

What is Property

- **Black's law** - "That which is peculiar or proper to any person; that which belongs exclusively to one. In the strict legal sense, an aggregate of rights which are guaranteed and protected by the government."
 - Supports Blackstone (1st sentence) & Bentham (2nd sentence) (property is autonomous & not)
- **Bentham** – "Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases."
 - Property law is dependent on K & tort law
 - Most academics find this view more accurate
- **Blackstone** – "Property is that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."
 - property is autonomous, K & tort law are dependent on property
 - Lawson <3s this view bc practical
- Property is a 'bundle of rights/sticks'
- Property as a 'roll of toilet paper' ← can divide it up (certain spots w/perforations that rip nicely)
- *Jacques v. Steenberg Homes* – law provides very serious protection for possessory & exclusionary interests in land; sometimes actual harm is not the damage done to land, but loss of the person's right to exclude others from his property; S crossed J's land w/mobile home w/o permission
 - w/trespass – you can get punitive damages w/o actual damages (you don't have to prove damages, just have to prove that someone crossed your land w/o permission)
 - Trespass: (1) don't have to prove damages to have liability and (2) usual rules for injunctions do not apply

What is land?

- *Fisher v. Steward* – honey was on owner's land & therefore owner possesses it; trespassers lose!
 - bee case; guy trespasses & tells owner there are bees in the tree, owner knocks down tree & sells it for honey, trespasser argues it was their honey
- *Allred v. Biegel* – owner of land owns everything on land & under it (you have possessor/exclusionary rights to things that comprise part of land by virtue of owning it)
 - Canoe case; ppl in river see canoe in water & take it, ct held owner of land possesses canoe

Acquisition of Property:

Capture, find, and conquest

- Wild Animals:
 - o Foxhunting
 - *Pierson v. Post* – no one owns wild animals bc they aren't fixed in one place, but landowners have the exclusive right to hunt wild animals/do acts (capture, mortally wound, or kill) to convert wild animal into a legally ownable animal
 - mere pursuit confers no property right to the animal, pursuer must deprive the animal of its natural liberty by wounding, ensnaring, or subjecting it to his control
 - **“Relativity of Title” – Irving Principle** – you can have an absolutely crappy claim to a lawsuit so long as the other person has an even crappier one; only have to show that you are the best claimant (only need relativity of title to decide case)[*Bradshaw v. Ashley*]
 - o Land
 - If no landownership, next best thing is prior possession
 - 1. Land ownership
 - 2. Prior possession
 - o seeing it
 - o touching it
 - o reasonable prospect of kill/capture/wound
 - o capture
 - o mortally wound
 - o kill
 - **^Capture Rule (kill, capture, wound)**
 - mere pursuit does not create property rights
 - o physically holding
 - o **The Ad Coelum Rule:**
 - Traditional Rule: if you own land, you own down to depths (ad infernos) & up to heavens (ad coelum)
 - Modern Rule: Ad Coelum rights are limited (above the land) but Ad Infernos rights (below the land) are unlimited
 - Up: Ad Coelum – air travel is not ‘trespass’ bc not causing injury to landowner’s property
 - o *Hinman v. Pacific Air Transport* – ad coelum rule does not extend to heavens, rather you have rights a certain point above surface that involve your reasonable use (just not all the way to infinity)
 - Below: Ad Infernos – no limit; absolute rights to center of earth
 - o *Edward v. Sims* – caves; E has cave entrance on land & ppl pay to go in it; neighbor Lee argues cave is on his land; E won't give permission for a surveyor, ct rules E must
- Wild Minerals
 - o **Escape Rule – animal ferae naturae - *Hughes v. Reese***
 - wild animals are ownerless until someone possesses them (1st person to kill, capture, wound); but if animal escapes & regains natural freedom (animal ferae naturae) w/o intention of returning (animus revertendi), it is owner-less & anyone has right to kill it/belongs to person who kills it
 - o *Stephens v. Albers* – minority rule – P had business w/silver foxes, Duncan (fox) was somewhat domesticated but ended up escaping & was shot and sold for its pelt, P sued; ct held P wins bc didn't want to discourage fox industry; rule of Capture doesn't apply in this case

- Liquids & Gases (ad infernum) [very specialized law]
 - **Hammonds Rule – gas underground is unowned, like farae naturae**
 - once it's in your pipeline/reservoir, you have captured it & thus it's yours
 - once back in ground/escapes/is released – unowned again
 - *Hammonds v. Central Ky. Natural Gas Co.* - gas company was not liable bc gas was unowned
 - *Lone Star Gas Co v. Murchison* – rejects Hammonds rule bc (1) gas is more analogous to a fox on a long leash bc it's not going anywhere (just in a big cage) & (2) don't want to piss off gas companies w/\$\$\$ at stake
 - Once Natural Gas is extracted from the ground & thus converted to personal property, it remains so even if sotred in underground reservoirs (as long as no leak)
 - *Texas American Energy Corp v. Citizens Fidelity Bank & Trust Co.*
- Lost & Found Property
 - Notes:
 - You do not lose ownership by having non-wild things escape
 - Legal Actions:
 - Replevin – action to recover personal property from someone else
 - Conversion – action to recover value of property from someone else
 - **Nemo Dat CL Principle** – no one can give that which they don't have; transferee's rights derive from the transferor's rights; relies on a 'chain of ownership' (idea that you can go backward through legit transactions to original acquisition)
 - purchase of a possession from someone who has no ownership right to it also denies the purchaser any ownership title
 - *Kunstsammlungen Zu Weimar v. Elicofon* – E bought paintings after WWII, discovered they were stolen from a German museum (K); though E was a good-faith purchaser, he got only what the thieves had in terms of title – nothing
 - Good faith exception to Nemo Dat:
 - Good faith purchasers can get title transfer if purchaser deceived transferor, check bounces, transaction is a cash sale, or delivery procured through fraud
 - Ex. you give watch to jeweler to hold on to but not to sell & he sells it to 3rd party who purchased it in good faith; bc jeweler is a merchant, assumed he gives a warranty that he owns item & thus buyer has possession of the property though seller didn't have right to sell it
 - Finder's property rights vary according to the characterization of the property found, place where it is found is important to determine if lost/mislaid (*Benjamin v. Lindner Aviation, Inc.* – B found \$ behind panel in airplane (B was hired by bank), ct held the \$ belonged to bank because it was mislaid property (put there for safekeeping) & bank was locus owner)
 - **Types of Property: Finder v. Locus Owner** (owner of where property is lost/abandoned/mislaid)
 - **Lost** – did not intend to part w/property (involuntary/accidental); finder wins
 - Exceptions:
 - Trespassers lose (if finder was trespasser, they always lose)
 - Contracts (can K around normal rules of finders; express/implied K)
 - **Mislaid** – intend to part w/possession but not permanently (prob forgot); locus owner beats finder
 - **Abandoned** – intend to part w/possession permanently (intentional/voluntary); finder wins
 - Exceptions:

- Trespassers lose (if finder was trespasser, they always lose)
 - Contracts (can K around normal rules of finders; express/implied K)
 - Prior possessors don't have claims to this
 - **Treasure Trove** – unclaimed gold, silver, currency, etc. intentionally concealed/buried by an unknown owner; locus owner wins
 - *^ these categories are questions of fact bc turns solely on mental states
 - some states have created statutes (WA, NY) that set out a statutory uniform scheme; if you find something – give it to the cops, if prior possessor does not show up w/in a period of time, the finder gets it
 - if you are a finder & you do not make reasonable effort to locate a prior possessor = larceny
- Prior Possessors – finder of lost property has a superior right to the property against everyone *but* the true owner; the rightful owner is the only one that can take it back
 - *Ganter v. Kapiloff*– K owned stamps despite losing them; K was rightful owner
 - Prior possession trumps subsequent possession no matter how prior possession occurred (focus on sequence of possession, not strength of title)(1st to have it has superior title)
 - Exceptions: (subsequent possessors can beat prior possessors when...)(prior possessor can lose legal rights to something when)...
 - 1. Statute of limitations has expired
 - 2. Other area of law (like UCC's exception for good-faith purchasers)
 - *Kotis v. Nowlin Jewelry, Inc.* – UCC §2.403(a) allows purchasers who buy items in good faith to keep possessory rights even at expense of the 'superior' claims of prior possessors
 - A person w/voidable title has power to transfer a good title to a good-faith purchaser for value; by selling something, you can create legal rights that didn't exist (anti-Nemo Dat)
 - *Hauck v. Crawford* – though he sold void title to bad guys, title was purchased by a bona fide good purchaser & thus became valid
 - 3. Abandonment – once you've given it up/abandoned, you're done; even if you change your mind, the person who finds it has possessory rights
 - must show mental state of person who lost the item
 - Must intend to possess the property (mental component); possession of property lost, abandoned, mislaid depends on actual taking of the property w/an intent to possess it
 - *Eads v. Brazelton* – B did not do enough to warn intruders that he had claimed the boat, so he had not effectively taken possession of the wreck
 - Bad shit goes down while in the hands of the finder/locus owner:
 - **Bailments** –voluntary entrusting of property to another, not through ownership, but through possession (must be *mutual*)
 - Often a K, but doesn't have to be – can be “will you watch my laptop” ← but there does have to be some sort of agreement (might just lack consideration)
 - Bailee = person to whom object was entrusted; accepts custody of property
 - Bailor = person who entrusted object to bailee
 - Bailment = object
 - CL Sliding Scale Standard of Care:
 - When bailor benefits = bailee only liable for gross negligence

- Ex. I ask Jeff to watch my computer, Jeff doesn't benefit, just me (bailor) and thus Jeff is only liable for gross negligence
 - When bailee benefits = bailee is liable for slight negligence (bailee must exercise extraordinary care)
 - Ex. mariss borrows my computer, she is the bailee and is liable for slight negligence
 - Mutually beneficial = bailee is liable for negligence; ordinary due care
 - Bailee is strictly liable if misdelivers/refuses to return the property
- Many courts have rejected the sliding scale & use a general standard of reasonable care
- **Bailments occur when bailees take custody of the item. Bailees must know what they possess. If you can see it, you are responsible for it.**
 - You aren't responsible for an item you didn't know about/misled in taking
 - (ie. if a coat had a diamond ring & you held the coat, the bailor can't claim you're liable for the diamonds if you lost the coat)
 - But if you know about the item, you are still liable for it even if you don't know the specific value
 - *Peet v. Roth Hotel Co.* – doesn't matter that Roth didn't know the value of the ring, the bailment was mutually beneficial (Roth took ring as part of business services (goodwill to customers)) and it doesn't matter if Roth made a mistake about its value; as a bailee, Roth is liable for ordinary negligence (ordinary prudent person in same circumstances)
- Bailees are 2nd on chain of title only to owner
 - If bailee is using an item in bailment & 3rd party damages it – bailee may use the 3rd party for damages
 - Bailee would have to turn over damages to bailor though
- If bailee does something w/item outside the scope of the bailment, it is conversion
- **Servitude** – right to do something to someone else's property that would otherwise be a tort; this is a legal relationship, not a bailment & therefore liability doesn't apply
- **Parking Garages** – courts are split as to this classification
 - *Allen v. Hyatt Regency-Nashville Hotel* – Allen leaves car in parking garage & someone stole it, he sued Hyatt on grounds that Hyatt was a bailee & thus should use ordinary care; ct held that bailment was created when owner leaves his vehicle in the custody of the parking garage w/limited access & when he had to give a ticket to the attendant to leave; on proof of nondelivery, patron is entitled to presume they were negligent in letting someone steal the car
- Person improves an item that belongs to someone else
 - **Accessions** – when one mistakenly takes up a physical object & transforms it through labor into a fundamental different object (from mistakes or bad faith)
 - (1) After improvement, who owns the item?
 - Improving it doesn't change title (ex. putting diamond into a new setting)
 - You have to change it so much = full transformation
 - If item no longer exists (consumed/transformed by improvement so much it's no longer recognized), then title changes (ex. gold nugget melted down into statue)
 - (2) Does any money have to exchange hands between the parties?
 - If you can separate the original item from the improvement/transformation – item should be returned to the owner
 - If the item is so transformed that it cannot be separated, and you are a good faith actor, you may keep the item and pay damages to the original owner
 - Figure out which was the principal item (original thing or improvement)

- Owner of the principal item = owner of the object
 - Ex. I take cloth mistakenly and make an elaborate vest – the principal item is clearly the improvement since I have increased the complexity and value of the cloth significantly, I would keep the vest and pay the cloth owner damages
 - Compensate original owner's loss w/o unduly penalizing possessor & w/o conferring a windfall on original owner
 - ^Doctrine of Restitution
 - *have to increase value so much that it transformed item (like 2k → 20k)
 - *Weatherbee v. Green* – D turned tree wood into barrel hoops (way more valuable); ct said D can keep the item though P is entitled to damages compensating him for the value of the trees cut
- Bad faith actors tend to lose their items even if they are significantly transformed
- **2 Tests for Inseparability**: added goods are inseparable from original when...
 - (1) they cannot be removed w/o damage to original good
 - less likely to result in unjust enrichment
 - (2) separation would destroy the usefulness of the improved goods
- *Bank of America v. J. & S. Auto Repairs* – repair shop installed new engine & transmission in an abandoned van. Ct held the engine could be removed & therefore their value should be restored to the repair shop
- **Improvements to Land**: mistaken improvers accidentally build on another's property; CL baseline was that a person who does this would have to remove the building (equitable relief), but now statutes usually govern this
 - Strict Trespass Rule: trespass law is remorseless; all it takes is boundary crossing (encroachment)
 - *Pile v. Pedrick* – foundation over neighbor's boundary by 1 inch is trespass; injunction ← rule
 - *Golden Press v. Rylands* – if injunction will really screw someone over (really disproportionate to its gains), we'll remit you for damages instead of injunctive relief ← exception
- Qualifications that soften the strict trespass rule:
 - Statutes - 3/4 of states say if you're an innocent improver & didn't intentionally do it, you can buy the land at a fixed price
 - Courts – if build in good faith on wrong property, you may be entitled to equitable relief if can remove home w/o damage. If can't remove w/o damage, P can pay fair market value of the structure or, if they refuse, D can pay for the land. If they cannot agree, land can be sold and proceeds divided accordingly (*Producers Lumber & Supply Co v. Olney Building Co.*)

Wild Land

- Originating Land Titles - Types of Ownership
 - Irving Principle (relativity of title) – having a claim against someone else
 - This is not sufficient to constitute you a locus owner for Finder's law, nor for transactions needing title (home ownership)
 - Blackstonian Ownership – having top of the heap claim against anyone else in universe
 - Trace your ownership through prior legally valid transactions to initial grant from sovereign gov't
 - Only gov't can own newly discovered lands; conquer native inhabitants & extinguish their claims (*Johnson v. M'Intosh*)
 - Cherokee Principle – idea that you can have the best, indisputable legal right to the world and you can still end up without it if you don't have an enforcement mechanism
- Proving Land Titles
 - Transactions involving land must be in writing
 - Nemo Dat – 1st in time, 1st in right
 - Actions to reclaim property
 - Replevin
 - Conversion
 - Trespass (protect possessory interest in land from intrusions)
 - Nuisance (protect interest in use of land, not possession)
 - Ejectment (kick someone off of my land when I have the better claim)
 - Do not need to show Blackstonian title, Irving Principle is sufficient for ejectment
 - Action to Quiet Title: action against the world, basically announces that this land is mine; judgment binds everyone who could have had notice of the action
 - Deeds & Transactions
 - Warranty deed – grantor guarantees that his claim is the best – guarantees absolute ownership
 - Risk on seller of prior possessor showing up with better claim
 - Quit claim deed – transfers whatever transferor has, w/o guarantee; grantor transfers all his claims to the land w/o making any guarantee as to the quality of those claims; risk on buyer of prior possessor showing up w/better claim
 - Typically price is lower, buyer can research title cheaply
 - First Transfer Rule – if a grantor makes the same grant to 2 people, then the grantee of the 1st grant has a better claim (embodiment of relative title principle)(losing grantee might have an action for damages against the grantor if the grant was a warranty deed)
 - Title searches & title insurance
 - In the US, proof of absolute ownership would require a claimant to trace their interest in the land back through all the transfers to the original grant of land from a sovereign government
 - Searches: Deeds have record of previous transfers
 - Insurance: Title insurers profit by assuming risk of prior possessor showing up w/better claim
 - Recording Statutes Systems
 - Most states now use recording statutes to alter the rule of first transfer
 - Statutes encourage recording deeds w/the county in order to facilitate more accurate title searches
 - Buyer has responsibility to search title, some jurisdictions stipulate that a search of 'x' years is good enough & any claims based on defects from before that time are no good
 - *general function: allow subsequent acquirers of property to sometimes beat prior acquirers of property even though the prior ones should win under nemo dat
 - Race Statutes – grantee who records their grant first has the best claim

- ***Race-Notice Statutes** – grantee who records first has the best claim if the grantee received the grant in good faith (must record first & be in good faith)
 - “Every conveyance of any interest in real property, including any non-possessory interest, is void as against any subsequent purchaser of the same property, in good faith and for a valuable consideration, whose conveyance is first duly recorded.”
- **Notice Statutes** – subsequent grantee has better claim if prior grantee did not record and subsequent grantee had no notice; buyer’s responsibility to search title (must have good faith purchase)
- **Adverse Possession** – when SoL has expired on a trespass claim (P has burden of proof; adverse claim forces another to bring a claim of possession)
 - Titleholder of land must commence an action to eject someone who enters their land w/in a statutorily prescribed period (eastern states 15-20, western 5yrs)
 - After SoL has run, titleholder loses right to bring ejectment action & the occupier has greater right in the land than all others – he may bring an action to quiet title and then become the titleholder
 - Wrongful occupier may obtain land possession if...
 - (1) Statute of limitations runs out
 - (2) Paid property taxes on land occupied for entire SoL period
 - Gives landowner notice that someone is on their land
 - (3) Color of Title – when someone occupies land based on a bad record (ex. fraud of forgery occurred somewhere in chain of title)
 - (4) Satisfy CL elements of ownership (after SoL has run its course, you need *each* ENCROACH element...)
 - *most states say all you need is #1 & #4
 - **ENCROACH Elements**: adverse possession = occupier must be in actual possession, open and notorious, continuous, exclusive and adverse for the statutory period
 - **Exclusive** – can’t be simultaneously occupied by you & the true owner (almost never an issue)
 - ***Open & Notorious** – not concealed, engaging in acts of possession that are capable of being seen (doesn’t have to be observed, just observable)
 - Note: most courts don’t hold landowner responsible for knowing exactly where their property line is; encroachment/activity must be obvious & over actual line
 - **Claim of Right** – mental state of wrongful occupant during time of occupation; they must act in good faith
 - *emerging trend that most states won’t look at mental state
 - Helmscholtz Effect – regardless of a juris’ approach, bad faith adverse possessors rarely win (may skew court against him)
 - **Actual Possession** – wrongdoer must do things on land that resemble what a normal landowner would do; acts consistent w/character of land
 - **Continuous** – must occupy land in continuous way that a normal landowner would
 - There are certain forms of land that by their nature, a reasonable true owner would only occupy during certain times of year (ie. vacation property) ← courts are split about whether to accept seasonable occupation of seasonable property as sufficient for adverse possession
 - Sometimes can add up successive periods of occupation by new people to make continuous possession when in privity w/each other (irving principle, does not violate Nemo Dat)= tacking
 - Can only ‘tack’ when adverse possessors make *good faith* transfers (thinking they have good title to pass)

- “tack” when true owner transfers the property (ie. A occupied B’s land for 5 years & SOL is 10; B sells to C; A’s 5 years count against C)
 - *Howard v. Kunto* – D occupied land only during summers, but land was seasonal so possession was considered continuous & previous owner’s possession was allowed to “tack” onto D’s claim to qualify as continuous possession; can add together when occupants are in privity w/each other (privity = mutual/successive relationship to same right in property)
 - **Hostile** – non-permissive, no consent; wrongful occupier is not permitted on land
 - Any factual dispute about whether/not permission was given is for jury
 - *Jarvis v. Gillespie* – outer boundary for what constitutes adverse possession, J grazed cattle, cut wood, etc.; ct found he had open, notorious, hostile, an dcontinuous possession of property for more than 15 years (SoL in VT)
 - *Lessee v. Viewing* - deals mainly w/open, hostile, notorious – P claimed ownership of land next to D’s property; P received land through inheritance and had never visited the property, D treated land as his own for 21 years, court found D had adversely possessed the land
 - How adverse possession cases come up:
 - Adverse possessor could bring a Quiet Title Action or an Ejectment action (after satisfied all reqs)
 - Title owner may discover you and bring an ejectment action against you
 - P has burden of proof w/quantum of clear & convincing evidence
 - Note: adverse possession cannot run against future interests bc future interest holder has no right to possession and therefore cannot bring action to recover real property
 - Disabilities toll the SoL for the duration of the disability (insanity, infancy, imprisonment)
- Purchase
 - Personal property (UCC class)
 - Real property (Real Estate law class)
- **Gifts** – gratuitous transfer of property; someone can give you an interest in property; certain gifts are enforceable
 - Requirements:
 - Intent to give & intent to receive
 - Delivery (physical or symbolic)
 - enforceable gift v. unenforceable promise – if I deliver item, title to item has transferred & gift is completed (delivery doesn’t have to be physical, can be symbolic)
 - Transfer Inter Vivos (bw living ppl, made during donor’s lifetime) might undermine use of wills

Estates in Land

Introduction to Estates

- Estate – type of property right that measures a person's interest in land in terms of duration
- Grants have words of purchase & words of limitation to describe the estate:
 - Words of purchase = who the grant is transferred to
 - Words of limitation = language defining what type of interest is created, describe temporal duration
 - “To B for life” [To B = words of purchase] [For Life = words of limitation] = life estate
- 2 kinds of interests in an estate:
 - (1) present possessory – I have property now
 - (2) future interest – I don't take possession until some future event transpires. I have no right to use/possess land, though I can sell my future interest (under *neo dat*, of course, the buyer would have only the future interest & no possessory interest)
 - 2 names: 1st = describes the future interest; 2nd = describes what it will become if becomes present possessory
 - ex. “To Amy for her life” *grantor has Reversion in FSA*
 - ex. Grantor has a life estate, then grants “To Amy for her life” *grantor has reversion for the life of the grantor*
 - retain their title even if they are transferred to holders who could not have had that kind of interest to begin with
 - ex. Grantor conveys “To Amy for her life” *grantor retains a reversion in FSA. Normally, nongrants cannot hold reversions, but the grantor may convey his reversion to Lindsey. Lindsey would have a reversion in FSA.*
- Types of Estates:
 - Freehold interests: undivided fee simple (FS Absolute), life estate (LE), defeasible fees
 - Nonfreehold: leases

on the exam, jurisdiction presumes that all grants of property convey the max possible temporal interest unless stated otherwise

*****Write what each person has and what the grantor keeps*****

Present Interests – interest someone can assert now

- right to use & possess property in the present moment (always only one but can be owned by more than one person)
- 3 categories of present interests (temporal duration of interest in property):
 - **(1) fee simple** - forever
 - **(2) life estate** – temporal duration is measured by someone's life span; lasts lifespan
 - **(3) tenancy** – all others
- usually construe the grant according to the grantor's intention
 - if grantor specifies which type of interest – courts usually respect that
 - if no explicit language, look to grammar or certain words/phrases
- **Fee Simple** – for life; “and his heirs” “forever” – Rest of Property §14 ← *might not say ‘his heirs’*
 - substantively defined by 2 properties
 - potentially infinite
 - note: can involve an interest that will end bc of some event that is certain to occur but is not a fixed period of time or life of a human (ex. life of an animal, next rainy day in boston, etc.)
 - freely transferable

- *note: grantor cannot make a fee simple defeasible on transfer by limiting who the beneficiary can transfer to (“to Brock and his heirs so long as the property is not sold”) – attempts to limit the transferability of fee simples are called restraints on alienation and they are void (the limitation is void, not the grant)
- note: cannot impose conditions that are against public policy
- **Fee Simple Absolute (FSA)** - infinity; an estate in land that has no natural end; nothing in grant contains any limits beyond nature of estate
 - “To Amy & her heirs” or “to A in fee simple”
 - *heirs do not receive any part of the grant; the words are simply there to specify that the grant is a fee simple of some kind
 - owner may designate a successor by will, or, if he does not, statute will control who receives land after death (statutes of intestacy)
 - if someone w/an estate dies w/o a will & w/o any heirs, property escheats (reverts to state)
 - When only something outside the grant would terminate it (ie. grantee having no heirs)
 - No future interest, controls entire timeline, freely transferrable
- Fee Simple Defeasible – grant identifies some event that can bring interest to end
 - **Fee Simple Determinable (FSD)** – ends automatically when a named event occurs; the event may never occur, in which case the estate acts like an FSA
 - “To A and his heirs, so long as they use the land for specified purposes only”
 - so long as, until, while
 - words of limitation seem to be all one flowing thought
 - Potentially infinite duration so long as the condition is not violated
 - Grantor retains a future interest (“possibility of reverter”) – if condition is broken, estate automatically terminates and possession reverts to the grantor
 - When named event occurs, someone else will get the present possessory interest; that person’s future interest, before the event occurs, is called a *possibility of reverter* (automatically becomes present possessory as soon as defeasibility condition is met; no paperwork required)
 - Freely transferrable
 - Forfeiture occurs if condition is broken so courts tend to be hostile to these
 - CA doesn’t allow determinable interests at all
 - **Fee Simple Subject to Condition Subsequent** – estate continues indefinitely except that if a named event occurs, the interest does not automatically, but can be ended by action of grantor
 - “To A and his heirs, but if the land is used for other than specified purposes, G or his heirs shall have right to enter and declare the estate forfeited”
 - upon condition, but if, so that, provided, comma/punctuation
 - when thought seems interrupted, condition is afterthought of the grant
 - **law tends to favor this construction
 - grantor’s future interest is a *right of entry & power of termination* (thus grantor has not conveyed all of his interests in the land)
 - if condition happens, it does not automatically terminate present interest, the future interest holder must then take affirmative steps to get his present interest (must enter & terminate)
 - person w/right of entry can file an act of ejectment, a motion to quiet title, or send letter from one attorney to holder of present interest that one intends to take possession

- no real time limit; adverse possession clock does not begin running until the person w/right of entry actually takes possession/affirmatively moves to take property
- freely transferrable but always subject to the condition

distinction bw determinable & condition subsequent when grantor doesn't tell us is based on grammar
 (Mahrenholz v. County Board of School Trustees of Lawrence County – grantor conveyed land that was 'to be used for school purposes only, otherwise reverts to grantor', land was not used as directed, judge held whether was a FSD or FSSCS was a matter of the words chosen; generally a grant of exclusive use followed by an express provision for reverter when that use ceases = FSD – ct held grant was a FSD ('for school purposes only' was a complete thought & 2nd clause was redundant), if school violated condition, P would have a FSA – held school didn't violate bc storage was a school purpose)

- **Fee Simple Subject to an Executory Interest** – same as FS SCS except that person/entity that can repossess is a 3rd party
 - if condition is broken, then estate goes to a 3rd party & not the grantor (future interest is created in someone other than the grantor)
 - "G grants to "A and his heirs, but if the land is used to sell alcohol then to B and his heirs" or "B and her heirs shall have the right to enter and declare the estate forfeited" or "...but if A has no sons then to B and his heirs"
- **Life Estate** – "To A for life" – for life – estate in land that ends w/death of a named person, usually holder of the estate. Life estates may also be measured by another human life (pur autre vie)
 - When grantee dies, possession of the land reverts to the grantor or his heirs
 - Thus the grantor has only transferred possession of his land for the grantee's life
 - Can also measure duration by life of a 3rd party ("To B, for A's life") – possession terminates when measuring life dies (if B dies first, estate goes to B's heirs until A (measuring life) dies)
 - Note: if A has a LE for A's life and he transfers it to B. B holds the LE for A's life = the measuring life stays the same
 - A could, however, choose to give B a life estate measured by B's life, in which case A would keep a reversion
 - Can be absolute or defeasible [determinable, subject to condition subsequent, or subject to executory interests] (conditioned on a certain event, occurrence of which will entitle the grantor either to automatic reversion or to enter & reclaim)
 - Often the norm for family grants
 - Can be non-transferrable by conditions placed upon them at their creation
 - Only measure human lives (ex. "To Lindsay for the life of her pet cat." = not a life estate. The death of the cat is a defeasibility condition. Lindsey actually has a fee simple)
- **Tenancy** - See p. 17
- **Law of Waste** – way of allocating rights across time; law presumes that the grantor wanted the land to pass to the holder of the future interest in more/less the same shape as it passed to the holder of the present interest
 - Grantors can specify they do not want law of waste to apply – but w/o that specification, law of waste supplements whatever limitations grantor chooses to place on present interest holder
 - Deal with possible conflicts of interest where the present & future interests in a piece of land are held by different parties
 - Person w/present interest will want to max value of property now
 - Person w/future interest will want the land's value protected for future use
 - Though future interest holders have no right of use/possession, they do have a certain right of control or right to say no through law of waste
 - *Brokaw v. Fairchild* – P had life estate in a mansion in a city, P wanted to convert it to an apartment, which would be more profitable. D, holder of future interest in the mansion, wanted

to prevent this. Court held that such a *significant change* to the interest would constitute voluntary waste (particularly since it was grantor's intention that mansion be passed on)

- 2 types of waste:
 - Voluntary Waste – misfeasance; affirmative action causes unnecessary/extraordinary damage to property (eg. failing to pay property taxes & gov't takes it)
 - does not include depreciation of normal wear and tear
 - easier to prove & thus more common
 - Permissive Waste – nonfeasance; failure to maintain a property properly
 - difficult to prove bc hard to prove had legal duty in the first place
- Holders of life estates may lose their life estate if they behave badly, they will also be liable to future interest holders for damages (if malicious/deliberate, maybe be liable for treble (triple) damages); *future interest holders will want an injunction to preserve property until they take possession
- Sometimes courts allow significant changes if they are ameliorative waste (increase value of the property)

Future Interests – property rights that presently exist but are not currently possessory yet may become possessory in the future

- unless present interest is a FS Absolute, there will be a future interest
- grantors can keep multiple future interests (LL commonly have a possibility of reverter (if nonpayment bc follows a FSD) and a reversion (when lease ends bc conveyed away a lesser interest)
- future interest's name & legal properties are assigned at the time when the interest is created
 - during sales or transfers, the name or legal properties of the interest do not change
- all future interests automatically become present interests when conditions specified in grant occur (except right of entry)

Kept by Grantor:

- **Reversion** – future interests retained by grantors who convey away less than they have; one has a reversion when a transfer is 'carved' out of one's own interest according to this hierarchy (*not* about temporal duration)
 - (most) fee simple
life estate
 - (least) tenancy
 - ie. when grantor carves a tenancy out of a fee simple, grantor keeps a reversion; when grantor w/fee simple conveys away a life estate/tenancy, he holds a reversion; when holder of a life estate conveys away a tenancy, he also holds a reversion; when the holder of a tenancy conveys away a tenancy of shorter duration, the tenant holds a reversion
 - no reversion if grantor dies w/o will before the interest conveyed away ends
 - no paperwork is required – it just *happens* that as soon as present interest expires, the grantor's reversion transforms into a present possessory interest
 - transferrable
 - ex. B has a FS Absolute & transfers a LE to C. C has a present possessory interest (LE). At C's death, the LE terminates and possession of the land reverts to B.
- **Possibility of Reverter** – retained future interest held by a transferor of a fee simple determinable only
 - When defeasibility condition is met in FS Determinable, someone else will get the present possessory interest
 - Before the event occurs, that person's future interest is called a *possibility of reverter* (automatically becomes present possessory as soon as defeasibility condition is met; no paperwork required)
 - (adverse possession clock begins running on the former present interest holder as soon as the defeasibility condition is met)

- runs w/fee simple determinable that was conveyed
- only becomes possessory when condition is broken, operates automatically
- transferrable
- ex. To A for so long as no alcohol is sold on the property – if alcohol is sold on property, the present interest is automatically gone and the future interest automatically transfers to a present interest
- ex. Fee Simple Determinable – when grantor intends to have a mandatory return of a fee simple determinable estate, grantor retains a possibility of reverter (*Mahrenholz v. County Board of School Trustees of Lawrence County*)
- **Right of Entry (“power of termination”)** – retained future interest in the transferor of a fee simple subject to a condition subsequent, where the transferor expressly reserves the right to reenter the land and reclaim possession when the condition is broken; gives future interest holder a choice
 - Runs w/land and can be asserted against any subsequent grantee of the original transferee
 - only becomes possessory when condition is broken
 - however to take possession – grantor must actually enter and declare the prior possessor’s claim void
 - cannot be created in anyone other than the grantor, but grantor can convey away his right of entry to someone else
 - “To Amy, but if she falls off the wagon, the girl is out” *grantor holds a right of entry in FSA. Grantor could transfer that to Lindsey, giving Lindsey the right of entry in FSA.*
 - ex. “To A, but if the land is used to sell alcohol, Grantor or his heirs shall have the right to enter and declare the estate forfeit.”

Created in grantee/transferee (someone other than grantor) – grantor may limit future interest in a transferee; occurs when transfer is made to several sequential transferees or if transferor places some condition to delay possession (ex. to A when he graduates)

- **Remainder** – future interest in someone other than the grantor that becomes possessory upon the natural expiration of a simultaneously created estate (usually life estate)
 - Future interest must meet 4 criteria:
 - (1) must be created in someone other than the grantor (ie. created in a transferee)
 - (2) capable of becoming possessory the instant the prior interest expires (must be *possible* to take *instant* possession)
 - (3) cannot divest the prior interest – this means it must ‘wait patiently’ for the present interest to run its course, rather than ‘snatching’ the interest away from the present possessor
 - (4) cannot follow a fee simple (if possessory interest is a fee simple of any kind, then the following future interest cannot be a remainder)
 - Ex. To Amy for her life, **then** to Lindsey and her heirs. ← *Amy has a LE, Lindsay has a remainder in FSA.* The word “then” is key since it indicates that the interest ‘waits patiently’
 - Ex. To Amy for her life as long as she stays clean, then to Britney and her heirs ← *the comma changes this because the condition is part of the grant, rather than part of the future interest*
 - *If condition is part of grant = any future interest waits for prior interest to expire and thus can be a remainder*
 - *If condition is part of future interest = potential to divest the interest = not a remainder*
 - **Vested Remainder** – becomes possessory at the termination of the prior LE and is subject to no other condition precedent
 - (1) Must have an ascertainable beneficiary (must be able to point to them; have to be alive)
 - if it’s an abstract description of characteristics (ie. current BU law students who play competitive pokemon), and no one meets that at specific point in time = not vested
 - (2) Must be no conditions precedent other than expiration of the prior present interest (nothing else has to happen *aside from the expiration of the prior interest* for the remainder to become possessory)

- *if condition is in clause separate from that creating the interest = vested remainder*
- Ex. To A for life, remainder to B ← A has a life estate, B has a vested remainder, which becomes possessory at A's death. B is a certain person & there are no conditions that must be satisfied to come into possession
- Vested Remainder Subject to Open – vested remainder where beneficiary is an abstract description and there is at least 1 person alive who meets it, but more people might in the future; class of beneficiaries can expand (*subject to RAP*)
 - Ex. To Lindsay for her life, then to B's past husbands & their heirs
- Vested Remainder Subject to Divestment/Subject to Executory Interest – something can occur that would divest remainder of his interest; you have to share property w/people so it's less economically valuable (from O to A for life, then to B, but if A stops growing corn, then to C" ← B would have a vested remainder subject to divestment bc he could be divested of his interest before it becomes possessory by an act of A")
- **Contingent** – remainder that is just...not vested (*subject to RAP*)
 - Can't become possessory interest instantly when prior interest runs out; there is some other condition precedent that needs to be fulfilled
 - Usually follows a life estate, becomes possessory only at the termination of that life estate & fulfillment of some other condition precedent
 - If the condition precedent becomes impossible to satisfy, then the interest definitively fails to vest
 - If contingency actually occurs, contingent remainder → vested remainder (or if unascertained beneficiaries become ascertainable)
 - *if condition is w/in clause creating the interest = contingent remainder*
 - [To Lindsey for her life, then to Britney and her heirs if Britney remarries K-Fed ← Lindsey has LE, Britney has a remainder (not held by grantor, will become possessory when Lindsey dies, waits patiently, doesn't follow FSD). Britney is an 'ascertainable beneficiary' – but she must marry K-Fed to have here interest become possessory = 'something else' & thus Britney has a 'contingent remainder in FSA'. If K-fed dies before she marries him, Britney cannot have a remainder – she will never take possession.]
- **Executory Interest**– any other future interests held by non-grantors (ie. not remainders); Rest of Prop §158 (*subject to RAP*)
 - “To Lindsey for her life, then one day later, to Britney & her heirs.” Lindsey has a LE, Britney has some kind of future interest. It can only be a remainder if it goes to someone other than the grantor, will become possessory as soon as prior interest ends, waits patiently, and doesn't follow FSD. Because Britney has to wait one day after Lindsey's life, she has an executory interest bc the grantor still has his reversion & possession for the single day (technically a FS)
 - “To Amy for her life, but the instant Amy starts using drugs, to Britney and her heirs.” ← *as soon as Amy starts boozing, B snatches the property away from Amy (divesting another interest bc she's cutting it short before the natural life span expires) – thus Britney's interest is an executory interest bc it could potentially divest Amy*
- To Steven for his life so long as the original lineup of Aerosmith continues to stay intact, then upon expiration of the prior estate to Joe for his life, then upon expiration of the prior estate to Brad and his heirs if Brad's last child ever expresses a sweet emotion.
 - Immediately after this grant takes effect...
 - What does Steven have? Defeasible Life Estate
 - Present possessory interest for life = life estate
 - Defeasible – bc condition
 - What kind of present/future interest does Joe have?
 - Joe has future interest – Vested Remainder for Joe's life
 - Remainder or executory interest? Remainder!
 - 3 Qs for Remainder

- 1. Can we imagine at least one state in which S' interest ends & J's immediately takes possession? Yup (no necessary gap; J can take possession immediately)
- 2. Is Joe waiting patiently for S' interest to run out, or is it snatching property away? 'upon expiration' = Joe is supposed to wait
- 3. Is Joe taking possession after fee simple? No, it's after some kind of life estate
 - satisfies all 3 → Joe has a remainder
- Vested? Yup
 - Ascertainable beneficiary? Yup – Joe
 - Conditions other than expiration? No
- What kind of present/future interest does Brad have?
 - Brad has a future interest – Contingent Remainder in Fee Simple Absolute
 - Remainder or executory interest? Remainder
 - 1. Possible for immediate possession? Yup
 - 2. Is Brad waiting patiently? Yup
 - 3. Is Brad interest taking possession following fee simple? No, it's after some life estate
 - Vested or Contingent? Contingent!
 - Ascertainable beneficiary? Yup – Brad
 - Conditions other than expiration? Yes – “if B's last child ever expresses sweet emotion”
 - Thus can't be vested → contingent
 - It's fee simple absolute if ever present because 'to his heirs' = code for absolute

Rule Against Perpetuities – No interest is good unless it must vest, if at all, no later than 21 years after the death of all lives in being

- Device by which CL can invalidate future interests (never applies to present interests or whole grants)
- **Future Interests that are subject to RAP:**
 - *Vested Remainder Subject to Open*
 - *Contingent Remainders*
 - *Executory Interests*
- Interests that are not subject to RAP: reversions, rights of entry, possibilities of remainder, vested remainders
- **Traditional CL Rule against Perpetuities:** Grantor must be able to guarantee, that no matter what happens in the universe, that future interest will either become possessory, fizzle out, or change into a non-threatening future interest w/in 21 years after the death of a life in being (measured at moment interest is created)
 - If grantor cannot guarantee those 3 actions will occur w/in 21 years after the death of a life in being, then the interest does not vest & is invalid (read: INTEREST is invalid, not entire grant; just take that interest out!)
 - Measuring lives include: (becomes “validating life” if w/absolute certainty I can say w/in 21 years of that person's death the future interest will do one of those favored things):
 - (1) beneficiaries in grant
 - (2) ppl who can directly & specifically affect who is a beneficiary
 - must have a really direct, unique connection to the terms specified in the grant
 - (3) ppl who can directly & specifically affect whether defeasibility conditions occur
 - if condition is general & abstract & doesn't depend on actions of some unique, specific persons = then doesn't count as measuring life
 - if condition includes really large # of people = doesn't count as measuring life
 - Ex. To Amy for her life, then to Britney's kids & their heirs ← *beneficiaries are Amy and Britney's kids (not Britney); A person who can directly affect who is a beneficiary is Britney (who will be their mom); No one else can affect whether defeasibility conditions occur.*
- **For a future interest to be valid → grantor must be able to guarantee that, no matter what happens in the universe, the future interest will vest** (the uncertainties will go away: become present possessory interest, fizzle out, transform into something ok) **within RAP's time period**
 - *if it is possible to create a scenario under which one of the future interests will neither succeed nor fail (aka will not vest) within the lifetime + 21 years = interest is invalid

- note: some statutes also include future interests held by the grantor (in addition to the 3 interests subject to RAP listed above), some also reject the 1 generation + 21 years time frame in favor of a “wait-and-see” approach (wait & see if it violates the rule) or a diff measured period
- 4 things that can happen to a future interest:
 - future interest → present possessory interest
 - future interest can vanish/fizzle out (definitively failing to vest bc conditions for their becoming present possessory interests are impossible to satisfy)
 - future interest → other future interest (ie. contingent remainder → vested remainder)
 - ^those 3 are favorable; law wants future interests to *vest* – become present possessory interests, fizzle out, or transform themselves
 - hang around as same future interest
- Hints
 - Interest is valid when there is an obvious validating life – “To A for A’s life, then to B’s children & their heirs” ← as long as B is alive when grant takes effect, B can serve as the validating life; when B is dead, even w/o 21 year bonus period, all uncertainty will absolutely vanish
 - Interest is invalid if a condition is not tied to anyone’s lifespan and is not limited to 21 years by the terms of the grant – “To A and his heirs, but if liquor is ever sold on the property, then to B and her heirs” ← there is at least 1 scenario (5000 yrs & no liquor) in which we cannot make the guarantee the law wants, so this would be invalid bc violates RAP
 - “Collect ‘em, Count ‘em, Kill ‘em” ← gather up all the measuring lives/beneficiaries (including beneficiaries of future interests), kill them all off immediately; can you guarantee the vesting of the relevant interest?
 - No → probably invalid future interest
 - Yes → does not prove interest is valid; still think of other possibilities
- Ex. To Britney & her heirs, but if anyone ever makes a heavy-metal remake of “Oops, I did it again”, then to L and her heirs
 - B has a Fee Simple Subject to an Executory Interest
 - L has Executory Interest in FSA
 - If jurisdiction has traditional rule against perpetuities & L had a straight up executory interest – we would be concerned because how can you value it?
 - we can’t guarantee that when we take their lifetime + 21 years, we will know 100% the fate of this executory interest = future interest is invalid
 - if it said “To Britney & her heirs, but if anyone w/in Amy’s lifetime ever makes a heavy metal remake of “Oops, I did it again”, then to L and her heirs” ← then we can make that guarantee & future interest would be okay bc will transform/fizzle out w/in 21 years after her death
- Ex. to Dave for his life, then to Joe 25 years later.” ← grant to Joe would be invalid bc violates RAP bc Joe & Dave could die the day after the grant took effect & Joe’s interest would not become possessory w/in 21 years of their death

Cotenancies

- Joint ownership of properties
 - Partnership – individual partners reap benefits of property owned by entite/partnership itself
 - Corporation
 - Marriage
 - Condominiums
 - Tenancy in common or Joint tenancy ← same legal rights
 - Can be present/future interest

Joint Tenancies & Tenancies in Common

- Only difference is what happens when someone dies
- Note: tenancy in common & joint tenancies are dumb unless you have a good detailed agreement in advance about how to resolve issues or you are mortally certain you & co-owners will get along

Tenancy in Common

- If tenant dies, his interest *passes* to his successor; successor takes all the baggage that comes along (mortgages, liens, etc.)
- Most common
- Advantage = flexibility

Joint Tenancy – each joint tenant has an undivided interest in the whole of the property

- Everyone alive has the same stake in property (financial claim & use of possession rights)
- If tenant dies, his interest *vanishes* and doesn't pass on (even if he has a will)
 - o Right of Survivorship – legal property in which surviving joint tenants have a right to enjoy the absence of interest passing; when one joint tenant dies, his interest is extinguished & the surviving joint tenant continues to hold an undivided right in the property
 - *joint tenancy by law cannot pass (mortgage & all that are gone)
- Advantage = reduces administrative costs when someone dies
- 6 Factors to ensure interest created is joint tenancy:
 - o (1) live in the right state
 - o (2) intent to create joint tenancy (including language about right of survivorship)
 - *Hoover v. Smith*
 - o (3) Time – each interest must be acquired at same time
 - o (4) Title – need to acquire title by same instrument (never by intestate succession)
 - o (5) Interest – each must have the same legal interest in property (don't need identical fractional shares)
 - o (6) Possession – each has right to possess the whole property
- To turn tenancy in common → joint tenancy: must create all conditions necessary for joint tenancy (convey all relevant interests in property conveyed to a single person, who conveys them back to everyone else)
 - o (1) time, (2) title, (3) equal shares of interest, (4) same durational interest

Rights of Cotenants

- *Swartzbaugh v. Sampson* – Swartzbaugh & husband owned land as joint tenants; her husband leased part of land w/o her consent; ct held when one cotenant of a joint tenancy executes a lease w/a 3rd party, the lease is a valid K giving to the lessee the same right to possession of the leased property as the cotenant had
 - o He didn't have to consult her because he had 100% right to that land; the issue is that it was inconsistent use
 - o She could ask for partition, but that's not what she really wants – she wants to be able to have walnut tree on land
- Partition:
 - o Partition in kind: physical partition; property is physically divided to reflect each cotenant's proportional interest; taking co-owned property & turning it into individually-owned property
 - o Partition by sale: selling property & dividing proceeds to reflect the proportional interests of the cotenants
 - o *Valences* – exception; maintained the actual property
- Ouster: (1) co-tenant in possession has to pay rent to the others; (2) file for partition

Landlord-Tenant Law:

creates present possessory interest in lessee & future possessory interest in lessor

Introduction

- Leases are present possessory interests held by tenants; landlords hold reversions
 - o Law of waste applies to tenants; landlords usually include other defeasibility conditions in their lease to support law of waste
- Leases are usually contractual = hybrid w/regular property conveyance & K
 - o K tends to be controlling document
- LLs can write 'forfeiture clauses' (defeasibility conditions) into their leases
 - o Possibility of Reverter = lease ends as soon as defeasibility condition is met
 - o Right of Entry = LL has right to 're-enter & retake' the property when condition is met
 - o ^these tend to tip leases in favor of LL, so courts began relying on covenant of quiet enjoyment & constructive eviction to strike a balance
- Nature of the Leasehold Estate (types of leases, only difference is how you get out of them)
 - o Term of Years – fixed time at which it terminates
 - Ends on date specified by parties (term runs out)
 - Or when a defeasibility condition is broken (tenant violates a condition)
 - no one has to give notice
 - usually have to be written leases
 - o Periodic Tenancy – automatically renews unless notice is given
 - Ends because appropriate notice has been given & time runs out
 - Notice period is usually same as lease term [lease for 1 month; notice 1 month], but CL caps notice at 6 months; statutes/provisions in lease can override that
 - LL must actually receive notice for it to be valid (anti-mailbox rule)
 - Or when defeasibility condition is broken
 - When tenant dies, leasehold interest remains unless death was a defeasibility condition in the lease – lease would pass by will or law of intestacy to tenant's heirs
 - o Tenancy at Will – lasts only as long as both parties want it
 - No fixed period of time
 - Or party gives notice (how much notice depends on statutes, lease, CL [6 mo max]; but usually as long as interval of rent payments (ie. rent due monthly, one month's notice))
 - Note: if you give notice Aug 1 → ends tenancy Aug 31; if you give notice Aug 20 → ends tenancy Sept 31
- Privity of Estate – relationship bw landlord & tenant that occurs when parties bound have interest such that one is carved directly out of the other
 - o Lessor & lessee are in privity of estate
 - o Lessor & sublessee are not bc sublessee's interest is carved out of the lessee's
- Privity of Contract – relationship bw landlord and tenant that stems from the lease; only parties to the K have privity of K

Transfer of Leasehold Estates

- Transfer by the LL (future interests):
 - o When LL transfers his reversion to someone else; new LL is usually bound by terms of original lease as long as they "*run with the land*"
 - Any covenant that "*touches & concerns the land*" runs w/the lease; any provision in lease that a normal person would regard as important (anything w/physical

- characteristics of the property (maintenance, consequences, etc.) will travel along w/transfer of lease interest) = baseline property obligations
 - (ex. covenant to repair the property would; covenant for personal services performed by LL (style tenant's hair) will not run w/land)
 - Note: T & LL could K around this and have lease end if LL sells property
 - *Mullendor Theatres, Inc. v. Growth Realty Investors Co.* – ct held a security deposit was not part of a covenant that ran w/land; thus new LL was not liable for return of a security deposit
 - Transfer by the tenant (present possessory interests):
 - Two Kinds:
 - (1) **Assignment** – new tenant gets everything old tenant had plus promises that touch & concern the land; LL effectively gets a new T
 - Privity of K & estate change when a tenant makes an assignment
 - L1 leases to T1. L1 & T1 are in privity of K & estate. T1 *assigns* to T2.
 - L1 and T1 are still in privity of K – but now L1 and T2 are in privity of estate, since T1 retained nothing when she made the assignment to T2
 - Contract-wise – nothing changes w/contractual obligations from T1 → L1
 - But privity of estate moves to T2 (privity of estate flows w/assignment)
 - **Assumption of Lease**: when first assignee expressly agrees as part of an assignment agreement to be bound by terms of original lease; Assignee (T2) is now in both privity of estate and K w/L1
 - (2) **Sublease** – original tenant (T1) carves a lesser interest out of his leasehold and leases it to a new tenant (T2). T1 is effectively T2's landlord. Subleases expire day before original lease expires
 - Privity of K and estate do not change when a tenant sublets; no legal effect on K or privity of estate
 - L1 leases to T1. L1 and T1 are in privity of K and estate. T1 leases to T2 – since T2 never signed a K, L1 and T1 are still in privity of K and estate since T1 still has a reversion. T1 and T2 are also in privity of estate and K.
 - If you keep a reversion → sublease
 - *Jaber v. Miller* – P and D1 signed document entitled 'assignment' that acted more like a sublease. D1 transferred to D2, who signed promissory notes for several payments. Bc document was an assignment, not a lease, those notes were for a full payment of property divided into installments (not rent). Thus obligation to pay notes did not expire when building burned down, as rental payments would.
 - Intention of the parties @ the time of lease formation is determining factor in whether a transfer of a lease is a sublease/assignment
 - This case was an assignment
 - Generally when T wants to transfer, LL can w/hold consent but only w/in a reasonable manner
 - *Kendall v. Ernest Pestana* – commercial lease; LL may w/hold consent only when has a commercially reasonable objection to the assignee/proposed use (ie. reason to think T2 will be less likely to maintain the property/pay rent, not wanting assignment bc T2 wants to build something that would affect commercial nature of current business)
 - Provisions in lease are independent; if one party defaults on some of their responsibilities – the other party is still required to uphold their own responsibilities
 - Ie. if T defaults on rent, LL can sue T for damages – but LL still has to perform on his promises. If LL defaults on repairing roof, T still has to pay rent

Dirtbag Landlords

- LL has certain obligations to Ts from several sources: lease, statutes, CL baselines
- Though there are independent covenants, there are several dependent covenants

- **Covenant of Quiet Enjoyment** – LL makes 2 promises, that he (1) actually transfers a valid interest to T such that the T won't have to deal with anyone else claiming the interest and (2) T can use/treat property as if it is his own, since he does hold the present possessory interest in it
 - Can K around this
 - LL violates this by leasing something to which he does not have good title or interfering w/T's use and enjoyment of land...
 - Constructive Eviction – if LL does something that effectively takes away T's right to quiet enjoyment he has been 'constructively evicted' – T does not have to pay rent (dependent provisions); LL can't simply evict Ts for no reason
 - *Smith v. McEnany*
 - Requirements:
 - LL breaches
 - Particular breach makes apartment in habitable (severe interference w/T's possessory rights that renders apartment effectively uninhabitable)
 - T must leave premises
 - LL must have not fixed problem after reasonable notice (if LL provides some other place to go, it's not constructive eviction)
 - Some juris allow T to get a declaratory judgment action to get advanced notice that they could win a constructive eviction hearing
 - Implied Warranty of Habitability (IWH) – imported building codes
 - "the" – no single doctrine here, varies by juris & housing code
 - "implied" – legis adopts specific statutes that spell out exact regulations
 - "warranty" – primes that something will be of a certain quality; contractual but can't be K'ed around – this is mandatory rule; intended to fix bargaining power bw ll and t
 - "habitability" – not always about whether one can live in the place
 - IWH only applies to large, urban, residential, multiunit dwellings
 - The defect must prevent use of premises for intended purpose; premises should be safe & sanitary; decided case-by-case
 - Sets minimum quality of standard for a unit & it covers both latent (unseen) and patent (obvious) defects
 - Remedies:
 - T may end lease (breach of IWH is breach of quiet enjoyment which is a dependant covenant)
 - Damages/rent reduction
 - Damages = fair rental value – what T pays
 - Damages = What t would pay in hypo housing market – rent paid
 - *Percentage Reduction Method = jury determine what % of rent is 'chewed up' w/problems, deduct that value ← most common
 - *Javins v. 1st National Realty Corp* – housing codes create standards of safety and health that is part of every lease; when LL allows building to breach housing code, LL has breached part of K
 - Critique: housing codes are overinclusive and underinclusive – so courts focused more on 'habitability' parts of the code – but they're still underinclusive and have an extreme standard
 - Thus courts moved to 'reasonable fitness for purpose' conception of IWH ← hard to know what 'reasonable' is, vague, huge enforcement problem (Cherokee problem)
- Deadbeat Tenants
- Abandonment versus Surrender
 - Doctrine of Surrender – LL and T can create a mutual release from their obligations through an implied K (usually unwritten)

- Offer: If T leaves w/o intending to return & communicates that to LL; T has made an 'offer' to surrender
 - Acceptance: If LL acts in a way that is inconsistent w/T's continuing right, LL 'accepts' T's surrender & lease is terminated
 - If LL does not accept T's offer of surrender...
 - Duty to mitigate – LL have obligation to make reasonable effort to mitigate damages by releasing an apartment wrongfully vacated by T (*Sommer v. Kridel*)
 - Summary Remedies
 - How do you get T off property? Sue for ejectment/appeal to forcible entry and detainer statutes (expensive can take a long time)
 - Must resort to judicial process (intended to discourage LLs from 'self-help' in retaking property forcibly (*Berg v. Wiley*)
 - Some juris have housing courts to create more streamlined process
 - Cherokee problem - trying to chase after a poor T is very hard
 - Judgment for nonpayment
 - Many juris still allow self-help in housing (takes forever and is nightmareish)
- Housing Discrimination
- Right to Exclude – you can decide who is on property and who isn't
 - Right to Use – you can give right to use to others and determine who can/can't use it
 - Right to Dispose – right to pass by gift, sale, will, law of intestacy
 - Right to Choose when, where, why those^ rights will be exercised
 - Civil Rights Act of 1866 – 42 USC §1982 - extended rights of white citizens to all citizens to purchase property (just about race)
 - No exemptions; this is a categorical prohibition
 - CL baseline: law avoids restraints on alienation (prefers to allow ppl to transfer to whomever they choose) and courts support a right of free association (ppl may choose to or not to associate w/whomever they choose)
 - Nondiscrimination purposes: increase housing opportunities for members of protected classes, prevent personal harm/indignity of rejection, eliminate social message of inferiority
 - Civil Rights Act of 1964 extended nondiscrim to certain businesses & common carriers; formulated primarily to deal w/discrim based on race & religion ← didn't mention housing
 - Fair Housing Act (Title 8 of CRA) – extension of CRA of 1964; focused primarily on racial and religious discrim; state can adopt more reqs than this, but not less; includes race, religion, sex, familial status (as in if you have kids, not if you're married), disability (does not include sexual orientation)
 - Unlawful to refuse to sell/negotiate/rent a dwelling to any person bc of race, color, religion, sex, familial status, or national origin
 - Prohibits: refusing to sell/rent/negotiate/make unavailable sale/rent
 - Because of: race, color, etc.
 - Unlawful = discrim in terms of lease/provisions
 - Unlawful to print/publish any notice/statement/ad containing any preference concerning race, religion, handicap, etc.
 - §3603: exceptions to prohibitions in §3604
 - Single-Family Home exception: any single family house sold/rent by an owner is exempted from prohibition in §3604
 - Mrs. Murphy exception: LL living on premises with 3 or less other apartments is exempt from antidiscrim provisions; Mrs. M could fairly reject a mother w/children if she wanted to
 - But still does not apply to advertising; she still cannot use discrim ads
 - §3604(b): can't charge certain people/classes more for rent

- §3604(e): realtors can't show certain properties to some classes and not to others
- §3604(c): can't advertise that certain classes are unwelcome; enforceable by DOJ (which doesn't enforce it)
- §3607: Religiously owned, noncommercial properties *can* discriminate (except on race). Private clubs are similarly exempted
- §3613: remedies
- Housing law encompasses federal, local, state ordinances. States can enact statutes that go beyond §1982 (ie. CA; no unreasonable, arbitrary discrim)
- Design your own experiment to see if it's discrim
- PFC elements of housing discrim to avoid 12(b)(6) dismissal
 - You are one of the ppl targeted in statute designed to help
 - You applied
 - It was denied
 - A person not in the group (w/o characteristics for basis of discrim) did get it
- Question does not involve reasonableness, rather involves sincerity (even if irrational, if D's decision was sincere, he should win)
 - Disparate Impact – if decision has effect of disproportionately excluding ppl in groups from statute, that could itself be discrim
 - ^this is only a theory of liability w/gov't housing bc they are responsible for remedying a wider social problem
 - not acceptable w/private party (you must show mindset w/private LLs)

Protecting Ownership – Nuisance & Trespass

Trespass - unconsented crossing of boundary/possession line w/o legal privilege; must have intention to cross boundary line (2nd Restatement of Torts §§158-59, 163-64, 167-215)

- P must show that something or someone crossed property line w/o consent
 - o don't need to prove harm to get injunction so it's easy to prove; crossing of one's boundary is harm in itself
 - do need to prove harm for damages though
 - o Liability attaches if you enter/cause someone or thing to enter another's property, if you remain on land after asked to leave (you have reasonable time to get off), and if you fail to remove an item owner asks you to remove
 - o Need intent!! ← not intent to commit trespass, but intent to move their bodies or instrumentalities in a certain way
 - You can be liable irrespective of whether you cause harm; if you intentionally enter land in possession of other or cause thing or 3rd person to do so, you are liable (intention isn't malice, it's just intending to move the way you did); liable even if you reasonably & actually believed you had a right to be there (*Weatherbee v. Green*)
 - Equitable/Injunctive relief is norm
 - o Ad Coelum rule applies (overhanging branches)
 - Exception = high flying aircraft; flying over property is only trespass if flies too low & interferes w/use and enjoyment of land
- Only present possessor may bring a trespass interest (holder of a future interest may not)
- Trespass is a supplement to ejectment (ejectment – person is still there & you need to get them off)
- What makes an invasion trespassory?
 - o Tradition – some things law recognizes as trespassory
 - **“Tommy Rule”**: **See me, feel me, touch me** – if you can see, feel, or touch it w/unaided senses = trespass ---- otherwise nuisance
 - Exceptions: water (diversion of natural water flow) ← nuisance
 - Hydrocarbon rule – natural gas & oil are trespasses (other gases = nuisance)
- Privileges Excepted:
 - o One may enter to stop a crime
 - o Owner must give you a reasonable amount of time to leave the property

Nuisance – non-trespassory invasion of another's interest in private use and enjoyment of property; everything that is not a trespass (Rest of Torts §821D) [public vs private]

- Objective standard: P must prove that the invasion harms their *use and enjoyment* of the land (must prove harm!)
- Holders of future interests *may* bring nuisance action, possessors of land, owners of easements & profits of land can all bring nuisance actions
 - o (eg. D leaches toxic chemicals onto A's land; P holds future interest in A's land; P may bring action for nuisance bc chemicals could interfere w/their future use and enjoyment)
- P must show (1) you a proper plaintiff (property holder) → (2) you suffered a significant harm as understood by reasonable person → (3) show invasion was intentional and unreasonable
 - o if can't show significant harm, you're screwed – end of case
 - o if you can show significant harm – D only liable if his conduct is legal cause of invasion of another's interest in private use and enjoyment of land & invasion is either intentional and unreasonable – or – intentional and otherwise strictly liable from some other branch of tort law (ie. hazardous activities)
 - Doesn't have to do with negligence – it's a problem of incompatibility

- Elements: significant harm, intentional, and unreasonable (gravity > utility)
 - o D must legally cause invasion
 - o Invasion must cause *significant harm* (§821F) [if not significant, stop here]
 - o Invasion must be *intentional* and *unreasonable* or *unintentional but causing another tort*
 - Intentional – acting w/purpose or knowledge w/substantial certainty (doesn't mean you intend to harm/nuisance, rather you just intend to perform physical acts that set causal chain)
 - Unreasonable (§826) [note: could bring both]
 - §826(a) Gravity of harm > utility of actor's conduct [case by case judgment: does the economic benefit outweigh the costs? If so, let them do it but give property owner damages. If not, injunction]
 - o Gravity of harm: extent/character of harm, social value attached to use invaded, suitability of enjoyment to locality, burden on P
 - o Utility of D's conduct: social value attached to primary purpose of conduct, suitability of conduct to character of locality, impracticability of preventing invasion
 - o *use this to get injunction!!!*
 - or
 - §826(b) Harm cause is *serious* and burden of compensating for this and similar harm would deter future instances of this type of harm
 - o Don't have to balance to prove unreasonable if harm suffered is so severe that you shouldn't have to bear it w/o compensation
 - o Don't have to weight if P's harm is *serious* and payment won't shut D down (No one knows what 'serious' vs. 'significant' is)
 - o *Boomer v. Atlantic Cement Co, Inc.* – P sued cement for dirt, vibrations, and noise from plant in nuisance; ct held comparative consequences of injunction were too unequal to justify it (plant was significant monetary investment & had 300 employees; ct granted temporary injunction until D paid permanent damages to P
 - Ct grants injunctions in nuisance only after balance equities; nuisance must be irreparable harm
 - *this case triggered change in nuisance litigation → if harm cause is serious and financial burden of paying it off won't ruin D = nuisance damages (not injunction) (but will allowing compensatory damages rather than injunction harm D bc 1000s of Ps might sue; could be de facto shut down)
 - o *Crest Chevrolet-Oldsmobile-Cadillac, Inc v. Willemsen* – Willemsen buy vacant land connected it to a storm sewer; when it rains water goes into Crest company's land, Crest sues for nuisance bc diversion of natural water flow is historically nuisance even though you can see/feel/touch; ct applied §826(b) & decided social utility analysis was unnecessary
 - Rule: Reasonable Use Doctrine - ct holds property owner can be allowed to make reasonable use of land even if creates nuisance, however, owner is responsible for resulting damages
- Remedies: damages and injunction (have to win twice to get injunction)
 - o If you cannot see me, feel me, touch me = nuisance
 - Eg. inherently noxious acts; factory emitting smoke/odors, business creating loud noise, gases other than natural gas & oil (smell, sound, light) = nuisances
 - *Morgan v. High Penn Oil, Co.* – P lived & owned mobile homes near D's oil refinery. D refinery unreasonably & intentionally emitted noxious gases on P's land & thus was liable for private nuisance. P entitled to damages & injunction
 - Exception to Tommy Rule: water intrusion = nuisance
 - o *Estancias Dallas Corp v. Schultz* – Ct held that an apartment complex's noisy AC unit was such a hamper on on the use and enjoyment of neighbor's land that the ct enjoined the AC; when

balancing equities in a nuisance case, cts consider the necessity of the action to the public (public health)

Invasion: must be an entry on my property from someone else's, usually no nuisance w/o an invasion

- Funeral homes are nuisances w/o creating invasions (*Jack v. Tarrant*)
 - o But cemeteries are never enjoined, never nuisances
- ½ houses in some juris may be nuisances w/o invasions; but depends on juris
 - o not nuisance in *Nicholson v. CT Halfway House*
 - w/locating uses in residential neighborhoods, usually P doesn't win solely based on fear & decrease in property values – injunctions may *not* be granted based on speculations about future nuisance
 - o nuisance in *Arkansas Release Guidance Foundation v. Needler* bc alcohol use and sex-offender in ½ way house
- xmas light display = not a nuisance if just gaudy, but if *really* bright prob a nuisance
- sometimes can enjoin a nuisance before an invasion occurs, but only if it's obvious and certain invasion will occur (ie. plans to put in a garbage dump next door)

Private Land Use Controls

Servitudes – permission, right to use property w/o right to possess it; privately negotiated land-use devices

- Affirmative Servitudes: right to do something that would otherwise be a tort (nuisance/trespass)
 - ex. licenses & easements
- Negative Servitudes: right to forbid something that normally would be lawful ← courts tend to be uncomfy with these
 - ie. non-invasive ‘nuisance’ that isn’t really a nuisance – you can give up that right and say you won’t put up gaudy xmas lights, rights to prohibit uses of land
 - ex. interference w/agriculture, water, sunlight
- when benefits or burdens of servitude bind successors = servitude ‘runs with the land’
- usually terminated by their own terms/purchase
 - many are defeasible & once defeasibility condition is met, they are over
 - built-in finite lifespans
 - burdened party can ‘buy them out’
 - “changed circumstances” – argue that servitude no longer serves a valuable purpose; ct will sometimes declare them equitably terminated (this is rare)
- 5 types of servitudes:
 - licenses, easement, profit, running covenant, equitable servitude

Licenses – permission to do something to land that would otherwise be a nuisance/trespass (ie. post a sign)

- affirmative servitudes; never negative!
- can be created orally (doesn’t need consideration/pay)
- damages only (can’t get specific performance)
- revocable at any time (unlike easements) [sometimes irrevocable if someone really relied on it]
 - only damages attached to revocation are if you paid for the license
 - eg. I go into a grocery store w/understand that I am welcome (I have a license to be there) even though I was not directly invited and facility is private property. If while there I do something to get kicked out, store may revoke the license w/o any damages owed to me
- *not* binding on successors in interest (if I grant a license to X and then sell property to Y. Y does not need to continue to grant X the license)

Easements – non-possessory interest in another’s land; rights to take tortious action on someone else’s land that cannot be revoked; affirmative servitudes

- may or may not be in writing, depending on SoF (doesn’t need to pay/consideration)
- not revocable; can be defeasible or limited by amount of time for which they are active
- can get specific performance
- you can grant an easement by:
 - Easement by Grant: written conveyance satisfying SoF
 - *Requirements*:
 - Temporal duration, physical location, dimensions, special uses allowed/disallowed (scope), may have subsidiary rights
 - Easement by Implication: not expressly identified but given circumstances, looks like the nature of the transaction/buyer’s intention; arise when parcel of land is broken into smaller parcels
 - *Requirements*:
 - (1) necessary for beneficial use of property (some strong cost if you don’t have it)

- (2) prior *apparent* usage; must exist at time of transaction, can't be new use (use must be anticipated when plot was initially divided)
 - (3) property is initially severed (only 1 entity could own land initially)
 - burdened landowner receives no compensation
 - court must fix physical, legal, temporal dimensions of the easement
 - *Schwab v. Timmons* – Ps sold portions of their land that connected them to the main road; wanted to extend a private road through Ds land to give P access to the road; wanted easement by necessity or implication; ct here did not find easement necessary bc P had never used the private road and it was not in interest of public policy
- Easement by Necessity: subspecies of implied easements; more narrowly focused on 1 person owning chunk of land, sever off part of it to someone else & chunk they transfer is completely landlocked
 - *Requirements*:
 - (1) initially common ownership (2 land parcels were, at one time, owned by same person)
 - (2) land was landlocked at moment you acquired it → ct may create easement by necessity simply for access to the road
 - usually burdened landowner gets compensated
- Easement by Prescription: consistent use of another's property for special purpose can ripen into permanent use; acquire right of use through passage of time if usage was sufficiently continuous; time period is drawn from SoL
 - Like getting an easement through adverse possession (same SoL applies)
 - *Requirements*:
 - Actual, continuous, open & notorious use
 - What counts as continuous & open is different for use (easement by prescription) than possession (adverse possession)
 - Doesn't have to be exclusive (can get prescriptive easement even if you're not the only person)
 - Jurisdictions are split on hostility
 - Usually must be hostile (nonpermissive) bc otherwise no tort to start the running of the SoL
 - But "lost grant theory" (early CL) says permission from landowner is evidence of long-lost easement
 - Temporal duration, geographical location, scope
 - Don't have to pay anything to burdened landowner
 - *Warsaw v. Chicago Metallic Ceilings* – Warsaw's trucks couldn't fit in their driveway but for more than 5 years they've driven on Chicago's property; Chicago builds barriers, court holds easement by prescription bc C never sued W before
 - Open, notorious, continuous, adverse use for period of time satisfying SoL
 - Continuous is debatable bc in *Warsaw*, ct could have easily found the route was not continuous bc not same route/time of day
- Types of easements:
 - Affirmative – right to do things that otherwise would be torts (most common)
 - Negative – promise not to do something w/a certain piece of property; negative right to not do something (not common)
- What is easement attached to?
 - Easement Appurtenant – easement attached/benefits a particular piece of land
 - Transferrable = runs with the land for the length of the grant (travels w/transfers)
 - dominant tenement (benefits); servient tenement (burdens)
 - *Martin v. Music* – courts presume easement in appurtenant unless told otherwise
 - Ex. Blackacre has easement to use road across Whiteacre to get to main road, Blackacre is dominant tract, Whiteacre is servient tract

- *Willard v. 1st Church of Christ, Scientist, Pacifica* – neighbor allowed church to use her parking lot for services; when neighbor sold land she required new buyer allow church same use; a grantor, in deeding real property to one person, may effectively reserve an interest in the property to another
 - ^this is different bc usually courts require that an appurtenant easement be created in a separate document before transferring to a 3rd party (easier to file and conduct title searches)
- Easement In Gross – easement attached/benefits a certain person/entity
 - Don't transfer (unless commercial)
 - Commercial easements w/business purpose = transferable
 - Personal purposes = usually intended to be nontransferable bc they're for a specific person
 - Ex. I let B fish in my pond
 - *Baseball Publishing Company v. Bruton* – Baseball K'ed with Bruton to place ad on wall of his building, K said Baseball had 'exclusive right and privilege to maintain the ad sign'; Bruton returned checks and had sign taken down; ct held since K granted exclusive rights it was more than an license (bc it vests in P the right to use the wall); it was an easement in gross which could be enforced by specific performance bc land interest

no one in their right mind would use a running covenant or equitable servitude to create affirmative rights when an easement is available

anything you can do by easement, you can also do by running covenant or equitable servitude, but usually ppl choose easements bc they're easier, unless it's negative, then...

The following are vehicles to impose restrictions on land that binds successors:

Running Covenants – tend to be negative (diff from easements); K bw 2 landowners, binding the successor in interest of each, that restricts one owner's use of his land in a manner benefiting the other's land

- Function like appurtenant easements – but they are different bc these are negative
- Remedy: usually damages, though could get injunction
- American Rule: to run w/land, one must show:
 - (1) Enforceable contract
 - must have consideration (can pay person)
 - (2) Intent to run w/land; intend for their promises to bind successors to property interest
 - (3) Promise must *touch and concern* land (has to be about land; often physical characteristics, use of land, payment of money/rent, promise to buy insurance)
 - 3rd Rest of Property would abolish touch & concern req and substitute a 'public policy' analysis instead
 - (4) Horizontal Privity – American Rule: parties must create the covenant as part of a land transaction (A transfers to B, who immediately transfers back to A w/covenant attached to get running covenant); English rule: parties must share some common interest (LL/T)
 - a lot of states have abolished this & adopted expanded notion of what constitutes a relationship
 - other jurisdictions have extended relationship to neighbors or people close enough that promise affects their property
 - American rule: will recognized binding successors if the promise is part of a land transaction (even if it's phony)
 - 3rd Rest of Property openly endorses the abolition of horizontal privity
 - (5) Vertical Privity – promises only run to direct successors of estate; successor must hold everything predecessor had at time of covenant; must have exactly the same interest as parties who initially formed covenant; assignees have vertical privity (sublessees do not) ← modern law has pretty much abolished this

Equitable Servitudes – another vehicle for imposing restrictions on land that bind successors (negative servitude), interest recognized in equity of one property owner in the land of another

- Requirements:
 - Enforceable contract
 - Must have consideration (pay person)
 - Intent to bind successors
 - Touch and concern land
 - Notice to successors
 - Notice (actual or constructive) acts as substitute for horizontal privity
- Remedy: traditionally, injunction
- Equitable servitudes in *planned communities/residential subdivisions* tend to get special treatment if party suing can show developer really had a plan for the community; when you buy into a development, you have certain expectations about obligations of your neighbors; courts will enforce restrictions in these even if they do not meet technical formalities of running covenants or equitable servitudes
 - implied reciprocal negative servitudes/easements – no one actually made these agreements openly (implied), they're reciprocal bc network of promises
 - ex. court can grant injunction to prohibit building gas stations in the area