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Landlord and Tenant: A Study in Property and Contract

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LANDLORD AND TENANT: A STUDY IN PROPERTY AND CONTRACT

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INTRODUCTION

A lease is both a conveyance and a contract.¹ Thus, the question of the proper relationship between property and contract analyses of the lease is not surprisingly a dominant theme of recent cases and commentary. The theme has generated two divergent theses. The traditionalists argue that there is a significant tension between the conveyance and contract views of a lease.²

1. See, e.g., 1 AMERICAN LAW OF PROPERTY § 3.11, at 203 (A.J. Casner ed. 1952); R. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT § 1.1 (1980). As we hope to show in this article, the concept of a lease as a "conveyance" is complex. Several constituents of this concept appear in our ensuing discussion, and we return specifically to the question of what it means to call a lease a "conveyance" in Part IV-A.

2. "Traditionalists," in our use of the term, are those theorists who argue, first, that property and contract rules for the decision of lease disputes are different from one another, property rules being essentially archaic and regressive; and second, that the application of contract rules to landlord-tenant disputes would effectuate necessary reforms. Those two ideas can be found, explicitly or implicitly and usually passim, in the following commentary: 2 R. POWELL, THE LAW OF REAL PROPERTY ¶ 221[1], at 181-85 (P. Rohan ed. 1983); R. SCHOSHINSKI, *supra* note 1; Bennett, *The Modern Lease—An Estate in Land or a Contract (Damages for Anticipatory Breach and Interdependency of Covenants)*, 16 TEX. L. REV. 47 (1937); Friedman, *The Nature of a Lease in New York*, 33 CORNELL L.Q. 165 (1947); Hicks, *The Contractual Nature of Real Property Leases*, 24 BAYLOR L. REV. 443 (1972); Lesar, *The Landlord-Tenant Relation in Perspective: From Status to Contract and Back in 900 Years?* 9 U. KAN. L. REV. 369 (1961); Lesar, *Landlord and Tenant Reform*, 35 N.Y.U. L. REV. 1279 (1960); Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 FORDHAM L. REV. 225 (1969); Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519 (1966); Woodruff, *Lessor and Lessee: Parties to a Contract or Landlord and Tenant?*, 8 U. KAN. CITY L. REV. 35 (1939); Note, *Contract Principles and Leases of*

They assert that the conveyance view is archaic and ill-suited to the needs of modern tenants, particularly residential tenants. They advocate the outright rejection of the conveyance view and the adoption of the view that "leases of urban dwelling units should be interpreted and construed like any other contract."³ This approach has been the cutting edge of much recent reform⁴ and is supported by respected judges and commentators.⁵

Lately, however, a revisionist thesis has emerged, which questions much of the traditionalists' distinction between property and contract analyses. The revisionists demonstrate that there are substantial similarities between property and contract doctrines, and they deny the accuracy and utility of the view that landlord and tenant law reflects any developmental movement from property to contract principles.⁶ Arguing, in short, that the

Realty, 50 B.U.L. REV. 24 (1970) [hereinafter cited as Note, *Contract Principles*]; Note, *The California Lease—Contract or Conveyance?*, 4 STAN. L. REV. 244 (1952).

We do not contend that traditionalists never see points of contact or similarities between property and contract analyses. For example, traditionalists almost universally recognize that the property doctrine of eviction is a substitute for the contract doctrine of dependency of covenants. See, e.g., Hicks, *supra*, at 460-64; Note, *Contract Principles and Leases of Realty*, *supra*, at 29-33. However, as we hope our discussion will indicate, it is fair to say that the traditionalists have found fewer similarities than actually exist, and that they have neither seen the extent of the similarities that they identify nor the differences that remain.

3. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1075 (D.C. Cir. 1970) (footnote omitted) (under contract principles, warranty of habitability similar to warranty of merchantability should be implied in residential leases). *Javins* is recognized as the seminal traditionalist case, but numerous other habitability decisions have espoused its viewpoint. See, e.g., *Green v. Superior Court*, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704, (1974); *Lemle v. Breeden*, 51 Hawaii 426, 462 P.2d 470 (1969); *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); *Mease v. Fox*, 200 N.W.2d 791 (Iowa 1972); *Boston Hous. Auth. v. Hemingway*, 363 Mass. 184, 293 N.E.2d 831 (1973).

4. For cases that have found an implied warranty of habitability akin to a warranty of merchantability in a sale of goods, see *supra* note 3. See also *Sommer v. Kridel*, 74 N.J. 446, 378 A.2d 767 (1977) (landlord is under duty to mitigate losses by making reasonable efforts to relet premises wrongfully vacated by the tenant); *Ringwood Assocs. v. Jack's of Route 23, Inc.*, 153 N.J. Super. 294, 379 A.2d 508 (1977) (tenant's duty to pay rent is dependent upon landlord's performance of obligation not to unreasonably withhold consent to assignment of lease; tenant entitled to terminate if landlord is in breach); *Albert M. Greenfield & Co. v. Kolea*, 475 Pa. 351, 380 A.2d 758 (1977) (tenant's obligation to pay rent is dependent on continued existence of buildings on leased premises; tenant excused upon destruction of the buildings by fire).

5. See *supra* notes 2 & 3.

6. See Chused, *Contemporary Dilemmas of the Javins Defense: A Note on the Need for Procedural Reform in Landlord-Tenant Law*, 67 GEO. L.J. 1385 (1979); McGovern, *Dependent Promises in the History of Leases and Other Contracts*, 52 TUL. L. REV. 659 (1978); Siegel, *Is the Modern Lease a Contract or a Conveyance?—A Historical Inquiry*, 52 J. URB. L. 649 (1975); Weinberg, *From Contract to Conveyance: The Law of Landlord and Tenant, 1800-1920 (Part I)*, 1980 S. ILL. U.L.J. 29.

traditionalists' assertion of important differences between property and contract analyses is more rhetorical than real, the revisionists counsel either caution in the use of the property-contract dichotomy as a framework of analysis⁷ or abandonment of the dichotomy altogether.⁸

We think that both the traditionalists and the revisionists have presented partial and in important ways incorrect accounts of the property-contract theme, and that an accurate statement of the utility of the theme requires a synthesis of the two perspectives. This article attempts such a synthesis.⁹ In Parts I and II, we analyze two doctrines that, according to the traditionalists, reveal dramatic differences between property and contract law. In Part I we discuss the doctrine of independency of covenants, which states that a tenant is not discharged from his rent obligation by the landlord's material breach of a covenant. In Part II we discuss the doctrine that destruction of buildings on the lease premises does not frustrate the tenant's purpose in entering the lease, and hence does not terminate the lease or the tenant's obligations under it. We shall attempt to show that these two doctrines are not denials of contract law but rather expressions of it. While the independency and destruction doctrines are often couched in a unique property vocabulary, we suggest that both doctrines are in essence understandable as facets of the contract law of constructive conditions. However, we also attempt to show that while property law shares the concept of constructive conditions with contract law, it implements that concept in unique and idiosyncratic ways. Our analysis is thus devoted to establishing that there are important similarities between property and contract analyses which traditionalists have overlooked, and, at the same

7. See McGovern, *supra* note 6, at 704; Weinberg, *supra* note 6, at 31.

8. See Chused, *supra* note 6, at 1386 & n.7; Siegel, *supra* note 6, at 687.

9. We are concerned in this article only with the impact of the property-contract theme on the tenant's rights and obligations under the lease. No rigid separation of the positions of landlord and tenant is possible, of course. The determination, for example, that the tenant has no right to rescind for the landlord's breach, or upon destruction of the leased premises, necessarily indicates that the landlord has a right to continue to enforce the tenant's rent obligation after those occurrences. See *infra* Parts I & II. However, we consider the landlord's position only in that indirect sense. Specifically, for example, we do not consider the question of the impact of the property-contract theme on the landlord's rights and remedies when the tenant wrongfully abandons the premises. May the landlord claim anticipatory breach and must he seek to mitigate his damages? See generally Love, *Landlord's Remedies When the Tenant Abandons: Property, Contract, and Leases*, 30 U. KAN. L. REV. 533 (1982).

time, important differences that the revisionists have ignored in their rush to assimilate property and contract analyses.

In Part III, we attempt to extend the essence of the traditionalist critique by showing that even recent decisions under the aegis of the view that a lease "should be interpreted and construed like any other contract"¹⁰ bear the lingering imprint of conveyance reasoning. In Part III-A, we show that the warranty of habitability, despite its origins in a contractual view of the lease, has been given a restrictive scope that denies much of that origin. In Part III-B, we show that the obligation to deal in good faith, which increasingly is being recognized in contract law, is almost nonexistent in lease cases.

In Part IV, we attempt to summarize our discussion and to state our position on the property-contract theme. Part IV-A will generalize the point suggested in our consideration of the independency and destruction doctrines: that property and contract reasoning are inescapably related because property reasoning can readily be translated into, if it is not already expressed in, contract categories. However, similarity is one thing, identity is another. We suggest that there is not one form of conveyance reasoning, but several, and that such reasoning has operated in lease cases to limit or ignore vital considerations that could emerge were a full contract perspective of the lease to prevail. We thus conclude that as a corrective to the simplicity of the traditionalist position the revisionist argument has immense value, but that the traditionalist insistence that there are differences between property and contract reasoning in landlord-tenant cases is ultimately correct, even though the steps leading to that conclusion are more complicated than the traditionalists have suggested.

In Part IV-B, we argue that the accuracy of the traditionalist *description* of lease cases does not necessarily suggest the correctness of its *prescription* that the application of contract ideas to leases is the necessary and sole means to achieve reform.¹¹ To

10. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1075 (D.C. Cir. 1970). For citations to other cases which apply contract principles to residential leases, see *supra* notes 3 & 4.

11. The traditionalists' case for the superiority of contract over property analysis can be assailed not just with the argument that property law is effective to achieve reform, but also with the argument that the traditionalists' contract law is often ineffective to achieve reform without important modification. We have argued the latter point elsewhere. See Chase, *The Property-Contract Theme in Landlord and Tenant Law: A Critical Commentary on Schoshinski's American Law of Landlord and Tenant*, 13 RUTGERS L.J. 189 (1982). See also Browder, *The Taming of a Duty—The Tort Liability of Landlords*, 81 MICH. L. REV. 99, 100 (1982) ("the lit-

the contrary, we argue that property analysis can accomplish the reforms advocated by traditionalists in the areas that we canvassed in Parts I through III: independency of covenants, destruction of the premises, the scope of the warranty of habitability, and the landlord's obligation to deal in good faith.¹² This argument that property analysis can achieve the same reforms as the overt contractual approach advocated by the traditionalist literature should not be surprising, since we will already have suggested that property reasoning is essentially contractual reasoning, although often covert and limited contractual reasoning. Nevertheless, because of an unfortunate doctrinal facade, it is often difficult to unmask conveyance concepts in order to identify their contractual bases. Consequently, we ultimately conclude that open recognition of the contract underpinnings of lease law is desirable and offers the more attractive avenue to the accomplishment of needed reforms in landlord-tenant law.

The possibility that creative lawyers *can* accomplish reform of landlord-tenant law using either property or contract concepts leads us in Part IV-C to reiterate briefly our conclusion that there is both less to the property-contract theme than the traditionalists have indicated, and more to it than either they or the revisionists have noted.¹³ Whether that conclusion is correct is, of course,

any recited in many landlord-tenant cases that the solution to current problems in this field depends on recognizing leases as contract, not property transactions" is a "bold and simplistic proposition"). In Part IV-B *infra*, we discuss the argument that property law might be effective to achieve reform.

12. Indeed, throughout this article, we attempt to maintain a distinction between the descriptive point that there are differences between property and contract analyses in landlord-tenant cases, and the normative or prescriptive point that contract reasoning is essential for the reform of landlord-tenant law. In numerous instances we will point out that property reasoning obscures important considerations concerning the lease transaction that probably would not be obscured were a contract perspective to prevail. However, we should make clear our belief that property reasoning, *as practiced by the cases*, has been deficient; we do not mean that reform could never be reached through a proper use of property reasoning. To the contrary, as we argue in Part IV-B, we think that property reasoning is sufficiently flexible to accomplish reform of landlord-tenant law, even though it remains true that contract reasoning, modified so as to avoid pitfalls overlooked by traditionalists, is often preferable.

Because property law can achieve the reforms sought by traditionalists, *see infra* Part IV-B, and the traditionalists' contract law sometimes does not, *see supra* note 11, a case might be made for the superiority of property over contract reasoning—the exact opposite conclusion from that asserted by the traditionalists. Professor Humbach has recently attempted to make that case. *See Humbach, The Common-Law Conception of Leasing: Mitigation, Habitability, and Dependence of Covenants*, 60 WASH. U.L.Q. 1213 (1983). We do not think that the argument for the superiority of property over contract reasoning can succeed, but that is a separate topic meriting an independent essay.

13. What separates us from the revisionists is our refusal to assimilate to-

debatable. What is not debatable is that the property-contract theme is a useful descriptive and heuristic device, that it has generated a rich and helpful discussion of a difficult and developing corner of the law, and that in so doing it has cast light on important phases of property and contract law, and perhaps on law in general.

I. CONSTRUCTIVE CONDITIONS OF PERFORMANCE IN LANDLORD-TENANT LAW: THE DOCTRINE OF INDEPENDENT COVENANTS

When a promisor expressly or impliedly promises to perform an undertaking, and fails to perform, the question arises whether that failure excuses the innocent party if the contract fails to address the matter. In a lease, for example, the landlord might promise to repair the premises. If he fails to perform, would the tenant be justified in vacating and rescinding the contract, and denying liability for future rent?¹⁴ In technical terms, the question is whether, the lease contract being silent, the court will imply or construct a condition¹⁵ that the landlord's performance is a prerequisite to the tenant's obligation to pay rent.¹⁶ If so, the landlord's failure to perform is a failure of the condition, and the tenant is excused.¹⁷

tally property and contract reasoning. What separates us from both the traditionalists and Professor Humbach is our refusal to agree that a choice between property and contract analyses is necessary. See Humbach, *supra* note 12. We at most suggest that such a choice may be desirable. See *infra* Parts IV-B & C.

14. "Rescission," as commonly used by courts in lease cases, does not carry its technical contract meaning of nullification of the contract and restoration of the status quo ante. See O. BROWDER, R. CUNNINGHAM, J. JULIN & A. SMITH, *BASIC PROPERTY LAW* 494-96 (3d ed. 1979) [hereinafter cited as *BASIC PROPERTY LAW*]; 4 A. CORBIN, *CORBIN ON CONTRACTS*, § 982 (1960); D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* 254 (1973). Rather, it refers to "a termination of contract elected by the victim of the other party's breach, ending all rights and obligations accruing after the rescission, and entitling the electing party to damages for the breach (rather than restitution)." J. WINOKUR, *AMERICAN PROPERTY LAW: CASES, HISTORY, POLICY AND PRACTICE* 425 (1982). We use the term "rescission" in this article in the sense indicated by Professor Winokur.

15. See 3A A. CORBIN, *supra* note 14, §§ 631-632 (distinguishing between "implied in fact" conditions, based upon the parties' words or conduct, and "constructive" conditions, based upon considerations of justice); *id.* § 633 (distinguishing between a promise, which "creates a legal duty in the promisor and a right in the promisee" and a condition, which "creates no right or duty and is merely a limiting or modifying factor"); *id.* § 653 (distinguishing constructive conditions from implied conditions).

16. See *id.* §§ 700-712 (discussing the "substantial performance" doctrine, which addresses the extent to which performance by one party is a condition of the other party's duty to render his performance).

17. See *id.* §§ 1252-1254 (discussing discharge of duty by the other party's

The contract doctrine of independency of covenants denies that constructive conditions can be created to relieve a party who fails to incorporate a condition in the contract; it insists that such conditions be express.¹⁸ Applying that view to our example, the tenant's obligation to pay rent, if in terms unconditional, would in fact be unconditional. The tenant would have a cause of action for damages for the landlord's breach of promise; but, since performance of the landlord's promise does not operate as a condition, the tenant would have no excuse from his or her own continuing obligation to perform.¹⁹

A standard doctrine in landlord-tenant law—indeed a centerpiece of the traditionalist critique—is that lease covenants are independent.²⁰ Traditionalists argue that this doctrine is rooted in

breach of contract). In landlord-tenant law, there is no straightforward determination as to whether the landlord has substantially performed so as to preclude a claim of discharge by the tenant. See *infra* Part I-B.

18. See 3A A. CORBIN, *supra* note 14, § 637, at 45 (“[I]f the duty of rendering performance of one promise is conditional upon the antecedent performance of the other, or of a tender of such performance, the first mentioned promise is said to be a ‘dependent’ promise.”); *id.* § 653, at 133 (“[A]s the law of contract assumed increasing importance in human affairs, there was for some centuries an increasing tendency to regard the intention of the parties as the sole operative factor in determining the legal relations consequent upon agreement. . . . [A] promise was held to be independent and unconditional unless words were used to indicate otherwise.”); E. FARNSWORTH, W. YOUNG & H. JONES, *CASES AND MATERIALS ON CONTRACTS* 691 (2d ed. 1972) [hereinafter cited as E. FARNSWORTH & W. YOUNG] (“To say that a promise . . . is ‘independent’ . . . is still an intelligible way of saying that it is not subject to a constructive condition.”). We follow these writers in reserving the term “independency” to denote the situation in which a party must have secured an express condition in order to claim an excuse from the duty to perform when the other party to the contract breaches. The concept of independency, however, can be, and indeed often has been, used to denote other quite distinguishable situations. See *infra* notes 20 & 21.

19. See J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* § 11-29, at 435 (2d ed. 1977) (tenant's duty to pay rent is generally independent of landlord's duty to provide services); 3A A. CORBIN, *supra* note 14, § 654, at 136 (failure of promisor to perform does not affect other party's duty); Rosett, *Contract Performance: Promises, Conditions and the Obligation to Communicate*, 22 *UCLA L. REV.* 1083, 1086 (1975).

20. See, e.g., *Stone v. Sullivan*, 300 Mass. 450, 15 N.E.2d 476 (1938) (landlord's duty to make repairs does not give tenant right to refuse to pay rent); *Meredith Mechanic Ass'n v. American Twist Drill Co.*, 67 N.H. 450, 39 A. 330 (1893) (landlord's breach of covenant to repair is not a defense to action for payment of rent, but gives tenant a claim for damages); *Stewart v. Childs Co.*, 86 N.J.L. 648, 92 A. 392 (1914) (landlord's breach of covenant to keep cellar waterproof is not a defense in action for nonpayment of rent); *Income Properties Inv. Corp. v. Trefethen*, 155 Wash. 493, 284 P. 782 (1930) (lessor's covenant to repair is independent of lessee's covenant to pay rent).

The assertion that covenants are independent can have several distinct meanings in landlord-tenant law. In order to avoid confusion, we think it helpful to review the distinct meanings of independency in one place, even though

property concepts, that it is "the most important logical incident

such a review anticipates much of our later analysis. For purposes of this discussion, we assume a situation in which the landlord has promised to repair the leased premises, and either fails to perform the promise, or renders less than full performance.

(1) In the modern, most useful, and probably only proper sense of the term, the concept of independency is the converse or denial of the concept of constructive conditions. Under this view, any conditions that limit or qualify a party's duty to perform must be in writing, because courts will refuse to infer or construct conditions to fill the contractual gap created by a party's failure to get the conditions expressed. Thus, in our example, the landlord's total failure to perform the repair promise would not excuse the tenant from his performance obligations under the lease if covenants were independent in this sense.

Contract law has recognized constructive conditions at least from the eighteenth century. See *Kinston v. Preston*, 2 Doug. 689, 99 Eng. Rep. 437 (K.B. 1773); McGovern, *supra* note 6, at 663-76 (arguing that the concept of dependency of covenants appeared much earlier than the seventeenth century, and that independency persisted thereafter). Therefore, it is incorrect to say that covenants in contract law are generally independent. In fact, the presumption in modern contract law is the opposite: covenants are dependent unless expressly made independent or unconditional. See U.C.C. § 2-609 & comment 1 (1977) (contract for sale imposes an obligation on each party to perform); 6 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 813, at 6 (W. Jaeger 3d ed. 1962) (in usual bilateral contract, failure to give performance on one side deprives party in default of right to enforce the other party's promise). Similarly, landlord-tenant law excuses the tenant from the obligation to pay rent in some situations even though the tenant has not expressly bargained for the excuse, including instances in which the landlord has defaulted on a promise to repair. See *infra* Part I-B. Thus, it cannot be said that covenants in landlord-tenant law are independent in this first sense of that term.

(2) The concept of independency is also used to describe substantial performance. When covenants are dependent, that is, when constructive conditions are recognized, the promisee's ability to claim excuse from the obligation to perform depends on whether the condition to the promisee's duty to perform has been satisfied. Substantial performance by the promisor satisfies the condition of performance. If substantial performance has been rendered, the promisee loses his or her claim for excuse and is left with a claim for damages resulting from the fact that substantial rather than exact performance has been rendered. Conversely, since material breach is the antithesis of substantial performance, the promisee can be excused if the promisor is in material breach of his or her obligation to perform. See J. CALAMARI & J. PERILLO, *supra* note 19, § 11-22; 3A A. CORBIN, *supra* note 14, § 700, at 310, § 709, at 334, 338-39. There are two ways to determine whether substantial performance has occurred. In the case of multiple promises by a promisor, substantial performance of the vital or important promises constitutes substantial performance of the contract; incomplete performance of, or even total failure to perform, collateral or minor promises is an immaterial breach. In our example, if the repair promise were categorized as minor, even a total failure of performance by the landlord would not excuse the tenant, since nonperformance of an immaterial promise, by definition, could not be a material breach. With respect to the vital promise or promises in a contract, a small deviation from performance also is an immaterial breach. In our example, if the landlord's repair promise were vital, the landlord's failure to perform it could be deemed insignificant in some circumstances—for example, were the landlord to fail to repair a single window pane. See, e.g., *Dittman v. McFadden*, 159 Okla. 262, 263, 15 P.2d 139, 140 (1932) (landlord's failure to make minor repairs is not eviction justifying abandonment by tenant).

flowing from the common law's conception of the lease as a con-

The concept of independency can be used to describe both of these varieties of substantial performance. Thus, a collateral or minor promise can be described as "independent" to indicate that failure to perform it does not excuse the promisee. Also, one might describe the fact that a promisor's incomplete performance of a vital promise is immaterial by saying that the promisee's duty to perform became "independent," that is, unconditional, after receipt of substantial performance of the vital promise. We prefer to avoid using the concept of independency to describe either variety of substantial performance. Instead, we prefer to say that the question in either case is not independency proper—that is, whether conditions are recognized—but rather substantial performance—that is, whether the conditions have been satisfied.

(3) The concept of independency also can be used to explain the obligation of a tenant who affirms the lease after a material breach by the landlord. If covenants are independent, a promisee remains obligated to perform even when he or she has received no performance at all from the promisor. Similarly, even if promises are dependent, a party who has received substantial but less than full performance likewise is not relieved of his or her obligations by the immaterial breach. However, if promises are dependent and a party does not receive substantial performance—that is, if a material breach has occurred—the promisee has an election: terminate the contract and with it, his or her obligations to perform; or affirm the contract, in which case his or her own obligations under it remain alive. The promisee who elects to affirm "waives" the material breach and is relegated to the situation he or she would be in had only an immaterial breach occurred (or, indeed, had the covenants been independent). The promisee has an action for damages, but no excuse from his or her own obligation to perform. See J. CALAMARI & J. PERILLO, *supra* note 19, § 11-37; 3A A. CORBIN, *supra* note 14, § 755.

Returning to our example, if the landlord failed to perform the promise to repair, and if that failure constituted a material breach, the tenant would have the election to vacate and rescind, thereby terminating his or her future liability under the contract. However, if the tenant remained in possession and affirmed, he or she would continue to be liable. While it would be possible to state the conclusion that the tenant who affirms must continue to perform his or her own obligations by saying that these obligations are "independent," we see no merit whatsoever in doing so. The conceptual explanation for the affirming tenant's continued obligation to pay rent when the landlord commits a material breach is that the tenant's election to affirm keeps the contract, and both parties' obligations under it, alive. See *id.* The policy explanation is that an unjust enrichment would occur if the tenant were allowed to keep possession and avoid payment of rent. See McGovern, *supra* note 6, at 681-82. Neither explanation requires resort to the concept of independency. See Cunningham, *The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status*, 16 URB. L. ANN. 3, 116 (1979). To the extent that difficult questions exist, they are procedural and focus on whether the tenant has a safe, effective and fair means to offset his or her damages against the admitted liability for rent. As we have argued elsewhere, the substantive doctrine of independency should be irrelevant to those questions, and would be, were it not for the distorting effect of summary dispossession legislation. See Chase, *supra* note 11, at 206-25.

To summarize: In the strict and proper sense of the term, covenants in leases are not independent, because landlord-tenant law allows the tenant to be excused from her or his obligations to perform when the landlord commits a material breach of contract, even though the tenant's duty to perform is not made expressly conditional upon the landlord's performance. The proposition that covenants in landlord-tenant law are "independent" *could* be used to describe the quite different conclusion that the tenant in a particular case has been the beneficiary of substantial performance by the landlord, and hence must per-

veyance of an interest in real estate."²¹ Revisionists, although

form her or his own obligations under the lease. However, this latter proposition can be explained more effectively by conceding that covenants are dependent and by discussing the adequacy of the landlord's performance under the rubrics of substantial performance and material breach. See *infra* Part I-B. Finally, the use of the term "independency" to explain the continuing obligation of an affirming tenant to perform his or her duties under the contract should be avoided as hopelessly confusing. The critical question for the tenant is whether procedures are available to pursue a damages claim against the landlord, a question which, properly regarded, has nothing to do with the substantive doctrines of independency and dependency.

21. *Boston Hous. Auth. v. Hemingway*, 363 Mass. 184, 195, 293 N.E.2d 831, 841 (1973). It seems clear that conceptualizing a lease as a conveyance does have a restrictive impact on the questions of whether and when the tenant can be excused for certain landlord breaches of covenant. To that extent, the traditionalists' central claim of an important difference between property and contract analyses is correct. See *infra* Part I-B. However, in attempting to differentiate property and contract analyses, we think it more accurate to say that the conveyance view of a lease produces a particular (and perhaps peculiar) conception of substantial performance and material breach, rather than to say, as the *Hemingway* court argues, that it produces the doctrine of independency, in supposed contrast to the contract doctrine of dependency. For a discussion of the doctrine of independency, see *supra* note 20. In other words, we believe that the essence of the conveyance view is that the landlord has substantially performed his or her obligations under the lease when he or she conveys possession of the land to the tenant and refrains from disturbing the tenant's possession thereafter. Consequently, any breach that does not affect the tenant's possession of the land generally has not been regarded as material.

Indeed, inasmuch as traditionalists recognize that the doctrine of eviction is a substitute for the contract doctrine of dependency of covenants, see *supra* note 2, their claim that property law burdens tenants in ways that contract law does not, would have to take either of two forms, if it is to have any substance at all. First, traditionalists might argue that there are important differences between the property doctrine of eviction and the contract doctrine of material breach for which it substitutes. Because of the difference, tenants who wish to rescind the contract and be excused from further performance of it might be denied that remedy under a property analysis when they might be granted it under a contract analysis. Second, instead of (or along with) arguing that property law is more demanding than contract law on the question of the grounds for rescission, traditionalists might argue that the property doctrine of independency prevents the tenant who remains in possession and affirms the contract from effectively offsetting his or her damages against the landlord's claim for rent. Of these two arguments, we believe the first has merit, while the second does not. See *supra* note 20.

Unfortunately, traditionalist literature fails to differentiate clearly between the two questions of remedies we have identified: the question of whether property law places obstacles on the tenant who wishes to rescind after the landlord's breach, and the separate question of whether property law prevents the tenant who affirms from effectively setting off his or her damages against the landlord's rent. For a discussion of traditionalist literature, see *supra* note 6. Some traditionalists argue the second point. See, e.g., R. SCHOSHINSKI, *supra* note 1, §§ 6:11, :17. Some argue both the rescission and affirmation points. See, e.g., Quinn & Phillips, *supra* note 2, at 231-39; Note, *Contract Principles*, *supra* note 2, at 29-33, 47-50. We are not aware of any traditionalist writers who present what we regard to be a completely accurate assessment of the dependency of covenants dispute, namely, that the question of rescission presents the sole instance in which the independency-dependency distinction should matter, and also that

they take different tacks, challenge the traditionalists' conclusion that the independency of lease covenants illustrates important divergencies between property and contract law.²² Instead, they view independency as explainable in contract terms. The question thus framed by the dispute between traditionalists and revisionists is whether there are important differences between property and contract analyses of conditional performance, and if so, what they might be.

A. *The Traditional and Revised Versions of Independency*

At least on the surface, there is considerable merit to the traditionalist claim that property and contract analyses of the landlord's breach of lease covenants diverge markedly. Two landmark cases, both decided in 1914, are illustrative. In *University Club of Chicago v. Deakin*,²³ the landlord sued for rent due on a one-year lease after the tenant had vacated during the tenancy. The tenant, a jeweler, defended the suit on the ground that the rent obligation was excused, because the landlord had breached a promise in the lease not to rent other parts of the building to tenants making a speciality of the sale of pearls. The landlord had leased a neighboring storeroom, and had inserted in the lease a provision forbidding the sale of pearls. The second tenant, however, violated that provision. The Supreme Court of Illinois reversed a judgment for the landlord.²⁴ In a refreshingly direct opinion, the court held that the lease in question "was a bilateral contract," in

there are specific and important differences between the property and contract law versions of rescission. We attempt in this article to provide that assessment. Thus we reject the revisionists' claim that there are no relevant differences between property and contract analyses on the dependency question.

22. For example, Professor McGovern denies that there is any meaningful conceptual connection between property reasoning and the question of the independency or dependency of lease covenants. See McGovern, *supra* note 6, at 679-80. Professor Siegel sees a connection, and argues that the supposed independency of lease covenants is an application of the contract doctrine of substantial performance. But he fails to find any meaningful differences between the property and contract views of substantial performance and material breach. See Siegel, *supra* note 6, at 663-70. While both theorists thus reject the traditionalist claim that there are important differences between property and contract analyses on the question of independency, we will focus on Professor Siegel as the primary exponent of the revisionist view. Even though, in our view, he overlooks important differences between property and contract analyses, his recognition that conveyance reasoning is at least relevant to the important issues that are debated under the rubric of "independency" is accurate. For a further discussion of Professor McGovern's views, see *infra* note 128. For additional comments on Professor Siegel's views on independency, see *infra* notes 67 & 119.

23. 265 Ill. 257, 106 N.E. 790 (1914).

24. *Id.* at 262, 106 N.E. at 792.

that it "contained covenants to be performed by each" party: the landlord's covenant to protect the tenant from competition, and the tenant's covenant to pay rent.²⁵ Although the contract did not explicitly excuse the tenant in the event that the landlord failed to perform his promise, the court stated that it would "be presumed," that the parties intended the landlord's promise to be one of the vital provisions of the lease, and that the tenant "would not have entered into the contract if this clause had not been made a part of it."²⁶ The court held that the promise was "such an essential provision of the contract that a breach of it would warrant [the tenant] in rescinding the contract and surrendering possession of the premises."²⁷

In contract terms, the *Deakin* court imposed upon the landlord a constructive condition of performance of the noncompetition promise. The court went on to find that the landlord had not substantially satisfied that condition merely by inserting a restrictive covenant in the second lease. Because of the landlord's material breach the tenant was excused.²⁸ The court thus applied to a lease the standard contract presumption of dependency in bilateral contracts.²⁹

*Stewart v. Childs Co.*³⁰ lends marked contrast. There, as in *Deakin*, the landlord sued a commercial tenant who had vacated during the lease term and had ceased paying rent. The tenant defended on the ground that the landlord had failed to perform an express promise to waterproof the basement of the restaurant building, resulting in substantial flooding of the leased premises.³¹ The trial court directed a verdict for the landlord, holding

25. *Id.* at 260, 106 N.E. at 791.

26. *Id.* The court explained that when a contract provision is violated and there is no express agreement that the breach should operate as a discharge, the court must determine whether the violation concerned a matter "vital" to the contract. *Id.*

27. *Id.* at 260-61, 106 N.E. at 791.

28. *Id.* at 261-62, 106 N.E. at 791-92. The court found that "[i]t was incumbent upon [the landlord] to do more than insert this provision in the second lease." *Id.* at 261, 106 N.E. at 792. Since the landlord contracted not to lease to anyone in the tenant's line of business, if the landlord failed to prevent subsequent tenants from engaging in that speciality, he did so at the risk of the original tenant terminating the lease. *Id.* at 262, 106 N.E. at 792.

29. See 6 S. WILLISTON, *supra* note 20, § 813, at 6 (if a contract is bilateral, the failure to give performance will deprive that party of the right to enforce performance by the other party).

30. 86 N.J.L. 648, 92 A. 392 (1914).

31. *Id.* at 649, 92 A. at 393. In the lease the landlord promised that "[t]he basement shall be waterproof, and not less than 7 feet high. And he does hereby guarantee that he will at all times during the said lease keep the said cellar water-

that the tenant's covenant to pay rent was independent of the landlord's promise to waterproof the premises. On appeal, the Supreme Court of New Jersey affirmed. The court conceded that "[t]he cellar was necessary for the conduct of the business" of the tenant,³² thus suggesting that the covenant to waterproof was a vital and material provision of the lease. Moreover, the court found that the landlord had breached the covenant, since "[t]he presence of the water in the cellar was wholly due to the fact that the walls and foundation were not waterproof" in accordance with the landlord's promise.³³ Nevertheless, the court refused to condition the tenant's obligation to pay rent on the performance of the landlord's covenant to waterproof. The court adopted without discussion the trial court's view that the two covenants were independent, stating simply and flatly that the landlord's "breach of . . . covenant was not a defense to the action."³⁴ In contrast to the *Deakin* language of bilateral contracts, material breach and rescission, the *Stewart* court spoke a pure property vocabulary: While the tenant could not be excused for the landlord's breach of an independent covenant, he might be excused if the landlord's conduct amounted to a "constructive eviction" of the tenant from the premises.³⁵ The court concluded, however, that the landlord's conduct in the case did not amount to a constructive eviction.³⁶

The traditionalist claim that there are differences between property and contract analyses appears to be borne out by a comparison of cases like *Stewart* and *Deakin*. In assessing basically sim-

proof at his own expense." *Id.* At times the water in the basement was three feet deep. *Id.* at 650, 92 A. at 393.

32. *Id.* at 650, 92 A. at 393. The premises were used as a restaurant. A steam apparatus for brewing coffee as well as storage items were kept in the cellar. *Id.*

33. *Id.*

34. *Id.* at 650-51, 92 A. at 393. The court reasoned that there was no evidence that the landlord intended to deprive the tenant of the use of the premises. *Id.* at 651, 92 A. at 393.

35. *Id.* at 650, 92 A. at 393. See 2 H. UNDERHILL, A TREATISE ON THE LAW OF LANDLORD AND TENANT § 674, at 1137 (1912) ("An actual eviction as distinct from a constructive eviction occurs when the landlord . . . enters upon and takes physical possession of the whole or of some part of the premises All other evictions are constructive merely."). As we have suggested above, see *supra* notes 20 & 21, and shall develop more fully in Part I-B, the property doctrine of eviction is a substitute for the contract doctrine of dependency of covenants. Nonetheless, it is a substitute, and is in important ways different from the contract doctrine.

36. 86 N.J.L. at 650-51, 92 A. at 393. For a discussion of the justifications for the court's view that no eviction had occurred, see *infra* notes 81-113 and accompanying text.

ilar facts the two cases employ different methods and reach different results. *Deakin* employs a straightforward contract approach, focusing on the materiality of the landlord's noncompetition promise and the extent to which the landlord's actions constituted performance of that promise. *Stewart*, in contrast, eschews entirely the contract perspective. Instead, the court assesses the landlord's performance in terms of the property doctrine of "constructive eviction," and concludes that no eviction occurred on the facts of the case.³⁷

In spite of the foregoing distinctions, a strong recent revisionist critique has argued that the apparent differences between property and contract analyses suggested by cases like *Deakin* and *Stewart* are illusory, and that property and contract law in fact apply identical doctrine. Though joined on this point by other commentators, Professor Siegel has offered the most provocative argument for the proposition that the lease doctrine of independency of covenants is not a rejection of modern contract doctrine, as *Stewart* seems to indicate, but rather an expression of it.³⁸ He asserts that under contract doctrine, substantial performance "can render covenants independent which theretofore have been dependent."³⁹ By performing substantially, the promisor satisfies the constructive condition of performance imposed in bilateral contracts,⁴⁰ thus becoming entitled to the performance of the aggrieved party and precluding a claim of rescission.⁴¹ Professor Siegel quotes cases in which he suggests that the basis of the decision to deny rescission to the tenant is that the landlord has substantially performed his obligations under the lease.⁴² He thus

37. For a discussion of the *Stewart* court's conclusion that the facts in that case did not amount to a constructive eviction, see *infra* notes 81-113 and accompanying text.

38. See Siegel, *supra* note 6, at 663-70. See also Weinberg, *supra* note 6, at 66-82.

39. Siegel, *supra* note 6, at 665 (footnote omitted). While we think that Professor Siegel correctly indicates that the real question in landlord-tenant cases is not independency of covenants but rather substantial performance, which assumes a dependency view, we question his quoted statement concerning substantial performance doctrine. See *infra* notes 44-66 and accompanying text.

40. For a discussion of the doctrine of substantial performance, see *supra* note 20.

41. Substantial performance of a condition makes absolute the duty of the person whose performance was predicated on satisfaction of that condition. See A. CORBIN, *supra* note 14, § 709.

42. Siegel, *supra* note 6, at 665 (citing, *inter alia*, *McCulloch v. Cox*, 6 Barb. 386 (N.Y. Sup. Ct. 1849); *Obermyer v. Nichols*, 6 Binn. 159 (Pa. 1813)). For a criticism of Professor Siegel's use of these cases in support of his thesis, see *infra* note 67.

concludes that “[i]n fact, the independence of lease covenants” does not stand in contrast to modern contract law, but rather “results from a vigorous application of one branch of the contract principle of constructive conditions, i.e., the doctrine of substantial performance.”⁴³

We think that Professor Siegel’s analysis, while it contains significant insight, is flawed in important ways. On the one hand, his analysis does not go far enough, and on the other, it goes too far. Siegel does not go far enough in his important, and we think correct, claim that the property doctrine of independency is actually an application of contract principles. In fact, in developing that claim, Siegel appears to confuse two separate assertions about the property doctrine of independency. His confusion diminishes the reader’s ability to perceive his criticism of the traditionalist position and weakens his case.

The thrust of Siegel’s argument is that the independence of lease covenants is a function of the doctrine of substantial performance. One way in which he states that argument is his contention that “[p]art performance [i.e., substantial performance] can render covenants independent which theretofore have been dependent.”⁴⁴ For our part, however, we see little merit and considerable danger, in an area already rife with confusion, in characterizing the situation that results from substantial performance of a constructive condition as a kind of independency.⁴⁵ It is true that substantial performance of a constructive condition makes absolute (i.e., unconditional) the duty of a person whose own performance was contingent on the condition being satisfied.⁴⁶ And it is true that the aggrieved party is left, after substantial performance, with only an action for damages for any shortfall resulting from the fact that the performance he has received is partial (though substantial) rather than complete.⁴⁷ Because the aggrieved party’s duty is absolute after substantial performance, and because he has only an action for damages, it is tempting to say that his obligation to perform is “independent,” since exactly

43. Siegel, *supra* note 6, at 664 (footnote omitted). Professor Siegel explains that whatever the motive for the substantial performance doctrine might be, the doctrine represents nineteenth century contract law. *Id.* at 664 n.80.

44. *Id.* at 665 (footnote omitted).

45. For a discussion of the possible meanings of “independency of covenants,” see *supra* note 20.

46. J. CALAMARI & J. PERILLO, *supra* note 19, §§ 11-22, at 407-12; 3A A. CORBIN, *supra* note 14, § 709, at 334, 338-39.

47. J. CALAMARI & J. PERILLO, *supra* note 19, §§ 11-22, at 407-08; 3A A. CORBIN, *supra* note 14, § 709, at 334.

those consequences attach to an independent promise.⁴⁸ However, we would prefer to analyze the substantial performance situations by saying that the tenant's duty is unconditional because the condition to his duty has been performed,⁴⁹ not that it is unconditional because it is an independent duty, that is, one to which no condition of performance ever attached.

Lest this seem needlessly punctilious we should explain why the two descriptions we have indicated are different. In a lease case, the landlord might, as in *Stewart*, make a promise respecting the condition of the premises. When the landlord fails to perform that promise, property law asserts that the tenant is not discharged, because his duty to pay rent is independent of the landlord's performance of the repair promise. Professor Siegal argues that the reason for the tenant's duty being absolute is that the landlord has substantially performed the repair promise. The assumption of that analysis would be that the rent obligation was originally conditioned on performance of the repair promise, but that the condition had been satisfied by part, i.e., substantial, performance, thus rendering the tenant's obligation "independent" from that point on. We believe this is a misdescription of the situation. In *Stewart*, the landlord did not substantially perform the covenant to waterproof the basement. He did not perform the covenant at all. Yet despite the landlord's total breach of that covenant, he was allowed to recover the rent. If it makes sense to say that the tenant's duty to pay rent was independent, the reason must be found in an explanation other than that the duty was "independent" because the condition to its performance—waterproofing of the basement by the landlord—had been satisfied.

Another explanation of the lease doctrine of independency is available, and on occasion Professor Siegel hints at it. Like his first explanation, this second one employs the concept of substantial performance, but in a sense different from that indicated so

48. See J. CALAMARI & J. PERILLO, *supra* note 19, §§ 11-29 (lease provisions are generally construed as independent promises).

49. See RESTATEMENT OF CONTRACTS § 268 comment d (1932). Comment d provides:

If two performances constitute the subjects of an agreed exchange, and the duty to render one of them is conditional upon the antecedent or simultaneous rendition of the other, the condition is performed when that other subject of exchange is rendered substantially in full, in the absence of an express provision to the contrary. The conditional duty has now become unconditional, because the condition has been performed.

Id.

far. In the sentence immediately preceding his statement that “[p]art performance can render covenants independent which theretofore have been dependent,”⁵⁰ Siegel quotes Williston for the proposition that “breach of a separate collateral promise of minor importance will not justify refusal by the other party to perform, if the main promise to him has been or is being substantially performed.”⁵¹ As illustration, Siegel cites and quotes several cases in which, as in *Stewart*, tenants were refused exoneration from their rent obligation after the landlord breached various specific lease covenants.⁵² The Williston quote and the examples, however, do not illustrate the proposition that “part performance can render covenants independent which theretofore have been dependent.” Rather, they illustrate a separate kind of “independency.” The Williston quote in full is as follows:

Where several promises are made by one party, a breach of one of them necessarily goes to only part of the consideration, but it may be a vital part, or it may be a minor part. A breach of a separate collateral promise of minor importance will not justify refusal by the other party to perform if the main promise to him has been or is being substantially performed.⁵³

Translated into our present discussion, this excerpt indicates that in cases of multiple promises by a promisor, the promisee’s reciprocal duty to perform is conditional upon substantial performance of the vital promise or promises by his promisor, but is not conditional upon performance of “a separate collateral promise of minor importance.” That is, the promisee’s duty is “independent” of the promisor’s performance of such collateral promises. Under this analysis of independency, the fact that a particular promise has not been performed at all is irrelevant (except of course insofar as nonperformance gives rise to a claim for damages), so long as the breached promise is classified as collateral or minor. Thus, the promisee has to perform because his performance was not dependent at all upon the collateral promise.⁵⁴ This

50. Siegel, *supra* note 6, at 665 (footnote omitted).

51. 6 S. WILLISTON, *supra* note 20, § 841, at 159, *quoted in* Siegel, *supra* note 6, at 664-65.

52. Siegel, *supra* note 6, at 665. *See also supra* note 42.

53. 6 S. WILLISTON, *supra* note 20, § 841, at 159 (citations omitted).

54. We accept, for purposes of the textual discussion accompanying notes 50-53, the long tradition that refers to minor promises in the multiple promise situation as “independent.” However, modern contract writers prefer, as do we,

contrasts with Professor Siegel's basic approach, in which the promisee's obligation was "therefore" dependent upon the collateral promise and was "rendered independent" by the promisor's substantial part performance of it.

Had Professor Siegel separated the "independency" that results from substantial performance of an admittedly conditional duty, and the "independency" that results from the distinction between vital promises (which are dependent and require substantial performance) and collateral promises (which are "independent" and subject to no condition of performance at all) he could have carried his analysis further. As it is, his analysis tells us, instructively, that the property doctrine of independency is related to the doctrine of substantial performance in contract law. However, by introducing the false note of "independency" resulting from substantial performance of a constructive condition,⁵⁵ he misses the opportunity to be precise; and in missing it, he fails to draw the exact relevant parallel between property and contract law.

Put in the terms we have now introduced, the decision in *Stewart* would hold that the landlord's obligation to waterproof the basement was not a "vital" part of the consideration for the tenant's promise to pay rent, but was, rather, only a "collateral" or "minor" covenant.⁵⁶ Because the waterproofing promise was thus "independent," breach of it generated at best a claim for damages but did not discharge the tenant's duty to pay rent. Thus explained, the result in *Stewart* appears to be entirely straightforward (if somewhat outdated) contract law. In modern understanding, a covenant is "independent [i.e., unconditional] if nothing but a lapse of time is necessary to make the promise enforceable."⁵⁷ Where, as in *Stewart*, a promisor makes several promises, a minor promise might be regarded as independent in the sense that the promisor's failure to perform it does not discharge the promisee.⁵⁸ However, since the concept of dependency does apply in this situation—because the promisor's failure

to avoid the terminology of independency entirely in the multiple promise situation. See *infra* notes 57-63 and accompanying text.

55. For a discussion of the analytical view that independency results from substantial performance of a constructive condition, see *supra* notes 44-49 and accompanying text.

56. For a further discussion of *Stewart*, see *supra* notes 30-36 and accompanying text.

57. J. CALAMARI & J. PERILLO, *supra* note 19, § 11-29, at 432 (footnote omitted).

58. *Id.* (citing S. WILLISTON, *supra* note 20, § 822, at 44 (in contract to sell a

to substantially perform the “vital” promise or promises *would* discharge the promisee—modern authorities prefer to say that “the real question” in cases of multiple obligations “does not involve independent promises but [rather] substantial performance.”⁵⁹ Thus, “[i]n a true sense a promise is independent in cases to which the doctrine of constructive conditions does not apply” at all, not in cases to which it does apply.⁶⁰

In effect, modern commentators on the law of contracts take the position that promises are generally dependent, unless expressly made unconditional.⁶¹ Whether a promisee has a duty to perform thus depends on whether the promisor has substantially performed his or her obligations.⁶² If the agreement involves multiple obligations, the question in determining substantial performance “is not whether each promise is substantially performed but whether there is overall substantial performance.”⁶³ Thus, multiple promises are considered as a package and the question is whether the promisee has received substantial performance of the entire package. Professor Siegel, it appears, has neglected this refinement of the doctrine of substantial performance.

We conclude, then, that a thorough revisionist critique of the traditionalist view should assert that the traditionalist emphasis on independency as a property doctrine in contrast to the contract doctrine of dependency commits a double error. First, as Professor Siegel seems to understand in a general sense, the traditionalist view overlooks the fact that the so-called “independency” doctrine of landlord-tenant law is not true independency doctrine at all, but instead is an adaptation of the contract law of dependency and substantial performance. The tenant in *Stewart* did not lose because the landlord owed him no performance at all as a precondition to recovery of rent, which would have been the

car and change a tire, performance of promise to change the tire is not a condition to buyer's duty to pay)).

59. J. CALAMARI & J. PERILLO, *supra* note 19, § 11-29, at 433 (footnote omitted). See also E. FARNSWORTH, *CONTRACTS* 580 n.21 (1982) (“Courts sometimes revert to the notion of independence of promises when it would be less confusing to treat all promises as dependent and base the result on the immateriality of the breach.”).

60. J. CALAMARI & J. PERILLO, *supra* note 19, § 11-29 at 433. See E. FARNSWORTH & W. YOUNG, *supra* note 18 (“To say that a promise . . . is ‘independent’ . . . is still an intelligible way of saying that it is not subject to a constructive condition.”).

61. See, e.g., E. FARNSWORTH, *supra* note 59, at 580 n.21; 6 S. WILLISTON, *supra* note 20, § 813, at 6.

62. See, e.g., E. FARNSWORTH, *supra* note 59, at 580 n.21.

63. J. CALAMARI & J. PERILLO, *supra* note 19, § 11-29, at 432 n.13.

case if lease covenants in general were truly independent.⁶⁴ Rather, the tenant lost because the landlord had in fact substantially performed the package of obligations upon which rent depended. The fact that the promise to waterproof was totally unperformed did not preclude substantial performance of the package.⁶⁵ Second, the traditionalists overlook that the contract law applied in cases like *Stewart*—which in essence labels minor promises in the lease as “independent”—is dated contract law. Modern commentators avoid the concept of independency entirely except to describe the situation in which no constructive conditions of performance operate.⁶⁶ Yet in cases like *Stewart*, the landlord is subject to the constructive condition that he substantially perform his package of promises in the lease. The question of the significance of the promise to waterproof the basement should thus be considered as a part of the question of the landlord’s substantial performance. If the landlord’s failure to perform does not discharge the tenant, the reason should be that performance of the promise is immaterial to substantial performance of the landlord’s total package of promises, not that it is an “independent” promise.

As a final point to this portion of our discussion, we should point out that we do not wish to be understood as agreeing ultimately with even a revised version of Professor Siegel’s revisionist analysis.⁶⁷ He regards his discussion of independency doctrine as

64. For a discussion of the possible interpretations of the “independency” of lease covenants, see *supra* note 20. For a discussion of the facts and holding of *Stewart*, see *supra* notes 30-36 and accompanying text.

65. For a discussion of the court’s conclusion that the landlord’s failure to perform the waterproofing covenant in *Stewart* did not constitute a constructive eviction, see *infra* notes 81-113 and accompanying text.

While we agree with the revisionists’ rejection of independency as a proper mode of analysis for cases like *Stewart*, we note that it is quite easy to appreciate how independency came to be viewed as the explanation for such holdings. Any one of the landlord’s promises which, if completely unperformed, would not excuse the tenant’s rent obligation is, in practical effect, an independent promise. Yet, at the same time, if its nonperformance combined with the nonperformance of one or more other landlord promises would excuse the tenant’s rent obligation, it is also potentially dependent. While the dependency of such a promise is only in combination with other promises, the potential for dependency is there nonetheless. Consequently, a labelling of these promises as independent, while often correct in practical effect, distorts the full analysis that should occur in a case like *Stewart*.

66. For a discussion of modern views of the concept of an “independent” covenant, see *supra* notes 57-63 and accompanying text.

67. As we have indicated, we think that the central insight in Professor Siegel’s discussion is his translation of the question of the so-called independency of lease covenants into the question of substantial performance and material breach; the latter analysis assumes, of course, a dependency of covenants

an illustration of his general thesis that “modern leasing law is

view. See Siegel, *supra* note 6. One who adopts that perspective, as we do, might be expected to argue as follows: First, when a court determines, as in *Stewart*, that a landlord’s nonperformance, or partial performance, of a specific covenant does not excuse a tenant from her or his own performance obligations, and justifies that conclusion by saying that covenants are “independent,” the court really should be understood as saying that the landlord has committed only an immaterial breach, or (using the opposite side of the coin) that the tenant has received substantial performance, and consequently must perform as promised. Under this approach, the court should not be understood to mean that covenants are independent in the sense that no failure of performance by the landlord could ever excuse the tenant unless the tenant has contracted for the excuse. This is because the tenant who has not contracted for the excuse nevertheless may be able to be excused when the landlord’s failure to perform constitutes an eviction of the tenant. Second, the fact that property law covertly employs concepts of substantial performance and material breach does not mean that it employs them in the same way that contract law does. Whether it does or does not is a question that must be explored. It may be that the doctrine of eviction is not an exact parallel of the contract doctrine of dependency, and may in fact be a more demanding doctrine. In Part I-A we argue the first point; and in Part I-B, we argue the point that property and contract analysis of substantial performance and material breach do in fact differ. Overall, we conclude that there is merit, as well as some unfortunate partiality, to both the traditionalist and revisionist positions.

Professor Siegel does not pursue his insight the way we have just suggested, and as a result, his analysis presents difficulties beyond those we have identified in the text. First, having suggested correctly that the property doctrine of independency is not a true independency doctrine, but rather a substantial performance doctrine, Professor Siegel should have undertaken to analyze the various meanings that independency might have in lease cases, and the various fact situations in which it might matter what a court is saying when it speaks of covenants being independent. See *supra* note 20. Conceptual clarity, of course, is at stake here, and in an area as overrun with confusion as this, conceptual clarity is its own reward. In addition, however, there is a practical problem with Professor Siegel’s failure to develop the various categories of independency because the several explanations of independency can lead to different results in actual cases. For example, all of the cases involving a breach by the landlord examined by Professor Siegel in his treatment of independency are cases in which the tenant remained in possession and sought to avoid paying rent. See *supra* note 42. Faced with a tenant in possession, a court might well want to conclude that the tenant is not excused by the landlord’s breach, in order to prevent the unjust enrichment that could result from the tenant’s remaining in possession without obligation to pay. See McGovern, *supra* note 6, at 681-82 (the courts’ distinction between total and partial breach often is motivated by a desire to avoid unjust enrichment). An imprecise court might well seize upon the concept that covenants are independent—in the sense that an excusing condition must be express, see *supra* note 20—to explain its conclusion that the tenant is obligated to pay rent notwithstanding the landlord’s breach. That explanation produces the desired result, and the sort of result-oriented classification it represents is a frequently used technique in legal decision-making. See Taylor, *H.L.A. Hart’s Concept of Law in the Perspective of American Legal Realism*, 35 MOD. L. REV. 606, 608-09 (1972) (discussing result-oriented categorizations). However, the suggestion that covenants are independent in the sense that constructive conditions are not recognized could come back to haunt the court if a tenant who has not expressly contracted for an excuse has vacated the premises and is seeking to rescind. There, the unjust enrichment problem is nonexistent, but the determination in the previous case that covenants are independent could prevent rescission in the

neither feudal, agrarian, nor grounded in real property doctrines," but rather is "modern, commercial, and already grounded in contract doctrine," and in fact has a "dominant contract basis."⁶⁸ However, while Professor Siegel properly rejects the extreme disunity of property and contract law posited by the

latter situation. Thus, in order to avoid prejudicing later (and different) cases, the court should say that the reason the tenant remaining in possession is not excused from the obligation to pay rent is either that the breach in question is immaterial (if that is in fact the case), or that, even if a material failure to perform has occurred, the tenant has elected to treat the failure as immaterial. *See supra* note 20. As between the second and third explanations for the result, the court likewise should be careful. If the court—again being imprecise—states that the landlord's breach was immaterial, when in fact it was significant, but had been treated as a partial breach by the tenant, that determination could prejudice a later case in which the tenant vacates and seeks to use the same type of landlord nonperformance to justify termination of the lease. Hence, if in fact the tenant in the former case did not receive substantial performance, the court should say so, and base its holding against the tenant on the ground that the tenant by remaining in possession in the face of a material breach had elected to affirm the lease.

If the tenant vacates and seeks to use the landlord's breach as a basis for rescission, the first and second meanings of independency (express conditions are required, or substantial performance has occurred) are relevant, rather than the third (affirmance by the tenant). *See supra* note 20. If the court concludes that the tenant is not entitled to rescind, it could justify that conclusion either by saying that covenants are independent—meaning that the tenant is not excused because he or she failed to contract expressly for an excuse—or that covenants are "independent" in the sense that the landlord has not committed a material breach. Again, precision is essential. The determination that covenants are independent in the sense that constructive conditions are not recognized would mean that a tenant who failed to contract for an excuse could *never* rescind even in the face of the landlord's material breach. In contrast, the determination that covenants are "independent" in the sense that the tenant has in fact received substantial performance leaves open the result that the tenant *can* rescind when the landlord in fact commits a material breach. In this regard, Professor Siegel's statement that "regardless of its origins, the independence of lease covenants would accomplish 'perfect justice,' were it not for the nineteenth century legislation on summary proceedings for possession of real property" far overshoots the mark. *See Siegel, supra* note 6, at 663. Independency in the sense that conditions must be express might accomplish perfect justice in cases in which the tenant remains in possession, but it accomplishes far less than perfect justice in cases in which the aggrieved tenant wishes to rescind rather than receive the benefits of the landlord's performance while remaining in possession.

In short, Professor Siegel overlooks the range of meanings to the concept of independency. By limiting his focus to tenant-in-possession cases, he fails to make the important point that the court's choice of concept is—or should be—a function of the fact situation before the court. Also, in addition to, if not because of, his limited concentration on tenant-in-possession cases, Professor Siegel offers an unsatisfactory discussion of the relationship between the contract doctrine of dependency and the property doctrine of eviction that substitutes for it, a relationship that becomes apparent in cases in which the tenant seeks to vacate and rescind because of the landlord's breach. We defer consideration of Professor Siegel's analysis of constructive eviction until we have discussed the basic doctrine more fully. *See infra* note 119.

68. Siegel, *supra* note 6, at 650.

traditionalists, we question whether he has not gone too far in the opposite direction, positing a complete “unity of modern leasing and contract law”⁶⁹ in its stead. To say that property and contract cases both work within the doctrinal framework of substantial performance, based upon the law of constructive conditions, does not justify Professor Siegel’s conclusion that property and contract analyses are identical. Unless the revisionists can demonstrate that property and contract law employ common doctrine in a common way, they will at best have blunted some of the extreme rhetoric of the traditionalist position (substituting some extreme rhetoric of their own), without destroying the central point of that position, that property and contract analyses *are* significantly different. Stated affirmatively, if there are important differences of method in the handling of common doctrine, a substantial part of the traditionalist criticism remains sound. Whether there are such differences is the question prompted by the analysis thus far.

B. *Substantial Performance in Property and Contract Analyses*

Professor Siegel’s insightful revisionist critique answers one question only to generate another. His analysis, as refined, correctly tells us that the property doctrine of “independency” announced in cases like *Stewart* is in fact an expression of the contract doctrine of substantial performance: The tenant is bound to pay rent because the landlord has substantially performed the package of promises vital to the lease transaction. What his analysis fails to explain is why promises of relatively equal significance are regarded so differently by the *Stewart* and *Deakin* courts—why, that is, performance of the covenant to waterproof was regarded as immaterial to substantial performance in *Stewart* while the noncompetition promise was regarded as vital to the question of substantial performance in *Deakin*. Put in terms we prefer, the issue is why the *Deakin* landlord was regarded as having materially breached because he failed to perform the noncompetition promise, while the *Stewart* landlord was regarded as having performed substantially even though he breached the covenant to waterproof the basement of the leased premises. The

69. *Id.* at 651. See Weinberg, *supra* note 6, at 31 n.9 (Professor Siegel’s “enthusiasm for his thesis may be excessive. His argument, that the lease was generally viewed as a contract throughout the nineteenth century, leads him to overlook evidence of an estate frame of mind.”). For a discussion of differences between property and contract approaches to the determination of substantial performance and material breach, see *infra* notes 104-13.

question is whether property and contract analyses differ significantly in their determination of substantial performance, and if so, how. We have an answer, but the question assumes that substantial performance doctrine *does* apply in landlord-tenant law. We suspect that before the answer we offer will make sense, it will be useful to backtrack a bit and show how substantial performance doctrine applies in a case like *Stewart*.

1. *Dependency in Lease Cases: The Doctrine of Eviction*

The law has held from very early times that the tenant's rent obligation is excused if the landlord evicts the tenant from possession of the premises.⁷⁰ The source of this obligation to protect the tenant's possession is the express or implied covenant of quiet enjoyment.⁷¹ The doctrinal basis for the discharge of the rent obligation upon eviction is that the covenant of quiet enjoyment "is, in its nature, a condition precedent to the payment of rent . . ." ⁷² That language, of course, is reminiscent of *Deakin*,⁷³ and establishes that the covenant of quiet enjoyment is, to use

70. McGovern, *supra* note 6, at 666 (in Roman law and medieval England, lessor who evicted lessee was not entitled to rent). For a discussion of the dependency of promises and feudal rent theory as bases for the tenant's excuse after the landlord evicts, see *infra* note 72.

71. See *Hannan v. Harper*, 189 Wis. 588, 595, 208 N.W. 255, 258 (1926) (the implied covenant of quiet enjoyment "is a covenant relating to the possession of the property, and it is broken by an entry and expulsion from or actual disturbance of such possession."); 1 AMERICAN LAW OF PROPERTY, *supra* note 1, §§ 3.47-3.51.

72. *Dyett v. Pendleton*, 8 Cow. 727, 730 (N.Y. 1826). See also *Jackson v. Eddy*, 12 Mo. 209, 212 (1848); 1 AMERICAN LAW OF PROPERTY, *supra* note 1, § 3.47, at 272 & n.6; J. TAYLOR, A TREATISE ON THE AMERICAN LAW OF LANDLORD AND TENANT 183 (1844) ("The quiet enjoyment of the premises, without any molestation on the part of the landlord, is an implied condition on which the tenant is to pay rent.").

As do we, these authorities view the rent obligation as promissory in origin, arising either from the express promise to pay a stipulated amount that will exist in most leases, or from the implied promise to pay fair rental value that will arise by virtue of the tenant's taking possession of the premises. See 1 AMERICAN LAW OF PROPERTY, *supra* note 1, § 3.64 (duty to pay reasonable value for use of property); RESTATEMENT (SECOND) OF PROPERTY § 12.1 introductory note & comment b (1977) (if landlord did not give use of land as a gift, tenant obligated to pay rent). In the *Dyett* statement quoted in the text accompanying this note, that promissory obligation, whether express or implied, is dependent upon the landlord's performance of his or her promise, either express or implied, to protect the tenant's quiet enjoyment of the premises.

In an earlier formulation, however, the rent obligation was conceived in nonpromissory terms. The obligation was viewed as "issuing from the land," and was conceptualized much like a species of affirmative easement that the landlord reserved upon the transfer of the land to the tenant. See 2 AMERICAN LAW OF PROPERTY, *supra* note 1, § 9.41; Humbach, *supra* note 12, at 1226. This conception no doubt accurately described early leases, in which landlords did

contract terms, a "vital provision" of the lease, and that the tenant's covenant to pay rent is dependent upon the landlord's substantial performance of it. The tenant's obligation to pay rent, in short, is dependent on the landlord's maintenance of the tenant's possession.⁷⁴

So much is generally conceded in property law. What dispute exists has centered not on the principle that rent is dependent upon possession, but rather upon the question of what landlord activity constitutes substantial performance of the obli-

reserve rent in the form of a share of crops. See 2 R. POWELL, *supra* note 2, ¶ 230[1], at 296. In that sense, rent literally did issue out of the land.

Professor Weinberg says that in the sixteenth and seventeenth centuries this feudal or medieval conception of rent coexisted with the contractual or promissory explanation, and was superseded by the latter conception in the eighteenth century. See Weinberg, *supra* note 6, at 36. One interesting question raised by the existence and coexistence of these two quite distinct explanations of the tenant's obligation to pay rent is whether the two analyses produce the same results. It appears that, in some cases, the two analyses will lead to the same conclusion. In the typical case in which the landlord physically expels the tenant from the leased premises, the tenant's rent obligation is excused both on the dependency explanation offered in *Dyett*, and on the ground that rent issues from the land: When the estate is terminated by repossession, the obligation that issues from it likewise terminates. See Humbach, *supra* note 12, at 1231; Weinberg, *supra* note 6, at 36. In other cases, however, the two analyses appear to diverge. Thus, if the landlord deprives the tenant of access to an entitlement connected with the lease, such as a right of way to reach the leased premises, the obligation to pay rent could not be excused on feudal rent grounds, since rent issued from the demised premises and not from appurtenant rights. See Siegel, *supra* note 6, at 683; Weinberg, *supra* note 6, at 79. American courts, however, have excused the tenant in such cases on constructive eviction grounds. See, e.g., *Rogers v. Osborne*, 35 Barb. 523, 524 (N.Y. Sup. Ct. 1861). Since this particular use of the doctrine of constructive eviction is indicative of the courts' use of the doctrine to import contract reasoning into lease cases, we return to it later. See *infra* note 119.

73. For a discussion of *Deakin*, see *supra* notes 23-29 and accompanying text.

74. The landlord's obligation to secure the tenant's undisturbed possession includes both an obligation to refrain from evicting the tenant from possession after the term has begun, and an obligation to deliver possession at the outset of the term. Failure to perform allows the tenant to rescind if he so elects. See *Adrain v. Rabinowitz*, 116 N.J.L. 586, 186 A. 29 (1936) (lessor has duty to put lessee in actual possession of premises); *Sloan v. Hart*, 150 N.C. 269, 63 S.E. 1037 (1909) (landlord impliedly covenants to deliver possession to tenant); 1 AMERICAN LAW OF PROPERTY, *supra* note 1, § 3.37 (lessor's implied covenant to deliver possession); *id.* § 3.46 (implied covenant of power to demise); *id.* § 3.49 (interference by lessor). Because the tenant is allowed to rescind, her or his rent obligation is dependent on the landlord's performance of the promise to deliver possession. For a discussion and analysis of the doctrine of dependency as applied to leases, see *supra* note 20. Although the concept of "possession" can exert a restrictive influence on the determination of the landlord's substantial performance in the delivery as well as in the eviction context, see *infra* note 113, we limit out textual analysis to eviction in order not to prolong unduly the discussion.

gation to protect possession. All agree that actual eviction by the landlord—"invasion of the tenant's right to physical possession of the property"⁷⁵—justifies the tenant's termination of the lease. The landlord is thus in material breach if he engages in positive acts of physical interference with the tenant's possession. A more problematic concept, however, is constructive eviction, the claim at issue in *Stewart*.⁷⁶ Originally, courts took the position that only an actual eviction excused the tenant's nonperformance of the covenant to pay rent.⁷⁷ Then, in the nineteenth century, English and American courts adopted the rule that a plea of "constructive" eviction could be raised as a defense to a suit for rent.⁷⁸ This was done on the sensible ground that the landlord could make the tenant's life miserable by interference as bad as, but falling short of, an actual eviction.⁷⁹ In so doing, the courts, as one judge prophetically said, "introduce[d] a new and very extensive chapter in the law of landlord and tenant."⁸⁰ In our discussion below, we hope to show that this chapter of the law, with its genesis in property concepts, differs from, although it is related to, the contract chapter on material breach. Specifically, we hope to show that the doctrine of constructive eviction, because it derived from the property doctrine of eviction from possession, is more restrictive than the doctrine of material breach of contract, so that on identical facts a landlord might be held not to have committed a constructive eviction when, in contract terms, he almost certainly would be regarded as having committed a material breach.

75. 1 AMERICAN LAW OF PROPERTY, *supra* note 1, § 3.49, at 275.

76. For a discussion of *Stewart*, see *supra* notes 30-36 and accompanying text.

77. See Lewis, *Constructive Eviction*, 25 LAW. & BANKER 12, (1932) ("The early common law did not recognize *constructive* eviction, an *actual* eviction being necessary to relieve the tenant from liability for rent." (emphasis in original)). See also Dyett v. Pendleton, 8 Cow. 727, 739-40 (N.Y. 1826) (Colden, J., dissenting); McGovern, *supra* note 6, at 666-67; Weinberg, *supra* note 6, at 67-69.

78. See 1 AMERICAN LAW OF PROPERTY, *supra* note 1, §§ 3.50-3.51; Weinberg, *supra* note 6, at 66-82.

79. See *East Haven Assocs. v. Gurian*, 64 Misc. 2d 276, 279, 313 N.Y.S.2d 927, 930 (Civ. Ct. 1970). The *East Haven* court stated:

The doctrine of constructive eviction was developed by analogy to actual eviction on the basis of a very simple and obvious proposition. If a tenant is effectively forced out of leased premises as a result of misconduct by a landlord that substantially impairs enjoyment of the leased premises, the same legal consequences should follow as though the [tenant] . . . were physically evicted.

Id.

80. Dyett v. Pendleton, 8 Cow. 727, 739 (N.Y. 1826) (Colden, J., dissenting). See also Weinberg, *supra* note 6, at 69-82 (discussing American expansion of doctrine of constructive eviction in nineteenth century).

2. "Possession" and Material Breach: The Scope of the Covenant of Quiet Enjoyment

Because the tenant's obligation to pay rent is dependent upon the landlord's maintenance of the tenant's possession, even when the lease is silent on the question,⁸¹ it cannot be said that lease covenants are independent in the strict and proper sense of that term.⁸² The tenant is excused if the landlord does not substantially perform his obligation to protect the tenant's quiet enjoyment of possession. The question is: What conduct by the landlord, short of physical interference with the tenant's access to the leased premises, constitutes material breach of that covenant? Specifically, the issue in *Stewart* is whether breach of a specific lease covenant alone can constitute a material breach of the lease in the terms that property law imposes for resolving that question—that is, whether it can constitute a "constructive" eviction. We suggest that under a property analysis, there are several ways in which it could be argued that breach of such a covenant does not constitute material breach. What makes *Stewart* a representative and noteworthy case is that it can be read as addressing or raising all of the possible arguments.

One possibility is to say that the landlord's breach of a particular lease covenant does not discharge the tenant because the only substantial performance required under the lease is performance of the covenant of quiet enjoyment itself. The covenant of quiet enjoyment has a minimum content apart from any question of its incorporation of other specific lease covenants,⁸³ such as a covenant to repair, in that under the doctrine of actual eviction, the tenant is protected from the landlord's acts of physical interference with his possession.⁸⁴ Once "constructive" eviction is recognized, some expansion of the covenant of quiet enjoyment to cover landlord interferences beyond those of an actual ouster

81. For a discussion of the covenant of quiet enjoyment, see *supra* notes 70-74 and accompanying text.

82. For a discussion of the dependency of lease covenants, see *supra* note 20.

83. See C. DONAHUE, T. KAUPER & P. MARTIN, CASES AND MATERIALS ON PROPERTY: AN INTRODUCTION TO THE CONCEPT AND THE INSTITUTION 905 (1974) ("[T]he covenant [of quiet enjoyment] is often said to impose no affirmative duties on the landlord whatsoever. This can easily lead one to conclude that the covenant has no substantive content. Such a conclusion would clearly be in error, for the covenant does require that the landlord refrain from certain conduct directed toward the lessee.").

84. For a discussion of the doctrine of actual eviction, see *supra* text accompanying note 75.

from possession is inevitable. If, however, the covenant of quiet enjoyment is patterned after the parent eviction doctrine, and is limited to landlord interferences of the same *type* exhibited in cases of actual physical eviction, then only affirmative interferences with the tenant's possession would constitute a "constructive" eviction.⁸⁵ Thus, the relevant interference with possession would have to be by the landlord's affirmative conduct—⁸⁶acts as opposed to failures to act. Moreover, these acts might have to be accompanied by a specific intent to dispossess the tenant.⁸⁷ The landlord's mere failure to act—to perform specific additional lease covenants like the covenant to waterproof in *Stewart*—would on this reading allow the tenant a damages remedy alone.⁸⁸

85. An actual eviction consists of both a physical entry (a trespass) by the landlord and an ouster (dispossession) of the tenant. See Weinberg, *supra* note 6, at 67. This double requirement explains the oft-repeated statement in actual eviction cases that a mere trespass does not constitute an eviction. *Id.* at 76-77 & n.224. In an early English case, Lord Mansfield laid the groundwork for the plea of "constructive" eviction by suggesting that the landlord's trespass, accompanied by such significant interference with the tenant's enjoyment of the premises that the tenant abandoned possession, might be tantamount to an eviction. The tenant lost the case, however, because he failed to properly plead eviction. *Hunt v. Cope*, 1 Cowp. 242, 98 Eng. Rep. 1065 (K.B. 1775). See also Weinberg, *supra* note 6, at 68-69. The concept of constructive eviction thus had its origin in, and could have been limited to, situations in which the landlord's conduct satisfied the entry but not the ouster element of actual eviction. As such, the doctrine would have been only a limited expansion of the doctrine of actual eviction. However, when constructive eviction appeared in American law in *Dyett v. Pendleton*, the court extended the fiction of "constructive" interference to include the landlord's entry as well as ouster of the tenant, thus creating a broader concept of constructive eviction than had been suggested in *Hunt v. Cope*. *Dyett v. Pendleton*, 8 Cow. 737 (N.Y. 1826). Despite this expansion, we find that the parent doctrine of actual eviction has exerted a restricting influence on the determination of the relevant landlord activity that can amount to a "constructive" eviction of the tenant. See *infra* note 95 and accompanying text. The development of "constructive" eviction doctrine thus historically has been influenced by its origin, and perhaps continues to be. See *infra* note 116.

86. See Lloyd, *The Disturbed Tenant—A Phase of Constructive Eviction*, 79 U. PA. L. REV. 707, 718 (1931) ("Logically an eviction by the landlord is an affirmative act and the use of the term should be confined to acts of commission involving an intentional and wrongful interruption of the possession or a permanent and substantial interference with the beneficial use.") (footnote omitted); Rapacz, *Origin and Evolution of Constructive Eviction in the United States*, 1 DE PAUL L. REV. 69, 79 (1951) ("In theory, eviction ought to involve some act of the lessor. It has often been asserted that it is properly an affirmative act on the lessor's part; an act of commission rather than just an act of omission.") (footnote omitted).

87. See M. McDUGAL & D. HABER, *PROPERTY, WEALTH, LAND: ALLOCATION, PLANNING AND DEVELOPMENT* 369-70 (1948) (noting that "amusing decisions" result from insistence on specific intent, and that more recent cases reduce the "intent hazard" in constructive eviction law by holding that the landlord intends the natural and probable consequences of his acts).

88. See, e.g., *Wright v. Lattin*, 38 Ill. 293, 296 (1865) (landlord's breach of covenant to repair is not an eviction; the tenant's "possession remains undis-

Under this approach, the "vital" provision in the lease upon which the tenant's rent obligation depends is the landlord's (negative) obligation, expressed in his covenant of quiet enjoyment, to refrain from acts having the characteristics of an actual eviction. Thus, affirmative obligations that the landlord might undertake in the lease are not "vital," but rather "collateral," because their breach does not involve the paradigmatic conduct originally recognized by the law of actual eviction.⁸⁹ *Stewart* might well be ex-

turbed, the breach of covenant only hindering the more commodious enjoyment of the term, whilst in case of an eviction, the term is gone, or the property so situated that it ceases to be useful for the purpose for which the term was obtained"); *Leavitt v. Fletcher*, 92 Mass. (10 Allen) 119, 121 (1865) (tenant's covenant to pay rent is "independent" of landlord's covenant to repair); *Etheridge v. Osborn*, 12 Wend. 529, 532-33 (N.Y. Sup. Ct. 1834) (landlord's failure to perform lease covenants is not an eviction). See also 1 H. TIFFANY, *THE LAW OF REAL PROPERTY* § 145 (B. Jones 3d ed. 1939) (landlord's failure to perform separate covenants should not constitute eviction); Note, *Landlord and Tenant: What Constitutes Eviction*, 16 ILL. L. REV. 535, 535 (1922) (noting that *Gibbons v. Hoefeld*, 299 Ill. 455, 132 N.E. 425 (1921), "seems to be the only instance in which the Supreme Court [of Illinois] has held on the facts that an omission of duty on the part of the landlord as distinguished from an affirmative wrongful act will constitute constructive eviction").

The courts' refusal to consider the landlord's breach of specific lease covenants in determining whether the tenant has received substantial performance puts tenants at an extreme disadvantage for at least three reasons. First, by hypothesis, the tenant cannot vacate and terminate the lease for such breaches; if the tenant *has* vacated under a misapprehension of his or her right to claim an eviction resulting from the landlord's breach, the tenant faces double exposure: the original rent liability continues, in addition to whatever new rental liability the tenant may have assumed. Second, if the tenant remains in possession and stops paying rent in response to the landlord's breach, he or she faces dispossession. See, e.g., *Arnold v. Krigbaum*, 169 Cal. 143, 146 P. 423 (1915) (landlord's breach of covenant to repair cannot be asserted in summary dispossession proceeding). Finally, even if the landlord sues the tenant for rent rather than for possession, the tenant may be unable to resolve the dispute with the landlord in one proceeding; the landlord's breach under local procedural rules may not be susceptible to set-off, counterclaim, or recoupment. See *Weinberg*, *supra* note 6, at 33 n.15. Sensitivity to the difficulty of the tenant's position may have been the motivating factor behind the decision of some courts to allow breach of at least some specific lease covenants to amount to an eviction. See *infra* notes 91-103 and accompanying text.

89. It would be possible to categorize all specific promises by the landlord, including the covenant of quiet enjoyment, as immaterial, on the theory that the landlord's execution of the lease or delivery of possession constitutes substantial performance. See, e.g., *In re Edgewood Park Junior College*, 123 Conn. 74, 77-78, 192 A. 561, 562-63 (1937) ("[S]ince the execution of the lease by the lessor may be said to constitute performance on his part, the lease for that reason may be considered a unilateral agreement. . . . A lease, therefore, considered as a contract, is a unilateral agreement with no dependency of performance."); RESTATEMENT OF CONTRACTS § 290 comment a (1932) ("Partly . . . because the grantor of a lease or other conveyance has performed the major part of his side of the transaction and any covenants are subsidiary, there are no general rules excusing performance of a covenant by one party because of breach of covenant by the other."); 3A A. CORBIN, *supra* note 14, § 686, at 240 (footnote omitted)

plained in this way, inasmuch as the court emphasized that it was "unable to find in the record any evidence that shows that the landlord . . . *did* anything with the intention of depriving the tenant of the enjoyment of the premises."⁹⁰ In short, the *Stewart* court found nothing in the landlord's mere failure to act that looked like the kind of conduct typical of an actual eviction.

While this analysis might explain the result in *Stewart*, it does not explain other constructive eviction cases considered below. In any event, it would not make our point as broadly as we wish to make it. We contend that the property concepts of "possession" and "eviction" also exert a constricting influence on the determination of material breach in those cases in which the courts *allow* breach of a separate covenant to operate as a constructive eviction. Such cases exist; indeed, the venerable *American Law of Property* speculates that "[p]erhaps the most significant cases on constructive eviction are those involving breach of an express covenant or a statutory duty to repair or to furnish heat or services."⁹¹ Here, the point to be made is that the parent property concepts of "possession" and "eviction," if they do not restrict the relevant landlord breaches to acts as opposed to failures to act, might nonetheless restrict the *kinds* of relevant failures to act that can count as constructive evictions. There are defaults and

("Upon the execution of the lease, the landlord has conveyed and the tenant has received a property interest in the land. In making this conveyance, the landlord has rendered the most important of the performances that the parties contemplate in connection with the lease. Subsequent breaches of covenant by him, therefore, do not operate as a total failure of consideration.")

The difficulty with this view is that the tenant's obligation to pay rent is dependent upon the landlord's performance of the post-delivery obligation to protect the tenant's quiet enjoyment of the premises, although admittedly property law generally discusses the landlord's post-delivery obligations under the rubric of eviction, either actual and constructive, rather than substantial performance and material breach. However, since eviction is a form of dependency reasoning, it seems preferable to say that the landlord has not substantially performed her or his obligations under the lease unless the landlord both delivers possession and refrains from interfering with the tenant's possession after delivery. See 3A A. CORBIN, *supra* note 14, § 686, at 241 (tenant's continued enjoyment of possession is a condition of duty to pay rent; eviction "goes to the essence and operates as a discharge" of the tenant's duty). If the landlord's breach of a specific lease covenant does not excuse the tenant, the reason properly should be that the landlord is deemed to have substantially performed his post-delivery obligations according to the standard applied by property law to those obligations. The landlord should not be viewed as having substantially performed merely by executing the lease. See *infra* notes 91-103 and accompanying text.

90. 86 N.J.L. at 650, 92 A. at 393 (emphasis added). For a discussion of *Stewart*, see *supra* note 31 and accompanying text.

91. 1 AMERICAN LAW OF PROPERTY, *supra* note 1, § 351, at 281.

there are defaults. Not every breach of an express lease covenant creates a situation that is comparable to actual eviction. "Possession," which the covenant of quiet enjoyment protects,⁹² is a spatial concept, just as "eviction" is a physical interference with possession.⁹³ For purposes of determining "constructive" eviction, the covenant could be read to incorporate the landlord's express additional covenants only to the extent that performance of those additional covenants is necessary to protect the actual livability or physical availability of the premises.⁹⁴ Stated differently, if, as in *Stewart*, the premises remain available for some beneficial use, despite the landlord's interference, the interference does not constitute a constructive eviction.

Two considerations support our claim that the property concept of "eviction from possession" can inhibit a court's determination of substantial performance and material breach when the landlord's failure to perform specific lease covenants is at issue.⁹⁵

92. For a discussion of the doctrine of quiet enjoyment, see *supra* note 71 and accompanying text.

93. For a discussion of actual eviction, see *supra* note 85.

94. See, e.g., *Dolph v. Barry*, 165 Mo. App. 659, 668, 148 S.W. 196, 198 (1912) ("To constitute an eviction by construction of law, the wrongful conduct of the landlord must be sufficient, through affirmative act or omission of duty, to render the premises untenable for the purpose for which the tenant leased them or at least seriously interfere with their permanent use."). A. CASNER & W. LEACH, *CASES AND TEXT ON PROPERTY* 366 (2d ed. 1969) ("The only case in which a landlord's default will permit a tenant to quit is where the default makes the premises uninhabitable—which is called a 'constructive eviction,' and is treated the same as the case where the landlord sends his men around and throws the tenant out."). See also *Kulawitz v. Pacific Woodware & Paper Co.*, 25 Cal. 2d 664, 669, 155 P.2d 24, 27 (1944) (lease covenants are independent unless dependency is "expressed or necessarily implied"). The view of constructive eviction that we are considering in the text makes the *Kulawitz* point concrete. The tenant's obligation to pay rent would be dependent by necessary implication upon the landlord's performance of covenants that are indispensable to the habitability of the premises.

95. In the course of his perceptive discussion of the nineteenth century development of the doctrine of constructive eviction by American courts, Professor Weinberg takes a view different from ours on the limiting effect of the parent doctrine of actual eviction. He apparently sees the analogy to actual eviction as producing only two limiting requirements: first, the requirement that in cases of third party interference with the tenant's possession the interference be attributable to the landlord; and second, the requirement in all cases that the tenant abandon the premises in order to claim relief from the obligation to pay rent. See Weinberg, *supra* note 6, at 75-77. As developed in the text, we see the parent concept of eviction as also limiting the very scope of the covenant of quiet enjoyment, that is, as limiting the kinds of landlord activity that might be said to constitute a "constructive" eviction. Thus, in our view, the requirement of affirmative landlord misconduct, or the requirement that relevant landlord defaults must seriously impede the tenant's actual access to the premises, are best explainable on the ground that unless those requirements appear in the case, the landlord's interference will bear little resemblance to an actual eviction.

First, as the *American Law of Property* excerpt notes, the typical cases in which the courts have found a constructive eviction upon the landlord's breach of an express lease promise are those in which the promise is indispensable to possession because its substantial breach is likely to interfere with the tenant's use of the premises for *any* purpose.⁹⁶ Examples include promises to repair, to provide heat or electricity, or to provide some other essential service. Breach of such promises places the tenant in much the position he would be in were the landlord to enter and expel him physically: The premises are in essence unavailable to the tenant for any beneficial use.⁹⁷ Second, it is revealing that the leading cases involving covenants whose breach does *not* interfere with possession in fact (however much it may interfere with the tenant's contractual expectations) avoid property reasoning altogether. These cases generally elect an explicit contractual view to justify the tenant's discharge from the rent obligation.⁹⁸ *Deakin* is

Some cases have made the point expressly. See, e.g., *Wright v. Lattin*, 38 Ill. 293, 296 (1865) ("There seems to be no analogy between an eviction, or an act of the landlord which amounts to an eviction, and the breach of a covenant of the landlord to repair the premises.").

96. See *supra* note 91 and accompanying text.

97. For a discussion of constructive eviction cases, see *supra* note 94. See also *Lewis & Co. v. Chisolm*, 68 Ga. 40, 47 (1881) (landlord's failure to repair does not excuse the tenant's rent obligation "unless the premises become untenable for want of repairs where the landlord was under covenant to repair"); *Alger v. Kennedy*, 49 Vt. 109, 118 (1876) (rejecting view that to constitute an eviction, the landlord "must do some positive overt act, and not merely neglect to do some act that he was duty bound to perform," and holding that "any act or default of the lessor that renders the tenement such as endangers the life or health of the occupants, may be treated by the lessee as an eviction, and give him the right to abandon the premises, and terminate his obligation to pay rent").

98. See, e.g., *Medico-Dental Bldg. Co. v. Horton & Converse*, 21 Cal. 2d 411, 132 P.2d 457 (1942); *University Club of Chicago v. Deakin*, 265 Ill. 257, 106 N.E. 790 (1914); *Hiatt Inv. Co. v. Buehler*, 255 Mo. App. 151, 16 S.W.2d 219 (1929). But see *Kulawitz v. Pacific Woodenware & Paper Co.*, 25 Cal. 2d 664, 155 P.2d 24 (1944) (landlord's failure to perform noncompetition covenant treated as constructive eviction). In *Kulawitz*, the tenant was in breach of his obligation to pay rent when the landlord's breach occurred, and the case is now understood to stand for the proposition that the constructive eviction defense "is available to a lessee who was himself in default in the payment of rent at the time when the lessor's breach occurred." BASIC PROPERTY LAW, *supra* note 14, at 495. It is doubtful whether a holding for the tenant could have been justified on dependency principles. See Note, *The California Lease—Contract or Conveyance?*, 4 STAN. L. REV. 244, 252 (1952). The *Kulawitz* court thus may have elected the eviction route to avoid the contract obstacle to granting relief to the tenant. In any event, what is important for present purposes is that the court's treatment of the noncompetition covenant in eviction terms appears aberrational. See BASIC PROPERTY LAW, *supra* note 14, at 495 ("In fact where the lessor's breach produces economic rather than physical injuries, as in *Kulawitz*, it seems peculiarly inappropriate to speak in terms of eviction."). In addition, the decision has been

representative.⁹⁹ Unquestionably, the noncompetition promise at issue was vitally important to the commercial tenant. As another case noted, “the only reasonable explanation of the presence in the lease of the grant of exclusive rights is that . . . [the] covenant was bargained for” by the tenant “as a necessary part” of the commercial transaction.¹⁰⁰ In contractual terms, the landlord’s noncompetition promise is a vital part of the agreed exchange, and it is perfectly appropriate to treat breach as a failure of the condition of performance implied in the lease.¹⁰¹ But *Deakin*, as we noted, is explicit in grounding its result in contractual reasoning.¹⁰² In contrast, if the property doctrine of constructive eviction provides the only recourse for the tenant, it is questionable that a tenant aggrieved by his landlord’s breach of a noncompetition covenant could prevail: “Where the lessor’s breach produces economic rather than physical injuries . . . it seems peculiarly inappropriate to speak in terms of eviction.”¹⁰³ It is inappropriate,

subjected to criticism. See Note, *supra*, at 251-56. For a discussion of constructive eviction doctrine in noncompetition covenant cases, when the lease also restricts the tenant’s use of the premises, see *infra* note 103.

99. For a discussion of *Deakin*, see *supra* notes 23-29 and accompanying text.

100. *Carter v. Adler*, 138 Cal. App. 2d 63, 72, 291 P.2d 111, 116 (1956). See *Medico-Dental Bldg. Co. v. Horton & Converse*, 21 Cal. 2d 411, 420, 132 P.2d 457, 462 (1942) (“The exclusive right to conduct a drug store in the building was vital to [the tenant’s] successful operation of its business. . . .”); RESTATEMENT (SECOND) OF PROPERTY, § 7.2 & comment b (1977) (landlord’s noncompetition covenant is material covenant, giving tenant full remedies upon breach). See generally 1 AMERICAN LAW OF PROPERTY, *supra* note 1, § 3.42.

101. For a discussion of implied conditions in leases, see *supra* notes 14-17 and accompanying text.

102. For a discussion of *Deakin*, see *supra* notes 23-29 and accompanying text.

103. BASIC PROPERTY LAW, *supra* note 14, at 495. Of course, if the rent were substantial and the tenant had reasonably expected to produce high income from the bargained-for special use of the property, interference with that reasonable expectation could be viewed as the functional equivalent of eviction. However, property law traditionally has taken a more limited and mechanistic view of the eviction concept. The focus of traditional property reasoning has been on an abstract notion of the tenant’s right to use the property. To illustrate, a lease provision may, in addition to barring the landlord from leasing to competitors of the tenant, restrict the tenant to the use protected by the noncompetition covenant. The presence of such a restriction aids the determination that the landlord’s noncompetition promise is material. See *Medico-Dental Bldg. Co. v. Horton & Converse*, 21 Cal. 2d 411, 419, 132 P.2d 457, 462 (1942) (“The lessee was limited by the terms of the lease to maintaining a drug store, a restriction emphasizing the import of the lessor’s duty in negotiating future demises of other portions of the building.”). See also *University Club of Chicago v. Deakin*, 265 Ill. 257, 106 N.E. 790 (1914) (restriction on tenant’s use mentioned in facts, but not further adverted to in opinion). The absence of such a restriction would appear to be fatal to a claim of constructive eviction, because, as suggested in the text accompanying this note, the tenant would suffer purely economic injury,

however, not because the tenant has suffered no harm, but because he has not suffered the kind of harm that the conveyance view of the lease, with its emphasis on "possession" as the essence of the bargain, allows property law to take seriously.

We have noted two possible restrictions on the scope of the covenant of quiet enjoyment, both flowing from the covenant's historical mission of protecting the tenant's "possession," which in turn is the central entitlement of the tenant under the conveyance view of the lease. First, the covenant might be read to require that the landlord's "substantial interference" with the tenant's possession be by affirmative misconduct rather than by mere failure to perform. Under that view, all express covenants in the lease, other than the covenant of quiet enjoyment itself, are classified as subsidiary or collateral; breach of any of them leaves the tenant with only an action for damages. Second, the covenant of quiet enjoyment might be read to incorporate express lease duties to the extent that failure to perform such duties renders the premises physically uninhabitable. Under this second view, express covenants that secure or enhance the physical condition of the premises will be vital; those that only secure economic or other nonphysical benefits will be collateral. Under either interpretation, "substantial interference" with the tenant's posses-

but no physical restriction on his use of the premises as a result of the landlord's breach. If, however, the lease did restrict the tenant's use, the tenant could make a good case—indeed, the only case, see *supra* note 98—for regarding the landlord's breach of promise as an eviction. The landlord's breach would render unavailing the one and only use the lease allows the tenant. In that situation the landlord's breach thus could be regarded as tantamount to a physical exclusion of the tenant. This may explain why the leading noncompetition covenant cases, discussed *supra* at note 98, adopt contract rather than property reasoning in order to allow the tenant to rescind, regardless of whether the tenant's use of the premises is restricted.

In any event, the fact that some noncompetition covenant cases are decided on constructive eviction grounds does not alter the point made in the text. There will be some covenants which, no matter how material in a contract sense, will have no bearing on the tenant's physical enjoyment of the premises, under any circumstances. Breach of such covenants, under the view of material breach now being considered, thus could not amount to an eviction of the tenant. See, e.g., *Exchange Sec. Co. v. Rossini*, 44 Cal. App. 583, 186 P. 828 (1919) (landlord's covenant to give the tenant an option to purchase the property was "in its nature" independent of tenant's covenant to pay rent). Cf. *Brown v. Young*, 364 A.2d 1171 (D.C. 1976) (landlord's breach of covenant giving tenant right of first refusal in case of sale could not be asserted in landlord's suit for possession); *Ringwood Assocs. v. Jack's of Route 23, Inc.*, 153 N.J. Super. 294, 379 A.2d 508 (Law Div. 1977) (suggesting that tenant's duty to pay rent could be regarded as dependent on landlord's performance of his obligation not to unreasonably withhold consent to assignment on contract principles but not property principles) *aff'd*, 166 N.J. Super. 36, 398 A.2d 1315 (App. Div. 1979).

sion—the test of constructive eviction¹⁰⁴—is a more demanding standard than the contract test of material breach, since it requires an interference which deprives the tenant of use of the premises. The contract test simply asks whether the tenant has lost the bargain he expected. In these terms, all constructive evictions will be material breaches, but not all material breaches will be constructive evictions. Since possession is a predicate to *any* use at all, it would have to follow that a “substantial interference” with possession would deprive the tenant of a significant part of what he contracted for, and thus be a material breach. But the relationship does not hold the other way. It is quite possible for the landlord to breach an essential term of the contract (viewing the matter without the fetters of “possession”), and yet for the tenant still to have the possibility of beneficial enjoyment of the leased premises (viewing the matter in property terms). It may not be the beneficial enjoyment the tenant contemplated and contracted for in entering the lease, but viewing the transaction in property terms makes *that* question irrelevant. The conveyance view defines the tenant’s bargain as the acquisition and retention of a “possessory” interest in land, and it is quite consistent with that view to say that the tenant still has his bargain, thus defined, even though the landlord has breached a term that on the particular facts the tenant regarded as essential.¹⁰⁵

The distinction we have suggested can be illustrated by re-considering *Stewart*. There, the court noted that the “cellar was necessary for the conduct of the business of the [tenant].”¹⁰⁶ A more explicit acknowledgement of the materiality of the landlord’s promise in the contract could not be found. The record showed that “the premises were fitted for and used as a Childs restaurant,”¹⁰⁷ and the conclusion seems inescapable that the tenant contracted for use of the cellar.¹⁰⁸ But while the water-

104. 2 R. POWELL, *supra* note 2, ¶ 225[3] at 273.

105. The requirement of interference with “possession” in order for a constructive eviction to result, and not merely interference with the expected bargain, bears an obvious affinity to the requirement in cases of frustration of purpose that the frustration be total or nearly total. See *infra* notes 162-72 and accompanying text.

106. 86 N.J.L. at 650, 92 A. at 392-93. For a further discussion of *Stewart*, see *supra* notes 30-36 and accompanying text.

107. 86 N.J.L. at 650, 92 A. at 393.

108. It is possible to argue that the result in *Stewart* would not necessarily be different even under modern contract principles. If the tenant’s need for a waterproof basement to run its coffee-making apparatus were regarded as unusual, and if the landlord did not know of that need, it could be argued that the parties did not intend for the landlord’s performance of the waterproofing cove-

proof cellar was necessary to the business, the business was not necessary to the beneficial enjoyment of the premises. Since the lease did not limit the tenant's use of the premises to this particular type of business,¹⁰⁹ it is quite possible that the tenant could have used the premises for some other business, or some other purpose, not requiring a waterproof cellar.¹¹⁰ The fact that both parties knew and contemplated that the tenant would operate the particular business that he did¹¹¹ is relevant if we are concerned with determining materiality in situational terms. We suggest, however, that it is precisely the function of the conveyance view of a lease to determine material breach without such concerns. Rather, it determines material breach in conclusive, *a priori* terms.¹¹² The tenant's bargain, as embodied in the property doc-

nant to be a condition of the tenant's obligation to pay rent. *See* Grinnel Bros. v. Asiuliewicz, 241 Mich. 186, 188, 216 N.W. 388, 388-89 (1927) ("There goes with every rental of premises the right of beneficial enjoyment by the tenant for the purpose for which the premises are rented, at least to the extent disclosed to the lessor at the making of the lease."). *Cf.* 6 A. CORBIN, *supra* note 14, § 1356, at 472 (the lessor may be unaware of the lessee's intention to use the premises for a particular purpose, "and the usefulness of the premises for that specific purpose may have played no part in determining the amount of the rent. When such is the case, the risk of frustration . . . is left . . . on the lessee.").

The argument makes two critical assumptions: (1) that the *Stewart* landlord did not in fact know, or could not be chargeable with knowing, of the tenant's needs for the waterproof cellar; and (2) in any event, that inferential rather than express evidence of intent to make performances independent of one another is sufficient. Both assumptions are questionable. The landlord's promise in *Stewart* was not boilerplate. Rather, it was couched in specific and unequivocal language, suggesting that the landlord knew or should have known that a dry basement was vital to the tenant. Specifically, the provision read: "the basement shall be waterproof, and not less than seven feet high. And he does hereby guarantee that he will at all times during the said lease keep the said cellar waterproof at his own expense." 86 N.J.L. at 649, 92 A. at 393 (emphasis added). *See* O'Byrne v. Henley, 161 Ala. 620, 626-27, 50 So. 83, 85 (1909) ("the use to which the lessee put the premises seems to have been known to the landlord, and no objection was made by him; hence we think that the business he is shown to have carried on was the business which the lease contemplated."). In any event, promises in modern contract law appear to be mutually dependent "unless a contrary intention is clearly manifested." RESTATEMENT OF CONTRACTS § 267 & comment a (1932). The landlord's argument traced above is founded upon inferences from silence rather than upon a clear manifestation of intent that the promises be independent.

109. *See supra* note 103.

110. *See* Royce v. Guggenheim, 106 Mass. 201, 206 (1870). In *Royce*, the landlord encroached on leased premises and erected a building that blocked off light and air to the leased premises. *Id.* at 206. As a result, "two of the rooms . . . previously used as a kitchen and bedroom, were made entirely unfit for those purposes, and by reason of that unfitness were abandoned. The bill of exceptions does not show that the [landlord] contended that the rooms could have been used for any other purpose after the erection of the new building." *Id.*

111. *See supra* note 108.

112. The determination of substantial performance in contract law is in-

trines of eviction and “constructive” eviction, is rent for possession. The tenant in *Stewart* continued to have the benefit of *that* bargain, despite the landlord’s failure to waterproof the cellar, and even though the tenant no longer had the bargain he expected.¹¹³

But the *Stewart* holding is not the last word on the covenant of quiet enjoyment. It is possible to regard protection of the tenant’s “possessory” expectations as one function of the covenant but not its sole function. Since “enjoyment” is a concept capable of expansive meaning, it is possible to read the covenant without its “possession” gloss. Under this view, the covenant protects the bargain for which the tenant actually contracted, as revealed by the facts and circumstances, and not just the bargain attributed to him by property law. Indeed, the tenant in *Stewart* urged just such an expansion of the covenant of quiet enjoyment on the court, arguing that

the failure of the landlord to do what is lawfully required of him either by the terms of the lease or otherwise, which renders the demised premises unfit for the purpose for which they are leased, *or* which seriously interferes with the beneficial enjoyment thereof . . . constitutes an eviction by construction of law, and releases the tenant . . .¹¹⁴

We know, of course, that the *Stewart* court rejected the tenant’s argument. But courts in other jurisdictions, as well as commenta-

tensely fact oriented. See 3A A. CORBIN, *supra* note 14, § 704, at 318 (substantial performance “is always a question of fact, a matter of degree, a question that must be determined relatively to all the other complex factors that exist in every instance”) (footnote omitted).

113. In suggesting that the concept of “possession” restricts the determination of substantial performance and material breach, we have limited ourselves to cases of constructive eviction where, as in *Stewart*, the restriction operates to the landlord’s benefit. However, the concept of “possession” also can operate in other areas to distort the determination of substantial performance and material breach to the landlord’s disadvantage. See, e.g., *Smith v. McEnany*, 170 Mass. 26, 48 N.E. 781 (1897) (tenant excused from rent obligation when the landlord built a wall that encroached one or two feet on the side of the leased lot; landlord argued that the question of excuse should depend on whether the wall made the premises “uninhabitable for the purpose for which they were hired, materially changing the character and beneficial enjoyment thereof”); *Diefenbach v. McIntyre*, 208 Okla. 163, 165, 254 P.2d 346, 348 (1952) (tenant who leased multi-unit premises for a beauty parlor allowed to rescind when landlord failed to deliver a part of the premises not used for the tenant’s business; landlord argued “that the breach was only a partial breach since it did not interfere with the operation of the beauty parlor”).

114. 82 N.J.L. at 539, 92 A. at 393.

tors, have stated a similarly broad view of constructive eviction.¹¹⁵ In fact, *Stewart* appears to have been repudiated by at least one later case in its jurisdiction.¹¹⁶

Because of this broad, bargain-protecting reading of the covenant of quiet enjoyment, it is not possible to argue, and we do not contend, that property principles *necessarily* produce different results from contract principles in the determination of substantial performance and material breach.¹¹⁷ We do contend, how-

115. See, e.g., *Radinsky v. Weaver*, 170 Colo. 169, 174, 460 P.2d 218, 220 (1969) (any disturbance "which renders the premises unfit for occupancy for the purposes for which they were leased, or which deprives the lessee of the beneficial enjoyment of the premises . . . amounts to a constructive eviction") (citations omitted); *Automobile Supply Co. v. Scene-In-Action Corp.*, 340 Ill. 196, 201, 172 N.E. 35, 38 (1930) ("Any act of the landlord which renders the lease unavailing to the tenant or deprives him of the beneficial enjoyment of the premises constitutes a constructive eviction."). See generally AMERICAN LAW OF PROPERTY, *supra* note 1, § 3.51, at 282 ("liberally applied," constructive eviction produces results "not different" from the contract rule of dependency); RESTATEMENT (SECOND) OF PROPERTY, § 6.1 (1977) (landlord's interference with "a permissible use of the leased property by tenant" justifies termination); 6 S. WILLISTON, *supra* note 20, at 589 n.5 (difference between constructive eviction and dependency "is of no great moment" so long as tenant vacates when deprived of the beneficial use of the premises).

116. See, e.g., *Reste Realty Corp. v. Cooper*, 53 N.J. 444, 457, 251 A.2d 268, 274 (1969) ("Any act or omission of the landlord . . . which renders the premises substantially unsuitable for the purpose for which they are leased, or which seriously interferes with the beneficial enjoyment of the premises, is a breach of the covenant of quiet enjoyment and constitutes a constructive eviction.").

117. However, despite broad statements of the scope, or potential scope, of the covenant of quiet enjoyment, see *supra* note 115, we hesitate to say that modern courts enforce the covenant as a bargain-protecting device, totally free of its "possession" gloss. We draw this conclusion from a consideration of companion developments under the supposedly more progressive law relating to the warranty of habitability. There, modern courts, ostensibly applying the current view that a lease should be treated like any other contract, see *supra* note 3 and accompanying text, nevertheless have restricted the scope of the warranty of habitability to a minimum-expectations standard. Thus, while the abatement remedy constitutes a significant advance over the remedies traditionally available for breach of the covenant of quiet enjoyment, the remedy is not available for the landlord's failure to provide promised amenities, nor presumably for his or her failure to perform any material promise unrelated to the condition of the premises. See *infra* Part III-A.

Moreover, in one important area of constructive eviction law, the covenant of quiet enjoyment continues to receive a narrow construction that belies the broad statements of its scope, and reflects, we think, the origins of the doctrine in the law of actual eviction. In cases in which the tenant claims a breach of the covenant of quiet enjoyment because of the disturbing conduct of neighboring tenants, the majority view apparently continues to be that the landlord is not responsible for such conduct, and thus is not in breach of the covenant of quiet enjoyment, unless he or she participates in or encourages the conduct. The landlord's mere failure to act—for example, by refusing to enforce a covenant in the lease with the disturbing tenants—does not constitute a constructive eviction. See, e.g., *Stewart v. Lawson*, 199 Mich. 497, 165 N.W. 716 (1917); 1 AMERICAN LAW OF PROPERTY, *supra* note 1, § 3.53; RESTATEMENT (SECOND) OF PROPERTY

ever, that the *possibility* of different results is present, that this possibility results from the concept of a lease as the conveyance of a possessory interest in land, and that the possibility has been realized in some decisions, as a comparison of *Stewart* and *Deakin* amply reveals.

3. *Revisionists and Traditionalists*

If our analysis is correct, both the revisionists and the traditionalists have expressed important insights on the property-contract theme, though neither has presented a fully accurate picture. The revisionist position, represented by Professor Siegel, argues that the independence of lease covenants in landlord-tenant law is a function of the contract concept of dependency, and constitutes a "vigorous" application of the doctrine of substantial performance.¹¹⁸ While the focus on substantial performance and its op-

§ 6.1 & reporter's note 3, at 232 (1977) (adopting view that landlord is responsible for "conduct of tenants which he could legally control," but indicating that "the weight of authority is *contra*"). See generally Humbach, *Landlord Control of Tenant Behavior: An Instance of Private Environmental Legislation*, 45 *FORDHAM L. REV.* 223 (1976); Annot., 1 *A.L.R.* 4th 849 (1980). The view that the landlord is only responsible for conduct that he connives in or encourages is a modern instance of the requirement that to constitute a constructive eviction, the landlord must engage in affirmative misconduct. See *supra* notes 83-90 and accompanying text.

118. Professor Humbach takes issue with Professor Siegel's equation of the lease doctrine of independency with the contract doctrine of substantial performance. He suggests that if the equation were correct, substantial performance should produce "independency," while material breach would excuse the tenant and reflect dependency. He points out, however, that the latter half of that proposition does not hold in two situations. First, "many landlord failures to provide services are certainly of sufficient magnitude to constitute a failure of substantial performance in the nature of a material breach," and yet courts do not always excuse tenants for such breaches. Humbach, *supra* note 12, at 1275 n.273. Second, even if a material breach is found, with the result that the tenant's duty to pay rent should be dependent, "the duty would still be subject to recreation" when the tenant affirms, and thus would still be an independent duty. *Id.* at 1279 n.283. He concludes that "the so-called independence of covenants in leases most emphatically cannot be regarded as simply a result of the doctrine of substantial performance, as has been alleged" by Professor Siegel. *Id.* at 1279 n.287.

Professor Humbach's first point, far from denying a connection between "independency" and substantial performance, suggests to us exactly what the connection is. Landlord-tenant law will excuse the tenant when the landlord does not substantially perform, but it will not always define substantial performance in exactly the same way that contract law does; specifically, it might exclude service obligations from the definition of substantial performance. See *supra* notes 83-90 and accompanying text. While Professor Humbach is aware that property and contract reasoning may produce different versions of substantial performance, he does not emphasize the difference and thus misses an opportunity to show an instance in which ordinary contract law and property law do produce divergent results. See Humbach, *supra* note 12, at 1281 n.295.

posite, material breach, is instructive and correct, Siegel's total assimilation of property law into contract law is extreme and unpersuasive because it distorts the reality of the results produced in cases like *Stewart*.¹¹⁹ In that assimilation, however, Professor

Professor Humbach's second point, that covenants are still "independent" when the tenant affirms, notwithstanding the landlord's material breach, is correct. That does not deny a connection between substantial performance and independency doctrine so much as indicate that the connection does not exhaust all the relevant things to be said about the tenant's obligation to pay rent. As we have noted, *see supra* note 20, we think it is important to separate three questions that frequently get merged and confused under the "independency" rubric: (1) the question of whether conditions to a promisor's duty always must be expressed; (2) the question of what kinds of performance satisfy constructive conditions when they are recognized; and (3) the question of the impact of the tenant's election to affirm, notwithstanding a substantial failure of performance, on his or her obligation to pay rent. We prefer to avoid the independency label in discussing the latter two questions, while Professor Humbach does not. *See Humbach, supra* note 12, at 1274 n.269.

119. Professor Siegel separates his discussion of independency from his consideration of constructive eviction. *See Siegel, supra* note 6, at 663-70 (discussing independency), 679-85 (discussing constructive eviction). This separation is troublesome because it obscures the essential point that while constructive eviction is a significant property substitute for the doctrine of dependency of covenants, it is nevertheless a *substitute*, having important differences from the contract doctrine. We have dealt in detail with Professor Siegel's discussion of independency doctrine. *See supra* notes 38-69 and accompanying text. A word is in order concerning his views on constructive eviction.

In discussing constructive eviction, Professor Siegel argues that cases in which the landlord breaches a specific duty imposed by the lease or by statute, such as a duty to repair, *see supra* note 91 and accompanying text, constitute the only area of overlap between property and contract doctrine. In cases in which the landlord affirmatively interferes with the tenant's possession, *see supra* notes 83-90 and accompanying text, he regards constructive eviction law as *sui generis*, based neither on contractual concepts nor on the property law of actual eviction; rather, he contends, it represents an expression of feudal rent analysis. *See Siegel, supra* note 6, at 679-87. *See also supra* note 72 (discussion of feudal rent analysis). To argue, however, that cases of affirmative landlord interference with the tenant's possession are not based upon contractual analysis is to overlook that the duty to refrain from such interferences is imposed contractually by the covenant of quiet enjoyment. The tenant's obligation to pay rent is dependent upon the landlord's performance of his covenant of quiet enjoyment, and a breach of the covenant can occur quite apart from the landlord's failure to perform any separate specific covenants in the lease. While the *factual* parallels between constructive eviction by such affirmative misconduct and a typical breach of contract case may not be close, the underlying *theory* of constructive eviction in such cases is contractual, as *Dyett v. Pendleton* indicates. *See supra* note 72 and accompanying text.

The argument that the affirmative interference cases are not based on property reasoning is that "from its outset, constructive eviction necessitated redefining eviction." Siegel, *supra* note 6, at 682 (footnote omitted). Given that the doctrine under consideration is "constructive" eviction, one would expect that some redefinition of the basic doctrine is necessarily involved. *See A. CASNER & W. LEACH, supra* note 94, at 53-54 (discussing "'constructive' this and that, and other fictions"). The relevant question is the nature of the redefinition. If we are correct, the problem with constructive eviction law over much of its history is

Siegel can claim distinguished company. Professor Corbin, after noting that the tenant's continued possession of the premises is a condition of the duty to pay rent, and that an actual eviction discharges the tenant, observed that

[the] rule as to the effect of eviction gave the courts an opportunity to infiltrate the law of contracts into the law of landlord and tenant. . . . The word 'constructive' [in "constructive eviction"] shows that it is not the law of property that the court is applying, but the law of mutual dependency in contracts; it is believed that the time has come to recognize this fact openly and to apply the flexible rules of contract law in determining whether a breach by either party is so material as to discharge the other from further duty. The question of 'materiality' varies with the circumstances; and decisions may seem to lack harmony.¹²⁰

While we fully agree with Professor Corbin on the desirability of applying a flexible contract approach to the determination of material breach in lease cases, we differ in our perception of the obstacles to that goal. Professor Corbin, like Professor Siegel after him, apparently sees the law of constructive eviction as simply a covert application of the contract doctrine of dependency. He thus is led to attribute the "lack of harmony" of cases like

not that it disregarded the parent concept of eviction, but rather that it adhered too closely to it. As we have suggested, it is precisely the close adherence to the law of actual eviction that causes the law of constructive eviction to diverge from contract analysis. See *supra* notes 85-103 and accompanying text.

Interestingly, in arguing that constructive eviction law is an example of feudal rent analysis, see *supra* note 72, rather than contractual or property analysis, Professor Siegel notes that the feudal rent analysis is selectively applied. "Applying the feudal theory no suspension of rent occurs upon the deprivation of appurtenant rights because the rent does not issue from them but from the demised premises alone." Siegel, *supra* note 6, at 683 (footnote omitted). However, because landlord-tenant cases *do* allow an eviction claim for interference with appurtenant rights, one might reconsider the argument that such cases do not reveal contractual analysis at work. In contract terms, the landlord would be in breach if he substantially interfered with an important right of the tenant under the lease. That seems to be precisely the way that courts recognizing an eviction for landlord interferences with an appurtenant right proceed. See, e.g., *Rogers v. Osborne*, 35 Barb. 523, 524 (N.Y. Sup. Ct. 1861) (landlord's interference with an easement of access "was a material interference with the beneficial use . . . of the [leased] premises"). To be sure, the doctrine of constructive eviction is not a full-blown example of contract reasoning for the reasons we have suggested. See *supra* notes 104-13 and accompanying text. But it does not follow that the doctrine is not based on contract reasoning at all, or that it is not an important advance over feudal rent analysis.

120. 3A A. CORBIN, *supra* note 14, § 686, at 242-43.

Stewart and *Deakin* to the inherent difficulty of applying the loose standard of "materiality" to divergent facts, the dissonance being compounded by the fact that property decisions do not acknowledge what the courts are doing. Professor Corbin's criticism is thus an application of Professor Llewellyn's "famous Realist dictum"¹²¹ that "[c]overt tools are never reliable tools."¹²²

With respect, however, we suggest that property cases like *Stewart* are not simply doing the same thing as contract cases without saying so. They are doing something different. We think that the differences that exist between property and contract analyses are methodological. The problem is not (or not merely) the elastic, and hence unpredictable, test of substantial performance that property and contract both apply; the problem is rather that the test is applied in different ways. In property law, when the landlord makes a specific promise in the lease, the significance of that promise is not assessed factually but rather conceptually; it is assessed through the lens of the covenant of quiet enjoyment and the "possession" that the covenant protects. The court thus does not ask whether performance of the promise is vital to the bargain that the tenant in fact struck. Instead, the court asks whether performance of the promise is vital to the bargain that property law regards him as having struck: the maintenance of the tenant's "possessory" interest in the premises. The advantage of rejecting this quiet enjoyment and possession analysis, as *Deakin* does in its straightforward evaluation of the lease as a bilateral contract, is that it allows the determination of substantial performance to be made on the strength of the facts of the case, rather than by way of deductions from a concept.

By these remarks we do not mean to suggest that difficult and controversial judgments about materiality do not exist in contract law. Like all teachers, we have our favorite contract cases in which courts have deemed material promises that the facts might suggest are immaterial, and immaterial those that the facts might suggest are vital.¹²³ In contract cases, however, it seems fair to

121. Chester, *Cy Pres: A Promise Unfulfilled*, 54 IND. L.J. 407, 408 (1979).

122. Llewellyn, Book Review, 52 HARV. L. REV. 700, 703 (1939) (reviewing O. PRAUSNITZ, *The Standardization of Commercial Contracts in English and Continental Law* (1937)). Llewellyn points out that the law has developed "a whole series of semi-covert techniques" to avoid throwing out a contract clause on the basis of public policy. *Id.* at 702.

123. See e.g., *Norrington v. Wright*, 115 U.S. 188 (1885); *Walker & Co. v. Harrison*, 347 Mich. 630, 81 N.W.2d 352 (1957). In *Norrington*, a seller contracted to sell 5,000 tons of iron to the buyer, shipment to be "at the rate of about one thousand (1,000) tons per month, beginning February, 1880, but

attribute the divergent results, as Professor Corbin suggests, to the multitude of fact patterns in which the question arises. In property law, by contrast, the controversial judgments about materiality result from the hegemony of the concept of "possession."

The traditionalists, for their part, will have to relinquish the claim that lease covenants are independent in the proper sense of that term, and will have to concede the revisionist point that the concepts of substantial performance and material breach, grounded in the law of constructive conditions, operate in landlord-tenant law. Given this, traditionalists will have to argue that the differences between property and contract lie in the application of shared concepts. The most astute of the traditionalists have, in fact, suggested the essential point that property law, while it recognizes dependency through the doctrine of constructive eviction and related doctrines,¹²⁴ defines substantial performance in a unique way. In the course of a provocative seminal article, Professors Quinn and Phillips argue that the landlord's failure to perform a specific contractual obligation, such as the obligation to furnish heat or electricity, could discharge the tenant's rent obligation "in the limited situation where the failure to provide services was so severe that it shocked the court's conscience."¹²⁵ Professors Quinn and Phillips thus echo the earlier

whole contract to be shipped before August 1st, 1880." 115 U.S. at 189. The quoted language could have been read as requiring substantial shipments in each of the first five months, with the sixth month available to make up any shortfall. The Court, however, treated the language literally, and held that delivery of "about" 1,000 tons in the first five months was a condition of the buyer's obligation to perform. *Id.* at 204-05. The Court excused the buyer, notwithstanding that the seller had shipped the entire contract tonnage within the six months. *Id.* at 205. Thus, what could have been regarded as a minor breach without violence to either the contract language or common sense was regarded as a material breach. In *Walker*, the lessor of a sign promised to maintain and service the sign. 347 Mich. at 631, 81 N.W.2d at 353. Notwithstanding repeated requests by the sign tenant, the landlord did not perform the requested service until the tenant had repudiated the contract. *Id.* at 636, 81 N.W.2d at 356. Apparently determining that prompt servicing was not a condition of the tenant's performance, the court held that there was no valid ground for the tenant's repudiation, and that the tenant himself was therefore in breach, entitling the sign owner to judgment on the contract. *Id.* Here a breach which arguably should have been regarded as material, was treated as immaterial. Thus, the possibility of a shifting standard of breach, moving between stringency and relaxation, is not unknown to contract law. "Obviously there is some softening effect, or 'play,' in the process of deriving a condition from a promise." E. FARNSWORTH & W. YOUNG, *supra* note 18, at 698. And just as contract law can be restrictive, property law can be expansive. See *supra* Part IV-B.

124. See *supra* note 113.

125. Quinn & Phillips, *supra* note 2, at 236; see J. CALAMARI & J. PERILLO,

argument of Professor Schoshinski's widely-acclaimed article on tenant remedies, that the defense of eviction "is in effect a plea of *complete* failure of the consideration for which the rent was paid," while under the contract doctrine of dependency, "any *substantial* failure of the landlord to meet his obligations would defeat his action for rent, as well as entitle a tenant to rescind the lease and abandon the premises."¹²⁶

We have simply attempted to spell out, and to put into more concrete terms, what we perceive to be the essential insight of these writers. Underlying the notion that eviction constitutes a "complete failure" of consideration, or consists of conduct that "shocks the conscience," is the point that property analysis imposes a more demanding standard of material breach than does contract law. We prefer to make that point explicit, and to focus on the various classes of landlord activity that might constitute an eviction from the restrictive perspective of property law: acts as opposed to failures to act, or failures to act that interfere with the tenant's expectation of possession as opposed to his expectation of benefits in addition to possession.¹²⁷ The central point is that with modification and extension, the traditionalist insistence on a fundamental difference between property and contract analyses of material breach remains sound, despite variations in the articulation of the difference among traditionalists, and (especially) despite the revisionist attempt to collapse the distinctions.¹²⁸

supra note 19, § 11-29, at 434 (constructive eviction operates in "extreme" cases); S. PLAGER, *NEW APPROACHES IN THE LAW OF PROPERTY* 5 (1970) (constructive eviction operates in "egregious" cases).

126. Schoshinski, *supra* note 2, at 534 (discussing the defense of failure of consideration).

127. See *supra* notes 83-113 and accompanying text.

128. In the course of his informative discussion of dependency doctrine, Professor McGovern makes the following observation:

It is often said that covenants in leases were independent because a lease [is] regarded as a conveyance of property rather than as a contract. Rarely has a proposition about legal history been so often asserted with so little evidence to support it. If medieval lawyers regarded a lease as a conveyance rather than a contract, they never said so

It is hard to see any connection between the dependency of promises and the conveyance of property rights between parties to a contract.

McGovern, *supra* note 6, at 679 (footnotes omitted).

As we read his discussion, Professor McGovern makes two points, both of which we find troublesome. First, he makes the conceptual argument that property reasoning generally does not have an impact on the question of the dependency or independency of covenants. Indeed, he finds "only one situation" in which the conveyance concept affects the issue of dependency: "Under the English Sale of Goods Act of 1893, after the property in the goods had passed to the

II. FAILURE OF "PRESUPPOSED CONDITIONS" IN LANDLORD-TENANT LAW: DESTRUCTION OF THE LEASED PREMISES

When a promisor's ability or willingness to perform a con-

buyer he could not reject them if they were defective." *Id.* at 680 (footnote omitted). The basis for this exception "seems to be that when 'the property passes by the sale, the vendee having thus benefitted by the partial execution of the contract, and become the proprietor of the thing sold, cannot treat the failure of the warranty as a condition broken.'" *Id.* (quoting *Behn v. Burness*, 3 B. & S. 751, 755, 122 Eng. Rep. 281, 283 (Ex. Ch. 1863)). In short, the buyer's obligation to pay becomes "independent" after delivery by the seller. Thus, under the English Sale of Goods Act, it seems the seller's vital promise is the promise to deliver the goods, while any promise or warranty that the seller may have made concerning the quality of the goods is collateral or minor. Since the seller has performed the promise upon which the buyer's obligation to pay depends, the buyer must pay. In the terminology that we prefer, the seller under the Sale of Goods Act has substantially performed his obligation by delivery, and any breach of warranty is an immaterial breach. *See supra* notes 56-66 and accompanying text.

We suggest, however, that Professor McGovern's recognition of the role of property reasoning on the dependency question in this "one situation" undercuts his point that "[i]t is hard to see any connection between the dependency of promises and the conveyance of property rights." McGovern, *supra* note 6, at 679. Although we think that there is more to conveyance reasoning, *see infra* Part IV-A, one component of the conveyance view of a lease regards the lease transaction as akin to the sale of the premises for the term, with rent as the purchase price. *See, e.g., Fowler v. Bott*, 6 Mass. 63 (1809) (lessor entitled to rent even after building burned down). Under this view, the landlord has performed substantially upon delivery, and any subsequent breaches are immaterial. *See RESTATEMENT OF CONTRACTS* § 290 & comment a (1932). In other words, the conveyance view of the lease puts the tenant after delivery in the same position as the buyer after delivery under the English Sale of Goods Act. In both cases, the tenant's obligation to pay rent is "independent," i.e., unconditional, because the condition to its performance, delivery by the landlord, has been satisfied. Thus, the "one situation" in which Professor McGovern sees a connection between conveyance reasoning and the dependency doctrine is precisely the landlord-tenant situation as conceived by conveyance reasoning.

Second, in addition to seeing only the supposedly limited conceptual connection between conveyance reasoning and the dependency question noted above, Professor McGovern makes an historical or evidentiary point. He suggests that if medieval lawyers saw any conceptual connection between the dependency of lease covenants and conveyance reasoning, they failed to state it. McGovern, *supra* note 6, at 679. Since we are not legal historians, and have neither the familiarity nor the facility with ancient sources that Professor McGovern does, we quarrel with this point with diffidence. Nevertheless, it seems to us that Professor McGovern's own use of his data renders his point irrelevant. The primary argument of his insightful article is that the law reveals no simple developmental movement from the view that promises are independent to the view that they are dependent, with Lord Mansfield's decision in *Kingston v. Preston* being the important turning point. *See id., supra* note 6, at 676. He supports his argument by noting earlier cases from various fields of law in which courts *in effect*—though not in terms—regarded promises as dependent. In discussing medieval lease cases, for example, he says that it was "settled" law no later than the end of the fourteenth century that the landlord's eviction of the tenant from possession excused the tenant's duty to pay rent. The tenant's rent obligation in his view was thus effectively dependent on the landlord's maintenance of the

tractual undertaking is impaired by an unforeseen supervening event, the question arises whether the promisor must nevertheless perform, or at least pay damages if he fails to perform.¹²⁹ The building on leased premises, for example, might be destroyed without the fault of either the landlord or tenant. The question would thus arise whether the tenant is nonetheless obligated to pay rent despite this unforeseen interference with the use and enjoyment of the premises.

A general rule of contract law, expressed in the maxim *pacta sunt servanda*, is that agreements must be enforced as written. Under this view, "when a contractual promise is made, the promisor must perform or pay damages for his failure to perform no matter how burdensome performance becomes as a result of unforeseen circumstances."¹³⁰ An exception to the rule, however, is recognized in cases in which the supervening event renders performance impossible or totally frustrates the venture of which the promised performance was a part.¹³¹ In such cases, the contract is either terminated and the promisor excused, or the contract is modified to reflect the changed circumstances.¹³²

The doctrinal basis for recognition of the excuse from performance in cases of impossibility and frustration is the law of implied or constructive conditions.¹³³ "The parties are said to have contemplated the continued existence of a state of facts,"

tenant's actual possession of the premises. *Id.* at 666. He then notes that "other breaches" by the landlord did not justify the tenant's termination of the lease. Thus, in the fifteenth century, the courts rejected the view that the landlord's failure to repair allowed the tenant the right to terminate the lease, and he notes that constructive eviction did not become settled law until the nineteenth century. *Id.* at 666-67. It seems to us that the explanation for the differing results in the actual eviction and failure-to-repair situations might lie precisely in conveyance reasoning as we have explained it. In the former case, the landlord has materially breached, while in the latter the landlord has substantially performed because he or she has not interfered with the tenant's "possession" or actual access to the leased premises, which is the tenant's central entitlement under a property view of the lease. The fact that courts at that time did not state the matter in terms of material breach and substantial performance, *see supra* note 72, does not deter Professor McGovern from making a forceful, and we think persuasive, case that the courts in effect were applying dependency analysis. At the same time, the fact that the courts did not explicitly say that there is a connection between conveyance reasoning and dependency doctrine does not prevent us from contending that there is such a connection.

129. *See* Rosett, *supra* note 19, at 1087.

130. J. CALAMARI & J. PERILLO, *supra* note 19, § 13-1, at 477.

131. *See id.* at 476-77; Rosett, *supra* note 19, at 1093, 1094-95. *See generally* 6 A. CORBIN, *supra* note 14, §§ 1353-1361.

132. *See* Rosett, *supra* note 19, at 1095.

133. *See* 6 A. CORBIN, *supra* note 14, § 1331.

and there is thus a “condition precedent to the promisor’s duty that the facts contemplated continue to exist.”¹³⁴ Phrased in the language of the Uniform Commercial Code, the lease example presents the question of whether the continued existence of buildings on the leased premises is a “basic assumption” of the parties, and hence a “presupposed condition” of the tenant’s obligation to pay rent.¹³⁵ Thus stated, the question of the tenant’s continued liability after destruction of the premises bears an obvious affinity to the question, canvassed in Part I, of the tenant’s continued rent liability after breach of promise by the landlord. In fact, the dependency and destruction cases present two aspects of the same question. The type of condition may be different,¹³⁶ but the issue in both cases is whether the court will impose a constructive condition to ameliorate the lease omission and whether conveyance reasoning has any impact on that issue. Our conclusion here, as in the dependency discussion, is that there are important similarities between property and contract reasoning, but that these similarities should not be allowed to obscure vital differences.

A. “Possession” and Presupposed Conditions

Despite inconsistency and confusion in judicial statements and commentary,¹³⁷ the tenant’s relevant claim in cases of the destruction of the premises is frustration of purpose, not impossibility of performance. Destruction of the premises does not render it impossible for the tenant to perform the obligation to pay rent.¹³⁸ Rather, the tenant’s claim is that he or she had a particular object or purpose in contracting for the use of the leased

134. J. CALAMARI & J. PERILLO, *supra* note 19, § 13-1, at 477.

135. U.C.C. § 2-615 (1977). Some recent cases reflect a doctrinal shift, from the view that implied conditions are rooted in the parties’ expectations, to the view that they are based on considerations of fairness and justice. *See, e.g.*, *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 315 (D.C. Cir. 1966). This shift is part of a larger shift away from manipulation of intent as the basis for contract decisions toward a more forthright balancing of the interests at stake. However, much of the reasoning in contemporary excuse cases still employs traditional methodology, as the text accompanying notes 134 & 135 reveals. Consequently, we focus on that methodology in our discussion.

136. *See* J. CALAMARI & J. PERILLO, *supra* note 19, §§ 13-1, 13-10 at 477, 495 (distinguishing between a constructive condition that substantial performance be rendered, and a constructive condition that an assumed state of facts continued to exist, as bases for excusing a promisor from a duty to perform).

137. *See* 6 A. CORBIN, *supra* note 14, § 1322.

138. *Id.* § 1353, at 458. *See* *Warshawsky v. American Automotive Prods. Co.*, 12 Ill. App. 2d 178, 188, 138 N.E.2d 816, 820 (1956).

premises; that the continued availability of the premises for this use is a condition of the obligation to pay rent; and that the rent obligation is discharged when unforeseen fortuitous events destroy the premises and hence the possibility of the particular use.¹³⁹

Traditional landlord-tenant doctrine rejects the tenant's claim for relief from the rent obligation when the premises are destroyed. Typically it declares that "a tenant is not relieved from paying rent by the destruction of a building on leased premises, although the building may be the principal subject matter of the lease."¹⁴⁰ While that statement indicates an unambiguous result, it masks a variety of justifications for the result. At least three separate explanations appear in the decisions, each differing in its assessment of the fact that buildings on the leased premises "may be the principal subject matter of the lease." Traditionalists have tended to merge the explanations. This is unfortunate since the explanations are conceptually discrete and since merging them obscures the contractual roots of all three explanations. Revisionists, for their part, have failed to explore all of the explanations, and their selectivity has blinded them to important differences between property and contract reasoning.

1. *Property as Contract: Three Explanations for the Destruction Result*

Courts occasionally assert that they will not relieve a tenant from "an express contract to pay rent upon the ground that the premises have been destroyed by fire . . . unless there is an express stipulation to that effect."¹⁴¹ The requirement of such an express condition dates to the early English case of *Paradine v.*

139. See 6 A. CORBIN, *supra* note 14, § 1353, at 457-58. For a further discussion of Professor Corbin's view of the frustration argument in lease cases, see *infra* note 220. As we hope to show in the ensuing discussion, conveyance reasoning presents various obstacles to the successful assertion of the frustration argument stated in the text. See *infra* notes 141-76 and accompanying text.

140. 1 AMERICAN LAW OF PROPERTY, *supra* note 1, § 3.103, at 396. Because the common law rule is modified by statute in many jurisdictions, or by a lease provision in particular cases, it might well not apply to a majority of modern leasing transactions. Since our concern is with the reasoning underlying the common law rule, we disregard such statutory and contractual modifications. Where the rule has not been modified, some courts have indicated a willingness to follow it even today. See Annot., 99 A.L.R.3d 738 (1980). See generally Henszey & Pugh, *Tenant's Liability for Rent on Destruction of the Leasehold Premises*, 7 REAL EST. L.J. 187 (1979) (discussion of common law rule, exceptions, and statutory modifications); Note, *Destruction of Building on Leasehold*, 32 OR. L. REV. 336 (1953) (same).

141. *White v. Molyneaux*, 2 Ga. 124, 126 (1847).

Jane,¹⁴² in which a tenant defended a suit for rent on the ground that the leased premises had become completely unavailable to him, as they had been overrun by an alien army. The court rejected the defense. The tenant was bound to make good on his express promise to pay rent “notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.”¹⁴³ In this simple and straightforward analysis, the tenant lacks the benefit of a constructive condition for the simple reason that constructive conditions are not recognized. If use of buildings on the leased premises or use of the land itself is in fact “the principle subject matter of the lease,”¹⁴⁴ and hence a condition of the tenant’s obligation to pay, it is incumbent on the tenant to bargain accordingly. Thus, conditions not stated in the lease do not exist.¹⁴⁵

Because this first explanation fails to excuse a tenant who has not protected himself in the contract, it is distinguishable from the second approach. The second approach does not insist upon express contractual conditions; rather it determines the tenant’s liability for rent in accordance with legal rules allocating risk of loss in sales transactions. In the leading case of *Fowler v. Bott*,¹⁴⁶ tenants who had leased premises for use as a mill site defended an action for rent on the ground that the destruction of the mill building relieved them of their obligation to pay. The court, framing the question as “whether, after a destruction by fire of the buildings demised, the lessors . . . can recover their rent,”¹⁴⁷ held for the landlord. In addressing the “supposed hardship” of its rule of continued rent liability, the court eschewed the robust freedom-of-contract rationale of *Paradine*. Rather, the court reasoned that the lease “is a sale of the demised premises for the term. . . . The rent is in effect the price, or purchase money, . . . and their [the premises’] destruction, or any depreciation of their value, happening without the fault of the lessor, is no abatement of his price, but entirely the loss of the purchaser.”¹⁴⁸

Because *Fowler* requires an express stipulation to upset the risk of loss allocation made by sales law, it is easy to confuse this

142. Aleyn 26, 82 Eng. Rep. 897 (1648). See generally 6 A. CORBIN, *supra* note 14, § 1322, at 328-31 (discussion of *Paradine*).

143. Aleyn at 26, 82 Eng. Rep. at 897.

144. See *supra* note 140 and accompanying text.

145. See 6 A. CORBIN, *supra* note 14, § 1324, at 335.

146. 6 Mass. 63 (1809).

147. *Id.* at 67.

148. *Id.*

explanation with *Paradine's* express condition rationale. The difference is that under *Paradine*, the absence of an express contractual escape from rent liability is always fatal, whereas under the sales analogy, it is only fatal when sales law operates to impose the risk of loss upon the tenant. Though there are few cases on point, it appears that the sales rationale would excuse the tenant from the rent obligation, whereas the *Paradine* rationale would not, if the premises were destroyed between execution of the lease and the start of the term, notwithstanding the absence of an express stipulation.¹⁴⁹ This result could be explained by saying that risk of loss does not pass to the purchaser until delivery.¹⁵⁰ The facts in *Fowler*, however, are representative of the far more common case, in which destruction of the premises occurs after the term has begun. In this situation the delivery test is satisfied, and the tenant, as purchaser, bears the risk of loss. The result, again, is not affected by the fact that a "building may be the principal subject matter of the lease,"¹⁵¹ because risk of loss as to the building has passed, according to applicable rules, to the purchaser-tenant.

This second explanation, while widespread in the cases, is not universal. A third approach was articulated in the leading English case of *Baker v. Holtzaffell*,¹⁵² where the landlord sued for rent accruing after a fire destroyed buildings on the leased premises. Apparently, use of the buildings was central to the tenant's purposes in acquiring the leasehold. After the fire the premises were described as in "a ruinous state and not inhabited" by the tenant.¹⁵³ Nevertheless the landlord recovered. Importantly, however, the court did not mention the sales analogy which figured as centrally in *Fowler*. Instead, the court found that the tenant remained bound because "[t]he land was still in existence" to support the rent obligation.¹⁵⁴ A leading treatise convincingly

149. See *Wood v. Hubbell*, 10 N.Y. 479, 486-88 (1853) (alternate holding; court also reformed the lease, finding that parties had agreed to insert a covenant excusing the tenant in case of destruction of the premises and had failed to include it by mistake). *But see Anderson v. Ferguson*, 17 Wash. 262, 277, 135 P.2d 302, 308 (1943) (dictum; tenant is bound if premises are destroyed subsequent to the "making" of the lease). Cf. 3A A. CORBIN, *supra* note 14, § 667, at 194-95 (in contracts for the sale of land, risk of loss resulting from destruction of buildings or land in the interval between contract of sale and conveyance of deed is on purchaser).

150. See U.C.C. § 2-509(3) (1977).

151. See *supra* note 140 and accompanying text.

152. 4 Taunt. 45, 13 Rev. Rep. 556 (1811).

153. *Id.*

154. *Id.* at 46, 13 Rev. Rep. at 557. *Accord*, *Paxson & Comfort Co. v. Potter*,

suggests that *Baker* illustrates the “well settled rule of the common law that where lands are the subject of a demise and the buildings or improvements thereon are accidentally destroyed . . . , this destruction . . . does not discharge the covenant to pay rent”¹⁵⁵ The reason is that “the subject of the lease is the land and not the buildings thereon. . . . As the land remained to the tenant after the erections were destroyed . . . , his liability for rent was still assumed to continue.”¹⁵⁶

As thus elaborated by the commentary, the *Baker* reasoning is different in important ways both from the sales analogy advanced in *Fowler* and from *Paradine’s* express condition rationale. Under the sales analogy, once risk of loss passes to the tenant it becomes irrelevant that the “subject matter of the contract” is destroyed since the tenant, as purchaser, bears the burden of the fortuitous destruction of the subject matter of the transaction. In contrast, under *Baker*, destruction of the “subject matter” of the lease transaction is a central consideration and the determination of the lease’s “subject matter” becomes crucial.¹⁵⁷ Thus, the tenant

30 Pa. Super. 615, 616 (1906); *Post v. Brown*, 142 Tenn. 304, 306-07, 218 S.W. 823, 824 (1920); *Anderson v. Ferguson*, 135 P.2d 302, 308 (Wash. 1943).

155. 2 H. UNDERHILL, *supra* note 35, § 528.

156. *Id.* But see *infra* note 177 (citing cases for the minority viewpoint that tenant is excused upon destruction of buildings, even though land remains to support the rent obligation).

We do not mean to suggest that *Baker*, an 1811 case, overtly employs the vocabulary of frustration of purpose. That concept apparently does not appear explicitly in English law until the early 1900s. See *Krell v. Henry*, 2 K.B. 740 (1903) (frustration of purpose excuses promisor). See also *Taylor v. Caldwell*, 122 Eng. Rep. 309 (K.B. 1863) (impossibility of performance excuses promisor). Indeed, the “subject matter” explanation of *Baker* appears to be based on the property conception that rent issues out of the land, and that since the tenant still has the land after destruction of buildings, he continues to owe rent. See *supra* note 71. We do suggest, however, that the “subject matter” explanation of *Baker* is the property equivalent of the contract doctrine of frustration of purpose, just as the doctrine of constructive eviction is the property equivalent of the contract doctrine of material breach. See *supra* Part I. Viewed in frustration of purpose terms, *Baker* holds that the tenant is not excused upon destruction of buildings because the essential element of the transaction remains, and hence there is no total, or even substantial, loss of bargain. See *infra* note 166 and accompanying text. Here, as on the independency question, property law does allow the tenant to be excused. See *infra* note 160 (tenant excused when land is unavailable). However, the criteria used by property law are, on the whole, more stringent than those employed in the alternative contract doctrine.

157. To be sure, the two explanations can produce the same result. When buildings on the leased premises are destroyed, the tenant remains liable for the rent on either theory, because risk of loss of that destruction has been allocated to him (at least after delivery) under the sale of goods rationale, or because he still has the central use (of the land) contracted for, and hence has suffered no relevant interference with his bargain, under the *Baker* rationale.

might escape continued rent liability, even after delivery of possession, if it can be said that the purpose for which the tenant let the premises no longer can be achieved. Nevertheless, destruction of buildings on the premises, even though the buildings in fact "may be the principal subject matter of the lease,"¹⁵⁸ ordinarily does not thwart the purpose of the lease because property law conceives the purpose to be use of the land, unless the parties specify otherwise.¹⁵⁹ But inaccessibility of the land itself *would* thwart the purpose of the lease and thus should excuse the tenant, as the commentary and the few relevant cases suggest.¹⁶⁰ And because such inaccessibility would excuse the tenant even without an express condition in the contract, the *Baker* explanation also differs from that in *Paradine*,¹⁶¹ since in *Paradine* the tenant was held liable even though he was, in fact, excluded from the entire leasehold, including the land.

Since the *Baker* reasoning explains the tenant's excuse in cases where the land itself becomes unavailable, while *Fowler* and *Paradine* do not, it has the advantage of making the destruction cases internally consistent. In addition, the *Baker* analysis has the advantage of revealing consistencies between the destruction cases and related lease decisions. Although the common law denied that destruction of buildings excused the tenant's rent obligation, it also generally held that a lease for a use subsequently made illegal or severely restricted by government regulation *did* excuse the tenant.¹⁶² These illegality cases are based on an appli-

158. See *supra* note 140 and accompanying text.

159. See *supra* notes 155-56 and accompanying text.

160. See *Viterbo v. Friedlander*, 120 U.S. 707, 712 (1882) ("The common law regards . . . a lease [for a term] as the grant of an estate for years, which the lessee takes a title in, and is bound to pay the stipulated rent for, notwithstanding any injury by flood, fire, or external violence, at least unless the injury is such a destruction of the land as to amount to an eviction."); *Waite v. O'Neil*, 76 F. 408, 416 (6th Cir. 1896) ("If the land remained to the tenant after the buildings were destroyed, and he had a right to occupy and use it, his liability for rent, without abatement, was held to continue. . . . But the very foundation upon which the old rule was rested is removed if the subject-matter of the demise is destroyed."); *Chamberlain v. Godfrey's Adm'r*, 50 Ala. 530, 534 (1874) ("When the land . . . ceases to exist, the rent . . . of necessity must cease."); *Bunting v. Orendorf*, 152 Miss. 327, 331-32, 120 So. 182, 183 (1929) ("[t]here is no allegation that the land . . . rented was destroyed."); RESTATEMENT (SECOND) OF PROPERTY § 5.4 reporter's note 4, at 201 (1977) ("The basis of the old rule was that the tenant could terminate on destruction of the subject matter of a lease, but the land was the subject matter of a lease unless otherwise specified, and unless the land itself was destroyed, the tenant could not bring himself within this rule.")

161. See *supra* notes 141-45 and accompanying text.

162. See 1 AMERICAN LAW OF PROPERTY, *supra* note 1, §§ 3.44, 3.104. See also

cation of the doctrine of frustration of purpose: "In effect, the courts imply a condition that the specified use continue to be lawful."¹⁶³ Like the cases in which the land itself becomes inaccessible, the illegality cases are inconsistent with the *Fowler* and *Paradine* rationales. Under *Fowler*'s sales reasoning, the tenant would bear the risk of changes in the law respecting use of the purchased object.¹⁶⁴ Under *Paradine*'s reasoning the tenant bears all risks not expressly contracted away.¹⁶⁵ The illegality cases, however, are not inconsistent with *Baker*'s "subject matter" explanation of the destruction cases, inasmuch as the frustration doctrine that the illegality cases apply is simply a version of that same doctrine as applied to destruction cases. Frustration doctrine requires that the "object" of the contract be totally or almost totally frustrated.¹⁶⁶ While it is possible to say that the bargain is not frustrated so long as the premises remain available for any use after the supervening illegality occurs, the cases generally hold otherwise. They hold that if the "principal use" of the lease is frustrated by the supervening law, there is sufficient total or near total loss to excuse the tenant.¹⁶⁷ Before finding that the "principal use" has been frustrated, however, the cases require an express restrictive covenant limiting the tenant to the very use made illegal or prohibited by subsequent law or regulation.¹⁶⁸ Where there is no restrictive covenant, the conclusion that there is not sufficient frustration to excuse the tenant's rent obligation is justified on the ground that the tenant's allowed uses are various, and frustration of one of those uses, even if it is the tenant's

O'Byrne v. Henley, 161 Ala. 620, 50 So. 83 (1909) (analogizing illegality rules to destruction rules). It is perhaps more correct to say that *American* common law applies what is essentially frustration of purpose reasoning in both the destruction and supervening illegality cases. In England, apparently, the courts refuse to apply the principle of supervening illegality to leases. See *infra* note 232 and accompanying text.

163. 1 AMERICAN LAW OF PROPERTY, *supra* note 1, § 3.44, at 265. See also *supra* notes 130-35 and accompanying text (constructive condition as basis of frustration argument).

164. 1 AMERICAN LAW OF PROPERTY, *supra* note 1, § 3.44, at 266.

165. See *Imbeschied v. Lerner*, 241 Mass. 199, 201, 135 N.E. 219, 220 (1922) (tenant of lease for "liquor business only" not excused by federal prohibition law "in the absence of any provision in the lease that the rent should be abated . . . in the event of such business becoming illegal"). For a discussion of *Paradine v. Jane*, see *supra* notes 141-45 and accompanying text.

166. See J. CALAMARI & J. PERILLO, *supra* note 19, § 13-10, at 495-96.

167. 1 AMERICAN LAW OF PROPERTY, *supra* note 1, § 3.44, at 265-66.

168. See *id.* § 3.44, at 265-66; *id.* § 3.104, at 400-01; 6 A. CORBIN, *supra* note 14, § 1356, at 473; *infra* note 169.

principal use, leaves the tenant free to pursue other uses.¹⁶⁹

The requirement of a restrictive use covenant in the illegality cases, however, appears to be nothing more than an expression of the reasoning that underlies *Baker's* "subject matter" view of the destruction cases. In the destruction cases, the law reasons that loss of buildings does not frustrate the tenant's principal use of the premises, because that use is presumed to involve the soil, not the buildings, unless the lease expressly provides otherwise.¹⁷⁰ Similarly, in the illegality cases, loss of one use does not frustrate the tenant's purpose under the lease because the law assumes that other uses remain available, unless the lease specifically provides that only one use is allowed. The restrictive covenant requirement in the illegality cases functions to make the loss incurred by the tenant tantamount to loss of the land in the destruction cases—any beneficial use becomes impossible.¹⁷¹ To say that the tenant is excused when land but not buildings is destroyed, then, is simply to apply consistently the principle that operates in the illegality cases. The principle in both cases is that the tenant can be excused when his main purpose in entering the transaction is frustrated, but property law in both cases imposes a stringent requirement on the determination that the main purpose *has* been frustrated.¹⁷²

There are thus three separate explanations for the destruction cases, and they contain important differences. The differences, however, should not obscure important similarities. The most important similarity for purposes of the property-contract theme is that all three of the explanations are forms of contract reasoning. The insistence upon an express condition to relieve a promisor from an obligation is a remnant in landlord-tenant law of the once general rule of contract law. That this insistence re-

169. See Note, *Landlord and Tenant, Liability for Rent Not Excused Under Doctrine of Commercial Frustration*, 1957 U. ILL. L.F. 156, 157 ("The doctrine [of frustration] will apply to leases only if the use of the premises is restricted by the terms of the lease to a particular purpose, and the supervening event prevents that use. If, however, the terms of the lease contain no reference to the use to be made of the premises, or if such references as it contains is merely permissive, the lease is not terminated by any fortuitous event. This is true irrespective of the fact that the premises were to be used for one particular purpose and no other.") (footnotes omitted).

170. See *supra* notes 155-56 and accompanying text.

171. The parallel in the constructive eviction context is the view that the landlord's interference must render the premises uninhabitable. See *supra* notes 83-113 & *infra* notes 194-97 and accompanying text.

172. See J. CALAMARI & J. PERILLO, *supra* note 19, § 13-10, at 495-96.

flects the law of “an earlier, sterner age”¹⁷³ should not obscure the fact that it reflects the contract law of that age, and is not an idiosyncrasy of lease cases. Likewise, the sales analogy relied on in *Fowler* simply compares the lease contract for purposes of risk of loss to a standard contract for the sale of goods. While the express condition rationale is dated,¹⁷⁴ the risk of loss principle that becomes relevant by virtue of the sales analogy is standard in contract law and applicable even today.¹⁷⁵ Finally, *Baker*’s “subject matter” rationale is, as we suggested, in essence an application to leases of the contract doctrine of frustration of purpose, based on a theory of conditions. In property terms, the “object” of the lease contract is use of the land. The continued availability of the land is thus a “basic assumption” of the parties. The tenant is excused when the land is no longer available because continued existence of the land is a “presupposed” condition of his obligation to pay rent.¹⁷⁶

2. *Property vs. Contract: The American “Exception” for Multiple-Occupancy Premises*

The *Baker* rule’s unvarying assumption that land is the essence of the lease transaction is essentially useless to the modern tenant. In response to this perceived deficiency, a small but vocal minority of American cases simply have rejected that assumption.¹⁷⁷ However, a more significant development in American law is the creation of a purported “exception” to the *Baker* rule. Under this “exception,” the tenant is excused from the obligation to pay rent when the lease “is of rooms in a building or of a building without land,” and the building is destroyed.¹⁷⁸ The “excep-

173. Rosett, *supra* note 19, at 1094.

174. See 6 A. CORBIN, *supra* note 14, § 1324, at 335-36; § 1339, at 395; § 1356, at 471.

175. See U.C.C. § 2-509(3) (1977) (risk of loss generally on purchaser after delivery).

176. See *supra* notes 133-35 & 152-61 and accompanying text.

177. See *Whitaker v. Hawley*, 25 Kan. 674 (1881); *Wattles v. South Omaha Ice & Coal Co.*, 50 Neb. 251, 69 N.W. 785 (1897); *Albert M. Greenfield & Co. v. Kolea*, 475 Pa. 351, 356, 380 A.2d 758, 760 (1976) (“In this case, . . . if we applied the general rule and ignored the realities of the situation, we would bind the [tenant] to paying rent for barren ground when both parties to the lease contemplated that the building would be used for the commercial enterprise of repair and sale of used motor vehicles.”); *Cogan v. Parker*, 2 S.C. 255, 275 (1879) (“If parties contract with reference to the occupation of a dwelling house, the destruction of that dwelling house is clearly the destruction of that which they had in view, and was the basis and consideration of their contract.”).

178. 1 AMERICAN LAW OF PROPERTY, *supra* note 1, § 3.103, at 397. Because the American “exception” really functions as a repudiation of the *Baker* rule in

tion" is justified on the theory that "as distinguished from cases where the lessee still has the land, here there is a complete destruction of the subject matter of the lease."¹⁷⁹ The excuse in this "exception," like the excuse for the tenant where the land is inaccessible, is inconsistent with the express condition and sales rationales. Commentators who have said that it is a repudiation of those explanations and not a true exception to them are quite right.¹⁸⁰ Under *Paradine's* express condition rationale, the question of whether the lease is a building or a land lease is simply irrelevant; in all cases the contracting party seeking an excuse from his obligation to perform must have negotiated a specific casualty exception to his obligation in the contract.¹⁸¹ Likewise, the American "exception" is inconsistent with the sale of goods rationale. Regardless of whether the tenant receives rooms or land at the outset of the lease, the fact is that the tenant receives them at that point, so that any ensuing loss is a post-delivery loss, with the risk on the tenant. Since the sales construct focuses on the tenant's acquisition of possession of the thing—whether buildings or land—rather than on the particular uses that the tenant might have contemplated for the thing, the American "exception" is "illogical" in sales terms, as Professor Lesar has forcefully contended.¹⁸²

an important sense, *see infra* notes 185-97 and accompanying text, we are reluctant to discuss it without the quotation marks.

179. 1 AMERICAN LAW OF PROPERTY, *supra* note 1, § 3.103, at 397-98.

180. *See infra* notes 81-82 and accompanying text.

181. *See, e.g.*, *Graves v. Berdan*, 26 N.Y. 498, 502 (1863) ("In a case where a lessee binds himself, by express covenant, to pay the rent during the term, and there is no exception in the lease of casualties by fire, notwithstanding the house should be burnt down by accident, he is bound to pay, for the simple reason that he has bound himself by an express covenant to do so.") (Wright, J., dissenting). *Linn v. Ross & Co.*, 10 Ohio 412 (1841) (tenant who leased portion of building and expressly covenanted to pay rent, held liable for rent after destruction of building). The majority in *Graves* did not disagree with the *Paradine* reasoning of the dissent; it simply adopted an alternative theory that rendered that reasoning irrelevant. For further discussion of *Graves*, *see infra* note 215. For a discussion of *Paradine*, *see supra* notes 141-45 and accompanying text.

182. *See* 1 AMERICAN LAW OF PROPERTY, *supra* note 1, § 3.103, at 398 ("logically, this exception is inconsistent with the theory of the destruction rule, and it is not made in England") (footnote omitted); Lesar, *supra* note 2, at 1284 n.32 (1960) ("The reasoning [of the American "exception"] is that, as distinguished from cases where the lessee still has the land, here there is a complete destruction of the subject matter of the lease. But the burden of the . . . common law rule, is that the lessee has purchased an estate and is not contracting for the use of something. The distinction is not made in England."). Putting the question of England aside temporarily, *see infra* note 190, we think that Professor Lesar more appropriately might have said that the burden of one strand of the common law rule, the lease-as-sale conception, is that the tenant is a purchaser. *See*

A closer question is presented with respect to the *Baker* "subject matter" rationale¹⁸³ to which the American position consciously purports to be an "exception." However, we think that even here the so-called "exception" is ultimately a repudiation, in an important sense, of the very explanation of which it is supposedly a part. To be sure, from one perspective, the American "exception" is consistent with the basic proposition stated in *Baker*, because it simply draws the line that defines *Baker's* outer limits. Thus, if land is the essence of the bargain under the *Baker* rationale, the tenant should be excused whenever land is *not* an essential part of the bargain. In the ordinary case of rental of a suite of rooms in a multiple-story building, the sole basis on which the parties contract is use of the space demarcated by the various cubicles in the building, rather than use of the land on which the building is situated.¹⁸⁴ Destruction of the building prevents the tenant from using the bargained-for space, and hence from consummating the bargain. Under this approach, it would be entirely consistent with the rule announced in *Baker* to relieve the tenant from the obligation to pay rent in that situation. But while the American "exception," at least in the situation noted, appears consistent with the *Baker* rule, we wonder whether the rule is altogether consistent with the "exception." The American cases seem to apply the "exception" in all cases in which the tenant leases a portion of a building rather than an entire building.¹⁸⁵ Application of the "exception" in cases of multiple-story build-

supra notes 146-48 and accompanying text. In contrast, the subject-matter rationale of the *Baker* case appears to us to treat the lease as a contract "for the use of something" rather than as a sale. But *Baker* also defines the "something" as the use of land rather than buildings on the land, so that destruction of buildings does not cause any frustration of the tenant's purpose in entering into the lease. In treating the lease as a contract for use rather than as a sale, the American "exception" runs counter to the sales rationale strand of the destruction rule, as Professor Lesar rightly notes. We think, however, that the American "exception" also runs counter to the *Baker* analysis that it purports to apply, because instead of invoking the property notion that the lease is an estate "in land" as a means of ascribing a purpose to the transaction, it searches the transaction itself for clues about the purpose of the lease. For a discussion of *Baker*, see *supra* notes 152-56 and accompanying text. For further discussion of the impact of conveyance reasoning on the frustration argument, see *infra* notes 220 & 232.

183. See *supra* notes 152-61 and accompanying text.

184. See *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1074 (D.C. Cir. 1970) ("In the case of the modern apartment dweller, the value of the lease is that it gives him a place to live. The city dweller who seeks to lease an apartment on the third floor of a tenement has little interest in the land 30 or 40 feet below").

185. See 1 AMERICAN LAW OF PROPERTY, *supra* note 1, § 3.103, at 397-98 (no distinction drawn between types of multiple-occupancy situations).

ings is sensible, as we have just noted. However, when the tenant leases half of a single-story building and the building is destroyed, it is still possible to define a discrete *land* space that remains "available" for the tenant's exclusive use, in a way that is quite literally impossible in the case of destruction of a multiple-story building. In spite of this conceptual flaw, the American "exception" applies in this situation as well.¹⁸⁶ Likewise, the American "exception" is applicable, according to the authorities, when the tenant leases a "building without land,"¹⁸⁷ which means, we take it, a building having no appreciable apron of usable land. Here again, however, destruction of buildings still would leave the tenant with exclusive access to the land on which the building rested. Since we believe the basic *Baker* rule is troublesome, we do not contend that it should be applied in these latter situations. We argue only that it *could* be applied, and that the failure of American courts to apply the rule in these situations is evidence not only of a dissatisfaction with the rule but of an actual repudiation of it.

The repudiation of the *Baker* rule manifests itself more obviously in the reasons the courts give for the "exception" than in the results reached. In the American "exception" cases, the courts say that the subject matter of the lease is the use of buildings rather than of land.¹⁸⁸ They then apply the *Baker* rule relieving the tenant on the ground that the subject matter of the contract is destroyed.¹⁸⁹ But in the "exception" cases the mode of determining the subject matter of the transaction is critically different from the *Baker* approach. The courts apparently let the rental facts speak for themselves; they determine from the circumstances of the letting that the parties must have intended for

186. See, e.g., *Ainsworth v. Ritt*, 38 Cal. 89, 90 (1869) (tenant who leased west half of building excused from rent obligation after fire; lease "was of a portion of the building or superstructure, and not of the land upon which the same rested; hence a destruction of the house, the subject-matter of the lease, . . . terminated the lease and the relation of landlord and tenant").

187. 1 AMERICAN LAW OF PROPERTY, *supra* note 1, § 3.103, at 397.

188. See *Womack v. McQuarry*, 28 Ind. 103, 104 (1867) ("This exception . . . is founded upon the idea that in such cases it is not the intention of the lease to grant any interest in the land, save for the single purpose of the enjoyment of the apartment, and that when that enjoyment becomes impossible, by reason of the destruction of the building, there remains nothing upon which the demise can operate."); *Albert M. Greenfield & Co. v. Kolea*, 475 Pa. 351, 354, 380 A.2d 758, 759 (1976) (the exception recognizes "that in a landlord-tenant relationship with respect to an apartment, the parties have *bargained for* a part of a building and not the land beneath" (emphasis in original)).

189. See *supra* notes 152-61 and accompanying text.

the buildings to be a vital part of the transaction, and that their continued existence is a condition of the tenant's obligation to pay rent.¹⁹⁰ Unlike the *Fowler* sales analogy cases, these "exception" cases regard the purpose for which the tenant receives delivery of the leased premises as the essence of the contract. In addition, unlike the *Baker* "subject matter" cases, the courts in these cases inquire into the tenant's purpose in entering the lease by looking at the facts and circumstances of the transaction, rather than merely ascribing a purpose to the tenant and putting on the tenant the burden of expressly stating any contrary purpose in the lease.

All of this is quite proper. Indeed, it seems inevitable from a contract perspective.¹⁹¹ One is hard-pressed to contend that a tenant in any of the cases covered by the American "exception" has the slightest interest in the land on which the building is situated. The point is, however, that if the reasoning of the "exception" were taken seriously, the *Baker* rule itself would virtually cease to exist. In many of the cases in which the *Baker* rule of continued rent liability is applied, it is just as difficult as it is in the American "exception" cases to believe that the tenant had any real interest in the soil as opposed to the buildings on the premises. In *Baker* itself, for example, the continued existence of the leasehold buildings was vital to the achievement of the tenant's

190. See *supra* note 188 and accompanying text. Some commentators argue that the American "exception" is "illogical" and draw support for that conclusion from the rejection of the exception in England. See *supra* note 182 and accompanying text. However, the English case *Izon v. Gorton*, cited as authority for the rejection of the exception, presents peculiar facts. See *Izon v. Gorton*, 5 Bing. (N.C.) 502, 132 Eng. Rep. 1193 (C.P. 1839). In *Izon*, the tenant rented upper floors of a warehouse. The fire that provoked the lawsuit gutted the building, but apparently left the structure, including means of access to the upper floors, intact; as the court noted, "the space enclosed by the four walls [of the tenant's rooms], still continued as marked out by them." 5 Bing. (N.C.) at 507, 132 Eng. Rep. at 1195. The tenant in *Izon* thus still had his particular space available after the fire, just as in the usual *Baker* situation the tenant still has his or her land available after destruction of buildings. *Izon*, in short, is not really a destruction case, and thus is not authority for the English rejection of the American "exception". The *Izon* court could have conceded the "exception" and still ruled against the tenant, since there had been no effective destruction of the tenant's rooms. *Izon* is rather more akin to cases of supervening illegality, in which the thing leased continues to exist, but subsequent events impair its beneficial use to the tenant. As to those kinds of lease cases, the English courts apparently have consistently refused to apply frustration-of-purpose doctrine. See *infra* notes 232 and accompanying text.

191. See 6 A. CORBIN, *supra* note 14, § 1356, at 470 (courts in American "exception" cases treat the transaction "as a contract for use and occupation rather than a conveyance").

bargain.¹⁹² Nevertheless, the court refused to excuse the tenant, ascribing to him a purpose to use the soil, not the buildings.¹⁹³

Tying the present discussion to our earlier discussion of independency, we suggest that there is a direct parallel between, on the one hand, the common law destruction rule and the doctrine of independency of lease covenants revealed in *Stewart v. Childs Co.*,¹⁹⁴ and on the other hand the American "exception" to the destruction rule and *University Club v. Deakin*.¹⁹⁵ In both the destruction and independency contexts, conveyance reasoning—which defines the tenant's bargain as a contract for a possessory interest in land—operates to suppress transactional facts that do not fit that model.¹⁹⁶ However, in the American "exception" for

192. See *supra* notes 152-61 and accompanying text.

193. See *id.* See also *Mayer v. Morehead*, 106 Ga. 434, 436, 32 S.E. 349, 350 (1899) (tenant of gin mill not excused upon destruction of gin house on premises, even though "[a]ccording to the evidence offered by the [tenant], the gin house constituted a very substantial part of the rented premises, and was of much benefit to [them]"); *Bussman v. Ganster*, 72 Pa. 285, 291 (1872) (tenant who contracted for use of building as storeroom held liable for rent after destruction; the dissent argued that "the true purpose of the contract" was occupancy of the building, not the land).

It should not be assumed, and we do not contend, that frustration analysis always will relieve a tenant from the obligation to pay rent upon destruction of the leased premises. If in a particular transaction it appears that the land is in fact the essence of the bargain, the tenant should not be excused upon destruction of buildings on the premises. Cases exist in which the courts have, quite properly, refused to excuse the tenant in such circumstances. See, e.g., *Bradley v. McCabe*, 438 P.2d 468 (Okla. 1967). The point is that in deciding whether to excuse the tenant, the court should employ usual contractual processes of determining intent. These processes include looking to the particular transaction for clues about the actual or presumed intent of the parties respecting the destruction situation (for instance, the presence of insurance on the premises, payable to the landlord), or assessing the transaction in the light of general policies concerning the parties' relative ability to bear the loss, the impact of destruction doctrine on leasing practices, and the like. In short, the court should determine whether there is a particular transactional or a general social basis for inferring or constructing a condition to relieve the tenant and decide accordingly. It should not determine, abstractly, that the tenant remains bound because the landlord has "sold" the premises to him, or because the tenant has contracted for use of the land rather than buildings on the land.

194. For a discussion of *Stewart*, see *supra* notes 30-36 and accompanying text. See also *O'Byrne v. Henley*, 161 Ala. 620, 50 So. 83 (1909) (comparing illegality and destruction rules to constructive eviction).

195. For a discussion of *Deakin*, see *supra* notes 23-29 and accompanying text.

196. See *supra* note 193 and accompanying text. Again, of course, our statement in the text about the debilitating effects of conveyance reasoning refers to conveyance reasoning as it is generally understood and employed by the courts. See *supra* note 12. There is no inherent reason why the concept of "possession" could not be employed to protect the expectations of the tenant, as revealed by the facts and circumstances of the particular transaction before the court. Indeed, the minority cases on destruction, see *supra* note 177, and the American

multi-unit premises and in *Deakin*, the courts reject the constricting effects of conveyance reasoning. Instead they inquire into the bargain actually struck by the parties as revealed by the facts and circumstances of the individual case,¹⁹⁷ and they excuse the tenant through the device of a constructive condition when that bargain is not forthcoming.

However, one should not be led to overestimate the importance of the American multiple-unit destruction cases. For one thing, the severe hardship that the destruction rule visits on the tenant provides a strong equitable impetus to find an "exception" to mitigate the hardship. For another, whatever their numerical ratio to all destruction cases, the multiple-occupancy destruction cases are probably far less numerous than cases in which landlords breach specific lease covenants. Thus, while an essentially contractual approach flourishes in these "exceptional" destruction cases, it probably occupies a relatively small domain in landlord-tenant law.

B. *Revisionists and Traditionalists*

We suggest that the conclusion reached in our consideration of the independency doctrine holds for the destruction cases as well. There are inescapable similarities between property and contract reasoning because, on inspection, "property" reasoning turns out to be essentially some form of contract reasoning. Yet, important differences remain because the contract ideas underlying conveyance reasoning are limited (as in the sales analogy), or at least are put to limited use (as in *Baker's* "subject matter" approach).

Revisionists have argued, however, that the destruction cases, like the independency decisions, reveal no important differ-

"exception" for multiple-occupancy lease transactions, see *supra* notes 178-91 and accompanying text, appear to employ just such a transactionally oriented concept of possession. For a further discussion of the use of property concepts to achieve reform, see *infra* Part IV-B.

197. See *supra* notes 188-91 and accompanying text. The minority common law cases, see *supra* note 177, also employ a transactional method of determining whether the tenant's purpose in entering the lease has been frustrated by destruction of buildings on the leased premises. See, e.g., *Albert M. Greenfield & Co. v. Kole*, 475 Pa. 351, 356, 380 A.2d 758, 760 (1976) ("It is no longer reasonable to assume that in the absence of a lease provision to the contrary the lessee should bear the risk of loss in the event of the total destruction of the building. Where the parties do not expressly provide for such a catastrophe, the court should analyze the facts and the lease agreement as any other contract would be analyzed."). For a further discussion of the impact of conveyance reasoning on the frustration argument, see *infra* notes 220 & 232.

ences between property and contract analyses. The most vigorous statement of the revisionist position again has been made by Professor Siegel. Far from seeing significant differences between property and contract analyses in the destruction cases, Professor Siegel highlights the destruction cases as an “exemplar”¹⁹⁸ of his thesis that lease law is “grounded in contract doctrine” and indeed has a “dominant contract basis.”¹⁹⁹ Specifically, he asserts that “the decisions establishing the rule [of continued rent liability upon destruction of the premises] . . . are not grounded in real property law. They are contract decisions,”²⁰⁰ inasmuch as they are based on a “three hundred year old view of a lease as a contract”²⁰¹ of sale of the premises for the term. “The sale of goods is the paradigm, the core analogy, of modern landlord-tenant law,”²⁰² and the analogy anchors the destruction cases solidly in contract: “The primary economic function of contract, in the premodern era, was to transfer title to personal property. Contract meant sale of goods.”²⁰³ Thus, “[i]t is obvious that modern commercial contract analysis,” and not real property analysis, “is the basis of the rule of a tenant’s continued rent liability after destruction [of the leased premises] by fire.”²⁰⁴

There is certainly no ambiguity here. On the basis of a review of “all cases,”²⁰⁵ Professor Siegel denies that there is any difference between property and contract reasoning because, he argues, the destruction cases are in fact expressions of contract reasoning. What is one to make of his thesis? First, and least important, we think it is necessary to point out that “all cases” do not support his claim that the sale of goods analogy is *the* articulated *ratio decidendi* of the destruction case. As we discussed above, there are cases that rely on express condition reasoning,²⁰⁶ others that employ “subject matter” reasoning,²⁰⁷ and still others that merge some²⁰⁸ or all²⁰⁹ of the three explanations.

198. Siegel, *supra* note 6, at 651.

199. *Id.* at 650.

200. *Id.* at 655.

201. *Id.* at 652.

202. *Id.* at 658.

203. *Id.* at 657 (footnote omitted).

204. *Id.* at 658.

205. *Id.* at 652.

206. *See, e.g.*, *Buerger v. Boyd*, 25 Ark. 441, 443 (1869).

207. *See, e.g.*, *Baker v. Holpzaffell*, 4 Taunt. 45, 13 Rev. Rep. 556 (1811).

208. *See, e.g.*, *Gibson v. Perry*, 29 Mo. 245 (1860) (express condition and sale of goods rationales merged).

209. *See, e.g.*, *White v. Molyneaux*, 2 Ga. 124 (1847).

However, since the express condition and “subject matter” explanations as well as the sales analogy can be understood in contract terms,²¹⁰ this objection simply questions the selectivity of Professor Siegel’s focus. It does not repudiate, indeed it broadens and strengthens, his basic point of a connection between property and contract analyses.

However, a second, and more basic, objection takes issue with Professor Siegel’s complete assimilation of property and contract reasoning. Professor Siegel rather triumphantly identifies the reasoning in the destruction cases as contractual, only to invest “contract” with the meaning ordinarily ascribed to “conveyance,” that is, transfer of title.²¹¹ When the destruction rule is based on *that* narrow contract analogy, differences between property and contract reasoning of course disappear; contract law, even today, puts the risk of loss on the purchaser of delivered goods.²¹² Nor should this identity of result be surprising. A sale of goods can be regarded as a “conveyance,” just as a conveyance of a lease interest can be regarded as a “sale.”

Professor Siegel’s complete assimilation of contract and property reasoning on that basis betrays both a logical and an historical error. His logical error may be exposed by the following syllogism, which underlies his argument: Contract, over much of its history, has performed a sale of goods (i.e., transfer of title) function; the destruction cases identify a lease as a sale of the premises for a term; therefore, the destruction cases have a “dominant contract basis” and in fact exemplify the “unity of modern leasing and contract law.” In making that claim, however, Professor Siegel has confused a part with the whole. It is true that there is an analogy between sale of goods and conveyance reasoning; but it cannot follow that the analogy totally or even substantially equates contract and property doctrine unless we supply the intermediate premise that contract doctrine itself is essentially exhausted by the sale of goods (i.e., transfer of title) analogy. Although that intermediate premise is on its face difficult to accept, Professor Siegel seems to assert it. His “confirmation” that the tenant’s continued rent liability is grounded in contract law is

210. See *supra* notes 173-76 and accompanying text.

211. See Humbach, *supra* note 12, at 1215 n.11 (“Professor Siegel implicitly recognizes that leases are conveyances by analogizing leases to contracts for the sale of goods Such analogies, however, miss the point of the argument that leases should be treated as contracts: the point is that leases should be treated as contracts instead of as conveyances, not as contracts of conveyance.”).

212. See U.C.C. § 2-509(3).

“the fact that such liability is in harmony with applicable contract principles in each era of contract doctrine.”²¹³ The tenant’s continued rent liability after destruction of the premises is not “in harmony with applicable contract doctrine,” however, except on the assumption that the only “applicable” contract doctrine is the sale of goods analogy. But that, of course, is to assume that which Professor Siegel should be busy trying to establish.

We believe that Professor Siegel’s logical error springs from an error in his “historical” analysis. His historical approach proceeds by identifying some early cases on destruction, isolating the transfer of title reasoning in those cases, and comparing the result with extant sale of goods principles.²¹⁴ From this perspective, his historical analysis validates his “unity” thesis, since the liability of a purchaser after delivery of goods has been constant in sales law. But a preferable historical approach would have dug more deeply and widely into the lease cases. Moreover, it would have gone beyond the lease cases. By doing either, Professor Siegel could have elaborated two contract arguments in favor of the tenant’s *relief* from rent liability. He then could have seen that there is a difference between those contract principles and the limited contract (sale of goods) principle he has identified, and thus a difference between property and contract reasoning.²¹⁵

213. Siegel, *supra* note 6, at 656.

214. *Id.* at 657-59.

215. In his discussion of the destruction cases, Professor Siegel in fact maintains two theses. He argues not only that the common law destruction rule is thoroughly contractual, but also that the American “exception” for multiple-occupancy premises is noncontractual, and is based instead on property reasoning. *See id.* at 658-62. While we have devoted our textual discussion to the first of these theses, we have difficulty with the second as well.

In *Graves v. Berdan*, 26 N.Y. 498 (1863), the leading case presenting the question of the tenant’s continued rent liability after destruction of multiple-occupancy premises, the court affirmed a lower court judgment that the tenant’s rent liability did not survive destruction of the building. The dissenters, as Professor Siegel notes, “spoke contract”:

In a case where a lessee binds himself, by express covenant, to pay the rent during the term, and there is no exception in the lease of casualties by fire notwithstanding the house should be burnt down by accident, he is bound to pay, for the simple reason that he has bound himself by an express covenant to do so.

26 N.Y. at 504 (Wright, J., dissenting). Against this contractual reasoning, the majority, according to Professor Siegel, offered the following “absurd” and “anachronistic,” Siegel, *supra* note 6 at 662, conveyance reasoning:

A distinction is taken between an overflow of the land by the sea, and fresh water, because, though the land be covered with fresh water, the right of taking the fish is vested exclusively in the lessee, and in that case the rent will not be apportioned. In the latter case the tenant has a beneficial enjoyment, to some extent, of the demised premises, but in the former he has none, and if the use be entirely destroyed and lost, it

One way to avoid the common law rule concerning destruction is to start with the sales analogy that figures so prominently in the cases discussed by Professor Siegel, and then to modify it. While risk of loss even on today's contract principles is clearly on the purchaser after delivery of the goods, that principle defeats the tenant only on the assumption that delivery is complete at the beginning of the lease. In other words, the tenant loses only if

is reasonable that the rent should be abated, because the title to the rent is founded on the presumption that the tenant can enjoy the demised premises during the term The effect of the destruction of the building, in such a case, is analogous to the effect of the destruction of demised premises by the encroachment of the sea

26 N.Y. at 500. While the aquatic analogy is quaint, we do not agree that it is "absurd" and "anachronistic." The quoted language, on balance, can be understood as a straightforward example of frustration of purpose analysis. The tenant owes rent if after the supervening event he or she continues to have "a beneficial enjoyment . . . of the demised premises," and does not if he or she has no such enjoyment. In the case of salt water overflow, the loss of enjoyment is total, whereas in case of fresh water overflow it is only partial, and hence not legally cognizable. See *supra* note 166 and accompanying text (frustration must be total or nearly total). Thus, both the dissent and the majority in *Graves* "speak contract." They differ only in that the dissent speaks the old express condition language of *Paradine v. Jane*, discussed *supra* at notes 142-45 and accompanying text, while the majority in essence speaks the more modern constructive condition language of frustration of purpose doctrine, discussed *supra* at notes 152-61 and accompanying text.

Professor Siegel's search for a pure property approach to the multiple-occupancy cases is productive only with respect to one set of cases. When the landlord sued a recalcitrant tenant for possession of multiple-occupancy premises after destruction of the building rather than, as in *Graves*, for rent, the courts had to abandon contract theory. This is because on sale of goods principles the tenant would continue to own, and thus be entitled to possess, whatever remained of the leasehold premises. On frustration of purpose principles, it would be anomalous to allow the landlord to assert the tenant's frustrated purpose as the basis for terminating the contract when the tenant himself is not doing so. Consequently, the decisions granting the landlord the right to repossess the premises after destruction do indeed talk property rather than contract. See, e.g., *Winton v. Cornish*, 5 Ohio 477, 478 (1832) (lease of rooms in a building analogized to grant of an easement or license to take minerals from the soil; "[b]y such grants, the land does not pass"). While the later American "exception" cases involving the landlord's claim for rent seized the underlying factual insight of cases like *Winton*—that land is not the tenant's main interest under the lease in multiple-occupancy leasing transactions—they generally stated that insight in vocabulary which is understandable in frustration of purpose terms, see *supra* notes 178-97 and accompanying text, rather than the *Winton* language of grants and reservations. Thus it seems incorrect to claim that *Winton* "founded a collateral line of precedent which was used in the multiple-occupancy liability for rent cases that followed," Siegel, *supra* at 659-60, if by that claim one means to say, as Professor Siegel apparently does, see *id.* at 662, that cases like *Graves* adopted both the factual insight and the doctrine apparatus of *Winton*. In any event, since the liability-for-rent destruction cases, and not the ejection destruction cases, are the central focus in any discussion of the property-contract theme, as Professor Siegel recognizes, see *id.* at 659, the fact that *Winton* expresses pure property reasoning is somewhat beside the point.

one assumes that the appropriate sales analogy is the single-transaction, rather than the installment, sale of goods. The vast majority of the landlord-tenant cases proceeding on the sales analogy accept the "single-shot" delivery model as the appropriate one.²¹⁶ But a few cases disagree. Occasionally courts have said that a lease is "a running rather than a completed contract," "an agreement for a continuous interchange of values between landlord and tenant, rather than a purchase single and completed of a term or estate in lands."²¹⁷ Under this installment sale analogy, the tenant would not bear the risk of loss, and hence would not be obligated for outstanding installments of the purchase price, as to undelivered future segments of possession.²¹⁸ The installment sale analogy is, of course, contractual, so that courts adopting it are invoking contract reasoning. The important point, however, is that the existence of the alternative installment sales analogy shows that there remains a tension between the general run of destruction cases, which do not employ that particular analogy, and at least some forms of contract reasoning.

A second argument for relieving the tenant from liability eschews the entire sale of goods analogy in favor of an explicit frustration approach. This approach focuses on the purpose of the lease, and asks whether enough of the purpose remains after destruction of the premises to justify continuing the tenant's obligation to pay rent. Under this view, the lease is not essentially the sale of a thing, that is, a transfer of absolute dominion over an object, which becomes complete for purposes of ownership and risk of loss upon delivery.²¹⁹ Rather, the lease is viewed as a contract for certain uses of the leased space,²²⁰ uses that can be es-

216. See, e.g., *Fowler v. Bott*, 6 Mass. 64 (1809); *Gibson v. Perry*, 29 Mo. 245 (1860).

217. *Whitaker v. Hawley*, 25 Kan. 674, 687 (1881); accord, *Wattles v. South Omaha Ice & Coal Co.*, 50 Neb. 251, 267, 69 N.W. 785, 790 (1897).

218. See U.C.C. § 2-509(3) (1977).

219. See Note, *Disengaging Sales Law from the Sale Construct: A Proposal to Extend the Scope of Article 2 of the UCC*, 96 HARV. L. REV. 470, 470 (1982) (under the sale of goods paradigm, "transfer of ownership in a physical thing is complete and is the sole concern of the parties to the contract").

220. Under the sale analogy, the tenant-purchaser is deemed to have only one important purpose in entering the transaction: receipt of the thing sold. See 6 A. CORBIN, *supra* note 14, § 1356, at 472. With that analogy, the only way to protect the tenant in cases of destruction is to argue that the tenant has not yet received the thing; that is, that the sale is in installments, and that the tenant is not responsible for the price of future installments that cannot be delivered because of destruction. See *supra* notes 216-18 and accompanying text. By contrast, when the lease is viewed as a contract for the use of the leased space, it becomes possible to argue that the tenant has both "immediate" and "indirect

established by extrinsic evidence if they are not specified in the lease.²²¹ When the tenant's purpose in entering the contract no longer can be fulfilled, either because the uses for which the premises were let are no longer lawful or practicable (as in the illegality cases) or because the buildings in which the uses were to occur are no longer in existence (as in the destruction cases) the tenant can be excused.

This frustration approach appears in lease cases, as well as in general contract cases. The "subject matter" destruction cases and the illegality cases in essence announce this frustration doc-

or ultimate" purposes. See 6 A. CORBIN, *supra* note 14, § 1353, at 457. Professor Corbin has captured this dual purpose idea in the following succinct statement:

[A] lessee promises to pay rent in order to induce the lessor to convey a limited estate in the land—the leasehold interest. He desires to be owner of this leasehold . . . in order to enjoy the physical use and occupation and to realize the profits therefrom by operating it as a farm, a dwelling place, a movie theater, or a liquor saloon. The conveyance is made; and the lessee is in possession and owner of the leasehold interest. He has attained his immediate object. Yet he may be wholly ousted from possession by an invading army; the dwelling house may be burned down; a city ordinance may forbid the use of inflammable films; the legislature may prohibit the sale of liquor. In these cases, the ultimate purpose of the lessee is frustrated. It is what he now regards as his chief purpose; without it, he would not have promised to pay rent or, at least, so much rent.

Id. This dual purpose conception appears to undergird both the American "exception" cases to the destruction rule, see *supra* notes 177-96 and accompanying text, and the minority common law cases, which hold that the tenant is excused upon destruction of buildings on the leased premises, see *supra* note 177 and accompanying text. For a further discussion of the basis of the American "exception" and the minority common law view, see *infra* note 232.

The sale of goods analogy historically has harmed the tenant in the destruction context. See *supra* notes 146-48 and accompanying text (tenant as purchaser bears risk of loss of destroyed premises). It has also harmed the tenant historically in the warranty of habitability context, although whether it should have is debatable. See *Franklin v. Brown*, 118 N.Y. 110, 115-16, 23 N.E. 126, 127 (1880) (no warranty of habitability in lease because "[t]he maxim *caveat emptor* applied to the transfer of all property, real, personal, and mixed, and the purchaser generally takes the risk of its quality and condition unless he protects himself by an express agreement on the subject") (citation omitted). *But see, e.g.,* L. VOLD, HANDBOOK OF THE LAW OF SALES § 89, 435-37 (2d ed. 1959) (citing cases preceding and roughly contemporaneous with *Franklin v. Brown* that recognize warranty of merchantability in sale of goods). In any event, the sale of goods analogy only recently has been used to the tenant's advantage. See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970) (warranty of habitability implied in residential leaseings on analogy to warranty of merchantability in sales law). Perhaps in the future it might be used to even better advantage. See Chase, *supra* note 11, at 221-25 (use of U.C.C. § 2-717 as model for fair withholding procedure in habitability cases). We do not at this writing attempt to choose between the sale of goods analogy and the contract-for-use-and-occupation approaches to conceptualizing the lease transaction, nor even to suggest that a choice is necessary.

221. See *supra* notes 188-97 and accompanying text.

trine. The problem is that, under the influence of property reasoning, they define the tenant's purpose in entering the lease so narrowly that the principle rarely gets applied in favor of the tenant.²²² There are a few destruction cases, however, that reject the common law rule even when the land remains to support the rent obligation.²²³ Furthermore, the American "exception" to the destruction rule applies what is essentially frustration doctrine unimpeded by its conveyance underpinnings.²²⁴

Moreover, once the destruction cases are conceived in frustration of purpose terms, general contract decisions involving occupancy transactions other than leases become relevant. In the landmark case of *Krell v. Henry*,²²⁵ the owner brought suit on the defendant's formally unconditional promise to pay for the use of rooms. The defendant, who had taken the rooms to view the royal coronation, successfully asserted the frustration defense, based on the cancellation of the coronation after the agreement had been struck. The court took great pains to classify the transaction as "a license to use rooms for a particular purpose,"²²⁶ rather than as a lease of the rooms. A license, of course, is an agreement to use the premises for a particular purpose,²²⁷ as opposed to an agreement looking solely to the transfer of possession. The vital difference is that the licensee analysis focuses on the purpose for which the premises are hired,²²⁸ whereas in the lease analysis the mere acquisition of the premises is deemed central to the bargain. By classifying the occupancy agreement as a license, the *Krell* court opened up the possibility of viewing the transaction according to a standard contract approach that accounts for the unexpressed expectations of the parties, as gleaned

222. See *supra* notes 152-72 and accompanying text.

223. See *supra* note 177 and accompanying text.

224. See *supra* notes 178-97 and accompanying text.

225. 2 K.B. 740 (1903).

226. *Id.* at 750.

227. An easement, which is like a license except on the question of revocability, is "an interest in land in the possession of another" which "entitles the owner of such interest to a limited use or enjoyment of the land in which the interest exists." RESTATEMENT OF PROPERTY § 450(a) (1936). Thus, the determination that the transaction does create a right of "limited use or enjoyment" is an essential element in classifying the transaction as an easement or license. Transactions which fail to clearly specify a limited use invite litigation over whether a limited interest or some more substantial interest was intended. See, e.g., *Minneapolis Athletic Club v. Cohler*, 287 Minn. 254, 177 N.W.2d 786 (1970); *Northwest Realty Co. v. Jacobs*, 141 N.W.2d 141 (S.D. 1978).

228. See *supra* notes 146-51 & 227 and accompanying text.

from the circumstances of the transaction.²²⁹ Thus, the court excused the defendant from the obligation to pay for the rooms because, even though the contract was silent on the point, the circumstances indicated that the occurrence of the coronation “was regarded by both contracting parties as the foundation of the contract.”²³⁰ Had the *Krell* court been burdened with the conveyance reasoning entailed in a lease classification, its result would have been much more difficult to reach. *Krell* is a case involving not the destruction of the premises, but rather the thwarting of the purpose for which the premises were taken; its analogue in standard lease cases is the situation in which the purpose for which the lease is made subsequently becomes illegal. As we noted in discussing those cases, conveyance reasoning can present a double barrier to resolution in favor of the tenant. In its sale of goods guise, conveyance reasoning might insist that the risk of cancellation of the coronation be on the purchaser.²³¹ In its “subject matter” variation, conveyance reasoning would presume that the tenant’s purpose in entering the transaction was satisfied merely by having the use of the premises unless the lease expressly provided—as it did not in *Krell*—that use for the specific purpose of viewing the coronation was central.²³²

229. See 3A A. CORBIN, *supra* note 14, § 686, at 243 (“A contract between a lodger and his landlord for the mere hiring of a room is quite different from a formal lease creating in the tenant an estate in the land. Lodging contracts are not conveyances, and the usual contract rules with respect to conditions will be applied.”).

230. *Krell v. Henry*, 2 K.B. 740, 750 (1903).

231. See *supra* note 164 and accompanying text.

232. See *supra* notes 166-72 and accompanying text. See also Note, *Government Orders and Regulations Affecting Tenant’s Liability for Rent—Application of Doctrine of Frustration to Leases*, 32 MINN. L. REV. 837, 838 (1948) (“English courts, not hesitating to apply the doctrine of frustration to excuse performance under contracts, have steadfastly refused to follow *Krell v. Henry* in regard to leases”) (footnote omitted).

What unifies *Krell* with the minority common law approach to destruction, see *supra* note 177 and accompanying text, and with the American “exception” cases, see *supra* notes 178-97 and accompanying text, is the conclusion that an occupant of premises hired for a particular purpose should be excused from payment when unforeseen supervening events prevent attainment of that purpose. *Krell* gets at the vital question of the purpose of the transaction through the device of classification and regards the arrangement as a license rather than a lease. This approach is also illustrated by some American cases. See, e.g., *Roberts v. Lynn Ice Co.*, 187 Mass. 402, 73 N.E. 523 (1905) (occupant of icehouses destroyed by fire is excused if he had license to use them, but bound if he leased them). However, as the minority common law cases and the American “exception” cases indicate, classification of the transaction as a lease does not necessarily prevent a court from focusing on the parties’ purposes in entering the transaction. What is necessary under the lease classification is that the court reject the inhibiting elements of conveyance reasoning. Under the view that the

Whether the installment sale or the frustration theories are implicated, the point is the same with respect to the revisionist thesis: during the nineteenth and early twentieth century heyday of the common law destruction rule, alternative conceptions of the lease transaction existed; those conceptions, like the ones underlying the common law rule itself, are contractual, but they are based on contractual ideas or approaches that open up the possibility of a result different from that of the common law rule. Here, as with the independency question, property reasoning and contract reasoning can be related but not assimilated. Important tensions exist between property and contract reasoning, or as we prefer, between different forms of contract reasoning, unscathed by the revisionist thesis.

III. THE CURRENT NEED FOR CONTRACT ANALYSIS

The dependency and destruction questions discussed above are facets of the law of constructive conditions. We asserted that conveyance reasoning can impede the free imposition of constructive conditions to effectuate the parties' expectations or to achieve a just result in disputed cases. We now move to the other constituent of implied or constructive terms—promises rather than conditions.²³³ As a starting point, we will assume that the modern residential tenant has two central concerns, the quality and continuity of possession.²³⁴ The tenant expects livable prem-

lease is a sale, the tenant's purpose is deemed to be the mere receipt of the thing sold, so that the further question of the purpose for which the tenant bought the thing becomes irrelevant. See *supra* note 220 and accompanying text. Under the view illustrated by *Baker v. Holtzaffell*, the tenant is regarded as having a purpose to use the premises in a particular way, but then conveyance reasoning deems that the tenant's post-delivery purpose is satisfied by having the land available, unless the lease contract specifically provides that use of buildings is the main inducement to the lease. See *supra* notes 152-56 and accompanying text. Both the minority common law cases and the American "exception" cases reject the approach of ascribing a purpose to the tenant, and inquire, rather, into the tenant's actual purpose. They differ only in the extent of their rejection of the common law destruction rule. The minority cases reject the rule for all leases, while the American "exception" cases reject it only in the situation of leases of a portion of a building.

233. See Patterson, *Constructive Conditions in Contracts*, 42 COLUM. L. REV. 903, 904 (1942) ("Contracts are . . . made up of promises, which give rights to promisee and impose duties on promisors, and conditions, which qualify or negate these rights and duties.") (footnotes omitted); Rosett, *supra* note 19, at 1088.

234. See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1074 (D. C. Cir. 1970) ("When American city dwellers, both rich and poor, seek 'shelter' today, they seek a well known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance.") (footnote omitted); Kludze, *The Termination of*

ises and security against abrupt termination of occupancy of the premises. In the past, the law often disappointed both of those expectations. The common law refused to imply a warranty that the premises were fit for occupancy at the outset of the lease, or a promise to repair during the tenancy.²³⁵ Furthermore, it imposed no requirement of cause for the termination of indefinite tenancies or for the refusal to renew term tenancies.²³⁶

Modern landlord-tenant law generally does imply a warranty of habitability in residential leases.²³⁷ We shall attempt to show, however, that the warranty, despite its vaunted origins in contract, has not progressed beyond a modest, minimum expectations standard. As to the expectation of "durational security,"²³⁸ landlord-tenant law lags behind at least one related contract field, franchises, which has recognized some limitations on the right to terminate.²³⁹ We shall attempt to show that the failure of contract ideas to flower, as to the warranty of habitability, or to even take root, as to good cause termination, is the result of landlord-tenant law's continued reliance on conveyance reasoning, or, at the very least, of its "estate frame of mind."²⁴⁰

A. "Habitable" Premises: The Scope of the Warranty of Habitability and the Remedy of Abatement

Until the early 1970s, landlord-tenant law generally did not recognize an implied term guaranteeing any particular level of quality in residential leases.²⁴¹ Thus, unless the landlord expressly contracted to make repairs, the burden of making repairs fell on the tenant. In the 1970s, courts, starting from the premise that leases of urban dwellings "should be interpreted and con-

Leases, 7 REV. GHANA L. 10, 10 (1975) ("Any person who takes a lease of premises must be interested in the circumstances in which the landlord can terminate his lease or secure his ejection from the premises.").

235. See 1 AMERICAN LAW OF PROPERTY, *supra* note 1, § 3.45, at 267-69.

236. See *id.*, §§ 3.23, 3.28, 3.85, 3.88, 3.90.

237. See Fusco, Collins & Birnbaum, *Damages for Breach of the Implied Warranty of Habitability in Illinois—A Realistic Approach*, 55 CHI.[-]KENT L. REV. 337, 344 (1979) (thirty-eight states and District of Columbia have adopted implied warranty of habitability).

238. See R. SCHOSHINSKI, *supra* note 1, § 2.16, at 60.

239. For a discussion of franchise cases, see *infra* Part III-B.

240. Weinberg, *supra* note 6, at 31 n.9.

241. See *supra* note 235 and accompanying text. Various exceptions to the common law rule existed, the chief one being that the landlord was held to have impliedly warranted the fitness of furnished premises leased for a temporary purpose. See 1 AMERICAN LAW OF PROPERTY, *supra* note 1, § 3.45, at 267-69.

strued like any other contract,"²⁴² began to recognize an implied warranty of habitability in residential leases.²⁴³ To effectuate this newly created right, the courts afforded the tenant what was at the

242. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1075 (D.C. Cir.) (footnote omitted), *cert. denied*, 400 U.S. 925 (1970). *See also* *Sommer v. Kridel*, 74 N.J. 446, 454, 378 A.2d 767, 771 (1977) ("distinction between a lease for ordinary residential purposes and an ordinary contract can no longer be considered viable").

243. *See supra* note 237 and accompanying text. Courts frequently base the existence or creation of the implied warranty upon the expectations of the parties as revealed by the lease contract. *See, e.g., Javins*, 428 F.2d at 1079 (because lease specified a certain period of occupancy of premises as shelter, tenant can reasonably expect habitable premises during that period); *Marini v. Ireland*, 56 N.J. 130, 144, 265 A.2d 526, 533-34 (1970) (lease for "apartment" to be used as "dwelling" implies fitness for that purpose). Unquestionably, however, the courts also rely on considerations of public policy as a basis for constructing the warranty. *See, e.g., Javins*, 428 F.2d at 1076-77 (public policy reflected in housing code requires recognition of warranty of habitability); *Marini*, 56 N.J. at 144, 265 A.2d at 534 (warranty was based on considerations of fairness and justice). In addition, courts occasionally find an express term as a basis for the warranty of habitability. *See, e.g., Berzito v. Gambino*, 63 N.J. 460, 469, 308 A.2d 17, 21 (1973) (landlord's promise that he would make premises "livable" and would repair them treated as express warranty of habitability); *Marini*, 56 N.J. at 144, 265 A.2d at 533-34 (description of premises as "apartment" and specification of use such as "dwelling" could constitute express warranty of habitability).

The distinction between implied in fact, implied in law, and express warranties might be important on two questions. First, the ability to disclaim the warranty could vary depending on the basis of its creation: express warranties, *see* U.C.C. § 2-316(1) (1977), and warranties implied in law, *see Javins*, 428 F.2d at 1081-82, would not be subject to disclaimability, while implied in fact warranties, which are based on the parties' intentions, could be negated by a clear statement of intention. *See* U.C.C. § 2-316(2), (3) (1977). It should be noted, however, that *Javins*, which employs both an implied in fact and an implied in law basis for creation of the warranty, rejects the possibility that the implied in fact warranty can be disclaimed. *See* 428 F.2d at 1080 n.49. Such a notion of non-disclaimability can be explained in terms of unconscionability; the landlord's attempt to disclaim the warranty of habitability, like the seller's attempt to disclaim liability for personal injuries resulting from defective consumer goods, is unconscionable. *See* U.C.C. § 2-302 (1977) (basic unconscionability provision); *id.* § 2-719(3) ("[l]imitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable").

Second, the content of the warranty, which is the question that we address at length in this article, could depend on the manner of its creation. *See infra* notes 249-332 and accompanying text. A court that bases the warranty solely on public policy might incline toward a minimum definition of the warranty, while a court that bases the warranty on an express or implied agreement of the parties might use the language and facts and circumstances of the transaction to define a broader warranty. *Compare* *Winchester Management Corp. v. Staten*, 361 A.2d 187 (D.C. 1976) (expressly promised air conditioning excluded from scope of warranty of habitability narrowly defined) *with* *Park Hill Terrace Assocs. v. Glennon*, 146 N.J. Super. 271, 369 A.2d 938 (App. Div. 1977) (expressly promised air conditioning included in broader warranty of habitability). However, this distinction is again at best suggestive. A generally phrased express warranty, such as that the premises will be "livable" or "habitable," leaves room for a narrow as well as a broad interpretation of what is intended or included. A public policy basis for the warranty could accommodate a definition that incorporates the rea-

time a rather remarkable remedy: The tenant was allowed to remain in possession of the defective premises and withhold rent.²⁴⁴ The significance of this remedial development becomes apparent when it is realized that previously the tenant had no such rent abatement right even if the landlord had breached an express lease term concerning the condition of the premises.²⁴⁵

With the advent of this contractual approach to the lease and its concomitant abatement remedy, landlord-tenant law stood at an important crossroads, with at least three potential paths of development. First, on the basis of the proposition that leases should be treated "like any other contract," the courts could have used a normal, transaction-oriented contractual method of ascertaining the material terms of the lease contract, and extended the abatement remedy to all material breaches of those terms. Second, the courts could have employed the same contractual method for determining material terms, but limited the availability of the abatement remedy to material breaches of terms affecting the livability of the premises. Thus, breach of the warranty of habitability alone would trigger the abatement remedy, but the scope of the warranty could be defined broadly in accordance with transactional circumstances and expectations. Third, and this is the most restrictive path, the courts could have defined the warranty of habitability in terms of minimal qualities essential to the bare livability of the premises, and limited the abatement remedy to breaches of such minimal guarantees.

Under each approach, some breaches by the landlord would

sonable expectations of the parties to the transaction if protection of such expectations were deemed an important goal of public policy.

244. See, e.g., *Javins*, 428 F.2d at 1082-83; *Cunningham*, *supra* note 20, at 113-26.

245. See, e.g., *Arnold v. Krigbaum*, 169 Cal. 143, 146 P. 423 (1915) (landlord's breach of express covenant to repair is not defense to landlord's suit for possession based on tenant's nonpayment of rent). Prior to the adoption of the abatement remedy, however, the tenant, in at least some situations, had a remedy functionally equivalent to it. If the tenant withheld rent in response to his landlord's breach of a covenant to repair and the landlord sued for rent rather than for possession, the tenant could counterclaim for damages and the court would "net out" the two claims, resulting in a form of abatement remedy. See *Chase*, *supra* note 11, at 211-13; *Humbach*, *supra* note 12, at 1282. The problem, of course, is that if the landlord instead decided to sue for possession, the courts consistently held, as *Krigbaum* indicates, that the landlord's failure to perform could not be raised by the tenant as a bar to the landlord's recovery. Although the topic of summary dispossess actions is outside the scope of this article, we should note that we remain unconvinced that the doctrine of independency of covenants was responsible for the tenant's pre-1970s position in such actions, or that the doctrine of dependency solves the problems that do exist. See *Chase*, *supra* note 11, at 213-25.

leave the tenant with a damages remedy only, rather than a right to abate rent. Under the "any material breach" approach, the tenant would not have a right to abate rent for breaches of immaterial terms in the lease. Under the broad warranty of habitability approach, the tenant could abate for breaches of terms relating to the "habitability" of the premises, but not for breaches of lease terms that do not affect habitability, even though those terms were regarded by the parties as inducements to consummating the lease transaction. Finally, under the narrow warranty of habitability approach, the tenant could not abate for the landlord's breach of terms that, although relating to habitability generally, fall outside of the narrow definition used to trigger the abatement remedy; *a fortiori*, then, the tenant could not abate rent for breach of terms that do not speak to the livability of the premises, even though those terms were regarded by the parties as inducements to entry into the lease transaction.

Since it is perhaps difficult to argue that the tenant should have the right to abate rent for breach of an immaterial term, the limitation of materiality under the first approach to the abatement remedy is not particularly severe. Likewise, at first blush at least, the consequence of adopting either the second (broad warranty of habitability) or the third (narrow warranty of habitability) approach does not appear to be harsh. In theory, under either of the latter two approaches, the tenant does not lose a damages cause of action for breach of terms excluded from the abatement remedy. Instead, the tenant simply loses the right to abate. As a practical matter, however, breaches not covered by the abatement remedy are likely to go unredressed. Excluding the breach from the abatement remedy means that the tenant must pursue a separate suit while continuing to pay rent to avoid dispossession. That approach puts the burden of recovery in the first instance on the tenant. Yet even when the tenant is prepared to go forward with a separate suit, the amount potentially recoverable in many instances may not justify the time and expense of the suit. Thus, in most instances, the only meaningful rights that are afforded the tenant are those protected by the abatement remedy.²⁴⁶

246. See Donahue, *Change in the American Law of Landlord and Tenant*, 37 MOD. L. REV. 242, 245 (1974). Professor Donahue notes:

It does the tenant no good to be told that he has a substantive right to habitable premises if the only way he can enforce that right is by costly proceedings in a higher court. The ideal remedy from the tenant's point of view, granted the substantive right, is a self-help remedy

Id. Indeed, the tenant might face a serious dilemma as to claims excluded from the abatement remedy. If the tenant proceeds by an ordinary action in a court of

The most heavily travelled path in determining the tenant's right to an abatement has been the third path, the restricted warranty of habitability. While many jurisdictions have adopted the warranty, we shall focus on cases in only two, the District of Columbia and New Jersey. The District is considered in our analysis because of the force and breadth of the landmark decision in *Javins v. First National Realty Corp.*,²⁴⁷ while in New Jersey a succession of cases provides an interesting study of the incremental process of doctrinal development.²⁴⁸ Beyond that, cases in both jurisdictions have reached strikingly similar conclusions about the current limits of the warranty of habitability, conclusions which are explicable in terms of, if not mandated by, the differences between property and contract reasoning in landlord-tenant cases.

1. *The District of Columbia: From Javins to Winchester*

In *Javins*, the United States Court of Appeals for the District of Columbia Circuit held that a warranty of habitability is implied in leases of urban dwelling units and that breach of the implied warranty gives the tenant the option of withholding rent pending judicial determination of the amount of abatement.²⁴⁹ Noting that this holding "reflects a belief that leases of urban dwelling units should be interpreted and construed like any other contract,"²⁵⁰ *Javins* developed two contractually oriented methods for defining the content of the warranty. First, the court asserted that "the common law itself must recognize the landlord's obligation to keep his premises in a habitable condition."²⁵¹ Rejecting the traditional assumption of conveyance reasoning that land is the essence of the lease contract, the court noted that in modern urban housing transactions, tenants "are interested, not in the land,

general jurisdiction, he or she faces the expense and delay noted by Professor Donahue. The only alternative that the tenant might realistically pursue without an attorney is an action in small claims court, but jurisdictional limitations might be a bar in some states. See, e.g., N.J. STAT. ANN. § 2A:6-43 (West Supp. 1983-1984) (only landlord-tenant dispute recognizable in small claims court is one involving a security deposit).

247. 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970). See C. BERGER, *LAND OWNERSHIP AND USE* 301 (3d ed. 1983) ("one of the most influential decisions in modern property law"). For a further discussion of *Javins*, see *infra* notes 249-68 and accompanying text.

248. See *infra* notes 270-333 and accompanying text.

249. 428 F.2d at 1072-73, 1082.

250. *Id.* at 1075.

251. *Id.* at 1077.

but solely in 'a house suitable for occupation.'"²⁵² The court found an appropriate analogy in recent consumer protection cases. The tenant, as a purchaser of a "package of goods and services,"²⁵³ has neither the knowledge, capacity, nor opportunity to make adequate inspection of the product. Like the purchaser of an automobile, the tenant must rely on the skill and good faith of the seller-landlord.²⁵⁴ In addition to this consideration concerning tenants generally, the court noted a particular aspect of the *Javins* transaction which supported the expectation of habitability:

[I]n the present cases there is no allegation that appellants' apartments were in poor condition or in violation of the housing code at the commencement of the leases. Since the lessees continue to pay the same rent, they were entitled to expect that the landlord would continue to keep the premises in their beginning condition during the lease term.²⁵⁵

Finally, the court cited the inequality of bargaining power between landlords and tenants in times of housing shortages as an explanation for the absence of an express term in the contract mandating habitable housing.²⁵⁶ In sum, the court employed a standard contract method in defining the implied warranty of habitability. It made the expectations of the contracting parties the touchstone of its inquiry; it refused to limit protectible expectations to those put into express language in the contract; and it looked to the general and particular circumstances of the transactions to augment the express contract.

In addition to the foregoing analysis, *Javins* developed a second, narrower methodology for defining the warranty, noting that "in any event, . . . the District's housing code requires that a warranty of habitability be implied in the leases of all housing that it covers."²⁵⁷ Relying on the "well established" principle that "the

252. *Id.* at 1078 (quoting *Ingalls v. Hobbs*, 156 Mass. 348, 350, 31 N.E. 286 (1892)).

253. *Id.* at 1074.

254. *Id.* at 1079.

255. *Id.* (footnote omitted).

256. *Id.*

257. *Id.* at 1080. *Javins* never clearly commits itself to either the broad or narrow approaches for giving content to the implied warranty of habitability. On one hand, the court twice states its specific holding in terms of the narrow warranty. See *id.* at 1072-73 ("We . . . hold that a warranty of habitability, measured by the standards set out in the Housing Regulations . . . , is implied by

law existing at the time and place of the making of the contract is deemed a part of the contract, as though expressly referred to or incorporated in it,"²⁵⁸ the court reasoned that "by signing the lease the landlord has undertaken a continuing obligation to the tenant to maintain the premises in accordance with all applicable law."²⁵⁹ Thus, the court suggested that public policy dictated that the relatively sparse requirements of the housing code be read into the lease as a minimum statement of the landlord's obligations.²⁶⁰

Both approaches of the *Javins* court are contractually oriented. The first rationale, because it is based explicitly on a search for the actual or presumed intent of the parties with respect to the level of habitability of the premises, focuses on the

operation of law into leases of urban dwelling units covered by those Regulations"); *id.* at 1082 ("We . . . hold that the Housing Regulations imply a warranty of habitability, measured by the standards which they set out, into leases of all housing that they cover."). See also *id.* at 1077 ("In the District of Columbia, the standards of [the warranty of habitability] are set out in the Housing Regulations.") Thus, there is ample textual support for the conclusion of the District of Columbia Court of Appeals in *Winchester Mgmt. Corp. v. Staten*, 361 A.2d 187, 189 (D.C. 1976), that *Javins* adopted a narrow definition of the warranty of habitability. For a discussion of *Winchester*, see *infra* notes 263-68 and accompanying text.

On the other hand, several considerations suggest that *Javins* need not, and we think should not, be regarded as holding that the housing code is the only basis for giving content to the warranty in the District of Columbia. First, in remarks prefatory to its discussion of the source and the content of the implied warranty, the court noted that "the trend toward treating leases as contracts is wise and well considered," and immediately thereafter stated that "[o]ur holding in this case reflects a belief that leases of urban dwelling units should be interpreted and construed like any other contract." 428 F.2d at 1075 (footnote omitted). The premise that leases should be treated "like any other contract" would of course *allow* reference to statutes and ordinances as a method for defining expectations under a contract, but it would not suggest a *limitation* of such expectations to statutes or ordinances. Second, the court's extensive discussion of a transactional basis for inferring and giving content to the warranty of habitability, see *supra* notes 249-56 and accompanying text, tends to negate the suggestion that the court wanted to limit the warranty to housing code violations. Finally, the tenant in *Javins* alleged extensive housing code violations, apparently as the sole basis for relief. 428 F.2d at 1073. Technically, the court's holding should have been stated in terms of housing code violations, since those were the only violations at issue in the case. It does not follow from a holding that housing code violations constitute a breach of the implied warranty of habitability that such violations constitute the *only* breach.

258. 428 F.2d at 1081 (quoting *Shiro v. W. E. Gould & Co.*, 18 Ill. 2d 538, 544, 165 N.E.2d 286, 290 (1960)).

259. *Id.* In its common law discussion, the court pointed to circumstances—the consumer nature of the transaction, and the characteristics of the leased unit at the outset of the lease—that furnished evidence of the *actual* or the *presumed* intent of the parties as to the quality of the leased premises. See *supra* notes 252-56 and accompanying text.

260. See *supra* notes 257-59 and accompanying text.

facts and circumstances of the particular case and on the nature of such transactions generally. The second rationale, in contrast, is based on considerations of fairness and public policy. It suggests a threshold below which the parties cannot go in structuring their bargain, or more appropriately, below which the landlord cannot go in dictating the conditions of the tenancy.²⁶¹ It establishes the minimum expectations to which all tenants are entitled, as opposed to the potentially greater actual or presumed expectations that might be established by examining the individual lease transaction through the eyes of an ordinary reasonable tenant.²⁶²

While many tenant complaints will be based on living conditions that violate housing codes, and thus satisfy even the narrower basis of the *Javins* decision, the court's reliance upon two distinct analytical foundations for the implied warranty portended trouble. What would be the position of a tenant who could point to a transactionally based expectation of suitable housing concerning a condition not enumerated in a housing code? *Winchester Management Corp. v. Staten*²⁶³ presented that question. Tenants whose leases expressly provided for air conditioning withheld rent during summer months when their premises were both without hot water and air conditioning. In the landlord's suit for possession, the trial court granted abatements for both defects, finding that the absence of a continuous supply of hot water violated the housing code, and that the failure of air conditioning was a material breach of an express term of the contract.²⁶⁴ On appeal, the District of Columbia Court of Appeals reversed in part, rejecting the abatement remedy for the failure of air conditioning. In a careful opinion, the court recognized that the rejected abatement claim could have been upheld on either of two theories. The court moved to forestall both. First, one could reason that even though the warranty of habitability is the sole theoretical basis for the tenant's abatement, the warranty can be defined broadly to encompass *any* condition relating to the livability of the premises. The scope of the warranty would depend on the particular bargain struck between the contracting parties as to the condition of the premises. Under this view, all relevant facts and circumstances of the transaction would be available as indicia

261. See Williams, *Language and the Law* (pt. 4), 61 L.Q. REV. 384, 401 (1945) (discussing actual intent, presumed intent and public policy bases for judicial implication of terms in contracts).

262. See Humbach, *supra* note 12, at 1267.

263. 361 A.2d 187 (D.C. 1976).

264. *Id.* at 188.

of the parties' expectations. Thus, an express promise for a particular service such as air conditioning, if found to be an inducement to the tenant's entry into the bargain, would necessarily be an element of such a transactionally defined "habitability." Readers of our earlier discussion will recognize this view of the scope of the warranty of habitability as the one developed by *Javins* in accordance with its assertion that "the common law itself must recognize the landlord's obligation to keep his premises in a habitable condition."²⁶⁵

Alternatively, but still adhering to the rule that only breaches of the warranty of habitability trigger the abatement remedy, one could define the warranty more narrowly, as being coextensive with the housing code. However, limiting the warranty of habitability to housing code violations would not prevent a tenant's claim to abatement for the absence of air conditioning if one rejected the premise that the implied warranty of habitability is the sole justification for an abatement. Instead, one could allow abatements for *any* material breach of contract, notwithstanding that the breached promise is not part of the warranty of habitability, no matter how habitability is defined.²⁶⁶

Since, on the facts of *Winchester*, either the broad definition of the implied warranty of habitability or the recognition of an abatement right tied to any material breach of the lease contract would have supported the tenants' claim, the potential differences between the two approaches are not dramatized by that case. It is important to note, however, that the *Winchester* court addressed and responded to both arguments. The court concluded both "that the tenant may be relieved of his full contractual rental obligation only when the landlord breaches his implied warranty of habitability,"²⁶⁷ and also "that the landlord's duties under such a warranty are discharged when he has [substantially] complied with the applicable standards set forth in the Housing Regula-

265. 428 F.2d at 1077. See text accompanying note 251.

266. The statement in *Javins* that a lease should be treated "like any other contract," 428 F.2d at 1075, would suggest not only a broad definition of the warranty of habitability, see *supra* note 243, but also the possibility of allowing the abatement remedy for any material breach of contract. This also seems to be the approach adopted by the *Winchester* trial court as to the air conditioning claim. 361 A.2d at 190. See RESTATEMENT (SECOND) OF PROPERTY, § 7.1, at 247 (1977) (tenant may abate for landlord's breach of promise that deprives tenant "of a significant inducement to the making of the lease").

267. 361 A.2d at 189.

tions.”²⁶⁸ Thus, the court rejected the two broadest definitions of the tenant’s right to an abatement—the broad warranty of habitability approach and the “any material breach” approach. In their stead, the court adopted the narrowest possible approach, limiting the scope of the implied warranty of habitability to conditions covered in the housing code and limiting the abatement remedy to those narrowly defined violations of the implied warranty of habitability.

2. *New Jersey: From Marini to Berzito*

By a more circuitous route, New Jersey decisions have arrived at a result similar to *Winchester*. In *Marini v. Ireland*,²⁶⁹ the New Jersey Supreme Court, building on a dictum in an earlier case,²⁷⁰ held that “the landlord should, in residential letting, be held to an implied covenant against latent defects, which is another manner of saying, habitability and livability fitness.”²⁷¹ In *Marini*, the tenant had repaired and deducted the cost of repairs from the rent.²⁷² In upholding this action, the court sanctioned a more restricted remedy than the withholding and abatement allowed by *Javins*, but it followed *Javins* in announcing both a broad and a narrow basis for giving content to the implied warranty of habitability. Having identified the implied warranty as one of “habitability and livability fitness,” the court expanded on that key phrase.²⁷³ The court noted that the implied warranty is a promise by the landlord that at the inception of the lease there are no defects in “facilities vital to the use of the premises for residential

268. *Id.* The court also noted that substantial, as opposed to exact, compliance is sufficient to satisfy the landlord’s duty. *Id.* at 193.

269. 56 N.J. 130, 265 A.2d 526 (1970).

270. *See* *Reste Realty Corp. v. Cooper*, 53 N.J. 444, 251 A.2d 268 (1969). In *Reste Realty*, a commercial tenant of a basement unit vacated the premises after the landlord’s repeated failure to repair the grade of an adjacent driveway, which caused flooding of the tenant’s unit. The thrust of the opinion is that the landlord’s failure to repair constituted a breach of the covenant of quiet enjoyment, and a constructive eviction of the tenant, justifying the tenant’s termination of the lease. The court also indicated, however, that it regarded the landlord’s failure to repair as the breach of an implied warranty against latent defects, *see id.* at 453-55, 251 A.2d at 272-74, and that the landlord’s breach might justify either a “repair and deduct” or an abatement remedy. *See id.* at 462 n.1, 251 A.2d at 277 n.1. As the New Jersey Supreme Court later noted, *Reste Realty* “is probably more important for what the opinion said and for what it forecast than for what it held.” *Berzito v. Gambino*, 63 N.J. 460, 465, 308 A.2d 17, 20 (1973).

271. 56 N.J. at 144, 265 A.2d at 534.

272. *Id.* at 134-35, 265 A.2d at 528.

273. *Id.* at 144, 265 A.2d at 534.

purposes” due to faulty construction or deterioration.²⁷⁴ Moreover, the implied warranty is a promise “that these facilities will remain in usable condition during the entire term of the lease.”²⁷⁵ The scope of the warranty is thus that “vital” facilities are and will remain operable. In determining how a “vital” facility might be defined, however, the court vacillated between two methods. First, taking a partially transactional approach, the court suggested that the “nature of vital facilities . . . is limited and governed by the type of property rented and the amount of rent reserved.”²⁷⁶ It said that the landlord’s obligation is to make “reasonable repairs” and that the failure to do so would allow the tenant to offset against rent due “the cost of such repairs as are reasonable in the light of the value of the leasehold.”²⁷⁷ The court’s second approach suggested a more restrictive method for giving content to the warranty of habitability. Thus the court noted that it is “eminently fair and just” to charge a landlord with the duty of warranting that the premises are habitable.²⁷⁸ The use of considerations of fairness and justice to give content to the warranty rather than the use of the facts and circumstances of a particular lease transaction is suggestive of the minimum expectations approach employed by the *Javins* court in its use of the housing code to give content to the warranty.

Tying *Marini* to our earlier consideration of *Javins*, we would

274. *Id.*

275. *Id.*

276. *Id.* at 144-545, 265 A.2d at 534.

277. *Id.* at 146, 265 A.2d at 535. A full transactional perspective might, of course, consider facts and circumstances other than the type of rental property and the amount of rent. In using those two factors as “limiting” considerations, the court proceeded cautiously on the rights side even as it did in sanctioning a more restrictive remedy than did *Javins*. See *supra* note 276 and accompanying text. An inclination to be cautious when treading new ground, however, is understandable. What seems most important on balance is that the court recognized the transactional method of giving content to the implied warranty and not that it failed to embrace the most expansive application of that method.

Although the tenant in *Marini* apparently only requested the repair and deduct remedy that the court in fact adopted, the court’s discussion of remedies is nevertheless restrictive. In contrast to *Reste Realty*, which suggested the propriety of an abatement remedy, the *Marini* court held that the tenant had “only” the alternatives of repairing and deducting, or vacating the premises under a claim of constructive eviction. 56 N.J. at 147, 265 A.2d at 535. Cases subsequent to *Marini*, however, do establish the abatement remedy suggested in *Reste Realty*. See *infra* note 286 and accompanying text.

278. 56 N.J. at 144, 265 A.2d at 534. See Comment, *Implied Warranty of Habitability: External Defect of Suburban Townhouse Entitles Tenant to Rent Abatement*, 7 RUT.-CAM. L.J. 617, 619 (1976) (“*Marini* . . . left unanswered the question whether the covenant of habitability was based on public policy alone or on the intentions of the parties.”) (footnote omitted).

say that nothing in *Marini* suggests that the court sanctioned the broadest possible defensive claim for tenants in eviction proceedings—the claim that any material breach of contract justifies relief from the rent obligation. While that suggestion was not rejected, neither was it alluded to, as in *Javins*; the *Marini* opinion considers only the defense arising out of the landlord's breach of the warranty of habitability. With respect to that warranty, however, *Marini* is ambiguous. While *Marini* adopts the implied warranty rationale as its *ratio decidendi*, the court, as we noted, discusses both the transactionally defined and the minimum expectations formulations, without committing itself to either. The court's discussion of the warranty of habitability problem thus prompts, but does not resolve, the same basic question generated by *Javins*: What happens when a tenant has a legitimate expectation, based on the lease contract read in the light of attendant facts and circumstances, that his premises will be "habitable" according to a particular standard, but the particular service or facility which the tenant reasonably expects to receive is not within the scope of a narrowly defined "vital" facility?

Immediately after *Marini*, a trial court in *Academy Spires, Inc. v. Brown*,²⁷⁹ embraced the narrower implications of *Marini*'s discussion of the implied warranty of habitability. Reciting a monotony of miserable living conditions that the tenant had endured, the court stated that some of them "clearly go to bare living requirements,"²⁸⁰ and that the landlord's failure to supply such bare necessities was a breach of the implied covenant of habitability, justifying an abatement remedy.²⁸¹ The court noted, however, that other conditions "go to what may be called 'amenities.'"²⁸² "Living with lack of painting, water leaks and defective venetian blinds may be unpleasant, [and] aesthetically unsatisfying, but [it] does not come within the category of uninhabitability. Such things will not be considered in diminution of the rent."²⁸³

While *Brown* might be faulted for adopting the closed, categorical approach to the definition of the implied warranty of habitability, in contrast to the open-ended, transaction-oriented alternative also suggested in *Marini*, the decision at least may be commended for taking a stand, and also for attempting to flesh

279. 111 N.J. Super. 477, 268 A.2d 556 (Essex County Ct. 1970).

280. *Id.* at 482, 268 A.2d at 559.

281. *Id.*

282. *Id.*

283. *Id.* at 482-83, 268 A.2d at 559.

out, through the suggestive “bare living requirements and amenities” language and the recitation of examples, the notion of “vital” facilities established in *Marini*. A subsequent supreme court decision, *Berzito v. Gambino*,²⁸⁴ stands in contrast. There the court held “that the covenant on the part of a tenant to pay rent, and the covenant—whether express or implied—on the part of a landlord to maintain the demised premises in a habitable condition are for all purposes mutually dependent.”²⁸⁵ That holding is important chiefly for its statement of remedy. While the facts of the case did not squarely present the question, the court apparently wanted to broaden *Marini* and to allow the abatement remedy of *Brown* for breaches of the warranty of habitability.²⁸⁶ However, on the crucial question of the scope of the warranty of habitability, on which the abatement remedy hinged, the *Berzito* decision offered little elucidation.

The court began with the proposition that “[n]ot every defect or inconvenience will be deemed to constitute a breach of the covenant of habitability. The condition complained of must be such as truly to render the premises uninhabitable in the eyes of a reasonable person.”²⁸⁷ But “reasonable” could mean reasonable as defined narrowly by the court, or as defined broadly by the parties to the transaction. Instead of choosing a clear approach, the court simply paraphrased an eight-factor list of considerations—it cannot be called a “test”—from an earlier Iowa case.²⁸⁸

284. 63 N.J. 460, 308 A.2d 17 (1973).

285. *Id.* at 469, 308 A.2d at 21. For a discussion of the potential significance of the distinction between express and implied warranties, see *supra* note 243.

286. 63 N.J. at 471 n.1, 308 A.2d at 22 n.1 (citing *Brown* as adopting a “similar approach” to the question of remedies). See also *Millbridge Apts. v. Linden*, 151 N.J. Super. 168, 173, 376 A.2d 611, 614 (Camden County Ct. 1977) (“*Berzito* . . . established the principle that if there is a breach of habitability, the tenant is entitled to an abatement in the amount of rent due.”).

287. 63 N.J. at 469, 308 A.2d at 22.

288. See *Mease v. Fox*, 200 N.W.2d 791 (Iowa 1973). The eight factors enumerated in *Berzito* are as follows:

1. Has there been a violation of any applicable housing code or building or sanitary regulations?
2. Is the nature of the deficiency or defect such as to affect a vital facility?
3. What is its potential or actual effect upon safety and sanitation?
4. For what length of time has it persisted?
5. What is the age of the structure?
6. What is the amount of the rent?
7. Can the tenant be said to have waived the defect or be estopped to complain?
8. Was the tenant in any way responsible for the defective condition?

63 N.J. at 470, 308 A.2d at 22.

The list is less than useful, however, because it includes a diffusion of considerations, some going to the question of the scope of the warranty, and some looking to the question of whether the landlord can negate the tenant's assertion of the warranty, whatever its scope, by way of the claims of waiver, estoppel, or unclean hands. Moreover, and this is the more basic concern for present purposes, even the factors which do relate to the issue of the scope of the warranty relate in different ways. Two of the factors are variations of the categorical minimum expectations approach: the existence of a housing code violation, redolent of *Javin's* alternative theory;²⁸⁹ and the effect of the condition on safety and sanitation, a consideration which would seem to suggest a narrow standard for the determination of habitability. Two other considerations, the age of the structure and the amount of the rent, are relevant only if one defines the scope of the warranty in transactional terms. A tenant would have fewer legitimate expectations of quality in older and less costly housing units, and greater legitimate expectations of quality in newer, more expensive, units. Indeed, these factors were suggested in *Marini*²⁹⁰ and have been used as relevant indicia of intent in a few cases.²⁹¹ Nowhere in the *Berzito* opinion, however, does the court endeavor to guide lower courts in applying these imprecise and potentially inconsistent criteria. While lower courts faithfully continue to recite the eight factors,²⁹² no decision of which we are aware has been able to reason effectively from them. This is no wonder, since the considerations, to the extent that they are meaningful at all, point in no clear direction.

3. *Property and Contract Analyses in Habitability Law:* *Glennon and Dietz*

Limiting the scope of the implied warranty of habitability to housing code violations, as in *Winchester*,²⁹³ and to the landlord's failure to provide "bare living requirements," as in *Brown*,²⁹⁴ are

289. See *supra* notes 257-60 and accompanying text.

290. See *supra* note 276 and accompanying text.

291. See, e.g., *Timber Ridge Town House v. Dietz*, 133 N.J. Super. 577, 338 A.2d 21 (Law Div. 1975). For a further discussion of *Dietz*, see *infra* notes 305-33 and accompanying text.

292. See, e.g., *Millbridge Apts. v. Linden*, 151 N.J. Super. 168, 376 A.2d 611 (Camden County Ct. 1977); *Park Hill Terrace v. Glennon*, 146 N.J. Super. 271, 369 A.2d 938 (App. Div. 1977)(per curiam); *Timber Ridge Town House v. Dietz*, 133 N.J. Super. 577, 338 A.2d 21 (Law Div. 1975).

293. See *supra* notes 263-68 and accompanying text.

294. See *supra* notes 279-83 and accompanying text.

but variations on a single method for determining the scope of the warranty. The method *can* be stated in terms of expectations, but only in terms of minimum expectations that every tenant is entitled to have, not expectations that would emerge from a perusal of the particular lease transaction before the court. The conflict between the minimum expectations and the transactional expectations methods of determining the scope of the implied warranty of habitability is often unapparent because the condition of the premises frequently violates even minimally defined expectations. When the conflict does emerge, *Winchester* and *Brown* represent one response: the limitation of claims for abatement to conditions that violate a relatively fixed and predetermined standard, and relegation of the tenant to a damages remedy for violations that fall outside the scope of this narrowly defined warranty. In fact, since housing codes usually cover the sort of conditions that one would describe as "bare living requirements,"²⁹⁵ the *Winchester* and *Brown* approaches may well amount to much the same thing in practice.²⁹⁶

There are contrary decisions. Two New Jersey Superior Court cases are particularly noteworthy, both for a more generous contract method of analysis that offers broader relief for tenants, and for the contradictions that have arisen when courts have attempted to employ that method.

In *Park Hill Terrace Associates v. Glennon*,²⁹⁷ the issue, as in *Winchester*, was whether the landlord's failure to provide expressly promised air conditioning constituted a breach of the warranty of habitability. The landlord, understandably in light of New Jersey law, argued that air conditioning was an amenity. The court apparently rejected that view, holding that there was "sufficient credible evidence to support the trial judge's finding that the air-conditioning failure for the stated days affected the habitability of the involved premises."²⁹⁸ However, no further basis for the decision appears in the report. The court did not say that it regarded the landlord's promise to provide air conditioning as a relevant

295. See, e.g., *Park West Management Corp. v. Mitchell*, 47 N.Y.2d 316, 328, 391 N.E.2d 1288, 1294, 418 N.Y.S.2d 310, 316 (1979)(warranty of habitability, though not limited to housing code provisions, is limited to conditions constituting "[t]hreat to . . . health and safety").

296. See *Winchester Management Corp. v. Staten*, 361 A.2d 187, 191 (D.C. 1975) ("With no explicit direction from the housing code making cool air in the summer vital to the use of these (or any) apartments, we would be exceeding the proper limits of our authority to read in such a provision.").

297. 146 N.J. Super. 271, 369 A.2d 938 (App. Div. 1977)(per curiam).

298. *Id.* at 277, 369 A.2d at 941-42.

consideration in defining the scope of the implied warranty. In fact, the court seemed to dismiss the landlord's express promise with the true but hardly dispositive observation, that "[t]here are many instances of breaches of the leasing agreement which would not affect habitability and thus would not be relevant in a dispossession action although they might very well be a proper basis for a separate cause of action for breach of contract."²⁹⁹ Nevertheless, the court still could have articulated a persuasive implied warranty basis by noting that air conditioning in fact existed at the outset of the lease, and that it figured into the determination of the tenant's rent obligation. Those facts would justify an expectation by the tenant—as the court in *Javins* argued³⁰⁰—that the service would continue to exist, in its original form, throughout the tenancy. By focusing on the fact that air conditioning was present, rather than on the landlord's promise to provide it, the court would have avoided, as it obviously wanted to avoid, the suggestion that all express promises count in the determination of the right to an abatement. The court, however, seemed to reject that analysis, stating that "[w]e do not deem it controlling that the leasing contract contemplated the providing of air conditioning and that the rentals were higher because of it."³⁰¹ What the court did do was recite the eight *Berzito* factors, and follow immediately with the conclusion, quoted above, that the record supported the trial court's determination that the air conditioning was part of the habitability of the premises.³⁰²

299. *Id.* at 276, 369 A.2d at 941.

300. *See supra* note 255 and accompanying text.

301. 146 N.J. Super. at 276, 369 A.2d at 941.

302. *Id.* Unlike the court in *Glennon*, the court in *Winchester* did explain its restrictive view of the scope of the warranty of habitability: "To hold otherwise could have the potentially devastating effect of depriving the landlord of the rental income needed to maintain the premises and correct any defective conditions about which the tenants complain." 361 A.2d at 190. *Winchester* also defended its equation of habitability with the housing code as an appropriate judicial deference to legislative action:

Indeed, it was a desire to be consistent with the announced legislative policy of requiring habitable living space which led the courts to imply a warranty of habitability into the modern lease. Thus, rather than leaving it to the whim of the tenant and the discretion of the trial court to determine what does and does not constitute a habitable dwelling for purposes of the landlord's warranty, we defer to the legislative judgments on the standards of habitability.

Id. at 191 (footnote omitted).

The abatement remedy itself, ironically, may explain in large part the narrow scope that generally has been given the warranty of habitability. A breach of the warranty of habitability justifies total rent withholding. *See, e.g., Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1082-83 (D.C. Cir. 1970). Since such

Glennon leaves us with a holding in want of a rationale. The court's apparent fear that not every promise in a lease contract should be relevant in dispossess cases may be justifiable, but that fear does not require the court's lapse into methodological silence. The court apparently wanted to disavow, as did the *Winchester* court, the "any material breach" approach to determining abatement claims.³⁰³ However, if an abatement is to be allowed, the only remaining possibility is that it is allowed because the landlord has breached a warranty of habitability, defined either broadly or narrowly. Since it is difficult to see how air conditioning could be anything other than an amenity under the restrictive view of the warranty of habitability adopted in *Brown*,³⁰⁴ *Glennon* would appear to reject *Brown*, and to stand for the proposition that the abatement remedy is available for breaches of the warranty of habitability broadly defined. Yet the court did not say that, and what it did say rather effectively destroyed its basis for a holding on that ground. Election of either the "any material breach" or the broad warranty of habitability approach would have given the orphaned *Glennon* opinion the rationale that it lacks, and which is difficult to supply on any other theory. The court's failure to understand the relevant options is an indication of the lack of guidance in New Jersey on the question of the scope of the warranty of habitability.

A parallel case to *Glennon* arose in *Timber Ridge Town House v. Dietz*,³⁰⁵ which is by far the most interesting theoretical opinion on habitability in New Jersey. There, the tenant of an expensive suburban townhouse sought an abatement for the landlord's failure to provide a landscaped patio, a swimming pool, and a playground. The court allowed the abatement for the absence of the

action by the tenant can have a drastic effect on the landlord's cash flow, courts probably are reluctant to expand the scope of the warranty. On the other hand, if the tenant's remedy were proportionate withholding, the potential effect on the landlord would not be as drastic, and much of the reluctance toward an expansive view of the content of the warranty of habitability might disappear. The central problem with proportionate withholding, that is, the burden placed on the tenant to calculate his or her damages correctly, is not insurmountable; the tenant could be protected so long as the calculation was made in good faith. For what amounts to a sanctioning of proportionate withholding in a sale of goods context, see U.C.C. § 2-717.

303. For a discussion of the scope of the abatement remedy, see *supra* notes 241-46 and accompanying text.

304. For a discussion of *Brown's* "bare living requirements" approach to habitability, see *supra* notes 279-83 and accompanying text.

305. 133 N.J. Super. 577, 338 A.2d 21 (Law Div. 1975), noted in Comment, *supra* note 278.

patio, but denied it for the pool and playground. Unlike *Glennon*, *Dietz* cannot be faulted for its silence. Its internal consistency, however, is another matter. In *Dietz*, the rental facility was new, and the complaining tenants were the first occupants of the unit in question. The housing complex was the most expensive in the municipality. The landlord's promotional campaign included the distribution of brochures that described "on-site recreational facilities including a swimming pool and children's play area . . . and individual patio facing a spacious landscaped courtyard."³⁰⁶ Construction work by the landlord in the vicinity of the tenant's unit had destroyed the landscaped courtyard, generated mud and water which interfered with the tenant's use of his patio, and prevented construction of the pool and playground.³⁰⁷

In allowing the abatement for the defective patio, the court followed an impeccable contract approach. Focusing specifically on "the intention of the parties to this agreement"³⁰⁸ and looking at all the circumstances surrounding the transaction for evidence of intent, the court concluded that the "[t]enants had a reasonable expectancy of a decent exterior environment from the sales promotion, the initial condition of the premises, and the higher price of the apartment compared to others in the community."³⁰⁹ In another statement perfectly in accord with its announced contractual orientation, the court stressed that legitimate expectations would vary with the circumstances of the letting:

[I]n many multiple-family dwelling units exterior habitability would be a minimal or nonexistent consideration, especially in a city where the tenant's expectations are limited to a habitable apartment. In this suburban "townhouse" setting defendants did have a reasonable belief that they were renting some adjacent exterior living space, and their reasonable anticipation should not be frustrated.³¹⁰

Since the conclusion that the lease transaction supported the tenant's expectation of a landscaped courtyard rendered immaterial any determination that the courtyard was an "amenity," the court correctly noted that the abatement would follow "whether the ex-

306. 133 N.J. Super. at 579-80, 338 A.2d at 22.

307. *Id.* at 580, 338 A.2d at 22-23.

308. *Id.* at 584, 338 A.2d at 24.

309. *Id.* at 580, 338 A.2d at 23.

310. *Id.* at 584, 338 A.2d at 25.

pectancy be characterized as one of amenity or necessity.”³¹¹ While the court canvassed the *Marini*, *Berzito* and *Brown* decisions, and made the obligatory recitation of the eight *Berzito* factors,³¹² it sandwiched that portion of the opinion between two substantial paragraphs, from which we have quoted above, focusing on intent and expectations as derived from circumstances. Interestingly, and indicative of the court’s broad contractual orientation on the question of the abatement for the patio, the court characterized *Marini* as a decision that relied upon a transactional determination of contractual intent.³¹³ *Dietz* thus seized an opportunity that the *Glennon* court missed, holding that the facts and circumstances of the letting, including the landlord’s representations that a particular facility would exist, are important considerations in determining whether the premises are “habitable” in accordance with the warranty recognized in *Marini*.

Unfortunately, however, in denying an abatement for the pool and playground, the *Dietz* court failed to apply its insight consistently. The pool and the playground, like the patio, were specifically mentioned and depicted in the landlord’s rental brochure. The court found as a fact that “these promised facilities were a substantial inducement offered by the landlord to procure the rental agreement.”³¹⁴ No less than with his expectation of a decent exterior environment, the tenant in *Dietz* legitimately could have expected that these additional facilities were a part of his high rental dollar in this suburban townhouse setting. In short, the identical circumstantial considerations supporting the abatement for the defective patio and courtyard mandated an abatement for the absent pool and playground. In denying the

311. *Id.* at 580-81, 584, 338 A.2d at 23, 24-25. For a further discussion of *Dietz*’s “amenity” language, see *infra* note 321.

312. 133 N.J. Super. at 583, 338 A.2d at 24.

313. *Id.* at 581, 338 A.2d at 23. While transactional intent analysis dominates the *Dietz* court’s consideration of the patio abatement issue, the court did, in its application of the eight *Berzito* factors, describe the patio in terms that could be viewed as bringing the decision within the minimum expectations view of *Marini*’s “vital facility” language: “Here, no housing code violation is present, but the work on the retaining wall, causing the unsavory condition, was required by the borough engineer as a public safety measure. . . . There is a possible effect on sanitation and safety.” *Id.* at 583, 338 A.2d at 24. Interestingly, however, the court in the same paragraph used the term “vital facility” in connection with a factor that is totally oriented towards a transactional determination of intent: “In the context of the promotional effort and type of townhouse development promised, the court feels a vital facility is affected.” *Id.* *Dietz* thus displays the same ambivalence over the definition of “vital facility” that *Marini* does. See *supra* notes 270-78 and accompanying text.

314. 133 N.J. Super. at 584, 338 A.2d at 25.

latter abatement, however, the court expressed a reluctance to go so far and cited a factual distinction between the allowed and disallowed conditions: while the defective patio was a “very special and individualized harm”³¹⁵ to the tenant, the absence of a pool and playground affected the tenant and other occupants of the premises indifferently. We respectfully suggest that this factual distinction is nothing more than that. The absence of individualized harm is certainly a factual distinction between the patio claim on the one hand and the swimming pool and playground claims on the other; as such, it can be used to draw the line as to which defects in the case are abatable and which are not. Yet the court’s rationale for the patio abatement seems to transcend the factual distinction. There is simply no difference between the patio, playground, and pool insofar as the tenant’s reasonable expectations as to what he would get for his rent money are concerned. In fact, the tenant’s expectations are precisely what the court emphasized in its discussion of the patio abatement question.

The *Dietz* decision is coherent on any of three theories, none of which, unfortunately, finally prevailed in the opinion. The decision could have been written in terms of the “bare living requirements and amenities” (or minimum expectations) approach to habitability stated in *Academy Spires v. Brown*.³¹⁶ The construction work which interfered with the landscaped patio likewise deposited mud on the walkways and driveway of the Dietzes’ apartment. Since unobstructed modes of ingress and egress would necessarily count as “vital” to the livability of the premises, the abatement for that condition would have been fully justified; a pool and playground, by contrast, would amount, on any reckoning, to “amenities” at best. The “bare living requirements” test thus accounts for the result in the case but not the reasoning. The court did suggest that the pool and playground were not part of the “living vitality” of the premises,³¹⁷ but it nowhere indicated that it was basing its decision on the bare living requirements and amenities distinction; nor could it do so, since it suggested in its consideration of the patio problem that even amenities provided a basis for abatement.³¹⁸

Alternatively, the opinion could have been written either in terms of the transactional definition of the implied warranty of

315. *Id.* at 585, 338 A.2d at 25.

316. *See supra* notes 279-83 and accompanying text.

317. 133 N.J. Super. at 585, 338 A.2d at 25.

318. *See supra* note 311 and accompanying text.

habitability, or in terms of an “any material breach” approach to abatement claims. In discussing the courtyard and patio, the court in fact vacillated between these two broader versions of the abatement right. It suggested that the promised landscaped courtyard and patio were elements of “habitability” transactionally defined,³¹⁹ and abatable under *Berzito*.³²⁰ But it also stated that the courtyard was a “promised amenity,”³²¹ which would suggest that it was abatable precisely because it was an expressly or impliedly promised condition which was an important inducement to the tenant. However, since the court specifically found that the pool and playground were inducements on the same footing as the courtyard and patio,³²² consistent application of either the broad implied warranty or the “any material breach” theory also would have required an abatement for all of those deficiencies. Instead, the court compromised and fell into inconsistency in the process. The court reached a result which conforms to a theory not articulated, while it articulated theories pointing to a result not reached. The result reached can be explained only in terms of the minimum expectations theory. Yet the theories espoused focus on the actual expectations of the parties as revealed by the transactional realities of the situation. While the

319. 133 N.J. Super. at 580-81, 584, 338 A.2d at 22-23, 24-25.

320. See *supra* note 286 and accompanying text.

321. 133 N.J. Super. at 580-81, 584, 338 A.2d at 23, 24-25 (suggesting that patio and courtyard could be regarded as an impliedly promised “amenity,” but still abatable because it was a “substantial attribute” of premises and hence a legitimate part of tenant’s expectation). In contrast to the patio and courtyard, the court referred to the pool and playground as “expressly promised social amenities.” *Id.* at 585, 338 A.2d at 25. Since the inclusion of the pool and playground in the rental brochure apparently provided the basis for their characterization as “expressly promised” amenities, and since the patio and courtyard were likewise described in the rental brochure, it would seem that the patio and courtyard also could be fairly characterized as “expressly” promised amenities. But the important point is not whether the amenities are characterized as expressly or impliedly promised. Rather, it is that the court, under either characterization, was willing to allow an abatement for a condition that went beyond the “habitability” of the premises narrowly defined. By emphasizing that the patio might be regarded as an *amenity*, the court indicated its view that the warranty of habitability is not limited to “bare living requirements.” By emphasizing that the patio was a *promised amenity*, and a “substantial attribute” of the package that the tenant legitimately expected to receive, the court suggested that an abatement might be appropriate for the landlord’s failure to perform any promise constituting a substantial inducement to the tenant’s entry into the lease. See RESTATEMENT (SECOND) OF PROPERTY § 7.1 (1977) (tenant entitled to abatement when deprived of “significant inducement to the making of the lease”).

322. 133 N.J. Super. at 584, 338 A.2d at 25 (“The court finds as a fact that these promised facilities were a substantial inducement offered by the landlord to procure the rental agreement.”).

court's policy concern of not going too far with the abatement remedy may have been real, its resolution of that concern will perpetuate the doctrinal uncertainty that plagues habitability law in New Jersey.

In spite of its internal inconsistencies, *Dietz* remains the most interesting and innovative case on the warranty of habitability in New Jersey, or perhaps in any other jurisdiction, and one which is central to our thesis. The court's explicit use of a broad contractual method as the *ratio decidendi* for the abatement for the defective courtyard and patio represents a positive and significant choice. It stands both as a rejection of the formulaic approach to lease bargains illustrated by *Winchester*, and as a fidelity to the premise—so prominent on the rhetorical level in the leading habitability cases—that a lease “should be interpreted and construed like any other contract.”³²³

However, the court's failure to apply its methodological innovation across the board³²⁴ reveals that old habits die hard. In landlord-tenant cases the conveyance frame of mind still dominates the decision making process. The attentive reader of *Dietz* cannot help but notice that an important shift occurs in the court's transition from the patio discussion to its consideration of the pool and playground claims. Whereas on the former point the court's method was broadly contractual, on the latter the opinion lapsed into the minimum expectations approach to habitability: “[W]here the living vitality of the rented facility and its immediate environs is not specially affected by the failure to perform, the court believes tenants' remedy, individually or in combination with other similarly aggrieved tenants, would be best handled in a more conventional legal proceeding.”³²⁵ In denying an abatement for the pool and playground, and relegating the tenant to a separate suit for damages, the court in effect determined that the landlord's breach as to those conditions was immaterial.³²⁶

323. See *supra* note 242 and accompanying text.

324. For a discussion of the court's flimsy but honest reasoning, see *supra* notes 314-15 and accompanying text.

325. 133 N.J. Super. at 585, 338 A.2d at 25.

326. Under the prevailing theory, the tenant has a right to withhold rent upon the landlord's breach, and to retain possession by paying the abated rent determined by a court in a summary dispossess proceeding. See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1083 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970). It would seem to follow that a breach of the magnitude required for a rescission, i.e., a material breach, would likewise be required for an abatement, since the justification for the tenant's right to withhold rent initially appears to

It is not farfetched to suggest a direct parallel between the pool and playground discussion in *Dietz* and the *Winchester* case on the one hand, and constructive eviction cases like *Stewart v. Childs Co.*³²⁷ on the other. In *Stewart*, it will be recalled, the court in effect conceded the existence of a rescission remedy under the doctrine of constructive eviction. The court, however, denied the tenant that remedy based on its narrow definition of what constituted constructive eviction. While a material breach, i.e., substantial interference, would have justified rescission, the court's opinion, influenced by conveyance reasoning, defined materiality in such a way as to exclude claims for breaches that did not affect the entire usefulness of the premises.³²⁸ Similarly, in *Dietz* and *Winchester*, the opinions recognize the basic right to an abatement. Given the apparent current theory of abatement,³²⁹ these cases necessarily premise that right on a material breach by the landlord. For there to be such a breach, however, the landlord must fail to provide housing that meets a mere minimal level of habitability; otherwise a breach by the landlord triggers only the remedy of suing for money damages and not the remedy of rent abatement.³³⁰

Unlike *Stewart*, however, *Dietz* and *Winchester* cannot claim the virtue of consistency between method and result. In determining the conditions under which a tenant could claim rescission for his landlord's breach, *Stewart* had available two models. The contract view analyzed the right and remedy in straightforward contract terms of material breach and rescission. The conveyance view depended upon the property vocabulary of quiet enjoyment and constructive eviction from a possessory interest. While *University Club v. Deakin*³³¹ chose the contract method, *Stewart* clearly and expressly opted for the conveyance approach, and thus limited rescission to cases in which the tenant could show the possessory interference required by the court's conveyance theory. The *Winchester* and *Dietz* courts, however, fail to establish the premise

be that the tenant's performance of the obligation to pay rent is excused by the landlord's breach on dependency of covenants principles. *See id.* The cases occasionally suggest as much. *See, e.g.,* *Millbridge Apartment v. Linden*, 151 N.J. Super. 168, 171, 376 A.2d 611, 613 (Camden County Ct. 1977) (drawing parallel between standard for constructive eviction and for breach of warranty of habitability).

327. *See supra* notes 30-36 and accompanying text.

328. *See supra* notes 106-113 and accompanying text.

329. *See supra* note 326 and accompanying text.

330. *See supra* notes 241-46 and accompanying text.

331. *See supra* notes 23-29 and accompanying text.

which would render their restrictions of the abatement right sensible.³³² We would suggest that *Winchester* in both result and reasoning, and *Dietz* in at least result, indicate that landlord-tenant law has not completely rid itself of the restrictive methodology generated by the "conveyance" view of the lease bargain. Commitment to that restrictive methodology is unfortunate if the effect is the suppression, as in the old destruction and dependency cases, of relevant transactional facts suggesting a right to relief for the tenant. Commitment to the methodology is doubly unfortunate when, in addition to generating unjust results, it flies in the face of a purported reliance upon the principle that a lease should be treated "like any other contract."³³³

B. *Good Cause Termination as an Implied Term: The Landlord's Obligation to Deal in Good Faith*

Common law doctrine dictates that either party to a periodic tenancy may, upon proper notice, terminate the arrangement for any reason or for no reason.³³⁴ The absence of the requirement of cause to terminate likewise governs tenancies at will³³⁵ and tenancies for a term.³³⁶ The common law, in short, consistently imposes no obligation on the parties to continue existing lease relationships.

In allowing the landlord to terminate arbitrarily a tenancy at will or a periodic tenancy, the common law refuses to require the

332. *Javins*, on balance, seems to have diligently avoided committing the District of Columbia to the minimum expectations test for defining the scope of the warranty of habitability. See *supra* note 257 and accompanying text. *Dietz*, on its own terms, and consistently with *Marini*, opts for a broad, intent-based determination of abatement claims in its discussion of the courtyard and patio issue. See *supra* notes 270-78 & 308-13 and accompanying text.

333. See *supra* note 242 and accompanying text.

334. See 1 AMERICAN LAW OF PROPERTY, *supra* note 1, § 3.23, at 222-23. The only requirement for termination is one of timeliness, not good cause. The terminating party must give the other party reasonable notice, but if that is done, the absence of a good reason for the giving of notice is irrelevant. *Id.* On the other hand, the common law's stringent notice requirements for termination of a periodic tenancy occasionally forced an additional lease period on an unwilling party. See, e.g., *Pack v. Feuchtenberger*, 232 Ky. 267, 271-74, 22 S.W.2d 914, 916-17 (1929) (untimely notice to terminate is not effective at next possible time; error is fatal and requires new notice). However, barring a failure to satisfy notice requirements, either party could cause the lease to end upon the expiration of the period in question. See *Pugsley v. Aikin*, 11 N.Y. 494, 496 (1854) (yearly periodic tenancy "continues until terminated by a legal notice" and thus "tenant cannot put an end to the tenancy, or his liability for rent, by withdrawing from the occupancy of the premises").

335. See 1 AMERICAN LAW OF PROPERTY, *supra* note 1, § 3.28, at 229.

336. See *id.* § 3.23, at 222.

landlord to deal in good faith with the tenant. In contract terminology, the law refuses to imply a promise of good faith dealing as a term in the lease contract. We suggest below that property considerations are at the root of this refusal. Since there are few cases addressing the problem directly, our argument will depend upon two sets of indirectly relevant cases.

First, we shall consider the often discussed situation of leases expressly terminable at the will of one of the parties only. These cases do not address the question of why such leases are free from a requirement of good faith termination; rather they address the logically prior question of whether a lease terminable at the will of one party only is a tenancy at will, as opposed to some other type of tenancy. Regardless of how the courts decide that question, they miss some rather obvious ways of looking at the facts of leases terminable at one party's option, ways that would appear to do more justice on the facts and that would be available were it not for the limitations of property analysis. In our analysis we discuss the "unilateral-at-will" lease cases to establish the general point that there are differences between property and contract analyses of leasehold facts, and that the property analysis limits the courts' ability or willingness to imply promises.

Second, we briefly consider some recent cases in which courts have refused to allow franchisors to terminate or fail to renew a franchisee's business operations. Unlike the unilateral-at-will cases, these cases *do* directly address the question of subjecting the contractual relationship to a good faith requirement, and they conclude that only good faith terminations are allowed. These decisions are particularly interesting because they inject a good faith analysis only after first concluding that the transactions are *not* lease transactions. Since they appear to assume that a good faith rule would be unavailable in a lease transaction, these decisions provide support for the conclusion we draw in considering unilateral-at-will lease cases: that property analysis inhibits the ability of courts to imply terms requiring the landlord to deal in good faith.

1. *Property and Contract Analyses Compared: Leases Terminable at the Will of One Party*

In *Foley v. Gamester*,³³⁷ the landlord leased premises to the

337. 271 Mass. 55, 170 N.E. 799 (1930), noted in Note, *Landlord and Tenant—Tenancy at Will*—*Foley v. Gamester*, 10 B.U.L. REV. 570 (1930) [hereinafter cited as Note, *Foley v. Gamester*]. See generally Note, *Landlord and Tenant—"Lease" De-*

tenant "for as many years as desired"³³⁸ by the tenant, at a specified yearly rental. The tenant immediately entered into possession and erected a gasoline service station. Two years later, the landlord conveyed the reversion to the plaintiff, who notified the tenant to vacate. When the tenant refused, the plaintiff instituted a summary dispossess proceeding, contending, in the court's words, "that as the lessee could terminate the tenancy at his will, he was in fact a tenant at will"³³⁹ and thus was subject to peremptory termination at the landlord's option. The court held for the landlord, stating that "where the lessee is not bound for any definite period and is at liberty at any time to terminate the tenancy, the estate is not a term of certain duration, and as the lessee is not bound to remain for any definite period, the landlord is not prevented from ending the relation."³⁴⁰ In classifying the lease as a tenancy at will, the court relied heavily on Lord Coke's view that leases expressly at the will of the tenant alone, like leases at the will of the landlord alone, are tenancies at will, because "every lease at will must, in law, be at the will of both parties."³⁴¹ The court concluded that "[t]he tenancy had no certain duration as to the [tenant] and therefore there could be no certain duration as to the [landlord]. It was in fact a tenancy at will."³⁴² Notwithstanding the lease provision that the tenant could have the land "for as many years as desired," the decision deprived the tenant of his leasehold interest and the ongoing business which he operated on the property.

On the surface, *Foley* appears to be another example of the difference between property and contract analyses. While there are several possible answers as to the intended duration of the lease,³⁴³ it seems unquestionable that, at a minimum, neither party contemplated that the landlord could terminate the arrangement whenever he wished.³⁴⁴ The landlord's promise that

fined—Tenancy at Will, 14 TEX. L. REV. 109 (1936); Note, *Landlord and Tenant—Tenancy at Will of the Lessee*, 33 W. VA. L.Q. 307 (1927) (discussion of related unilateral-at-will lease decisions) [hereinafter cited as Note, *Tenancy at Will*].

338. 271 Mass. at 55, 170 N.E. at 799.

339. *Id.* at 56, 170 N.E. at 799.

340. *Id.* at 56-57, 170 N.E. at 799.

341. *Id.* at 57, 170 N.E. at 799-800.

342. *Id.* at 57, 170 N.E. at 800.

343. See *infra* notes 352-59 and accompanying text.

344. A construction of the *Foley* arrangement as creating a yearly periodic tenancy rather than a tenancy at will would have protected the tenant somewhat, since the six months' notice required to terminate such a tenancy would have given the tenant some time to wind down his affairs. 1 AMERICAN LAW OF PROPERTY, *supra* note 1, § 3.23, at 222. However, while better than the tenancy at will

the tenant could remain "as long as he wished" and the tenant's conduct in investing in a business on the leased premises indicate as much. Thus, the classification of the tenancy as a tenancy at will seems inconsistent with the expectations of the parties as revealed by their words and conduct. In fact, however, *Foley* conforms to the pattern that we have previously identified as the essence of the property-contract debate: Below the surface differences, there are important similarities between property and contract analyses, which when explored reveal still further important divergencies.

We turn first to the similarities between property and contract reasoning that are found in the *Foley* opinion. The court did not follow Lord Coke's rule just because it was a rule. Instead, the court repeatedly emphasized the rationale for the rule: The landlord was not bound to continue the lease for any longer period than he desired because the tenant was not bound to do so.³⁴⁵ Rephrased in contract terms, Lord Coke's rule manifests a concern with mutuality of obligation. The issue in contract terms is whether each party has supplied the requisite lawful consideration. The landlord's promise to allow the tenant to remain "as long as he desires," is a legal detriment and clearly qualifies as a consideration. The tenant, however, promises only to stay as long as he chooses, and to pay if he stays. Because performance is entirely optional with the tenant, his return promise is illusory, "an expression [which is] cloaked in promissory terms, but which, upon closer examination, reveals that the promisor has committed himself not at all."³⁴⁶ Since both parties must furnish consideration in a bilateral contract, "the entire arrangement fails if one of the party's promises are illusory."³⁴⁷ From this perspective, *Foley* is simply a conveyance law variation on a line of classic contract cases that traditionally have been held to exemplify illusory and unenforceable agreements—cases in which one party reserves the right to terminate the agreement at any time without notice.³⁴⁸ Consequently, the result in *Foley*, while harsh, is not at

construction, the periodic tenancy construction still does not address directly the expectations and fairness considerations that are central under an overt contractual approach to the case. See *infra* notes 352-59 and accompanying text.

345. 271 Mass. at 57, 170 N.E. at 800.

346. J. CALAMARI & J. PERILLO, *supra* note 19, § 4-17, at 159.

347. *Id.* at 160.

348. The plight of the tenant in *Foley* was similar to that of the forbearing creditor in *Strong v. Sheffield*, 144 N.Y. 392, 39 N.E. 330 (1895). In *Strong*, the creditor, in return for the defendant wife's promise to guarantee an overdue indebtedness of her husband, agreed to forbear enforcement of the debt "until

all unusual.

Appreciation of the *Foley* problem as part of the general contract analysis of mutuality of obligation, however, not only explains the harsh result of the case, it also reveals alternative approaches to the problem. Mutuality doctrine is at best a "puzzle," which has a "core of validity" but which "has clearly been over-generalized and used as a mistaken premise for decisions defeating justified expectations."³⁴⁹ Illusory promises present one area of mistaken applications of the mutuality doctrine. As noted in a prominent contract treatise:

Countless bargains, freely entered into and openly arrived at, have been struck down because of zealous judicial concern that one party's promise appeared illusory. It mattered not that, ordinarily, it was this party who was prepared to carry out the bargain without taking advantage of the escape route contained in his promise and the other party who reneged on the agreement.³⁵⁰

The point is well illustrated by the result in *Foley*. The landlord was allowed to exit the contract along the tenant's escape route, even though the tenant was willing and ready to perform.

The key to resolution of the mutuality puzzle and to avoiding the harsh but understandable result illustrated by *Foley* lies in the recognition that "the supposed requirement of mutuality of obligation is merely one of mutuality of consideration: each contracting party must supply consideration to the other."³⁵¹ As an exercise in consideration doctrine, the at-will lease problem of *Foley* can be resolved in several ways, keeping in mind that the task is to supply a consideration on the tenant's side in exchange for the landlord's promise to allow the tenant to remain as long as he desires.

First, it is possible to view the tenant's erection and maintenance of a service station on the leased premises as an implied

such time as I want my money." *Id.* at 395, 39 N.E. at 331. This "agreement" was followed by approximately two years of actual forbearance. Thereafter, the creditor sought to recover against the wife on her promise. Even though the wife had in effect "bought" the time she was seeking, the court held that the creditor was not entitled to recover because his promise was illusory and did not provide consideration for the promise of the wife: "The consideration is to be tested by the agreement, and not by what was done under it." *Id.* at 396, 39 N.E. at 331.

349. J. CALAMARI & J. PERILLO, *supra* note 19, § 4-14, at 157.

350. *Id.* § 4-17, at 160.

351. *Id.* § 4-14, at 157.

offer to remain for a reasonable period of time. That promise, because it is detrimental to the tenant, is meaningful and is consideration, in contrast to his "promise" to stay as long as he chooses. The landlord's failure to object to the building could constitute an implied acceptance of the tenant's offer.³⁵² The case then would be one in which there is a bargain, based on offer and acceptance inferred from the circumstances of the case. The question of the "reasonable" duration of the lease would go to the content rather than the validity of the contract. Both parties would be bound for some duration, the exact time being a question for judicial determination. Cases upholding leases for the "duration of the war" as binding agreements, not terminable at will, are closely analogous.³⁵³

Second, it is possible to focus on the tenant's reliance on the landlord's original, meaningful promise to allow the tenant to remain "for as many years as desired." The tenant's erection of the gas station constitutes reasonable and foreseeable reliance on that promise, and provides a substitute for the consideration lacking in the tenant's formal promise to remain only as long as he desires.³⁵⁴ While this analysis, like the first, focuses on the tenant's conduct in erecting the gas station, it differs in the duration

352. See, e.g., *Blaustein v. Burton*, 9 Cal. App. 3d 161, 184, 88 Cal. Rptr. 319, 334 (1970) ("The making of an agreement may be inferred by proof of conduct as well as by proof of the use of words.").

353. See, e.g., *Beeson v. LaVasque*, 144 Ark. 522, 223 S.W. 355 (1920). For discussions of the need for certainty in the term of years, see generally Note, *Lease-Definiteness of Term—"Duration of War"*, 2 ARK. L. REV. 126 (1947); Note, *Landlord and Tenant: Need for Certainty of Duration of Term in Estates for Years*, 32 CALIF. L. REV. 199 (1944); Note, *Leases for the 'Duration of the War'*, 39 ILL. L. REV. 85 (1944). See also *infra* note 372 (discussion of "duration of war" lease cases). But see *Stanmeyer v. Davis*, 321 Ill. App. 227, 53 N.E.2d 22 (1944) (lease for duration of war creates tenancy at will).

354. RESTATEMENT OF CONTRACTS § 90 (1932). Under this section, a promise "which the promisor should reasonably expect to induce action or forbearance of a definite substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." *Id.* Reasonably foreseeable detrimental reliance upon a promise provides a basis for the enforcement of the promise, and is thus a substitute for consideration. In other words, if the doctrine is found to be applicable to a particular promise, that promise is entitled to the same degree of legal enforcement, no more and no less, as any other contract promise. See generally 1 S. WILLISTON, *supra* note 20, § 140, at 607-19 (discussing traditional view of the role of promissory estoppel noted above).

In contrast to the traditional view, the *Second Restatement of Contracts* adopts a much more flexible view of the doctrine. Section 90 of the *Second Restatement* provides:

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can

of the resulting lease. In the first analysis, the duration of the lease is for a reasonable period, since nothing else is specified. In the promissory estoppel analysis, the tenant's reliance is used to enforce the landlord's original promise, so that the tenant can remain as long as he chooses, a period which may turn out to be more or less than what a court would decide is a reasonable period. In effect, the promissory estoppel analysis creates a lease for life, if not longer,³⁵⁵ but one that is terminable earlier if the tenant so chooses.

Third, it is possible to read the tenant's power to terminate the arrangement at any time as subject to an implied requirement of reasonableness. In this analysis, the bargain is construed to infer a promise on behalf of the tenant either to give notice or to remain until there is good cause to terminate the lease. Both implied promises constitute consideration, and both have clear analogues in general contract law.³⁵⁶ An implied obligation of

be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979). This more pliable notion of promissory estoppel, which of course had not been perceived at the time of *Foley*, affords a middle ground between full enforcement and nonenforcement of the agreement. For example, if an agreement like the one in *Foley* is viewed as too one-sided to be enforced because of the unlimited discretion afforded the tenant, the tenant need not be left without a remedy. The landlord's promise could be subjected to limited enforcement. More specifically, the tenant could be allowed recovery of his out-of-pocket loss, i.e., the cost of constructing the service station in *Foley*, which was an expenditure directly induced by the promise of the landlord. See, e.g., *Hoffman v. Red Owl Stores*, 26 Wis. 2d 683, 133 N.W.2d 267 (1965).

355. See *Thompson v. Baxter*, 107 Minn. 122, 119 N.W. 797 (1909) (lease at will of tenant creates life estate); RESTATEMENT OF PROPERTY § 21 comment a (1936) (lease at the will of the tenant creates "either an estate for the life of the transferee or an estate in fee simple determinable depend[ing] upon whether the required words of inheritance, if any are required for the creation of an estate of inheritance, are present").

356. The use of an implied term to salvage an otherwise unenforceable promise is not a technique new to contract law. See J. CALAMARI & J. PERILLO, *supra* note 19, § 4-20, at 169-71. For example, in *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 118 N.E. 214 (1917), the defendant promised the plaintiff the exclusive right to market her "indorsement" of products. The defendant attempted to escape liability for her promise to share her profits by claiming that the plaintiff had promised nothing in return. Justice Cardozo, speaking for the New York Court of Appeals, rejected the defendant's argument:

It is true that [the plaintiff] does not promise in so many words that he will use reasonable efforts to place the defendant's indorsements and market her designs. We think, however, that such a promise is fairly to be implied. The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view to-day. A promise may be lacking, and yet the whole writing may be "instinct with an obligation," imperfectly expressed. . . . If that is so, there is a contract.

reasonable notice to terminate a contract is an interpretive device recognized in the Uniform Commercial Code,³⁵⁷ while the requirement of good cause as a condition of termination has been imposed in cases involving franchises terminable at the sole discretion of the franchisor.³⁵⁸ Unlike the first and second analyses, which depend on the tenant's use of the property subsequent to the illusory agreement, this third analysis does not require additional conduct by the tenant to cause the illusory promise to become concrete; rather, it finds an implied bargain in the original words of the agreement.³⁵⁹

Id. at 90-91, 118 N.E. at 214 (citations omitted).

Of course, a case like *Foley* represents a different, and perhaps more difficult, situation for use of the implied term analysis than the one *Wood* presents. In *Wood*, the agreement was silent as to any obligation on the part of the plaintiff; in *Foley*, the agreement stated that the tenant would continue the lease as long as he chose to do so. Thus in *Wood* the implied term would only fill a gap in the agreement, while in *Foley* the implied term would modify an otherwise unambiguous express term. This difference, however, is not an insurmountable obstacle to the use of the implied term technique for preservation of the bargain. See J. CALAMARI & J. PERILLO, *supra* note 19, § 4-17, at 161-62 ("Even where the language of the agreement seems to reserve the right to terminate at any time without notice the more recent cases have sustained the agreement by a process of interpretation."). For example, in *Sylvan Crest Sand & Gravel Co. v. United States*, 150 F.2d 642 (2d Cir. 1945), the plaintiff agreed to supply the United States Government with the trap rock needed for a construction project. The agreement provided that "[c]ancellation by the Procurement Division may be effected at any time." *Id.* at 643. The court held that the obligation of the United States was impliedly qualified in the cancellation clause:

[The "acceptance" of the United States] should be interpreted as a reasonable business man would have understood it. Surely it would not have been understood thus: "We accept your offer and bind you to your promise to deliver, but we do not promise either to take the rock or pay the price." The reservation of a power to effect cancellation at any time meant something different from this. We believe that the reasonable interpretation of the document is as follows: "We accept your offer to deliver within a reasonable time, and we promise to take the rock and pay the price unless we give you notice of cancellation within a reasonable time."

Id. at 644.

357. U.C.C. § 2-309(3) (1977). This section provides that "[t]ermination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party and an agreement dispensing with notification is invalid if its operation would be unconscionable." *Id.*

358. For a discussion of good cause termination and franchise cases, see *infra* notes 410-26 and accompanying text.

359. Of course, if the lease contains a promise by the tenant in addition to the illusory promise, there would be no consideration problem, and the lease would not be relegated to the tenancy at will category. Some cases, however, do not always reach that result. Compare *Newsom v. Meade*, 102 W. Va. 489, 135 S.E. 604 (1926) (lease obligating tenant to plant fruit trees and care for the premises, and allowing him to stay as long as he pleased, created life estate and not a lease terminable at will), noted in Note, *Tenancy at Will*, *supra* note 337 with

In relation to the property-contract theme, then, *Foley* is important for what it does and does not do. In effect, *Foley* applies a standard contract analysis: For want of mutuality of obligation, the contract was illusory, and the landlord was bound to no duration of performance because the tenant was not.³⁶⁰ What *Foley* fails to do is to apply any of the three alternative analyses, discussed above, which would solve the consideration problem generated by the initial classification of the tenant's promise as illusory. The crucial remaining question is why the court failed to transcend the illusory promise analysis in a way that would have given effect to an intended bargain.

We suggest that the answer lies in the inhibiting effect of property analysis upon the freedom of courts to assess transactional facts in lease cases. From this perspective, *Foley* supports the basic theme of our discussion: that there is an important difference between property and contract methodologies in assessing transactional facts. *Foley* nicely illustrates that difference. Contract law accords more deference to contracting parties—or more appropriately, more autonomy to courts in determining what contracting parties mean when they act ambiguously—than conveyance law accords to landlord and tenant. While “[i]t is conceivable that, in a matured system of law, interests in land could be created without models and with an infinite variety of legal consequences, somewhat as contracts are formed,”³⁶¹ property law does not work in such a manner. An owner of land “is not free to fashion segments of ownership in any way that he pleases.”³⁶² Rather, the owner may only divide his ownership into the kinds of segments that the courts have come to recognize.³⁶³ Autonomy is limited not only because these “segments” or estates are limited in number, but also because they are fixed so that “one legal category having been selected, legal conse-

Sage v. Shaul, 159 Neb. 543, 545, 67 N.W.2d 921, 922 (1955) (“The [tenant’s] version of the oral lease is that if he would go on the place and clean it up, he could stay as long as he desired. The [landlord’s] version is that defendant could rent it as long as he was satisfactory and [the former landlord] owned the place. Under either version a tenancy at will was created.”).

360. Exceptions to the mutuality rule, however, are so widespread that the use of the doctrine to abort bargained-for transactions may well be the anomaly rather than the rule in modern contract law. See J. CALAMARI & J. PERILLO, *supra* note 19, § 4-17, at 161-64 (sustaining illusory and optional promises).

361. 1 L. SIMES & A. SMITH, *THE LAW OF FUTURE INTERESTS* § 61, at 45 (2d ed. 1956).

362. *BASIC PROPERTY LAW*, *supra* note 14, at 213.

363. *Id.*

quences . . . necessarily follow.”³⁶⁴

Foley nicely demonstrates the dilemma that arises when ambiguous transactional facts must be forced into the limited legal molds of conveyance law. It seems unquestionable that the parties in *Foley* intended to make a binding contract for the use of the land, and it is almost certain that neither party had contemplated that the landlord could terminate the agreement at will. Beyond that, the agreement demands thoughtful interpretation. At one extreme, the right to remain in possession “for as many years as desired” could give the tenant a right to lifetime possession, if not more.³⁶⁵ At the other extreme, the quoted language might have been intended only to negate the landlord’s right to terminate at will. The point, however, is that the quoted language alone is not, and should not be regarded as, sufficient to determine what the parties’ expectations were at the time of the agreement.³⁶⁶ A lifetime right to possession may appear to be a reasonable or an extreme construction depending on the circumstances of the agreement. The construction would seem extreme if the rental were low in relation to present and predictable fair rental value, but reasonable assuming a fair return to the landlord, or some peculiar transactional facts, such as a close relationship between the landlord and tenant.³⁶⁷ If the lifetime occupancy construction appears unreasonable under the circumstances, occupancy at the landlord’s will is not the sole alternative. As we have noted, the *Foley* arrangement could have been construed to authorize occupancy by the tenant for a reasonable period.³⁶⁸

364. 1 L. SIMES & A. SMITH, *supra* note 361, § 61, at 46.

365. See *supra* note 355 and accompanying text.

366. See J. CALAMARI & J. PERILLO, *supra* note 19, § 2-13, at 48-49 (contracts providing that employment shall be “permanent” are subject to various interpretations: “Terms such as ‘permanent employment’ have no immutable meaning. When used in different concrete situations by different individuals different meanings may fairly be attached to the term.”); *cf.* *McLean v. United States*, 316 F. Supp. 827, 828 (E.D. Va. 1970) (tenant’s option to renew “from year to year” did not create right to perpetual renewals: “There is nothing about the authorized or permitted use of the premises, the term of occupancy, the rental, the rights granted or language used to suggest the parties intended the lease to continue in perpetuity.”).

367. See, *e.g.*, *Thompson v. Baxter*, 107 Minn. 122, 119 N.W. 797 (1909) (lease at elderly tenant’s will creates a life estate and not a tenancy at will).

368. See *supra* notes 356-59 and accompanying text. In addition, where the tenant’s reliance upon the assumption that the landlord may not terminate at will is crucial to the case, flexibility in result is attainable under the pliable promissory estoppel doctrine formulated in the *Second Restatement*. See RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979). For the relevant text of § 90, see *supra* note 354.

The conveyance scheme of law, however, prevents adoption of any of the appealing compromise alternatives from among the various durational possibilities. The *Foley* court held that the lease arrangement was not a term-of-years tenancy because it lacked the essential characteristic of that estate, a fixed duration.³⁶⁹ Having rejected the term of years construction, the court, from the standpoint of the hierarchical theory of estates, could only construe the arrangement "up," as a life estate, or "down," as a periodic tenancy or tenancy at will. While the latter constructions are not responsive to the parties' apparent expectations,³⁷⁰ the life estate alternative may have given the tenant more than he bargained for. Neither solution provides flexibility. Since it is difficult to criticize the court for doing too little for the tenant when the alternative is perhaps to do too much, we do not suggest that the *Foley* decision was, on its terms, incorrect.³⁷¹ We do suggest, however, that the dilemma presented by cases like *Foley* results from a perceived need to fit fact patterns into rather limited property law categories.³⁷²

Three recent cases involving leases allegedly terminable at the will of one party reveal that courts continue to struggle with the type of problem presented in *Foley*. Although all three decisions, unlike *Foley*, uphold the bargain, conveyance law doctrine continues to be a factor in each case. In the first decision dis-

369. 271 Mass. at 57, 170 N.E. at 800.

370. For a discussion of these alternatives, see *supra* note 344.

371. In suggesting that the fairness of a life estate construction depends on how well it effectuates the parties' expectations or otherwise produces a just result, we are aware that the *Foley* court could not have classified the lease as a life estate because of a local rule prohibiting the creation of life estates without a seal or a recitation that a life estate was intended. See Note, *Foley v. Gamester*, *supra* note 337, at 572. It seems clear, however, that the court intended its at-will classification to apply even to transactions that would have been formally sufficient to create a life estate. See *id.*

372. The common law recognizes only four types of leasehold estates. See 1 AMERICAN LAW OF PROPERTY, *supra* note 1, §§ 3.13-36. No court, however, is obliged to follow the common law on this point, as cases upholding leases for the "duration of the war" illustrate. See *supra* note 353. The "war" cases could be understood simply as expanding the concept of certainty that is an essential feature of a term of years. See RESTATEMENT OF PROPERTY, § 19 & comment a (1936). A lease for the duration of the war is certain to end, although the exact time cannot be specified. This explanation is troublesome, however, since it obliterates the distinction between a life estate and a term of years, and largely destroys whatever utility the concept of certainty has as applied to the term of years. A preferable explanation is simply that the cases recognize the possibility that valid leases can be created, if the parties so intend, even when their durations do not conform to accepted common law categories. Our point in the text is that cases operating under the aegis of property concepts frequently do reach restrictive results, not that they necessarily must. See *infra* Part IV-B.

cussed below it is clearly the dominant form of analysis, with the court simply revising the traditional property approach of *Foley*. The second case illustrates how a court can straddle the fence and employ a mixture of property and contract doctrine to justify its decision. The third pays lip service to traditional property doctrine and seems to recognize the modern lease as a contract, but then utilizes a questionable contract analysis.

In *Myers v. East Ohio Gas Co.*,³⁷³ the lease provided for "a term of ten years, and so much longer . . . as gas is being produced, stored, withdrawn or held in storage by the lessee."³⁷⁴ The landlord, seeking to escape the bargain after the ten year period, sought, *inter alia*, a declaratory judgment that the lease agreement created a tenancy at will after the initial ten year term.³⁷⁵ The landlord argued that a lease for a "primary term, followed by a grant of uncertain duration that conditioned termination upon the occurrence of events solely within the control of the 'lessee,' gives rise to a tenancy at will once the primary term has expired."³⁷⁶ The court upheld a verdict for the tenant, holding, unlike *Foley*, that the agreement was not a tenancy at will, and therefore was not terminable by the landlord even though it was terminable at the will of the tenant.³⁷⁷

While the *Myers* court perceived the *Foley* problem of unilateral termination as a consideration question, it did not decide the case on that basis, and thus bypassed the shorter road to the result it reached in favor of the tenant.³⁷⁸ As a consideration case, *Myers* is an easier case than *Foley*. In *Foley*, the silence of the agreement on the tenant's obligation gave the appearance that the tenant was agreeing to lease the property for as long as he wished.³⁷⁹ Thus, the only consideration for the landlord's promise to lease to the tenant was the tenant's illusory promise to do, in effect, whatever he wanted to in the future. The facts of *Myers* are dramatically different. In *Myers*, the tenant agreed to lease the property for a term of at least ten years. This promise, in contract terms, clearly provided sufficient consideration at the outset of the agreement to support a return promise by the landlord to

373. 51 Ohio St. 2d 121, 364 N.E.2d 1369 (1977).

374. *Id.* at 127, 364 N.E.2d at 1374.

375. *Id.* at 122, 364 N.E.2d at 1371.

376. *Id.* at 122-23, 364 N.E.2d at 1371.

377. *Id.* at 127, 364 N.E.2d at 1374.

378. *See infra* notes 383-90 and accompanying text.

379. For a discussion of the lease agreement in *Foley*, see *supra* notes 337-72 and accompanying text.

lease the property for ten years and as long thereafter as the tenant desired.³⁸⁰

In addition, a second avenue for finding consideration sufficient to support the landlord's promise to Myers was readily available. Even as to the period after the initial ten years, the lease in *Myers* did not provide, as in *Foley*, for a duration only so long as the tenant wanted the property. Instead, the lease called for a duration so long as the tenant continued to use the premises for specified oil and gas purposes.³⁸¹ Contract law, in analogous situations, has recognized an implied promise *not* to cease operations except for good faith reasons;³⁸² the recognition of such a good faith limitation on the right to terminate solves any problem with lack of mutuality of obligation. Since the *Myers* lease did not obligate the tenant to undertake the oil and gas operations, the analogy to the contract cases is not perfect. Nevertheless, it remains true that whereas in *Foley* the court would have had to construct a good faith obligation purely out of its perception of the justice of the situation, in *Myers*, the fact that the lease adverted to oil and gas operations, even though it did not require them, could have been the basis for an intent-oriented inference of a good faith limitation on the tenant's right to terminate.

Notwithstanding the foregoing contract rationales, the *Myers* court employed property-based reasoning that was only slightly less mechanistic, and certainly more confusing, than that employed by the court in *Foley*. *Myers* recognized, but declined to follow, the widespread adoption of the *Foley* rule that a lease expressly terminable at the will of only one party is in law terminable at the will of both.³⁸³ Instead, the court held that "those leases which do not clearly state whether they are terminable at the will of one or both parties will be presumed, in keeping with the majority rule, to be terminable at the will of one or both parties."³⁸⁴ However, "those leases which clearly and unambiguously terminate at the will of only one party are to be controlled by their express terms," and are to be regarded as terminable by

380. See J. CALAMARI & J. PERILLO, *supra* note 19, § 4-22, at 173-74 (one consideration will support many promises).

381. 51 Ohio St. 2d at 122, 364 N.E.2d at 1371.

382. See, e.g., *HML Corp. v. General Foods Corp.*, 365 F.2d 77 (3d Cir. 1966) (buyer in requirements contract must exercise good faith in determining requirements); *407 E. 61st Garage v. Savory Fifth Ave. Corp.*, 23 N.Y.2d 275, 244 N.E.2d 37, 296 N.Y.S.2d 338 (1968) (a business will not necessarily shut down before contract term merely because it is losing money).

383. 51 Ohio St. 2d at 124, 364 N.E.2d at 1372.

384. *Id.* at 126-27, 364 N.E.2d at 1373.

that party only.³⁸⁵ Although the *Myers* lease did not expressly state that the tenant could terminate at will, it did tie the duration of the lease after the initial ten year period to various production contingencies over which the tenant had sole control. In the court's view, this provision "clearly granted the [tenant] the right to terminate at will" once the ten year primary term had expired.³⁸⁶ Moreover, the lease did address the landlord's right to withdraw, and gave the landlord that right only upon 30 day's notice and only if the lessee defaulted.³⁸⁷ As a result of these provisions, the court concluded that the agreement

is clearly terminable at the will of the lessee only. Therefore, the presumption that a lease at the will of one party is a lease at the will of both does not apply, a tenancy at will is not created, and the lease will be enforced according to its express terms.³⁸⁸

The dissenting judge in *Myers* chided the majority for refusing to adopt or reject the *Foley* rule, and for assuming a "mugwumpian stance" in its creation of the "novel" presumption of mutual termination.³⁸⁹ While much of the dissent's opinion is not entirely clear, its criticism of the majority's rejection of the clear *Foley* rule in favor of a presumption is apt. The *Myers* court seems to have replaced the irrational certainty of *Foley* with an irrational uncertainty. The majority decision creates a two-tiered level of analysis for unilateral-at-will leases. In some cases, the rule that a lease at the will of one party is also a lease at will of the other party will apply, but as a rebuttable presumption. In other cases, as in *Myers* itself, the lease is given effect as written, that is, as a lease terminable at the will of one party only.

Since the *Myers* court provides routes for both proving through and drafting around the presumption, it is clear that little remains of the *Foley* rule. Probably few leases that are expressly terminable at the will of one party only will survive the double assault and be treated, as in *Foley*, as leases likewise terminable by the other party. But while the objective of preventing parties like the landlord in *Myers* from escaping an undesirable but freely assumed bargain is commendable, one must wonder whether the

385. *Id.* at 126, 364 N.E.2d at 1373.

386. *Id.* at 127, 364 N.E.2d at 1374.

387. *Id.*

388. *Id.*

389. *Id.* at 128, 364 N.E.2d at 1374 (Celebrezze, J., dissenting).

Myers court's method of achieving that result is appropriate. In contrast to the relatively straightforward, but by no means flawless, consideration analysis,³⁹⁰ *Myers* creates an uncertain and perhaps ultimately futile variation on the *Foley* property approach. The case addresses neither of the important questions prompted by its mode of analysis: How is one to draft around the presumption, and what circumstantial factors are necessary to rebut the presumption? The fact that the majority and the dissent disagreed on whether the *Myers* lease did "clearly and unambiguously" provide for termination at the will of the tenant, and thereby negate the presumption, indicates that the appropriate application of that part of the court's test, at least, is far from clear. The upshot of the court's silence and ambiguity on these important questions is that the court has the worst of both worlds—it has achieved neither the certainty of *Foley* nor the reasoned flexibility of an overt contract approach.

In *Thomas v. Goodwin*,³⁹¹ the Supreme Court of Appeals of West Virginia ultimately employed traditional property doctrine when faced with what was argued to be a terminability at will problem. The lease at issue was for a period of fifteen years, but contained a provision that the lessee could terminate the lease "at any time by giving Lessor thirty (30) days notice thereof."³⁹² The trial court, in granting the landlord's motion for summary judgment, held that a lease that granted a unilateral termination right to the tenant but failed to create a corresponding termination right in the landlord was either void, or a month-to-month tenancy.³⁹³

In reversing the trial court, the appellate court recognized that the *Foley* rule is based upon the doctrine of mutuality of obligation.³⁹⁴ The court, however, did not dispose of the case under a consideration rationale. Although the requirement of a specified time for notice of termination is, by itself, a sufficient restriction on a party's future conduct to constitute consideration and to prevent that party's promise of performance from being viewed as illusory,³⁹⁵ the court instead opted for a more conventional analy-

390. See *supra* notes 351-59 and accompanying text.

391. 266 S.E.2d 792 (W. Va. 1980).

392. *Id.* at 793.

393. *Id.*

394. *Id.* at 794.

395. See J. CALAMARI & J. PERILLO, *supra* note 19, § 4-17, at 161-62 (requirement of giving notice constitutes detriment and is consideration); IA A. CORBIN, *supra* note 14, § 163 (same). See also *supra* note 357 and accompanying

sis. The court cloaked its opinion in traditional property doctrine and emphasized that the lease provided for a definite duration—fifteen years—subject to earlier termination by the tenant's giving of the required notice.³⁹⁶

Thomas' requirement of a combination of both a definite duration and a notice requirement as necessary to take the case out of the tenancy at will category represents a hybrid method of decision. In property law, the rule that a lease terminable at the will of one party alone is a tenancy at will is not applied when the unilateral right to terminate is attached to a definite term.³⁹⁷ Form dominates substance, inasmuch as the mere setting of a term, even though the term set is subject to earlier termination, avoids the at-will classification; it is not necessary that the right to terminate be limited by a notice requirement. In contract law, the notice requirement alone would be sufficient to avoid the tenancy at will classification since it provides valid consideration for the landlord's promise to allow the tenant to remain in possession until the tenant elects to give reasonable notice.³⁹⁸ Because the *Thomas* decision requires that the right to terminate be burdened by a notice requirement, it is responsive to the underlying mutuality of obligation issue. Yet, in adding the term requirement, the court also embraces the formalism of the property approach, and thus fails to achieve a straightforward contract analysis.³⁹⁹

text (discussing possibility of inferring term in contract that requires giving of notice).

396. 266 S.E.2d at 795.

397. See, e.g., *Peoples Park & Amusement Ass'n v. Anrooney*, 200 Wash. 51, 57, 93 P.2d 362, 365 (1939). See also RESTATEMENT (SECOND) OF PROPERTY § 1.6 comment g (1977) ("Such a lease is an estate for years determinable if the power to terminate it at the will of one of the parties is engrafted on what would otherwise be an estate for years. . .").

398. See *supra* note 395 and accompanying text.

399. An interesting parallel to the *Thomas* court's "property" approach on the duration issue is the court's position on the landlord's unconscionability argument. Given the rather traditional approach employed by the court on the duration issue, one might have expected the unconscionability argument to have been rejected by the court as inapplicable to leases. See, e.g., *Division of Triple T Serv., Inc. v. Mobil Oil Corp.*, 60 Misc. 2d 720, 728, 304 N.Y.S.2d 191, 200 (App. Term 1969) ("The [Uniform Commercial] Code provisions governing sales are limited in scope to 'transactions in goods' . . . and by no mean application of judicial sophistry can the lease of real property be deemed to fall within its intendment."), *aff'd mem.*, 34 A.D.2d 618, 311 N.Y.S.2d 961 (1970). The *Thomas* court did seem to face an apparent temptation to pursue the compartmentalized approach. See *Thomas*, 266 S.E.2d at 794 (instant case involves "lease of property, not the sale of goods, and is not controlled by the Uniform Commercial Code"). Notwithstanding that temptation, the court in *Thomas* disposed of the unconscionability argument on the merits:

The trial court erroneously held that the lease agreement was uncon-

In *L. E. Cooke Corp. v. Hayes*,⁴⁰⁰ the lease called for rental payments based upon the amount of coal removed by the tenant with a minimum rent of one dollar per acre per year. As for duration, the lease provided: "This lease shall remain in full force and effect for one year and thereafter until notice is given by lessee of its intention to cancel said lease."⁴⁰¹ During the first year, no mining occurred. At the end of that year, when the tenant undertook to pay the minimum royalty, he was notified that the landlord was terminating the lease.⁴⁰² In the landlord's action to cancel the lease, the trial court held for the landlord. Relying on *Killebrew v. Murray*,⁴⁰³ which according to the court subscribed to the *Foley*

scionable, there having been no showing that it was entered into as a result of oppressive or unfair conduct. As herein noted the thirty-day termination clause alone does not render the lease void or create a tenancy at will.

Id.

400. 549 S.W.2d 837 (Ky. Ct. App. 1977).

401. *Id.* at 838.

402. *Id.*

403. 151 Ky. 345, 151 S.W. 662 (1912). In *Killebrew* the landlord promised to lease the premises for ten years and

so long thereafter as phosphate or phosphate-bearing rock may be found in what shall be considered by the . . . [tenant] as paying quantities [and w]hen the . . . [tenant] shall conclude that phosphate or phosphate rock is not found on said premises in paying quantities, he shall notify the party of the first party thereof in writing, and such notice shall terminate this lease, which however, shall continue until such notice.

Id. at 346, 151 S.W. at 663. The tenant in return promised to pay a set amount per ton of phosphate mined and a minimum of five dollars per year whether the land was mined or not. At the end of the second year, mining had not yet begun and the landlord refused to accept the minimum five dollar payment and brought an action to cancel the lease.

In upholding the lower court decision in favor of the landlord, the appellate court relegated the minimum payment obligation to a position of insignificance and declared:

[The lease] obligates the lessor, in unequivocal language, to continue the lease for 10 years, all the while holding the leased premises in readiness for the lessee's mining operations, but gives her no right to terminate the lease, to compel the lessee to begin mining the land, or to continue the work, if abandoned after being commenced. On the other hand, the lease does not bind the lessees to do anything. It permits them to begin the work of mining phosphate on the leased premises at anytime within 10 years that may be selected by them; to quit when they choose, or not to begin at all; and also the right to terminate the lease at anytime upon their mere ipse dixit that the land does not contain phosphate in "paying quantities;" it being left to them alone to decide whether it is in quantity sufficient to make the mining thereof profitable to them.

Id. at 349, 151 S.W. at 664. From this analysis, the court reasoned that the tenant's promise was illusory and that it did not provide consideration to support the landlord's promise. Thus, the landlord was free to terminate as her promise was not legally enforceable.

rule, the trial court held that a lease terminable at the will of the tenant is also terminable at the will of the lessor.⁴⁰⁴ The Court of Appeals of Kentucky reversed, offering the following rationale:

[I]t is quite apparent that the heart of the holding [in *Killebrew*] is directed to the necessity for good, sufficient and valid consideration to have passed between the parties. Failure at that point is what made the lease there a unilateral agreement. Thus, when it was said that a lease which is terminable at the will of one of the parties is also terminable at the will of the other, it was enunciating a correct principle of law regarding unilateral agreements. This is sound, and it is still the law today. But, where consideration is good and sufficient (and one dollar per acre per year is) then rights relative to termination may be expressly contracted by either party without bringing such instrument under the unilateral rule.⁴⁰⁵

Like the courts in *Myers* and *Thomas*, the court in *Cooke* correctly—and far more directly—saw the *Foley* problem as an issue of consideration.⁴⁰⁶ Unlike *Myers* and *Thomas*, however, *Cooke* actually decided the case on consideration grounds. The only difficulty is that the court's reasoning as to the presence of consideration is tenuous at best. The *Cooke* court regarded either the payment of the one dollar per acre per year or the promise to pay as sufficient consideration to support the landlord's promise to lease the premises to the tenant for, in effect, as long as the tenant wanted the premises. On this basis the court distinguished *Killebrew*, which had held that the tenant's promise was illusory and thus failed to provide consideration for the landlord's promise.⁴⁰⁷ However, little meaningful difference exists between the

404. 549 S.W.2d at 838.

405. *Id.*

406. *Id.*

407. For the *Cooke* court's explanation of how *Cooke* differed from *Killebrew*, see *supra* text accompanying note 405. While the court is not clear in its application of the consideration doctrine, it seems to say that the yearly one dollar per acre payment by the tenant was the consideration for the landlord's promise to deliver possession to the tenant until the tenant gave notice of termination. Viewed in this manner, the exchange perceived by the court was a promise by the landlord to provide the premises for an indefinite period in exchange for an annual payment based upon a one dollar per acre amount. Thus the landlord essentially agreed to keep the lease in effect so long as the tenant made the required annual payment. Another way of reaching the same result by focusing on the annual one dollar per acre payment would have been to have viewed the tenant as having promised to pay the one dollar per acre amount each year until

tenants' obligations in *Killebrew* and *Cooke*. In *Killebrew*, the tenant agreed to lease for a definite period of ten years, and to pay a minimum of five dollars per annum. In *Cooke*, the tenant likewise agreed to a minimum duration, one year, and to a minimum rental, one dollar per acre per year. The cases appear to be distinguishable only on the dollar amounts. The five dollar rent in *Killebrew* could be categorized as nominal, and thus a sham, while the one dollar *per acre* rent in *Cooke* could be viewed as significant enough to take it out of the token class.⁴⁰⁸ However, when one takes into account that the five dollar per annum obligation was contained in a 1908 lease and the one dollar per acre amount was contained in a 1973 lease, this distinction is questionable.⁴⁰⁹

Our analysis of these three modern cases on the terminability-at-will problem suggests the following conclusions. On one hand, all three cases recognize, with different degrees of directness, that the at-will lease problem is really a facet of the contract requirement of consideration. That recognition is an important and promising development in landlord-tenant law. On the other hand, only *Cooke* approaches the full potential of the modern notion that a lease should be treated as a contract in all respects, although its dubious distinction of *Killebrew* and its murky appreci-

notice of termination was given. Under this view the promise of payment, rather than the acts of payment, would be the consideration for the landlord's promise.

Simpler applications of the consideration doctrine were available to the court in *Cooke*. First, the existence of consideration generally is tested at the outset of the agreement. Thus, the tenant's promise to remain as a tenant for at least one year and pay the minimum rent could be viewed as consideration for the landlord's promise to provide the premises for an indefinite duration. This, of course, is the same method of analysis that was available in *Myers* to find consideration, had that been viewed as the proper basis for decision. See *supra* note 380 and accompanying text. Second, the court could have focused on the promise to give notice to effect termination as the consideration for the landlord's promise. Under this view, the exchange for the landlord's promise to provide the premises for an indefinite duration would be the promise of the tenant to give notice of termination. See E. FARNSWORTH, *supra* note 59, § 2.14, at 78.

408. There is support for the proposition that nominal consideration will not suffice to make a promise enforceable. See, e.g., *Fischer v. Union Trust Co.*, 138 Mich. 612, 101 N.W. 852 (1904); RESTATEMENT (SECOND) OF CONTRACTS § 71 illustration 5 (1979) ("Being advised that a gratuitous promise is not binding, A offers to buy B for \$1,000 a book worth less than \$1. B accepts the offer knowing that the purchase of the book is a mere pretense. There is no consideration for A's promise to pay \$1,000."). *Contra* RESTATEMENT OF CONTRACTS § 84 illustration 1 (1932).

409. Even if the court in *Cooke* had utilized more precise contract reasoning to support its decision by focusing on the minimum lease duration along with the minimum rent, or on the notice requirement for termination, see *supra* note 407, the court would still have had difficulty in distinguishing *Killebrew*, because the tenant in *Killebrew* also had agreed to a minimum duration and to give notice as a requisite to termination of the lease.

ation of the consideration doctrine do little to clarify Kentucky law. *Myers* and *Thomas*, by contrast, produce variations of traditional property doctrine. *Myers*, perhaps the least progressive of the three cases, converts the rigid but certain property rule of *Foley* into a vague and uncertain presumption; the change achieves the desirable goal of flexibility of approach, but at the cost of considerable unnecessary doctrinal uncertainty. The reasoning of *Thomas* suggests a jurisdiction in transition. By requiring consideration in the form of notice to terminate, *Thomas* directly addresses the underlying consideration problem posed by at-will leases. Unfortunately, however, the court retains a significant remnant of property law by also requiring that the lease provide a definite term, even if it be a terminable definite term.

We discussed *Foley* to show that the application of traditional property doctrine can produce decisions justified by very rigid rules that are insensitive to the transactional intentions and reasonable expectations of the parties. The three more recent cases indicate that a degree of confusion still permeates modern lease law, because that law has not yet rid itself of the disabling property influences illustrated by *Foley*.

2. *Good Cause Termination and Leases: The Franchise Cases*

Foley and the more recent cases provide the background for our assertion that property doctrine inhibits the ability of courts to impose a good cause termination requirement in lease cases. Recent franchise cases, which focus on the question of whether the franchisor can terminate or refuse to renew longstanding business relationships with the franchisee, provide more direct support for this assertion.

*Atlantic Richfield Company v. Razumic*⁴¹⁰ furnishes a fact pattern and resolution that is typical in franchise cases. Atlantic Richfield (Arco) had created a comprehensive scheme for the "selling, displaying, promoting and merchandising" of Arco products.⁴¹¹ Defendant Razumic leased and operated an Arco service station for seventeen years under several "dealer lease" arrangements with Arco. At the end of the seventeen years, the parties entered into another agreement, also designated a "lease," but which differed from the previous agreements in that it set a three-year term. One month prior to the end of the three-year term, Arco notified Razumic that the "lease" would not be renewed and directed him

410. 480 Pa. 366, 390 A.2d 736 (1978).

411. *Id.* at 377, 390 A.2d at 742.

to vacate by the last day of the term. When Razumic refused to vacate at the end of the term, Arco sued for possession. The trial court entered judgment for possession for Arco.⁴¹²

On appeal, the Supreme Court of Pennsylvania reversed.⁴¹³ As a preliminary step in determining the duration of the agreement, the court concluded that the arrangement between Arco and Razumic was a franchise, and not a lease. Following standard contract methodology, the court reached its conclusion by looking not only at the writing embodying the parties' agreement, but also at their course of performance under the writing. Both the language of the agreement and the parties' performance under it revealed a comprehensive marketing scheme which imposed obligations on Razumic and granted rights to Arco beyond those of an ordinary landlord-tenant relationship. The court held that the designation of the transaction as a lease did not accurately indicate its legal import, and concluded that the transaction created a franchise.⁴¹⁴

Having characterized the parties' arrangement as a franchise, the court proceeded to address the issue of its duration. Arco, no doubt on the basis of the designation of the agreement as a "lease," contended that the relationship terminated of its own accord at the end of the three year term, and that Arco, as lessor, was free to refuse to renew, for any reason or no reason.⁴¹⁵ Razumic, relying on cases and commentary imposing a duty on franchisors not to act arbitrarily in discontinuing franchise agreements, contended that Arco could not end the relationship at will after the expiration date.⁴¹⁶ In finding for Razumic, the court first noted that while the agreement set a duration of three years, and hence indicated that the parties could not terminate before that time, it was silent on the question of renewals after the expiration date.⁴¹⁷ To fill this perceived gap in the writing, the court again reviewed the same factual circumstances that had prompted its classifying the arrangement as a franchise in the first place. The court noted that "Arco here has over the years sought every assurance from Razumic that he will use his best efforts in selling, displaying, promoting, and merchandising Arco products and attracting, serving, and satisfying Arco customers," and that "[i]n

412. *See id.* at 369-71, 390 A.2d at 737-38.

413. *Id.* at 384, 390 A.2d at 745.

414. *Id.* at 372-76, 390 A.2d at 739-41.

415. *Id.* at 372, 390 A.2d at 739.

416. *Id.* at 376-79, 390 A.2d at 741-42.

417. *Id.* at 372, 390 A.2d at 739.

exchange, an Arco dealer such as Razumic can justifiably expect that his time, effort, and other investments promoting the goodwill of Arco will not be destroyed as a result of Arco's arbitrary decision to terminate their franchise relationship."⁴¹⁸ Concluding that Arco was under an obligation "to deal with its franchisees in good faith and in a commercially reasonable manner," the court held that Arco could not "arbitrarily sever its franchise relationship with Razumic."⁴¹⁹

While there is little to quarrel with in the court's result, its two-step method of analysis is curious. Initially, the court took great pains to classify the arrangement as a franchise before addressing the duration issue. Yet, the terminability question exists regardless of whether the arrangement is a lease or a franchise. The vital question would appear to be not whether the arrangement was a lease or a franchise, but whether *any* arrangement which specifies a definite term can be construed to require renewals. Like the majority, the concurring opinion concluded that the court could impose an obligation to continue the franchise only if the parties themselves had not agreed upon its duration.⁴²⁰ The concurring opinion, however, differed in its determination of whether the three year term provision did constitute such an agreement. It regarded the setting of the three year term as answering—negatively—both the question of whether termination prior to that time could occur, and the question of whether continuation of the arrangement after that term was necessary.⁴²¹ The majority read the term provision more subtly, as answering

418. *Id.* at 377-78, 390 A.2d at 742.

419. *Id.* at 378, 390 A.2d at 742. The court also stated that "the writing's leasehold terminology stating a three year term of occupancy does not govern the duration of the comprehensive contractual business relationship between Razumic and Arco. Rather, the language establishes a right of occupancy which the franchisee Razumic can reasonably expect will not be abruptly halted." *Id.* at 381, 390 A.2d at 743.

420. *Id.* at 384-85, 390 A.2d at 745 (Pomeroy, J., concurring).

421. *Id.* at 385-86, 390 A.2d at 746 (Pomeroy, J., concurring). According to the concurring opinion:

The parties in the case before us entered into an agreement which was to continue for a three-year period. No provision was made as to renewal of the contract. The majority, relying on authority which deals with franchise agreements having *no fixed term*, in effect excises the three-year term provision from the contract and reads into the contract a duty on the franchisor-lessor to keep the agreement in force indefinitely, with no provision of any sort for termination, so long as the franchisee fulfills its obligation to provide good service to the public, and otherwise performs as required by the agreement. I cannot agree.

Id. (emphasis added).

only the first question, leaving the second to be answered in favor of the franchisee if circumstances or policy so indicated.

But while the majority and the concurrence disagreed on the interpretation of the three-year term provision, they agreed on the more basic point that for our purposes makes *Razumic* an interesting and revealing case. The majority concluded that a franchise for a term cannot be arbitrarily discontinued,⁴²² while the concurrence concluded that the courts should impose a prohibition against arbitrary termination only when the franchise is for an indefinite period;⁴²³ but the concurring judges agreed that the promisee is entitled to relief against arbitrary termination only when the parties' arrangement is something other than a lease.⁴²⁴ In short, the entire court in *Razumic* regarded the preliminary classification step as vital. The classification step is vital, however, only on the assumption that designation of the transaction as a lease would foreclose the possibility of implying or constructing an obligation on the landlord not to arbitrarily terminate the arrangement. The necessary assumption of the *Razumic* discussion is thus that the property classification prevents the free exercise of contractual interpretation of the transaction.

Razumic's distinction between leases and franchises pervades the case law, with courts refusing to impose a good faith obligation in transactions that are labelled leases. In *Kerr-McGee Corp. v. Cutter*,⁴²⁵ for example, the plaintiff oil company brought a forcible entry and detainer action when the tenant service station operator refused to yield possession after a termination notice. The court found the franchisor-franchisee argument unpersuasive, stating:

It has consistently been held that if the relationship is that of lessor-lessee, . . . courts will not imply a good cause requirement in order to terminate the lease, but will permit the lease to be terminated in accordance with the contract provisions. We adopt the majority view that a landlord-tenant relationship existed between the parties, and that termination of the lease is to be determined by the traditional principles of real property and

422. *Id.* at 381 & n.12, 390 A.2d at 743-44 & n.12.

423. *Id.* at 387-88, 390 A.2d at 746-47 (Pomeroy, J., concurring).

424. *Id.* at 384-88, 390 A.2d at 745-47 (Pomeroy, J., concurring) (case cannot be treated as if only dealing with a lease).

425. 564 P.2d 215 (Okla. 1977). See also *Mobil Oil Corp. v. Lione*, 66 Misc.2d 599, 322 N.Y.S.2d 82 (3d Dist. Ct. 1971) (court reluctantly allowed landlord to terminate service station tenant without cause after 19 years of annual renewal of the lease).

contract law.⁴²⁶

While the *Kerr-McGee* court offered no explanation to support its conclusion, it is clear that if a transaction is categorized as a lease, an automatic and unyielding consequence attaches. Neither the landlord's right to terminate in accordance with the terms of the lease nor his right to refuse to renew a lease upon its expiration are encumbered by a good faith requirement. On the other hand, if the transaction is classified as a franchise, the termination or nonrenewal right is magically transformed from one without restriction to one bridled with the requirement of good faith.⁴²⁷ Again, the modern lease has not been fully absorbed into general contract law.

IV. SUMMARY AND CONCLUSION: PROPERTY AND CONTRACT ANALYSES IN LANDLORD-TENANT LAW

Traditionalists advance two arguments. First, the claim that conveyance reasoning is fundamentally different from contract reasoning; second, they claim that the application of contract reasoning to landlord-tenant disputes would lead to the more just resolution of those disputes.⁴²⁸ The first is a descriptive and the second a normative or prescriptive claim.⁴²⁹ Together, these claims provide a useful framework for summarizing our discussion, and for stating our position on the significance of the property-contract theme.

A. *Traditionalists and Revisionists*

A lease is, in part, a conveyance.⁴³⁰ "[A] conveyance is regarded as an executed transaction by virtue of which something is transferred from one person to another."⁴³¹ That deceptively simple statement contains two ideas of great importance for the

426. 564 P.2d at 217-18.

427. *Id.* at 217.

428. For a discussion of this traditionalist assertion, see *supra* note 2 and accompanying text.

429. See Posner, *The Present Situation in Legal Scholarship*, 90 YALE L.J. 1113, 1115-16 (1981) ("[Traditional] doctrinal analysis has always been at once positive and normative. It analyzes what the law is but often it also advocates changing some rule of law to make it conform better to the central trends, themes, or concepts that are revealed in the positive analysis.")

430. 1 AMERICAN LAW OF PROPERTY, *supra* note 1, § 3.11; J. CALAMARI & J. PERILLO, *supra* note 19, at 434; C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 69 (1962). See R. SCHOSHINSKI, *supra* note 1, at 22.

431. RESTATEMENT OF PROPERTY § 450 comment k, at 2909 (1936). See also *id.* § 522.

property-contract theme. First, as an “executed transaction,” a lease is regarded as complete, insofar as the landlord’s performance obligation is concerned, no later than the date set for the tenant’s entry into possession.⁴³² Second, the “something” which is created and transferred by the conveyance is an “estate” in the tenant.⁴³³ An estate has two essential characteristics. It is a “possessory” interest, characterized by an exclusive right to enjoy and control access to the space covered by the lease;⁴³⁴ and it is a possessory interest “in land,” such that, at least historically, use by the tenant of structures or improvements on the premises is secondary to use of the land, and not the main purpose of the transaction.⁴³⁵

In addition to being a conveyance, however, a lease is also a bilateral contract that expressly or impliedly imposes on the landlord and the tenant executory obligations—that is, obligations to be performed after the tenant has received possession.⁴³⁶ For example, the landlord impliedly promises to protect the tenant’s quiet enjoyment of the premises during the term,⁴³⁷ and he may make additional express promises, such as to repair the premises.⁴³⁸ The tenant almost universally promises to pay rent at stated intervals during the term, and generally will make additional promises with respect to the use and transfer of the leased premises,⁴³⁹ and to avoid committing waste.⁴⁴⁰

432. For a further discussion of the “executed transaction” idea, see *infra* notes 449-53 and accompanying text.

433. See RESTATEMENT OF PROPERTY § 9 (1936) (“estate” is an interest in land which “is or may become possessory”); *id.* §§ 19-22 (defining term of years, periodic tenancy, tenancy at will, and occupancy at sufferance as “estates”).

434. *Id.* § 7 & comment b (possession entails “control” over land and power “to exclude other persons therefrom”).

435. See, e.g., *Javins v. First Nat’l Realty Corp.*, 428 F.2d 1071, 1074-75 (D.C. Cir. 1970) (agrarian economy concepts are dated); *Boston Housing Auth. v. Hemingway*, 363 Mass. 184, 189, 293 N.E.2d 831, 837 (1973) (land was the essential part of the lease transaction at common law); 1 AMERICAN LAW OF PROPERTY, *supra* note 1, § 3.11, at 203 (in an agrarian economy, land was the principal goal).

436. See *supra* note 430 (citing authorities explaining bilateral contract aspects of leases).

437. See 1 AMERICAN LAW OF PROPERTY, *supra* note 1, § 3.47.

438. RESTATEMENT (SECOND) OF PROPERTY § 11.3 & comment a (1977) (duty to keep property up to health codes).

439. *Id.* § 12.1 (rent); *id.* § 13.1 & comment c (repair).

440. See, e.g., *id.* ch. 12 introductory note, at 383-84 (“The obligations of the tenant inherent in the landlord-tenant relationship which arise without the aid of any express promise by the tenant are to pay the rent reserved, not to commit waste, and not to use the leased property for an illegal purpose.”); *id.* § 12.1 comment b, at 386 (obligation to pay fair rental value if no reservation of rent in the lease).

Comparison of the conveyance view with the contract (i.e., bilateral contract) view of the lease indicates that to call a lease a conveyance is not to deny that it is a contract, but rather to classify the lease as a particular type of contract, or, at least, to apply contractual ideas in a particular way. Some writers have suggested that the conveyance component of the lease makes it essentially a unilateral contract, with the tenant promising to pay rent in return for the landlord's act of executing the lease or delivering possession to the tenant.⁴⁴¹ This theory, in effect, treats the lease as a sale for a specified duration, a transaction "in which transfer of ownership in a physical thing is complete and is the sole concern of the parties to the contract."⁴⁴² As we have discussed, the sale analogy—with its allocation of risk of loss to the tenant-purchaser after delivery—has figured prominently in the law of destruction of the leased premises.⁴⁴³

Confronted with these opposing views, Williston has chosen a middle course, labeling the lease a "partly bilateral" contract.⁴⁴⁴ While that unique description appears anomalous, it avoids the conceptual difficulties inherent in the unilateral contract theory. Under that theory, as we just noted, the tenant promises to pay rent in return for the landlord's act either of executing the lease or delivering possession to the tenant. This act-for-promise conception, however, does not stand up to analysis. Property law does not regard the landlord as having fully performed merely by executing the lease. Rather, the landlord is considered to have fully performed only if legal or actual possession is available to the tenant on the day the lease term is to begin.⁴⁴⁵ The delivery of possession is an obligation of the landlord, not merely a requested act, and breach of the obligation allows the tenant a damages remedy.⁴⁴⁶ It is true that the landlord's affirmative obligations under the lease can be regarded as *substantially* satisfied very early in the transaction, by the mere delivery of possession at the outset of the lease term. It is perhaps for this reason that Williston defined the lease as "partly bilateral," highlighting

441. See Friedman, *supra* note 2, at 166 (lease is complete upon execution); Lesar, *Landlord and Tenant Reform*, 35 N.Y.U. L. REV. 1279, 1283-84 (1960) (tenant must pay rent even if property is destroyed).

442. Note, *supra* note 219, at 470.

443. See *supra* Part II-A.

444. S. WILLISTON, *supra* note 20, § 890, at 580.

445. See 1 AMERICAN LAW OF PROPERTY, *supra* note 1, § 3.37 (discussing landlord's obligation to deliver legal or actual possession, or both).

446. *Id.* § 3.37, at 251-52.

the fact that after delivery of possession only the tenant has material executory obligations.⁴⁴⁷ Nevertheless, under no accurate conception can the lease be regarded as a unilateral arrangement, under which the landlord is under no executory obligation at all after agreeing to the lease.⁴⁴⁸

Although Williston's formulation is thus preferable, both he and the unilateral contract theorists appear to be striving to make essentially the same point: The significance of the conveyance view of the lease is that it interferes with the application of normal bilateral contract analysis to the lease transaction. For our part, we prefer to make the point in a somewhat different way. We think it is preferable to say simply that a lease is a bilateral contract—wholly rather than partly—but that the “conveyance” view operates to restrict judicial determinations of what comprises the landlord's agreed exchange for the tenant's rent obligation, and when this is received by the tenant. Thus, under the “executed transaction” component of conveyance reasoning,⁴⁴⁹ the landlord has substantially performed when possession is delivered at the outset of the lease term. That, of course, is the conveyance view that Williston emphasized by describing the lease as a “partly bilateral” contract. Williston's description is a useful, though incomplete,⁴⁵⁰ explanation for results in various landlord-tenant cases. On the one hand, the view that the landlord has substantially performed by delivering possession can be used to explain why the landlord traditionally has no implied obligations concerning the habitability of the premises. If the landlord's essential promise is the delivery promise, which is performed by the landlord's making possession available to the tenant at the start of the lease, it would be unnecessary for courts to infer or construct other covenants to perfect the tenant's bargain;⁴⁵¹ the bargain is already substantially complete upon delivery. Moreover, if the

447. Our textual discussion does not approve, but merely attempts to explicate, the unilateral contract conception as applied to leases. As we note below, the view that the landlord has substantially performed merely by delivery of possession is inadequate to explain the results in many lease cases favoring the tenant. See *infra* notes 454-61 and accompanying text.

448. See J. CALAMARI & J. PERILLO, *supra* note 19, § 1-10, at 17-18 (“Every contract involves at least two contracting parties. In some contracts, however, only one party has made a promise and therefore only he is subject to a legal obligation. Such a contract is said to be unilateral. If both parties have made promises, the contract is bilateral.”) (footnote omitted).

449. See *supra* note 431 and accompanying text.

450. See *infra* notes 454-61 and accompanying text.

451. See, e.g., *Marini v. Ireland*, 56 N.J. 130, 143, 265 A.2d 526, 533 (1970) (“A covenant in a lease can arise only by necessary implication from specific

tenant's main inducement to the bargain is the receipt of a possessory interest, any other express promises made by the landlord, such as promises to repair or not to compete, would have to be classified as nonessential or collateral, the breach of which would not justify rescission.⁴⁵² Finally, if receipt of the object constitutes the essence of the tenant's bargain, risk of loss would appropriately be on the tenant after delivery of the premises by the landlord.⁴⁵³

On the other hand, the "partly bilateral" description is incomplete because property law *does* regard the landlord as having a material obligation during the lease term to protect the tenant's quiet possession of the premises.⁴⁵⁴ Thus, another and different consequence of conveyance reasoning must be identified to illustrate fully the differences between property and contract reasoning. The conveyance idea that the tenant receives a "possessory" interest "in land"⁴⁵⁵ guarantees the tenant not merely a right to initially receive possession, but also a right to have and "enjoy" it during the term of the lease. In protecting the tenant's "possession" during the term, primarily under the rubrics of "eviction" and "constructive eviction,"⁴⁵⁶ the conveyance view gives the tenant more rights than it logically must, since the landlord could be regarded as having performed substantially or fully by mere delivery of possession. Yet, at the same time conveyance reasoning gives less than it could, since it limits, or can limit, the determination that an actionable eviction from possession has occurred, as we noted in comparing the property doctrine of eviction with the contract doctrine of material breach.⁴⁵⁷

Moreover, the notion that the tenant has a protectable interest during the lease term is necessary to account for the result,

language of the lease or because it is indispensable to carry into effect the purpose of the lease.").

452. See RESTATEMENT OF CONTRACTS § 290 comment a (1932) ("because the grantor of a lease . . . has performed the major part of his side of the transaction," any other covenants "are subsidiary"). For a discussion of the impact of the landlord's breach of "subsidiary" promises on the determination of whether the landlord has substantially performed his or her lease obligations, see *supra* notes 50-66 and accompanying text.

453. See *supra* notes 146-51 and accompanying text (under analogy to sale of goods, risk of loss is on tenant after delivery of possession).

454. See *supra* note 437 and accompanying text. For a discussion of cases that address whether eviction of the tenant is a breach of the covenant of quiet enjoyment, see *supra* notes 70-74 and accompanying text.

455. See *supra* notes 433-34 and accompanying text.

456. See *supra* notes 70-117 and accompanying text.

457. See *supra* notes 104-113 and accompanying text.

reached in some cases⁴⁵⁸ and entertained in others,⁴⁵⁹ that the tenant is excused from his rent obligation upon destruction of the leased premises after delivery, a consequence that cannot be explained by the standard "lease as sale" view adopted by some of the decisions.⁴⁶⁰ If, as a result of fortuitous events, the tenant loses the principal use of the premises for which he contracted, he can be excused. However, while this component of the conveyance view gives the tenant an advantage that the "executed transaction" component does not, it also operates to limit that material advantage. As we discussed above, destruction of buildings on the leased premises or the supervening illegality of one particular use of the leased premises will not excuse the tenant unless the lease contract specifically states that use of the buildings, or use for a particular purpose, is the essence of the transaction. In the absence of such a lease specification, conveyance reasoning ascribes to the tenant a primary purpose to use the land rather than the buildings, or to use the leased premises for some remaining legal purpose.⁴⁶¹

When it is understood that "conveyance" and "contract" are, in essence, two conceptions of contract, rather than totally different legal concepts, the exact nature of the dispute between traditionalists and revisionists comes more into focus, as does the partiality of each view. The gulf between conveyance and contract posited by traditionalists and the unity of contract and conveyance asserted by revisionists are both more rhetorical than real. The asserted chasm between property and contract analyses gives the advocate a strong argument for urging reform of outmoded property rules, and it gives the court a justification for adopting the reform. In fact, however, the results typically lamented by traditionalists as outmoded can be explained as restricted applications of contract doctrines, such as material breach or frustration of purpose, as the revisionists have noted. On the other hand, to point out that the conveyance rules abhorred by the traditionalists are in essence contract rules only superficially answers the traditionalist critique of landlord-tenant law. The gravamen of the traditionalist critique centers on the unfortunate results often reached by the courts in landlord-tenant cases in de-

458. See *supra* notes 177-97 and accompanying text (discussing minority common law destruction rule and the American "exception" to that rule).

459. See *supra* note 160 (tenant is excused if land is destroyed).

460. See *supra* notes 146-48 & 182 and accompanying text.

461. See *supra* notes 152-72 and accompanying text.

nying, for example, that the tenant is entitled to rescind for the landlord's breach of promise to repair, or upon the destruction of the leased premise. That the argument in support of that critique is wrong does not make the critique wrong. For instance, while the revisionists contend that constructive eviction is material breach, in an important sense it is not material breach as that concept is worked out generally in contract cases other than leases. Also, while the destruction cases admittedly apply frustration of purpose reasoning, they do not apply it the way that a court dealing with a transaction other than a lease might apply it. To avoid the claim that we have chosen outdated examples, we have also noted that lease cases still lag behind general contract cases on two important current problems—the scope of the warranty of habitability, and the need for an obligation of good faith dealing by the landlord. Thus, the revisionists at best have shown, correctly, that conveyance reasoning is essentially contractual; but they have overlooked the equally fundamental point that conveyance reasoning is essentially idiosyncratic or limited contractual reasoning, and as a result, the traditionalists' fundamental claim of doctrinal lag between property and contract analyses is valid.

B. *Property Law and Reform*

Round one—the debate over whether there are important differences between the analyses employed in landlord-tenant cases and in contract cases generally—thus goes to the traditionalists. Round two—centering on the traditionalists' additional claim that contract reasoning is necessarily superior to property reasoning⁴⁶²—has hardly yet occurred. On this second issue, the traditionalists blithely seem to assume that contract reasoning solves the problems they identify in lease cases, while the revisionists apparently have rested their case by demonstrating that the traditionalists' abhorred property reasoning is really contract reasoning. While it would be inappropriate, given both the embryonic current state of this portion of the debate, and the length of our essay already, to offer a full analysis of this dispute, we will venture a few remarks.

The traditionalists' claim that contract reasoning is superior to property reasoning can be assailed on two fronts: First, by attempting to show that contract reasoning does not necessarily produce the results that traditionalists seek; and second, by dem-

462. See *supra* notes 2 & 11 and accompanying text.

onstrating that property reasoning does not intrinsically inhibit those results.⁴⁶³ Since we have argued elsewhere that the former approach works best with regard to the role of contract ideas in summary dispossess proceedings,⁴⁶⁴ we will confine ourselves here to arguing that property reasoning does not *necessarily* prevent the achievement of results favorable to the tenant on the topics canvassed in this essay.

With respect to the “independency” of lease covenants, we suggested in Part I that the property doctrine of constructive eviction serves as a substitute for the contract doctrine of dependency. Thus, constructive eviction doctrine allows the tenant to rescind when the landlord fails to substantially perform his obligations to the tenant, just as contract doctrine allows the promisee to rescind upon the promisor’s material breach.⁴⁶⁵ Property doctrine, however, refuses to find a material breach in lease cases unless the landlord’s failure of performance undermines the tenant’s “possession” of the premises.⁴⁶⁶ The expectations protected under this “possession” concept are generally confined to the tenant’s presumed expectation of physical access to the leased space, and differ from the transactional expectations that might be indicated by the tenant’s needs and the landlord’s promises in a particular case—for example, the expectation that the landlord will keep the premises in repair, and not merely available; or that he will refrain from defeating the tenant’s economic prosperity by competition. Because of this different approach, the property version of material breach differs in quite a few cases from the contract version.⁴⁶⁷

However, we believe that this divergence is not necessitated by the concept of “possession,” even as that concept has been developed by the cases. It seems to us that a critical conceptual movement in property law occurred when the law moved from the view that the landlord’s covenant of quiet enjoyment protected the tenant from acts of dispossession by the landlord (the

463. One could also attempt to argue *both* that the traditionalist’s contract law does not produce the desired results, and that property law, properly understood, could produce them. In so doing, one would be making the exact opposite case from that of the traditionalists, and arguing in effect for the superiority of property over contract reasoning in landlord-tenant cases. As we have noted, we do not think that such a strong thesis can be maintained successfully, although that is a topic for another day. *See supra* note 12.

464. *See Chase, supra* note 11, at 206-25.

465. *See supra* notes 70-117 and accompanying text.

466. *See supra* notes 75-105 and accompanying text.

467. *See supra* notes 104-113 and accompanying text.

doctrine of actual eviction) to the view that the covenant protected the tenant from acts and omissions short of actual eviction but having the same practical effect (the doctrine of constructive eviction).⁴⁶⁸ With this transition, property law moved from the view that the covenant of quiet enjoyment protected the tenant's sheer physical possession to the view that it protected the tenant's beneficial use and enjoyment of the premises. Admittedly, in practice "use and enjoyment" is often read with a heavy possession gloss, so that acts or omissions that did not have the effect of making the premises unusable might not count as a constructive eviction.⁴⁶⁹ But to us, the significant point is that property law now imposes an obligation on the landlord to protect the tenant's "use and enjoyment" of the premises. This injects a potentially expansive variable into the determination of the scope of that obligation. Once "enjoyment" enters the picture, it becomes just as possible to read the covenant of quiet enjoyment broadly, by defining possession in terms of enjoyment, as it is to read it narrowly, by defining enjoyment in terms of possession.⁴⁷⁰ As we have noted, some courts have chosen the former view and defined the covenant broadly, making it essentially a transactional bargain-protecting device. Under this approach, the covenant protects the tenant from any act or omission of the landlord that "renders the premises substantially unsuitable for the purpose for which they are leased."⁴⁷¹ When the covenant of quiet enjoyment is read this way, it is certainly no narrower than the contract-based warranty of habitability. Ironically, given the recent restrictive interpretations of the warranty,⁴⁷² it actually seems *more* expansive. To be sure, we agree that it is generally easier for a court to frame a material breach question in the contract terminology of material breach and rescission than in the more circuitous vocabulary of quiet enjoyment and constructive eviction. We also think that doing so avoids the possibility that the court's analysis will be tainted by the intrusion of restrictive meanings that have encrusted the property concepts. Our point, however, is that while it may be *preferable* to employ a straightforward contract analysis, it is not *necessary* to do so.

468. See *supra* notes 75-80 and accompanying text.

469. See *supra* notes 94-105 and accompanying text.

470. See *supra* notes 114-17 and accompanying text.

471. *Reste Realty Corp. v. Cooper*, 53 N.J. 444, 457, 251 A.2d 268, 274 (1969). For a further discussion of the expansive definition of the covenant of quiet enjoyment, see *supra* notes 114-16 and accompanying text.

472. See *supra* notes 263-68, 279-92 & 314-23 and accompanying text.

With respect to destruction of the leased premises, discussed in part II, much the same point can be made. The basic doctrine that can be used on behalf of the tenant is already in place when a court adopts the *Baker* "subject matter" version of conveyance reasoning.⁴⁷³ Under that view, the tenant is not the buyer of an estate so much as he is the consumer of a product intended to be used for certain purposes.⁴⁷⁴ Although the common law usually irrebutably presumes that the tenant intends to use the land, the basic construct can be adopted to work for the tenant with a simple redefinition of purpose, as in the minority common law cases and the American "exception" to the *Baker* rule.⁴⁷⁵ Thus, as in the covenant of quiet enjoyment cases discussed above, results favorable to the tenant can be achieved by employing concepts familiar under the conveyance view of the lease.⁴⁷⁶ Once again, translation of the *Baker* "subject matter" analysis into overt contractual frustration of purpose terms seems preferable, but not absolutely necessary.

With respect to the warranty of habitability, we attempted to suggest in part III-A the irony that results when a court, having adopted a contractual view of the lease as a justification for finding an implied warranty, then turns around and narrowly defines the scope of the warranty, thus undercutting the initial advantage of the contract analysis.⁴⁷⁷ We see more than an echo of the property approach to determination of the landlord's obligations in this particular development, since the courts appear to be starting with a very narrow definition of the warranty of habitability just as they originally started with a narrow definition of the covenant of quiet enjoyment.⁴⁷⁸ But just as we see no inherent obstacle to the development of a broad covenant of quiet enjoyment, we also see no inherent obstacle to the development of a broad warranty of habitability. Indeed, since cases adopting the implied warranty of habitability generally *start* with the proposition that a lease "should be interpreted and construed like any other con-

473. See *supra* notes 152-72 and accompanying text.

474. See *supra* notes 170-72, 182 & 219-32 and accompanying text.

475. See *supra* note 177 and accompanying text (minority common law cases on destruction); *supra* notes 178-97 and accompanying text (American "exception" to the common law destruction rule).

476. Likewise, results favorable to the tenant can be achieved under the analogy of the lease to a sale of goods, see *supra* notes 146-48 and accompanying text, if the installment sale analogy is employed. See *supra* notes 216-18 and accompanying text.

477. See *supra* notes 249-333 and accompanying text.

478. See *supra* notes 81-90 and accompanying text.

tract,"⁴⁷⁹ it is not the argument for an expansive warranty that seems peculiar and in need of special explanation, but rather the argument for the narrow warranty currently being employed by the cases.⁴⁸⁰

Finally, with respect to the landlord's obligation to deal in good faith with the tenant, the courts rather woodenly assume, as we noted in Part III-B, that classification of the transaction as a lease prevents imposition of such an obligation, while classification of the transaction as a franchise would allow it.⁴⁸¹ The apparent rationale for this distinction is that the absence of any requirement of cause to terminate an existing lease relationship is a doctrinal incident of the concepts of periodic tenancy, tenancy at will, and term of years. Yet, it is not at all clear to us that moving the transaction into the franchise category is effective to yield a different result.⁴⁸² More basically, it is not at all clear to us that moving it out of the lease category is necessary to achieve that result. The courts adhering to this dubious distinction between leases and franchises have failed to distinguish between historical and logical incidents of common law tenancies. If the obligation to deal in good faith were precluded by common law concepts, then the recent and widely adopted doctrine of retaliatory eviction⁴⁸³ would be quite impossible. That doctrine imposes a negative obligation on the landlord to avoid dealing in bad faith, which is analytically akin to the affirmative obligation to deal in good faith, an obligation which we believe should be generally recognized. It is curious that courts that have no difficulty requiring the landlord to avoid the one should have such great difficulty

479. See *supra* notes 3 & 242 and accompanying text.

480. The point of our criticism in the text is that since a lease is to be treated "like any other contract," there is very good doctrinal reason for refusing to limit the scope of the warranty of habitability as recent cases have done. Additionally, we would point out that there is no doctrinal reason why the covenant of quiet enjoyment itself could not have served as the conceptual means for recognition of the duty now developed under the warranty of habitability. See Chase, *supra* note 11, at 199-206. Nor is there any doctrinal reason why the abatement remedy could not have been extended to breaches of the covenant of quiet enjoyment. See *Reste Realty Corp. v. Cooper*, 53 N.J. 444, 462 n.1, 251 A.2d 268, 277 n.1 (1969).

481. See *supra* notes 410-27 and accompanying text.

482. See *supra* notes 420-21 and accompanying text.

483. See, e.g., *Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1968). See also RESTATEMENT (SECOND) OF PROPERTY, §§ 14.8-14.9 (1977). The source of retaliatory eviction doctrine is specifically statutory in some jurisdictions. *Id.* § 14.9 comment f. The seminal retaliatory eviction case, however, is *Edwards v. Habib*, which develops the doctrine without the aid of a specific retaliatory eviction statute.

in requiring him to achieve the other. Perhaps if courts were to see this connection, the obligation to deal in good faith would lose its apparently alien appearance.

C. Conclusion

In resolving landlord-tenant disputes, courts do, as courts must, apply doctrines and concepts to the facts before them. Revisionists suggest that there is less to the property-contract theme than meets the eye, because the doctrines and concepts that the courts apply in the areas that traditionalists focus on are in fact contract doctrines and concepts, or closely akin to them.

But to stop there, as the revisionists have, is to achieve a Pyrrhic victory. The revisionists' "answer" to the traditionalists minimizes the entire property-contract debate, rendering it almost trivial and uninteresting. The revisionist point that property and contract cases employ the same or essentially similar doctrines and concepts is an important insight, but it only begins the analysis. Properly pursued, the traditionalist analysis develops the point that important differences remain between the standard approach of a court in resolving disputes in lease cases, and its approach in general contract cases. That critique is essential in order to avoid the complacency that would deny the urgent need for reform of landlord-tenant law. It is also essential to an understanding of the point, occasionally missed by revisionists,⁴⁸⁴ that the need for reform arises *because of* the inadequacy of the doctrines and concepts employed in landlord-tenant cases.⁴⁸⁵

It is thus the essential merit of the traditionalist critique to steadfastly focus on the substantive doctrines and concepts employed in landlord-tenant cases, and to suggest that those doctrines and concepts need modernization. We think, however, that the traditionalists have fallen into error in arguing that contract law is the only means to modernization and reform: Just as the revisionists have seen too little in the property-contract debate, the traditionalists may have seen too much. Without at all denying the importance and urgency of the traditionalists' goals, we prefer to think that the law in both mansions—property and contract—has the resources for achieving these goals.

484. See Chused, *supra* note 6, at 1386 n.7 ("Property-contract disputes . . . have nearly played themselves out. Procedure is the most important area of review for present day lease law aficionados.").

485. See Browder, *supra* note 11, at 100 ("It must be conceded that current troubles in this area probably have their origins in traditional property law.").

