives a lease for use of the whole
i) Swartzbaugh – H had the right to possession of the whole, which he leased. That is ok. But that means the other co-tenant doesn't really have the ability to use the land anymore, so could try for ouster and get rent, or for a partition, or other alternatives (10/21 notes)

7) Landlord-Tenant Law/Leasehold Estates

a) A contract between a landlord and tenant is still part of the estate system. It is formally a nonfreehold estate, the lowest form. It is a personal interest in real property.

b) All leasehold estates have three common features
   i) Estate in the tenant
   ii) Reversion in the landlord
   iii) Right of exclusive possession and enjoyment of the land in the tenant
   iv) Many have a 4th – a personal contract between the parties (not required)

c) There are 4 types of leasehold estates – distinctions are murky
   i) Tenancy for a term of years – terminates at a specified time
   ii) Periodic tenancy – repeating from period to period
   iii) Tenancy at will – no fixed end – either can terminate
   iv) Tenancy at sufferance – if lease ends and tenant holds over, landlord can evict or bind tenant to a new lease.

d) The Four Types in detail
   i) Tenancy for term of years – must be for a fixed period, must terminate automatically at the end of the period, may terminate prior, can be for a year, less more, a month, two, whatever. No notice of termination is necessary, and the death of either party has no effect on it.
      (1) Statute of Frauds applies to all leases, but especially to Term for years – it must be in writing. Although most states permit them for leases less than a year. If it is oral, then it is presumed to be a tenancy at will.
   ii) Periodic Tenancy – for a fixed but repeating period of time (month to month, year to year)
      (1) If notice of termination is not given, lease automatically renews.
      (2) Notice of termination –
         (a) common law – must give 6 months notice
         (b) Modern – usually 30 days notice.
      (3) Death has no effect on the tenancy
   iii) Tenancy at Will – no fixed period, endures as long as the tenant and landlord want. Ends when terminated by one party or when one party dies.
      (1) Garish – Lease was for $100/mth, T had power to terminate. L dies. What is it?
         (a) If a tenancy at will – then lease terminates upon L’s death.
         (b) If life estate terminable – then only T has the right to terminate it, L’s death doesn't matter. (rule used to be that if one can terminate other must be able to, but that was because of livery of seizent, which isn't around anymore) So the court says it is a life estate terminable
         (c) Interpret to best carry out intentions of the parties.
         (d) Is this fair? Will an unsophisticated landlord be stuck for life?
            (i) Here it seems it was for a friend – fair.
      (2) Problem, pg. 450, notes 10/27
   iv) Tenancy at Sufferance – not really a tenancy, holdover tenant can be treated as a trespassor or L can consent to new tenancy. If a L accepts rent of a holdover tenant, most jurisdictions say they have made a periodic tenancy for one year.
      (1) Crechale v. Smith – Once the landlord decides to treat the tenant one way, can't change his mind and treat other way.

e) Duties Landlord and Tenant Owe to One Another
   i) Duty to deliver possession
(1) Right of possession – Landlord has implied duty to deliver RIGHT
(2) Actual possession – Tenant has duty to oust trespassors AFTER he is in actual possession, but what about delivery of actual possession?
(a) English Rule – Implied covenant that L deliver actual possession
   (i) Pros – There is a closer relationship between L and the holdover tenant. Easier for L to oust. More fair, T wouldn't sign lease if knew there was a holdover (reflects reasonable intent of parties)
   (ii) Cons – Makes it hard to lease while there is still a tenant, because that tenant could possibly holdover.
(b) American Rule – Tenant has RIGHT to possess from L, but must take ACTUAL possession himself.
   (i) Pros – Wrongdoer is the trespasser. It would be unfair to place the burden on the landlord when he is the innocent party. Most states have rules that allow a tenant to evict a holdover tenant.

f) Subleases and Assignments
   i) Sublease – from one lesee to another of less than the entire lease
   ii) Assignment – from one lesee to another of everything the party had left in the lease.
   iii) Distinguished by two approaches
   (1) Whether the lesee has conveyed less than their entire interest
   (2) Look to the intent of the parties – what words are in the document? Context of the document?
   iv) Privity – 2 kinds
   (1) Estate – privity with some property law interest with someone with a mutual, successive relation to the same right of property
      (a) All subtenants (sublessees or assignee) are in privity of estate with the landlord
      (b) In a sublease – the lesee has given part to the sublesseor, and retains a partial interest, so the lesee still has privity of estate with the landlord
      (c) In an assignment – the lesee has given up everything to the assignee – so no privity of estate with the landlord anymore, because the lesee has no property interest in the land.
   (2) Contract – privity between two people who have a contract with eachother, the parties to the original lease.
      (a) The landlord and original lesee – Privity
      (b) Lesee and sublesseor – Privity
      (c) Lesee and assignee – Privity
      (d) Landlord and subtenant – NO privity
   (3) Ernst v. Condit – uses property theory (although they call it contract theory) rules that a lease an assignment, even though the parties called it a sublease. Says that he transferred the entirety of what he had, so no more privity of estate. (Notes at 10/28, pg. 500ish)
   v) Restraints upon Alienation – what if a L says T must get permission before subletting... L refuses all subletters?
   (1) Majority rule – Enforced regardless, Alienability is good, but contractual limits are generally enforceable to protect a landlord's interest
   (2) Minority Rule – Enforced only if the lessor has a commercially reasonable objection to a subtenant (would a reasonable person say it would be a bad decision to lease to this subtenant?) (KENDALL, pg. 490)
      (a) Lease as a conveyance – a restraint is bad, should strictly construe
      (b) Lease as a contract – emphasis on the good faith and fair dealing implied in contracts between parties. Fair to say you can withhold approval if there is a good reason.
         (i) Four Counter Arguments to the Minority Rule
            1. Lessor is owner, should be able to pick tenants (PROPERTY)
a. Not an absolute right, L has an obligation to mitigate, and a commercially reasonable rule maintains his interest.

2. Could have bargained for a reasonableness clause (CONTRACT), and court shouldn't rewrite intention of the parties.
   a. Aren't rewriting, merely recognizing duty of good faith, which is implied in all commercial contracts

3. Court shouldn't depart from common law rule (JURISPRUDENCE), stare decisis
   a. Stupid! World changes, contractual nature of leases has changed, law should change too

4. Public policy – L has a right to get the benefit of increased property value (ECONOMIC FAIRNESS)
   a. He will when he gets the property back.

  g) Berg v. Wiley – abandonment, self help (pg. 500, Notes 10/30)
  h) Abandonment – What must a L do if a T truly abandons a property?
     i) Three Options under Common Law
        (1) Accept the surrender and relieve the T of further liability
        (2) Retake possession of the premise and release it to mitigate
        (3) Do nothing and send a bill, sue at end to recover (not allowed in most states anymore)
     ii) Current law – most states say treat T's conduct as anticipatory breach, accept the surrender and then sue for damages. L has to at least attempt to mitigate the damages (Sommer v. Kridel) (see notes on 11/5) IN A RESIDENTIAL CONTEXT
        (1) Places the burden of proof of mitigation on the landlord
            (a) He knows if he tried and has the evidence.
            (b) Fair?
               (i) Economic efficiency – puts the land to best use
               (ii) Landlord isn't being forced to do something he wouldn't do. Geared towards commercial business.
               (iii) But L is also being doubly punished – a breach and then he has to bear a burden.
     i) Duties, Rights and Remedies of Landlord and Tenants
        i) When can a landlord and tenant sue each other?
           (1) Covenant of quiet enjoyment – implied by law, binding on commercial and residential leases
              (a) L guarantees T will not be disturbed in possession by any other with superior legal right to possession. L will defend T if it does happen. (Related to the implied duty to deliver legal possession)
              (b) L covenants that L will not evict T, either actually or constructively.
                 (i) Constructive eviction – substantial interference with the use and enjoyment of the property that occurs by an act/omission by the landlord or his agents. (ex. Failure to heat)
              (c) Reste Realty case
                 (i) Not a permanent condition – but it was, wasn't always flooded, but continued to flood when rained. "permanently recurring"
                 (ii) T took premise as is – no, the driveway isn't party of the premise under the lease, and she signed the second lease thinking the problem would be fixed.
                 (iii) Didn't complain soon enough – She did. She stayed while they promised to fix, and then when they didn't she left.
           (d) Problems on pg. 531, 11/4 in notes
           (2) Implied Warranty of Habitability – if it isn't livable
(a) Common law rule was that L had duty to deliver actual possession, but didn't have to be livable, changed because L's are now in the business and tenants aren't used to fixing things.
(b) Don't have to abandon the property
(c) Applies only to residential leases
(d) Can't be waived
(e) IWH deals with health and safety issues, covers "essential facilities"
   (i) Hilder court adds more rules
      1. Says violation of housing code is prima facia evidence of breach
      2. T must notify L and give L chance to fix.
      3. Regular contract remedies are available for T
      4. T can get damages for discomfort and annoyance
      5. T can withhold rent, implies abandonment not necessary
      6. If T notifies L of defect and L fails to fix in a reasonable time, T can repair and be reimbursed by L.
      7. Punitive damages available if willful and wanton action by L

PART 3 – Other People's Property – How 2 Adjacent Lands can affect eachother.

1) Nuisance

   a) Judgmade tort doctrine that regulates competing uses in land – use of your own property unreasonably to interfere with another's lawful use of their land
   b) Almost always conceptually messy!
   c) 2 kinds of nuisance (Morgan v. High Penn, pg. 747)
      i) Per se – always a nuisance, regardless of location
         (1) Extremely dangerous to everything around it OR
         (2) Illegal activities, immoral or indecent
      ii) Per accidens
         (1) Become a nuisance because of the location, the way it is used, built, or operation
         (2) Not unreasonably dangerous.
   d) Can be private or public
      i) Private – Intentional (if intentional and unreasonable under the circumstances), or unintentional (negligent, reckless or ultrahazardous)
      ii) Public – Affects the public at large vs. something that affects the use of a specific parcel of land.
   e) What makes the use of the land unreasonable? Two approaches
      i) Unreasonable as an order of magnitude
      ii) Unreasonable because the gravity of the harm outweighs the utility of the conduct (Restatement test)
   f) Estancias v. Schultz – the air conditioner case. Court says to get an injunction you must examine the
      i) Four Factors to Balance
         (1) Likelihood of the success of the case on its merits
         (2) Harm to the Δ
         (3) Harm to the π
         (4) Harm to the public
      ii) The majority rule means – balance factors to get an equitable decision. If the harm to π is significantly less than to Δ by stopping, then we don't want to stop. Makes economic sense to continue
      iii) In determining nuisance we balance the equities either in determining the unreasonableness (Rest.) or in the remedy (majority)
(1) Restatement rule – Even if there is a harm, if the balance is in favor of the other, then no remedy
(2) Majority rule – If there is harm, then the other party can get remedy, even if his harm is lesser than the harm to the other party. (notes 11/6)
(3) Notes 11/6 – externality, cost, ex post ex ante
(4) Economic, distributive, moral implications

**g) Types of Relief Available**

i) **Estancias** – Granted an injunction
   (1) Π essentially gets to choose. Be happy with the injunction, or could accept some payment from Δ.
   (2) Not economically efficient – more damage to the company than to the homeowner, but could lead to an efficient result

ii) **Boomer v. Atlantic** - *pg. 759* granted temporary injunction, to be lifted when the defendant paid the π permanent damages (a conditional injunction)
   (1) But π doesn't get to choose – they must take the money. Δ has the choice here, can either deal with the injunction, or can pay off π.
   (2) Compensation is measured through a market based approach.
   (3) Economically fair, but could be undercompensation, not compensating for the loss of enjoyment of the yard.
   (4) Problem – permanent damages paid means Δ has no incentive to fix the problem. Already paid “total” damages. Also dissent says it licenses a continued wrong.

iii) **Spur v. Webb** – pg. 766 – Grants injunction, but forces party who "came to the nuisance" to compensate the nuisance for having to move.
   (1) Coming to the nuisance
      (a) An existing community of sensitive users, place a nuisance in the middle. The nuisance COMES TO the area of sensitive people. Easy case – fault is the person who came to the sensitive area, evict.
      (b) Where a sensitive party moves right next to a pre-existing nuisance. Harder case, because it wouldn't be a nuisance if the sensitive party hadn't come there. First in time issue
      (c) If you "come to the nuisance" you assume the risk, but if the nuisance was not foreseeable, then coming is not unlawful.
   (2) Fairness
      (a) Spur didn't do anything wrong. Del Webb came to it. But the court grants injunction. Why? Because of the people Del Webb brought with them. Unfair to the public interest. There is a city now.
      (b) So the court issues the injunction, but then requires Del Webb to pay Spur for the cost of moving or shutting down.
         (i) The burden is not entirely on Spur
         (ii) Limited to cases where the nuisance creator could foresee the nuisance.
         (iii) Fair? Seem so. Del Webb got the land cheap because of the nuisance, shouldn't be allowed to get double benefit (cheap land and no nuisance)

**h) Quick overview of Remedies**

i) Abate the activity by injunction relief – the typical case
ii) Continue the activity if you pay damages – socially important nuisance, necessary, balance weighs in favor of nuisance, but unfair to punish the other
iii) Continue by denying all relief – where one comes to the nuisance
iv) Abate activity, but other party pays damages for the cost of abatement.

2) **Servitudes**

a) 2 Types
   i) Easements
(1) Easements
(2) Profits
(3) Licenses – not technically an easement, but similar

ii) Covenants
(1) Real covenants
(2) Equitable servitudes

b) Easements
i) Easements (little e) – gives someone a right to enter on land of another and **USE** it
ii) Profits – gives someone a right to enter on land of another and **TAKE** something from it.
iii) Both are legal interests in land, but aren’t estates in land
iv) Classified in three ways by law
   (1) Basic dicotomy – must be either an
      (a) Easement appurtenant – when in creation it is attached to a piece of land other than the one the easement is on, and it benefits the owner of the other piece of land.
         (i) Requires two pieces of land
             1. The dominant tenement (land whose owner is benefited)
             2. The servient tenement (land burdened by the easement)
         (ii) Can’t be detached from the dominant tenement without consent of BOTH owners
      (iii) COURTS PREFER EASEMENTS APPURTENENT)
   (b) Easement in gross – intended to benefit the owner of land, but intended to exist without a dominate estate
      (i) X owns an easment, not by virtue of owning land, but owns it as a person (ex. – X has a right to go onto Y’s land and pick apples)
         1. X is the dominant tenant *but no dominant tenement)
         2. Y is the servient tenant and his land is the servient tenement
      (ii) Typically a profit, but could be an easement
      (iii) Can be alienated without consent of the servient tenant
   (2) By means of creation – by how it was created
      (a) By prescription, by express provision, by implication, by estoppel, by eminent domain
   (3) By the difference between easements and profits (definitional)
      (a) An easement gives the owner only a right to use land with no right to take anything from it
      (b) A profit allows the owner to take something from the land and includes an implied right to use the land to the extent necessary to be able to take from the land.
   v) Willard case (pg. 785, notes 11/12) – an easement can be reserved in a 3rd party – sold the land, with an easement for the church to use the lot.
   vi) Licenses – an alternative way to get the same result as an easment, but it is not an interest in land, only a right to use land.
      (1) Oral licenses are enforceable
      (2) Permission to do something on someone’s land
      (3) A defense to trespass
      (4) Revokable at any time
         (a) Unless it is connected with an interest in land (license to enter and hunt – have a profit, with an implied license to enter, can’t revoke that license)
         (b) Can’t revoke if estopped – equitable discretion of the court.
         (c) An irrevokable license is functionally the same as an easement.
   vii) Easement Cases
      (1) Holbrook v. Taylor – H has land, T bought some to build house, asks H if he can use land as access road, H says yes. H later blocks road, T sues.
(a) Easement by estoppel – blocking the road is inequitable, H would be unfairly enriched by barring T's use. T had reliance on the use of the land.
   (i) Permission plus substantial investment is an irrevocable license. H can't take away the easement. Estoppel easements last as long as there would be an injustice if it were taken away – i.e. as long as the investment is present, if the investment is gone, no reason for estoppel.

(b) Argues Easement by prescription (like by adverse possession) – court says no. Need hostility for prescription – no hostility, or adverse possession, not continuous use.

(2) Implied Easements – not in writing, implied by circumstance, no statute of frauds, arise out of division of one plot into smaller plots. Must show that both pieces of land were part of one plot owned by same person at one time.

(a) Quasi Easements – easement implied by an existing use (Van Sandt)
   (i) Van Sandt – Sets out test for whether an easement is implied – look at the 3 factors together.
      1. The Factors
         a. Is the use of the land apparent?
         b. Is the use continuous or permanent?
         c. Is the use of the land reasonably necessary for the enjoyment of the quasi dominant tenant?
      2. The purchaser who is arguing no easement – says it wasn't recorded.
         a. A quasi easement doesn't have to be recorded. Can't be! Also, purchaser had notice – he knew he had plumbing... the existence of his sewer is notice.

(b) Easements implied by necessity (problems, pg. 810 what do you need 11/19 notes) It will end when the necessity is gone.
   (i) Other v. Rosier
      1. To show easement by necessity
         a. Tract must have been divided so a portion of the tract is now deprived access to a road
         b. Must be necessary to go through the alleged servient tenement to get to the dominant tenement
      2. In this case O couldn't show that his land was landlocked when it was originally sold from the original parcel. Basically loses because his evidence wasn't good enough (COULD HAVE WON BY ESTOPPEL – but council missed it, or could have raised quasi-easement, based on prior existing use)
      3. Easement by prescription
         a. Not here – R gave O permission to use the land, and O's use didn't interfere with R's use.

Easement by prescription
(1) Gives a party a right to use by long adverse use, generally like adverse possession, but hostility and exlusivity differ
   (a) Hostility – means use in absence of license or permission, hostility to owner's wishes to keep you from using the property, not hostility to actual ownership
   (b) Exclusive use – nature of easement is shared, exclusivity means your claim is different from the person you share it with

(2) To stop a prescriptive easement – either physically stop the use, or stop by revoking license.

ix) Bayhead – town trying to keep people from out of town off the beach
(1) Foreshore and water – publicly owned
(2) Dry sand and land with road access to sand – privately owned
(3) Public wants an easement to cut through the private land and dry sand to get to the wet sand and water.
(4) Public also wants easement to use dry sand when incident to enjoyment of wet sand and water.
(5) Court rules that the public must have access to the wet sand, but can’t use it wherever they want. Must use the roads – makes them quasi public. When the dry sand is essential to the enjoyment of the wet sand, also ok to use.
(6) Okay? Seems like a big intrusion onto the private right to use land and exclude who you want.
(7) Potential remedy – open up the “membership” to the public.
   (a) This is really an easement by necessity, which shouldn’t require compensation. (notes on 11/19)
   x) Assignability and Transferability
      (1) Appurtenant – can’t be detached without permission from both D & S
      (2) In gross – freely alienable
         (a) Recreational personal easements in gross are generally not assignable
   xi) Affirmative and Negative Easements
      (1) Affirmative – allows holder to do something on another’s land
      (2) Negative – takes away from an owner of the servient state the right to do something
         (a) Example – A agrees not to build a building on land he owns, so as not to obstruct B’s view.
         (b) Court’s have been unwilling to expand negative easements
   c) Covenants
      i) Real covenants – enforceable at law, but very messy
      (1) An agreement between landowners that one will or will not do something to their land
      (2) They run with the land, and are enforceable by assignees
      (3) Four Requirements for Running with the Land
         (a) Agreement must be on paper
         (b) There must be intent for the covenant to run with the land
         (c) Must touch and concern the land
         (d) Must be privity of estate between the parties.
            (i) A successive relationship to the estate in land from one of the original parties.
            (ii) Horizontal privity – analogus to privity of estate between the grantor and grantee, B’s land must be granted to A, then A can give back to B.
               1. Need horizontal privity for the BURDEN to run
            (iii) Vertical Privity – required for all covenants to run
               1. For burden to run, assignee must have estate of same derivation that assignor had
               2. For the benefit to run, all that is necessary is that some part of the estate is given to the assignee
      (iv) Example – House on A’s land, B promises to A not to build a factory on B’s land.
         1. A and B have horizontal privity and are in privity of contract and estate.
         2. Assume A conveys the land to D. A had the benefit of B’s promise. Does the benefit run to D?
            a. D and B are not in horizontal privity. But A and D are in vertical privity, which is all that is needed for benefit to run.
         3. Assume B conveys the land to C. Does the burden run to C?
a. B and C are in vertical privity, but C and A are not in horizontal privity – so no, burden does not run.

(e) Under the restatement approach, privity is not required.

(4) Real covenants are actions at law. A party can only recover damages.

ii) Equitable Servitudes – an action in equity, remedy is injunction

(1) Four Requirements
(a) Must be a writing
(b) Must be intent
(c) Touch and concern
(d) NOTICE – must be notice in the deed or writing of the restriction, if you take with notice, then it isn't fair to allow a violation. (Under the restatement approach, there is no Real covenant, all are equitable servitudes)

(2) Tulk v. Moxhay – old case that first came up with a way around the strict rules of real covenants
(a) P sold to E, with a covenant that E would not cover a garden. E sold to \( \Delta \), \( \Delta \) knew of the covenant, although it wasn't in the deed. \( \Delta \) tries to cover garden, P sues. P doesn't want damages, wants injunction.
(b) Court says that \( \Delta \) knew of the covenant and is trying to hid behind the technicality of the law to avoid it, which is unfair.
(c) Allows the injunction

iii) Potential of Covenants and Limits Under the Law

(1) Violation of a constitutional right
(a) Shelly v. Kramer – strikes down a racial covenant.
   (i) Strikes it based on theory that a court enforcing it would be like a court making the rule. 14th amendment issue. But that would have severe implications – courts enforce all rulings on all their decisions, makes anything a state action
   (ii) So it has not been read that broadly
   (iii) Could just argue that it violates a fundamental concept of freedom of alienation. We don't like restraints upon alienation, this is one.

(2) Private Communities – what rights do they have to burden their members?
(a) CA rules that covenants will be upheld in private land use situations where they are not unreasonable.
   (i) Justifies by 4 reasons
      1. Says litigation costs would be high if could sue every time
      2. Conserves the expectations of the members
      3. Policing costs would be high
      4. Protects the social fabric – upholds a written instrument, settles expectations of the community.

a. Dissent
   i. No social fabric interruption – these are cats in the home, don't have any effect on the outside area, or on the neighbors.
   ii. Not a mundane issue like the color of a door, pets are a quality of life issue
   iii. Conceptual objection – "a man's home is his castle", home ownership is central to the American Dream and American society. Basic right of humanity to do as we please in our own homes.

3) Zoning
a) Big Questions
   i) To what extent do we want zoning?
      (1) How much authority over controlling land use can we vest in zoning boards? *CONSTITUTIONAL QUESTION*
How much authority should we vest in zoning boards? *POLICY QUESTION*

b) Village v. Euclid (pg. 960)
   i) Uphold zoning regulations
   ii) Illustrates the most common type (even called Euclidian zoning) – by uses, by heights, by area. The use classifications are inclusive, lowest to highest.
   iii) They sue, attacking the entire statute, saying it is unconstitutional
   iv) Court says zoning is ok.
      1) Ideas behind it are good – makes sense to separate residential areas from commercial areas from industrial areas.
      2) Analogy to nuisance law
      3) Concerned about "the children" – wants to protect the single family home.
      4) Rests on the social thoery that separation of uses, single family home, low-rise developments, medium density of population are good things
         a) Maybe not though – more cars, traffic, more suburban, "small town values", perhaps aren't all great

c) Nonconforming Uses
   i) What happens when you have a pre-existing use and then a zoning law is passed that makes the use illegal? Can the new law just make the "nonconforming use" go away?
      1) Amortization – phases out the nonconforming use over time
         a) The PA court says no, it is unlawful and you can't control a pre-existing use unless it is a nuisance, illegal, abandoned, or taken with a payment
         b) Minority says no, amortization should be okay, but the time period should be reasonable to allow them time to get out.
         c) Policy perspective
            i) Good – times change, areas change, what used to be industrial might be residential...
            ii) Bad – unfair to the owners, they didn't do anything wrong. Even if you give them a long time to get out, they are still being harmed, even if the harm is lessened.
      d) Today, most courts uphold amortization if the period is long.

d) Aesthetic Zoning
   i) Ladue!
      1) House case – want to build "ugly" modern house in area with old colonial type style home. Board says no – can't build it. Why? Property values would be effected, against the "general health and welfare"
      2) Homeowner's make three arguments
         a) Zoning board creation is unauthorized
            i) Says it is beyond the power of the statue. But the court says no. The purpose the statute is to protect the general welfare and ensure property values – this justifies the creation of a board to enforce that.
            ii) Using aesthetic factors to determine what can be built is an arbitraty exercise of police power – the Court says no, here you are taking asethetic factors into account where there is a clear defined type in the area. It isn't the sole factor being used, the court argues the main factor being used is the effect on property values.
            iii) Board authority is an unconstitutional legislative deligation of the law making power. No, the court just says it is ok. String cites.
      3) Overall the court is saying that preservation of value and beauty is an acceptable reason for zoning.
   ii) Anderson case
      1) Court says here the standards are too vague. The law is consistent with Ladue, that aesthetic zoning of some kind is allowed, just not in this case.
         a) Why different result?
No consistent character here, Ladue had one.

Harmonious is the standard here, what does that mean? In Ladue, the standard was "grotesque"... much easier to determine what "grotesque" is, and it is a higher standard to meet.

iii) Ladue again – the signs case

1) Constitutional right of free speech was being suppressed by the ban on signs of a political nature.

2) While some type of restrictions are okay, a general ban is unfair.
   a) Overregulates – can't just make a widespread ban. Can't just ban all signs. Can't restrict information flow, it is an expressive medium
   b) Underregulates – can't restrict too little. Can't restrict just "government speech", must also restrict other types of speech on same level. Or not just commercial area, but also residential.