

A FIRST LOOK AT PROPERTY

I. Acquisition of Private Property Rights By Means Other than Voluntary Transfer

A. Possession

1. To acquire interest in *res nullius* requires occupancy, with ferae naturae wild animals that means capturing and killing. Pursuit is insufficient to establish ownership. This encourages labor, investment, and competition. Pierson v. Post
 - a. Escaped wild animals are ferae naturae.
2. Accession doctrine: ownership of the land means ownership of that on the land; ownership of one thing established by ownership of another, *ratione soli*.
3. Fair business competition is not illegal but malicious sabotage is. Keeble v. Hickeringill and Schoolhouses example.
4. State does not have inherent ownership of ferae naturae just because it is a State; only if it has invested labor and expense. Commonwealth v. Agway.

B. Possession and Jus Tertii

1. Possession consists of dominion & control over the property with intent to exclude others.
2. Removal from one's property is effectuated through an ejectment action. If P ejects successfully, P is entitled to recovery of possession & damages.
3. A prior peaceful possessor is usually allowed legal protection of his land against the whole world of trespassers, except the rightful owner. Tapscott v. Cobbs.
4. **Jus Tertii**
 - a. A defense referring to the right of a third person. A legal fiction.
 - b. Doctrine usually operated when a trespasser sued a prior possessor. The PPP must have physical control over the property and intent to assume dominion over it (more than mere discovery).

C. Adverse Possession

1. In General
 - a. When a non-title holder is engaged in occupation or use of property belonging to another for a period of time, the possessor may be able to beat out the owner and gain good title to the land.
 - b. Until the requirements have been met, the adverse possessor is a trespasser against whom the owner may seek ejectment.
2. Policy Considerations
 - a. Punish lax owner, reward diligent possessor, clear up title to determine status.
3. Elements
 - a. **Time**
 - (1) All five elements must occur for the entire SOL period.
 - b. **Actual**
 - (1) Depends on the nature of the property and the uses to which it would be put by a legitimate owner.
 - (2) Ewing v. Burnet possessor didn't need to actually live on a gravel lot to claim adverse possession. He used it in a manner in which a legitimate owner would, especially by paying taxes, improving the land, and leasing it.
 - c. **Exclusive** (claim of right)
 - (1) Adverse possessor must be only possessor of the land, determined with regard to the nature of the property. The use must be as exclusive as an owner's would be.
 - d. **Continuous**
 - (1) Property must be used in as continuous a manner as property permits - for some properties, seasonal use may be sufficient. Reasonableness standard.
 - (2) If there is a real interruption *by the owner* the timing for the SOL begins again. An unreasonable time gap also renews SOL timing.
 - (3) In Mendonca, Ps asserted possession over strip of land that D had used briefly for storage. Since D was owner, Ps hadn't yet reached adverse possession.

- e. **Hostile**
 - (1) Hostility is presumed via lack of owner consent. There is no hostility if there's estoppel (reliance) or permission.
 - (2) Two Schools of Thought
 - (a) Old Rule
 - i) Must believe subjectively and erroneously that the property belongs to you (i.e. improper title); or must know the land is not yours and you have no permission.
 - (b) Modern Rule
 - i) Hostility is presumed if the possessor doesn't have owner permission.
 - ii) In Patterson v. Reigle:
 - f. **Open and Notorious**
 - (1) Possession must be in such a manner as to give reasonable notice to owner that possessor is possessing, thus giving owner the chance to defend his property rights. Objective: *should owner have known?*
 - (2) In O'Keeffe v Snyder: painting hidden for years; although she knew it was missing, she didn't know who had it; had no one to defend her rights against.
4. Statute of Limitations
- a. The statute must be examined to determine the relevant time span and the provisions regarding tolling and disability (incl. age).
 - b. **Tacking**
 - (1) Subsequent adverse possessors may tack if: **privity of estate** and **no gaps**.
 - (2) Privity may be established by intent to transfer the land or the subsequent possessors not being hostile to each other. The subsequent possession may not occur by happenstance for there to be privity. Belotti v. Bickhardt.
 - c. **Tolling**
 - (1) Designed to protect those with legal disabilities from losing their land (i.e. infants, mental incompetents, prisoners).
 - (2) Disability must have been present at time of accrual to receive the benefit.
 - (3) Death ends the tolling period and the heir gets the benefit of the toll.
 - (4) If the disability ends, the owner is given a set period or the full SOL time to bring an action against a possessor.
5. Adverse Possession of Goods
- a. **Replevin** action, not ejectment.
 - b. **Discovery Rule:** given the *nature of the possession*, SOL begins running at the point when owner *knew or should have known* in the *exercise of due diligence* both possessor's possession and identity of possessor. O'Keeffe v Snyder: the discovery rule fulfills the open and notorious requirement.

II. Ownership of Lands & Natural Resources: Rights & Remedies for Their Protection

A. Basic Building Blocks

- 1. An **injunction** for trespass is useful to stop the trespass, encourage settlement, and prevent a windfall for P.
 - a. In Geragosian v. Union Realty Co., D had water pipe running under P's building, but there were no actual damages and an injunction was granted.
- 2. Trends
 - a. At Common Law, property rights in land extended to the center of the Earth and to the periphery of the universe - form of accession doctrine.
 - b. Modern law modifies the doctrine to take account of public interest in the use of airspace and mines.
 - c. Edwards: P sues D in trespass b/c D operates cave partially under P's land. Majority used accession doctrine and favored P. Thus P would negotiate with D to get part of the proceeds - from \$0 to the amount that D brings in from showing P's part. Dissent noted the only entrance was on D's land and applied *res nullius* and labor theory.

B. Natural Resources - Water Law

1. **Riparian System: Eastern US**
 - a. The traditional system: ownership of the land bordering the water source determines ownership of the water.
 - (1) Riparian rights pass with land; usually land & water rights are unseverable.
 - (2) Rights aren't quantified and riparian rights aren't affected by disuse.
 - b. Riparian Restrictions on Use
 - (1) **Natural Flow Doctrine**
 - (a) A riparian owner can remove water as long as it does not diminish natural volume, flow of the stream, or its quality.
 - (2) **Reasonable Use Doctrine** (Majority)
 - (a) Balance the interests and needs of the various riparian owners (upstream/downstream). Each riparian is permitted to take a "reasonable" amount of water.
 - (b) Reflects the shift to an industrialized society.
 - (c) In Dumont v. Kellogg, P had dam upstream and D had mill downstream. The upstream riparian was permitted to reduce the natural flow of the stream if reasonable.
 - c. Riparian Prescriptions
 - (1) If one riparian uses more than his fair share for a period longer than the SOL, he may acquire a prescriptive use.
 - d. **Removal from Watershed**
 - (1) Disallowed use by strangers.
 - (2) Traditionally, riparian was forbidden from using water in a way that kept it from getting back to its origin.
 - (3) Now it's permitted if the impact of these actions does not damage other riparians (consider steam engines).
 - (4) In Stratton v. Mt. Hermon School, the diversion of the water from the watershed was fine, if there was no actual damage downstream.
2. **Appropriative Rights System: Western US.**
 - a. General
 - (1) Water is *res nullius* and subject to occupation.
 - (2) First in time, first in right. Primacy is determined by place of diversion, amount of diversion, and date of first diversion. In drought, earliest rights get preference.
 - (3) Appropriative rights may be lost through disuse.
 - (4) Water rights are severable and independently conveyable.
 - b. Restrictions on Appropriative Rights
 - (1) Unlike the riparian system, the appropriative system allows for diversion and removal based on whatever the party is entitled to.
 - c. Determining the Rights
 - (1) General Adjudication *in rem* proceeding permitting all who claim rights in water to state their claim. It results in establishment of the rights of all parties with regard to the water in question.
 - (2) Some jds require issuance of permit before new uses/diversions.
 - d. Changing the System
 - (1) May affect the rights of users, and the state will have to pay them if their individual rights are diminished.
 - (2) In Robinson v. Ariyoshi, the HA Supreme Court announced change to full riparian, affecting many rights. The incorporation doctrine says if the fed govt would violate Bill of Rights by doing it then states can't do it either. 42 USC 1983 created a cause of action if someone under state law has violated federal rights (here 5th Am.).

OWNERSHIP AND TRANSFER

III. Conveyancing

A. Goals

1. Clarity, certainty, ease of transfer, inexpensive, definitiveness

B. Methods of Transfer

1. **Will:** Written instrument taking effect in the future. Revocable.
2. **Deed:** Written instrument taking effect now (usually at delivery). Irrevocable.
3. To transfer land you need:
 - a. **Intent**, which can be satisfied by a collection of documents. Metzger.
 - b. **Names of Grantor and Grantee**
 - c. **Identification of the Property**
 - d. **Physical delivery of the Deed**
 - e. **Grantor's Signature**
 - f. Some states require detrimental reliance.
4. **Oral Transfer**
 - a. Statute of Frauds voids oral transfer unless parol, requiring:
 - (1) Evidence of oral grant
 - (2) Possession of property
 - (3) Reliance on transfer
 - (4) Valuable improvements made to the property.
 - b. In Hayes v. Hayes, daughter-in-law claimed possession but her brother-in-law's kids claimed it was theirs. SOF exception: they'd made considerable improvements, had paid taxes, and had witnesses who heard conveyor say it was theirs.

C. Parts of a Deed

1. Premises Clause
 - a. Names of grantor and grantee, "conveyance" word, geographical description of property, description of the type of interest conveyed.
2. Habendum Clause: "to have"
3. Tenendum Clause: "to hold"
4. Redendum Clause - not in use today; vestige of feudalism.
5. Testimonial Clause: seal and swear.
6. Attestation: signed, sealed and delivered (Delivery and Acknowledgment).

D. Recording Acts

1. Common Law: first in time, first in right.
2. **Types of Recording Acts**
 - a. Race
 - (1) First in time wins. If neither yet recorded, A has unstable common law title. Even if A records after conveyance to B, A wins.
 - b. Notice
 - (1) BFP is first in right. He must be a purchaser and must not have had actual or constructive notice of previous conveyance *at time property is conveyed to him* (he can find out afterward).
 - (a) In Hood, B lost because he hadn't furnished consideration - thus not bfp.
 - (2) Often indicated in the Act by the words "recorded in good faith."
 - c. Race-Notice
 - (1) To be first in right, must be a BFP and must record first.
3. **Types of Notice**
 - a. **Actual Record Notice:** B has checked records and learned of prior conveyance.
 - b. **Constructive Record Notice:** B would have seen prior conveyance in records if he had checked as he should have.
 - c. **Actual Non-record Notice:** B heard about first conveyance (news, conversation).

- d. **Actual Non-record Notice:** Includes inquiry notice. B should have heard about first conveyance - perhaps if he had gone to the property he would have seen a possessor and thus should have made an inquiry.
4. Path of Analysis
 - a. Was A supposed to record? If yes, common law. If no, move to next step.
 - b. Did A record promptly? If yes, common law. If no, next step.
 - c. Is B a bfp? If no, use common law. If yes, move to next step.
 - d. What type of recording act is it?
5. Using the Recording Act
 - a. **Grantee Index:** look at the current grantor to see whether he's in the index as a grantee and who he got it from. Then look up that person to see who they got it from, etc. Go back to the govt or as far as statute requires. Establishes whether there is a break in the chain; if there is, how did the subsequent person get "ownership?"
 - b. **Grantor Index:** Once you've found the beginning, make sure each grantor only granted it to the grantee you have noted. Establishes whether there is another chain that might challenge you.
6. **Shelter Principle**
 - a. **Two questions:** Does B beat A under Recording Act? If yes, then anyone under B beats A. If no, then we ask whether C can beat A in his own right.
 - (1) Race: if B records before A, C is sheltered under B even if C doesn't record.
 - (2) Notice and Race-Notice: If B isn't bfp but records before A, B has bad title. If B sells to bfp C, that doesn't shelter C who must win title in his own right.
7. In Micklethwait both conveyances were good; the court looked to the most innocent party.

IV. Estates in Land

A. Overview

1. Courts generally don't look to the Grantor's intent, but instead fit his wording into a pigeonhole. Discovering intent can be burdensome.

B. Naming Estates - four questions

1. **How long** could your ownership interest last?
 - a. Freehold estate (traditional)
 - (1) Fee: potentially forever
 - (2) Life
 - b. Non-Freehold (ex. LT)
 - (1) Term of years, periodic tenancy, tenancies at will, tenancies at sufferance
2. **How inherited?**
 - a. Simple: no restrictions
 - b. Tail: only within one's bloodline (generally abolished today).
3. **Begins When?**
 - a. Present/immediate
 - b. Future: must wait for an event (i.e. death). Unlike a will, conveyance is irrevocable.
4. **Contingencies?**
 - a. No? Absolute or vested.
 - b. Yes? Can be either subject to a condition (such that you'll never get it OR you have it now but may lose it).

C. Ways of Transfer

1. By deed while living (*inter vivos*).
2. By will upon death: devise land to devisee. If you have devisees, you're dead. Sorry.
3. Intestate: death without a will. Usually goes to heirs or distributee.

D. Fees

1. **Fee Simple Absolute:** "To A and his heirs" or "To A"
 - a. Potentially indefinite. Presumed to be present and inheritable to anyone w/o conditions.
 - b. If G devises a Life Estate to A, A gets a LE and G's heirs get a reversion.
2. **Fee Tail:** "To A and the heirs of his body"

- a. Generally abolished. If B had had no children, estate would revert back to G.
 - b. Modern rule makes an attempted FT an FSA.
3. **Defeasible Fees**
- a. **Fee Simple Determinable**
 - (1) Automatic **reversion** to G if condition breached. SOL begins upon breach.
 - (2) Grantor maintains **possibility of reverter**.
 - (a) This was unalienable, undevisable and inheritable at common law.
 - (3) Freely alienable & devisable, but condition remains no matter who holds FSD.
 - (4) “To A and his heirs so long as/while/until land is used for X, at which point it shall revert to the Grantor.”
 - (5) No problem with RAP since contingent interest is vested in G upon creation.
 - b. **Fee Simple on Condition Subsequent**
 - (1) Not an automatic reversion upon breach of condition; SOL doesn’t start running until G asserts his **power of termination** or **right of entry**.
 - (a) This was inalienable, undevisable, but inheritable at common law.
 - (2) Freely alienable & devisable, but condition remains no matter who holds FSCS
 - (3) “To A and his heirs but if/provided that land is not used for X, then grantor shall have right to enter and declare estate forfeit.”
 - (a) If the right of entry clause is missing, it *should be* FSD; Storke said FSA.
 - (4) No problem with RAP since contingent interest is vested in G upon creation.
 - c. **Fee Simple Subject to an Executory Interest**
 - (1) If condition is breached, B has the right to enter and terminate the estate. Similar to FSCS except the power of termination is created in B, not G.
 - (2) B must assert his right within SOL or A’s title becomes FSA.
 - (3) Freely alienable and devisable but condition remains no matter who holds.
 - (4) “To A and his heirs so long as/while/until the land is used for X; at which time B shall have right to enter and declare estate forfeit.”

E. Life Estates

- 1. G retains the reversion upon granting a Life Estate. FSA = LE + reversion.
- 2. Measured by life in being, usually grantee A’s life. If measured by another’s life: **pur autre vie**: “to A for the life of B.”
- 3. A, who receives the life estate, may also convey a life estate, but it will still last for the span of the original life in being. If A has LE and conveys FSA to B, B has LE for A’s life.
- 4. **The Waste Doctrine**
 - a. As a current life tenant, you have an obligation to the future interest holder not to alter the land for better or worse.
 - b. **Exception**: Ameliorative Waste, see Melms, is allowed if:
 - (1) Radical and permanent change in the property surrounding the LE property.
 - (2) The property is valueless as is.
 - (3) Neither of the above are the LE holder’s fault.
 - (4) Property would be made more valuable by change.
- 5. Life Estate and Adverse Possession
 - a. A has LE and while there, Z gains adverse possession. Upon A’s death, B who has remainder may successfully sue Z for ejectment.
- 6. **Remainders and Reversions**
 - a. “To A for life, then B.” A has an LE and B has a remainder.
 - b. At common law a remainder was only legit if it immediately followed a LE, no gaps in seisin were allowed.
 - c. **Vested Remainders**
 - (1) No condition, besides the death of current estate holder, must be satisfied for the person with the remainder to take possession.
 - (2) Not subject to destructibility, merger, or the Rule Against Perpetuities.

d. **Contingent Remainders**

- (1) Before the person with the remainder may take possession a condition must be satisfied. "To A for life, remainder to A's children that survive him."
- (2) **Destructibility**
 - (a) Intentional: "To A for life, remainder to B if B survives A."
 - i) When A dies, if B is living the remainder vests.
 - ii) When A dies, if B is already dead, the remainder is destroyed.
 - (b) Counter-Intentional: "To A for life, then to B if B is 16."
 - i) At common law, if A dies before B is 16, then the remainder is destroyed and G gets an absolute reversion.
 - ii) Modern law: Grantor gets interim reversion until time passes for B to meet the condition (here, turning 16). B has **executory interest**.
- (3) **Merger Doctrine**
 - (a) When A possesses two consecutive vested interests, the lesser is merged into the greater. "To A for life" with G retaining reversion; if G later grants the reversion to A, A's LE and reversion merge into an FSA.
 - (b) Contingent remainders depending upon the lesser estate are destroyed if they don't vest at the time of grant. G grants "To A for life, remainder to B if 21" and G retains reversion. If G later conveys reversion to A, that merges with A's LE into a FSA and B loses his executory interest.
 - i) This counter-intentional merger is abolished today.
- (4) **Rule Against Perpetuities**
 - (a) "No interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest." Invalidates future interests that vest too remotely.

F. **Concurrent Interests**

	Joint Tenancy	Tenancy in Entirety	Tenancy In Common
Right of Survivorship?	Yes; but can be defeated via severance of your interest while alive.	Yes, by: death of spouse, mutual agreement in writing, divorce (-> tic), execution by joint creditor	No. The interest passes to tenants' heirs or devisees.
Severable by unilateral conveyance?	Yes -> TIC	No	Already severed b/c no rights of survivorship.
Right to Partition?	Yes.	No, not by the unilateral act of a spouse.	Yes.
Requirements	All four unities.	All four unities AND grantees must be married	Only possession.
Required Language	If blurry, it's a TIC. "To A & B as JT, and not as TIC, with rights of survivorship."	"To A and B, husband and wife, as tenants by the entirety."	"To A and B and their heirs." OR "To A and B as TIC."

1. Right of Survivorship
 - a. Upon one tenant's death, his share passes to co-tenants (not heirs). Last survivor gets the whole estate.
2. Right to Partition
 - a. Each co-tenant has right to get a piece of land and get out of the co-tenancy.

3. Severability
 - a. An actual physical severance of land, but each co-tenant retains an interest in the entire estate.
4. **The Four Unities**
 - a. Time: All interests must have vested *at the same time*.
 - b. Title: All interests must be vested *by the same instrument*.
 - c. Interest: All parties must be getting *the same amount of interest* (i.e. FSA, LE).
 - d. Possession: All parties must have *identical rights of possession*.

V. Landlord & Tenant

A. Types of Conveyances - see Tenancy Chart

1. **Estate for Years**
2. **Periodic Tenancy**
3. **Tenancy at Will**
4. **Tenancy at Sufferance**
 - a. **Holdover Doctrine**
 - (1) When the term is over a year, the LL can only holdover the t for a year (periodic tenancy). In Fetting, T overstayed 5 yr lease by 22 days. Court said the use of the holdover doctrine was OK, and created a one year year-to-year periodic tenancy.
 - (2) Holdover must be reasonable.
 - (a) In Hirschfield, Ts overstayed a few hours because the elevators hadn't worked. Although they had to pay damages for that time (often leases ask for double or treble rent), holding over for a year was unreasonable.

B. Termination of Leaseholds

1. **Abandonment and Surrender**
 - a. If T abandons leased premises before the end of the term, L has 3 options:
 - (1) Accept Offer of Surrender
 - (a) Terminates T's obligations under the lease, but past due rent may be recovered.
 - (b) T not liable if LL can't find new T unless T specifically covenanted not to abandon.
 - (2) Refuse Offer of Surrender and sue for rent due
 - (a) LL had **no obligation to mitigate damages** but **acceleration** not allowed so LL sued as rent becomes due.
 - (b) Under this old rule, LL had no incentive to mitigate.
 - (c) Today, LL has a duty to mitigate; in Sommer T leased apt for he and wife but fiancée ditched him and her dad was to pay. T told LL in letter but LL did nothing til the end and sued for full rent. T won.
 - (3) Re-enter Property and Relet as T's Constructive Agent
 - (a) LL is not accepting T's surrender but is attempting to mitigate damages.
2. **Landlord's Remedies for Unlawful Termination**
 - a. **Self-Help**
 - (1) **Distress and Disdain**: Common law allowed LL to use own means of collecting rent from T, such as taking T's stuff or padlocking door.
 - (2) Modern: Self-help is only legal if reasonable and non-forcible. Some courts have abolished self-help.
 - b. **Summary Eviction: Judicial Action**
 - (1) Speedy action. Only issue is LL's right to possession. No other LL claims, no T counterclaim. T can't raise defenses based on LL's breach of covenant.
 - c. **Ejectment Action: Judicial Action**
 - (1) Lengthy trial where all claims, counter-claims, and defenses pop up.
3. **Tenant's Grounds for Lawful Termination**
 - a. Expiration of Leasehold

- b. **Retaliatory Eviction**
 - (1) In Edwards v. Habib, although it was against the DIC, T raised “retaliatory eviction” as defense for non-payment of rent and sought damages. Court held LL can’t terminate as means of retaliation against T for reporting housing violations since that’s against public policy.
- c. **Constructive Eviction**
 - (1) An exception to the DIC.
 - (2) Defense for T’s nonpayment. Every LL has a non-waivable duty to adhere to the **Covenant of Quiet Enjoyment**. LL can’t substantially interfere with T’s use of the premises. A breach of the covenant = constructive eviction.
 - (3) At common law, T can use the defense, but only if T left premises promptly and LL’s breach. Dangerous for T since he’s saying the lease is void. He might be stuck without a home and penalized with damages if he was wrong.
 - (4) **Three Ways of Proving**
 - (a) LL’s Affirmative Action intended to deprive T of use of enjoyment of property.
 - (b) LL’s Affirmative Action not necessarily intended to drive T out, but which foreseeably have that effect.
 - (c) LL’s Inaction where he had duty to act in order to preserve CQE.
 - i) Must show LL’s duty (in Phyfe it was a duty to protect women) &
 - ii) LL’s duty is assimilated to quiet enjoyment (vital utilities, etc.).
 - iii) In Charles Burt, T sued for declaratory judgment that he owed no rent after LL failed to supply utilities and elevator in MA winter. Even though T hadn’t left promptly, constructive eviction defense was not barred and LL broke CQE.
 - a) Procedurally changed CE: allowed declaratory judgment.
 - b) Substantively changed CE: less risky now that T doesn’t have to leave first. But prompt departure is evidence of CE.
- d. **Illegality**: lease violates a housing statute.
 - (1) Five Types
 - (a) Statutory Prohibition of Leasing
 - i) The lease itself is illegal - was lease made before statute passed?
 - ii) In Brown v. Southall
 - (b) Conspiracy to Lease for an Impermissible Purpose
 - i) LL and T knew of illegality.
 - (c) Frustration of Purpose
 - i) Unanticipated supervening change of law makes the lease illegal. LL and T are both innocent.
 - (d) Fraudulent Concealment of Illegality of Lease
 - i) LL knew of illegality, T didn’t.
 - (e) Mutual Mistake of Law
 - i) Neither party knew of illegality.
 - ii) In Walker: lease was for commercial purposes in residential zone.
 - (2) Unenforceability Approaches - depends on jurisdiction.
 - (a) **Bilateral Unenforceability**: neither party can enforce the lease.
 - (b) **Unilateral Unenforceability**: primarily culpable party cannot enforce the lease, but the other party can choose to enforce.
 - (c) **Unclean Hands**: leaves parties where they are and court won’t interfere. Parties must then use self-help.
- e. **Breach of Covenant**
 - (1) **Doctrine of Independent Covenants** at common law: T’s duty to pay rent was not conditioned upon LL’s duties.
 - (2) In Stewart, the LL promised a waterproof basement and a breach of that promise

- didn't justify T's termination of rent payments.
- (3) In Brown v. Bragg the LL could not seek possession due to T's non-payment of rent, but could sue for rent.
 - (4) For one party's breach to release the other, must be explicitly included in deed.
- f. **Implied Warranty of Habitability (Res)/ Fitness for a Particular Purpose (Com)**
- (1) Common law had no implied warranties: *caveat emptor*
 - (2) Modern allows them since it's not practical for T to inspect everything or hire experts. LL knows the purpose of the lease - T's living there. LL is in a better position to inspect. There are implied warranties against **latent defects** (apparent) that existed at the time of lease signing.
 - (3) Unwaivable.
 - (4) In Lemle, the court followed the modern pattern; rat infestation, which was present at time of lease signing, was considered a latent defect.
 - (5) Habitability may be measured by housing codes, Southall, or by common sense, Lemle.
 - (6) **Remedies**
 - (a) Damages
 - (b) Rescission - since breach of warranty looks like constructive eviction, this remedy comports with DIC.
 - (c) Reformation - specific performance, injunction... Doesn't agree w/DIC.
 - (d) Termination of lease due to material breach - easier than proving CE.
 - (e) **Rent Abatement**
 - i) Fair Market Value As Is (w/defect): favors LL
 - ii) Fair Market Value As Warranted - As Is: favors T
 - iii) [(FMV as is)/(FMV as warranted)] x rental rate
- g. **Duty to Repair and Maintain:** events occurring after lease signing.
- (1) Waste doctrine at common law
 - (a) T had duty to rent when property burned down, but didn't have to rebuild.
 - (2) Modern
 - (a) LL has duty to repair and maintain both patent and latent defects.
 - i) Javins noted the LL had duty as defined by housing codes.
 - ii) Didn't follow DIC.
 - iii) Remedy: T is responsible only for the value of the premises in light of the housing code violations; proportional deduction.
 - (3) **Repair and Deduct**
 - (a) T spends his own money to repair, then deducts it from the rent.
 - (b) Not allowed at common law. Modern law is statute or judge-made.
 - (c) Only applies to repairs within your unit; typically only residential leases.
 - (d) Some states set a dollar or percent limitation.
 - (e) Only works if LL had duty to repair and maintain; usually requires notice of and inaction by the LL.
 - (f) T must show LL had reasonable notice and that LL materially breached.
 - (g) Termination of the lease is a possible remedy.

PRIVATE & PUBLIC REGULATION OF LAND USE

VI. Private Nuisance

- A. "An otherwise lawful activity substantially and unreasonably interfering with another's use of land."
- B. **Factors:** (D's use of land must be shown to be unreasonable).
 1. Location of land; zoning
 2. First in time (not dispositive as in piggery Pendoley)
 3. Weighing of interests and type of use; reasonableness of use.
 4. Commercial v. Residential value and efficiency (Boomer).

5. Fault
6. Actual harm
 - a. Can't be speculative, as in Nicholson
 - b. Fear for safety and decreased property value is non-speculative (Needler)

C. Remedies

1. Injunction
 - a. Free rider problem with wait and see Ps
2. Conditional Injunction / Specific Performance
 - a. Either the nuisance will be remedied or possibility of permanent damages (essentially ended up being a taking for private use in Boomer).

D. Damages

1. Loss of market value or loss of value of enjoyment
2. **Coase Theorem**
 - a. Considers efficiency: the non-efficient user should relocate regardless of fault.
 - b. Worries about efficiency and transaction costs - no concern of fault or fairness.
3. **Rabin Theorem**
 - a. Considers fault; second should leave. If non-faulty party moves because it's the more efficient move (less expensive), he will be compensated w/**compensation**.
 - b. Worries about fault balancing with efficiency - no concern of transaction costs.

E. Summary

1. Most courts follow Boomer, separating the issue of whether there is a nuisance from whether an injunction should be issued (instead of damages).
2. In cases like Ferrera where Ps seem to be at fault there is a substantial split in authority. Some make Ps pay and compensate. Others don't require Ps to pay - unconventional and they understand Coase's problem with making them pay (inefficient).
3. Multiple parties on P's side will add difficulty (transaction costs). Spur had one developer acting on behalf of all future Ps - worked better to make them pay there since there was only one person negotiating with Ds.

VII. Easements

A. General

1. Construed in favor of the grantee
2. **Appurtenant**
 - a. The easement benefits its owner in respect to that owner's ownership of land.
 - b. The benefitted land is dominant, the burdened land is servient.
3. **In Gross**
 - a. Does not belong to a person by virtue of their ownership of some land.
 - b. Personal right in property that gives an owner a right to use the servient land.
 - c. Traditionally transferable.
4. **Affirmative / Negative**
 - a. Affirmative permits a non-owner to use the owner's land.
 - b. Negative: restriction on owner's use of his property for benefit of non-owner. Peterson.

B. Methods of Creation

1. **Prescription**
 - a. Similar to adverse possession (same SOL), but with presumption of permission (not hostility) and owner's interruption doesn't break continuity. And must prove owner had actual notice, not just constructive notice.
2. **Express Grant**
 - a. Must be signed by grantor, may be granted alone or along with another interest.
 - b. "Full right of use" - unrestricted easement.
 - c. Owner cannot cause an undue burden on servient estate. Cox.
 - d. If the dominant estate is subdivided, each subdivision has an easement to the extent that the original burden on the servient estate is not exceeded.
3. **Reservation**

4. **Oral Grant + Reliance**
 - a. Without reliance, SOF and recording acts may terminate.
5. **Easement by Implication from a Plat**
 - a. In Putnam, they reasoned that since the easement is reasonably inferable from the plat and the plat was incorporated in a deed, an easement may be inferred.
6. **Easement by Implication from Prior Use**
 - a. Unity of ownership
 - b. Severance created necessity
 - c. Some need (perhaps other alternatives more expensive)
 - d. An apparent and continuous quasi-easement
 - e. Limited to the extent of the quasi-easement at the time of severance.
7. **Implication from Necessity**
 - a. Former unity of ownership
 - b. Severance: implied grant if dominant estate severed first; implied reservation if servient estate severed first. Adams. Courts like to find for grantor.
 - (1) Quasi easement w/implied grant is easiest to imply; then quasi w/reservation
 - (2) No quasi easement w/implied grant, then no quasi w/reservation hardest.
 - c. Strict necessity (NO alternative).
 - d. Limited to what was necessary at the time of conveyance.

C. **Methods of Termination**

1. **Merger**: owner of easement becomes owner of servient estate.
2. **Written Release**
3. **Abandonment** (disuse not enough)
4. **Easement for a Particular Time**
5. **Easement for a Particular Purpose** when the purpose ends.
 - a. Courts won't imply; need specific language. Raphael.
6. **Necessity ceases** (when implication from necessity), i.e. an accessible road is built.
7. **Sale to a BFP**
8. **Adverse Possession**
9. **Reciprocal Easements**: under the theory of dependent covenants, they'd cancel each other out.

VIII. **Covenants**

- A. Whether covenant or equitable servitude only matters depending on the remedy sought.
 1. Covenant must be in writing - seeking damages.
 2. Equitable servitude seeks injunction or specific performance.
- B. **Requirements**
 1. **In writing**
 - a. Covenant only
 2. **Intent**
 - a. Required for both
 3. **Touch and Concern**
 - a. In Eagle the covenant to buy water was not sufficiently tied to the land (esp. since he had his own well and it was not a time of drought).
 - b. Required for both
 4. **Privity**
 - a. Horizontal Privity
 - (1) Required for covenant; four different views. Abolitionist view doesn't require it, nor do equitable servitudes. Tulk.
 - b. Vertical Privity
 - (1) Covenant requires successor have the same estate or estate of same duration.
 - (2) Equitable servitude requires successor have some property interest in same land.
 5. **Notice**

- a. Covenant requires notice for BFP on the burden side.
- b. Equitable servitude also requires notice only on the burden side.

C. Priors / Subsequents

1. Prior grantees generally can not enforce against subsequent grantees since subsequents hadn't made promise yet at time of prior conveyance.
2. EXCEPTION: **Reciprocal Servitudes/Common Scheme.**
 - a. Ex: In Albright, there was a subdivision, which maintains a similar rule. A reciprocal promise was made there to the priors that the grantee would bind subsequents.
 - b. Courts will infer the benefit runs with the land if there are several conveyances of property by the same grantor having the same covenant.

D. Changed Conditions

1. Outside changes not on the actual land are insufficient to end a covenant. In Camelback, there was a fear of the domino effect slowly extending inward if residential property on edge were allowed to turn commercial.
2. Changes within the land may be sufficient to end the covenant if the intended purpose of the covenant is frustrated.
3. Estoppel / Enforcement
 - a. When every person who may enforce the covenant tells you they won't enforce it, and you then rely on that promise. Heavy burden of proof; mere silence insufficient.

IX. Zoning

A. Standard Zoning Enabling Act

1. Local govt has no basis for existence in the federal system therefore it must be authorized by state-wide action. Municipalities may exercise the option to engage in zoning.
2. **General purposes** for which zoning may be undertaken: HMSW
 - a. Not aesthetics: better to focus on something concrete like property values.
3. Examples: height, lot size, density, setbacks, location, type of use
4. Flexibility, Amendments, & **Variances**
 - a. Arises especially when there is a unique hardship.

B. Enforcement

1. Ordinances cannot be arbitrary or unreasonable - HMSW.
2. An ordinance may be unreasonable in fact or as applied.
3. When courts are offended by zoning they look at relation between means and ends
 - a. Substantial relationship between zoning and purpose?
 - b. Legislative intent often receives deference.

C. Zoning In Action

1. Euclid: Landmark case in which the court was deferential to ordinance and legislative judgment. Highlighted municipality's right to regulate community planning and development.
2. Pierro: zoning has to be reasonable, not arbitrary (motel). There, the court noted that the area generally excluded motels, not just this one, due to injury to morals and welfare.
3. Stoyanoff: aesthetic judgments can be made if related to property value. Connect your judgments to property value since property value is valid justification for zoning rationales.

X. Eminent Domain

A. General

1. If **physical occupation**, almost always a taking.
2. If **regulatory**, see Keystone analysis
 - a. Purpose, public benefit, economic impact, reciprocity of advantage, reasonable return on investment, singling out, extent of restriction, etc.
3. **Wipeout?** See Lucas bright line rule.
 - a. Complete wipeout means taking unless nuisance exception.
 - b. **UNIT / DENOMINATOR**: consider what the unit is when analyzing if it's a complete wipeout. Consider Keystone if not a complete wipeout. Do you have all the sticks?
4. Midkiff: Public use is not strictly defined. Goal of redistribution: legitimate public purpose.

PROPERTY: A SECOND LOOK

XI. Theories and Takings Galore

A. INS v. AP

1. Labor theory.

B. Kaiser

1. Bentham: law owes protection of what is expected to be protected. Reasonable investment-backed expectations (combination of labor (IB) and utilitarian theory (reasonable)).

C. Personality theory: people internalize when they are responsible and will take greater care if they own.

1. Hegel

D. Flemming

1. SS is not a property interest: govt gratuity. Protection from arbitrary decisions.
2. The decision was not arbitrary here since the govt had a rational basis for denying the SS: he wouldn't be spending the money in the US.

E. Perry

1. University violated right to hearing; he wasn't informed of basis for termination.

F. Shelley

1. Even though private individual discriminated, state court enforced, thus state action.
2. Court could have just said covenant didn't run, but they ignored the analysis.

G. Shack

1. By hiring migrant workers and housing them on his land he lost the right to exclude people that want to come in and provide basic/vital social services to people essentially being held captive.
2. Similar to relationship between LL and T and LL doesn't have right to exclude a T from having visitors. Here, the court carved out a small exception in this relationship for people bringing essential services.

H. Pruneyard

1. Dueling first amendment rights.
2. This is allowing a permanent physical occupation via continual use, so how is it not a taking?
 - a. Absolutely no diminution in property value. If there had been, D would have won.
3. This is a public place and Ps are not stretching the bounds to which this property is held open to the public (right of access issue - STICKS).
4. If a case is even one step further than this it probably would be a taking.