PROPERTY OUTLINE

I. THE INTERDEPENDENCE OF PROPERTY RIGHTS

1. *Class Introduction and Overview: Conceptualizing and Studying Property Law*

- a. Functions of property law
  - i. Defines what property is—anything of value that the state protects
    1. Property is hugely political
    2. Property is not an indivisible whole—bundles of entitlements
    3. Core entitlements—right to exclude, privilege to use, power to transfer, immunity from loss.
    4. Not enough only to ask who owns the property; need to resolve competing demands of owner w. others who have interest.
  - ii. Defines what we can do w/ property
    1. Tensions limiting the core entitlements.
    2. Balancing property interests of each owner.
  - iii. Creating a system that balances competing rights and responsibilities.
    1. Property law derives from a social compact, which leads to sovereign mandate.
       - a. At the base, people agree to submit to a form of gov't.
    2. Sovereign sets ground rules on property system.
       - a. Has to define rights, rights determine what will be protected.
       - b. Anytime there's a clash of entitlements, the state has to resolve that dispute.
         - i. Non decisions equally as significant as decisions.
    3. Property interests operate at two levels
       - a. Inter-sovereign
       - b. Within sovereign system (core entitlements; every one has a counter entitlement.)
         - i. Right to exclude v. right of access
         - ii. Privilege to use v. security from harm
         - iii. Power to transfer v. powers of ownership
         - iv. Immunity from loss v. power to acquire
    4. Sovereign holds some property rights for the public—stream beds, navigable waters.
    5. Individuals hold 2 sets of property rights
       - a. Publicly held
       - b. Privately held
    6. Property on an individual level is combination of rights/responsibilities.
- b. Normative approaches to property law
  - i. Traditional American Indian conceptions of property
    1. Traditionally regarded as spiritual—therefore not possible to "own" the land; property rights not exclusive; no concept of rent.
  - ii. Positivism and legal realism
    1. Positivism—equate law w/ rules from gov't for reasons of social policy (protect individual rights, increase social wealth, etc.).
       - a. Separate law from morals—although moral arguments might underlie rules of law, they aren't fully enforced legal sanctions.
    2. Legal realism—the law is what officials will do in resolving disputes.
  - iii. Justice and fairness
  - iv. Utilitarianism, social welfare and efficiency
  - v. Social relations
    1. Analyze property rights as relations among people regarding control of valued resources—every entitlement is limited by the competing rights of others.
    2. Examine role property rights play in structuring social relations and the way in which social relations affect access to property.
  - vi. Libertarian and progressive approaches to property.

2. ***The Common Law of Trespass and Public Policy Limits on the Right to Exclude***
    a. Public policy limits on the right to exclude
        i. Central right to ownership of property—right to exclude others from property.
        ii. Broad but not absolute—non owners may have right of access in some cases.
            1. Sources of right of access: common law, fed and state public accommodations statutes, labor relations statutes, fed and state constit. guarantees of freedom of speech.
    b. Common law trespass
        i. *Unprivileged intentional intrusion on property possessed by another.*
            1. Intent—met if D engaged in voluntary act, not necessary to show that D intended to violate owner's legal rights.
                a. Mistaken entry onto land can still result in liability.
            2. Intrusion—met the moment the non owner enters property.
                a. Can occur upon physical entry by person, agent (like employee) or object (building extending into neighbor's property).
        ii. Remedies
            1. Damages: nominal, compensatory (what it takes to repair; fair market value v. present value), punitive
            2. Injunction: legal order that trespasser must stay off.
            3. Declaratory judgment: establishing right/no right to go on property
            4. Criminal remedies
        iii. Trespass is privileged if:
            1. Consent: Entry is done w/ consent of owner;
                a. See, e.g., ***Food Lion v. ABC*** (4th Cir. Said consent was just for initial entry, but not for what happened after—videotaping meat packing practices).
                b. NB: consent, even if through fraud, is effective if it doesn't interfere w/ security or privacy. Where implied consent is fraudulent, still effective bc of implied public policy of access to property (e.g., testers, restaurant critics; but not ok to steal trade secrets from competitor).
            2. Necessity: Entry is justified by necessity to prevent more serious harm to persons/property;
            3. Public policy: Entry is otherwise encouraged by public policy.
                a. EX: stopping crime, rescuing someone, visiting graves on public property.
        iv. See, e.g., ***Desnick v. American Broadcasting Companies, Inc***. (Ds' actions didn't constitute trespass bc they didn't disrupt the activities of the office, there was no invasion of a person's private space, no embarrassing details publicized, no eavesdropping of private conversations, no violation of patient/client privilege, no invasion of legally protected interest in property of privacy).
            1. Clinic was open to public, had to accept risk of this happening.
            2. Test patients entered clinics that were open to anyone expressing desire to get eye care, tapes were of doctors' professional capacity.
            3. Wasn't interference w/ ownership of land, no invasion of person's private space.
    c. Criminal trespass
        i. Normally initiated by authorities; purpose is to deter wrongful activities and punish those engaging in them.
        ii. Criminal statutes: "After being forbidden by owner" plus punishment v. common law definition: no forbidding element and no punishment required.
            1. See, e.g., ***State v. Shack*** (D's refusal to leave P's property was outside bounds of trespass statute bc employer had no legitimate need to deny the MWers the opportunity to receive aid from fed, state or local services, or from charitable groups, and therefore didn't infringe upon right of exclusion of P).
                a. NB: Ct didn't think freedom of K applied bc MWs have so few rights—can't contract away all of your rights. Wants to grant MWs rights that are as broad as possible.
                b. Farmer's security/privacy v. workers' well being.

c. Narrow rule: a farmer can't deny representatives from fed., state, local, or recognized charitable agencies from entering his property w/ the sole purpose of assisting MWs. Members of the press may not be denied reasonable access if the MW doesn't object to seeing them.
d. Broad rule: MWs are allowed to receive visitors.

d. Trespass to computer systems
   i. Trespass to chattels—applies to personal property.
      1. P must allege some injury to property or show dispossession/intentional "using or intermeddling" with it.
         a. See, e.g., ***Intel Corp v. Hamidi*** (no trespass could be shown in absence of dispossession unless communication damaged recipient's computer system or impaired its functioning).
e. Right to roam
   i. Half of states allow hunting on private lands unless owner has posted "no trespassing" signs.

3. ***Right of Reasonable Access to Property Open to the Public***
   a. Private property (right to exclude strongest)—private property held open to public (medium; right of reasonable access)—public property (right of access absolute).
   b. <u>Right of reasonable access</u>
      i. You can't be excluded for an arbitrary or discriminatory reason—have to have a good reason for kicking you out.
      ii. No restrictions based on race/color/creed/national origin.
      iii. Analysis: case-by-case, look at facts and why person was excluded.
         1. Is there right of reasonable access?
         2. Were they excluded on arbitrary grounds?
   c. <u>Traditional common law rule</u>: duty on innkeepers and common carriers (planes, trains, buses) to serve members of public w/o discrimination, unless they have a good reason not to provide services to an individual.
      i. Minority rule: expands right of reasonable access to all businesses open to the public.
         1. See, e.g., ***Uston v. Resorts International Hotel*** (An owner of private property that is open to the general public does not have an absolute right of exclusion—can't exclude people unreasonably, and has duty not to act in arbitrary or discriminatory manner toward people who come on premises).
            a. NB: Ct gets around majority rule by citing public policy; demonstrating how law in action has evolved from law on books—spectrum analysis.
            b. The more private property is devoted to public use, the more it must accommodate the rights of the general public who use that property.
   d. 3 justifications for special obligations on innkeepers and common carriers
      i. More likely to be monopolies than other businesses—denial of service could mean denial of ability to travel/find place to sleep away from home.
      ii. Denial of services might put people at risk from elements or "bandits on highway."
      iii. Innkeepers and common carriers hold themselves out as ready to serve public, public relies on this representation.
4. ***Beach access and the Public Trust***
   a. Public Trust Doctrine: certain resources can't be the subject of private ownership, but rather, rest in state acting for the public as a whole. All citizens have a right to use it.
      i. Arguments in support:
         1. Want to give public access to limited resources where it's impossible to give everyone a private share.
         2. Protect lands from exploitation.
         3. Shouldn't give particular lands to just a few people.
         4. Has always been relied on, traditional rule.
      ii. Arguments against:
         1. Private property rights will lead to best use of land—property put to best use of land, avoid trampling by public.
         2. Society has evolved from time when rule came about.

iii. Mixed treatment by states—some hold that property can be transferred free of public rights of access, others have held that they're unalienable. Overall: shift from emphasis on property to emphasis on people (traditionally PTD only considered property issues, not what people wanted).
    1. *Traditional Public Trust Doctrine*
        a. Area: navigable waters, tidelands
        b. Uses: navigation, fishing
        c. Conception: Preexisting encumbrance on the land; public right created by sovereign duty; no private interests involved, so no public/private balancing.
    2. *Public Trust Doctrine Under Avon*
        a. Area: extended to dry sand area owed by municipality
        b. Uses: Navigation, fishing, recreation (bathing/swimming)
        c. Conception: still tied to sovereign duty; still no private interests involved; no private/public balancing; BUT emphasis on land being municipally-owned shows awareness of potential future conflict w/ private rights.
    3. *Public Trust Doctrine under Matthews (1984)***new conceptualization of PTD*
        a. Area: extended to dry sand area owned by quasi-public body
        b. Uses: navigation, fishing and recreation (bathing/swimming); includes crossing beach to get to water, and use of beach.
        c. Conception: an interest held by the public; not an encumbrance on land; balance public's right and private interests; weigh *Matthews* factors to determine what private property is implicated.
    4. *Public Trust Doctrine under Raleigh (2005)*
        a. Area: Extended to beach owned by private association.
        b. Uses: Navigation, fishing and recreation (bathing, swimming)
        c. Conception: Apply *Matthews* factors to balance public interests of access w/ private interests in exclusion.

b. Uses encompassed by Public Trust Doctrine
    i. Gradual extension of doctrine from fishing/navigation to recreational activities; molded to meet changing conditions/needs of public.
        1. See, e.g., ***Matthews v. Bay Head Improvement Association*** (the quasi-public Assoc. may not restrict its membership to Bay Head residents because doing so would restrict the public trust doctrine and frustrate the rights of the public to use the sea and the foreshore for recreational activities).
            a. Rule: The public must be afforded reasonable access to the foreshore as well as a suitable area for recreation on the dry sand.
                i. Factors to consider usage of dry sand: location of dry sand area in relation to foreshore, extend and availability of publicly owned upland area, nature and extent of public demand, and usage of upland sand by the owner
            b. NB: quasi-public nature of the association really important.
                i. Bc Assoc. was quasi-public and they were acting contrary to public good by restricting membership.
                ii. Assoc. acted as municipality—can't discriminate by only allowing access to members who had paid fee.
                iii. Ct makes distinction btwn municipality and private property.
        2. MA Sup CT held that uses could change over time—allowing expansion of public access would infringe on property owners' right to exclude.

c. 3 common law doctrines (other than public trust) to grant rights of access to beaches by gen. public.
    i. <u>Dedication</u>—gift of real property from private owner to public.
        1. Requires offer by owner and acceptance by public, must be unequivocal act, clear intent for public use.
    ii. <u>Prescription</u>—if public has used property possessed by another for certain purpose for a long time (measured by SoL), public can acquire rights of access permanently, even if they never had them in the first place (or if had been limited by private ownership).

iii. Easement—permanent right to do something on someone else's land.
1. Generally created by agreement BUT if landowner fails to exclude trespassers from property, she may lose right to sue them under SoL
a. Right of public: *prescriptive easement*
2. Traditionally: most cts refused to allow public to obtain easement by prescription, but today most will recognize such easements.

d. Custom
i. OR Sup Ct relied on custom (not prescription) to hold that longstanding, uninterrupted, peaceable, reasonable, uniform use of beachfront by public for rec. use conferred continuing rights of access.
ii. HI: unique legal custom, recognizes public access to all beaches up to "stable vegetation line" in accordance w/ traditional HI customs.

e. Right to be somewhere and problem of homelessness
i. ***Pottinger v. City of Miami***
1. ACLU sues Miami bc of sweep of homeless people before 1988 Orange Bowl Parade—many more homeless people than what could be handled in shelters.
2. Judge ordered police to stop arresting people for "innocent, harmless and inoffensive acts": eating/sleeping/bathing/sitting down in public.
ii. ***Tobe v. City of Santa Ana***
1. CA Sup Ct upheld muni ordinance that banned camping/storage of personal property in public areas, despite evidence that shelters were 2,500 beds short.
a. Said ordinance didn't inevitably conflict w. constitutional prohibitions.
b. Ordinance didn't punish individuals for being homeless bc it regulated conduct, not status. No constitutional obligation to make accommodations on/in public property to facilitate homeless people's exercise of right to travel.

5. ***Obligations regarding Quiet Enjoyment: Unreasonable Land Use***

a. **Nuisance**: substantial and unreasonable interference w/ the use or enjoyment of land.
i. Nuisance is a flexible doctrine, typical cases are activities that are "offensive, physically, to the senses and which by such offensiveness makes life uncomfortable such as noise, odor, smoke, dust, or even flies."
1. Ex: vibration/blasting damaging a house, emission of pollutants (smoke/dust/gas/chemicals), offensive odors, and noise.
ii. *General rule for who you can sue*: liability on any actor who "materially participates" in causing the harm.
1. D's conduct must be a "substantial factor" in bringing about the alleged harm.
iii. Nuisance distinguished from trespass
1. Trespass = intentional invasion of P's interest in the exclusive possession of his property.
2. Nuisance = substantial and unreasonable interference w/ P's use and enjoyment of his property.
a. Some cts distinguish trespass from nuisance by arguing that trespass has to be direct (bullet fired across land; therefore pollution is nuisance b/c particles carried by wind is indirect invasion) and that physical objects have to be larger than microscopic to constitute trespass.
i. Trend is to recognize invasion by particles as both trespass and nuisance and to allow P to recover under both theories.
ii. See, e.g., ***Bradley v. American Smelting & Refining Co.*** (trespass and nuisance claim against factory emitting arsenic and cadmium that fell on P's land)
1. T can only occur if particles fell to ground (remaining in air insufficient).
2. D liable for T only if P can prove "substantial damage"—reconciling interests of many who are unaffected by possible poisoning w/ few who are affected.

iv. Right protected by nuisance = quiet enjoyment of one's land.
v. Nuisance v. Negligence
    1. Negligence implies judgment that reasonable person would have foreseen harm and prevented it.
    2. Nuisance focuses on result of conduct rather than conduct itself—whether *interference* was unreasonable.
        a. Unreasonable—involves substantial harm that an owner shouldn't have to bear for the good of society.
vi. Permanent v. Temporary Nuisance
    1. Permanent: irreparably injures property or is of such a character that it is likely to continue indefinitely.
        a. SoL for bringing claim starts at time nuisance begins.
    2. Temporary: can be alleviated by changes in D's conduct.
        a. SoL refreshes w/ each new injury.
vii. Some cts apply strict liability on owners if they engage in "ultra hazardous" activities that cause harm to neighboring land.
viii. N doctrine broad enough to encompass any conduct that causes unreasonable and substantial harm to use and enjoyment of land.
    1. EX: against owners who have allowed property to be taken over by drug dealers; interfering w/ other owners' property rights; extreme Christmas lights.

b. **Defining unreasonable land use**
    i. To determine unreasonableness:
        1. Determine what *interests* fall under "use and enjoyment" of land.
            a. Freedom from pollution, noise, odors, and smoke.
        2. How serious must interference be for nuisance to be present?
            a. Traditional: "substantial: to be protected.
        3. If D has substantially interfered, how do we determine whether harm is unreasonable?
            a. Can focus on rights (P's right to security v. D's right to freedom of action) or fairness.
            b. Social utility/welfare analysis—costs v. benefits of providing remedy.
    ii. Rights considerations
        1. **Conflicts btwn D's right to freedom v. P's right to security—main balancing test in opinions.**
            a. Some states deem activity nuisance bc conduct is disfavored (spite fences to piss off neighbors).
            b. Some states deem activity nuisance when type of harm involved is one that owners shouldn't have to bear, at least w/o compensation.
            c. Nuisances *per se*—criminal activity (drug manufacturing/sales).
            d. Activities not customary to area—probably not protected.
        2. Certain activities not nuisances b/c regulating them restricts freedom of action too much and regulation will cause unfair surprise.
            a. Ex: hypersensitive use—use community standards to evaluate it (no remedy for P who had rare allergy to fumes near land).
            b. See, e.g., ***Page County Appliance v. Honeywell, Inc***. (TC should have let jury decide whether App Center was devoting its premises to an unusually sensitive use)
        3. Some activities not nuisances bc harmful activity was there first.
            a. P's coming to nuisance not absolute defense—operating factory may be wrong if it's eventually surrounded by homes.
            b. Some states have right to farm statutes that protect farmers from liability for nuisance if farms were established before surrounding residential property was built.
                i. NB: one ct struck down this law on ground it unconstitutionally deprived Ps of right to sue for nuisance.
    iii. Social welfare considerations in N law.

1. **R.2d §826(a):** land use is "unreasonable" when the "gravity of the **harm** outweighs the **utility of the actor's conduct**."
    a. **Harm factors:**
        i. Extend and character of harm involved
        ii. Social value that law attaches to type of use or enjoyment invaded
        iii. Suitability of particular use/enjoyment invaded to the character of the locality
        iv. Burden on person harmed of avoiding harm.
    b. **Utility factors:**
        i. Social value that the law attaches to primary purpose of the conduct
        ii. Suitability of conduct to character of locality
        iii. Impracticability of preventing or avoiding invasion.
    c. **Fairness**: character of harm, distributive concerns, and fault.
    d. **Welfare**: costs and benefits, incentives, lowest cost avoider.

iv. Vegetation in nuisance (traditionally not addressed in trespass)
1. See, e.g., ***Fancher v. Fagella*** (sweet gum tree ruining neighbor's property—was it a nuisance, and could the ct grant equitable relief in the case of the existence of a nuisance?
    a. 4 possible rules to adopt:
        i. MA: Self-help only.
        ii. VA: not noxious → not actionable, self help; noxious → after notice, right of action for trespass.
        iii. Restatement: if you planted it, you have to control it, if natural, no obligation.
        iv. HI rule: veg normally not nuisance, but they can be if they cause imminent/actual threat of harm.
            1. Differs from traditional nuisance claim, bc all you have to show is harm/danger of a harm as opposed to "unreasonable and substantial interference."
    b. Ct adopts HI rule.

c. **Remedies**
i. Two separate questions
1. Which party has basic entitlement?
    a. Does P have right to be free from the harm, or does D have right to engage in that activity?
2. What remedies for N action?
    a. Property—fix absolute entitlement either to engage in the conduct (no liability) or to be secure from the harm (injunctive relief). Fixed by private bargaining rather than court order.
    b. Liability—prohibit each party from interfering w/ interests of the other unless the party is willing to pay damages determined by a court of law.
        i. If P protected by law, D has to pay damages.
        ii. If D can engage in activity, P won't be entitled to injunction unless it compensates D for stopping activity—purchased or conditional injunction.
    c. Inalienability—assign entitlements and prohibit them from being sold/exchanged.

	P has entitlement—Landlord responsible	**D has entitlement—Landlord not responsible**
Property Rules	P can get injunction against D landlord, otherwise D has to pay P to allow drug dealers to stay/cost of relocating/damage to property caused by dealers → **Ps get**	Landlord has entitlement, can rent to whoever but can give entitlement away if Ps are willing to pay → **no nuisance**

	injunction	
Liability	Ps can get damages from D landlord but not injunction; depreciated value of property, D can continue harm if he pays off Ps, allow drug dealers to stay → **Ps get damages**	Ps can stop D's conduct if P pays D for cost of kicking drug dealers off →**purchased injunction**

d. Nuisance cases
    i. ***Boomer v. Atlantic Cement Co*** (1970): Ct found that cement factors was a nuisance for spewing black smoke/ash on surrounding homes. Didn't issue injunction but awarded damages bc determination that activity was reasonable on social level, but not btwn parties. Compensate P for harm but allow socially valuable activity to continue.

6. ***Obligations regarding Quiet Enjoyment: Light and Air***

a. General rule: One must use his property so as not to injure the lawful rights of another (sic utere tuo ut alienum non laedas).
    i. See, e.g., ***Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*** (Using property to as not to injure the lawful rights of another was not violated in this case bc there is no legally protected right to the free flow of light and air from adjoining land, therefore the construction of the building creates no cause of action.
        1. Generally, no US precedent for right to light and air.

b. Economic analysis of law
    i. Descriptive analysis-explain existing legal doctrine as set of rules that promote efficiency.
    ii. Prescriptive/normative analysis- using economic efficiency as value to determine what the legal rules should be.

c. Economic analysis of law—cost benefit analysis
    i. Costs and benefits measured by market value—how much would you pay for it, or how much you would have to be paid to give it up.
    ii. Evaluating legal rules: whether a change from one legal rule (baseline) to another will increase or decrease social wealth.
    iii. Market transactions allow economists to measure costs and benefits
        1. 3 elements: initial distribution of property rights, offer price by non-owner, asking price by an owner.
        2. Must determine initial distribution of wealth and initial allocation of entitlement.

d. ***Boomer v. Atlantic Cement Co.*** (1970)
    i. Neighbors complained that cement factory was billowing black smoke and depositing soot on a nearby residential community.
    ii. Entitlements: right to pollute v. right to be free from pollution.
    iii. Assume that either factory has initial right to pollute or residents have initial right to be free from pollution—then measure costs and benefits depending on who has to pay.

e. Traditional externalities analysis: cost internalization
    i. Externalities—costs imposed on third parties by legal actors that are not taken into account in actor's own revenue cost determination.
        1. EX: pollution in *Boomer*—unless law intervenes, factory won't have to take this cost into account in determining whether operations are profitable.
    ii. Want to choose legal rules that give actors incentives to choose activities whose benefits to society outweigh their costs—goal of efficiency analysis is to increase social wealth.
        1. EX: Factory would have to internalize its external costs—account to society for harm it causes.
    iii. Justice Brennan—*those who profit from an activity should bear its costs*.
        1. Argued that economic costs incident to land development should be borne by "those who engage in such projects for profit," rather than adjoining landowners.
            a. Rights argument: those who benefit from an activity shouldn't impose costs of others; property can't be used to unfairly harm legitimate security interests of neighbors.

b. Social welfare argument: economic actors should internalize their external costs to promote efficiency.

f. *Coase Theorem*
   i. **Part 1 of Coase Theorem:** If there are no transaction costs, it doesn't matter which legal rule is chosen because any legal rule will achieve an efficient result.
      1. EX: Fontainebleau case: in absence of transaction costs, parties will agree for some sum between $6 and $10 million to allow project to move forward (pg. 391).
   ii. **Part II of Coase Theorem:** In the presence of transaction costs, the choice of entitlements by the courts may have an effect on efficiency. The courts may increase efficiency by assigning entitlements to the parties who would purchase them in the absence of transaction costs.

II. ACQUISITION AND APPORTIONMENT OF PROPERTY

1. ***Conquest and Distribution by the Sovereign***
   a. Conquest
      i. Property rights derived from competing sovereigns.
         1. ESP, FR, GB induced/forced Indian nations to transfer sovereignty over specific areas of land—lots of miscommunication and cultural misunderstanding, Indians often understood arrangements as temporary accommodations of land use.
            a. See, e.g., ***Johnson v. M'Intosh*** (SCOTUS gives the thumbs up to conquest, US has exclusive power to extinguish the Indian right of occupancy; tribes had no power to transfer fee simple to their land to anyone other than the US gov't, only to grant and use rights subject to tribal law).
               i. Huge tension btwn law and power—Marshall couldn't go the other way bc it would have disintegrated property rights in the US, also trying to legitimize SCOTUS (1823).
               ii. Did NOT hold that tribes had no power to alienate land, or that tribal possession of land had no legal recognition.
      ii. Forced seizures of property from American Indian Nations
         1. See, e.g., ***Tee-Hit-Ton Indians v. US*** (SCOTUS basically justifying process by which US gov't robbed Indians of their ancestral lands—opinion also gave basis for substantial legal protection of Indian possessions).
            a. Holding: Indians do not have a legally protected interest in the land in question, because their occupancy is not specifically recognized as ownership by Congress, and therefore the removal of timber is not a compensable taking.
               i. **While Indian title is a recognized property right under federal common law, it is not "property" within the meaning of the 5th A, but a license that can be revoked at will by the US w/o compensation.**
            b. NB: opinion misrepresents *Johnson*, also somewhat inappropriate to take it as precedent (gives no justification) bc it was about 2 private individuals and transfer of title, not taking of property as is the case here.
            c. Practical effect of decision: protect US from having to pay interest on claims based on seizure of original Indian title land.
         2. Eminent domain and just compensation—in *Sioux Nation* SCOTUS held that when fed govt takes recognized title lands of Indian nations, it isn't liable for fair market value as long as it makes a good faith effort to grant equivalent value.
         3. Congress eventually passed statute compensating native Alaskans for loss for $962.5 million plus 40 acres of federal public lands (Alaska Native Claims Settlement Act of 1971); extinguished land claims to 335 million acres.

2. ***First Possession: Animals and Natural Resources***
   a. First Possession as principle
      i. Pros:
         1. Simple rule

2. Incentivizes taking care of property

ii. Cons:

1. Strongest person might get it first
2. Someone can free ride off of your hard work
3. Could disincentivize best use of land

b. Labor and investment as principle

i. Pros:

1. Those who value land most will upkeep it
2. Fair

ii. Cons:

1. Inefficient bc we create demand for more work than is necessary
2. Vague rule
3. Descriptively inaccurate

c. Wild Animals—feral nature, no one owns them. At what point do you obtain possession?

i. See, e.g., ***Person v. Post*** (Merely finding and chasing a wild animal doesn't give you possession of it—must be captured or killed.

1. Strong policy incentive to adopt clear rule such as this, rather than establishing possession at some time before capturing/killing animal.

d. Baseballs

i. See, e.g., ***Popov v. Hayashi*** (ball considered abandoned property in between it being in the air and someone catching it; ct adopts Gray's rule that according to custom, you need to have control of the ball, established by a preponderance of the evidence).

e. Oil and Gas Rights (analogs for all rules in water rights as well)

i. 4 rules in different jurisdictions

1. <u>Traditional absolutist rule</u>
   a. You get absolute right to anything you can extract from your land.
2. <u>Correlative rights rule</u>
   a. Variation on absolutist concept → absolute shared right to proportion of pool that is proportionate to your land.
   b. Main problem: doesn't incentivize capturing resources.
3. <u>Rule of capture</u>
   a. Natural resource is like a wild animal, you don't own it until you capture it.
   b. Main problem: leads to waste (inefficient for market bc it drives prices down, and hasty extraction creates possibility of huge disasters that could end resources for everyone).
4. <u>Reasonable use rule</u>
   a. You can extract to the extent that it's reasonable.
   b. Main problem: low predictability—in each case, ct will look to see if you were reasonable (huge leeway).
   c. See, e.g., ***Elliff v. Texon Drilling Co***. (after a well blew out, caused damage to Ps' wells and caused lots of gas and oil to drain from Ps' land).
      i. Holding: negligently wasting another's natural resources deprives a person of her property rights in those resources, including the right to profit from them. Waster should compensate injured party for her loss.
      ii. 2 questions in the analysis:
         1. Did petitioners have property interest in the gas?
            a. Ct says NO bc TX has rule of capture and they didn't capture it.
         2. Did respondents have duty to act non-negligently?
            a. Ct says YES, even if no property right, still can't act negligently.
      iii. Ct combines these to get to reasonable use rule—balancing liberty interest w/ safety interest.

3. ***First Possession: Finders***

a. Lost, mislaid, abandoned property

i. Lost—owner accidentally misplaced it.
ii. Mislaid—owner intentionally left it somewhere, and then forgot where he put it.
iii. Abandoned—owner forms intent to relinquish all rights in the property.
1. Property that has been lost or mislaid can later be abandoned if owner intends to give up any claim to it.
2. See, e.g., ***Charrier v. Bell*** (amateur archeologist attempting to sell Indian artifacts arguing they're abandoned property; but intent w/ a burial is not to allow the first person who comes across it to take it; P didn't have ownership bc they were burial goods, and he is not entitled to recover under a theory of unjust enrichment bc he was possibly acting out of his own negligence, and at least knowingly at his own risk).
iv. "Actual possession is, prima facie evidence of a legal title in the possessor."
1. See, e.g., ***Willcox v. Stroup*** (Civil war documents, private individual v. state dept of archives and history; in SC absent evidence of superior title, law presumes in favor of possession—favors status quo rather than great upsets in property rights).
a. Gives standard operating procedure: who has burden to show what.
b. Promotes stability.
c. Employing presumption doesn't frustrate interest in this case, bc documents already on microfilm.
i. State unable to provide evidence that rebuts presumption—has to prove superior strength of its claim, not just insufficiency of P's claim.
d. NB: important that there was no wrongdoing on part of P, he was never acting in bad faith.

b. Conflicts btwn true (original) owner and finder.
i. True owner has right to recover lost/mislaid property from finder
ii. Finder has right to keep abandoned property.

c. Conflicts btwn finder and 3rd parties.
i. Finder generally prevails over everyone but true owner.
ii. If true owner doesn't know where property is, and doesn't know it has been found (therefore not claiming it), finder is entitled to keep property.
1. ***Armory v. Delamirie***—chimney sweep who found jewel had superior rights to it, instead of jeweler to whom he had entrusted it for appraisal.

d. Conflicts btwn finder and owner of premises where property was found.
i. If finder was trespassing at time he found object, landowner will win.
1. More modern cases: no possessory rights to those who obtained possession illegally.
ii. If finder is on property w/ landowner's permission—cts extremely divided.
1. Object found in private home → normally right given to homeowner.
2. Object found in place open to public → cts split.
iii. Found embedded in soil, normally right given to landowner rather than finder.
1. Treasure: in US right given to finder rather than owner; in UK given to crown.

e. Finders statutes
i. Legislation for lost property—usually get rid of distinction btwn lost, mislaid and abandoned property.
ii. Normally require finder to report to police, award property to him if it isn't claimed in reasonable period of time.

f. Native American Graves Protection and Repatriation Act of 1990
i. Fed statute, Indian cultural objects on tribal or federal lands belong to tribe having strongest connection w/ them. Doesn't apply to objects found on private property.

4. ***Family: Support and Inheritance***

a. Child support
i. Cts usually hold that kids of divorced parents entitled "to be supported at least according to the standard of living to which they had grown accustomed prior to the separation of their parents." ***Pascale v. Pascale***

1. See, e.g., ***Bayliss v. Bayliss*** (a divorced, noncustodial parent does have a duty to contribute to the college education expenses of his/her child after that child has reached the age of majority).
    a. Huge policy, fairness and utility considerations in this opinion.
    b. Relevant question isn't whether or not the dad would have paid for college, it's whether or not the parents would have been <u>forced</u> to pay.
    c. NB: states evenly divided on question of requiring noncustodial parents to pay for college—19 require it.

ii. Some cts interpret legislation setting age of majority to liberate parents from duties of support at the same time that the child is liberated from parental control.
1. FL: any duty to pay for child's college education is a moral one, not legal one—married parents have no duty, so why impose it on divorced ones? Denies divorced parents equal treatment under the law.

iii. Langbein—argues that giving college education is major mechanism (other than inheriting family home) by which wealth is transferred btwn generations.

b. Gifts and inheritances
i. Gift = transfer of property from one person to another without payment.
1. *Inter vivos*—transfers from one living person to another.
2. Testamentary transfers—those made at death through valid will/inheritance.
    a. Possibilities:
        i. Destroy it
        ii. Bury it w/ testator
        iii. Treat as unowned and allow free for all
        iv. Allow gov't to confiscate it
        v. Honor testator's wish for conveying it.
            1. First two are wasteful and don't maximize the utility of the wealth the testator creating during his/her lifetime (but could create incentives so that people get rid of their property before death).
            2. #3 and 4 seem the most fair.
    b. Strongest arguments for private transmission
        i. Autonomy of decedent—peace of mind
        ii. Efficiency
        iii. Family ties, prevents need for state support.
        iv. Encourage caretakers—people are aware they could be disinherited.
        v. Incentivizes hard work during life, incentivizes saving $.
            1. Some of these are only looking to interest of donor.
    c. Overall: wealth isn't passed through testamentary means anymore, now it's more of a gradual and progressive transmission (private schools, grad schools, etc.).

ii. Law of gifts requires:
1. **Intent** to transfer title.
    a. Intent has to be present to transfer ownership rights in the object—doesn't mean that actual possession has to be transferred (ex: give a gift but specify that it has to remain in your house until your death).
2. **Delivery** of the property
    a. Generally requires physical transfer of object, but constructive or symbolic delivery might be sufficient (ex: giving only key to locked box).
    b. Some cts recognize constructive delivery only if physical delivery is inconvenient/impossible.
    c. Can be accomplished by writing rather than physical delivery (ex: formal deed or more informal writing that indicated present intent to transfer).
3. **Acceptance** by the donee.

iii. Property transferred at death either by written will or (in its absence) by the terms of state statute—<u>intestacy statute</u>

1. Limits ability to completely disinherit a spouse—laws in every state grant surviving spouses some portion of the property owned by the deceased spouse at death.
    a. Law in US allows parents to completely disinherit their kids—EU takes different approach, gives kids same rights as spouses.

iv. Wedding rings
1. Because wedding ring is given under understanding that parties would be married, most cts require ring to be returned if engagement is called off.
    a. Some cts refuse to inquire into whose fault it was that the marriage was called off.
    b. Some cts won't allow you to recover a ring if you break off engagement w/o justification.

5. ***Labor and Investment: Cells/Organs***

a. See, e.g., ***Moore v. Board of Regents*** (P did not have ownership of his cells following their removal. Therefore Ds' unauthorized use of P's cells did not constitute a conversion).
i. Majority opinion:
1. Part 1: Privacy Arguments
    a. Privacy cases involving unwanted publicity—ct says product from cells isn't unique, therefore no property right to it.
    b. Privacy cases holding that patients have right to refuse treatment—ct passes on that.
2. Part 2: Timing of Conversion
    a. CA statute: limits what he can do w/ his cells after they are excised, therefore no property right left for conversion
        i. [this misses the point: Moore is claiming conversion from the moment the cells were still in his body, not adter they were taken]
3. Part 3: Labor Theory
    a. By definition, Moore can't have interest in the patent bc he just supplied raw resources and patent rewards research and ingenuity.
        i. [misses the point: Moore isn't trying to get the patent, just a slice of the pie]
4. Part 4: Traditional utility analysis
    a. Patient's right to make autonomous decision v. protecting emerging biotech industries.
    b. Ct worried about lawsuits that would bankrupt the emerging biotech industry [dumb argument, harm would be very small to industry].

ii. Dissent: why are we only worried about the sanctity of the biotech industry? Other values at work: freedom of K, transactional freedom.
1. Compares to slavery—forbidding a person to have control over his own body, but allowing others to profit off of it.

iii. Not consistently followed: ***Brotherton v. Cleveland***, Ct held that aggregate of rights granted by OH to P rises to level of "legitimate claim of entitlement" in P's husband's body, including his corneas (removed during autopsy), and this was sufficient to establish a property interest protected by 14th A.
1. Important competing policy considerations: protection of competent patient's right to make autonomous medical decisions v. can't threaten innocent parties (researchers) who are doing socially useful activities w/ civil liability.
    a. Ct. finds the latter more compelling—extension of conversion doctrine into research on human cells will hinder research by restricting access to necessary materials.

b. Business methods
i. Until recently, not possible to patent "business method" bc most business and financial innovations were either considered not to be "novel" or unpatentable bc they didn't involve physical processes.
1. Changed with ***State Street Bank & Trust Co. v. Signature Financial Group***: Fed Cir decided that business methods ARE patentable (1998).

ii. What constitutes novel and nonobvious business method is hard to determine.

1. One click checkout novel or nonobvious (***Amazon.com v. Barnesandnoble.com,*** 1999). 10 yrs later, US Patent Office denied all but 5 of 26 claims to patentability of 1 click system.

iii. 2006: SCOTUS held that injunctions stopping patent infringement wouldn't be given automatically anymore, but would be subject to normal balancing of interests test.
1. ***Ebay, Inc. v. MercExchange, LLC***: damages may be adequate in patent infringement cases bc dispute is often about the money that can be made by infringing the patent; therefore injunctions not always necessary.
a. Injunctions only issued if:
i. Patent owner has suffered irreparable injury.
ii. Damages are inadequate to compensate for that injury.
iii. Injunction is warranted by the balance of hardships btwn P and D.
iv. Public interest wouldn't be disserved by permanent injunction.

6. ***From Trespass to Adverse Possession***

a. Title v. possession
i. Adverse possession: possession of another's property in a manner that is exclusive, visible (open and notorious), continuous, and without the owner's permission (adverse or hostile) for a period defined by state statute → title transferred from title holder (true/record owner) to adverse possessor.
ii. If possession lasts for more than period defined in relevant SoL, owner is barre from bringing action in ejectment against possessor.

b. **General Adverse Possession definition**
i. A non owner can acquire full ownership rights in real property if non-owner "actually possesses" property w/o permission by the "true" owner (formal title holder) in a visible manner for a period of time established by statute.
1. **Actual possession that is**
a. APor must actually physically occupy property in some way.
i. Some states have statutes that define what types establish "actual" possession.
ii. In absence of statute: "ordinary use to which land is capable and such as an owner would make of it."
1. Ex: building a fence, treating land as your own (in absence of fence, significant activities on land—building on land, living there, conducting business, farming, clearing land, planting shrubs).
iii. When land is rural, lesser exercise of control may be reasonable.
b. Color of title (deed is defective bc formality not complied with).
i. Arises when APor who has deed that purports to transfer land in question but is ineffective to transfer title bc of defect in deed or in process in transferring it.
ii. Can get entire parcel, but you need the deed (land area described in title used as conclusive evidence of property that is being adversely possessed).
iii. Some states lower # of years required to obtain AP when owner has color of title.
iv. See, e.g., ***Romero v. Garcia*** (deed was defective but Ps sued based on AP for more than statutory requirement under color of title and payment of taxes; deed wasn't void for want of proper description, if surveyor can ascertain boundaries w/ deed and extrinsic evidence on the ground).
c. Claim of title (claiming property outside of a formal deed).
i. APor only gets portion he's claiming.
ii. See, e.g., ***Brown v. Gobble*** (Ds may have had ownership of the tract of land via the AP of their predecessors, through tacking theory, even though a survey revealed that tract was part of Ps' property).

2. **Open and notorious**
    a. Cts generally agree that possessory acts must be visible and obvious enough to put reasonable owner on notice that property is being occupied by non-owner.
        i. Charged w/ seeing what reasonable inspection would disclose.
        ii. Lots of litigation about what acts are sufficient.
    b. Most states: objective test
        i. APor acts towards the land as an average owner would act; need not be express but can be implied by claimant's conduct.
        ii. Enclosing land by fence or wall = universally seen as open/notorious.
            1. Building something, planting, harvesting crops, etc.
        iii. NB: testimony about community reputation is relevant evidence that true owner was put on notice.
3. **Exclusive**
    a. Use is of a type that would be expected of a true owner of the land in question and that "adverse claimant's possession can't be shared w/ true owner."
        i. NB: 2 APors who possess property jointly may acquire joint ownership rights as co-owners
4. **Continuous**
    a. Depending on type of property in question, extended absences may not defeat claim.
        i. EX: seasonal use of summer cabin—relied on customary use, how reasonable owner would use summer cabin, doesn't necessarily affect continuity.
        ii. See, e.g., ***Nome 2000 v. Fagerstrom*** (seasonal use can establish continuity as long as it's as a reasonable owner would use it; community reputation/testimony is a key piece of testimony to establish notorious and open).
    b. Tacking: succeeding periods of possession by different people can be added together to establish continuity.
        i. Successors can add original adverse possessor's holding period only if they are in privity w/ one another—original adverse possessor formally transfers title to the property to the successor w/o interruption in the chain of title.
            1. NB: privity requires judge to determine that deed formally transferred title, whether or not deed was imperfect or if process was imperfect.
5. **Adverse or hostile**
    a. This element has the most confused/varied treatment.
    b. Cts at least agree that it means the use is nonpermissive—showing that true owner has permitted use will defeat the claim.
        i. *True Owner's State of Mind*
            1. Universal across all jurisdictions.
            2. Inquiry: whether true owner permitted use: if so, defeats AP claim.
            3. APor must show her use was nonpermissive to establish ownership via AP.
                a. EX: license/lease = permission; no trespassing signs = no permission.
            4. Cts almost always hold that there is a presumption that possession of another's property is non permissive if the owner hasn't said anything either way.

a. NB: to get AP against a co-owner, must make explicit statement of intent to take possession of entire property by AP → **ouster**.

ii. *Estoppel in property*
1. If owner allows another to possess property for long time, possessor reasonably relies on permission to invest in land, may be granted possessory rights bc owner is estopped from denying continued permission.

iii. *Adverse possessor's state of mind – 4 approaches*
1. **Objective test of lack of permission—overwhelming majority of jurisdictions.**
a. APor's state of mind is irrelevant, only thing that matters is that APor lacked permission from true owner.
2. Claim of right—must have intent to appropriate and use land as his or her own to the exclusion of all others.
a. Most states: APor acts toward the land as an average owner would act, need not be express but can be implied by claimant's conduct (essentially the objective test).
b. Subjective test: APor's intention to appropriate and use the land as his own to the exclusion of all others (essentially the intentional dispossession test).
3. Intentional dispossession***
a. APor must be aware he is occupying property owned by someone else, must intend to oust or dispossess true owner.
b. Mistaken occupation can't give rise to AP if APor has no intention of taking over property she doesn't own.
i. Normally limited to boundary disputes.
ii. Rejected by vast majority of cts and scholars bc it rewards wrongdoers and fails to protect innocents who have mistakenly occupied land.
4. Good faith***
a. Only innocent APors can acquire ownership by AP.
b. Some states have shorter SoL if possession wasn't in good faith.
c. Argument that even though most states reject good faith test, in practice they grant AP only to good faith APors by manipulating elements.
5. *** These are disfavored tests bc it's hard to establish state of mind.

6. **For the statutory period.**
a. Varies widely: 5-40 years.
b. Many states toll SoL if true owner is under disability (infancy, insanity or incompetence), then statute runs only starting after disability ends, shorting SoL period once disability removed, or setting max period longer than normal SoL.

ii. NB: large differences in how each element is interpreted and applied.
1. Esp. good faith and claim of right—particular variations on the "adversity" requirement, substantive disagreements about the meaning of the requirement.

iii. AP claim may be brought by adverse possessor in lawsuit against formal title holder to "**quiet title**."
1. Claim: asks ct to grant declaratory judgment that adverse possessor has become owner of disputed property through adverse possession.
2. Can also be defense to trespass or ejectment claims by record holders.

iv. Claims against government
1. Cts normally hold that AP claims can't prevail over gov't property—those who use/possess gov't property can't acquire prescriptive rights.
2. Gov't entity = absolute defense to AP claim.
a. NB: significant number of states have passed statutes limiting/abolishing gov't immunity from AP.
b. Fed statute allows AP of federal land in certain cases, if APor has occupied property for 20 years in good faith reliance on a claim/color of title, and has either cultivated land/constructed improvements.

c. Arguments for granting protection to land pirates
i. Create security by encouraging owners to rely on existing practical arrangements that have persisted for a long time—relying on actual use and occupation rather than formal title is more reliable.
ii. Failure of true owner to notice/object can be understood as effective abandonment of rights.
iii. Wrong for victim to wait too long to vindicate her rights—waiting too long creates reliance and expectations.
iv. NY effectively abolished AP in most border dispute cases—now only get AP if you build permanent structure that encroaches on land owned by another; "de minimus non structural encroachments" like lawn mowing, plants, fences, are all insufficient bc they're permissive and non adverse.

d. Arguments for treating AP as "roots which we shouldn't disturb."
i. Providing certainty of ownership of possessors of land by eliminating possibility of stale claims to land title.
1. BUT: cheaper to rely on boundaries in deed than litigating.
ii. Encouraging maximum utilization of land.
1. BUT: using property not always beneficial to society.
iii. Desire to protect settled expectations of APor as against true owner, who would win the lottery by receiving improved property.
iv. Morality—who is more personally/fungibly attached to the land; reliance issues.

7. ***Prescriptive Easements***

a. **Terminology**
i. Affirmative v. negative easements
1. Right to do something on someone else's land v. right to stop someone from doing something on their land.
ii. Affirmative v. negative covenants
1. Duty to do something on property v. duty to refrain from doing something on your property.
iii. Dominant v. servient easements
1. Benefits from v. burdened by
iv. Easements v. licenses
1. Property interest v. can be revoked at will
v. Easements v. covenants
1. Covenants developed more as flexible alternatives to easements
vi. Appurtenant v. gross
1. Easement that runs w/ land v. easement that is personal

b. **Prescriptive easement—base of theory is that we want owners to pay attention to their land.**
i. Elements
1. Same as AP except claimant must show adverse use rather than adverse "possession."
a. Most cts drop exclusivity requirement, some retain it.
b. Many cts add requirement that true owner "acquiesce" in adverse use.

c. Notice is much more of a problem w/ PE than w/ AP
2. Occasional/sporadic use will likely meet continuity requirement.
a. Ex: Ct recognized prescriptive easement of passage in Zuni tribe, traversed 110 mile path located on private lands every 4 yrs on pilgrimage to sacred site, had done so since 1540.
3. Burden: some require clear/convincing, others preponderance.
4. Result: right to continue kind and amount of use that persisted during statutory period (as opposed to AP which transfers title).
a. Can buy and sell easements.
5. Claim of right
a. Claimant's use can't be permissive.
b. Some cts disallow easements if claimant believed she had the owner's permission and was therefore acting subordinate to the owner's powers.
c. Most states have presumption that use by non-owner is nonpermissive as w/ AP (exists bc it's hard to prove)
i. BUT fair number presume that use is permissive, neighborly gesture, more justified in assuming limited uses are permissive rather than occupation being permissive.
6. Acquiescence
a. Significant # of states require prescriptive easement claimant to prove acquiescence of true owner.
i. Theory: PEs not based on adverse/permissive use, but on a "lost grant."
ii. I.e., owner didn't assert her right to exclude by bringing trespass action, OR that landowner must have known about use and passively allowed it to continue w/o formally granting permission.
7. Open and notorious—has to be sufficiently visible to put a reasonable owner on notice of it.
a. Harder to demonstrate with PE than with AP
8. If scope of non-owner's actions is **limited**, rather than general.

c. **NO NEGATIVE PRESCRIPTIVE EASEMENTS**
i. Negative easements can't be acquired by prescription in the US—*Fontainebleu*, just bc you have enjoyed unobstructed access to light and air for a long time, doesn't create an easement for light and air that prevents your neighbor from building on her property.

d. Acquisition by the public
i. Older cases mainly hold that public can't acquire easement by prescription.
ii. STRONG TREND of modern cases: recognize public may acquire PEs, while often presuming that public access to private land is permissive in absence of clear evidence to contrary (defeating claim for prescription).
1. Ex: statutes stating use by public of road for certain amt of time makes it a public highway.
2. Few states have used PE doctrine to recognize prescriptive rights in public to use beaches for recreational purposes.

8. ***Easements Implied from Prior Dealing or Created Expressly***

a. **Creation by implication**
i. Easements by estoppel (2 types: irrevocable licenses or oral easements)
1. Cts may prevent owner from revoking license if owner has granted licensee right to invest in improving property, or otherwise induces licensee to act in reasonable reliance of the license.
a. Owner estopped from denying continued access to his land for whatever period is deemed just under circumstances.
b. Converts revocable license into irrevocable easement.
2. See, e.g., ***Holbrook v. Taylor*** (Rule: the law recognizes that one may acquire a license to use a passway or roadway where, w/ knowledge of licensor, he has in the exercise of privilege spent money in improving the way or for other purposes

connected w/ its use on the faith or strength of the license—license becomes irrevocable).
    a. Key: Acquiescence of D (suffices for prescriptive easements)
    b. Recognized principle that right to use roadway over another's lands can be established by estoppel.

ii. Easements implied from prior use
    1. *Implied easements*: recognized in particular kinds of relationships despite absence of express contract to create an easement.
        a. Sometimes carry out intent of parties as manifested by conduct.
        b. Sometimes contradict actual intent of parties, but implied by law as a result of public policy judgment about fair/efficient allocation of property rights (estoppel relationship).
        c. See, e.g., ***Granite Properties Limited Partnership v. Manns***
            i. Easement implied from preexisting use established by proof of 3 elements:
                1. 2 parcels previously owned by common grantor;
                2. One was previously used for benefit of the other, and this use was apparent and obvious, continuous and permanent;
                3. Claimed easement is reasonably necessary and beneficial to enjoyment of the dominant estate
            ii. In absence of express agreement to the contrary, transfer imparts grant of property w/ all benefits and burdens which existed at time of conveyance.
        d. NB: vast majority of litigation addresses definition of "reasonably necessary."
            i. Cts seem to agree that absolute necessity isn't required for an easement implied from preexisting use.
    2. *Easement by reservation*: if grantor intends to retain easement over property conveyed to buyer, property burdened by the easement (servient estate) is subject to this bc seller reserved for herself an easement across the property being conveyed.
    3. *Easement by grant*: if grantor intends to grant buyer an easement over property retained by grantor, then property benefited by easement is attached to this (bc buyer has been granted an easement benefiting land he has bought). ***Purchaser has less reason to know about prior use.

iii. Easements by necessity
    1. Granted to owner of landlocked parcel over remaining lands of grantor to obtain access to parcel
        a. See, e.g., ***Finn v. Williams*** (if original landowner didn't claim a right of way over an area of land before any sort of conveyance was made, a claim for an easement by necessity can still be made; right of way over dominant estate is treated as having been dormant through the transfers of title, can be used at any time by one of the landowners when no other means of access to a road exist).
    2. Requirements:
        a. A common owner who severed the property, and
        b. Necessity for egress/ingress to landlocked parcel
        c. That existed at the time of the severance
    3. Policies underlying the doctrine:
        a. Effectuating the intent of the parties
        b. Promoting the efficient utilization of property
            i. See, e.g., ***Hewitt v. Mercury*** (public policy is implemented by the law's presumption that a grantor implicitly conveys or reserves whatever is necessary to put property to beneficial use, despite the omission to make any such express provision…the law thus presumes the common owner intended the easement."

c. **NB: Cts split on what to do when these policies conflict.**
i. Majority: hold that ultimate purpose of rule is to effectuate intent of grantor—therefore no easement of necessity will be granted if it's clear that grantor intended to sell, and grantee knew she was buying, landlocked parcel (supported by R.3d of Property §2.15).
ii. See, e.g., ***Finn v. Williams*****:** suggesting ultimate goal is promoting development of property by preventing property from becoming landlocked and taken out of market.
1. Line of cases holds that policy underlying doctrine of easement by necessity applies regardless of parties' intent.

4. NB: in some states there is statutory regulation of landlocked parcels.
a. Empowers owner of landlocked parcel to get easement over neighboring land for access to public road, by applying to public official, and paying compensation to landowner whose property will be burdened by easement.
5. Geographically landlocked land
a. See, e.g., ***Schwab v. Timmons*** (owners claimed property was landlocked bc of geographic barriers, would cost over $700k to build road connecting property to public road; Ct held that land wasn't landlocked, necessity couldn't be established just because obtaining access in that direction was prohibitively expensive).

b. **Creation by express agreement**
i. Easements came from customary rights that were part of communal system of agriculture in med. England—rights on land held in common.
ii. Formal requirements to create
1. Writing
a. Created by agreement of parties
b. Easements must be in writing to be enforceable under SoF, except prescriptive easements, estoppel, implication, necessity, and constructive trusts.
2. Rule against reserving easement in 3rd party—R.3d of Property (Servitudes) proposes to abolish this rule bc it has no modern justification.
a. Many states hold that grantor O may not sell parcel to A while reserving an easement over A's property in B.
i. Get around this by: O conveys property to B, who then conveys property to A, reserving easement for herself. Easement owner becomes grantor, rather than third party grantee, and easement will be recognizes (because grantors can reserve easements).
b. Some cts have changed the traditional rule, allowing it.
iii. Validity: substantive limitations on the kinds of easements that can be created
1. Limits on negative easements
a. US Cts have never recognized right to obtain negative easement by prescription.
b. Cts in this century have recognized new negative easements such as conservation easements, historic preservation, and solar easements (most have been created/recognized by statute).
i. NB: land use restrictions that don't fall within categories of allowable negative easements could always be created using the covenant form.
c. R.3d of Property abolishes distinction btwn negative easements and restrictive covenants, subjecting both to changed conditions and undue hardship doctrines.
2. No affirmative easements to act on one's own land.
a. Traditionally: can't create affirmative obligation to do something on someone's own land for benefit of other owners (duty to build structure/pay monthly fee to condo assoc.).

i. Law of covenants developed to allow creation of enforceable affirmative obligations that run w/ land.
ii. R.3d limits term "easement" to affirmative easements, would completely abolish negative easements; would treat all restrictions as "covenants" whether they are phrased as negative easements/restrictive covenants.

iv. Running with the land
1. Easement that runs w/ land is treated as if it were attached to that parcel—any future owner is benefited or burdened by the easement.
a. Requirements for the **burden** to run with the land.
i. 1st issue: whether burden runs w/ land: is future owner obligated to allow easement owner continued access to or control over her land under terms of original easement?
1. Implication, necessity, estoppel, and prescriptive easements are generally held to run w/ land if:
a. Intended to do so (normally held to be the case) AND
b. Are reasonably necessary for enjoyment of dominant estate.
2. Easements that don't fit into one of these categories (express) run w/ land to burden future owners only if:
a. Easement is in writing
b. Original grantor who created easement intended it to run w/ land
c. Subsequent owners of servient estate had **notice** of easement at time of purchase of servient estate.
ii. 3 kinds of notice
1. <u>Actual</u>
a. If subsequent owners know about existence.
2. <u>Inquiry</u>
a. If there are visible signs of use by non-owners, such as telephone poles, paths, etc.
b. Implication is that a reasonable buyer would do further investigation to discover whether an easement exists.
3. <u>Constructive</u>
a. If a title search of previous owners of the property would lead to discovery of deed conveying easement.
b. Reasonable buyer would conduct title search and discover existence of easement.
b. Requirements for the **benefit** to run with the land (appurtenant v. in gross)
i. 2nd question is whether benefit runs w/ the land.
1. **Appurtenant** easement: if benefit runs w/ land, it's treated as if it were attached to that particular parcel of land.
a. NB: cts have constructional preference for appurtenant easements—some say there is a presumption that easements are appurtenant rather than in gross.
i. Favorable bc limit # of people w/ easements over the land to the number of neighboring parcels.

ii. Easements in gross create more uncertainty about land use rights than appurtenant.

b. Cts generally hold that appurtenant easement cannot be severed from the land—pass automatically to whoever owns dominant estate.

2. **Easements in gross**: if benefit doesn't run w/ land, it isn't attached to particular parcel of land and there is no dominant estate.

a. **Test for distinguishing the 2 types is the intent of grantor**—can be recitation in deed, but problem arises when it is ambiguously stated/unstated.

ii. See, e.g., ***Green v. Lupo*** (when language of intent is ambiguous in deed, ct may consider situation involving property and parties, surrounding circumstances at time instrument was executed, and practical construction of instrument given by parties as proved by their conduct or admissions).

1. Granting of easement by Ds for ingress, egress, and utilities to the owners of adjacent land is evidence of an intent that the easement benefit the grantees' adjacent land, thereby being an appurtenant easement.

a. Will follow possession of dominant estate through successive transfers, even if dominant estate is subdivided into parcels.

2. Appurtenant easements can only be enforced by the person who owns the dominant estate, so can't be sold separately from land.

c. **Modifying and terminating Easements**

i. Easements last forever unless terminated by:

1. Agreement in writing
   a. Release of easement by the holder
2. Their own terms
   a. EX: if deed conveying easement expressly states that it is to last for 10 yrs.
3. Merger
   a. Holder of servient estate becomes owner of dominant estate.
4. Abandonment
   a. If it can be shown that the owner of the easement, by her conduct, had intent to abandon easement.
5. Adverse possession or prescription
   a. By owner of servient estate or 3rd party.
6. Frustration of purpose
   a. Finding that the purpose of the easement has become impossible to accomplish, or that easement no longer serves its intended purpose.
7. Marketable title acts
   a. Enacted by many states, require that easements and other encumbrances on property interests be re-recorded periodically (every 30-50 yrs) to be binding on future purchasers.
   b. Purpose: limit how far back a buyer has to look in chain of title to determine validity of seller's title and existence of encumbrances.
      i. Failure to comply w/ Act may leave easement owner unprotected from subsequent purchaser of servient estate—depending on language in statute, may be entitled to buy property free of burden of easement.

9. ***Covenants and Commercial Ordering***

a. Historically, Cs used to get around cts not enforcing negative easements.

b. Today, R.3d merges covenants and equitable servitudes.
    i. Traditional Approach:
        1. A covenant (damages) runs with the land if:
            a. Writing
            b. Intent to bind successors
            c. Touch and concern
            d. Privity
        2. An ES (injunction) runs with the land if:
            a. Writing
            b. Intent to bind successors
            c. Touch and concern
            d. Notice to successors in interest
                i. See, e.g., ***Winn-Dixie Stores v. Dolgencorp*** (Requirements of ES: existence in writing of a covenant that touches and concerns the land, an intention that the covenant run with the land and notice of the restriction by party against whom enforcement is sought).
                    1. **Facts:** W-D signed a grocery exclusivity agreement with the landlord of shopping center prohibiting other tenants from selling more than 500 ft of groceries, then Dolgencorp comes along and puts up a Dollar General that breaches the grocery exclusive. W-D sues.
                    2. **Analysis:** (1) grocery exclusive effects the mode of enjoyment of the premises (2) Paragraph 33 of lease demonstrated intent, (3) sufficient notice, Dolgencorp should've known based on commercial experience and its own exclusive, and they probably did know. [tenant qualifies as a purchaser, put on notice in same way].
c. Cts deal w/ 3 general issues in C analysis:
    i. Whether C "ran w/ the land" to bind succeeding owners, and whether the benefit could be enforced by a succeeding owner of the dominant estate.
        1. See, e.g., ***Wittinsville Plaza v. Kosteas*** (Traditional approach to requirements, but modern approach in remanding to determine reasonableness and appropriate remedy).
            a. **Facts:** Kosteas sold land to Trust subject to restrictive covenant by which Kosteas promised to not use remaining adjacent land in competition w/ store contemplated by Trust and to only use it for enumerated business purposes. Trust then sold land to Whitinsville Plaza, later Kosteas leased part of land to CVS. Plaza sues Kosteas and CVS to enforce covenant in original deed; seeks injunction prohibiting use of retained land and damages.
            b. **Issue:** Whether the anticompetitive covenant ran with the land.
            c. **Rule:** Reasonable covenants against competition may be considered to run with the land when they serve a purpose of facilitating orderly and harmonious development for commercial use.
            d. **Holding:** The anticompetitive covenant ran with the land, remand to determine reasonableness and remedy.
        2. Whether C was unenforceable bc it either violated PP or bc it was deemed "unreasonable."
        3. What should the remedy be—injunctive relief v. award of damages.
d. Rights and obligations of original parties to C
    i. Benefit of Cs held in gross (runs w/ person, not w/ parcel)
        1. Prior possessors of C can't sue
            a. Not intended to benefit anyone other than current possessor.
            b. Cts have traditionally refused to impose burden of a C on future owners of servient estate if benefit of C is held in gross.

c. EXCEPTION: many cts make exception when C is held by homeowner's assoc. on behalf of owners in neighborhood, by gov't entity, or charity.
d. R.3d allows benefit of C to be enforced in gross but only if "person seeking enforcement can demonstrate a legitimate interest in enforcing the servitude" (probably really unlikely).

ii. Enforceability against original party to C after land is transferred.
1. If Kosteas (original promisor) had sold property to CVS instead of leasing it, he would almost certainly not be bound by C. But bc he leased to CVS, he was almost certain to remain bound.
a. Leases are treated differently from sales bc landlords retain substantial powers to control use of leased premises.
2. Purpose of original C was to restrict use of servient estate—current owner who breaches C is liable for that breach, and prior owner isn't legally responsible for actions of later owners of burdened land.
3. Landlord held responsible—failure to control actions of one's tenant can be attributed to the landlord bc he retains the power, and hence duty, to ensure compliance w/ C.

e. Obligations of successors in interest.
i. Can Plaza (successor of dominant estate/benefited parcel) obtain damages and/or injunctive relief against CVS (subsequent possessor)?
1. Plaza can get remedy against CVS only if <u>both</u> benefit and burden run w/ the land—are both necessary.
2. Law of real Cs and ES must be applied.
a. Main difference: privity of estate traditionally required for real Cs but not ES; also Cs get damages while ES get equitable remedies.
b. Some cts still use distinction: if privity of estate is missing but other reqs are met, some cts will allow Plaza injunctive relief but not damages against CVS.

f. **To determine whether C ran w/ land, have to analyze both whether benefit runs w/ land to succeeding owner of dominant estate, and whether burden runs w/ land of servient estate.**
i. <u>Benefit</u>: need to determine whether current owner is entitled to enforce C made with his predecessor.
1. Is C in writing, intent, T&C test, privity?
2. If so, P entitled to sue to obtain injunctive relief to enforce C.
ii. <u>Burden</u>: need to determine whether C will be enforced against succeeding possessor of servient estate.
1. Is C in writing, intent, T&C test, privity, notice?
iii. If Benefit and Burden sides are met, then elements for enforcing C as equitable servitude are met, but judge determines whether injunctive relief is appropriate under circumstances.
iv. **<u>Elements for determining whether or not C ran with land</u>**
1. ***C is in writing***
a. Normally as part of lease/deed transferring property rights.
b. Developers may put Cs in deeds of each parcel, or use "*declaration*" of restrictions applicable to entire subdivision, or "*plat*" (detailed map showing restrictions) before any lot is sold.
i. Deeds might not have explicit reference.
ii. Majority: if C is in prior recorded declaration or plat, it meets writing requirement on ground that buyer is on notice and is bound in good conscience—makes restriction enforceable as ES.
c. Some cts relax strict writing requirement and apply estoppel to enforce representations made in sales literature or orally when buyers rely on them.
i. Justice/fairness concerns.
ii. Ct. in ***PMZ Oil*** found that estoppel would apply to prevent fraud, and even if developer changed his mind after representations were made.

d. Other cts refuse to enforce oral representations not included in prior-recorded documents.

2. ***Party to be bound (owner of burdened parcel) had notice of burden at time of purchase***
    a. Notice: intended to protect owner of servient estate
    b. Inquiry: whether owner of burdened land knew or should have known that the parcel was restricted when she bought it.
        i. Actual: actually told about it/otherwise made aware of it.
        ii. Inquiry: any condition of premises indicated that property was burdened by a C.
            1. Likely to be important only for aff. easements (rights of way)—buyer can observe things that suggest another party might have interests in land.
        iii. Constructive: C was recorded in registry of deeds along w/ deed/lease creating C, or if declaration containing restriction was recorded prior to sale.
            1. Recordings put buyer on constructive notice—reasonable buyer is expected to search title to determine whether property is burdened.
            2. If C is in deed of sale of parcel binding grantor's remaining land, and then grantor sells/leases part of remaining land w/o referencing restriction—MAJORITY say constructive notice exists, bc buyer obligated to search all grants made by seller during the time the seller owned the land.
3. ***Grantor intended restriction to run w/ land on both sides (burden servient and benefit dominant)***
    a. Intent established by grantor if:
        i. Recites that C is made to the grantor or grantee and "their heirs and assigns" and/or
        ii. It is intended to bind future owners of the parcel described in the deed, or explicitly states that C is intended to run w/ the land.
    b. Cts generally hold that C benefiting owner of neighboring land is presumptively intended to run w/ land so long as it touches and concerns land.
        i. BUT some cts require clear evidence of intent to run.
4. ***Restriction touches and concerns both dominant and servient estates (NB: ONLY SUBSTANTIVE REQUIREMENT)***
    a. Confusing/hard to define: R.3d proposes to get rid of it (but actually recreates it in a strange way). At one point meant physically touch.
    b. In general: effect of C is to make the land itself more useful/valuable to the benefited party.
    c. C must affect legal relationship of parties as landowners, therefore performance of burden must diminish landowner's rights, privileges and power in connection w/ enjoyment.
        i. Burdened estate: T&C test met if C restricts what you can do w/ burdened land, and the obligation is intended to benefit current and future owners of the dominant estates.
        ii. Benefited estate: T&C test met if C improves enjoyment of that land or increases its market value.
    d. Sometimes T&C test is used to invalidate Cs that violate PP.
        i. Substantive judgment that obligation shouldn't be permitted to run w/ the land—real reasons for invalidation seldom given by ct, if ever.
        ii. Modern law tends to address PP concerns more directly.

1. R.3d would abolish T&C requirement and provide that Cs run w/ land unless they are unconscionable, w/o rational justification, or otherwise violate PP.
    a. So it actually maintains T&C requirement by calling it a different name: "appurtenant" benefits and burdens.

e. Most cts still retain some version of T&C requirement.

5. ***Privity of estate exists btwn original covenanting parties (horizontal privity) and btwn those parties and succeeding owners (vertical privity).***
    a. R.3d unifies law of real Cs and ES by modifying doctrine of privity of estate.
    b. **Horizontal privity**: btwn original parties to C.
        i. Mutual privity: 2 owners have simultaneous interest in same parcel of land—consideration, exchange in benefit/burden on each party's land.
            1. EX: landlord tenant: tenant has present possessory interest, landlord has future interest of reversion (right to recover possession @ end of lease).
        ii. Instantaneous privity: C intended to only burden one parcel for benefit of the other can become attached to both if it's created at the moment the owner of one parcel sells the other parcel—achieved at moment of transfer.
            1. C contained in deed of sale transferring property interest will satisfy horizontal privity.
            2. C in lease or mortgage will satisfy horizontal privity.
        iii. NB: 2 situations that DON'T satisfy traditional horizontal privity test.
            1. Agreements btwn neighbors that aren't part of simultaneous conveyance of another property right—has to be part of title transfer.
                a. Ex: K among all owners on block to restrict property to residential sales.
            2. Agreements btwn grantors and grantees that aren't made at the same time as conveyance of property interest burdened or benefitted by C.
                a. Ex: C made one week after sale of parcel—not ok.
        iv. ***Ability to create privity by using straw person (lawyer) really doesn't make sense to keep this requirement.
    c. **Vertical Privity**: btwn original parties and successive parties
        i. Relaxed vertical privity: impose burden on any future owner of burdened land, and benefit on any future owner of benefited land (approach taken by ES law and R.3d, specifically changed to include lessees).
        ii. Strict vertical privity: technical requirement that grantor not retain any future interests in land (approach taken by C law; present when you sell land but not lease it).
        iii. Some cts distinguish btwn necessity vertical privity for burden v. necessary vertical privity for benefit:
            1. For burden: party must have succeeded to original promisor's entire estate or ownership interest (tenants don't count).
            2. For benefit: remote or subsequent purchaser must have a possessory interest (tenant can assume benefit).
        iv. NB: 3 situations that DON'T satisfy vertical privity test:

1. Successors in interest who have an estate of lesser duration than prior owner (landlord tenant relationship).
2. Neighbors who are intended beneficiaries of C, but are not successor owners or possessors.
    a. Most cts will allow any landowners in vicinity who are "intended beneficiaries" to enforce it whether or not they derive their titles from one of covenanting parties.
    b. Many cts won't find neighbors outside chain of title to be intended beneficiaries unless document creating C mentions their names w/ words "heirs and assigns."
3. Owners who derive title from grantor who imposed restriction but who purchased their land before sale of parcel burdened by C.

v. R.3d drops vertical privity requirement and allows benefit and burden to pass whether or not grantor retains future interest (bc it's really just a formality).

g. **Remedies**
    i. Damages often thought to be inadequate bc of unique value attached to location of land and desire to use particular unique structures.
        1. Granting of injunctions always been discretionary.
    ii. Benefits of injunction:
        1. Parties get to bargain to determine who values entitlement most and to set appropriate price.
        2. Avoid time and expense of litigation.
        3. Avoid inaccuracy of damage awards set by 3rd party who is less knowledgeable about benefits of noncompete Cs and their value to parties.
    iii. Benefits of damages:
        1. Litigation can produce result where transaction costs might prevent parties from bargaining to mutually beneficial result.
    iv. Modern trend toward case-specific remedies.
h. **Modern approach to analysis**
    i. Privity = relaxed vertical privity
    ii. T&C modified
    iii. Reasonableness/PP analysis done as separate analysis
    iv. Remedy not determined by formal requirements of C/ES but by circumstances of the case
        1. See, e.g., ***Davidson Bros., Inc. v. D. Katz & Sons, Inc.*** (Modern approach in melding touch and concern (majority) and separating out reasonableness and remedy analysis (concurrence)).
            a. **Facts:** Davidson owned and operated property as a supermarket, which operated at a loss bc of competition from his other store. Davidson sold said property to Katz w/ restrictive covenant that forbade using property as supermarket for 40 years from date of deed. Other store became more profitable, but closing of first store imposed hardship on neighborhood residents. Housing Authority leased first property from Katz and sought proposals for supermarkets, C-Town agreed, Davidson sues both to enforce restrictive covenant and to prevent C-Town from opening store.
            b. **Issue**: What test to evaluate the enforceability of noncompetition agreement: touch and concern, or reasonability?
            c. **Rule**: Covenants will run with the land if they are reasonable: whether it had impact on considerations exchanged, where it is reasonable concerning area and duration, whether it violates PP bc it constitutes unreasonable restraint on trade, otherwise interferes w/ public interest.
            d. **Holding**: Reasonableness is the proper test for evaluating the enforceability of noncompetition covenants.

i. **Concurrence**: argued only issue was whether C should be enforced by inj. Relief or damages; majority had confused question of whether C ran with land w/ question of whether it was reasonable.

10. ***Equitable Servitudes (writing, intent, touch and concern, notice)***

a. Covenant that regardless of whether it runs with the land at law, equity will enforce against the assignees of the burdened land who have notice of the covenant. Usual remedy is an injunction against violation of the covenant
   i. If P wants an injunction, must show that the covenant qualifies as ES.
b. Requirements: writing (unless negative implied) Intent to bind Successors; Touch and Concern; Notice (don't need privity)
c. Servitudes implied from common scheme
   i. When a developer subdivides land into several parcels and some of the deeds contain negative covenants but some do not, negative covenants or equitable servitudes binding ALL the parcels in the subdivision may be implied under the doctrine of "reciprocal negative servitudes" (**DOES NOT APPLY TO AFFIRMATIVE COVENANTS**)
   ii. Two requirements
      1. Common scheme for development
         a. Developer had a plan that all parcels in the subdivision be developed within the terms of the negative covenant
         b. If the scheme arises after some lots are sold, cannot impose burdens on lots previously sold
         c. May be evidenced by recorded plat, general pattern of prior restrictions or oral representations (typically made to early buyers)
         d. On the basis of scheme it is inferred that purchasers bought their lots relying on the fact they would be able to enforce subsequently created equitable servitudes similar to the restrictions imposed in their deeds
      2. Notice of the covenants (see above)
         a. To be bound by the terms of a covenant that does not appear in his deed, grantee must at the time he acquired the parcel have had notice
         b. Actual, inquiry, record
d. Privity not required
   i. Majority of courts enforce servitude not as an in personam right against the owner of the servient tenement, but as an equitable property interest in the land itself. Thus do not need privity
e. Implied beneficiaries of covenants – General scheme
   i. If a covenant in a subdivision deed is silent as to who holds its benefit, any neighbor in the subdivision will be entitled to enforce the covenant if a general scheme or plan is found to have existed at the time he purchased his lot
f. Reasons not to enforce
   i. "unclean hands" – if person seeking enforcement is violating similar restriction on own land
   ii. Acquiescence: If a benefitted party acquiesces in a violation of the servitude by one burdened party, he may be deemed to have abandoned the servitude as to other burdened parties
      1. Does not apply if the prior violation occurred in a location so distant from the complainant that it didn't really affect his land
   iii. Estoppel
      1. If the benefitted party acted in such a way that a reasonable person would believe that the covenant was abandoned and the burdened party acts in reliance thereon, benefited party will be estopped to enforce the covenant
         a. Similarly, if benefited party fails to bring suit against a violator w/in a reasonable time, action may be barred by laches
   iv. Changed conditions
      1. If the neighborhood has changed significantly since the time the servitude was created, with the result that it would be inequitable to enforce the restriction, injunctive relief will be withheld

a. Many courts still allow the holder of the benefit to bring an action for damages
b. Ex) zoning

g. Termination
   i. Written release from benefited holder(s)
   ii. Merger of the benefitted and burdened estates
   iii. Condemnation of burdened property

11. ***Implied Reciprocal Negative Servitudes***

a. **Elements of IRNS** are
   i. Common grantor developing land
   ii. Intent of developer to create common plan
   iii. General development plan
   iv. Uniform restrictions
   v. Notice to purchasers
b. 3 key issues w/ IRNS
   i. What is the scope of the common plan?
      1. No dec/plat, ½ of plots have same Cs → no common plan
      2. All lots have Cs but they're different → no common plan
      3. Deeds to 90% of lots have identical Cs → common plan
   ii. What constitutes sufficient notice?
   iii. What rules apply to the land retained by the grantor?
c. **FOR EXAM**
   i. Make it clear that courts are all over the place with IRNS--Have to weigh tension of reliance of other owners in neighborhood who accepted C with the owner's property rights (like majority vs. dissent opinions in Riley).
   ii. Theory behind IRNS: ct solved problems of subdivisions under C and ES law by inventing IRNS (bc intent, notice and privity of estate had issues).
      1. Cts determined that early buyers were intended beneficiaries of Cs made by later buyers if all of their lots were part of a common plan or scheme of development, w/ all lots in the plan obligated to comply w/ uniform plan of restrictions, for benefit of all owners in area.
         a. Tension btwn interests of owners in free use of land v. interests of other owners in relying on enforcement of mutual plan of restrictions.
d. **3 Questions to ask when looking at IRNS:**
   i. What factors evidence the existence of a common plan?
      1. Presence of restrictions in all or most deeds
      2. Recorded map/plat
      3. General plan
   ii. What rules apply to unrestricted lots?
   iii. What rules apply to land retained by the grantor?

e. **Subdivisions**
   i. Unrestricted lots: most courts hold that buyers of unrestricted lots are on constructive notice of covenants in other deeds in the vicinity sold by the same grantor.
   ii. Lots retained by the grantor: if it was noted on the original plat, most courts hold that it was part of the common plan –only parcels within the common scheme are restricted and that the grantor's intent to leave a tract or parcel out of the common scheme is determinative
   iii. ***Evans v. Pollock*** (lakefront subdivision)
      1. **Holding:** Restriction-amendments required ¾ vote by the lakefront owners – that determines the extent of the common plan – developer was only interested in those lots for the scope of the plan
   iv. ***Sanborn v. McLean*** (gas station v. residential neighborhood)
      1. **Holding:** Ds were on constructive notice and inquiry notice – there is a common plan, so IRNS applies

v. ***Riley v. Bear Creek Planning Committee*** (snow tunnel lol)
1. **Holding:** Ps aren't subject to the restrictions because there was no writing in their deed limiting the use of their land and the intent of the owner to impose those restrictions was not binding on them
2. **Dissent:** buyers did have knowledge (hello, developer told them!), so that's all we should need to prove – it's not fair b/c this rule allows people to capitalize because of a mistake and disregard restrictions

f. **What rules apply to unrestricted lots?**
i. Problem arises when developer doesn't record declaration/plat, but Cs are in most but not all deeds in subdivision, and grantor makes no promise to restrict remaining lots.
1. If buyers of remaining lots knew of restriction, orally promised to comply, could apply equitable estoppel/3rd party beneficiary doctrine to allow enforcement by prior and later buyers.
2. If no oral promise, most cts hold that buyers of unrestricted lots are on constructive notice of Cs in other deeds in vicinity sold by same grantor.
3. Evidence to show common plan?
a. If too many lots are sold w/o Cs, ct may find that no common scheme was established, freeing all unrestricted lots from compliance.
ii. Two cases with opposite approaches:
1. ***Sanborn v. McLean***
a. This case is definitely an outlier – P had no actual notice – there were only 53 plots out of 91 had restrictions – not fair
2. ***Riley v. Bear Creek Planning Committee***
a. Had actual notice, but didn't get recorded in their deed and declaration was late getting filed, so didn't have to do it – that doesn't seem fair

g. **What rules apply to land retained by the grantor?**
i. Generally: if developer retains lot separate but neighboring subdivision w/o restriction, while restricting all lots w/in subdivision, developer can sell it to commercial users. Most cts hold that only parcels w/in common scheme are restricted, and grantor's intent to leave tract/parcel out of common scheme is determinative.
1. R.3d: can have C when benefit is in gross, but must have legitimate interest.
a. Legitimate interest almost always = to increase market value, maintain reputation for future developments, etc.
ii. Two cases:
1. ***Duvall v. Ford Leasing*** –court thought that the development was piecemeal and occurred over too long of a time for there to be a common plan – so they allowed the restrictions to NOT apply to the lot that wanted car dealership on it
2. ***Snow v. Van Dam*** – court concluded that a lot across the street from the subdivision was intended to be in the same common plan, even though it was sold 15 years after the first lot, b/c the delay in sale was caused by the inability to sell the property, rather than an intent to exclude it from restricted area
a. NB: There is a strong presumption against a developer being able to enforce these things after he's sold everything b/c his interest has supposedly been satisfied – but this presumption is not universal

12. ***Regulation of Covenants and Common Interest Communities (Homeowners Associations, Cooperatives, Community Land Trusts and Limited Equity Corps., Gated Communities/Private governments)***
a. Theory behind CICs: common interest = owners benefited/burdened by servitudes that require them to pay $ to maintain common areas. Wanted way to handle common areas.
b. <u>Homeowners Associations and Condos</u>
i. Created by a declaration filed by the developer before the first sale.
ii. No privity but we allow them to enforce covenants because notice and interests are so intertwined – also association is the agency of the developer, eventually becomes the agency of the homeowners.
1. HA empowered to enforce Cs or restrictions, bring lawsuits to compel compliance

a. Each owner is member of HA; owners empowered to vote for members of a board.
    i. ONLY OWNERS have voting rights—tenants and other family members don't get to vote.
    ii. Votes may be unequal, based on lot size.

2. Condos are HAs normally made of units in buildings/attached dwellings.
    a. Common areas all owned by unit owners collectively as tenants in common.
    b. Other units not affected by one person's mortgage/payment of taxes.
    c. Every owner is a member; ownership interests usually proportional to %age of building taken up by individual unit.
    d. State condo rules regulate them by establishing ground rules for organizing condo—normally prohibit partition of common areas, define basic structure of CA, requiring declaration, bylaws, supermajority votes for certain decisions of CA.
3. R.3d: Developers can't use power to amend declaration in a way that would materially change the character of declaration, unless it fairly puts buyers on notice that the power could be used in that way. Can't violate notice principles by materially changing general development plan of subdivision w/o fair warning.
    a. See, e.g., ***Appel v. Presley Companies***
        i. **Fast Facts:** Ps own a home in a subdivision owned by D – a developer and owner of a tract in the subdivision wants to build 4 townhouses on it – originally all lots were supposed to be restricted but then some Committee deleted 9 lots from the effect of the restrictive covenants. Provisions in question really all give developer much stronger position (on surface look like they balance interest, not actually the case).
        ii. **Rule:** surprise, it's a reasonable test!
        iii. **Analysis:** Inherent inconsistency btwn set of Cs, designed to provide for general scheme or plan of development, and clause reserving in grantor the power to change or abandon any part of it—not ok bc clause can't destroy general scheme/plan.
        iv. **Holding:** It's not just about the language of the actual restrictions – courts have to apply a reasonable test to determine whether or not amendments of subdivision restrictions are enforceable
            1. **NB:** highlights divergence of interests btwn developer and homeowners; best answer might be to pass statutes that regulate this.

c. <u>Cooperatives</u>
    i. Entire building owned by single non profit cooperative corporation.
        1. Individual owners buy shares, then lease individual units from corp.
        2. Ownership vested in corp—entire coop will be financed by single mortgage that coop takes out.
            a. So if individual owner fails to make monthly payment, other owners have to make up difference to avoid foreclosure.
        3. Overall: much greater financial interdependence. Much less common than condos.
d. <u>Community Land Trusts and Limited Equity Corps.</u>
    i. Overall: new forms of land holding for poor. Purpose: remove land from speculative market, create housing for poor, keep it affordable.
    ii. <u>Community land trusts</u>
        1. Nonprofit corp, normally w/ elected BoD and open membership.
        2. Buys and holds title, usually by buying cheap land in depressed area/subsidized by government loans.
            a. Retains title, sells building located on it to poor buyer/group of buyers.
                i. Called <u>ground lease</u> (lease building for long time, often 99 yrs, often renewable).
            b. This is ok because:

i. Trust retains title to land; sells/leases building only.
ii. Non profit: purpose is to provide affordable housing rather than maximize profits/returns.
iii. Land is in area w/ low real estate value.
iv. Normally gets assistance: loan guarantees, local property tax abatements, contributions from charitable institutions, direct gov't subsidies.

3. Important: agreement btwn owner and lessee/buyer that building will be sold only to community land trust, or another low income owner, at price well below market value (NOT on open market for fair market value).
    a. Normally fixed at amount equal to owner's initial investment and future investment, w/ adjustment for inflation.
    b. Ground lease normally gives community land trust right of first refusal to buy building for fixed price—ensure property remains low cost in future.

iii. Limited Equity Corps.
1. Purpose similar to CLTs but organized like normal coop.
2. Buyer gets shares in coop and gets lease to a certain unit.
3. Allow sale of owner's shares at fixed price—prevents owner from benefitting from increases in the market value of the unit.

e. Private governments and gated communities
i. HAs raise issues about legitimate scope of powers over individual owners and ability to engage in exclusionary conduct (privatizing previously public areas).
1. Disenfranchising renters bc of voting allocation.
2. Oppressive micromanagement of individual units—infringing on liberty of owners to be free from control by neighbors.
3. Creating private governments.

13. ***Racially discriminatory covenants***

a. Themes:
i. Property owners' liberty interests inevitable conflict w/ security interests.
ii. Once property opened to public world of marketplace, different rules apply (explains a lot in *Shelley).*
iii. Property rights always limited by others' property rights.
iv. Our system seeks to prevent illegitimate concentrations of ownership that wrongfully preclude access to market for property.

b. ***Shelley v. Kraemer*** (no blacks or Asians)
i. **Issue**: Does the enforcement of a racially restrictive C violate one's 14th A right to due process under the laws? Whether enforcement by judiciary constitutes state action?
ii. **Rule**: For purposes of 14th A, state action = exertions of state power in all forms.
iii. **Holding**: Enforcement by judiciary constitutes state action, therefore racially restrictive C violates one's 14th A right to due process.
1. **NB**: two possible interpretations; (1) case is about state sup. Ct. going far out of its way to enforce racial restrictions (could have just invalidated provision under equitable servitude or Cs, bc there was arguably no notice, privity or intent); (2) case is about property rights v. contract rights (binding future owners v. only parties present to the K).

c. ***Evans v. Abney*** (Macon/Bacon)
i. *Cy pres* doctrine—allow terms of charitable trust to be changed to achieve donor's general charitable purposes when method chosen becomes impossible.
1. Requirements: (1) Charitable gifts; (2) general charitable intent; (3) impossibility—as stated, directions are impossible.
ii. GA ct. Concluded Bacon would have rather had park closed to everyone rather than see it integrated.
1. NB: at time Bacon wrote his will, law in GA authorizing racially restrictive trusts—he took advantage of it.

iii. SCOTUS: closing park under these circumstances didn't violate 14th A because impetus to close park came from private party rather than state officials. When trust failed, title transferred automatically to heirs, no ct. judgment needed for this to happen. No state action forcing transfer of title—distinguishable from *Shelley*.
1. Bullshit—even if you close it people still know why—message sent that discrimination is ok.

d. ***Palmer v. Thompson***
i. 1 year after *Evans*; Ct. held that when city closed public pool to prevent it from becoming integrated, no violation of equal protection clause bc pool closing treated everyone equally.
1. Brennan and Douglas dissented—should fail as the imposition of a penalty for obedience to a principle of national supremacy. State action at every level of fact situation.

14. ***Restraints on Alienation***
a. Common law: strong presumption that property owners should be able to transfer their interests.
b. Traditionally: validity of restraints on alienation determined by reference to the type of property.
i. Greatest ownership interest: fee simple/ fee simple absolute.
ii. Restraints on alienation on lesser interests in land (leases) generally upheld.
c. Modern approach: restraints on alienation subject to reasonableness test, but restrictions on leases still more likely to be upheld than ones on fee interests.
i. **R.3d §3.4: reasonableness of a restraint on alienation is determined by "weighing the utility of the restraint against the injurious consequences of enforcing the restraint."**
ii. NB: partial (last for limited time/only against certain people) are sometimes upheld—either doesn't unduly limit ability to transfer property or the restraint has a legitimate purpose that justifies the limit.
iii. Total restrains on alienation of fee simple interests uniformly held void and unenforceable.
1. Disabling restraints—directly forbids owner from transferring interest in property.
a. EX: "Any transfer of Blackacre shall be null and void."
2. Promissory restraints—grantee promises not to alienate his interest in property.
a. EX: "A promises that Blackacre shall never be conveyed."
3. Forfeiture restraints—provides for a future interest that will vest if owner attempts to transfer her interest in the property.
a. EX: "If A ever tries to convey Blackacre, it reverts to the grantor."
d. Policy goals supported by alienability:
i. Efficiency—shift property easily to more valued use.
ii. Liberty—free current owners from undue restrictions imposed by past owners.
iii. Equality—promoting dispersal of ownership and preventing arbitrary/exclusionary interests.
e. 5 different types of restraints on alienation:
i. Direct restraints
1. See, e.g., ***Horse Pond Fish & Game Club v. Cormier*** (MODERN APPROACH: Restraint against alienation may have been valid if P were a charitable entity—need to determine P's charitable status).
a. **Rule:** rule of "reasonable restraints" generally doesn't apply in the case of a gift to a charitable trust/corporation.
b. **Analysis**: have to determine whether P is charitable entity, if so, whether restraint is valid based on whether or furthers the charitable purpose of the organization. If P is not a charitable organization, the rule of reasonable restraints has to be considered and TC's earlier determination that the restraint was reasonable would stand.
c. NB: Charities get special rules bc over time, property might become so valuable that board might be tempted to sell and move away from the original purpose of the charitable gift; therefore restrictions on alienation are more often ok.
ii. Servitudes requiring consent of either grantor (developer) or assoc. to transfer property—*grantor consent clauses*.
1. EX: "A can only transfer Blackacre with grantor's consent."

2. Many cts won't allow developer to exercise consent to sale C once the last unit is sold.
3. Cs that grant power of consenting to sale to homeowners or condo assoc are normally upheld if they either:
    a. Require assoc. to act reasonably
    b. Are in the form of preemptive rights that ensure the owner can transfer the unit for its fair market value to the assoc. or its members or that require holder of preemptive right to match any bona fide offers.
4. See, e.g., ***Northwest Real Estate Co. v. Serio*** (TRADITIONAL APPROACH: C conveyed was not ok because P had been granted absolute ownership, and therefore his alienation can't be limited).
    a. Strong argument that ct shouldn't be interfering w/ market, shouldn't be picking winners and losers, restricts efficiency and liberty.
    b. Maybe it's better to have a broad rule striking all of these down to avoid as much discrimination as possible.
    c. Dissent: nothing against public interest in C bc restraint was intended to give developer power to control development for long enough to secure returns—this includes preventing certain "elements of the population" invading the neighborhood. Racist.
5. See, e.g., ***Riste v. Eastern Washington Bible Camp, Inc.*** (TRADITIONAL APPROACH: C that restricted selling lots only to people who agreed to subscribe to the tenets of the church, new owner wanted to sell them to people contrary to restrictions, Cs were found to be invalid).
    a. **Rule:** a prohibition on conveying land by grantee w/o approval of grantor, when grantor transferred fee simple estate, is void.
        i. Also presumption of invalidity on public policy grounds, C violates discrimination grounds.

iii. Rights of first refusal (aka preemptive rights)
1. EX: "If A ever wishes to sell Blackacre, grantor shall have priority over all other buyers in purchasing it."
    a. NB: doesn't necessarily qualify as fair provision if you're promised fair market value bc it allows the grantor to swoop in at the last minute at the end of the transaction; hugely inefficient.
2. Generally allow matching of 3rd party offers—ensuring transferability of property for something approaching fair market value. Many cts enforce them for this reason, esp if held by condo assoc.
    a. Other cts review RoFR to see if they are reasonable—if not, strike them down as unreasonable restraints on alienation (esp. if they have no time limit).
3. See, e.g., ***Wolinsky v. Kadison*** (MODERN APPROACH: single mom wanted to sell her condo and buy a new one in the same building, Board exercised its right of first refusal for the one she wanted to buy (allowed to do so under declaration); P was member of assoc. and Board failed to comply w/ the bylaws which was a breach of their fiduciary duty to her as a member).
    a. **Rule:** Exercise of RoFR subject to reasonable test:
        i. Whether reason for exercising it is rationally related to the protection, preservation or proper operation of the property and purposes of assoc.
        ii. Whether it was exercised in fair and nondiscriminatory manner.
    b. All condo assoc. officers and board members become fiduciaries to some degree—owe fiduciary or quasi fiduciary duty to members of assoc.

iv. Options to purchase—right to buy property when one chooses to do so; right to force an owner to sell.
1. EX: "At any time, grantor may purchase Blackacre from A for its FMV."
2. Opposite of preemptive right.

3. Options likely to be held as unreasonable restraint on alienation if they are for a fixed price and have no termination date; if for limited time and ensure that owner receives fair market value, likely to be upheld.

v. Indirect restraints on alienation
   1. Some private controls on land use are so intense that they make property really hard to sell—sometimes struck down as indirect restraints on alienation.
   2. Difficult to win on this: R.3d requires lacking a rational justification.
   3. Obsolete restrictions are generally handled by doctrines of changed conditions and relative hardship.

vi. Low income housing.
   1. Community development corporations (CDCs): established housing for low income families.
      a. Often subject to restraints on alienation that prohibit leasing property or sale to family that isn't low income.
         i. See, e.g., ***City of Oceanside v. McKenna*** (restriction on leasing was justifiable bc provision of housing for low/moderate income people is in keeping w/ public policy of the state).
            1. Determine whether restraint was reasonable: the greater the restraint, the stronger justification you need to support it.

IV. TRANSFERRING PROPERTY INTERESTS

15. *Leaseholds: Conflicts about Rent*

a. Main rights reserved by landlord in relation to tenant:
   i. Right to receive rent
   ii. Right to have premises intact and not damaged, subject to normal wear and teat (tenant's duty not to commit waste).
   iii. Landlord's reversion (regain possession at end of term).

b. Most lawsuits brought by LLs against Ts bc T hasn't paid rent.
   i. Usually LL sues for back rent and to evict tenant.
   ii. Smaller #: attempt to evict T for breaching other express/implied terms of lease
      1. C to not keep pets; C to not sublet.

c. Landlord's remedies when T fails to pay rent
   i. <u>T doesn't pay rent or some other material term in lease, continues to occupy premises.</u>
      1. LL can sue for back rent and possession (evict T and rerent to someone else).
      2. T's defenses: implied warranty of habitability and retaliatory eviction, unlawful discrimination.
   ii. <u>Holdover T and the renewal of the tenancy.</u>
      1. If T wrongfully stays after lease term and continues to pay rent, LL can choose to accept new tenancy relationship: holdover T.
         a. Most states: new tenancy is a periodic tenancy based on rent payment.
            i. If LL accepts check for one month's rent—new month-to-month tenancy is created.
            ii. Minority of states: new term created if LL accepts rent from holdover T who was originally occupying for years—T is bound to another term of the same length as original one.
      2. LL can also treat T as "T at sufferance" or a holdover T and sue for possession.
         a. NB: some states hold that acceptance of rent check necessarily creates a new tenancy.
   iii. <u>Self help</u>
      1. T breaches lease and refuses to leave—can LL engage in self help to get T out?
         a. Most states: NO (at least in residential context, often in commercial too).
         b. LL normally has to evict T through court.
         c. See, e.g., ***Berg v. Wiley*** (T made structural changes to building which violated a C in the lease, LL responded by changing the locks and barred

him from premises, ct held for T bc the only lawful means of eviction was through ct.).

d. Public policy rationale: self help likely to get violent, L may be wrong about right to possession, he shouldn't be the judge of his own rights.

iv. Summary process

1. Most states have summary process statutes—allow relatively fast judicial determination of the LL's claim of a right to regain possession of her property.
    a. Aka forcible entry and detainer, unlawful detainer, summary proceedings, and summary ejectment.
    b. Often limit issues that can be addressed in the lawsuit—for many years prevented Ts from raising defenses to LL's claim.
        i. NB: have become less "summary" bc Ts now able to raise defenses, esp. implied warranty of habitability.
        ii. Some states still prevent T from raising defenses in summary proceedings: SCOTUS says this is ok and doesn't violate DPC of 14th A—interesting.

d. Landlord's duty to mitigate damages

i. If T breaches lease for term of years by ceasing rent payments and moves out before end of lease term—3 remedies.

1. Accept T's surrender
    a. By moving out, T makes implied offer to LL to end term of years.
    b. LL can choose to accept T's surrender of the lease. LL agrees T won't be legally obligated to pay future rent.
        i. LL can still sue for back rent, damages for BoL.
2. Re-let on T's account
    a. LL can choose to refuse surrender. Instead after LL gives notice to T, he can actively look for new T and re-let on T's account.
    b. When new T is found, LL can sue former T for diff. btwn old rental price and new rent. New rent has to be reasonable—can't agree on $5 w/ your sister and collect.
3. Wait and sue for rent at the end of the lease term v. mitigate damages
    a. Traditional rule: LL can do nothing, wait for end of lease term, then sue T for remaining back rent. Couldn't sue before rent became due.
        i. Almost all states reject this—apply K doctrine that aggrieved party has to mitigate damages.
            1. Obligation on LL to act reasonably in finding another T.
            2. If LL doesn't do this, damages will be reduced by the amt that would have been avoided if LL had acted reasonably to find a replacement T.
    b. See, e.g., ***Sommer v. Kridel*** (T prematurely ended lease by surrender, but LL didn't mitigate damages at all, ct focused on trend of getting rid of technicalities and relying on intent of parties like in K law, K principle should apply here too; LLs must mitigate damages in event of T surrender of lease).
        i. **Rule:** Reject traditional formal rule; now LLs have duty to mitigate damages when he wants to recover rent from a defaulting T. Apply modern notions of fairness and equity. LL has burden of proving that he used reasonable diligence in attempting to re-let.
    c. Almost all states have common/statutory law that imposes duty to mitigate on both parties for residential, most for commercial as well.
        i. LL seen as least cost avoider.
        ii. In lawsuit against T for back rent, LL can recover only difference btwn market rent and K rent provided for in lease w/ original T, plus costs of finding replacement T.

ii. Efficiency Arguments for and against the duty to mitigate damages:
    1. For: encourages LL's to rent premises rather than leaving them vacant. LL in a better economic position if can lease to someone else, plus, the T isn't stuck. Plus, you'd lose social wealth if don't try to re-let.
    2. Against: LL and T bargained for right not to have to look for another tenant. This is a property right the LL owns. T has no right to take from LL without offering adequate compensation. Only compensation that is adequate is remainder of bargained-for rent.

16. ***Leaseholds: Tenants' Right to Habitable Premises***

a. **Covenant of quiet enjoyment and constructive eviction**
    i. Express and implied terms in LL-T relationship
        1. LL-T relationship governed partly by express terms of any written lease.
        2. Also governed by implied terms—may not be written down or even explicitly discussed to be legally binding.
    ii. Structure of LL-T litigation
        1. Bound in ongoing contractual relationship—LL has transferred to T right to possess property in return for periodic rent payments.
        2. Most lawsuits: claims by LL against T based on T's failure to pay rent or on some claimed breach of lease agreement.
            a. LL may seek either payment of back rent or possession of premises (aka eviction).
            b. ***Important to separate LL's claim for back rent from LL's claim for possession.
        3. In response to lawsuit from LL, T may make counterclaims against LL if rules of procedure allow it.
            a. T can argue for:
                i. **Abatement**—reduction in rent.
                ii. **Injunctive relief**—like an order to LL to fix apt to comply w/ local housing code.
            b. Rather than waiting for LL to sue T, T may sue LL initially w/ T's claims, normally these lawsuits ask for:
                i. Damages resulting from LL's neg. maintenance or compensation for injuries resulting from LL's failure to comply w/ housing code, OR
                ii. Injunction ordering LL to fix apt to comply w/ terms of lease or housing code.
    iii. Actual Eviction—when LL breaches lease by physically barring T from the property, T's obligation to pay rent ceases entirely.
        1. Partial actual eviction constitutes breach of lease and provides T w/ ample justification to move out before end of lease term; T won't be liable for rent after moving out.
        2. Traditional rule: T doesn't have to pay rent *completely* even though T continues to occupy rest of premises.
            a. NB: this rule may change; modern trend seems to be rent abatement.
    iv. Constructive Eviction—when LL substantially interferes w/ T's quiet enjoyment of premises; defense of constructive eviction allows T to stop rent payments and move out before end of lease term.
        1. Traditional rule: T can raise defense of constructive eviction only if he moves out w/in reasonable period of time.
        2. Partial constructive eviction: T can show that LL's actions have substantially deprived the T of the use and enjoyment of a portion of the property.
        3. R.2d departs from traditional law:
            a. Defines constructive eviction as interference that is "more than insignificant" rather than requiring interference to be "substantial."

b. Adopts *Blackett* doctrine—LL liable for acts of 3rd parties "performed on property on which LL has an interest, which conduct could be legally controlled by him."
c. Rejects traditional requirement that T abandon premises before taking advantage of constructive eviction doctrine, on ground that "it makes the law completely unavailable to tenants who for one reason or another cannot move."

4. See, e.g., ***Minjak Co. v. Randolph*—marked the beginning of the change from traditional rule of caveat emptor** (LL sued Ts for non payment of rent, but Ts' answer had aff. def. of constructive eviction and counterclaimed for breach of WH bc LL had made 2/3 of their apt uninhabitable bc of LL's renovations; Ct affirmed that constructive eviction is an aff. def. to non payment of rent).
   a. T has right to enjoyment of premises under IWH.
   b. Takeaway: T can assert constructive eviction as defense to non-payment of rent, even if he has abandoned only a <u>portion</u> of the premises due to LL's acts in making that portion of premises unusable by T.
   c. NB: jury found morally culpable conduct on part of LL—dangerous and offensive manner in which LL permitted construction to be performed.

v. Relation to implied warranty of habitability
   1. IWH obligates LL to comply w/ housing code and to provide premises that are safe and suitable for habitation.
   2. Bc of the development of the IWH, litigation about constructive eviction has focused less on conditions of premises and more on other LL acts that might interfere w/ quiet enjoyment, such as noise and harassment.
      a. See, e.g., ***Blackett v. Olanoff*** (LL allows nightclub to set up shop in residential area, lease for nightclub specifically provided that it shouldn't disturb neighbors but experience was that sound levels patrons wanted was offensive to tenants—bc the condition was natural and probable consequence of LL's lease to the nightclub, they violated IWH for residential tenants).

vi. T's duties to other Ts
   1. Most written leases contain express clauses obligating Ts not to disturb quiet enjoyment of other Ts and many states have statutes that require T to conduct himself and require other ppl on premises w/ his consent to conduct themselves in manner that won't disturb his neighbors' "peaceful enjoyment of the premises."

vii. LL's liability for acts of other Ts
   1. Traditional rule: constructive eviction may be shown only if LL has acted in a way that interfered w/ T's interest in quiet enjoyment.
      a. Is applied in most states.

b. **Warranty of habitability**
   i. Majority rule: IWH has been adopted by almost all states by statute (in response to judicial creation) or common law for residential tenancies and is non-disclaimable.
      1. NB: a few holdouts still refuse to apply warranty to residential leases; many states don't apply IWH to commercial leases bc commercial Ts have it for a really long time and bc they have more equal bargaining power.
      2. Many cts hold that IWH isn't violated until LL has been notified of the problem and had a reasonable opportunity to fix it.
      3. Some cts find violation the moment the condition occurs.
      4. Standard: generally local housing code.
   ii. T's duty not to commit waste
      1. Ts also have obligations not to damage premises and to keep them clean and safe.
      2. T who intentionally/negligently damages premises can be evicted by LL.
   iii. <u>Remedies</u>—in most states, remedies available to Ts come from a combination of common law doctrines and specific statutory provisions.
      1. See, e.g., ***Javins v. First National Realty Corp*** (Ts didn't pay rent for one month, were sued by LL for possession but Ts alleged violations of Housing Regulations as

"an equitable defense or claim by way of recoupment or set-off in an amount equal to the rent claim").

a. Ct moving toward treating lease as K: T's obligation to pay rent is dependent upon LL's performance of his obligations. Implied warranties ok to uphold legitimate expectations.
b. WH (measured by standards set out in Housing Regulations) is implied by operation of law into leases of urban dwelling units covered by those Regulations, and breach of this IWH give rise to usual remedies for BoK (even though regs were silent on whether they gave rise to a private cause of action).
    i. *Brown*—having code does create privately enforceable duties.
c. NB: Ct's conclusion compelled by 3 main things:
    i. Outdated factual assumptions
    ii. Consumer protection
    iii. Nature of urban housing market.
d. Strong feeling of gross injustice—LLs making big $ off of minority tenants who were poor, living in appalling conditions.

2. *Rescission, or right to move out before end of the lease term*
    a. LL's violation of his contractual obligation to provide a habitable apt entitles T to stop performance of her contractual obligations—T can repudiate K and move out before end of lease w/o being liable for months remaining on lease.
3. *Rent withholding*
    a. If LL sues T for back rent, T can raise violation of IWH as a defense to claim for back rent.
    b. If LL has breached IWH, then T's failure to pay rent doesn't constitute breach of T's contractual obligations—T has legal right to stop paying rent under circumstances.
        i. Advisable for Ts who are contemplating rent withholding to determine whether any statutes regulate their ability to withhold rent.
        ii. Advisable for Ts to notify LL of problem before withholding rent; cts unlikely to find violation of IWH unless LL has been notified of problem and then failed to correct it w/in reasonable period of time.
4. *Rent abatement*
    a. When LL violates IWH, T normally entitled to reduction in rent; amt in reduction depends on test used in jurisdiction.
5. *Repair and deduct*
    a. T may be able to pay for needed repairs herself and then deduct cost of repairs from rent paid to LL.
6. *Injunctive relief/specific performance*
7. *Administrative remedies*
    a. Local housing code may include procedures for enforcement by local housing inspectors.
8. *Criminal penalties*
    a. State building code statutes may have criminal penalties (fines and imprisonment) for LLs who fail to fix dangerous and unlawful conditions in apt buildings.
9. *Compensatory damages*
    a. Most cases: Ts raise IWH as defense to claims by LL for back rent/possession, but sometimes Ts bring claims for comp damages against LLs for violation of IWH as independent lawsuits or counterclaims.

17. ***Real Estate Transactions: the Recording System***

a. Deeds and title protection

b. **Formalities**
    i. Deed must be in writing (statute of frauds) AND:
        1. Identify parties
        2. Describe property being conveyed
            a. Has to be precise enough to locate boundaries
            b. Can be described by a plat or a subdivision map.
            c. Can be described by metes and bounds.
                i. Starts at defined point (natural/artificial monument such as fence or street edge; identifies direction/distance of first border, etc. until returning to original starting point).
                ii. Basically describes how you would walk around property in question.
        3. State grantor's intent to convey property interest in question
        4. Contain grantor's signature (grantee signature not necessary)
    ii. Deed doesn't have to be recorded to transfer title—just delivery of deed to grantee is sufficient.
        1. Some states require public notary, some require 1+ witnesses to transaction.
    iii. Delivery
        1. Deed has to be delivered to grantee to make transfer of ownership.
            a. When people give real property as gift (normally to family members) problems of delivery are common:
                i. A person sometimes gets physical possession of a deed and may even record, when owner doesn't intend to transfer ownership.
                    1. Possession of deed/recording it/both can give rise to a PRESUMPTION that the grantor intended to transfer.
                    2. Most cts hold that presumption can be overcome by extrinsic evidence that original owner didn't intend to transfer—oral testimony allowed.
                ii. Some cts are reluctant to find delivery unless deed has been physically handed over to the donee or to a 3rd party who has instructions to deliver it.
                    1. <u>Constructive delivery</u>—most cts hold that delivery has occurred even if deed isn't physically delivered to donee (but cts split on this).
                        a. Writing a deed and engaging in conduct that demonstrates intent to transfer is sufficient to constitute delivery.
                        b. Many cts hold that delivery of deed to 3rd party (like atty) w. instructions to hand over deed to grantee at grantor's death constitutes delivery of vested remainder to grantee, w/ life estate retained by grantor.

c. **Title Covenants**
    i. Warranties of title
        1. Most important elements of real estate transaction: seller's ability to convey title to property to buyer, and buyer's ability to be assured that his ownership rights will be secure against other claimants.
        2. Title search might not reveal important defects in chain of title—buyer might want additional info.
            a. Additional assurance: **title covenant/warranty of title** contained in deed.
            b. **Present covenants**—these are breached (if at all) at time of closing (conveyance); SoL starts running then.
                i. *Conveyance of seisin*
                    1. Grantor's promise that he owns the estate that he is purporting to convey to the grantee.

a. EX: Lessee would breach this if he were trying to convey fee simple.

ii. *Covenant of the right to convey*
1. Grantor's promise that he has the power to transfer the interest purportedly conveyed to the grantee.
a. EX: if property were adversely possessed by someone other than the seller, seller would have seisin of the property but not the right to convey it.

iii. *Covenant against encumbrances*
1. Grantor's promise that no mortgages, leases, liens, unpaid property taxes, or easements encumber the property other than those acknowledged in the deed.

c. **Future covenants**—these are breached (if at all) after closing, when disturbance to grantee's possession occurs; SoL starts running when possession is disturbed.
i. *Covenant of warranty*
1. Grantor promises to compensate grantee for any monetary losses brought by grantor's failure to convey title promised in deed.
a. **General warranty**—covenants against all defects in title.
b. **Special warranty**—limits C to defects in title caused by grantor's own acts but not acts of prior owners.
i. Specifically limits time frame to that of grantor.
c. **Quitclaim deed**—no warranty or C of title whatsoever; purports to convey whatever interests in property are owned by grantor BUT doesn't promise that grantor actually owns the property interest that he claims to own. Gives no real assurance.
i. Advantages: easy and cheap, ok if it comes from a grantor you trust (direct from gov't).
ii. Border disputes—2 ft tract of land.
iii. "Right, title and interest" = quitclaim deed.
iv. NB: constitutes inquiry notice in some states.

ii. *Covenant of quiet enjoyment*
1. Grantor promises that grantee's possession won't be disturbed by any other claimant w/ superior lawful title.
a. NB: more or less the same as C of warranty.

iii. *Covenant for further assurances*
1. Requires seller to take further steps to cure defects in grantor's title—paying adverse possessor to leave property or paying owner of encumbrance to release it.
a. NB: rarely used.

ii. **Remedies for breach of warranty of title**
1. Most widely used C is C of warranty
a. Runs w/ land, can be enforced by later grantees.
b. Damages for BoW, seisin, right to convey, and quiet enjoyment are normally measured by the price paid for the property that has been lost.
i. Normally fair market value of property at time of closing.

ii. NB: if breach discovered after closing, buyer won't be able to recover market value of property—highly criticized.
1. Insurance might handle this better.

c. Damages for breach of C against encumbrances is either cost of removing encumbrance (ex: pay off mortgage) or difference btwn value of property w/o encumbrance and w/ encumbrance.

d. **Recording Acts**

i. The recording system
1. Intended to give buyers of real property security that they will actually own property interests that they're buying.
2. Every state has recording act—provides for central registry at each locality (often county level).
a. Submitting deed to registry = recording the deed.
3. Prior common law rule: first in time, first in right
a. Recording acts change this—define when buyer who has recorded his deed will prevail over buyer who didn't.
4. Two general rules:
a. Subsequent buyer who has no notice of a prior conveyance and who records his interest will prevail over any prior unrecorded interest.
b. A buyer who has no notice of a prior conveyance and records his deed is protected against any conflicting claimants who record their interests later.
i. NB: many statutes only provide for recording long term leases—if statute doesn't cover it, common law rule applies.
5. *Estoppel by deed*: vests grantor's interest immediately in grantee, when grantor previously purported to transfer interest but didn't own it, and acquires deed later (generally true even if grantor records deed before grantee).
6. *Wild deeds*—treat it as non existent.

ii. Other places to check
1. Courts—see if any lawsuits affecting property, wills probated, divorce proceedings, etc.
2. If owner has declared bankruptcy.
3. Whether any liens to collect unpaid property taxes.
a. Recording system DOES NOT protect against adverse possession—buyer has to investigate.

iii. Recording systems normally only protect buyers, not recipients of gifts. If dispute btwn 2 donees, common law rule applies.

iv. How to conduct a title search.
1. Info would best be filed by tract—not how it's done.
2. Normally: grantor-grantee index.
a. Separate files for grantors and grantees.
i. Grantor index: all instruments listed alphabetically and chronologically by grantor's last name (same for grantee index).
b. Index has bare outline of each transaction.
i. Grantor and grantee
1. NB: search in grantor index starts at date of execution, not at date of recording.
ii. Description of land
iii. Type of interest conveyed
iv. Date recorded
v. Book and page numbers where copy of document can be found.

v. See, e.g., *Sabo v. Horvath*
1. Horvath's deed, recorded too early outside chain of title, didn't give constructive notice to Saboses and isn't duly recorded under the statute, whereas Saboses duly recorded their deed (quitclaim) when they were granted it 2 years later, therefore Saboses' interest prevails.

a. Ct found the Saboses didn't have constructive notice bc Horvath recorded deed prior to grantor obtaining patent from the gov't and didn't rerecord when the grantor obtained the patent—made Horvath's deed a wild deed.
b. Policy: want to promote simplicity and certainty in title transactions.

vi. Types of recording acts
1. Divided into 3 types: race, notice, and race-notice
a. Race (2 states: NC and LA)
i. Person who records first prevails—win race to registry.
ii. True even if person who records first KNOWS about an earlier conveyance to someone else.
iii. EX: O conveys land to A, who doesn't record, O then conveys same land to B. B knows of earlier conveyance to A. B records his deed. In a lawsuit btwn A and B, B prevails.
iv. Key language in statute:
1. "Recording"
2. "Registering"
3. "First to record"
4. No mention of "notice" or "good faith"
b. Notice (23 states)
i. Subsequent purchaser prevails only if he didn't have notice of earlier conveyance.
ii. Protects any purchase w/o notice against prior unrecorded interests, even if purchaser doesn't record first.
iii. EX: O conveys land to A, who doesn't record. O then conveys land to B. B doesn't know about A. B prevails over A, even though B doesn't record his deed. B also prevails over A even if A later records his deed, before B records his.
iv. Key language in statute:
1. "Without notice" or "in good faith," w/o reference to recording first.
c. Race-notice (25 states and DC).
i. Subsequent purchases prevails over prior unrecorded interests only if he:
1. Didn't know of prior conveyance at the time he acquired his; AND
2. If he records his deed before the prior one is recorded.
3. If first purchaser records first, she prevails.
ii. EX: O conveys land to A, who doesn't record. O conveys same land to B. B didn't know about A. A records, then B records. A prevails over B bc he recorded first.
iii. Key language in statute:
1. "good faith" or "notice" and "first recorded" or "first duly recorded."
2. For Notice and Race-Notice, actual and constructive notice suffice
a. Constructive notice: when grantee, by conducting reasonable title search, would have discovered earlier conveyance.
b. Inquiry notice can exist if subsequent buyer would have discovered conveyance if he had reasonably investigated facts at his disposal.
i. EX: property is being occupied by someone else other than grantor.

vii. Shelter doctrine
1. Allows bona fide buyer to convey property to 3rd party even if 3rd party is on notice of earlier conveyance.
a. Bona fide buyer who records first gets full rights in property over earlier buyer who didn't record.

e. **Fraud**

i. Statutes authorize seller to convey an interest they no longer own, when they protect bona fide purchasers by granting them title to property even if seller previously sold to someone else.
    1. Essentially defraud first buyer.
    2. Create new property interest: power in grantor to transfer ownership from first grantee, who didn't record, to second grantee.
        a. NB: even if grantee loses title to someone else, he can sue grantor for damages under fraud.

f. **Marketable Title Acts**
    i. Attempt to solve problem of defining how far back you have to search by limiting searches to a reasonable period (usu. 30-40 years).
    ii. When a person has a record title for designated period of time, all other claims/interests are extinguished.
    iii. To preserve claims, owners must rerecord interest/file notice of claim every 30 yrs after intial recording.

g. **Title insurance**
    i. Title insurance companies exist to search title
    ii. Some banks require buyers to buy it as condition for getting a mortgage.
    iii. Disputes may arise btwn title insurance companies and insured over interpretation of K, esp as to what kinds of defects in title are covered.

h. **Title registration**
    i. Title registration/Torrens system adopted in 10 states
        1. Owner who wants to register land must file petition for judicial/quasi judicial proceeding, similar to action to quiet title.
        2. Notice has to be given to anyone w/ interest in land.
            a. Result: certificate of registration or title, stating identity of property and all encumbrances; conclusive as to title, filed in registrar's office.
            b. If owner sells, deed has to be brought to registry and new certificate issued.
        3. New buyer only has to examine current certificate and documents referred to in it.
            a. Simplifies system a lot, but is really really expensive.
            b. States who have adopted it allowed owners to register land on voluntary basis—therefore most land is still unregistered and governed by old system.

18. ***The Fair Housing Law***

a. Two sets of cases:
    i. Discriminatory treatment (discriminatory intent, focus is on **nature** of D's conduct)
    ii. Disparate impact (discriminatory effects of D's conduct, focus is on **effects** of D's conduct).
    iii. Standing
        1. 2 categories of people have standing under statute
            a. Those directly injured by discriminatory acts
            b. Those who have sufficient incentive to litigate the case
                i. Includes testers and fair housing organizations.
    iv. Prima facie case for discriminatory treatment claims
        1. Test articulated in *Asbury* only applies to claims based on D's refusal to sell or refusal to lease to P.
            a. L who takes a particular apartment off the market, refusing to rent it to anyone to avoid renting it to a member of a protected class, may be violating statute on ground that conduct constitutes refusal to sell because of race.
    v. D's Answer
        1. If P can produce evidence of the various elements of the prima facie case, burden shifts to D to show non discriminatory reason for differential treatment.
            a. If D fails to assert any justification and fact finder is persuaded that P has met prima facie case, P is very likely to prevail.
                i. If D produces evidence, P must show reasons are pretextual.
                    1. If P shows reasons are pretextual, jury may conclude (not required to) that real reason was discriminatory.

b. **§13.1.1 Fair housing Act**
   i. §3601 *Declaration of policy*
      1. "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."
   ii. §3602 *Definitions*
      1. Dwelling= any building or portion of building; any vacant land offered for sale for the construction of any building.
      2. Family= includes 1 person
      3. Handicap does not include current, illegal use of or addiction to a controlled substance.
   iii. § 3603(b) *Exemptions*
      1. Only subsection c of §3604 applies to single family homes sold or rented by owner, as long as owner doesn't have more than 3 single family homes at the same time.
      2. Sale/rental will be exempted from the subchapter only if it is sold/rented (A) without use of any professional real estate agents, and (B) without the publication of anything in violation of §3604(c).
      3. Also doesn't apply if owner is one of maximum 4 units in a dwelling, intended for 4 independent families.
   iv. §3604 *Discrimination in sale or rental of housing and other prohibited practices.*
      1. A) Can't refuse to sell/rent based on race, color, religion, sex, familial status, or national origin.
      2. B) Can't discriminate in terms/conditions/privileges of sale/ or rental for the same reasons.
      3. C) Can't make advertisements that discriminate or state preferences.
      4. F) No discriminating against handicapped people
         a. After Sept. 13 1988, all dwellings have to be designed so that people with wheelchairs/handicaps can use them.
   v. §3613 *Enforcement by private persons*
      1. A) creates right of action no later than 2 years after occurrence or termination of discriminatory practice.
      2. B) court can appoint an attorney or allow commencement/continuation of civil action without payment if the court finds that the person can't afford it.
      3. C) Court may award actual and punitive damages, may grant relief in the form of permanent/temporary injunctions, temporary restraining orders, or others (ex: enjoining D from engaging in such practices, or ordering such affirmative action as may be appropriate).
         a. Also can award attorney's fees and costs to P (reasonable) as long as P isn't the US.
   vi. §3617 *Interference, coercion or intimidation; enforcement by civil action*
      1. Can't intimidate people if they exercise their rights/ help others exercise their rights under the previous sections.
   vii. §3631 *Violations; penalties*
      1. If you injure/intimidate/interfere with anyone you will be fined under Title 18 or imprisoned for no more than a year or both.
      2. If acts include use, attempted use, or threatened use of a dangerous weapon, explosives, or fire then you get fined under Title 18 or imprisoned not more than 10 years or both.
      3. If acts result in death or if acts include (attempted) kidnapping, (attempted) aggravated sexual abuse or an attempt to kill, you get fined under Title 18, or imprisoned for however long or for life, or both.

c. **Remedies**
   i. Fair Housing Amendments Act of 1988 (FHAA) significantly expanded FHA
      1. Prohibited discrimination against families w/ kids (familial status) and against people w/ disabilities (handicap)
      2. Extended SoL from 6 months to 2 years and by eliminating $1000 limit on PD
      3. Granted Housing and Urban Development power to enforce statute.

4. Aggrieved people can file lawsuit in fed ct for injunctive relief, comp and PD.
    a. They could also file complaint w/ HUD—power to investigate and adjudicate dispute.
        i. If HUD finds evidence of violation, it must issue a charge on behalf of the person, explaining the facts which give the Secretary reasonable cause to believe discriminatory practice may be in place.

ii. Are remedies adequate?
1. Prof. Schwemm: racial discrimination by landlords remain at alarmingly high levels.
2. Many don't report discrimination—delay and expense of litigation also undermine value of FHA.
3. Landlords influenced by unconscious racial bias.

iii. Standard of Liability
1. Claims under FHA can be based either on showing of **discriminatory treatment** (intent) OR **disparate impact**.
    a. Discriminatory treatment—denying particular people housing on purpose.
    b. Disparate impact—Ds actions have a disproportionate, exclusionary impact on members of a protected group and that the impact isn't justified by legitimate gov't or business objectives.
        i. NB: employers are generally vicariously liable for acts of employees; but officers are generally not personally liable unless they acted to direct or approve discriminatory practices.

d. **Discrimination by housing providers**

i. *Burden shifting regime for discriminatory claims*
1. See, e.g., ***Asbury v. Brougham*** (10th Cir 1989)
    a. **Facts:** African American mom and her daughter go to Brougham Estates in Kansas City looking for an apartment or a townhouse. She was told there were no occupancies, but she later finds out that there were. Asbury alleges she was discriminated against by the management, Leo Brougham and his employee, on the basis of race/sex.
    b. **Issue:** Whether or not there was discrimination on the basis of race or sex in violation of 42 USC §1982 or FHA.
    c. **Rule:** 3 part burden of proof analysis from *McDonnell Douglas Corp*.: (1) must show prima facie case of discrimination; (2) if prima facie case established, burden shifts to Ds to produce evidence that refusal to rent/negotiate was motivated non-racially; (3) once Ds articulate reasons, burden goes back on P to show that reasons were pretenses.
        i. Proof necessary to establish prima facie case under FHA and §1982:
            1. member of racial minority (she is black)
            2. applied for and was qualified to rent specific apartment (based on income alone D admitted she would have probably qualified)
            3. denied opportunity to rent/inspect/negotiate for rental; and
            4. housing remained available employee told another potential renter that the apartments were available immediately (a lot of evidence for this, both apartments and townhomes were available)
        ii. Burden Shifting
            1. (**shift 1: from plaintiff to defendant →)** Defendants claimed their legitimate, non-discriminatory reasons for rejecting Asbury rose out of the policy that families with one child could rent townhouses but not apartments, and that there were no exceptions to this rule. They also claimed no appropriate housing was available to Asbury at the time due to this policy.

2. **(shift 2: from defendant back to plaintiff)** But Asbury provided evidence that they had made exceptions in the past AND there was some evidence that townhouses would be available when Asbury planned to move

d. **Holding:** There was substantial evidence supporting and a reasonable basis for the jury's verdict awarding both comp and pun damages.

ii. See, e.g., ***United States v. Starrett City Associates*** (2d Cir. 1988)

1. **Issue:** Whether or not practice of maintaining certain racial balance to maintain integration (avoid white flight and tipping) is in violation of FHA and/or Title VIII.
   a. While quotas promote integration policy, they contravene its antidiscrimination policy—bring two goals of Act into conflict. Race conscious plans can't be "ageless in reach into the past, and timeless in ability to affect the future." Impact of Ds' policies falls only on minorities and acts as a ceiling to their access.
2. **Analysis**: Although affirmative action doesn't necessarily violate the Act, a plan employing racial distinctions must be:
   a. Temporary in nature
   b. Benign in practice by not working against innocent people
   c. Based on some history of racial discrimination
      i. Starrett's ceiling quotas lacks each of these characteristics. Not temporary, appellants fail to say at least 15 more years. It hurts minorities by failing to provide them with access to Starrett City. Finally, there is no history of prior racial discrimination or imbalance since Starrett City was initiated as an integrated complex.
   d. Factors a court looks to in evaluating a race conscious plan:
      i. Projected duration
      ii. History of a problem within the entity
      iii. Access quota or ceiling quota
3. **Holding:** FHA does not allow the use of rigid racial quotas of indefinite duration to maintain fixed level of integration by restricting minority access.
4. **Dissent:**
   a. Statute never intended to apply to actions such as these—intended to bar perpetuation of segregation.
   b. FHA intended to enhance opportunity for people of all races to live next to each other—shouldn't be interpreted to prevent landlord from maintaining one of the most successful integrated housing projects in the US.

e. Racial steering

i. Many cases brought under FHA concern claims against realtors who have done "racial steering"—showing blacks housing in certain areas and whites housing in others.

1. Violate act by otherwise making unavailable housing because of race, and violating express prohibition against discrimination
2. Proving that a realtor has engaged in racial steering often involves use of testers.

f. Advertising

i. Ads that limit housing to whites clearly violate FHA

1. See, e.g., ***Ragin v. NY Times Co***—newspaper's practice of publishing real estate ads with almost always white models in a city w/ significant minority population might violate FHA by showing discriminatory preference—ultimate issue for fact finder was whether a natural interpretation by an ordinary reader is a racial preference.
   a. NB: Communications Decency Act of 1996: immunizes websites and service providers from liability for discriminatory roommate advertisements posted on its website (would have faced this liability if it were a regular newspaper).

g. Tipping

i. *Starrett City* presents possible conflict btwn integration and nondiscrimination.

1. NB: Landlords in area dominated by blacks can actively seek white tenants to move into a complex as a means of promoting integration.

h. State laws
   i. Almost every state has some kind of fair housing law—may regulate more types of discrimination than covered by fed FHA.
      1. Ex: marital status, age, sexual orientation.

i. **Discrimination based on family status**
   i. See, e.g., ***Human Rights Commission v. LaBrie, Inc.*** **(VT 1995)**
      1. **Issue:** Whether occupancy limit was in violation of VT and/or Fed FHA
      2. **Rule:** Occupancy limits can be in violation if they have discriminatory impact and if they are not adopted as a reasonable restriction.
      3. **Holding:** Occupancy limit was unlawful because it was unreasonable and had discriminatory impact

j. **Reasonable accommodation of persons with disabilities**
   i. Examples of case law:
      1. Can't evict physically handicapped tenant w/ back problem for failing to remove boxes that were fire hazard when tenant made arrangements to have them removed, and when FHA places obligation on landlord to make reasonable accommodation for tenant's handicap.
      2. Can't evict tenant for having a cat, even if your rules disallow it, if tenant has psychiatric disability and emotional attachment to/psych dependence on the cat and when cat didn't bother neighbors.
   ii. Have to make reasonable modifications at expense of handicapped person if the modifications may be necessary to give person full enjoyment; lessors can require that lessees return apt to state it was in previously. Must also provide for equal opportunity to use and enjoy the dwelling.
      1. Ex: blind person w/ seeing eye dog, have to allow dog even if it would otherwise be not allowed.

19. ***Intergenerational Transfers: the System of Estates***

a. **Fee simple/ fee simple absolute** = property ownership without an associated future interest.
   i. Owner has present right to own and use property however she sees fit.
      1. Conveyance =
         a. O to A
         b. O to A and her heirs
            i. NB: indicates fee simple interest; doesn't actually give A's heirs interests in the property itself.
      2. *Words of purchase*= language that identifies owner A
      3. *Words of limitation* = language that identifies kind of estate owned by A (fee simple).
         a. O to A in fee simple
   ii. Owners presumed to convey all the interests they own in property they convey unless conveyance states otherwise.

b. **Defeasible Fees—**present interests that terminate at the occurrence of a specified event (other than death of current owner). (think of conditional fee)
   i. **Categories of defeasible fees** relate to 2 distinctions:
      1. Whether future interest is in the grantor or in a third party
      2. Whether the future interest becomes possessory automatically when event occurs, or becomes possessory only if future interest holder chooses to assert his property right
   ii. **Automatic transfer to the grantor**
      1. When future interest reverts automatically to grantor on occurrence of stated event
         a. **Present interest = fee simple determinable**
         b. **Future interest = possibility of reverter**
      2. EX: O to A so long as used for residential purposes; while used for residential purposes; unless used for nonresidential purposes

a. Creates a fee simple determinable in A with a possibility of reverter in O or his heirs or devisees.

iii. **Transfer upon grantor's assertion of property rights**
1. Grantor may choose to retain for herself/heirs the right to decide, at time condition is violated, whether to retake her property
a. **Present interest = fee simple subject to a condition subsequent**
b. **Future interest = right of entry (power of termination)**
2. EX: O to A on condition that property be used for residential purposes; in event it is not so used, O shall have right of entry.
3. Traditionally: possibilities of reverter and rights of entry not transferable (too insubstantial as property rights since they might never happen—vast majority of states hold that future interests are alienable as well as devisable and inheritable).

iv. Modern approach treats two types of future interest (reverter and right of entry) the same under 1 of 2 theories.
1. Ct may apply doctrine of laches to prevent holder of right of entry from waiting too long to assert right of entry.
a. Unreasonable delay in asserting legal right would unfairly prejudice the other.
2. Policy: inappropriate for the one who violates a condition to face the perpetual possibility of a claim by current holder.
a. **Start running of statute the moment condition is violated (not universal approach)—has the effect of making rights of entry more or less identical to possibilities of reverter.**

v. **Transfer to a third party**
1. Future interest in defeasible fee belongs to someone other than the grantor.
a. **Present interest = fee simple subject to executory limitation**
b. **Future interest = executory interest**
i. Executory interest = any interest in 3rd party that's created when limitations put on estate of previous owner.
ii. 2 kinds of executory interest:
1. Shifting—follows estate in a grantee
2. Springing—divests an estate in the grantor
2. Interest identical to fee simple determinable, but ownership shifts automatically to 3rd party rather than reverting to grantor upon occurrence of event.
a. EX: O to A so long as used for residential purposes, then to B.
3. NB: any conveyance that transfers ownership to third party on occurrence of event other than current owner's death = fee simple subject to an executory limitation.

c. **Life estates**
i. Present ownership rights can be held during life of designated person
1. EX: "O to A for life" creates **life estate** interest in A

ii. Future interest following life estate can be either in grantor or 3rd party.
1. **Reversion**—if property reverts to grantor when A dies
2. **Remainder—**if grantor designates 3rd party to obtain ownership when A dies

iii. Difference btwn life estate and fee simple: owner of fee simple can choose who owns property after her death; life estate owner has no right to determine who owns property on death bc ownership automatically
1. NB: if A sells her life estate to B, B gets the estate for the life of A: B's interest is called **life estate for the life of another or a life estate per autre vie.**
a. EX: O to A for life
i. Gives life estate to A and automatically creates reversion in O (when A dies, property reverts to O).
b. EX: O to A for life, then to B
i. Creates life estate in A, w/ remainder in B

d. **Contingent and vested remainders**
i. Future interests following life estates may vest in a third party (remainer)—two types of remainders: contingent and vested.

ii. **Contingent remainders**
1. If one or both of 2 conditions are met:
a. *If remainder will take effect only upon event that is not certain to happen;*
i. Condition precedent—describes future into estate, future event that has to happen before future interest can become possessory.
b. *If remainder will go to person who can't be ascertained at time of initial conveyance.*
2. EX: O to A for life, then to B if B has graduated law school—creates contingent remainder bc at time of the original conveyance from O to A it isn't certain that B will graduate from law school.
a. If B doesn't graduate, property reverts to O on A's death; if B later graduates from law school property will spring to B.
b. Condition has to occur within description of estate—BEFORE other punctuation.
3. NB: If a remainder isn't contingent, it's vested (***if condition comes after comma, it's vested).
a. Law formerly provided that contingent remainders were "destroyed" if they didn't vest before preceding life estate ended or by merger (limited ability of grantors to create contingent remainders that would vest far in the future).
b. Modern approach: contingent remainders are indestructible.
i. O to A for life, then to B if he becomes a lawyer.
1. If B had not become a lawyer before A died, property would revert to O as fee simple subject to executory limitation w/ an executory interest in B that would vest and become possessory if B ever became a lawyer.
ii. NB: contingent remainders likely to vest too far into the future are regulated by the rule against perpetuities.

iii. **Vested remainders**
1. Includes any remainders that aren't contingent—people are identifiable at time of initial conveyance and for whom there are no conditions precedent other than natural termination of prior life estate.
2. 3 kinds of vested remainders:
a. *Absolutely vested remainders*—any remainder that follows a life estate that is definite going to happen**.**
b. *Vested remainders subject to open*—class of people that may grow in the future.
c. *Vested remainders subject to divestment*—may never vest bc of an event that occurs after the original conveyance.
i. Condition that looks like condition precedent but is outside of descriptor clause.
3. **Key question**: whether vested remainder could be divested before it ever becomes possessory. If so, remainder is subject to divestment. If it becomes possessory and THEN you might lose it, it isn't vested.

e. **Doctrine of worthier title**
i. "O to A for life, remainder in the heirs of O" is often interpreted by many states as "O to A for life, remainder in O"
1. Remainder in O's heirs converted into a reversion in the grantor—no longer an absolute rule.
2. Rule might be justified bc inability to create a fee simple interest by contract may really interfere w/ alienability of the property.

f. **Rule in Shelley's Case**
i. Similar to doctrine of worthier title: converts a remainder in grantee's heirs into a remainder in the grantee.
1. O to A for life, remainder to A's heirs→ O to A for life, remainder to A.
a. A owns life estate and remainder; the two are merged into a fee simple.

ii. ABOLISHED IN THE VAST MAJORITY OF STATES

g. **Fee tail**
   i. Estate whose purpose is to keep the property in a family dynasty—"O to A **and the heirs of his body**;" created set of life estates in A and A's descendants until blood line ran out, would then revert to O or O's heirs.
      1. Only recognized in DE, ME, MA and RI.

h. **Trusts**
   i. Grantor conveys property to a trustee to be managed for the benefit of the beneficiaries—trustee has power to sell property and reinvest if doing so is in best interests of beneficiaries (unless settlor intended property not to be sold).

i. **How to interpret ambiguous conveyances**
   i. Cts first seek to implement the intent of the grantor.
      - If intent is unclear, turn to public policy considerations—attempt to further the free use and alienability of property by a presumption against finding a future interest (esp. if recognizing future interest would mean that present possessor lost title to future interest holder).
         1. In tension w/ principle of promoting the grantor's intent
   ii. *Presumption against forfeitures.*
      1. Forfeitures are not favored in the law—if it's possible to interpret ambiguous language to avoid loss of property by current owner, cts will generally adopt this interpretation.
   iii. See, e.g., ***Wood v. Board of County Commissioners of Fremont County (WY 1988)***
      1. **Rule:** There is a presumption that every conveyance of real estate passes all the estate of the grantor unless the intent to pass less is expressly stated or is necessarily implied in the terms of the grant.
         a. NB: Ct really relying on public policy—fewer owners there are for a given property, the easier it is to alienate.
   iv. See, e.g., ***Edwards v. Bradley*** **(VA 1984).**
      1. **Rule:** If a will does not explicitly leave a life estate in property, the creation of a life estate can be implied from the intent of the testator.
         a. NB: Ct really relying on the intent of the grantor.
         b. Only way conveyance could be legal is if it were interpreted to be a life estate.
            i. Wording
            ii. If fee simple, restrictions are unreasonable restraints on alienation.
   v. *Changed conditions doctrine*
      1. Changed conditions doctrine denying enforcement of Cs when circumstances are so changed that they no longer benefit dominant estate has traditionally NOT applied to future interests.
      2. NB: some states have statutes that remove future interests in charitable properties.

20. ***Regulating Future Interests and the Rule Against Perpetuities***

a. **Rule Against Perpetuities**
   i. "No interest is good unless it must vest, if at all, no later than 21 years after the death of some life in being at the creation of the interest."
      1. Policy: leave control of wealth in the hands of the living rather than the hands of the dead.
   ii. A future interest is void the moment it is created if:
      1. It is in a grantee (a remainder or an executory interest)
      2. If it is a remainder, it is either contingent or subject to open, and
      3. It might not vest within 21 years after the death of the last person alive at the time of the conveyance (ambiguity is the problem).

b. **Three-step approach to applying RAP:**
   i. *Determine whether the future interest in question is one to which RAP applies.*
      1. RAP applies to:

a. Contingent remainders
    i. "O to A for life, then to B if B graduates"
b. Vested remainders subject to open
    i. "O to A for life, then to A's children"
c. Executory interests
    i. "O to A, so long as used for hospital, then to B"

2. ***If you have age limitations on currently non-existent kids, it's a red flag.
3. RAP **DOES NOT** apply to other future interests, including:
    a. Rights of reentry
    b. Possibilities of reverter
    c. Other vested remainders

ii. *If RAP applies, determine whether the future interest in question is valid.*
1. If the interest is certain to **vest** or **fail** within a life in being plus 21 years, it is valid.
    a. An interest vests the moment the contingency occurs that renders the interest certain to come into possession.
2. A life in being is anyone named in the conveyance.
    a. NB: Corporations are NOT "life in being" (according to book).

iii. *If the future interest in question is invalid, delete the offending language and modify what you have left to create a recognized estate.*
1. EX: O to A for residential purposes, then to B → O to A for residential purposes.

c. **Rules to keep in mind when applying RAP**
i. RAP applies when the conveyance is created. A will becomes effective (so the conveyance is created) when the testator dies.
ii. A child is considered alive (a life in being) from the time the child is conceived if the child is later born alive.
iii. Ignore medical advances: in vitro fertilization, surrogate motherhood, sperm storage.
iv. Any person who is alive is considered capable of having more children, regardless of the person's age or physical condition (Fertile Octogenarian).
v. No living person has a widow or widower and the person who may ultimately meet these descriptions might not be alive at the time of the conveyance (Unborn Widow).

d. **Modern Approaches to the RAP**
i. Wait until point down the road when all lives in interest +21 years have passed—if it vests, it's ok, if not then it's invalid THEN, not when the conveyance is created.
ii. Make smallest modification possible to preserve the interest.
iii. Get rid of inconsistency btwn grantee and grantor—cut grantor's interest short as well.
iv. Similar approach to recording acts.
v. All interests have to vest/fail to vest within 90 years.

e. Interest groups who like the RAP
i. Small farmers
ii. Environmentalists
iii. Big banks who want perpetual trusts
iv. Oil drillers.
1. RAP serves to create possibility of return of fee tail, even though it's been abolished.

21. ***Conflicts over Transfers by Co-Owners***

a. **Varieties of common ownership**
i. Tenancy in common/joint tenancy
ii. Tenancy by the entirety
iii. Partnerships (businesses)
iv. Community property—marital assets in some states.

b. **Tenancy in common and joint tenancy**
i. *Tenancy in common*
1. Each tenant in common has the *right to possess* the entire parcel (unless all co-tenants otherwise agree by contract).

2. Each co-tenant has "undivided interest"—each has right to possess the whole property; may choose to possess property together in many situations.
3. When tenant in common dies, interest goes to devisees under will or to heirs under state intestacy statute
4. EX: To A and B as tenants in common, with a 75% undivided interest in A and a 25% undivided interest in B.

ii. *Joint tenancy* (fairly worthless doctrine, normally only used today when 1 party is trying to take advantage of the other).
1. Each T has right to possess entire parcel
   a. NB: UNLIKE TIC, JTs traditionally required to possess equal fractional interests in the property.
2. *Right of survivorship*—when JT dies, property interest is immediately transferred to remaining JTs in equal shares.
3. EX: To A, B, and C as joint tenants.
4. A JT can sever the tenancy and destroy the right of survivorship by conveying her interest to herself, even w/o notice to other JT.

iii. Main differences btwn JT and TIC.
1. *Formalities of creation* (NB: some states passed statutes abolishing one or more of these; can be easily avoided by using a straw man).
   a. Unity of time—interest of each JT must be created at the same moment in time.
   b. Title—all JTs must acquire title by the same instrument or title.
   c. Interest—all JTs must possess equal fractional undivided interests in the property and interests must last same amt of time. (in reality this doesn't happen).
   d. Possession—all JTs must have right to possess entire parcel.
2. *Severance*
   a. JTs can transfer property interest and destroy the right of survivorship of fellow owners.
      i. A and B own property as JTs—each has right to obtain full ownership when the other one dies. If A sells her ½ interest to C, JT is severed, and B's right of survivorship is destroyed→ B and C will own property as TIC.
      ii. JT can convey interest to another who can convey it back—thereby destroying right of survivorship while retaining life interest. A and B are now TIC.
   b. JTs can achieve same result by conveying interest from self as JT to self as TIC—designate intent to destroy right of survivorship.
   c. Severance only occurs btwn selling owner and remaining owners—doesn't change relations of remaining owners among themselves.
      i. NB: possible to create indestructible right of survivorship if you use life estates and remainders.
         1. O to A and B as life tenants, with a remainder in A if A survives B, and a remainder in B if B survives A.
         2. Creates alternative contingent remainders in A and B—whoever dies 2nd will get remainder, and therefore property in FSA.
   d. Cts divided on question of whether leases sever JTs.
      i. Allowing severance may increase alienability of property, esp if ct holds that leases given by one JT don't survive the death of the lessor (few people will rent property if they know their possessory rights will end as soon as their landlord dies).
      ii. HOWEVER right of survivorship may increase alienability of property by decreasing # of owners fron 2 to 1—makes it easier for property to be bought and sold.
   e. Cts divided on question of whether mortgages sever joint tenancies.

iv. Interpretation problems and presumptions
    1. If conveyance is ambiguous as to whether grantor intended to create a tenancy in common or joint tenancy, current practice is to interpret conveyance as TIC.
        a. EX: To A and B as co-tenants—presume it's TIC.
        b. Imposed in some states by statutes and in others by common law.
        c. To clearly create JT, state "to A and B as JTs with right of survivorship."
v. Transferability of co-tenancy interests
    1. JTs and TICs are free to transfer interests w/o consent of their co-owners
    2. TICs can leave their interests to devisees by will, JTs can't do this b/c their interest automatically goes to other JT when they die.
vi. Partition
    1. JTs and TICs have power to file lawsuit for *judicial partition* of commonly held property—ct may order property physically divided among co-owners; if not doable, ct will order property to be sold and proceeds divided to co-owners in proportion to ownership shares.
        a. *Voluntary partition*—co-owners agree among themselves to partition.
    2. Restrictions against partition are now generally upheld as long as they are reasonably limited in time and have reasonable purpose.
    3. Fiduciary obligations of co-tenants or joint tenants to share the benefits and burdens of ownership.
        a. Sharing the benefits of ownership—if one co-owners chooses to live on property and the other doesn't, normal rule is that tenant in possession has no duty to pay rent to the non-possessing tenant (not universal).
            i. JTs and TICs do have duty to pay rent to co-owners if they have ousted them (wrongfully exclude from co-owned property).
                1. Constructive ouster—if property is too small to be physically occupied by all co-owners.
            ii. Right to share any rents paid by 3rd parties who are possessing property
            iii. Right to lease your own interest WITHOUT consent of other co-tenants.
        b. Sharing the burdens of ownership—mortgage, property taxes, property insurance.
            i. Co-tenants don't have duty to share costs of major improvements unless they agree to do so.
            ii. Most cts hold that co-owners have duty to share basic maintenance and necessary repairs of property so it doesn't fall into disrepair.
            iii. Most cts hold that co-owner who exclusively possesses the premises must bear entire burden of expenses, if value of her occupation exceeds those payments.
                1. NB: a tenant in possession can sue co-tenants out of possession only for their share of expenses that exceeds fair rental value to which they would be entitled if the property were leased to third party.
        c. Accounting
            i. Co owners can bring a judicial proceeding to require co owners to pay their portion of maintenance expenses, or to force co owners to hand over portion of rent from 3rd party.
vii. Trespass
    1. Can one owner prevent another from receiving visitors in jointly owned property?
        a. See, e.g., *Georgia v. Randolph* (SCOTUS 2006): wife gave police permission to enter to search house for drugs, but husband refused to let them in. SCOTUS held that 4th A prohibits police to enter home over objections of physically president resident, even if co-owner consents.
viii. Adverse possession and ouster

1. Co-tenant can't get AP against another co-tenant unless possessing tenant makes clear to nonpossessory tenant that he is asserting full ownership rights in property to exclusion of other co-tenants.
    a. Cts generally require some affirmative act that puts nonpossessory tenant on notice that co-owner is APing her interests.
        i. Traditionally: ouster required forcible physical removal.
    b. Rationale: each T has legal right to possess entire property—sole possession doesn't violate rights of other co-Ts and therefore doesn't constitute a trespass.
        i. NB: cts strongly disagree about what constitutes an ouster.
        ii. See, e.g., ***Olivas v. Olivas*** **(NM 1989)**
            1. **Issue**: Whether or not Mrs. Olivas had constructively ousted Mr. Olivas from their community property after their separation.
            2. **Rule**: when the emotions of a divorce make it impossible for spouses to continue to share the marital residence pending a property division, the spouse who chooses to leave may be entitled to rent through constructive ouster.
                a. Constructive ouster—intolerable to live there, forced to leave w/o physical removal.
            3. **Holding:** Evidence presented to TC was conflicting as to whether husband was pushed out or pulled away—evidence did not compel TC to find constructive ouster, even though it could apply in a case of division of property following a divorce.

c. **Tenancy by the entirety**
    i. Form of JT available only to married couples; has been abolished in majority of states (still around in 20).
        1. EX: To A and B as tenants in the entirety.
    ii. Similar to JT:
        1. Co owners must be legally married
        2. Property can't be partitioned except through divorce proceeding.
        3. Individual interest of each spouse can't be sold, transferred or encumbered by mortgage w/o consent of the other spouse (right of survivorship can't be destroyed by transfer of interest of one party)
        4. Creditors can't attach property held through tenancy by the entirety to satisfy debts of one of the spouses.
    iii. Traditional way of married couples to have property
        1. Gave husband sole power to manage and control property.
        2. Has been held to violate equal protection clause by defining state property law in a way that discriminates on the basis of sex.
        3. In states that still have this, some interpret ambiguous conveyances to married couples as tenancy by the entirety, but some apply usual presumption in favor of tenancies in common.

d. **Family conflicts over use of common property**
    i. See, e.g., ***Carr v. Deking*** **(WA 1988)**
        1. **Issue:** Whether Carr Jr. was entitled to eject Deking from the land on the basis that the lease he signed with Carr Sr. was invalid.
        2. **Rule:** A coT may lawfully lease his own interest in the common property to another w/o the consent of the other T and w/o his joining in the lease, and w.o giving notice. Any TIC can lease their interest w/o notice to the other TIC and the other TIC can't stop it.
        3. **Holding:** Carr Jr. isn't allowed to eject Deking from property; remedy is partition. Until partition occurs, Deking can continue to farm.

e. **Death**
    i. See, e.g., ***Tenhet v. Boswell*** **(CA 1976)**

1. **Issue:** Whether or not a JT's lease to a 3rd party for a term of years completely or temporarily severs the joint tenancy.
2. **Rule:** When a JT leases his interest to a 3rd party for a term of years, and JT dies during that term, the **lease doesn't sever the joint tenancy** but expires upon death of lessor joint tenant. When a JT grants certain rights in joint property w/o severing tenancy, **when he dies any encumbrances placed by him on the property become unenforceable against the surviving joint tenant** (including leases).
3. **Holding:** Lease is no longer valid because it is unenforceable against the surviving JT as an encumbrance, because lessor JT's interest in property died when he died.
    a. **Take away:** Ct wants to protect institution of JT—any other result would undermine the doctrine itself.

f. **Divorce**

i. See, e.g., ***Kresha v. Kresha*** **(Neb. 1985)**

1. **Issue:** Whether or not the son's lease, conveyed to him by his father, was valid after his parents divorced and the lands (including the part he leased) were transferred to the mother.
2. **Rule:** When the mother took entire ownership of lands in conveyance, she took the lands subject to the son's leasehold interest in the father's former ownership interest.
3. **Holding:** The son's lease is still valid.

V. PROPERTY, PUBLIC ORDERING, AND THE CONSTITUTION

22. *Zoning*

a. **Generally**

i. The state may enact statutes to reasonably control the use of land for the protection of the health, safety, morals and welfare of its citizens.

ii. Zoning is the division of a jurisdiction into districts in which certain uses and developments are permitted or prohibited

iii. Power is based on the state's police power and is limited by Due Process Clause of 14th Amendment and the Fifth Amendment: "no taking without just compensation clause"

b. **History of Zoning**

i. History

1. Response to problems created by rapid urbanization
2. **LANDMARK CASE:** Village of Euclid v. Ambler Realty, 1926
    a. **Facts:** P, realty company, owned vacant land in the village of Euclid which it wished to develop for industrial purposes. Land was in a district of the Village that had been zoned soley for residential uses. P claimed that the value of the land was reduced from $10,000 per acre to $2,500/ acre and that ordinance was an unconstitutional violation of P's due process and equal protection rights.
    b. **Holding:** Zoning measures would be struck down as unconstitutional only it was **clearly arbitrary** and **unreasonable**, having no substantial relation to the public health, safety, morals, or **general welfare**. Use zoning scheme, insofar as it reduced traffic/noise in residential areas and facilitated fire prevention met the standard. Court did not evaluate each minor provision, instead looked at the overall reasonableness of the scheme was clear

ii. Effects of *Euclid*

1. Gave rise to spread of similar ordinances across the nation. Euclid ordinance was cumulative: each successive district permitted all the uses allowed in the previous district plus some. Not the case anymore (would have houses in industrial areas which is bad)
2. Evolution: now serves a number of purposes
    a. Preserving neighborhood character, protective property values, preventing environmental degradation, encouraging economic development

c. **Exclusionary Zoning**

i. Refers to land-use controls that tend to exclude low-income and minority groups. Euclidean zoning designed to separate land uses, but soon used to keep certain groups and uses out of community (aka snob zoning)
ii. Typical examples of devices which might be used to exclude people
    1. ban on multiple dwellings
    2. If apartment buildings are allowed, a minimum floor area for each living unit
    3. Prohibition on publicly-subsidized housing
    4. If apartments are allowed, set limit on number of bedrooms (prevents large families from burdening school system e.g. Mt. Laurel)
    5. Ban on mobile homes
iii. Traditionally, states were reluctant to invalidate exclusionary zoning devices, and granted municipalities a great deal of latitude in furthering "general welfare"
    1. **Today**, courts have expanded notion of general welfare from present residents of the particular community , now consider welfare of the entire region
    2. Zoning interest falls under state so must be in interest of the state
iv. See, e.g., ***Southern Burlington County, NAACP v. Mt. Laurel (NJ 1975)***
    1. **Facts**: P represented Black and Hispanic persons living in/near Mt. Laurel who claimed that the town's zoning policies prevented them from finding low- or moderate- income housing. Mt. Laurel zoning plan contained 2 exclusionary features 1) all areas zoned for residential use required single-family detached dwellings with substantial minimum lot-size and floor area restrictions and 2) nearly 30% of the town's land area was zoned for industrial use seven though < 1% was actually used and the rest was vacant. PUD's had been built but were designed to contain upper-income apartments (mainly 1B so no families w/ school aged kids would be allowed). Town argued that it was only doing this for tax reasons, to make sure that new housing would in effect pay its own governmental way so wanted as few children as possible.
    2. **Issue:** Whether a municipality may validly by land use regulation (zoning ordinances) make it physically and economically impossible to provide low and moderate-income housing in the municipality and thereby exclude people of limited income and resources?
    3. **Analysis:** Scheme violated substantive due process and equal protection rights guaranteed by the state constitution and failed to serve the general welfare of the region as a whole. Municipality may not foreclose opportunities for low- and moderate- income housing and must offer opportunity for such housing 'at least to the extent of the municipality's fair share of present and prospective regional need' Fair share of regional housing needs: confinement to certain county isn't realistic but restriction within the boundaries of a state seemed ok. Ct. rejects tax argument and fiscal considerations as a legitimate defense for exclusionary zoning b/c municipalities must zone primarily for the living welfare of people and not for the benefit of the local tax rate. **Intent not important: effect.**
    4. **Rule**: A zoning regulation, like any police power enactment, must promote public health, safety, morals or the general welfare. Presumptively, the town can't prevent opportunity of class of people mentioned to get low/mod income housing, regs must affirmatively afford that opportunity.
        a. **NB*: MINORITY RULE***; only a few states have interpreted their state constitutions in the same way.
    5. **Holding:** Town has to use zoning laws to give low/mid income families appropriate choice and variety of housing**.** Town has 90 days to comply, but Ps have opportunity to attack amendments via supplemental complaint (they did).
v. ***Mt. Laurel II***
    1. Trust in town was unfounded: 8 years later Mt. Laurel still had exclusionary zoning and no low/middle income housing had been built. New challenges brought, 6 were consolidated in single appeal to NJ Sup. Ct.
    2. Extended obligation to every municipality in the state, not just "developing" communities.

3. Imposed affirmative remedies on towns to encourage construction of low/mid income housing:
    a. **Density bonuses**: right to build extra housing beyond normally allowed by zoning ordinance if builder promises to make some units be low income
    b. **Federal subsidies**: Cooperating w/ developer to obtain federal subsidies for low income housing
    c. **Eliminating** bans on Mobile homes
    d. **Builder's remedy**: ordering a municipality to allow a developer to construct a particular project that includes a substantial amount of lower-income housing unless the "municipality establishes that because of environmental or other substantial planning concerns, the P's proposed project is clearly contrary to sound land use planning.
    e. **Mandatory set asides:** requiring developers include a minimum amount of lower income housing in their projects to get a permit to build
    f. **Appointment of a master to revise zoning ordinance:** in extreme case of municipal disregard of the law, appointing a master to rewrite the zoning ordinance to comply w/ the constitutional obligation to provide for the municipality's resident poor or its fair share of the regional low-income housing need

d. **Legislation**
    i. *Mt. Laurel II* invited NJ legislature to act to implement constit. obligation to precent exclusionary zoning.
    ii. *Fair Housing Act of 1985*
        1. Transferred authority of Mt Laurel cases to state admin agency—Council on Affordable Housing.
        2. Allowed municipalities to buy their way out of Mt Laurel obligation by paying neighboring communities to absorb up to half of fair-share obligation.
        3. NB: Tows can avoid Mt. Laurel obligations by taking property by eminent domain, if the taking is motivated by "legitimate public policy concerns."→could be literally anything.
    iii. **Inclusionary Zoning:** Some states have adopted legislation to limit exclusionary zoning or to promote inclusionary zoning, for example through linkage ordinances that condition real estate development on providing low income housing
        1. Recent evidence: inclusionary zoning programs have produced significant amts of low income housing, but benefits mainly elderly and white people (more means and more likely to take place in suburban areas).

e. Growth controls
    i. ***Zuckerman v. Town of Hadley***
        1. MA Sup. Ct. held that town's permanent limit on # of annual building permits was detrimental to public welfare, therefore not legitimate zoning purpose, therefore unconstitutional.
        2. Can't serve general welfare of state to allow one town to deflect wave of newcomers onto neighbors.

f. **Efficiency Concerns**
    i. Robert Ellickson
        1. Zoning = tax on new construction b/c some units that would otherwise not be profitable must be included in the development thereby raising the cost of providing new housing
        2. When cost is artificially raised by gov't less will be providing thereby exacerbating housing shortage for low/moderate income
    ii. Other scholars
        1. Such techniques are likely to restore the efficient use of land by removing inefficient restrictions on development contained in existing exclusionary zoning laws
        2. Laws that exclude low-income housing from the community arguably decrease social welfare by attempting to create protected subdivisions w/o accounting for the externalities of limiting low-income housing

3. Also artificially Inc. cost of low-income housing by excluding it from Ares in which developers could otherwise profitably build

23. ***Eminent Domain; Origins of the Regulatory Takings Problem***

a. **Defining v. defending property rights**

i. Property rights serve twin roles: protector of individual rights against other citizens; safeguard against excessive government interference.

ii. Some limit has to be imposed on state's ability to redefine property rights in order to defend property owners from illegitimate governmental power.

1. 5th A supposed to fill dual role as applied to **federal** government takings
2. 14th A supposed to fill dual role as applied to **state** gov't takings.

iii. When state acts within legitimate sphere of police power, infringement on private property interests gets you no legal redress—eminent domain is separate.

1. Eminent domain power of states: power to take or "condemn" private property, expropriating it, paying just compensation to owner, and transferring property to some use designed to further the public welfare.

iv. Regulatory takings

1. State actions intended to regulate private conduct to promote private welfare sometimes have disproportionately negative effects on some property holders.
2. Takings clause mediates btwn police power and eminent domain power—defines when a purported exercise of the police power has gone "too far" in infringing on private property rights w/o adequate public justification, constituting an exercise of the eminent domain power that can be accomplished only by compensating the owner for the loss of property rights.
3. 3 separate elements
    a. taking
    b. for public use
        i. Gov't may only take property for a "public use"—SCOTUS has interpreted this to require taking to effectuate a legitimate public purpose.
    c. without just compensation
        i. If public use test is met, takings clause does NOT prevent gov't from taking property—designed to secure compensation in the event of otherwise proper interference amounting to a taking.

b. **The eminent domain power and the condemnation process**

i. Eminent domain power regulated and defined by statute.

1. Sometimes legislature exercises power directly; sometimes delegates eminent domain power to agency that is empowered to take property for specific purposes.
    a. Port Authority
    b. Transportation Dept.
    c. Municipalities

ii. Statutes define the condemnation process.

1. Quick-take: authorize seizure of property immediately; require owner to file lawsuit to recover damages.
2. Most require agency to attempt to negotiate to buy the property from the owner for a fair price, before filing lawsuit against owner and any occupants to condemn property.
    a. Often results in gov't paying more than fair market value in order to appease owner and avoid litigation.
    b. If parties can't agree, ct may appoint experts to determine fair market value; lawsuit might be conducted to determine compensation mandated by statute and constitution.
    c. Suit ends w/ condemnation decree that transfers title.
    d. Appeals can be pursued on question of whether taking was for valid public use, and on question of whether legal standards for determining just compensation were followed correctly.

c. **Public Use and the Federal Constitution**
    i. LANDMARK CASE: ***Kelo v. City of New London***
        1. **Issue:** Whether a city's decision to take property for the purpose of economic development satisfies the "public use" requirement of the 5th A.
        2. **Rule:** Public purpose test: defined broadly, deferential to legislative decisions. Only taking's purpose, and not its mechanics, matter in determining public use (*Berman*).
        3. **Analysis:** All courts who have heard case agree there was no illegitimate purpose in this case. City not planning on opening all of condemned land to the public—can be ok as long as it serves the public purpose. Case turns on whether development plan serves a public purpose—precedent of deference to legislature, define public purpose broadly. *Berman* and *Hawai'i Housing* support the public purpose test—didn't evaluate Ps' claims in isolation in those cases, b/c legislative judgment must be viewed as a whole for the plan to work. In determining public use, taking's purpose and not its mechanics is what counts. Allow legislature lots of leeway in determining what public needs, justify use of takings power. State statute that specifically authorizes ED to promote development; must view in light of entire plan—plan satisfies public use b/c serves public purpose. Bright line rule proposed by Ps (economic development doesn't qualify as public use) is dumb and doesn't address the issue; no basis exists for exempting economic development from the understanding of public purpose. No need to make rules based on hypothetical parade of horribles; no need for "reasonable certainty" that expected public benefits will accrue—would be a huge impediment to successful completion of comprehensive plans.
        4. **Holding:** The city's proposed condemnations are for a public use within the meaning of the 5th A and are therefore proper.
            a. **Kennedy's concurrence:** Proposes different standard of review: "A court confronted w/ a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government's actions were reasonable and intended to serve a public purpose." More stringent standard might be required for some cases (doesn't say which ones). Heightened scrutiny not needed just by virtue of economic development.
            b. **O'Connor's dissent:** Can't have majority's absolute deference to legislature—otherwise public use clause is meaningless. There should be infliction of affirmative harm on society pre-condemnation. Each taking in precedents directly achieved public benefit (ex: removing blight, breaking up oligopoly). Ct. significantly expanding meaning of public use. Majority making all property vulnerable through its interpretation.
            c. **Thomas' dissent:** Takings are only ok if the government owns the property, or if the public has a legal right to use the property. Read "in context" and "naturally," "public use" has a narrower meaning than what the majority suggests. Losses via takings will fall disproportionately on poor communities.

d. **State Law and State Constitutions**
    i. *Poletown v. Detroit* MI Sup Ct. held that goal of economic development was sufficient public purpose to justify the use of the eminent domain power, despite transfer of parcels to private ownership.
    ii. Overturned prior to *Kelo* decision in SCOTUS—*Wayne County v. Hathcock*
        1. Held: economic development was not a sufficient purpose to justify the condemnation of private lands for transfer to another private owner. Use of eminent domain to transfer property from one private owner to another satisfies public use test only when:
            a. Public necessity of the extreme sort requires collective action
            b. Property will be subject to public oversight after transfer to a private entity

c. Property selected because of facts of independent public significance about the property being taken, rather than advantage to the private entity to whom property is transferred (ex: area is blighted).

iii. Many state sup cts have interpreted state constitutions in manner consistent w/ federal interpretation.

iv. Some states have interpreted state Cs more stringently than fed C by SCOTUS—states entitled to grant greater protection for property than that afforded by fed C.

1. Adopt version of Kennedy's test: public use isn't met unless "the public benefits and characteristics of the intended use substantially predominate over the private nature of that use."
2. Adopt version of O'Connor's test: property cannot be taken and transferred from one owner to another unless the nature of the property itself justifies the taking.
    a. Prohibit takings for economic development purposes unless the property being taken is causing harm to others.
    b. Taking must be justified in the sense that the public purpose could not be achieved in any other way than through a taking of one owner's property and transfer to another.
3. Adopted version of Thomas' approach: "Public use" = "public ownership" or "use by the public," thereby denying power to take property from any private person if it is to be transferred to another and used privately rather than by the public at large.

e. **"Categorical" takings and the ad hoc test**

i. SCOTUS has said it's been unable to develop set formula for determining when justice and fairness require that economic injuries have to be compensated.

1. Looks at particular circumstances of each case—ad hoc; focuses on 3 major factors.
    a. character of governmental action
    b. protection of "reasonable, investment-backed expectations"
    c. economic impact of the regulation on the private owner
2. Overall, requires weighing of public and private interests.
3. Goal of working towards "fairness and justice"

ii. While SCOTUS normally applies this test, it has flirted w. attempt to develop some per se tests to identify types of regulations that constitute categorical takings—compensation is required regardless of how important the public interest is in the regulation.

1. *Tahoe-Sierra v. Tahoe Regional Planning Agency* (2002): signaled retreat from pursuing per se tests; required lower courts to make "careful examination and weighing of all relevant circumstances."

iii. **SCOTUS has now clarified that there are only 2 categories that will be deemed per se takings**.

1. Government mandated "permanent physical invasions of property." *Loretto v. Teleprompter Manhattan CATV Corp.*, 1982
2. Regulations that "completely deprive an owner of **all** economically viable use of her property [unless] background principles of nuisance and property law independently restrict the owner's intended use of the property." *Lucas v. South Carolina Coastal Council*, 1992.
    a. NB: these instances will "generally" be deemed per se takings—apply in relatively narrow circumstances, not always deemed takings.

iv. **Vast majority of cases will be analyzed under *ad hoc* test** in *Penn Central Transporation Co. v. NYC* (1978).

1. **3 categories of cases that have significantly more chance to be deemed unconstitutional takings under the ad hoc test.**
    a. Deprivation of certain core property rights or estates in land.
    b. Retroactive deprivation of vested rights belonging to owners who invested in reasonable reliance on a prior regulatory action.
    c. Required dedications of property imposed as conditions on land use development permits when those "exactions [do not] substantially advance the *same* interests that land use authorities asserted would allow them to deny the permit altogether."

2. Test: a regulation can be struck down as a violation of substantive due process if it is "arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt."
    a. Standard requires great deference to legislative discretion.
3. Distinction btwn preventing an owner from harming others (legitimate exercise of police power) and requiring an owner to provide a benefit (a taking). Distinction is difficult if not impossible.

f. **Ad hoc test: Fairness and Justice underlying every decision**

i. LANDMARK CASE: ***Miller v. Schoene*** **(1928)**

1. **Facts:** The state entomologist (Defendant) ordered Plaintiffs to cut down a large number of ornamental red cedar trees growing on their property, in order to prevent the spread of a rust or plant disease to the apple orchards in the vicinity. A statute requires the state entomologist to discover infected trees and direct the owner to destroy them.
2. **Issue:** When two classes property exist in dangerous proximity, may the state choose to preserve one, which is of greater value to the public over the other?
3. **Analysis: Red cedar trees have occasional use and value as lumber. Its value throughout the state is shown to be small as compared with that of the apple orchards of the state. Apple growing is one of the principal agricultural pursuits in Virginia. Millions of dollars are invested in the orchards**, which furnish employment for a large portion of the population, and have induced the development of attendant railroad and cold storage facilities. The state needed to make a choice between the preservation of one class of property and that of the other because they existed in dangerous proximity. When forced to make such a choice, the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another, which is of greater value to the public. There is a strong public concern in the preservation of one interest over the other. When the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of police power, which affects property.
4. **Holding:** The public interest outweighs the property interest of the individual, and the state may use its police power to preserve the public interest, even if that means property must be destroyed.

ii. LANDMARK CASE: ***Penn Central Transportation Co. v. NYC*** **(1978)**

1. **Facts:** In 1968, the Petitioner entered into a 50-year lease agreement with a British company to construct a multistory office building on the top of the existing terminal. The plan was to increase revenue by renting the office space. But, the application to build was denied.
2. **Issue:** May a city place restrictions on the development of individual historic landmarks without effecting a taking requiring just compensation?
3. **Analysis:** The Petitioner's argument that it is being denied the opportunity to further develop the property for economic gain is not a sufficient intrusion upon the property. The Respondent is not interfering with the current use or economic value of the property. Furthermore, the Respondent has a legitimate interest in preserving the general welfare by continuing the current use of the Terminal as-is.
4. **Holding:** The restrictions do not interfere with the present use of the Terminal. It still allows Petitioner to profit from the Terminal and obtain a "reasonable return" from its investment. If the restriction is reasonably related to a legitimate public interest, then it does not result in a taking. Diminution in property value alone does not establish a taking. Ct notes that impact IS more severe on a few owners, but that it's part of the city's comprehensive plan and is ok.
    a. **Dissent:** This is a taking because the Respondent is asking companies like the Petitioner to bear the cost of maintaining designated historical landmarks throughout the city. The cost should be borne by the citizens of the city that insists these locations remain unchanged.

g. Central principle of the takings clause

i. Regulation of property will be deemed unconstitutional taking if "fairness and justice" require us to conclude that the public at large, rather than private owner, must bear burden of an exercise of state power in the public interest.
ii. If "burden of common citizenship"—regulation not unconstitutional.

h. Relevant factors
   i. Weighing cost of regulation—borne by public at large or individual owners?
      1. Requires weighing of public and private interests.
         a. *Penn Central*: (1) economic impact of regulation; (2) its interference w/ reasonable investment backed expectations, (3) character of gov't action.
            i. Character of gov't action (squishiest of the 3).
               1. Main inquiry: is there an average reciprocity of advantage—in bearing the cost of a reg, do you also benefit bc everyone else around you is subject to the same reg so you benefit, or are you unilaterally burdened while everyone else benefits?
               2. State generally empowered to legislate to protect public w/o compensating those whose property interests suffer resultant economic impact.
               3. How to determine whether regulatory law is legitimately preventing owner from harming others by imposing negative externalities on neighbors, or is illegitimately requiring owner to contribute benefit to community.
               4. Goal is to "identify those regulations whose effects are functionally comparable to government appropriation or invasion of public property.:
                  a. Takings: construction of dam that results in flooding of property; low flying military planes that made property uninhabitable and destroyed owner's business, etc.
                  b. Ok regulations: no operating quarry in residential area; zoning law restricting property to residential use even though it reduced fair market value of property by 75%.
            ii. Economic impact
               1. Greater loss in value, more likely regulation will be seen as taking.
                  a. NB: **no owner is guaranteed most beneficial use of property**.
                  b. SCOTUS has upheld constitutionality of rent control laws as long as they guarantee landlord reasonable return on investment.
               2. Depends on how you look at it: entire parcel v. a piece of it (denominator problem).
            iii. Interference w/ reasonable investment-backed expectations.
               1. Regulation more likely to be held a taking if person has already substantially invested in reasonable reliance on an existing statutory/regulatory scheme.
               2. Less likely to be taking if regulation prevents owner from realizing expected benefit in the future, imposing mere opportunity cost.
               3. Basic dilemma: people have to have some right to rely on existing law at time they invest, but legislature must have power to change law to impose greater restrictions when circumstances change/new scientific discoveries arise.

i. Theories to identify regulatory takings
   i. *Traditional*

1. Traditional definitions of property interests to determine which government actions constitute takings of property that have to be compensated.
2. Main problem: what rights are traditional?
3. Gradual evolution alters expectations of what rights go along with ownership—less likely to be seen as takings.

ii. *Efficiency*
1. Michelman argument: compensation should be required when it will help to promote efficient (wealth-maximizing) legislation.
2. Utilitarian argument: compensation should be awarded when the demoralization costs of failing to compensate are greater than the settlement costs of arranging for compensation.
    a. Rests on proposition that legislation is wealth maximizing if benefits outweigh costs—but sometimes legislature acts for special interests and cause more harm than good.
3. Efficiency argument to justify not compensating owners when their property rights are harmed:
    a. Administrative costs of compensating everyone are huge and could outweigh any benefit from regulation.
    b. Could mean that efficient legislation (preventing activities whose social costs outweigh benefits) won't be passed.
    c. Removes incentives for economic actors to foresee effects of conduct on others and likelihood that their conduct will be regulated in the future—could make developers invest in socially harmful activities.

iii. ***Distributive Justice*** **(what takings doctrine actually rests on)**
1. Central question: whether the regulation causes a loss that the individual property owner should bear as a member of society for the good of society.
    a. For compensation: Costs of public programs are borne by community, not just one person.
    b. Against compensation: regulations prevent owners from engaging in activities that harm the public welfare—they haven't lost anything to which they were entitled in the first place.
    c. Those harmed by regulation are also benefited by it because it also regulates neighbors' activities—distributive effect fair because burdens of regulation are balanced.

24. ***Regulatory Takings***

a. **Deprivation of economically viable use**

i. Full taking of small property interest OR small taking of entire property interest?

ii. LANDMARK CASE: ***Lucas v. South Carolina Coastal Council*** **(SCOTUS 1992)**
1. **Facts:** Petitioner (P) Lucas paid $975k for 2 residential lots on Isle of Palms on which he intended to build single family homes. In 1988 SC legislature passed Beachfront Management Act, had effect of barring P from building any permanent habitable structure, bc construction of habitable dwellings was prohibited seaward of a line drawn 20 ft landward of, and parallel to, the baseline that was established landward of P's parcels. No exceptions to the Act.
2. **Procedural:** TC found the Act rendered the lots "valueless" and that Act's complete obliteration of his land's value entitled him to compensation regardless of whether legislature acted in furtherance of legitimate police power objectives. SC of SC reversed, bc regulation was **designed to prevent serious public harm and therefore no compensation is owed under Takings Clause, regardless of effect on property value.**
3. **Issue:** Whether the Act's effect on P's lots's economic value constituted a taking under 5th and 14th As.
4. **Rule:** In the case of complete economic deprivation of land owner, state can only avoid compensation if it can show that P would have been prevented from carrying

out its intended use if nuisance/property law would have prohibited the use anyway under common law.

5. **Analysis:** 2 takings per se categories: (1) physical invasion, no matter how minute and no matter how great the public interest is; (2) regulation denies all economically beneficial or productive use of land. 5th A violated when land use regulation "does not substantially advance legitimate state interests or denies an owner economically viable use of his land." Total deprivation of beneficial use is equivalent of physical appropriation in eyes of owner. Sup. Ct. was incorrect is using "harmful or noxious uses" principle to decide this case, b/c correct understanding of principle is just "harm preventing." Necessary to evaluate the worth of competing uses of real estate—relative importance of use. In case of total economic deprivation, can only get around compensation if P didn't have use interests as part of title to begin with. 'Total taking inquiry': (1) degree of harm to public lands/resources or to adjacent private property; (2) social values of activities and suitability to locality in question; (3) relative ease with which alleged harm can be avoided through measures taken by owner and gov't. If particular use has long been engaged in by similarly situated owners and/or if similarly situated owners are allowed to use land denied to claimant→lack of common law prohibition (Usually). In order to win, SC has to identify background principles of nuisance/property law that prohibit the uses that P intends in the circumstances in which property is presently found.
6. **Holding:** SC's Act may have constituted a taking bc it seems that there are no background principles of property/nuisance law that would prevent P from using the land as he wished.
7. **Result:** Reversed and remanded.
    a. *Kennedy, concurring*
        i. Finding appears to presume that property has no significant market value or resale potential—have to accept it.
        ii. When regulation produces taking that deprives property of all value, test should be whether deprivation is contrary to reasonable investment-backed expectations.
        iii. Fundamentally, Takings Clause protects private expectations to ensure private investment—nuisance can't be the sole source of state authority to impose severe restrictions.
        iv. Coastal property might be uniquely fragile; State could go further in regulating development and use than common law of nuisance might otherwise allow.
        v. State didn't regulate until after property had been zoned for individual lot development and most other lots had been built up—should be taken into account.
    b. *Blackmun, dissenting*
        i. Court is launching a missile to kill a mouse—based on TC's finding that is almost certainly wrong, property still has rights that P can use (exclude others, recreational activities, alienate the land).
        ii. Loss to lots by virtue of restrictions not total.
        iii. Ct is going against precedent that recognized gov't's power to regulate property w/o compensation no matter how adverse financial effect on owner might be, in certain circumstances.
        iv. Guiding principle: the state has full power to prohibit an owner's use of his property if it is harmful to the public.
        v. Ct explicitly rejected evaluating infected cedars under common law nuisance principles in *Miller*.
            1. **Moreover, in determining what is a nuisance under common law, state cts make the same decision that majority thinks is bad: determine whether use is harmful. LOL.**
    c. *Stevens, dissenting*

i. Majority rule arbitrary—95% diminished value you get nothing, 100% you get the full monty.Majority rejecting result from *Mugler*—state-wide statute that prohibited owner of brewery from making alcoholic beverages didn't = taking, even though use of property had been 100% lawful and caused no public harm before statute was enacted.
ii. Now gov't has to pay for adverse economic consequences of decisions to ban production of goods (asbestos).
iii. Can't be the case that every movement away from current common law constitutes a compensable taking.

iii. ***Palazzolo v. Rhode Island* (2001)**
1. **Facts:** Palazzolo (P) wanted permits to develop waterfront property—fill in marshlands and build 74 homes. State agency charged w/ enforcing laws regulating construction on the coast denied his permits.
2. **Procedural:** P sued RI for $3.15 million in compensation for taking of property. Argued under *Lucas* that he had been denied all economically viable use of property (NB: appeared that agency would let him develop upland part worth $200k). RI Sup Ct rejected takings claim—held that state was protected from any takings claim by an owner who obtained title after a regulatory law restricting use of that property came into effect.
3. **Issue:** Whether D's denial of permits constituted a compensable taking.
4. **Rule:** A regulation that otherwise would be unconstitutional absent compensation isn't transformed into a background principle of State's law by virtue of the passage of title.
5. **Analysis:** SCOTUS found that evidence was clear that agency wouldn't allow any of the marshland to be filled in (didn't need final decision from agency to be "ripe for decision"). Refused to define constitutional standard for determining whether P had been denied all economically viable use of land—could develop some but not all, SCOTUS doesn't touch it. State NOT immunized from facing a challenge to the regulation as a taking of property even if owner took title w/ notice of regulation. Lower ct had found that this wasn't a 100% taking of value so *Lucas* rule doesn't apply. Remanded case to apply multifactor *Penn Central* test.
6. **Result:** Remanded.
    a. *O'Connor concurring*
        i. Agreed that acquisition of title after regulatory law passed didn't protect state from takings claim.
    b. *Scalia, dissenting*
        i. Thinks that the fact that regulation existed at time purchaser took title (other than restriction forming part of background property/nuisance) shouldn't have bearing on determination of whether restriction is so substantial as to constitute taking.
        ii. Investment backed expectations that law will take into account do not include assumed validity of restriction that actually deprives property of so much value that it is unconstitutional.—BS argument
    c. *Ginsburg, Souter, Breyer, dissenting*
        i. Disagreed that state agency had come to final ruling.
7. **On remand** RI ct found that development would constitute public nuisance, and that half of property was below mean high water line, making it tidal land subject to public trust doctrine (owned by public and not subject to private development at all).

iv. ***Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* (2002)**
1. **Facts:** Regional planning agency put temp moratorium on construction around Lake Tahoe officially for 32 months, but ct injunction extended it for as much as 6 years. Intended to allow agency time to develop plan to limit construction around lake to prevent loss of lake's exceptional clarity. Changing runoff patterns through undue development could destroy clarity and it would be impossible to fix for 700 years, if

ever. Ps argued that moratorium took all economically viable use of property when it was in effect, this was (temporary) taking of property and are entitled to compensation under *Lucas*.

2. **Procedural:** To SCOTUS.
3. **Issue:** Whether a temporary building moratorium could be a per se taking of property.
4. **Rule:** Only 100% loss in value of property triggers *Lucas* rule, anything less is governed by multifactor analysis.
5. **Analysis:** SCOTUS doesn't like any set formula for IDing regulatory takings. Want to examine many factors rather than adopt per se rules. Only 100% loss in value of property triggers *Lucas* rule, anything less is governed by multifactor analysis. Bc ownership is temporal and spatial, temporary moratorium by definition doesn't result in 100% loss. Can't require compensation for every delay in use of property.
6. **Holding:** A temporary building moratorium is not a per se taking of property b/c resist mathematical rule and bc only 100% loss in value of property triggers *Lucas* rule.
7. **Result:** Reversed?
    a. *Rehnquist, Scalia and Thomas dissenting*
        i. Development ban had lasted for 6 years, not reasonably related to legitimate land planning needs.
        ii. Functional effect: temporarily deny owners all economically viable use of land.
        iii. Temporary ban on all economic use is the equivalent of a forced leasehold for the owner.

b. Facial v. "as applied" challenges to regulations
    i. Facial: claim that enforcement of reg would necessarily constitute taking of private property in EVERY case; under no circumstances could it be constitutional.
        1. Likely to succeed only where law imposes a permanent physical invasion of property or ends core property right (ex: right to pass on fee simple at death).
    ii. "As applied": effect of reg on particular parcel constitutes taking of P's property.
c. Ripeness
    i. SCOTUS has held that claim that one's property has been unconstitutionally taken w/o just compensation is premature if agency hasn't made final decision on scope of permitted development.
        1. Owner has to apply for permit and be denied in a manner that further attempts won't work.
        2. Owner has to exhaust all appeals and remedies available under state law before challenging as taking.
    ii. Facial challenges: can sue in fed ct; "as applied" challenges: have to exhaust all state remedies, including bringing suit in state ct.
        1. NB: City can't avoid takings challenge by repetitive and unfair procedures that never seem to result in final determination.
d. Civil rights
    i. *City of Monterey*, owner can sue city under §1983 for violating its civil rights by taking its property through repeatedly rejecting development proposals over 5 years—treated owner differently from other similarly situated owners w/o adequate reason, therefore denied equal protection.
e. Inverse condemnation
    i. Refers to lawsuit for damages by property owner against public body whose regulations are alleged to have taken owner's property w/o just compensation.
    ii. Can get damages and injunctive relief.
f. Temporary takings
    i. *First English*: owners can get damages for temporary taking if prevented from using property for any period.
    ii. If Ct holds that regulation constitutes taking of property, agency can enforce the regulation (compensation must be paid) or rescind (owner can have claim for damages).

g. Environmental protection laws
    i. Lots of owners bring inverse condemnation claims challenging application of environmental protection statutes to their property.
    ii. These regs traditionally upheld by cts.
    iii. Difficult issues to resolve.
        1. **Denominator problem.**
            a. How to determine how great the loss in value has been—what denominator do you use?
            b. SCOTUS says "we must focus on the parcel as a whole."
            c. Two options: either entire parcel or "developable tract" that could have been developed under reasonable zoning laws.
        2. **Background principles of property law**
            a. Are they constitutional bc they fit within nuisance exception to *Lucas* or touch on interests that owner didn't have in the first place?
            b. Central question is relevance of cumulative impact of development: if 1 lot developed that way wouldn't be a nuisance, but all the lots developed that way would destroy scare ecological resources, and therefore constitute both public and private nuisance.

25. ***Exactions and Linkage Requirements***

a. LANDMARK CASE: ***Dolan v. City of Tigard*** **(SCOTUS 1994): Nollan established the need for a nexus. Dolan inquires into the requisite nature and degree of the nexus.**
    i. **Facts:** Florence Dolan (Petitioner) owned a plumbing and electric supply store and wanted to redevelop the site. The City of Tigard (Respondent) issued her a permit to expand, but it was subject to the condition that Petitioner dedicate a part of her property to the city to be used as a pedestrian/bicycle pathway. The city justified their request because the pathway would help prevent some flooding that would occur from a nearby creek with the expansion and it would also offset some traffic demands. Petitioner says the dedication is a taking of her property.
    ii. **Procedural:** After City Council approved Commission's final order, appealed to Land Use Board of Appeals (LUBA) on ground that dedication requirements weren't related to proposed development; therefore requirements were uncompensated taking of property under 5th A. OR CoA affirmed: conditions on granting of permit related to impact of expansion of P's business, therefore satisfied "reasonable relationship" test.
    iii. **Issue:** Does an impermissible taking of property occur when a city requires a landowner to convey property to the city in order to get a permit to redevelop property?
    iv. **Rule:** Step 1: determine whether essential nexus exists between legitimate state interest and permit conditions. Step 2: if yes → decide required degree of connection btwn exaction and projected impact of proposed development using the "rough proportionality" test.
    v. **Analysis:** One purpose of the takings clause is to bar the government from forcing some people to bear public burdens, which should be borne by the public as a whole. Had the city simply required Petitioner to dedicate a strip of land along the creek for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred. Such public access would deprive Petitioner the right to exclude others. However, a land use regulation does not constitute a taking if it substantially advances legitimate state interests and does not end the economically viable use of his land. A determination must be made as to whether the essential nexus exists between the legitimate state interest and the permit condition exacted by the city. If the nexus exists, then a determination must be made as to the required degree of connection between the exactions and the projected impact of the proposed development. There must be a rough proportionality between the demands of the city and the impact of the proposed development.
    Here, the prevention of flooding and reduction of traffic are legitimate public purposes, and a nexus exists between preventing flooding and limiting development.
    But for the rough proportionality test, the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development. Here, the city has never explained why a public greenway, as opposed to a private one, was required in the interest of flood control. Petitioner has lost her

ability to exclude others, which is one of the most essential sticks in the bundle of property rights. It is difficult to see why recreational visitors walking on the land is sufficiently related o the city's legitimate interest in reducing flooding problems along the creek, and the city has not attempted to make any individualized determination to support this request.

vi. **Holding:** While there was an essential nexus, the conditions failed the "rough proportionality" test, and the conditions therefore constituted a compensable taking.

vii. **Result:** Reversed and remanded.

1. *Stevens, with Blackmun and Ginsburg, dissenting*
    a. Majority's new test and its application are contrary to previous cases.
    b. State cases give support for *Nollan* but not the ct's new test.
    c. Majority ignores benefits that owners get from the permit.
    d. Should be focusing on entire parcel of private property, not just segments of parcels.
    e. Inquiry should focus on whether the required nexus is present, then only go to considerations of condition if the developer establishes that a germane condition is so grossly disproportionate to proposed development's adverse effects that it manifests motives other than land use regulation on the part of the city.
    f. Ct is micromanaging state decisions with its new rule
2. *Souter, dissenting*
    a. *Nollan* declared the need for a nexus btwn the nature of an exaction of an interest in land (beach easement) and nature of governmental interests.
        i. Here, ct adds degree of connection to the analysis.
    b. Tigard never sought to justify public access portion of dedication as related to flood control—just argued that whatever recreational uses were made of bicycle path and one foot edge on either side, they were incidental to permit condition of 15 foot easement for bicycle path and flood control.
    c. Ct faults city for using "could" instead of "would."
    d. Ct seems to put burden of producing evidence of a relationship on the city, when normal rule in cases w/ police power is that there's a presumption that the gov't has acted constitutionally.

b. Linkage ordinances
    i. Many municipalities have enacted amendments to zoning ordinances requiring certain developers of commercial property/residential housing to either directly provide low income housing or child care facilities or pay a fee that is devoted to a fund for these purposes.
    ii. Market doesn't respond to housing shortages by constructing low income housing; competition for existing housing raises rents and pushes out lower-income tenants.
    iii. Child care linkage intended to address market's inadequate response to increase in women in work force and shortage of affordable health care.
        1. For both, development creates externalities and exacerbates shortages in LIH and affordable child care.
        2. Program intended to internalize costs by requiring developers to account to community.

c. Impact fees
    i. Some cts hold that *Nollan* and *Dolan* don't apply to impact fees bc both cases involved land—therefore monetary exactions are exempt.

d. Whether *Nollan-Dolan* test applies only to individualized decisions rather than general legislative judgments.
    i. Linkage law differs from particularized determinations at issue in N&D bc it represents a general regulatory law affecting many/all parcels of land in an area.
        1. Could create "average reciprocity of advantage" like general zoning law rather than taking of property.
    ii. Some cts held it's sufficient for a city to determine that particular types of development have particular impacts—impose fees reasonably related to those impacts.

iii. Others disagree—bc *Dolan* requires individualized determinations that impact fees bear a "rough proportionality" to the externalities of development, this might not be sufficient and studies might have to be conducted for each parcel subjected to exaction.

e. Government benefits
   i. *Ruckelshaus v. Monsanto* (1984): SCOTUS held that takings clause wasn't violated by fed law requiring that businesses applying for gov't permission to use an insecticide disclose trade secrets to the gov't and consent to gov't use and disclosure of trade secrets.
   ii. *Nollan:* Scalia distinguished this w/ argument that the right to register/sell insecticide was a "valuable gov't benefit" and not an established property right. Right to build on one's own property, even though its exercise can be subjected to legitimate permitting requirements, can't be described as a "government benefit."
   iii. *Wyman v. James* (1971): SCOTUS held that 4th A's prohibition against unreasonable searches and seizures wasn't violated by NY law requiring that welfare recipients agree, as condition of receiving benefits, to home inspections.
      1. Not coerced bc family could avoid them by declining to agree to accept welfare benefits.
         a. What if P had characterized home visits as taking of property rights rather than violation of 4th A? Condition here is a physical invasion of property, albeit temporary.