Property Outline – Professor Dogan – Spring 2010

Acquisition by Discovery

I. Terms:
    a. Real property: land and things affixed to the land (ex: houses, fences, structures)
    b. Personal property: other property – can be tangible (physically movable things) or intangible (ex: copyrights of a song)
        i. Physical, tangible property is rivalrous and physically excludable
        ii. Intangible property is non-rivalrous and non-excludable
    c. Both, ex: crops – real property when affixed to the land, but become personal property when they are harvested and thus made movable
    d. Power: property rights create a form of power in the owner of the property rights as against other individuals
        i. The power to exclude others from using your property, e.g.

II. Right of Acquisition
    a. Acquisition by discovery essentially entails the sighting or finding of unknown or uncharted territory
        i. It is frequently accompanied by a landing and the symbolic taking of possession
        ii. The notion that being there first somehow justifies ownership rights is a persistent one
    b. *Johnson v. M'Intosh* (1823), Legal Doctrinal Explanations
        i. Discovery plus productive possession = title in the land
            1. Historically, discovery combined with possession has formed a basis for asserting property rights
        ii. Conquest (acquired and maintained by force)
        iii. Occupancy (Indians occupied the land, but did not really possess it as they were transient and did not cultivate/change/produce the land)

III. Lockean Labor Theory
    a. Whatsoever then he removes out of the state that nature has provided, and left it in, he has mixed his labor with, and joined to it something that is his own, and thereby makes it his property
        i. Mingling labor with natural resources should result in ownership
            1. Labor puts the value on land, and without labor it would not be worth much
    b. Humans should not just exist on the land; land should be harvested and used in a productive manner
        i. As long as you are able to make productive use of the land and presumably consume what you are using (i.e. not wasting), then you are entitled to the use
            1. You can take only so much as to ensure you are not depriving others (so long as there is enough for others)

IV. Utilitarian/Economic Approach
    a. People view property rights as a means for ensuring the appropriate allocation of resources
        i. Land should be put to its highest and best use
            1. If you give people property rights over land, there is an incentive for the people to use the land and put it to productive use
    b. Critique: when you have too much private ownership of property, owners have an incentive to refuse access to parties that could put their work/land to good, productive use

V. Personhood Approach
    a. People have a personal connection to things within their possession – we feel some innate personal connections to our goods and/or land
        i. Because the nature of people's relationship to different objects/possessions can vary, property rights should recognize the difference in these relationships
            1. Rules surrounding property rights should turn to some extent on the intimacy of the product to the human being

a. Ex: there is more intimacy to a personal work of art than there is to a bike helmet or can of Coke

VI. Natural Law/Dominion Approach (Lockean)
   a. This approach was used as a moral justification for ownership of land and other things that exist on Earth
      i. Man was made in God's image and God intended for man to not only occupy the Earth, but also possess the Earth

<u>Acquisition by Capture</u>

I. *Pierson v. Post* (plaintiff in pursuit of fox, defendant kills before plaintiff): pursuit/chase of something is not enough to acquire property rights through first possession
   a. Property of wild animals is acquired by occupancy only
      i. If you have taken away the animal's liberty (mortally wounded) that is sufficient for possession
         1. Possession is the key to ownership
            a. You do not possess an animal until you have certain control over it (need greater certainty, chase is not enough to ensure future possession)
   b. Justifications:
      i. Utilitarian/Economic argument: need to think about the law's impact on human behavior and create property rights with this in mind
         1. What kind of behavior do we want to incentivize?
            a. Focuses on behavioral goals
      ii. Role of custom: court felt it should respect custom and incorporate that into the holding
      iii. Administrative burden: bright-line rules (bullet in fox = ownership) vs. gray area (suggesting pursuit is enough)

II. *Ghen v. Rich* (mortally wound a whale, you have property rights when it washes ashore)
   a. Custom justification: (holding aligned with the custom)
      i. Custom is consistent with government (maritime law) and societal (preserve the industry) objectives, and with private practice/behavior (custom was well established and fully accepted in the industry and there was no other competing custom)
         1. Courts will typically recognize custom when it aligns with the greater societal interest
   b. Fairness argument: want to encourage people to act responsibly, not fraudulently
   c. Administrative burden: this practice is easily administrable; there is certainty
   d. Lockean Notion: the whaler invested his labor into this possession and is deserving of the benefit

III. *Keeble v. Hickeringill* (duck pond & neighbor tortuously interfering)
   a. Interference vs. Competition
      i. Competition and a fair market offer societal benefits
         1. Encourages and induces people to improve their products, and consumers are benefitted
         2. Competition offers more choices
      ii. Interference does not offer any societal benefits
   b. Landowners have constructive possession of wildlife that is on their land, so if someone comes and removes the wildlife from the land, the landowner is found to have superior title because of their constructive possession (even though landowner had no actual physical possession or control)
      i. An original trespasser can have relative priority over a subsequent trespasser who takes possession from the original trespasser
      ii. Generally, land owners do not have property ownership of wild animals that just pass through their land
         1. Rule might be different if the animals are domesticated and the animal has a habit of return

iii. When the government is being sued as a defendant for damage done to someone's property by wild animals, courts have generally held that the government does not own the wild animals because it has not reduced them to physical possession (*Pierson v. Post* sense)
iv. Natural resources (mineral rights, oil, gas):
1. Historically, ownership required capture and physical possession (like wild animals)
a. Critique: might encourage over-extraction, and thus harm the interests of adjoining property owners
2. Natural gas, modern rule = as long as your use of underground chambers to hold natural gas is not hurting anyone else's land, then you have effectively taken possession and exercised control over it, which gives you continuing property rights over the natural gas

IV. Externalities (Demsetz article) = effects that are external to the actor (effects on third parties) that occur as a result of the primary actor's behavior
a. Consider: efficiency, overall utility, overall harm, long term costs vs. short term/current costs
i. Costs = transaction costs, negotiation costs, enforcement costs
b. Private property rights can give owners an incentive to use the property efficiently, not to over-use, which causes adverse, negative externalities
i. If we have a communal ownership, each individual lacks incentive to look forward and preserve the land – selfish motive to extract as much as they can for themselves
1. Communal ownership creates negative externalities because the costs are not realized by the individual user
ii. Utilitarian justification: want to focus on current behavior and the effect of current behavior on land use in the future and the best way to do so is by granting property rights
1. Looks to promote the most efficient use of the resources
a. Preserve land so as to optimize its use now and over time
i. Private property rights accomplishes these goals
c. Critique:
i. People who are excluded from ownership can be adversely affected
ii. Private ownership can result in gridlock – too much assertion of property rights
iii. Psychological costs – people may miss communal projects, joint ventures

<u>Acquisition by Creation</u>

I. Intellectual property's positive externality
a. Ex: you invent something that solves a significant health problem, which has tremendous beneficial effects on third parties
i. You cannot physically prevent people from replicating the product, so cannot physically capture the benefits that society is feeling
1. Intellectual property law allows people to internalize these externalities by giving them property rights in their inventions (exclusive rights in their inventions/creations)

II. *INS v. AP* (no property right in the news; not protected under copyright law – everyone has a right to collect it) (very limited, narrow holding)
a. Quasi-property: AP worked hard through their labor to develop this information and therefore they should have some kind of right in it
b. Court focuses on the property rights between the two parties, not between AP and the world
i. Parties are in direct competition and INS is misappropriating the news by reaping what one has not sown – unfair competition (hot news misappropriation claim)
1. AP has a quasi property right against INS

III. Competition generally brings about the best results for society – higher quality products at lower prices

a. Public goods = goods that are both non-rivalrous (multiple people can possess simultaneously) and non-excludable (cannot physically deny people access to them)
    i. Absent some economic right that gives you a legal right to capture the value of your creation, there will be an underinvestment of goods that bring a benefit to society, which will result in market failure (if people cannot capture the positive value that their investment brings)
        1. Unless the government provides some kind of exclusive rights, people might not have enough incentive to participate in these ventures

Property in One's Person

I. Right of Publicity (*White v. Samsung*):
    a. Protects personal identity (name, likeness, e.g.)
    b. Autonomy and Personhood probably the most persuasive arguments

II. *Moore v. Regents*
    a. Conversion: actual interference with someone's ownership or right of possession
        i. Using someone else's property that amounts to appropriating the property for yourself
    b. Right of Publicity cases create a right in our personhood, but this does not extend to the cells within the body
    c. California State Law states that there is no longer dominion over cells once they leave your body
    d. Moore does not have any rights to the researchers' patents because the invention here owes most of its value to the researchers' labor
        i. Patents are granted when someone has invested time and labor to create a work that is differentiable from nature
    e. Public Policy re: granting property rights in cells excised from the body → balancing the dignity of an individual (a legitimate interest, but protected by fiduciary duty and informed consent) and weighing that against the cost of recognizing such a right (importance of cells for research, scientific research to face endless retroactive litigation to identify cells, e.g.)

Title vs. Possession

Acquisition by Find

I. First possessor generally gets ownership – a legal right, relative to third parties – to that good or property
    a. Relative title = ownership against everyone but the original owner
        i. Relative to the original owner, there are no legal rights; but relative to the rest of the world there are legal rights

II. General rule (with exceptions) = Finder has superior title over others except the rightful owner
    a. Ex: *Armory v. Delamirie*: chimney sweep found the jewel has title over the jeweler who did an appraisal
        i. Administrability justification: actually helps people to lend their property by recognizing property rights in the possessor; provides a level of certainty (i.e. no being scared to leave your clothes with the dry cleaner because he might claim possession)
    b. Hypo: F1 finds something that belongs to O, who has misplaced it; F1 loses the object and F2 finds it … F1 is the prior possessor, relative to F2, so the prior possession does give F1 title over F2
        i. If O comes along to retrieve the object, O has superior title against F1
    c. This general rule (priority in possession) incentivizes people to take care of their property
        i. It disincentivizes people to take stuff from others, because you respect people's property ownership
        ii. Provides an incentive to people who discover things to put these things to use – with the knowledge that you'll have rights in it (as against third parties), unless the original owner shows up
    d. Note: in theory, a finder has relative title even if he acquired the property by trespassing or wrongdoing
        i. However, courts often take good faith possession into account

e. Generally, a man possesses everything on his land
    i. Distinction though between things that are attached to or under the land (i.e. if a hired employee (agent) finds something buried) and those things that are not (i.e. when money is found on a shopkeeper's floor)
    ii. Cf: *Hannah v. Peel*: plaintiff soldier found brooch in house where he was quartered, which was owned by defendant – Plaintiff claims superior rights to the property against the world, save only the true owner, because he found the property – Defendant claims superior right because it was found on his land
        1. Factors for the Court → brooch was not attached to or under the land; plaintiff tried to find the real owner – court moved by equities and want to reward/incentivize this; defendant never took possession over the property at all – he purchased but before he took possession, the soldiers were quartered there; expectations of the parties
        2. Hypo: if a trespasser found the brooch, he would have not have superior title over the owner of the land, who has constructive possession
            a. A trespasser who has acquired possession of goods can acquire relative title, but only as to stranger third parties
    iii. Ex: *McAvoy v. Medina*: finder finds something in the shopkeeper's shop – property not attached to the land – court finds for shopkeeper
        1. Distinction between lost and mislaid property
            a. Mislaid property is such that appears misplaced, rather than dropped on the floor, e.g.
            b. Consider reasonable expectations of the parties – the reasonableness of the expectation of retrieving the property lessens over time

III. Summary
    a. Unpredictable how any court will rule
    b. Distinction drawn in the cases between items found on public property vs. quasi-public property vs. truly private property
        i. Generally, finders get to keep property found on public property
        ii. If it is quasi-property, but owned by a private party, likely there will be a lost/mislaid/abandoned distinction
            1. If the item is truly lost, the finder generally gets to keep it
                a. But, if the finder is acting as an agent, different outcome
                b. But, if the item is embedded in the property, different outcome
            2. If the item is merely mislaid, generally, the rule is that the owner of the physical land gets rights as against the finder
            3. If the item is abandoned, generally the finder gets to keep it
        iii. If someone goes into really private space, the landowner in these circumstances has more of a reasonable expectation of ownership
            1. Courts do weigh how private the property is where the item was found

<u>Acquisition by Adverse Possession</u>

I. Goals
    a. Promote productive use of land/property
        i. Discourage parties from letting their land go to waste, e.g.
    b. Evidence of ownership is difficult to prove after a certain passage of time – the evidence becomes less available and less persuasive
    c. Want to bring stability – settled expectations
        i. Quiet titles which are openly and consistently asserted
    d. Incentivize the original land owners to use and protect their rights – not to sit on their rights
        i. If you do not act on your legal right within a reasonable time, that right may be extinguished

II. In order to show adverse possession:

a. The party claiming adverse possession has to establish:
    i. (1) clear and convincing evidence of the
    ii. (2) length of time of actual occupation of the land, per the statute; and
    iii. (3) under claim of title
        1. Ways to show claim of title → substantial enclosure of the land or by substantially cultivating or improving the property
            a. Ex: *Van Valkenburgh v. Lutz*: court found no adverse possession because only cultivated a few plots of land and the structures on the land were not satisfactory improvements
b. Need to take actual exclusive possession
    i. Possession has to be open and notorious
        1. Original owner has to be put on notice that someone has taken possession of her land
            a. If the possession is substantial enough to give constructive notice, you do not have to prove the original owner knew about the possession – allege they knew or should have known
    ii. Possession has to be adverse and under a claim of right
    iii. Possession has to be continuous – for the whole period
c. Intent is irrelevant in most jurisdictions
    i. State of Mind (*Van Valkenburgh v. Lutz*):
        1. Objective standard [majority]: look at the nature of the behavior, rather than the intent or knowledge of the party asserting possession (without regard to why/motivation)
            a. Ex: do neighbors recognize the land as theirs, do they use the land as theirs …
        2. Good faith standard: must take possession in good faith
            a. If you are a trespasser, you can never have title mature
        3. Aggressive trespasser standard: you must know that the land is not yours (suggestion of hostility)
    ii. Ex: *Mannillo v. Gorski*: adopts the Connecticut Doctrine: the very nature of the act (entry and possession) is an assertion of title and the denial of the title of all others
        1. It does not matter that the possessor was mistaken, and had he been better informed, would not have entered on the land – mistake does not preclude adverse possession
            a. The focus is on whether the original owner knows about the adverse possessor, rather than focusing on the intent of the adverse possessor (makes it easier to prove adverse possession)
            b. Focus on the fact that the possessor had the intent to use the land as his own (under a claim of right requirement)
        2. Party claiming adverse possession does not win because adverse possession must be "open and notorious" – this case involved an overhang of only a few inches, which is too small to satisfy "open and notorious"; we cannot presume the original owner had knowledge/notice – impractical burden for original owner to continually survey to detect a few inches
    iii. Minority Rule: In some jurisdictions, mistake can make the possession not adverse, suggesting that the possessor did not have the state of mind necessary for hostile, adverse possession

III. Color of Title (notion of people acting under color of title)
a. Someone who possesses land under color of title has some documentary basis for believing they have valid title to the land (faulty or inaccurate deed, e.g.)
    i. To show color of title, you must act as if the land is yours – hold out yourself as the property owner to put the public on notice of your claim of title (could do by paying property taxes, e.g.)

b. A few states require the party to be acting under color of title for adverse possession to apply (similar to the good faith standard)
c. In most states, the fact that the party is acting under color of title can affect the term that you have to possess the land for (i.e. usually less of a term)
    i. When someone is acting under color of title, the nature of their possession might be a little bit less than required for normal adverse possession (as distinguished from someone who is claiming adverse possession through use)
        1. Ex: required only to cultivate a small portion of the lot versus the whole lot

IV. Remedies → even in cases where the adverse possessor has not established "open and notorious" (e.g.), courts can use a balancing test – want to give protection to owners, but also want to protect an adverse possessor who has done vast improvements
    a. Courts can force conveyance of the land for fair market value and the party claiming adverse possession can take control of the encroachment (for ex)
        i. Note: different from a finding that the adverse possessor has title, which is without any limitations
    b. Courts may require transfer of property to the party claiming adverse possession under an equitable notion, if:
        i. The party has an innocent or mistaken belief that they have title (encroachments, e.g.)
        ii. The party would be caused great expense/undue hardship to remove the encroachment, e.g.
            1. However, if it will be especially costly for the property owner to comply, then adverse possession and the equitable remedy may be denied

V. Vehicles for neighbor boundary disputes
    a. Doctrine of agreed boundaries: if there is a disagreement of boundaries, and the neighbors reach an agreement and act consistent with that agreement for some time, the court will recognize that boundary
    b. Acquiescence: the courts may treat long acquiescence as an agreement (i.e. you have been allowing the use)
    c. Estoppel: if a party makes a representation to her neighbor about the location of the boundary and the neighbor acts in reliance to her detriment on that representation, then the party making that representation may be estopped from denying it

VI. Adverse possession of chattel (*O'Keeffe v. Snyder*)
    a. Adverse possession is more complicated for chattel because of the "open and notorious" requirement (whereas land is obviously "open and notorious" and has a fixed position)
        i. Shift the burden to the owner of the chattel because it is easier for the owner to report the stolen item – rather than placing the burden on the acquiring party to make it open and notorious (i.e. hanging a painting on my wall at home is not open and notorious and would not have called attention to the true owner)
            1. Want to promote the diligence of owners to protect their interest and not sit on their rights
            2. Want to protect innocent owners also – and adverse possession rules would, in some circumstances, never result in ownership for the possessor (of art, e.g.)
    b. Discovery Rule (for personal property in some jurisdictions): if something has been stolen, then the SOL does not start to run until the true owner has a reasonable chance to discover who has possession of the property
        i. The owner's cause of action begins to accrue when she discovers or should have discovered facts of the existence of a claim against the possessor (regardless of whether the possessor's possession is open and notorious)
            1. Owner has an obligation to use reasonable diligence to try and reacquire the property, as well as act on information once she has it
                a. "Reasonable" diligence may be highly fact specific – depending on the means available to the owner and the nature of the goods (i.e. the

more valuable, the higher obligation to track down charged to the owner)
        b. Owner has the burden to establish due diligence to toll the SOL
    ii. New York opts for the adverse possession rule instead of the discovery rule
c. Statute of Limitations
    i. Stimulate activity
    ii. Punish negligence
    iii. Promote repose by giving security and stability
d. Void v. Voidable Title
    i. Voidable title occurs when an intermediary has acquired a title from the original owner by some wrongdoing or act of fraud (ex: owner is voluntarily/knowingly giving you title, but you are paying with a bad check/fraud)
        1. With a voidable title, a good faith purchaser from that intermediary is allowed to maintain title
    ii. Void title occurs between the original owner and a stranger/thief
        1. If the thief steals from the owner (who is not voluntarily/knowingly giving up title) and then sells to a good faith purchaser, that good faith purchaser does not get good title
    iii. Hypo: A owns a piece of artwork, B (an employee of A) steals the artwork and sells it to C
        1. A has reason to think that B is an untrustworthy person, but does not follow up – A does not report the artwork stolen
            a. C sells the artwork to D … 25 years pass … D puts the artwork in a gallery … A sues to get the artwork back
                i. Discovery Rule: SOL likely has passed because A did not use due diligence to reacquire the painting, so D probably has good title
                ii. Even if you have void title, over time depending on which rule applies, your possession can vest into title (i.e. if you satisfy the adverse possession rule or the discovery rule)
    iv. Hypo: A sells B a piece of art, B pays with a bad check, B sells to C who is a good faith purchaser
        1. C gets to keep the art because this is a voidable title
            a. A does not have a claim against C, but does against B

<u>Acquisition by Gift</u>

I. Gift Requirements:
    a. **Intention** of the donor to make a current, irrevocable gift (transfer of rights)
        i. Must be a clear intent conveying the property to make a gift
    b. **Delivery** of the gift
        i. Want evidence that the owner did in fact have the intent to make a gift, as they hand it over/deliver
            1. Actual delivery: actual, physical delivery of the gift
            2. Constructive delivery: delivering an object that gives someone access to the gift (keys, e.g.)
            3. Symbolic delivery: handing over something symbolic of the property given (a note, a written instrument, e.g.)
        ii. Modern rule is to accept more and more constructive delivery, as long as the intent is clear
    c. **Acceptance** of the gift by the receiving party (implied in most cases)
II. A valid gift is irrevocable – donor cannot change her mind
    a. Because of this irrevocability, courts demand recipients prove intent and delivery
III. An intent to make a gift in the future is not a binding gift

a. Ex: "I promise to leave you this ring when I die"
    i. If intent is in the future, and not presently, there is no intention to make a gift at that moment
        1. Intention does not vest any right in that person until there is delivery (actual, constructive, symbolic)

IV. Hypo: O owns a pearl ring. While visiting her daughter A, O leaves the ring on the bathroom sink. After O leaves, A discovers the ring. When A telephones O to tell her of the discovery, O tells A to keep the ring as a gift.
    a. O acknowledged the gift when A was in possession of the gift – that can be the equivalent of delivery – physical delivery has taken place by deliberately leaving the property where it lies & saying "you keep it"

V. Hypo: Suppose, instead, A does not telephone O. A week later, A surprises O by producing the ring. O takes the ring, looks at it, then gives it back to A, saying, "I want you to have it. It's yours." A tries the ring on, but it is too large for A's finger. O says, "Let me wear it until you can get it sized." O leaves and is killed in a car accident. A sues O's executor for the ring, and will be successful
    a. This is a valid gift – the delivery to A was effective and title was transferred to A
        i. A was treating O as a bailee, so it was still A's property, even when O was wearing it

VI. Ex: *Newman v. Bost*: issue over the life insurance policy in the bureau, to which plaintiff has the key
    a. This is a gift at the time of death
        i. Constructive, valid delivery to the bureau by handing over the keys, but court did not find constructive delivery to the life insurance policy because intent to give possession of the policy was not clear (also, papers are capable of actual, manual delivery)
            1. Court interprets delivery fairly strictly because they want to incentivize people to draft wills that clarify their intentions with their property, in order to avoid fraud

VII. Ex: *Gruen v. Gruen*: dad writes a letter to son re: I want you to have this painting when I die; the dad intended to keep a life estate (possession during his life)
    a. Court finds an effective gift here, even though dad did not part with possession of the item
        i. Dad had a present intent to convey an irrevocable interest in the property – he intended at this time to convey an **interest** in this painting (the right is conveyed in the moment), even though the **possession** does not vest in the son until later
            1. Key: irrevocable intent
        ii. Court is more focused on the purpose of the intent and delivery requirements, rather than the mechanics of them … delivery should be flexible when the donor's intent is clear (honor donor's intent)
            1. Actual delivery of a future interest seems unnecessary/illogical (because life estate was reserved)
            2. No concern about fraud here – dad's letters contain his clear intent

VIII. Policy Considerations
    a. General equities: party's relationship to the donor
    b. Honoring donor's intent
    c. Avoiding fraud

Estates

Freehold Estates and Future Interests

I. Estates: interests in property that are defined by the length of time they last/endure
    a. Fee simple estate: endure forever – no time limit – strongest possible legal estate
        i. Full bundle of rights: can sell, transfer through will or intestate, or inherit
        ii. Owner of the fee simple cannot put any limits on inheritability
            1. Restrictions will be unenforceable
                a. Want to promote alienation
                    i. Reflects a trend away from the natural rights approach and towards a utilitarian approach – we should recognize

property interests that allow property to be used for its best and most valuable use … and alienability best achieves that objective

b. Life estate: time limited interests which expire at death
    i. Absent restrictions, can be sold, but they are defined in time still and will expire at the death of the person to whom the life estate is granted
        1. Can place restraints of life estates to provide for forfeiture if the life estate tenant does not satisfy certain obligations (caring for the land, paying taxes, e.g.)
            a. But cannot impose absolute restraints on alienation
    ii. Under common law, a grant that said "to A" without "and his heirs" conveyed a life estate
        1. Now, the language "and his heirs" is not required to create a fee simple (modern day: fee simple is presumed, unless stated otherwise)
    iii. Remainder/Reversion is the interest that remains when the life estate ends
        1. Reversion: if it is not specified who gets what's left
        2. Remainder: if it is specified who gets what's left
c. Term of years: a term of years for some period of time
d. Expectancy interest: interest that has not yet matured into title or any legally enforceable right
    i. Heirs generally have a mere expectancy interest, which can be dispossessed before rights/title has been transferred

II. Fee Tail ("to A and the heirs of his body") (historical estate)
    a. Intended to keep property in the family
        i. Life estate supplanted fee tail as a way to control inheritance
            1. Ex: give children a life estate, and then designate grandchildren as remainders – so they will get a fee simple

III. Inheritance of a Fee Simple
    a. Heirs: if a person dies intestate (without a will), the decedent's real property descends to his heirs
    b. Issue: if the decedent leaves issue, they take to the exclusion of all others
        i. Issue = descendants (not limited to children)
    c. Ancestors: by statute, parents usually take as heirs if the decedent leaves no issue
    d. Collaterals: all persons related by blood to the decedent who are neither descendants nor ancestors (siblings, nephews, nieces, e.g.)
    e. Escheat: if a person dies intestate without any heirs, the person's real property escheats to the State

IV. Intention of the deceased should be ascertained by the language of the instrument and the surrounding circumstances
    a. *White v. Brown*: there is a presumption of a fee simple granted, unless there is an express statement otherwise
        i. Favor a broad interpretation and resolve doubts against a narrow interpretation
            1. Why?
                a. Simplifies matters
                b. People might be more careful when they are drafting narrow wills
                c. By identifying someone in your will, there is a suggestion that you are more interested in protecting their property interest than other heirs
                d. Want to avoid partial intestacy – want to resolve all of the person's property ownership to avoid burdening the State

V. Economic Waste
    a. A sale of property based on economic waste may be appropriate if there is a clear necessity for this sale to occur in order to avoid the waste from taking place

i. If the court exercises its equitable power – with great caution, with an eye out for what the necessity is – the court must ensure the decree serves the best interest of ALL parties (not just the life estate tenant, but also the remaindermen, e.g.)
    1. Need: necessity, caution, balance of the interests of all parties
    2. Ex: *Baker v. Weedon*: property was being used for agricultural purposes, but the value of the land for commercial purposes is much higher – notion that this relative unproductive use is wasting the land because it is does not realize the full capacity of the land
        a. Current tenant was broke and wanted to sell immediately, remaindermen saw the value increasing over time and wanted to postpone the sale – court has to consider all parties' interests, not just the current tenant who needs money

b. Affirmative waste: tenant engages in overuse or injurious acts that devalue the property
    i. If your immediate interest is only in the present, then you may have an incentive to draw more from the land than is appropriate
        1. Notion of waste is designed to encourage the current tenant to act reasonably and preserve the land for future owners (to avoid uses that waste or deteriorate the value of the land)

c. Permissive waste: an act of negligence – a failure to act, to care for the property

VI. Defeasible Estates: estates that will or can end if a certain event occurs
- a. Fee simple determinable: when the event occurs there is an automatic reversion back to the original conveyor or the heirs (the grant automatically ends when the event happens)
    i. Language used: "so long as," "until" – language is durational
    ii. Interest retained by the transferor: possibility of reverter
- b. Fee simple subject to condition subsequent: when the event occurs, the original conveyor or his heirs have a right of entry, but this right must be exercised before title transfers back to the conveyor or his heirs (grant may be cut off upon the occurrence of the event, not automatically)
    i. Language used: "but if," "may," "I have the right …," "on the condition that" – language is not terminable, does not suggest an automatic end
    ii. Interest retained by the transferor: right of entry
    iii. Modern trend is to favor fee simple subject to condition subsequent over a fee simple determinable, if the language is ambiguous
- c. Adverse possession:
    i. Fee simple determinable: adverse possession SOL starts to run as soon as the condition/event occurs – the grantor or his heirs has title of the land automatically, and the person who used to have the land now has hostile possession
    ii. Fee simple subject to condition subsequent: adverse possession SOL should be more generous of the owner because the hostility does not exist
        1. SOL starts to run when you ask for the title back – exercise your right of entry – and there is a refusal, then possession is hostile
    iii. Note: if the use is open and notorious, then the owner should be put on notice when the event happens
        1. If the nature of the grant is less open and the satisfaction of the condition is not obvious (or cannot be observed from the outside of the property), then you can make an argument that you did not and should not have had notice about the hostility of possession – argue the SOL should be tolled in your favor
- d. Restrictions
    i. Restrictions on sale are treated as void because they are restraints on alienation
    ii. Restrictions on use are not treated as void or as restraints on alienation
        1. *Mountain Brow Lodge v. Toscano*: two restrictions – one on alienation/sale, one on use – an invalid restraint against alienation does not nullify the condition on use

a. Majority: says this deed is a fee simple subject to condition subsequent – says the language focuses on the restriction to which the land will be put, so majority upholds it as a use restriction
b. Dissent: says that if you and only you may use this land forever or else it will revert back, then as a practical matter you are restricting them from selling the land
i. This is a more pragmatic approach, which some courts take – depending on jurisdiction, to determine whether the use restriction is actually a restriction on salability
1. Ex: *Cast v. National Bank*: "a condition attached to a defeasible fee simple is an unenforceable indirect restraint on alienation if it materially affects marketability adversely … if the condition subsequent in the conveyance expressly limits alienation of the property to an impermissibly small number of persons, it is void and unenforceable"

iii. Personal restrictions raise similar issues (to my son as long as he lets his siblings play on the land, e.g.)
1. Courts have to ask whether the personal restriction is an effective restraint on alienation, but can also invalidate for public policy reasons
a. Ex: *Casey v. Casey*: testator devised land to his son with a provision for forfeiture if the son's daughter were ever to own, possess, or be a guest on the land for more than 1 wk/yr → court held the condition unreasonable and void because capricious and imposed for spite or malice

e. Condemnation
i. Generally, the government has to pay the market value of the land, but there is a question as to who gets the money when the current possessor has a defeasible fee and there is some other party that holds the future interest?
1. Generally, if the condition seems remote (not likely that the land will stop being used for its purpose) then the payment goes to the current possessor
a. RST → who gets the money depends on how imminent the event that will result in a right of termination or right of entry will come to fruition
b. Ex: *City of Palm Springs*: court makes an equitable decision: city cannot have its cake and eat it too – because the city terminated the use, then it was foreseeable/imminent that the event would occur, so the grantor got 100% of the money
c. Ex: *Ink v. City of Canton*: court compared the market value of the land for unrestricted purpose vs. the value of the land as a public park (which is less than the full market, unrestricted value), and gave the city the lower value and the reversion interest the different (full market value minus the value as a city park)

f. Defeasible life estates upon marriage: historically they were enforced by sexist laws, but modern courts are paying attention to the effect of this as a restraint on marriage and strike them down
i. Can be enforced if they are written carefully as an attempt to care for the wife until someone else can care for her (still a sexist notion) [minority of cases]

VII. Future Interests (not current possessory interests)
a. Future interests are not mere expectancy interest – it gives legal rights to its owner – it is a presently existing property right
i. Although a future interest does not entitle its owner to present possession, it is a presently existing interest that may become possessory in the future
b. Future Interests retained by the transferor

i. Reversion: the interest left in an owner when he carved out of his estate a lesser estate and does not provide who is to take the property when the lesser estate expires
    1. Vested (so not subject to RAP)
    2. Transferrable – during life – or can sell or grant your rights in a third party in your will
ii. Possibility of reverter: arises when an owner carves out of his estate a determinable estate that is otherwise equivalent (fee simple determinable out of a fee simple absolute, e.g.)
    1. Exists when an owner has carved a determinable estate out of his
    2. The law treats this as vested (so not subject to RAP)
    3. Traditionally was not transferable, but modern rule is to allow
iii. Right of entry (power of termination): when an owners transfers an estate subject to condition subsequent and retains the power to terminate the estate
    1. The law treats this as vested (so not subject to RAP)
    2. Traditionally was not transferable, but modern rule is to allow

c. Future Interests retained by the transferee
    i. Remainder: occurs naturally at the expiration of the previous estate; an interest that becomes possessory at the end of the prior estate
        1. Vested remainder: (1) given to an ascertained (identifiable/known) person and (2) is not subject to a condition precedent/any contingencies
            a. A remainder is vested if it is created in an ascertained person and is ready to become possessory whenever and however all preceding estates expire
            b. Vested remainder subject to partial divestment (subject to open): "children get the land" – one child is born, but that interest is subject to divestment if more children are born before the interest vests
        2. Contingent remainder: (1) given to an unascertained person (someone who is not yet known or not yet born) and (2) is made contingent upon some event occurring, other than the natural termination of the preceding estate
            a. Alternative contingent remainder: remainder between two people, but the interest cannot vest in either until the event occurs – when that event occurs, the interest will vest in one of the two people, which will foreclose the interest that was in the other person
    ii. Executory interest: a future interest in a transferee that divests someone else's interest in the estate, upon the occurrence of a particular event (not necessarily of their possession, but of their interest)
            a. All executory interests are contingent, because it is not clear in some circumstances whether they will come into effect
        2. Shifting executory interest: divests or cuts short some interest in another *transferee* (shifting occurs automatically without a gap)
        3. Springing executory interest: divests the *transferor* in the future (springing there is a gap)
        4. Fee Simple Subject to Executory Limitation: executory interests can follow fee simple determinable and fee simple subject to a condition subsequent if the grantor reserves the possibility of reverter/right of entry in a third party (rather than in the grantor)
            a. Instead of being labels "possibility of reverter" or "right of entry", the interests are executory interests that divest the prior estate
                i. Executory interests happen automatically (unlike a right of entry)

d. Trusts: the trustee holds legal title to the trust property and manages that property for the benefit of the beneficiaries, who have the right of beneficial enjoyment of the property

i. One of the main benefits of the trust is that grantor/settler can protect the beneficiaries' interests by making them inalienable (whereas fee simple interests cannot be made inalienable)
    1. This happens frequently in families that want to control what their kids can do with the property
ii. Another benefit is that traditionally, a number of states allow you to create perpetual trusts – trusts that can control way into the future without being invalid against the RAP

e. Rule Against Perpetuities (RAP): "No interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest"
    i. A vehicle that prevents people from impeding alienability
        1. Want to allow some level of control by the donor, but we do not want to allow this control to persist generation after generation
    ii. RAP looks at the lives now in being and any grant that does not vest within 21 years after the end of all lives in being at the creation of the interest is simply void
    iii. To Apply:
        1. Look at the actual grant and identify what interests are created
            a. Decide which of the interests, if any, are subject to the RAP
            b. Applies only to interests that are not vested at the time of the instrument/conveyance that creates them (contingent remainder, executory interests and class gifts)
                i. Always valid as against the RAP: present interests, vested remainders that are not subject to open, and reversionary interests (reversion, possibility of reverter and right of entry)
        2. Determine whether it is possible that the interest might not vest within the life of some currently living party, plus 21 years
            a. If you want to validate the interest, you need to be able to prove that the interest will either vest or terminate during some currently alive person's life or within 21 years after some currently alive person's life (validating life)
                i. A validating life can in theory be any person, but as a practical matter, almost always has a connection to the conveyance
                    1. Note: children are "in being" from the date of conception
                ii. The interest has to vest within life plus 21 years – do not have to prove it will necessarily ripen into possession
    iv. Class Gifts: these will vest in interests for all of the members of the class when (1) all the members of the class are ascertained (class needs to be closed) and (2) if there is a condition precedent, it needs to be met
        1. Ask, will all the takers be ascertained within the validating life plus 21 years?
        2. Ask, will all of the conditions precedent be met for all members of the class within the validating life plus 21 years?
    v. If an interest is void under the RAP, at least under common law, the interest is struck from the instrument and everything else is left in tact
        1. This can create odd outcomes, which are sometimes clearly contradictory to the outcomes desired by the granting party
    vi. Perpetuity Reform Movement → the common law RAP has softened in modern years – started taking practical realities into account
        1. Some states started to reform the RAP by looking at what happened (the actual state of affairs) at the time of the expiration of the estate just prior to the interest that was problematic
            a. Ex: "to A for life, then the A's children that reach the age of 25" – this would not satisfy the traditional RAP, but under this 1st modification

the court would ask what the state of affairs was at the time of A's death (i.e. if A's child was 10 then the interest would be valid)

2. Some states starts to do away with crazy assumptions (i.e. 85 y/o woman can have children and toddlers can have children)
3. Some states started to reform the instruments to avoid the RAP if that would honor the intent of the grantor (i.e. modify the age from 25 to 21 years old)
4. Some states adopted a wait-and-see approach (this is a compliment to the RAP, not a substitute) – rather than looking strictly at the time of conveyance and deciding at that time, let's wait and see whether the interest at issue actually does vest or fail to vest within the relevant time
    a. 1st step: whether the interest would have been valid or not under the traditional RAP
    b. 2nd step: if the interest is not valid under a strict RAP approach, the of wait-and-see approach says, let's wait and see if the interest in fact vest or fails within the vesting period
5. Last stage of reform was under the USRAP, which says, let's wait 90 years after the creation of the interest and if 90 years have passed since the creation and the interest is still in existence and not yet vested, then the interest is not valid
    a. Note: most popular approach that has been adopted is some comb of the wait-and-see approach and the USRAP
6. Another reform = absolute abolition of the RAP for trusts that contain a power of sale in the trustee
    a. As long as the trustee has the power of sale, there is not the same concern about inhibiting the alienability of the property, as we have with other contingent interests
    b. One of the reasons this is done is because there is competition among states to have the business in their state – i.e. to have lawyers in their state draft these interests and manage properties – there is an economic interest for these states which have reformed this way

VIII. Concurrent Interests (when two or more people have concurrent rights of present or future possession)

- a. Tenancy in Common
    - i. Tenants in common have separate but undivided interests in the property
        1. Tenants in common can sell or devise its interest in property to a third party
            a. Can be transferred by will or deed
        2. Each tenant in common owns an undivided share of the whole (unity in possession)
            a. Each tenant has equal access/an equal right of possession and enjoyment of the property (though it can be split up under different proportions for purposes of valuing the people's rights at the time of sale)
    - ii. There are **no** rights of survivorship between tenants in common
    - iii. There is a presumption favoring tenants in common over joint tenancies, unless an intent to create a joint tenancy is expressly declared
    - iv. Ex: condo owners → have a fee simple ownership of your private space, but you and the other condo owners have a tenancy in common to the open access, shared areas
- b. Joint Tenancy
    - i. Joint tenants together are regarded as a single owner
        1. Each owns the undivided whole of the property (unity in possession)
        2. **Joint tenants have the right of survivorship** (a mere expectancy interest)
            a. So, when one joint tenant dies, nothing passes to the surviving joint tenant(s)

i. Rather, the estate simple continues in the survivors freed from the participation of the decedent, whose interest is extinguished
ii. Joint tenancy avoids probate (costly, time consuming to divide up interests) because no interest passes at the joint tenant's death (i.e. deceased joint tenant's interest cannot be passed by will – nothing passes)
iii. If a creditor acts during a joint tenant's life, the creditor can seize and sell the joint tenant's interest in property, severing the joint tenancy
1. If a creditor waits until after the joint tenant's death, the decedent joint tenant's interest has disappeared and there is nothing the creditor can seize

ii. Four "unities" are essential to a joint tenancy (otherwise there is a tenancy in common)
1. Time: the interest of each joint tenant must be acquired or vest at the same time
2. Title: all joint tenants must acquire title by the same instrument or by a joint adverse possession
3. Interest: all must have equal undivided shares and identical interests measured by duration
4. Possession: each must have a right to possession of the whole (unity in possession)
a. After a joint tenancy is created, one joint tenant can voluntarily give exclusive possession to the other joint tenant
b. Note: unequal shares
i. At common law, if A owned a 1/3rd share and B owned a 2/3rds share, A and B could not hold as joint tenants (because unequal possession)
1. It is increasing ignored by courts if A and B take title as joint tenants and A furnishes 1/3rd of the purchase price and B 2/3rds, and the parties intent the proceeds from any sale of the joint tenancy to be divided as such

iii. If the four unities exist at the time the joint tenancy is created but are later severed, the joint tenancy turns into a tenancy in common when the unities cease to exist
1. Joint tenants can change their interests into a tenancy in common by a mutual agreement destroying one of the four unities
2. Any one joint tenant can convert a joint tenancy into a tenancy in common **unilaterally** by conveying/selling his interest to a third party – this severs the joint tenancy as between the third party and his cotenants because it destroys one or more of the unities
a. The non-selling joint tenants, as between each other, still have a joint tenancy
b. Modern trend is definitely in favor of allowing parties to unilaterally sever joint tenancies with or without notice to the other parties
i. If a law does attempt to limit this, it is in order to avoid fraud
c. Ex: *Riddle v. Harmon*: wife attempted to sever the joint tenancy by a sale to herself (to avoid husband getting survivorship rights); husband said this should not be an effective way to convert your share into a tenancy in common; wife said why not do directly (sell to yourself) what you can do indirectly (sell to a strawman who sells back to you)

i. Court held for the wife: legislature had OK'd the creation of a joint tenancy unilaterally, so they probably would have wanted the same thing for a termination of a joint tenancy
    1. One joint tenant may unilaterally sever the joint tenancy without the use of an intermediary device

iv. Ex: *Harm v. Sprague*: a mortgage does not sever a joint tenancy; the mortgage does not encumber the property when the mortgaging party dies and his interest passes to the surviving joint tenant
    1. Under the title theory of mortgage, a mortgage is treated as a conveyance of a legal estate, with the title going to the mortgagee (person lending the money)
        a. So if Court relies on the title theory of mortgage, then there would be a severance of the unity of title (because of the title transfer)
    2. Court refers to levies and liens by analogy, which do not sever the four unities until there is actual transfer or title/actual execution
        a. Modern trend is away from the title theory of mortgage, towards a lien theory of mortgage – holding that title is not really transferred, therefore joint tenancy is preserved

v. A lease does not sever a joint tenancy (pg. 288, #2)

vi. Joint Tenancy Bank Accounts (multiple people have access to)
    1. "True joint tenancy" bank account
        a. Allocation of the money in the account is typically made according to how much each party put in, but presumption of allocation can be overcome by clear evidence that one person intended this as a gift (i.e. to share equally in)
    2. "Convenience" account – A has the power to draw on the account to pay elderly O's bills, but does not have survivorship rights if it can be shown that the only reason it was joint was so other party could help pay the bills

c. Tenancy in the Entirety
    i. Can be created only in husband and wife
    ii. The four unities (plus a fifth – marriage) are required, and the surviving tenant has the right of survivorship
        1. However, husband and wife are considered to hold as one person at common law
        2. Neither husband nor wife can defeat the right of survivorship of the other by a conveyance to a third party – only a conveyance by husband and wife together can do so – **cannot convert into a tenancy in common unilaterally**
        3. Divorce terminates the tenancy by the entirety because it terminates the marriage
            a. The parties usually become tenants in common

d. Partition: the privilege of each co-owner to transform a concurrent estate into estates held separately (i.e. terminate the cotenancy) [partition available to only joint tenants and tenants in common]
    i. Partition in kind: court orders the division of the property
        1. The standard presumption is to favor a partition in kind
    ii. Partition by sale: court orders land to be sold, with the proceeds divided between the parties
        1. Partition by sale should only be ordered in exceptional circumstances:
            a. (1) when it is hard to physically divide the land (i.e. odd shaped land, or with the number of owners it is difficult to divide equitably among them all – basically if the physical attributes of the land make a partition in kind impracticable or inequitable) … <u>AND</u>
            b. (2) the interests all parties are promoted by the sale

i. Party requesting a partition by sale has the burden of proof, since the presumption is a partition in kind
ii. Ex: *Delfino v. Vealencis*: plaintiff sought a partition by sale because wanted to create a residential subdivision on the land; defendant wanted a partition in kind to continue garbage business
    1. Court decides the land would be easily divisible, and a partition in sale would not be in the best interest of defendant
        a. Lower court ordered a partition by sale based on a utilitarian approach – need to optimize the economic value of the land by getting rid of the garbage business and selling it as a residential subdivision
        b. Upper court emphasized the personal connection between person and property – defendant made her home and her business/livelihood on this land & a partition by sale would force her to give up both
iii. Although there is a presumption of a partition in kind, most partitions these days end up being partitions by sale, because the courts find that the plaintiff has satisfied their burden – emphasis on economic interests
    1. Presumption is still in-kind, even though there is a modern trend ordering sales
        a. An attempt to minimize transaction costs is one concern that pushes courts towards partition by sale (especially when there are multiple owners)
    2. Partition in kind tends to be ordered in modern day when one of the owners has resided on the land for some time and the other tenant is more of a stranger to the land (but not always the case)
iv. It is not possible to prevent partition action (i.e. cannot agree never to bring a partition action) because that is a restraint on alienation – we want to facilitate the sale of land
    1. Can have an agreement to not bring any partition actions for a shorter, reasonable term and if there is a purpose behind the restraint (ex: until clouds on title are resolved, will not bring a partition action)

e. Sharing the Benefits and Burdens of Co-Ownership (*Spiller v. Mackereth*: non-occupying co-tenant demanded co-tenant vacate half the property or pay rent; court did not find either way to get ouster satisfied)
    i. General rule: in the absence of an agreement to pay rent or an ouster of a co-tenant, a co-tenant in possession is not liable (via rent) to his co-tenants for the value of his use and occupation of the property
    ii. Ouster: you've basically pushed the other party away and prevented them from taking their full possession and enjoyment of the property
        1. Two ways to get ouster:
            a. An absolute claim of ownership that would start SOL running for adverse possession
                i. If you are acting like you are the only one owning the property (i.e. you are paying the taxes, mortgage, etc.) or if you are holding yourself out as the sole owner of the property (i.e. enter into contracts or other transactions as the sole owner), this would suggest an absolute claim of ownership

1. Also need open and hostile possession of the land in a way that would trigger SOL

b. Denying a co-tenant access to the property

iii. Policy re: if one party has been exclusively using the property and the other party wants rent

1. Co-tenants have possession of the entire property, so if the other party is not trying to use the property, then the one who wants to should (and is) able to use the whole

a. Want to encourage productive use of property

iv. Other rules re: rights and responsibilities of co-tenants

1. Rents & profits: a co-tenant who collects rent from a third party has to split up the rent between co-tenants

a. Do not have to pay fair market value for the use of the land (just agreed upon rent)

2. Taxes & mortgages: if a co-tenant pays more than his share of taxes and mortgages, he generally has a right of payment from his co-tenants

a. Exception: if one co-tenant was in sole/exclusive possession of the land, because he is getting more use, so he should have to pay the costs

3. Repairs & improvements

a. Repairs: when one co-tenant repairs property, there is generally no right to repayment for the costs of repairs – this is because the costs are too uncertain and it is too difficult to evaluate the need for repairs

i. Exception: upon partition or accounting action, the repairing co-tenant can recover reasonable money for the repairs and improvements

b. Improvements: generally, if you improve the property you do not have a right to contribution

i. Upside/downside rule: if your improvements enhance the value of the property then you do get to keep the incremental value of the property that your improvements brought, but you take the risk that your improvements might also decrease the value and you will suffer the decrease in value (want to encourage people to make repairs that increase property value)

1. Only able to recover the increase in value of the property, not the costs of the improvements

<u>Leasehold Estates (non-freehold estates)</u>

I. Leasehold estates generally involve a landlord-tenant relationship

a. A leasehold is carved out of a larger estate

b. Landlord retains a reversion

II. **Term of Years**: a lease for a fixed period of time (can be fixed for years, months, etc.) that is going to end at a defined time

a. Some states limit the duration of term of years

b. A term of years must be for a fixed period

i. But it can be terminable earlier upon the happening of some event or condition (i.e. condition subsequent, *fee simple determinable*?)

c. Because a term of years states from the outset when it will terminate, no notice of termination is necessary to bring the estate to an end

d. Ex: " L leases Greenacre to T for the duration of the war" – T likely has a term of years because the term is certain to end at the end of the war

i. This violates the *numerus clausus* principle by modifying the lease to fit into a common law category

III. **Periodic Tenancy**: a lease for a period of some fixed duration (ex: month-to-month) that continues for succeeding periods until either the landlord or tenant gives notice of termination
   a. If notice is not given, the period is automatically extended for another period
   b. Under common law rules, half a year's notice is required to terminate a year-to-year tenancy
      i. For a periodic tenancy of less than a year, notice of termination must be given equal to the length of the period, but not to exceed 6 months (ex: for a month-to-month lease, notice must be given a month before termination)
         1. The notice must terminate on the final day of the period, not in the middle of the tenancy
   c. The death of the landlord or tenant has no effect on the duration of a term of years or periodic tenancy (but it does for a tenancy at will)

IV. **Tenancy at Will**: a lease with no fixed period – it endures so long as both landlord and tenant desire (i.e. until one party terminates it) or until one of the parties dies
   a. The notice period varies by jurisdiction

V. Ex: *Garner v. Gerrish*: deceased leased the premises to tenant Gerrish; executor tried to evict Gerrish claiming Gerrish has a tenancy at will because the lease failed to state a definite term; Gerrish claimed he had a tenancy for life unless he elected to surrender possession … the lease provides that it "shall continue for and during the term of quiet enjoyment … Gerrish has the privilege of termination of this agreement at a date of his own choice"
   a. This feels like a determinable life tenancy, but the court also uses the language of lease – life-long lease … court does recognizes this as a leasehold relationship
      i. *Numerus clausus*: generally, courts cannot create new estates – want concreteness to property law, so need to fit this interest into an existing type of estate (freehold or leasehold), and if the interest does not fit, the court will typically modify the instrument to fit
      ii. Here, the court violates *numerus clausus* by calling this interest a lifelong lease – court was trying to honor the parties wishes/intentions
         1. There is more flexibility in states that do not follow the *numerus clausus* principles

VI. **Tenancy at Sufferance**: arises when a tenant wrongfully remains in possession (holds over) after termination of the tenancy
   a. Common law rules give the landlord confronted with a holdover essentially two options:
      i. Treat the tenant as a trespasser and bring eviction proceedings, or
      ii. Can consent – express or implied – to the creation of a new tenancy
   b. Ex: *Crehale & Polles v. Smith*: in a holdover situation, once a landlord elects to treat a tenant as a trespasser and refuses to extend the lease on a month-to-month basis, but fails to pursue his remedy of ejecting tenant and accepts monthly checks for rent due, he, in effect, agrees to an extension of the lease on a month-to-month basis
      i. If you have a long-term term of years lease and the parties agree to a new tenancy, the longest tenancy that will be imposed is 1 year (i.e. if you have a 5-yr lease, can only renew lease for 1 yr in a holdover situation, not renew the same 5-yr lease)
      ii. Hypo: my 1 year lease ends, landlord agrees I can stay on, but there is no discussion of the terms; I pay rent the next month – does this payment make this another year lease or does it create a month-to-month tenancy?
         1. Majority view: in holdover circumstances, it is converted into a periodic tenancy and the period turns on how often the rent is paid (i.e. typically monthly, so a month-to-month tenancy) (has some basis in how and when the rent was paid)
         2. Minority view: some courts would consider this renewing my 1 year term of years lease

c. Some states have statutes that give the landlord the option of demanding double rent, but the landlord has to demand timely so the tenant is put on notice
    i. If it is not initially demanded, then the right is lost

VII. Leases vs. Licenses
- a. Considerations: intent of the parties, the number of restrictions on use, the exclusivity of possession, the degree of control retained by the granting party, the presence or absence of incidental services
- b. Leases give rise to the landlord-tenant relationship, which carries with it certain incidents – certain rights & duties and liabilities &remedies – that do not attach to other relationships
- c. A lease is a *possessory* interest
- d. A license is the right to *use*

VIII. Leases: conveyances or contracts?
- a. Conveyances give a possessory interest in land (property rights)
- b. Contract is more about the rights between the parties – typically reciprocal promises between the parties (contract rights)
- c. Leases have elements of both – most courts would treat the lease as having property right dimensions and contractual dimensions
    i. The contractual dimension has been treated over time as more significant by the courts

IX. Statute of Frauds: certain interests in land can only be conveyed in writing – intended to prevent fraud
    i. Commonly, leases for more than one year must be in writing

X. Unlawful Discrimination
- a. Fair Housing Act of 1968: prohibits a number of acts relating to discrimination on the basis of race, color, religion, sex, familial status, or national origin
    i. Acts of landlords at issue: refusal to sell or rent a property, discrimination in the terms of sale, advertisements that reflect preference or discrimination
    ii. Handicaps (mental and physical): landlord must make reasonable accommodations – to the extent that it requires physical changes to the existing property, the landlord has to allow the changes to be made at the tenant's expense
        1. In new buildings, the landlord has an obligation to build the buildings in a way that is accessible to handicapped people
        2. Landlords must also make reasonable policies and procedures on the land
    iii. Exemptions: small property owners or people who actually live in a multi-unit property (4 units or less) that they are leasing out as well are not subject to the Fair Housing Act [these are single individual type cases]
        1. One reason is that we want people to be comfortable with whom they are living with (if you live in the building and there are 4 units or less)
        2. Ex: "For rent: furnished basement apartment in a private white home" = protected by the exception; however the advertisement itself does violate the Fair Housing Act
            a. The Civil Rights Act would apply here though, because there are no exceptions
    iv. Brokers and advertisements are **not** exempt from the Fair Housing Act
- b. Civil Rights Act of 1866: "All citizens of the U.S. shall have the same right, in every State, as is enjoyed by white citizens thereof to inherit, lease, sell, hold, and convey real and personal property"
    i. It was not until 1968 that this Act was every really applied in a way that gave meaningful access, but since then it has been applied to prohibit discrimination based on race
    ii. Civil Rights Act is narrower than the Fair Housing Act because it reaches only racial discrimination and does not cover advertisements
        1. But it is broader in the sense that it does not have the exemptions the Fair Housing Act has

XI. Obligation of Landlord to Deliver Possession (*Hannan v. Dusch*: nothing explicit in the lease re: delivery)

a. English rule: implies a covenant requiring the landlord to put the tenant in actual, physical possession
    i. Arguments in favor:
        1. The landlord would know better the status of the property before the new tenant takes possession, so the landlord might be better positioned to take eviction action
            a. The landlord is in privity with the prior tenant, so in a better position to assess facts and possibility of holdover
        2. Rule only places the duty on the landlord on the first day the term is to begin – obligation is that the property be available on the first day the term is to begin
        3. Tenant's POV: it is fair to assume that when you sign a lease, from an equitable perspective, you expect actual, physical possession
            a. Tenant does not expect to sign a lease which would require tenant to take legal action before tenant can even move in
        4. Landlord might have less incentive, but also has more tools at this disposal (more facts, more knowledge, knows real estate attorneys, etc.)
        5. Rule gives tenants a lot of rights, other than suing the landlord directly to get actual possession
            a. Tenant can terminate (abandon) the lease and sue for damages
            b. Tenant can take partial possession of the land and sue for abatement (damages for the portion of the land that they lost)
            c. Tenant can take possession when it is available and sue the prior tenant for damages
    ii. Trend is towards the English Rule
        1. RST and the Uniform Residential Landlord and Tenant Act both adopt the English Rule
b. American rule: recognizes the tenant's legal right to possession, but implies no duty on the landlord to put the tenant in possession
    i. The tenant has the responsibility to take legal action and put himself in actual possession of the property
    ii. Landlord only had the duty to deliver legal title, which gives the tenant a legal right to possess the property, but landlord does not have a duty to deliver actual, physical possession of the property
    iii. Arguments in favor:
        1. Rule recognizes the legal right to possession, but will not impose a duty for actual possession if it is not expressly provided for
            a. Courts might be reluctant to imply delivery in the lease if it was not expressly provided for
        2. Landlords might be reluctant to enter into leases if they think they have a legal obligation to kick people off the property and ensure physical possession
            a. Thus, might wait until the last minute to sign leases until they are sure they will not have to go through eviction proceedings to deliver actual possession
        3. Tenant's right is against the wrongdoer, not the landlord
            a. New tenant might have more reason to sue than the landlord – more incentive to take action because the new tenant is the actual party suffering the harm
        4. Generally, the law does not treat third parties as having duties for another party's wrongdoing
            a. The holdover tenant is committing the wrong that is harming the new tenant, so generally, we do not hold some other party (i.e. the landlord) responsible for the wrongdoing

XII. Subleases and Assignments

a. Two ways in which courts have gone about distinguishing between:
    i. First (more common) is formalistic: an assignment arises when the lessee transfers his entire interest unless the lease – he transfers the right to possession for the duration of the term
        1. If the lessee transfers anything less than his entire interest, a sublease results
            a. If a sublease results, the lessee is said to have retained a reversion and the right to possession reverts to him at the end of the period designated in the transfer
        2. A more wooden formula which formalistically looks at whether you transfer the whole estate or less than
    ii. Second (less common) considers the intention of the parties
        1. Regardless of what words were used, look to the nature of the agreement and see what is actually transferred (the nature of what's transferred)
        2. Ex: *Ernst v. Conditt*: the new lease calls it a "sublease," but the court looked to the intention of the parties – which was for the lessee to transfer his entire interest (and then some) – and finds this transfer an assignment
            a. Because this was a full assignment, the court found the new tenant had privity of estate with the landlord and thus owed the landlord the obligations that ran with the land (i.e. pay rent & remove improvements)
    iii. Tools courts looks to decide how to distinguish (not inclusive list):
        1. Label: what the parties called it
            a. However, words are not dispositive
        2. Termination date
        3. Did the grantor retain any other control?
b. Privity of Estate: between parties whose legal estates are in direct privity with one another – are directly juxtaposed with one another
    i. People who take on someone's estate, take on that person's property obligations with respect to the land and that person's right with respect to the land
        1. There are some obligations in property law that are said to run with the land, and when a person takes on someone's leasehold estate, they take on all of those obligations that run with the land
            a. Ex: conveying a leasehold tenancy to a third party carries with it the obligation of the third party to pay rent to the landlord
    ii. If there is no privity of estate with the landlord (i.e. only between the original lessee and the new tenant), then the obligation that runs with the land only runs to the person who is granting the sublease
c. Privity of Contract: exists when a party has a contractual agreement/promise/covenant that he owes directly to another party
    i. Generally, two parties need to have expressly assumed a mutual obligation between one another
        1. Sometimes in the case of **third party beneficiary contracts**, courts will imply a privity of contract
d. Assignment: privity of contract and privity of estate
    i. Ex: T1 assigns his entire interest to T2 (T1 no longer has a legal interest in the estate – it has been abrogated)
        1. T1 and T2 have privity of contract
        2. T1 and L have privity of contract (T1 expressly assumed obligations under the contract with L, so there is nothing to negate these contractual obligations, absent some express agreement)
        3. T2 and L have privity of estate (because this is an assignment, the assignee in this case owns the landlord and obligation directly)
        4. Can T2 and L have privity of contract ever?

a. If there is a 3-way agreement in which L expressly releases T1 of his obligations, and if T2 expressly agrees to assume the obligations of T1 and fulfill to L (essentially T2 replaces T1 with a new contract)
    i. But, unless the contract expressly releases T1 from the contract, T1 still retains contractual rights and obligations
        1. So, the landlord can sue T1 or T2, but if the breach is by T2 and T1 is the one who L sues, T1 can then sue T2

e. Sublease: privity of estate
    i. Ex: T1 grants only a portion of his estate to T2 (so T1 retains some interest in the land)
        1. T2 has privity of contract with T1 (an agreement that runs between them)
        2. T1 has privity of estate with L (L has carved something out of her estate to T1, when T1's interest ends, it reverts to L)
        3. T1 has privity of contract with L, also
        4. T2 does have privity of estate with T1 (when T2's interest ends, it reverts to T1)
        5. T2 does not have privity of estate or contract with L (T2 and L do not really have a legal relationship)

f. Consent: Majority rule: when a lease specifically allows the landlord to approve of/consent to a sublease, the landlord can refuse approval for any reason – does not need to have a "reasonable" basis

g. Consent: Minority rule: when a lease provides for consent by the landlord, that consent cannot be "unreasonably" withheld
    i. The landlord who has the ability to reject an assignment can exercise that right only when he has a commercially reasonable objection or reason to withhold his consent/approval
        1. This is shifting towards becoming the majority rule (gaining popularity), but has not yet gotten there – has been adopted by the RST
    ii. Ex: *Kendall v. Ernest Pestana*: Ernest Pestana refuses consent to a reasonable assignee because they want to hike the rent up because the value of the property has increased since the original lease went into effect; Kendall claims this is an unlawful restraint on alienation because EP is unreasonably withholding consent
        1. Court applies the minority rule, with a basis in property and contract law
            a. Property law: minority rule is consistent with the growing aversion to restraints on alienability – property ought to be put to its highest use, so we do not want parties to be able to prevent this use/alienation – this is a commercial transaction (rather than personal) and there is an increasingly impersonal nature of commercial leases, therefore the landlord's interest in selecting the individual that will occupy the space becomes less critical, *unless* there is a reasonable business reason for objecting
                i. Many courts distinguish between commercial and residential leases (commercial = less personal; residential = more personal)
            b. Contract law: minority rule aligns with the trend of recognizing obligations of good faith and fair dealing on the part of contracting parties, so when a party is given discretionary power that affects the rights of the other party to the contract, that party must exercise that discretion reasonably to protect all parties' interest
        2. Standard: reasonableness
            a. Reasonable: financial responsibility of the proposed assignee; suitability of the use for the particular property; legality of the proposed use; need for alteration of the premises; the nature of the occupancy (i.e. porn shop could affect the landlord's other property

interests); and concern that one tenant make threaten another tenant's business
        b. Unreasonable: a landlord cannot reject based on personal tastes or personal animosity, for arbitrary reasons, or because she wants to get more rent or a better deal than she originally agreed to in the original lease
    3. Landlords can explicitly reserve the right to reject an assignment on any grounds
        a. Courts will not imply reasonableness if you expressly hold that the rejection can be made under any grounds
    4. Landlords can make an express provision in the lease to plan for if the market value does up and provide for rent increases (ex: if an assignment recognizes the increase in rent, the landlord is entitled to half of that increased value)
        a. If it is clearly and expressly stated in the lease, the parties can contract around the default rules
    5. Mitigation: if the tenant defaults after the landlord refuses the assignment, the trend in the case law is to say that landlords have the duty to mitigate their damages and find a new tenant
        a. If the tenant had found an acceptable assignee to lease the property, then the landlord is screwed (if the jurisdiction follows the minority/reasonableness rule)

XIII. Tenant Default: a landlord has a few options in the situation of a tenant default, either because of failure to pay rent or failure of some other duty
- a. In some jurisdictions, landlords can use "self-help" to re-enter the land and take their property back – to eject the tenant physically
    - i. However, there is a trend away from this rule, and a trend towards the landlord using the legal system and bringing actions for ejectment or eviction proceedings
- b. If a tenant vacates the property and defaults (stops paying rent), a landlord does have some duty to mitigate – they have to take some effort to reduce the harm they are suffering from the default (i.e. have to look for some other tenant to rent the property)
    - i. If the current fair market value is much lower than when the lease was originally entered, then the defaulting tenant will be liable for the difference in the rent they should have been paying versus the rent the new/mitigating tenant is paying

XIV. Landlord's Duty
- a. Constructive Eviction/Covenant of Quiet Enjoyment (these doctrines run hand in hand, courts may invoke the covenant of quiet enjoyment and allow constructive eviction) → courts started recognizing a right in the tenant:
    - i. (1) If the landlord engages in some act of wrongdoing or interfering with the tenant's use of their property
        1. Makes it feel like an eviction – the landlord's behavior was effectively evicting you from the quiet enjoyment of the property
        2. Traditionally, this is implied
    - ii. (2) Landlord's failure to perform express material duties under the lease
        1. Traditionally, courts held this had to be express – had to have an explicit agreement when discussing the landlord's failure to do something (ex: explicit agreement to provide adequate premises)
    - iii. If the landlord breaches the covenant of quiet enjoyment and constructively evicts the tenant, then the tenant is justified in failing to pay rent and ultimately terminating the lease
        1. Tenant must <u>vacate</u> within a reasonable time to claim a constructive eviction ("reasonable" is case-specific)
    - iv. Ex: *Reste Realty Corp. v. Cooper*: court finds a breach of the covenant of quiet enjoyment for the landlord's failure to fix the driveway which caused flooding into the

premises; court's holds: "under this rule any act or omission from the landlord, which renders the premises substantially unsuitable for the purpose for which they are leased, or which seriously interferes with the beneficial enjoyment of the premises, is a breach of the covenant of quiet enjoyment and constitutes a constructive eviction of the tenant"

1. *Reste* seems to create an independent covenant of quiet enjoyment – an independent right of the tenant to conditions of the premises that are neither specified in the lease nor brought on by some affirmative wrongdoing by the landlord
    a. This is a fairly broad approach to the covenant of quiet enjoyment – broader than the traditional common law approach
        i. Court could have held on narrower grounds re: agent's promise to repair was binding or the landlord failed to disclose latent defects, but chose to hold more broadly

v. In order for a tenant's nonpayment of rent to be justified under these circumstances and removal from the property, the landlord's interference really has to be substantial enough to constitute constructive eviction
    1. If it is not substantial/material enough, then the <u>doctrine of independence of covenants</u> continues to hold (i.e. tenant's promise to pay rent is independent of landlord's promises – parties rights and obligations are independent from each other)
        a. So, tenant can still sue the landlord, but is limited to a cause of action for damages, rather than being able to vacate and stop paying rent
    2. The covenant of quiet enjoyment and constructive eviction gives tenants leverage in their relationships with landlords
vi. There is some covenant of quiet enjoyment implied in every lease
    1. But the scope of the covenant can differ/vary based on jurisdiction
        a. Ex: *Reste Realty* implied a much broader rule than traditionally recognized

b. Implied Warranty of Habitability
    i. Before implied warranty of habitability: caveat lessee: "let the lessee beware" – the lessee takes the property as is, irrespective of the state of disrepair – landlord had no obligation to keep the property in good condition, unless there was an express covenant
        1. The exception to caveat lessee was constructive eviction, but that was limited to: landlord engaging in some act of wrongdoing or interference, or landlord's failure to perform express material duties under the lease
    ii. Implied warranty of habitability applies only to residential dwellings (term of years, periodic tenancies, and at-will leases)
        1. It clearly creates a landlord duty
    iii. Types of defects:
        1. Latent and patent (obvious/visible) defects
            a. In almost all jurisdictions, this warranty cannot be waived
                i. Also, you cannot bargain away the right to safety and health, so if you bargain for a $2,000 apartment to pay only $1,500 in rent because of the defective conditions – the court will still say you have the right to live in a $2,000 safe and healthy apartment; so landlord reduces the rent at the risk that the tenant will protest for an apartment in safe and habitable conditions
        2. Dangerous to safety/health/habitability
        3. Housing code violations, in most cases are going to be presumptive violations (prima facie showing that the premises are not in livable condition)
    iv. To prove violation, tenant must prove:

1. A substantive breach by the landlord to fail to provide safe and healthy conditions
2. Tenant notified the landlord of this breach, and
3. The landlord failed to repair within a reasonable time

v. Remedies:
1. Contract remedies:
a. Damages: difference between the value of the property as warranted vs. the value in its actual, defective condition; annoyance/discomfort damages; punitive damages (to punish); compensatory damages for the repair you made on your own, at your own expense
b. Rescission: if the breach is so substantial and material you can walk away from the contract – rescind your obligations under the contract
c. Reformation: a revision of the contract provisions (ex: reduced rent, shifted/changed obligations)
2. Tenant can withhold rent as a means of attaining the above damages
3. Tenant can terminate the lease and sue for damages

vi. Implied warranty of habitability does not require you to vacate the premises (like constructive eviction typically does)
1. Constructive eviction seems more like a last step, whereas implied warranty of habitability allows more negotiation and the tenant can try to get correction of the premises without having to vacate
2. Implied warranty of habitability provides for damages against the landlord that are more generous than those for a breach of the covenant of quiet enjoyment
3. Note: not all jurisdictions have adopted the warranty of habitability, but most have

vii. Strategy: if the landlord brings eviction proceedings because tenant withholds rent, the tenant's defense is the breach of the warranty of habitability
1. Court can order the landlord to fix the problems and order the tenant to pay the market value of the rent (i.e. not necessarily the full rent price) and then once the repairs are made, tenant will pay the full rent price
2. Tenant does this at some risk – the court could find that the landlord has not so substantially breached the warranty, and then the tenant may be evicted for withholding rent
a. But, it is also expensive for the tenant to both pay rent and bring a suit for damages, so tenant has to balance and make a decision

<u>Non-Possessory Interests</u> (Servitudes: agreements between private parties that create some interest in land)

I. Easements: private covenants to achieve the best use of the land – interdependent uses of property
a. Affirmative easements: allowed to do something – involves some right to enter or perform an act on the servient land
b. Negative easements: the right of the dominant owner to forbid or prohibit the servient owner from doing something on the servient land that might harm the dominant owner's land
i. Courts in the U.S. and England have shown some resistance to the widespread availability and enforceability of negative easements
1. Given the fact that other doctrines have emerged (i.e. real covenants and equitable servitudes) we have not seen a lot of pressure for formal changes in the law to get exceptions to this resistance
a. As a result, in many states we see a formal rule that negative easements are available in only very limited circumstances
i. But since these other doctrines look like and accomplish essentially the same thing, there is often a blending of the terms
c. Appurtenant easement: a right given to the owner of the land

i. An easement that runs with the land – goes with this tract of property (i.e. if the party sells the land, the easement goes with the land – tied to the land, not a particular individual)
    1. The appurtenant easement owner is given the right to enter the servient property, and the easement owner has is the dominant tenement – it is imposing its will on the servient property
ii. Easement appurtenant is preferred if there is ambiguity

d. In gross easement: a right given to someone without regard to ownership of land
    i. More of a personal benefit than one that connects to the land
        1. Ex: someone has a right to take their cattle across someone's land
            a. This easement is owned by that individual and is not tied to a particular tract of land

e. General rule: easements must be created through some signed writing
    i. However, there are some circumstances where easements can be created through prescription, estoppel or implication

f. Ex: *Willard v. First Church of Christ*: "subject to an easement for parking during church hours for the benefit of the church … such easement runs with the land only so long as the property whose benefit the easement is given is used for church purposes"
    i. Court distinguishes between reservations and exceptions
        1. Reservation: creates a new servitude that did not exist before
        2. Exception: excludes from the grant some servitude that preexists on the land
    ii. Traditional common law rule: you cannot reserve an interest in a property that you sell in some third party, which for the first time creates an easement in some third party
    iii. Modern trend: honor the grantor's interest, unless there is some public policy reason not to do so
        1. Court holds the traditional common law rule is antiquated and does not honor the intent of the parties
            a. Ex: purchase price could have been discounted to reflect the encumbrance on the property (i.e. the easement) – so modern rule could frustrate grantor's intent
        2. Court finds no countervailing policy argument in favor of the old rule
            a. Courts have also found ways to avoid applying the rule
                i. Estoppel: the buyer is estopped to deny the easement/reservation if it appeared originally to be going along with it and you acted in reliance on these assurances that you were purchasing the property with the easement/reservation
                ii. Other courts held that the rule did not apply to reservations in spouses
                iii. Treat reservations in some circumstances as exceptions
                    1. Reservations: transfer full rights and then there is a re-vestment in you for the easement
                    2. Exceptions: land is conveyed with part of the interest withheld for the easement
        3. Rather than chip away at the rule through these various exceptions, court does away with the rule and establishes: you can convey a property through a written instrument subject to a reservation in a third party
            a. Court applies this new, modern rule retroactively because plaintiff did not show that he relied on the old common law rule
                i. Need to balance the equities and policy considerations to decide whether to apply retroactively

g. Easements vs. Licenses
    i. Easements create an actual legal interest in land

1. Easements are irrevocable

ii. License simply grants a party the permission to use the land for a certain purpose, without conveying a legal interest
    1. Generally, licenses are revocable by the licensor
        a. Exceptions:
            i. A license that is coupled with some interest in the land conveys along with it the right to enter the land as necessary to exercise that right
                1. Ex: if you have the right to harvest timber (interest), you also have the right to enter the property to do so (license)
            ii. Estoppel: in some circumstances estoppel works to prevent someone from saying, "I meant to allow this use, but I only meant to do so at my discretion and I always intended to terminate your access at any time"
                1. Most jurisdictions allow easement by estoppel
        b. Once a license is irrevocable, it turns into an easement
        c. Some jurisdictions (NY & RI) follow the parole evidence rule strictly and hold that oral licenses are always going to be revocable at the option of the licensor
            i. Prevents the burdening of land with uncertain restrictions – if you write things down, it gives more security and certainty in title

h. Easement by Prescription: when someone's use of the property is continuous, adverse, and uninterrupted, they can acquire legal rights by prescription (similar to adverse possession)
    i. Ex: *Othen v. Rosier*: use must be hostile, adverse and exclusive
        1. Court finds Othen had permission to use the road, so a license cannot mature into a prescriptive right because it is not hostile/adverse
        2. Court finds that if you are sharing the road with the owner of the property, there is no exclusive use, so you cannot be found to have acquired an easement by prescription
            a. Trend away from the strictness of the exclusivity rule, but most courts do still abide by the exclusivity requirement
    ii. Easement by Prescription vs. Adverse Possession
        1. Adverse possession gives you a legal possessory title to the land
            a. Requires continuous possession
            b. Easement by prescription gives you a right to use, but title remains in the land owner
            c. Can be satisfied if you pass through the property, rather than requiring continuous possession
    iii. Fiction of the Lost Grant (old English law): will recognize easements by prescription if no one can remember when the use began or if has been used for 20 years; so, if you have been using a piece of property, there is a presumption that the grant of an easement was made at some time to you and the grant was lost – this presumption is irrebuttable
            a. In the U.S., sometimes courts refer to this fiction, but there is a tension between this fiction and our notion of easement by prescription, which found its roots closely related to the doctrine of adverse possession
            b. Tension between the requirement that the use be open, notorious, hostile, and adverse – and – the notion that the common law requires that there was some grant of permission that was lost (fiction)
            c. NOTE: treat easement by prescription akin to adverse possession (as opposed to the fiction of the lost grant theory)

i. Open, hostile, adverse, and with a claim of right
ii. Required exclusivity of use, but there has been some loosening of this requirement

i. Easement by Estoppel: if the party using the land is expending money and effort to develop the land (i.e. investing in reliance on the permission that is granted, either explicitly or implicitly by the party granting the license, the licensor is estopped from revoking the license)
    i. Estoppel is the equitable result as the licensor has stood by and watched someone make investments after telling them they could use the property – it seems unfair for the licensor to be able to revoke that license at their will
    ii. Elements:
        1. A license (explicit or implicit) – owner has to give some kind of <u>permission</u>
        2. Licensee has to exercise the privilege under the license to improve on the property or make substantial expenditures in <u>reliance</u> on the continued use of this license
        3. When the licensor stands by and watches the above elements happen, the license can mature into an irrevocable license – which is a legal right that becomes an easement
            a. Ex: *Holbrook v. Taylor*: servient tenement owners gave permission to the dominant tenement owner to use the road across their property for a number of purposes – gave construction vehicles permission to use the road and sat by as the owners constructed the house and continued to use the road – court found an easement by estoppel
                i. No requirement that the parties had a meeting of the minds re: creation of the easement – it might be very possible that the licensor never intended for the license to be irrevocable, but through the licensor's behavior it led the licensee to believe it was irrevocable, so the licensor is estopped from denying that there was no meeting of the minds

j. Implied Easements
    i. Easements Implied from a Prior Existing Use
        1. Quasi Easement: an owner may make use of one part of his land for the benefit of another part (not an actual easement because an easement is the right to access someone else's property, so cannot have an actual easement against yourself)
            a. If the owner of land, one part of which is subject to a quasi easement in favor of another part, conveys the quasi dominant tenement, an easement corresponding to such quasi easement is ordinarily regarded as thereby vested in the grantee of the land, provided the quasi easement is of an apparent, continuous and necessary character
                i. If the property is later subdivided (i.e. original common ownership required), quasi easements can mature into legal, implied easements if, <u>at the time of the grant/conveyance</u>:
                    1. Use of the easement is apparent to the purchasing party
                    2. Use is continuous
                    3. Use is necessary
                        a. Necessity must be reasonable
                        b. Necessity does not need to be strict – like easement by necessity's requirement
        2. Ex: *Van Sandt v. Royster*: easement involving a sewage drain under purchasing landowner's property (issue: sewage drains are hidden/not readily visible)
            a. Court is trying to understand what the intention of the parties was at the time of sale – with respect to uses that were continuous and

evident, or should have been, then it is reasonable to assume the parties contemplated the easement would continue

b. Court implies an easement, absent express language in the deed, because the use is so evident, has taken place for such a long time, and is so necessary – therefore, the purchaser must have known/foreseen, or should have known/foreseen, about the easement
    i. Court finds constructive notice – purchaser was aware of the modern plumbing and a reasonable inspection would have found the sewage drain – so purchaser is charged with knowledge, whether she actually/subjectively knew or not
        1. The fact that the sewer may be hidden underground does not negative its character as an apparent condition, at least where the appliances connected with and leading to it are obvious

c. Implied reservations vs. Implied grants **[FINISH!!!!]**
    i. OK to grant an easement implicitly
    ii. Not OK to implicitly reserve an easement in yourself

3. RST: Factors Determining Implication of Easements:
    a. Whether the claimant is the conveyor or the conveyee
    b. The terms of the conveyance
    c. The consideration (did the price reflect a discount if the encumbrance devalued the land)
    d. Whether the claim is made against a simultaneous conveyee
    e. The extent of necessity of the easement or the profit to the claimant (the need to get the access is relevant, but only a factor when determining whether the parties at the time of conveyance ought to have assumed that the access would continue – for easements from a prior existing use)
    f. The manner in which the land was used prior to its conveyance
    g. The extent to which the manner or prior use was or might have been known to the parties (notice issue: should they have known at the time of conveyance)
        i. Parties to a conveyance may be assumed to intend the continuance of uses known to them which are in a considerable degree necessary to the continued usefulness of the land
            1. They will be assumed to know and to contemplate the continuance of reasonably necessary uses which have so altered the premises as to make them apparent upon reasonably prudent investigation

ii. Easements by Necessity
    1. Does not require prior use (i.e. not necessarily linked to how the property was used before)
        a. More associated with how the property is severed and how that affects the property use
            i. At the time of severance, the necessity of access must arise
                1. Creating a new right by a need that arose at the time of severance that might not necessarily have existed before
                    a. So, unity of possession/original common ownership is required

2. Necessity requirement is strict necessity (not just mere convenience)
2. An easement by necessity endures only so long as it is necessary
3. Ex: *Othen v. Roiser*: necessity has to have existed at the time the original conveyance was made of the encumbered property (unity of property – severance – necessity (not mere convenience) arises at the time of severance)
    a. If title passes unencumbered at the original severance and a third party owns the property, an easement by necessity will not be imposed against a stranger/third party
    b. At the time of conveyance of the 100 acres, there was not a necessity – and the fact that this property originally came from the same owner does not necessarily mean the easement by necessity is created if the necessity was not present at the original time of severance

II. Real Covenants: a promise between two parties that can run with the land
    a. A real covenant is likened to a contract and cannot be implied in the same way that an easement can be implied or inferred through behavior
    b. A real covenant exists for the benefit of both parties and is really in the nature of a contract that comes with and requires consideration
        i. A mutual promise between two parties – two people decide to make an agreement that, on balance, increases or maximizes the value of their properties
            1. As distinguished from an easement, which can be constituted as a gift or arise from unilateral behavior that brings a benefit only to one party and not the other
        ii. A real covenant can be a negative promise (a promise not to do an act) or an affirmative promise (a promise to do an act)
    c. Main difference between easements and covenants (real covenants and equitable servitudes):
        i. Easements give the right of the easement owner to enter/use someone else's property
        ii. Covenants give someone a right to control someone else's behavior/use of their property
    d. Under English law, the courts require strict privity of contract to enforce rights and duties between landowners
        i. In England, privity of estate could substitute, but only in the context of landlord-tenant relationships (i.e. a tenant could enforce a covenant with its landlord)
            1. A burden cannot run at law – exception: the landlord-tenant relationship [but courts developed the notion of equitable servitudes …]
    e. American courts have shown more flexibility – have allowed certain agreements (benefits and burdens) to run with the land
        i. Benefits are more likely to run with the land than burdens are
    f. Privity of Estate
        i. Horizontal privity: privity of estate between the original covenanting parties
            1. The promise has to have arisen out of common ownership; arisen through one party that owned both plots of land and there was a sale, the covenants arose out of that transaction
            2. First RST required horizontal privity in order for burdens to run with the land (benefits did not require horizontal privity)
                a. Modern rule (Third RST) eliminates the requirement of horizontal privity for covenants to run at law
        ii. Vertical privity: privity of estate between one of the covenanting parties and a successor in interest
            1. For burdens to run under the old RST we needed perfect vertical privity – the party against who the burden was being asserted had to succeed to the same estate from the promisor (i.e. if you owned a fee simple, you needed to pass on a fee simple)

a. For the benefits to run, old RST was more flexible – anyone who succeeded to the full estate (i.e. fee simple) or some smaller estate that was carved out of the full estate could benefit

2. New RST does away with these distinctions of privity: both benefits and burdens can run with the land
    a. RST makes a distinction between negative promises and affirmative promises
        i. Negative promises: RST treats these as easements
            1. All owners and possessors of the property are bound by negative promises and all owners and possessors of the benefitted land are entitled to enforce it
        ii. Affirmative promises: RST treats owners differently [don't need to know the differences in treatment]
            1. If you have passed on to the full estate of the prior owner, then you are bound by these affirmative covenants (benefits and burdens)
            2. But if you pass on to some lesser estate or you are an adverse possessor, then different rules apply – you are treated differently than full inheritors of the estate

iii. Requirements (from review sesh):
    1. A writing, recorded with the assessor's office, e.g.
        a. Notice is not an independent requirement, but the writing requirement speaks to implicit/constructive notice
    2. Traditionally, horizontal privity was required
    3. Touches and concerns the land
    4. Intent for the covenant to run with the land
    5. Consideration

III. Equitable Servitudes
- a. Requirements:
    - i. Original parties must have intended that this promise run with the land and bind successors to the property
    - ii. The purchaser must have notice (actual or constructive) of the agreement
        1. Equitable servitude will not be enforced if there was no notice at all
    - iii. The covenants must touch and concern the land (effect the value and/or use of the land)
        1. Generally, negative covenants are found to touch and concern the land
            a. Ex: you agree not to build something on your property
- b. Equitable Servitudes vs. Real Covenants
    - i. Now we see a blending of courts of law and equity, but one of the differences is the type of relief available
        1. Equitable servitudes turn on the issue of notice – they exist, or are invoked, in cases where for one reason or another there is a problem with the real covenant claim (either because a formalistic rule prevented the covenant from running with the land or because of some lack of privity between the parties)
            a. Courts of equity step in where they think it will do justice to enforce the intent of the parties, even in circumstances where applying the law of real covenants would not require the court to enforce the covenant (where the law of real covenants would not have granted relief)
    - ii. Equitable servitudes might be implied even if there is not a writing that reflects it in your chain of title

1. Equitable servitudes are said to run with the land and do not depend on any formal transfer of title (whether in contract or in terms of strict vertical privity) – does not matter how you have acquired possession of the property, if the other conditions are met

c. Ex: *Tulk v. Moxhay*: no express covenants in the deed at issue, but Moxhay knew about the covenant in the original deed – he had actual (not just constructive) knowledge; restriction = maintain the land as a public garden
    i. Covenants at issue in the deed:
        1. "Keep and maintain the ground" = an affirmative covenant to do something
        2. "Uncovered by any buildings" = a negative covenant not to build
        3. "It should be lawful for the inhabitants to have … the privilege of admission at any time into the said garden and pleasure ground" = an easement
            a. Review: in 1848 this easement would be unenforceable because it was created in favor of a third party (remember, old rule from *Willard*)
    ii. English court cannot enforce the covenant because a burden cannot run with the land (outside the landlord-tenant relationship), so the court developed the doctrine of equitable servitudes – for the first time, in the absence of a real covenant at law, a party could enforce an equitable servitude
        1. Court enforced because it wanted to honor the intent of the parties
            a. Plaintiff had intended that the burden would always be on the land he sold & purchasing party was put on notice – and presumably the purchase price reflected this encumbrance/burden on the land
                i. Without equity, the purchaser could purchase at the lower price, then flip the property without the encumbrance and sell at a much higher price
            b. If two parties enter into a mutually beneficial promise at the time it was entered into, it seems silly to let one party walk away from the promise because of a technical distinction
                i. Court is sympathetic/likes this restriction and thinks the landowner would not have sold in the first place if the restriction was not a condition of sale

d. Ex: *Sanborn v. McLean*: landowners want to build a gas station on their lot, claim no use restriction in their deed (so no real covenant in the deed and no constructive notice because even if they did a title search, claim nothing would come up); court nonetheless enforced the restriction – calls it a reciprocal negative easement, but it is likely an equitable servitude
    i. Intent: land was once owned by a single original owner, who had a clear intent that the land be restricted to residential use when she subdivided the property
        1. The sale of some of the initial lots in grouping were subject to the encumbrance (per the deed)
    ii. Notice: court finds constructive notice because landowners could have looked around and seen the restrictions on the neighbors' properties – could have inferred an intent by the original grantor to keep the land for residential use – should have known
        1. Additionally, it seemed to be relevant that everyone else in the subdivision was acting along with the restriction, presumably because everyone benefitted from it
        2. When people create residential subdivisions and the maps and marketing used seem to broadcast the residential nature of the development, the fact that there is a defect in the deed of a single party (which lacks the restriction), does not allow the property owner to say he is not bound by said restriction – we assume constructive notice
        3. Court mentions "inquiry notice": the clues are all around you, so you should have looked into is, since you did not, you are charged with notice

a. Defense of "inquiry notice": in the interest of the collective property owners in the subdivision – the restriction brings use to every property and everybody gets mutual benefit (land value increase, e.g.) from these land agreement (even defendants)
    i. Because of this mutual benefit, which brings value to all of the parties, the courts have seen fit to be pretty liberal in enforcing these agreements/equitable servitudes in the context of subdivisions

e. Some jurisdictions require vertical privity for the benefit of a covenant to run in equity (i.e. if you can trace your interest in the land from someone who made the original promise)
    i. Notion is that someone who has title to property and cannot trace their title to these original covenanting parties, would receive a windfall (bonus)
        1. As distinguished from a burden, where there is a party who is relying on the burden to be enforced, since they are receiving the benefit
    ii. With real covenants, the standards are more generous for people claiming the benefits, rather than being charged with the burden
        1. There is a higher standard for burdens because, as a general matter, courts are more skeptical when an encumbrance will interfere with alienability, rather than promote it
            a. Preference is for alienability when possible

f. Ex: *Neponsit Property Owners' Association v. Emigrant Industrial Savings*: one of the first common interest communities/HOA cases; court enforced the assessment covenant to pay annual dues to the HOA – courts calls it a real covenant, but they are bending the rules, so seems like an equitable servitude (early example of the blending of the two concept: court could say it was a real covenant that ran with the land and they found a broad exception to the general rules – or – could say the elements for real covenants are not strictly met, but in the court's equitable power they will enforce it)
    i. Covenant requirements:
        1. It must appear that the grantor and grantee intended that the covenant should run with the land
        2. It must appear that the covenant is one "touching" and "concerning" the land with which it runs
        3. It must appear that there is "privity of estate" between the promisee (party claiming the benefit of the covenant and the right to enforce it) and the promisor (party who rests under the burden of the covenant)
    ii. Touch and concern: this court has endorsed the English rule: affirmative covenants do not run with the land – viewed with skepticism and considered personal promises that are not rooted in the land [rule is subject to a couple of exceptions]
        1. Court says that there are cases where exceptions have been recognized, so they will do so here: "The test is based on the effect of the covenant rather than on technical distinctions. Does the covenant impose, on one hand, a burden upon the interest in land, which on the other hand increases the value of a different interest in the same or related land?"
            a. There is a burden on the landowner that also benefits the landowner
            b. There is a mutual reciprocity by all landowners because all are burdened (by paying the dues) but all get and confer a benefit
                i. Court finds this covenant satisfies the touch and concern requirement, as it both benefits and burdens the land
        2. Cf: I subdivide my land and sell you 1/4th of my property, subject to a deed: "purchaser must provide babysitting services for 10 hrs/wk, and when no longer needed, will cook meals for 10 hrs/wk for the seller"

a. This covenant is unenforceable because it is a purely personal covenant, and nothing about these services relate to the value of either property

iii. Privity of Estate: HOA does not own any land, does not have an estate that it can trace back to anyone, so no vertical privity
1. Nonetheless, court finds vertical privity by viewing the HOA as either by (1) acting as an agent for the homeowners or (2) making a corporate argument: HOA is a legal device/fiction to reflect the homeowners' interests – if we look behind the corporate form, the HOA is really the members trying to assert their rights (in substance HOA is standing in the shoes of the homeowners', thus have standing to sue)

iv. Policy re: recognizing HOA right to enforce covenants
1. Reduces transaction costs when you bring suit under one HOA on behalf of the whole community
2. HOA is an enforcement mechanism: homeowners can pay knowing that if someone else does not pay, they will not personally have to go after them, HOA will

g. Generally, today, vertical privity is not required to enforce covenants in law or equity [modern rule = no privity requirement]
i. Courts have increasingly accepted third party beneficiaries and their right to enforce a covenant without reference to privity
1. Typically these are HOA, where the third party is representing the interests of the parties

ii. However, in cases where the beneficiary is some third party, sometimes courts are a little less generous, a little less clear, and start talking about vertical privity again (i.e. if you make a promise to someone to benefit some third party)

h. RST has largely abandoned the formal touch and concern requirement in favor of a default rule that says covenants between parties relating to land are generally enforceable, unless they violate public policy
i. As long as the agreement does not offend public policy, it should not matter whether the benefits of a servitude are in gross (see *Caullett*)

ii. Against public policy if: unreasonable burdens a fundamental constitutional right; is anti-environment, etc.

i. Ex: *Caullett v. Stanley Stilwell & Sons*: issue between purchaser and developer re: deed, under the heading of "covenants that run with the land": "The grantors reserve the right to build or to construct the original dwelling on said premises" … grantees claim the covenant is unenforceable
i. Court finds this covenant to be unenforceable
1. It is too vague, ambiguous, and indefinite – it is not clear what structure you are promising to build, etc. (court is unwilling to get deeply involved in the details of how people are going to comply with their obligations – to burdensome for the court to supervise)
2. Restricts alienability

ii. But, even if it was definite enough, covenant can still not be enforced
1. Buyer/Court: the covenant does not touch and concern the land because the effect on the land is more incidental and it is really just a personal benefit to the developer
a. Contractor: courts enforce restrictions on the aesthetic quality of the house (negative covenants) so maybe contractor wants to build because he wants a certain aesthetic consistency, might be a quality control measure
b. Court: to qualify as a covenant properly affecting the subject property, the deed provision must define in some measureable and reasonably

permanent fashion the proscriptions of and limitations upon the use to which the premises may be put
                i. This covenant is a one-time obligation, not a durable, ongoing covenant concerning the land
            2. Buyer/Court: the burden is attached to the property, but the benefit is a person one to the contractor – court finds the benefit is for the contractor only, and not for the property or surrounding properties
                a. Court does not seem to care that the buyer may have gotten the property at a discount in consideration of this covenant
                b. Court finds the benefit in this case is in gross (going personally to the contractor) and not relating to the estate or to adjoining property
                    i. Benefit was for personal commercial advantage
                    ii. In this court's view, you need some form of reciprocity re: benefits and burdens, in order for the covenants to be enforceable
            3. Contractor might have been more successful if he wrote the covenant to speak more to benefitting the land and the other properties – allege a neighborhood scheme with qualitative restrictions … show the restriction was not merely for contractor's financial benefit, but rather for the consistency and quality of the overall subdivision

IV. Termination of Covenants
    a. Changed conditions doctrine is very strict
        i. There is a heavy burden to show that there are no longer continuing benefits or that the purpose is thwarted
    b. Standard for Evaluating Changed Circumstances:
        i. Do the changes thwart the purpose of the restrictions?
        ii. Do the beneficiaries of the restriction still get benefit from enforcement of it?
            1. Changed circumstances justify a court finding a covenant unenforceable only if the changes thwart the purpose of the restriction and if the beneficiaries simply do not get any benefit from it anymore
    c. Tension between two core principals of property law: freedom of contract vs. freedom of alienability
        i. Freedom to do whatever you want with your own property (honoring the freedom of contract)
        ii. Society's desire to use the property for its highest and best use (in favor of alienability and in favor of people finding the best and highest use of land)
    d. Ex: *Western Land Co. v. Truskolaski*: neighborhood is restricted to residential use in Nevada, but now developed wants to develop commercially on the land and argues the covenant is no longer enforceable due to change circumstances (increased commercialization and traffic); homeowners want the covenant enforced though
        i. As long as the original purpose of the covenant can still be accomplished and there are still real, substantial and continuing benefits, then the covenant will stand
            1. Court enforces the covenant because the purpose of the covenant is not thwarted and the homeowners still benefit from the restriction (having a residential neighborhood, low traffic, etc.)
        ii. Court holds the covenant enforceable as long as the two conditions are satisfied (purpose not thwarted and still benefitted), even if the value of the property for commercial use is higher than for residential – the fact that there is a differential in value does not matter in determining whether a restrictive covenant like this is enforced
        iii. Developer argued zoning laws and issue of abandonment or waiver because apparently homeowners have violated this restriction in the past

1. Court holds that the fact that a municipality has zoned a particular area to allow for residential and commercial uses does not abrogate private covenants that restrict the land for residential use
    a. Court does not find waiver or abandonment here, such that the restriction is no longer enforceable – the violations have to be so general that they frustrate the original purpose of the agreement (and they do not here)

e. Ex: *Rick v. West*: there is a single hold out who will not release the covenant restricting the land for residential use so that an industrialist can build on the property (want to build a hospital); she is motivated by her emotional ties to the land and reasonably relied on the covenant that the property around her would be preserved as residential when she purchased the property (contractual covenant)
    i. Court holds that there was an agreement reflected in the deed, and freedom of contract holds that they will generally be enforceable unless void against public policy
        1. The changed conditions doctrine does not apply here because hold out is still getting benefits from the land and the purpose of the restriction is not thwarted here
            a. Covenant gives hold out a right to injunctive relief – a legal right to prevent someone from building a non-residential structure on the land
f. Remedies
    i. Property rule: injunctive relief
    ii. Liability rule: allow party to build, but mandate they pay damages to the landowner
        1. Hard to measure damages, hard to measure emotional ties/connections – does not feel like it adequately compensates landowner
    iii. Some jurisdictions (minority) have some flexibility to modify restrictions or award damages, rather than granting injunctions, when conditions have changed significantly
        1. Notion is that it is unrealistic to continue to enforce or give this one hold out landowner the power to enforce this restrictive covenant against a party who everyone else recognizes should be able to put the land to its best and highest use

V. Abandonment
a. Standard for abandonment: abandoned property is that to which an owner has voluntarily relinquished all right, title, claim and possession with the intention of terminating his ownership, but without vesting it in any other person and with the intention of not reclaiming further possession or resuming ownership, possession or enjoyment
    i. This standard is only applicable to personal property
b. Ex: *Pocono Spring v. MacKenzie*: landowner tried many things to get rid of the property and abandon it (sell it, give it away – nothing worked); court refuses to allow them to abandon the ownership of their property though
    i. Once you have perfect title in fee simple, you simply cannot abandon the property – no matter how voluntarily you try to relinquish title, you cannot if you name is recorded on the title in the recorder's office
        1. Standard for abandonment simply cannot be satisfied if you are the owner of title for property – you cannot relinquish title or possession of it
    ii. What can landowner do in this situation when she cannot get rid of the property and does not want to pay dues for property she is not using?
        1. Best (long shot) argument would be that it is unconscionable due to changed conditions – K is unconscionable because you get no use, can't sell it, can't give it away – land is pretty much useless
            a. Argue owner is no longer and will never get the benefits of the dues
        2. RST, which provides some flexibility to modify or terminate certain affirmative covenants (pg. 797) would not have been helpful in this case because does not apply to obligations to a common interest community (as we have here)

c. Policy for not allowing abandonment of real property:
    i. Statute of Frauds provides certainty to title of land – reliance on written documents to tell us who the owner of the land is, so owner cannot change their mind on a day to day basis
    ii. Society wants someone responsible for the property – if something happens to the property, we need the owner to fix and/or maintain it
        1. What if there is an attractive nuisance and someone gets hurt?
        2. Society puts certain responsibilities on landowners
    iii. State has an interest in collecting property taxes
    iv. If you can abandon property without some documentation filed with the government, how is the government suppose to know what property landowners are responsible for or not
    v. Productive use of land
        1. Want to know who owns the land
        2. At some point in time can come in and claim the land and put it to use?

VI. Common Interest Communities
a. *Neponsit*: a court for the first time allowed a HOA to enforce an affirmative covenant that was designed to preserve the character of a residential subdivision
    i. Treats common interest communities as prototypical examples of land ownership that can be subject to enforceable servitudes
        1. Whether covenants or servitudes run with the land are pretty easily satisfied in these cases [vertical and horizontal privity are typically found – in jurisdictions where they are required]
        2. Courts have pretty regularly found that the common interest communities' restrictions and regulations touch and concern the land (affirmative and negative covenants)
b. Ex: *Nahrstedt v. Lakeside Village Condo Assoc.*: homeowner contends the pet restriction is unreasonable as applied to her because her cats stay inside and do not make noise; CA statute holds common interest use restrictions "enforceable unless unreasonable"; court upholds the use restriction
    i. Pet restriction, here, seems more like a real covenant (rather than an equitable servitude) because it is written and recorded in the deed and privity is satisfied – not relying on constructive notice in the absence of an actual writing in the deed, which would feel more like an equitable servitude
        1. General trend in the cases is to treat real covenants and equitable servitudes interchangeably
        2. Doesn't really seem to touch and concern the land, but the trend is away from the formal touch and concern require and towards recognizing restrictions that deal with how one can possess their land – most modern courts would find that this use restriction touches and concerns the land
    ii. Court held that it must assess the "reasonableness" for the whole community at large – not an individualized, case-by-case approach to reasonableness
        1. An individualized inquiry taxes the HOA and the judicial system unnecessarily
            a. HOA: results in unnecessary legal fees and could increase the HOA dues for the homeowners if the HOA is constantly litigating cases
            b. Courts: results in an administrative burden to do fact-intensive investigations for individual cases
        2. Homeowners could have purchased in reliance on this restriction being enforced at large since it was built into everyone's document/deed
        3. Promotes stability –benefits of certainty in these common interest communities
            a. Social fabric benefits most from predictability, so restrictions built into written instruments should be promoted

iii. Standard: restriction is presumed to be valid unless it is arbitrary (no common purpose promoted, no benefits, e.g.), violates public policy (anti-discrimination laws, anti-environmental, e.g.), or the burdens it imposes on the use of land so substantially outweigh the benefits to the residents as a whole
    1. Incredibly deferential approach
        a. Court reads the statute creatively and presumes enforceable unless unreasonable in the equitable servitudes context (reference the law of servitudes) since the statute is talking about equitable servitudes
        b. Once you get to a deferential standard of review – that pretty much ends the inquiry in most cases and the restriction will likely be upheld
    2. Court holds that restrictions in the master deed will get the deferential approach and presumption of validity
        a. In dictum only, suggests they might be slightly less deferential when dealing with decisions/rules the HOA decided subsequent to purchase (i.e. not in the master deed)
            i. Some courts apply a "reasonableness" standard, holding that board decisions will be enforced unless unreasonable (a little less deferential when reviewing)
            ii. Other jurisdictions have adopted a "business judgment" rule: as long as the board/HOA acts in good faith and had some rational basis for the restriction/decision made, it will be upheld (likely this standard is easier to satisfy than the reasonableness standard)
            iii. Note: when the board/HOA is making a business decision (what construction company to use, what the dues are, e.g.), every jurisdiction subjects those decision to the business judgment rule … a "reasonableness" standard is used, if at all, when the restriction is on land use, etc.

The Nature and Extent of Ownership

The Right to Exclude

I. General presumption: homeowners have a right to exclude third parties from entering their land
    a. Ex: *Jacque v. Steenberg Homes, Inc.*: homeowner does have a right to exclude third parties from entering their land
        i. Court allowed punitive damages, even though there was no injury to the land (nominal)
            1. Landownership should come with confidence that you have the right to exclude if you want to
            2. Stability of the legal system relies on some notions that these private property rights will be enforceable
            3. Deterrence: in order for the right to exclude to be meaningful, you have to have the right to get a judicial order and damages award to deter people from violating your right
                a. From both sides, it is desirable to impose punitive damages
                    i. Property owner will know their right to exclude is meaningful and the legal system will enforce it
                    ii. Defendant will know they trespass at their own risk and will hopefully be more careful next time
    b. However, the right to exclude is limited in certain circumstances
        i. Cannot use your property to injure others
        ii. Necessity to enter someone's land: a limited right to use someone's property to save a life, e.g.
        iii. Ex: *State v. Shack*: farm owner did not have a right to prevent government aid workers from entering the land to visit the isolated migrant worker (no right to exclude third

parties); the circumstances were such that these workers had a right that was created and funded by the federal government, and the right was delivered through these quasi-governmental actors (defendants) – so **necessity** was the basis for allowing the 'trespass'

1. Some say this is a new form of necessity
2. Some say it creates a new right of entry that public policy dictates ought to be allowed (so a public policy exception to the right to exclude)
3. Court also extends the right to enter here – also say the workers have a right to receive visitors if they want, despite the objection of the landowner (this is a unique case and the court is moved by the sympathies of these parties)
    a. Workers are isolate, so still want them to be able to exercise the basic, fundamental human rights of interacting with friends, e.g.

II. Beach Access → courts are all over the place re: beach access, so really depends on your jurisdiction
    a. Ways beyond the public trust doctrine (which do not always work very well):
        i. Public prescription device: if the public has used the property for a long period of time, which is adverse, it is only fair that the right will vest in the public in that land
            1. Notion of public prescription is similar to the notion of easement by prescription (a private party doctrine)
            2. Note: sometimes this is not satisfied because the owner has actually allowed the public access to their land, so the adverse requirement is not present
        ii. Implied dedication: some courts say in circumstances where landowners have shown an intent to dedicate their land to the public, and the state has followed up by maintaining and treating the land as such, we can assume that the transfer/legal right of access to the public has become effective
            1. Sometimes courts, when it is not clear when the land use began, but the public has used the land for so long and so consistently, the courts will presume a dedication to the public, absent evidence to the contrary (similar to the fiction of the lost grant)
    b. Public trust doctrine: acknowledges that the ownership, dominion and sovereignty over land flowed by tidal waters, which extend to the mean high water mark, is vested in the State in trust for the people [this is just one tool courts use to allow access to water and dry sand]
        i. Extensions:
            1. People need access to the shore in order to engage in seaworthy behavior, and they need access to the sand to clean their nets, e.g. (fishing based)
            2. *Arnold*: access to the shores by the public is allowed up to the mean average high water (basically: the wet sand) (still fishing based)
            3. *Avon*: right to access to the shoreline was extended to recreational use: swimming, tanning – not just for productive uses
            4. *Van Ness*: a municipality needs to make its land available to the public in order to access the shore line
                a. Municipality has an obligation to make the dry sand beaches accessible to the public in order for the public to get access to the shoreline so they can enjoy their rights
            5. Ex: *Matthews v. Bay Head Improvement Association* (N.J.): private, quasi-governmental property owners must also give reasonable access to their dry sand beaches in order for the public to enjoy their right to engage in recreational use
                a. The nature of this Association makes it easier to impose this obligation because their activities parallel those of a municipality: its purpose, communal characteristics, common activities (lifeguards, collected fees, beach police), controls a lot of land that is treated as common land (so feels different than private individual landownership)

b. Necessity: in order to enjoy a right of access, public must be able to pass through and have meaningful access to the dry sand (so more than just an easement to pass through – can also lay your towel down, e.g.)
    i. Limits:
        1. Need to accommodate the interest of the private property owner
            a. Court might find it reasonable to restrict access to the property to protect boats or other recreational vehicles and also to protect the safety of the public
        2. It is appropriate for associations to charge fees for services their provide or to open access through membership
            a. However, cannot exclude non-property owners from membership
        3. Associations can reserve part of the dry sand for members and chairs, if there is other dry sand available for the public
        4. Access is required only as necessary (context specific inquiry)
c. Court does not reach the question of access to private individual property, so long as there is access through municipality land or quasi-public association land, but does warn that it is willing to revisit the question if purely private land owners get too stingy (and revoke the leases, for example, if that is how the quasi-public association owns the property)
    i. Note: could be a "taking" of private property for public use, so State would have to compensate the landowners

<u>The Right to Use/Nuisance (Right to Quiet Enjoyment)</u>

I. Nuisance: focuses on behavior that interferes with others' right to use and enjoyment of their property
    a. Certain circularity to nuisance law: A (harmed party) is claiming B's use of his property is interfering with A's use and enjoyment of her property – giving A a right to prevent B's behavior – this really gives A a right to interfere with B's use and enjoyment of his property [imposes a reciprocal obligation]
    b. Questions:
        i. If there is a problem/harm, what is the cheapest way to avoid the problem?
        ii. Who should bear the costs of that avoidance/harm?

II. Ex: *Morgan v. High Penn Oil*: plaintiffs claim defendant's commercial use produces stinky fumes
    a. Standard: a private nuisance exists in a legal sense when one makes an improper use of his own property and in that way injures the land or some incorporeal right of one's neighbor
        i. (1)There must be an interference with the use and enjoyment of someone's land
        ii. (2) The harm must be substantial (more than a mere annoyance)
        iii. (3) Behavior must be either
            1. Intentional and unreasonable
                a. Intentional: either purposeful (deliberately wanting this harm to occur), or with actual knowledge that the harm will occur, or if through your behavior it is clear (substantially certain) the harm will occur
                    i. Purposefully or knowingly engaged in behavior that will continue over time

b. Unreasonable: "substantially impairing" plaintiff's use and enjoyment [court does not do a good job articulating a legal standard]
    i. Court rejects a cost-benefit analysis (RST), but more whether the defendant was acting deliberately and unreasonably in their behavior (more subjective)
        1. In general, courts have largely resisted the RST approach
    ii. RST: to determine the unreasonableness in a case of intentional nuisance, the court is to consider whether the gravity of the harm outweighs the utility of the actor's conduct
        1. A cost-benefit approach (much more objective, utilitarian, economic approach)
2. Unintentional and resulting from negligence, recklessness or ultra hazardous activities
    a. Unintentional: courts will impose a reasonable person standard – did the person act reasonably under the circumstances?

III. Intentional Nuisance vs. Trespass
- a. Intentional nuisance: there is a notion of (un)reasonableness – you can avoid liability if you are found to have behaved reasonably (involves some balancing of burden, benefits, and reasonableness)
    i. More generous standard for defendants (i.e. if you acted reasonably)
- b. Trespass: when you actually physically invade someone's land, effectively strict liability is imposed
    i. More generous standard for plaintiffs (i.e. can get damages even if no harm)
- c. Number of parties affected by a trespass is much more limited than the parties affected by a nuisance (generally)

IV. Threshold vs. RST Approach
- a. Threshold: notion that if a harm is caused, then a nuisance is found, regardless of the benefits accrued from the harm
    i. Courts will not engage in weighing the benefits and/or harms
        1. Rather, will issue an injunction whenever a nuisance is found
- b. RST: requires a balancing of the harms and benefits
    i. Courts take into account the current, actual benefits and injury, but also the location of the nuisance, cost of alleviating the harm to the wrongdoer, and whether the defendant could have alleviated or avoided the harm at a reasonable cost
    ii. An intentional invasion is "unreasonable" for purposes of nuisance law if:
        1. (1) the gravity of the harm caused outweighs the utility of the actor's conduct – or
        2. (2) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible
            a. Softens the harshness of the RST approach, which would, on its face, allow a lot of behavior to occur that is causing harm to neighbors
            b. An intermediate approach: if the harm is substantial, and it is possible to pay damages to compensate for the harm without going out of business, then maybe we ought to allow the company to stay in business, but require them to compensate for the harm
            c. Ex: new, desperately needed airport, but its construction and operation will cause substantial injury to the market value of those homes close and a nuisance for those farther away; if we add up all of the economic injury to the homeowners, the airport could not compensate without going out of business – so airport is causing

substantial harm, but bringing benefits to the entire area (but the nature of the business does not allow it to capture, economically, the positive externalities)

i. Traditional RST: no nuisance
ii. Alternative (2): *if it is not feasible* for the defendant to absorb the costs without going out of business, and if defendant is bringing good to the public = no nuisance
    1. Only *if feasible* is it appropriate to find a nuisance and require the defendant to compensate (damages instead of an injunction) – so maybe only compensate those homeowners closest to the airport, e.g.

V. Ex: *Estancias Dallas Corp. v. Schultz*: plaintiffs brought a nuisance suit against defendant for harm caused by the apartment building's air conditioning unit
    a. Courts are suppose to engage in **balancing of equities** in cases involving intentional nuisances when an injection is requested
        i. The presumption is in favor of an injunction (equitable relief) when the harm is substantial, and injunctive relief should only be denied when the injury suffered by the plaintiff is "slight" compared to the injury that would result to the defendant *and the public*
            1. In over to avoid an injunction, defendant has to prove necessity (very strict approach, with great emphasis on the public interest/benefit)
            2. Balancing the equities has an apparent efficiency objective to avoid the greater harm or social cost – keeping the public interests intact

VI. Injunction vs. Damages
    a. Injunction is favored because you can trade it later on – you have leverage to get more than your actual damages if the activity/nuisance is bringing the defendant more value that your damages (some accept the idea of bargaining, some doubt it)
    b. Injunctions can put future parties on notice that they need to consider the rights of their neighbors and will not always get off by just paying damages
        i. Injunctions can give defendants an incentive to come up with a more efficient way to operate or to abate the nuisance as efficiently (i.e. lowest cost) as possible; whereas damages would allow the nuisance to continue with no change
    c. Damages (as discussed in *Boomer*):
        i. Temporary damages: damages to reflect the physical and emotional injury suffered by plaintiffs – not long standing or long term impact to their property
        ii. Permanent damages: recognizes that the harm is not going away and that it is decreasing the property value, so award the difference in property value with vs. without the harm/nuisance
    d. Ex: *Boomer v. Atlantic Cement*: a nuisance was found, trial court awarded temporary damages have been allowed (and can continue year after year if the parties do not settle), but an injunction has been denied – against the general rule in N.Y.: a nuisance will be enjoined although marked disparity be shown in economic consequence between the effect of the injunction and the effect of the nuisance
        i. Court of Appeals granted an injunction that shall be vacated upon defendant's payment of permanent damages – this is a forced bargaining structure to encourages settlement so the defendant can get out of the shadow of the injunction
            1. Court is inclined to award damages rather than an injunction shutting down the business because: (a) while air pollution is a serious environmental problem, it cannot be solved through individual private litigation, and (b) there is a large disparity in economic consequences between the nuisance and the injunction (defendant invested over $45M and 300 people are employed there)

2. Court considers the harm to the plaintiff in this suit only, but the benefits they balance are to the general public as well as to the defendant (asymmetry)

ii. Threshold approach: nuisance and injunction; traditional RST approach: not clear whether a nuisance would be found

iii. *Boomer*: RST alternative (2): in some circumstances it is appropriate to find a nuisance when the benefits outweigh the harm, and when the cost of the harm can be absorbed by the defendant without the defendant going out of business (i.e. it is feasible)

1. Reflects the trend in property law to try and facilitate the highest and best use of land

VII. Private Nuisance and/or Public Nuisance

a. Private nuisance: one affecting a single individual or a definite small number of persons in the enjoyment of private rights not common to the public (protects private rights in the use and enjoyment of land)

b. Public nuisance: one affecting the rights enjoyed by citizens as part of the public – nuisance must affect a considerable number of people or an entire community or neighborhood (protects public rights)

i. Even stronger presumption in favor of injunctive relief

ii. Standing to sue: traditionally there was a special injury requirement – you have to have suffered some special injury that was different than that of the general public

1. Many states have softened this rule, as reflected in the RST: in order to get damages for public nuisance, you still have to prove special injury; but you can seek an injunction as a representative of the general public, as a citizen in a citizen's action or as a member of a class action suit – with no special injury requirement

VIII. Coming to the Nuisance

a. Ex: *Spur Industries v. Del Webb Development*: plaintiff's neighborhood came to the nuisance, by no fault of the innocent defendant (feed lot owner); plaintiff bought the land at a low price because of the land's agricultural location; based on the circumstances, locality and number of people affected, the court finds a public and private nuisance; however, since there is no aspect of foreseeability or wrongdoing on the defendant's part, plaintiff must bear the reasonable costs of defendant shutting down or relocating (i.e. the cost of the injunction issued against defendant)

i. Generally, if we are dealing with one adversely affected party and the injured party knowingly came to the nuisance, then courts will let that injured party suffer

1. Coming to the nuisance is not always going to be dispositive, but it is a relevant factor – to both deciding whether a nuisance exists and/or the remedy

ii. Generally, if we are dealing with a business that is knowingly located on the outskirts of a city and the city predictably expands towards the nuisance, then the business must bear the costs of shutting down or relocating

iii. Factors at work here (balancing the equities):

1. Price of the land & knowledge of the feed lot

a. Developer's actions have changed this entire area from agricultural to residential – would create strange incentives for developers to engage in this behavior (finding cheap land in agricultural/industrial areas) and then suing the industry to leave, causing the developer to subsequently recognize an increase in land value

i. Equities require developer to pay to get rid of the nuisance – court is making the developer feel the benefit of his bargain

2. Residential communities bring benefits to people who want to retire in this city, so as a practical matter it makes more sense to let the residential neighborhood continue to exist and shut down the nuisance

3. Foreseeability

a. Developer should have known and realized he was coming to a nuisance, thus the low price
    i. Inequitable to impose the costs on the defendant for the actions of a developer who establish a residential neighborhood in a long-standing agricultural area

Zoning

I. Zoning is an effort by local governments to restrict and limit land use (similar to private covenants/agreements)
    a. History: coordination and control at a local level could achieve better results than could ad hoc development through the demands of the market
        i. Zoning emerged as a response to cities that were experiencing chaotic growth
            1. Zoning was a theory designed to prevent harmful effects being visited upon neighbors (analogous to private nuisance law; for ex: zone to keep out industrial uses because can case nuisance, traffic, noise, pollution)
                a. Zoning can preemptively avoid individual private nuisance actions
                b. Ex: use, height, lot size restrictions; single-family vs. apartment buildings
II. 2 layers of analysis: (1) constitutional constraints and (2) state laws re: what local governments can and cannot do in their zoning regulations
    a. SCOTUS has been very deferential
        i. State courts have been a little more aggressive when interpreting zoning regulations under their state constitutions
    b. Ex: possible constitutional issue: "taking" land from owners without due process and/or compensation
III. Different jurisdictions take different approaches to zoning
    a. Ex: Houston has no zoning regulations
    b. Ex: some cities in FL and AZ were created from the ground up with the deliberate goal of central control over every aspect in the city
    c. Ex: Chicago is a moderate city with the "city beautiful approach" – attempt to achieve an urban city environment with mixed use neighborhoods
IV. SCOTUS standard: zoning is constitutional, unless the provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare
    a. Zoning is a legitimate exercise of the state's police powers
    b. Ex: *Village of Euclid v. Ambler Realty Co.*: plaintiff challenges the zoning ordinance on its face/at large; plaintiff's land was zoned for a specific use, which devalued plaintiff's property; at the time of zoning, plaintiff's property was not being used; court upholds the ordinances because plaintiff did not carry its burden to proof they were arbitrary and unreasonable; the ordinance survives scrutiny, despite the fact that the regulation dramatically reduces the value of the plaintiff's property; plaintiff's property could still be put to use; "Euclidean zoning"
        i. Very deferential: presumption of validity as long as there is some rational basis; and "if the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control"
        ii. OK if zoning is a little over-broad (i.e. if it keeps out some industry that would not be a nuisance), as long as the purpose of the regulation is rationally related to promoting some government objective – do not want to clog the judicial system with a ton of case-by-case bases
V. Zoning considerations:
    a. Lessen congestion in the streets
    b. Secure safety from fire, panic, and other dangers
    c. Promote health and the general welfare
    d. Provide adequate light and air
    e. Prevent overcrowding of land

f. Avoid undue concentration of population
g. Facilitate the adequate provision of transportation, water, sewage, schools, and parks

VI. Structure of Authority
- a. Zoning is an exercise of the police power – essentially, the power of government to protect health, safety, welfare, and morals
  - i. Enabling statutes allow the state to delegate zoning authority to local governments
    1. Local governments set up a "master plan," which tries to define overall objectives for the zoning ordinances
- b. Master Plan vs. Zoning Ordinances
  - i. Master plan: a forward-looking, thought piece; tries to anticipate where population and commercial growth is likely to go and how it should be channeled in the future
    1. Less detailed than a zoning ordinance
    2. Not binding
  - ii. Zoning ordinances: local government's implementation of the hopes and aspirations reflected in the master plan; includes the rules that define particular uses of land and other requirements; also include the administration, processes, and enforcement of the zoning system
    1. Detailed
    2. Binding
- c. Primary Bodies: planning commission, city council/local governmental legislative authority, board of zoning appeals (aka board of adjustment)
  - i. Variability between jurisdictions re: the relative responsibilities between the bodies

VII. Nonconforming Use
- a. Amortization: time frame in which a property owner has to relocate/shut down their nonconforming use (i.e. phase out the nonconforming use); so a limited time frame in which the owner can continue the nonconforming use
  - i. Amortization has been upheld in about half of the states, as long as it is reasonable and it adequately balances the goals of the regulations and the interest of the landowner (fact-specific inquiry)
    1. In jurisdictions that allow amortization, there is significant variability in how it is exercised/applied
  - ii. Amortization periods can range from months to over 30 years
- b. Ex: *PA NW Distributors v. Zoning Hearing Board*: plaintiff owned an adult book store, zoning regulation passed 4 days after plaintiff opened store; amortization provision gave plaintiff 90 days to relocate; PA Supreme Court found amortization per se unlawful under their state constitution because the effect of the amortization provision was to deprive plaintiff of the lawful use of its property; it is beyond the local government's authority to pass zoning regulations that take away the right of an existing business to continue operating; court allowed the nonconforming use to continue; nonconforming use = vested property right (implicit in what the court is saying in relation to the PA constitution)
- c. Considerations:
  - i. How long the nonconforming use has been there
  - ii. Profits, tax revenue, jobs brought by the nonconforming use
  - iii. Industry sitting uncomfortably in residential zones (could be inconsistent with long term goals)
  - iv. Investment already spent on the nonconforming use
  - v. Nature of the use – business presumably already on the property (vs. land not yet used/developed)
    1. Locke: once you take something from the land and invest your labor in it, we find you have a greater entitlement
       - a. Cf: *Euclid*: plaintiff's land was undeveloped; plaintiff just wanted to sell at a higher price
  - vi. Reliance on the lack, or change, of zoning ordinance

1. Nature of the reliance
    a. Give an amortization period long enough (25 yrs?) so business can recover/recapture their costs, which they spent in reliance on this use being OK

vii. How inconsistent is this use with the overall zoning goals (slight or drastic)?
viii. Could nonconforming use have seen the zoning or residential creep (for ex) coming?

d. Generally nonconforming uses run with the land, so use can continue even if sold to new owner
e. In the case of nonconforming uses, a pre-existing operation is protected (idea of vested rights); generally plans to engage in some particular use are insufficient
    i. Exception: some jurisdictions will allow a nonconforming use rationale to protect people who have invested substantially in plans to use a property in a particular way
        1. If developers, who are actively planning to build, made a substantial investment in the planning process in reliance on the OK zoning of the land, their investments can accrue into something like the rights of a nonconforming use (the right to use the land in a certain way, even if the use did not begin prior to the change in zoning)
        2. Considerations: how far developer has gone in obtaining governmental approvals; invested made in good faith; on what the money has been spent

VIII. Achieving Flexibility in Zoning

a. Variances: authority extended to a landowner to use his property in a manner prohibited by the ordinance (essentially, special permission)
    i. Requirements (need to prove <u>both</u>; burden of proof of variance-seeker):
        1. Exceptions and undue hardship, if the variance is not allowed
            a. Essentially, there is no productive use to which your property can be put ("zoned into inutility")
        2. Negative criteria: that the variance can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zoning plan
            a. Essentially, issuing the variance is not inconsistent with the purpose of the zoning plan and will not negatively affect the public good
    ii. Ex: *Commons v. Westwood Zoning Board of Adjustment*: plaintiff is seeking to build a house on his land, but there is an ordinance that restricts the minimum lot size; plaintiff tried unsuccessfully to sell land to neighbors or acquire more land from neighbors so as to get closer to conforming with the ordinance; court held that plaintiff did demonstrate hardship; if neighbors really cared about this land, then they can internalize the costs by paying the fair market value for the land (unencumbered by the zoning ordinance); court suggests zoning board needs to balance the extent of owner's hardship with the effect of plaintiff's use on the overall goals of the zoning ordinance
        1. Factors courts consider re: hardship
            a. Self-inflicted hardship – did landowner put himself in this position by refusing to sell for a reasonable offer/fair market value
            b. Did owner try to find productive uses, or someone else that can use the land productively?
            c. Efforts owner took to bring the land into compliance (ex: trying to purchase neighboring land)
        2. Board needs to make specific findings; applicant needs to provide the board with specific plans
b. Special Exceptions: allows landowner to put his property to a use which the ordinance expressly permits/contemplates, under certain circumstances (i.e. ordinance permits, but does not grant outright; authorities retain the ability to approve or disapprove of a particular use)
    i. Exceptions are authorized under conditions which will insure their compatibility with surrounding uses

ii. Ex: *Cope v. Inhabitants of the Town of Brunswick*: plaintiff seeks a special exception to construct 8 apartment buildings; plaintiff argues ordinance is facially unconstitutional because it improperly delegates to the Board the authority to make the determination; Board is left to make determinations based on their subjective discretion, which puts the board in the position of the legislature; ordinance is insufficient because it does not have objective criteria by which the Board can make their determination re: suitability (case involves Maine constitution)
    1. Objective criteria possibilities: height requirements, density limitations, hours of operation, design specifications, off street parking; permitted uses e.g.
iii. Note: there is jurisdictional variation – some courts would uphold the ordinance found insufficient in *Cope*; there is variability in the comfort level certain states have when granting discretion to boards

c. Changes/Amendments
    i. Can apply to the city government for particular land to be re-zoned
    ii. Can make amendments to the zoning plan at large

IX. Aesthetic Regulation
a. A majority of jurisdictions do allow for aesthetic zoning (typically courts are deferential) [but some do not]
    i. Many of these jurisdictions allow architectural boards the exact recognized authority from *Stoyanoff*
        1. Ex: *Stoyanoff v. Berkeley*: plaintiff wants to build an ugly house in a rich, traditional suburb of St. Louis; city architectural board has authority to grant or reject any proposals based on aesthetics; plaintiff's proposal is rejected, in large part because of a concern that plaintiff's proposed use will reduce property values in the neighborhood; plaintiff contends the ordinance is unconstitutional/arbitrary because it is all about aesthetics and it is an unlawful delegation of power to the architectural board
            a. Court upholds the ordinance and hinges its decision on preserving both the character of the committing and property values (quasi-objective), which are specifically mentioned in the enabling statute – since the aesthetic concern touches property values, the ordinance is an OK exercise of police powers; property values and aesthetics both concern the people's health, general welfare and happiness (in this court's view)
                i. Aesthetics can be a general welfare consideration because it sustains the value of properties
b. A regulation is void for vagueness when it allows for too much discretion (arbitrary discretion)
    i. Cf: *Anderson v. City of Issaquah*: plaintiff developer's proposal to build has been rejected numerous times; plaintiff has gotten unhelpful feedback from the board; plaintiff contends that the ordinance is unconstitutionally vague; board must decide whether proposals are aesthetically appealing, fit with the surroundings, promote harmony; court finds this vesting of authority in the board unconstitutional because the "criteria" is so subjective that the board members can really use whatever rationale they want for accepting or denying a proposal
        1. Ordinance is unconstitutionally vague – the criteria does not give meaningful guidance; developers are left to guess at what will satisfy the ordinance
            a. Ordinances must have objective guidelines so developers are on notice and so board is not left with only their subjective feelings when making decisions

X. Tools for Challenging Zoning Ordinances (facially or as-applied)
a. Some state courts have shown sympathy to the notion that ordinances unconstitutionally delegate legislative authority to the local government
    i. If too much discretion, some states might be sympathetic to this argument

ii. Notion that is the board has too much subjective discretion, they are acting in the place of the legislature, which is unconstitutional

b. Could argue the ordinance is an arbitrary or irrational exercise of police power
    i. Unlikely to work in the vast majority of cases though

c. In state courts, could argue the ordinance at issue is not an exercise of authority that was granted in the enabling statute
    i. Courts are often not very sympathetic to this argument because typically the enabling statutes are written fairly broadly

d. Could argue the ordinance is unconstitutionally vague as applied to a particular proposal

XI. Other Considerations

a. Notion of exclusionary zoning
    i. Some courts look skeptically at zoning that appears to be designed to keep particular people out of town (ex: poor, apartment dwellers)
        1. Some courts have suggested that municipalities have a duty to ensure that people of different means have access to housing in the area

b. Courts are divided on the extent to which local governments can limit household composition (i.e. can you limit the number and/or type of people that live in a house?)
    i. Equal protection concerns raised
    ii. Most courts recognize that a very strict application of this single family composition is probably unconstitutional
        1. But, how far can you really push is open to question

c. Exercise: maintain quality of air, land and water; environmental goals – encourage ride sharing, bike paths; do you want mixed uses; do you want franchises; different values might run in tension; planning frequently done with a lot of consultation from the local community

d. Zoning ordinances generally reflect the community's values (esp. those of the people on the zoning board)
    i. In general, zoning boards are given a lot of deference by the courts re: how they go about promoting these values