

Property Power Point Outline

- I. What is property
 - A. “That sole and despotic dominion which one man claims and exercises over the **external things** of the world in **total exclusion of the right of any other individual** in the universe” (Blackstone)
 - B. “Property is the right of **enjoying and disposing of things** in the most absolute manner provided that they are **not used in a way prohibited by the laws** or the statutes” (Code Civil, art 544)
 - C. Conventional definition of property
 1. An individual’s despotic dominion over a physical thing enjoyed as a matter of pre-political natural right
 - a. Relation between a man and a physical thing (“external thing”)
 - b. Dominion
 - c. Despotic
 - d. Individual (“one man”)
 - e. Natural (18th and 19th century idea of property as a “natural right”)
 - D. “Post-Realist” Definition of Property
 1. **a state-delegated package of entitlements governing relations among persons with respect to valued resources**
- II. Trespass
 - A. Trespass: an unprivileged intentional physical invasion of a property owned or possessed by another
 1. Personal entry
 2. Causing the entry of a thing
 3. Causing the entry of a third party
 - B. Intentional: defendant intended the act which amounts to or produces the invasion (mistake not a defense, accidental invasion not a trespass, ex airplane crash)
 - C. Interest protected by trespass: the exclusive possession and quiet enjoyment of property
 - D. Common law limits on the right to exclude
 1. Consent
 2. Necessity
 3. Public Policy/Social Need
 4. Estoppel
 - E. Public Policy/Social Need
 1. State v. Shack
 - a. Property rights are not absolute: necessity, private or public, may justify entry upon the lands of another
 - b. Entry privileged because of public policy concern: welfare of a highly disadvantaged segment of society: migrant farm workers
 - c. Necessity of effective communication of legal rights
 - d. Necessity of providing medical services
 - F. Consent
 1. Desnick v. ABC
 - a. To enter upon another’s land without consent is a trespass

- b. Consent to an entry is often given legal effect even though the entrant has intentions that if known to the owner of the property would cause her to revoke her consent
- c. 2 classes of cases: the restaurant critic and the meter-reader impersonator
 - i. The distinction has to do with the interest that trespass protects (the inviolability of a person's property, exclusive possession, quiet enjoyment):
 - ii. Restaurant critic: no violation of the interest in exclusive possession/quiet enjoyment: the owner of the restaurant wants to have customers
 - iii. Meter-reader impersonator: violation of the interest in quiet enjoyment: the homeowner does not want strangers in her house unless they have authorized service functions

III. Places of "Public Accommodation": Common Law Duty to Serve the Public

- A. (Majority rule) Narrow common law duty to serve the public:
 - 1. innkeepers and common carriers have a duty to serve the public subject to reasonable regulations they may impose to protect their legitimate business interests
 - 2. other businesses have an absolute right to exclude for any reason unless limited by a civil rights statute
- B. Some common law precedents have extended the duty to serve to other facilities:
 - 1. hospitals (*Doe v. Bridgeton Hospitals Ass'n Inc*, N.J. 1976)
 - 2. public has a right to reasonable access to all businesses and facilities open to the public (*Uston*, N.J. 1982)
- C. Arguments for Narrow Notion (innkeepers and common carriers)
 - 1. More likely to be monopolies;
 - 2. They provide necessities;
 - 3. They hold themselves out as open to the public and public relies on this;
 - 4. Profit motive (*Brooks v Chicago Downs Ass'n*): in a competitive market the profit motive is likely to induce other businesses not to exclude unreasonably;
- D. Arguments for Broad Notion (all places open to the public)
 - 1. Innkeepers & common carriers no longer monopolies
 - 2. Other businesses also provide necessities (grocery stores)
 - 3. Many businesses hold themselves out as open to the public
 - 4. Profit motive may work the other way around and induce discrimination (if excluded group has less buying power than majority group)
- E. *Uston*: Right of Reasonable Access to All Business & Facilities Open to the Public
 - 1. Owners of property opened to the general public do not have the right to unreasonably exclude particular members of the public
 - 2. Property owners who open their property to the general public have a duty not to act in a discriminatory or arbitrary manner towards persons who come on their premises;
 - 3. This duty does not preclude the right to exclude those whose actions disrupt the regular operation of the premises or threaten the security of the premises or its occupants;

IV. Federal & State Public Accommodation Laws

- A. Elements of a claim that someone has violated Title II of the Civil Rights Act of 1964 (“federal public accommodation law”)
 - 1. Defendant committed discrimination
 - 2. On the ground of race, color, religion or national origin
 - 3. In access to a place of public accommodation
 - 4. To be a place of public accommodation a business must
 - a. Fit into the list of facilities named/implied
 - b. Serve the public and not constitute a private establishment “not in fact open to the public”
 - c. It must affect commerce or be supported by state action
- B. Are retail stores “places of public accommodation” under §2000a (b)?
 - 1. Arguments that the list is exhaustive
 - a. Language: it identifies specific types of establishments; if Congress had intended to apply to all businesses open to the public it would have said so;
 - b. Underlying Policy/Purpose: it addresses widespread discrimination in particular businesses; discrimination far less widespread in other businesses;
 - c. “Institutional Competence”: the job of a court is to defer to the intent of the legislature: to apply the statute in situations not covered by the statutory language would be a tyrannical exercise of power on the part of the court;
 - 2. Arguments that the list is illustrative
 - a. Language: ambiguous: it merely says that each of the following businesses satisfies the test for being a place of public accommodation;
 - b. Underlying Policy/Purpose: afford equal access to businesses that serve the public; hence should be interpreted broadly; some businesses pose greater problems, but Congress did not intend to allow discrimination in businesses where less urgency; any distinction would be irrational and would violate the entire regulatory scheme;
 - c. “Institutional Competence”: if courts opt for narrow interpretation, they would defeat the purpose of the legislation and hence contravene the intent of the legislature.
- C. If retail stores install lock & buzzer, are they private establishments, “not in fact open to the public” (§2000a(e))?
 - 1. Arguments that they are private establishments
 - a. Language: every word should have a meaning; § 2000a (e) clarifies that exemptions include both “private clubs” and places that are “not open to the public”; a place that is selective as to who it lets in is, plain language suggests, “not open to the public”;
 - b. Underlying Policy/Purpose: to allow equal access to places open to the public, not to require places that are not open to the public to change their nature;
 - 2. Arguments that they are not private establishments
 - a. Language: “Private clubs” is the operative category; the only exemption is for “private clubs” or places that closely resemble private clubs (application, membership list, etc....) retail store with lock & buzzer has none of these characteristics;
 - b. Underlying Policy/Purpose: to provide access to the market without invidious discrimination; this interest is clearly implicated in a retail store; retail store

should not be allowed to evade statutory requirements simply by installing lock & buzzer; (purpose underlying exemption, freedom of assoc.; not implicated in the case of a retail store)

D. Retail Stores: Civil Rights Act 1866 may provide remedy...

1. Some courts (Perry, Court of Appeals 3rd circ., Watson, Court of Appeals 6th circ): Civil Rights Act 1866 imposes on a wider range of places of public accommodation (hair salons & dept.stores) a duty to contract without unjust discrimination;
2. Argument against this relatively recent and minoritarian trend: legislative history & original intent (if this 1866 Civil Rights Act was really, functionally, a sort of public accommodation law...why did Congress pass the 1875 public accommodation law?)
3. Counter-arguments:
 - a. Precedent: courts have consistently held that 1866 Civil Rights Act covers situations also regulated by later statutes (employment discrimination, housing discrimination);
 - b. Language: the plain language of § 1981 & 1982 of the 1866 Civil Rights Act clearly applies to a wider range of establishments; 1875 public accommodation law was necessary to prevent misinterpretations and reaffirm the basic policy.

E. State Public Accommodation Laws: New Jersey's LAD

1. Covers wider range of establishments (comfort station, clinic or hospital, gymnasium, shooting gallery, billiard or pool parlor);
2. The list is illustrative (shall include but not be limited to);
3. Prohibits a wider range of types of discrimination (sex, affectional or sexual orientation, familial status, age, marital status....)
4. Exemptions: any institution, bona fide club or place of accommodation that is in its nature distinctly private;

F. How much can we stretch the notion of public accommodation? Are membership organizations public accommodations?

1. Dale v. Boy Scouts (NJ 1999)
 - a. BS are a "place": "place" is a term of convenience, not term of limitation;
 - i. Language: clear: "shall include but not be limited to"
 - ii. Policy: if the policy purpose of the LAD is eradication of discrimination it must be interpreted broadly
 - iii. Precedent: "the place where members do what they do" (New York Court of Appeals) , "organization engages in activities in places to which an unselected public is given open invitation" (Supreme Court of Minnesota)
 - b. BS are a "place of public accommodation"; test is:
 - i. Broad public solicitation
 - ii. Close relationship to government or other public accommodation
 - c. BS are not "distinctly private": test is selectivity:
 - i. Admission criteria
 - ii. Size
 - iii. Commitment to particular set of beliefs

V. Free Speech Right of Access

A. The “Company Town” (Marsh v. Alabama, 1946)

1. The “company town” is the functional equivalent of any other town: the business block serves as the community shopping center;
2. People who live in the company town may not have their free speech rights denied simply because a private company has legal title to all the town;
3. No analogy with the right of a homeowner to regulate the conduct of her guests; ownership does not mean absolute dominion: the more an owner, for her advantage, opens up her property for use by the public in general, the more do her property rights become circumscribed by the constitutional rights of those who use it;

B. The Shopping Mall (Logan Valley, 1968)

1. The shopping mall is the functional equivalent of the commercial center of a normal town;
2. The state may not delegate the power, through the use of its trespass law, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put;

C. The Shopping Mall (Lloyd Corp, 1972)

1. Distinguished from Marsh:
 - a. the company town was an economic anomaly of the past. In the case of a shopping center no comparable assumption of municipal functions;
2. Distinguished from Logan Valley:
 - a. the free speech activity was related to the shopping mall’s operations; here general matters of public concern;
 - b. Picketers had no other reasonable opportunity to convey their message (store was located at the center of the mall), here other opportunities are available;
3. Scope of invitation to the public: the shopping mall has a private character, the owner retains the power to determine the scope of the invitation to the public, the public is invited for designated uses only;

VI. Privilege to use: Water Rights

A. Surface streams

1. Natural flow rule: each riparian owner can prevent any diversion of the natural flow of the stream by an upstream riparian owner;
2. Reasonable use rule: each riparian owner is entitled to a reasonable use of the stream; reasonableness depends on variety of factors: geographical, technological, purpose of the use;
3. Prior appropriation rule: the first appropriator of water from the stream for a beneficial purpose has the right to the extent of her appropriation;

B. Groundwater

1. Free use (English rule): absent malice or willful waste landowner may without liability withdraw any quantity of water for any purpose;
2. Reasonable use (American rule): each landowner is restricted to a reasonable exercise of her rights in view of the similar rights of others and in view of a variety of geographical, technological factors;

3. Correlative rights (Western states): a proportionate sharing of water among landowners laying on a common underground basin;
- C. Diffuse surface water
 1. Common enemy: property owners have the absolute freedom to develop their property without liability for any resulting damage to neighbors caused by the increased run off of surface diffuse water;
 2. Reasonable use: court determines whether defendant's discharge of diffuse surface water causes unreasonable interference with plaintiff's use of her land; (Armstrong v Francis, NJ 1956)
 3. Natural flow: owners are entitled to discharge surface water through natural drainage pathways; any alteration as to the amount, force and direction of the natural flow gives rise to liability for any resulting damage;
- D. Francis v. Armstrong
 1. A possessor of land is not privileged to discharge upon neighboring land, by artificial means, large amounts of surface water; the rule is the reasonable use rule;
 2. Arguments used by the court to justify the reasonable use rule:
 - a. Formal Realizability: a flexible rule, allows consideration of all the relevant circumstances (the amount of harm caused, the foreseeability of the harm, the purpose or motive of the possessor of land who discharges water...);
 - b. Social Utility: social progress and common wellbeing are better served by a just and right balancing of the competing interests of the parties;
 - c. Fairness: unfair that the economic costs incident to the expulsion of surface water in the transformation of rural and semi-rural areas of the state into suburban communities be borne in any case by adjoining landowners rather than by those who engage in such projects for profit;
 - d. Law in the Books v. Law in Action: in the books, 3 alternative rules are available (common enemy, natural flow, reasonable use) but most courts who declare to follow common enemy or natural flow have modified such rules and reached the same results that would be reached with the reasonable use rule; hence the law in action is almost everywhere the reasonable use rule.

VII. Privilege to Use: Lateral Support

- A. Noone v. Price (WV 982)
 1. The defendant has a duty to maintain the wall that supported the plaintiff's land; this duty runs with the land, is binding on all future owners of the land;
 2. An adjacent landowner is strictly liable for acts of omission and commission that result in the withdrawal of lateral support to the neighbor's land in its natural state:
 - a. If the land in its natural condition was sufficient to support the building and withdrawal of lateral support caused the building to subside: excavating owner is liable for damages to both the land and the building (damage to the building is "consequential");
 - b. If the land in its natural condition would not have supported the building, and the building would have subsided eventually even if defendant had not withdrawn support for the land around it, the excavating owner is liable only if she negligently withdrew support for the building;

- B. Lateral Support
 - 1. Who can bring an action for removal of lateral support?
 - a. The owner of the land at the time the injury occurred
 - 2. Who is potentially liable?
 - a. The owner who conducted the excavation which resulted in the loss of lateral support;
 - b. An agent /employee of the owner or someone for whom the owner is vicariously liable is not liable;
 - c. If the excavation is done by tenant or licensee without the owner's knowledge and consent, the owner is not liable;
 - d. In some instances (Noone) a succeeding landowner who fails to maintain a supporting wall or structure may be liable;
- C. What does the plaintiff need to show to establish a prima facie case in strict liability for removal of naturally necessary lateral support?
 - 1. The defendant owed a duty to support plaintiff's land due to a natural dependence of the plaintiff's land upon the defendant's land for support;
 - 2. The defendant breached this duty by removing naturally necessary support;
 - 3. The plaintiff suffered some tangible injury;
 - 4. The injury is a proximate consequence of the defendant's removal of support;
- D. What does the plaintiff need to show in order to establish a prima facie case in negligence for damages to the buildings not naturally supported?
 - 1. The defendant had a duty to excavate with due care because of a risk that the excavation would injure the plaintiff's land and buildings;
 - 2. The defendant breached this duty;
 - 3. The plaintiff suffered some tangible injury;
 - 4. The injury was a proximate result of the defendant's excavation;
- E. Right to lateral support may be modified by contract
 - 1. In the absence of legislation preventing this result (ex: state building code)
 - a. owner may waive the right to lateral support: hence neighbor has the right to excavate on her own land without any liability for removal of lateral support;
 - b. Owner may waive only partially: hence neighbor who excavates assumes a lesser responsibility;
 - c. Neighbor who excavates may commit to taking precautionary measures;
 - d. Grant of right to excavate minerals does not mean automatic waiver of right to lateral support; absent an express waiver, the grantee is liable;
- F. Duty to provide lateral support may be modified by statute
 - 1. Statute may relieve the excavating owner from strict liability and impose instead a heightened duty of care; (statute may require not only that excavation be conducted with heightened duty of care but also that the excavator take precautions and/or give notice)
 - 2. Statute may modify rule that excavating owner is not liable for harm to buildings that the land in its natural state cannot support by providing, for example, that where excavation exceeds a certain depth, the excavating owner must share the cost of supporting the neighbor's buildings.
- G. Massachusetts Building Code: does the injured neighbor have a right of action?
 - 1. Plaintiff: yes

- a. Language: “complete protection”...denial of right to sue for damages...means...no “complete protection”
- b. Underlying Policy: a broad policy purpose (public safety, health, welfare...etc); legislature directed to construe liberally to effectuate this purpose; imposing liability for damages means effectuating this broad purpose...the owner who builds or excavates will be more careful and these goals will be achieved...
- 2. Defendant: no
 - a. Language:
 - i. No provision expressly says
 - ii. Only says obligation to protect
 - iii. Limited series of remedies (no mention damages)
 - iv. Says local inspector may sue...
 - b. How to answer the policy argument of the plaintiff?
 - i. Intent of the legislator: Building Commission knows how to draft..would have said..
 - ii. Institutional Competence: court may not despotically re-write statute and contravene intent of the Building Commission

VIII. Privilege to Use: Nuisance

A. Adams v. Cleveland Cliffs Iron Co.

- 1. Traditional view of the difference between trespass and nuisance:
 - a. Trespass
 - i. Invasion of the plaintiff’s interest in exclusive possession
 - ii. Direct and immediate invasion
 - iii. In the form of a tangible physical object
 - iv. The landowner can recover at least nominal damages even in the absence of proof of injury
 - b. Nuisance
 - i. An interference with the use and enjoyment of land
 - ii. Requires proof of substantial harm and unreasonable interference
 - iii. Calls for balancing the disturbance complained of against the social utility of the activity that caused it
- 2. Recent trend
 - a. Requirements of direct and immediate invasion in the form of a tangible physical object eliminated (invisible polychlorinated biphenyls, airborne particulate matter from sand and gravel, fluoride compounds in the form of gases and particles...etc)
 - b. Requirement of actual and substantial damage crafted onto trespass
 - c. Balancing of social utility of the activity causing the invasion

B. Nuisance

- 1. Test:
 - a. Harm substantial: if offensive or inconvenient to the “ordinary or average person in local circumstances”; minor harms are privileged, relief denied if plaintiff is unusually sensitive;
 - b. Interference unreasonable: balancing gravity of the harm and utility of the actor’s conduct;

2. Difference between negligence and nuisance standard:
 - a. Negligence: unreasonable conduct: doing something that a reasonably careful person would not do in similar circumstances
 - b. Nuisance: is a state of affairs, a condition: defendant liable if the condition is one that the plaintiff should not have to bear, even though defendant acted with highest degree of care
 3. Who can bring an action?
 - a. Owner/possessor
 - b. Anyone who has an interest in the land: mortgagees and owners of easements (protects not only ownership rights, but also possessory rights and lesser property interests)
 4. Who is liable?
 - a. The owner
 - b. Those who substantially, materially contributed to the offensive land use (manufactures/distributor of computer, owner if her customers engaged in disturbing conduct and she did nothing to stop them, landlord if disturbance in the common areas)
- C. Page County Appliance Center v. Honeywell
1. Material participation: ITT and Honeywell are liable because they materially participated: ITT leased the computer, collected the monthly payments,...the computer did not operate for the benefit of the travel agent alone; Honeywell had an ongoing contract to service and maintain the computer and technological know-how to solve the problem;
 2. Nuisance vs. negligence: Nuisance is a condition and not a failure to act on the part of the responsible party: a person responsible for a harmful condition found to be a nuisance may be liable even though that person has used the highest possible degree of care to prevent or minimize the effect;
 3. Reasonableness:
 - a. Consideration of manner, place , circumstances
 - b. The character and gravity of the injury is a major factor is balanced against the utility of the defendant's conduct
 - c. Normalcy standard; appliance center' display televisions do not constitute an hypersensitive use.
- D. Fontainebleau
1. Rights argument:
 - a. sic utere tuo ut alienum non laedas only means that one must use her property so as not to injure the lawful rights of another;
 - b. There is no right to light and air, hence where the structure serves a useful and beneficial purpose it does not give rise to a cause of action, even though it causes injury to another and regardless of the fact that the structure might have been erected for spite;
 2. Institutional competence argument: if public policy requires that a landowner in Miami Beach refrain from constructing buildings that would cast shadow on her neighbors, an amendment to the zoning ordinance is the way to go; to change the universal rule would amount to judicial legislation;
- E. Prah v Maretti

1. Majority
 - a. Precedent: English doctrine of “ancient lights” and American doctrine of “spite fences”;
 - b. Social utility: sunlight is now a valued economic resource; need to regulate development in the public interest;
 - c. Formal realizability: need for flexible nuisance standard; general trend towards reasonableness as a way to take into account modern social needs;
 - d. Rights: rejection of the 19 century notion of absolute rights;
 2. Dissent
 - a. Rights: a landowner’s right to use her property is a fundamental principle of a free society and should be vigorously protected;
 - b. Social utility: regulating development not for private benefit (Prah’s need for solar energy) but in the public interest (shortage in housing for disadvantaged groups);
 - c. Institutional competence: what type of development is advisable is a question for the legislature; the judiciary should not exercise legislative power;
- IX. Immunity from Loss: Adverse Possession
- A. Elements necessary to establish title by adverse possession:
 1. Possession under claim of right or color of title (defective title: defective deed, tax deed, arbitrator’s award, will, mortgage; some states have statutes that impose color of title as a requirement)
 2. Actual possession: no fixed standards as to what amounts to significant activity: depends on the character of the land: conduct in relation to the property such as would ordinarily characterize the conduct of owners of that type of land;
 3. Possession for the statutory period (in some states, shorter period if under color of title; under certain circumstances the running of the statute may be suspended if the true owner was under a disability, such as infancy or insanity, when the claimant first entered into possession of the land);
 4. Continuous and uninterrupted possession: sporadic acts of dominion are insufficient, use may be seasonal (need not be continuous by the same person: possibility of tacking the periods of possession of two or more persons);
 5. Exclusive possession: exclusive dominion and control, appropriation of land to her own use and benefit; the claimant must not share possession with anybody other than one to whom she gives permission; (occasionally allowing third parties, fishers, clam diggers, berry pickers etc... to trespass...does not mean not exclusive)
 6. open and notorious possession: so visible and open to the common observer that the true owner or her agent on visiting the premises might readily see that her rights are been invaded;
 7. Possession that is hostile to the true owner;
 - a. State of mind of the record owner: Non-permissive presumption that possession without explicit permission or explicit objection is non-permissive....presumption may flipped in case of relatives)
 - b. State of mind of the claimant: Actual possession (objective test) /claim of right (if no misapprehension and no intent to own...no adverse possession)/intent to dispossess/good faith

8. In some states - payment of property taxes;
- B. Normative Justifications for Adverse Possession
1. Protection of informal expectations: the longstanding possessor has justified expectations; informal sources of property rights are as important as formal ones;
 - a. Oliver Wendell Holmes: a long-standing possessor has come to shape her roots to her surroundings and when the roots have grown to a certain size they cannot be displaced without cutting her life;
 - b. Margaret Radin: the adverse possessor's interest in the disputed property, initially fungible, becomes more and more personal as time passes; on the other hand, the title holder's interest fades from personal to fungible and finally to nothingness;
 2. Efficiency/ maximizing social welfare by efficient allocation of valued resources:
 - a. the adverse possessor values the disputed property more; if title held by the one who values the property more, increase in social utility;
 - b. It prevents valuable resources from being left idle for long periods of time by specifying procedures for a productive user to take title from an unproductive user;
- C. Brown v Goble
1. Standard of proof: clear & convincing evidence (fairness/rights argument: a preponderance standard would increase the number of cases where land is erroneously taken from the title owner under spurious adverse possession claims; the interests at stake are traditional family and societal values);
 2. Tacking: permits adding together the periods of successive adverse possessors (precedent argument: this court, West Virginia, has long recognized the principle of tacking);
 3. Requirements for adverse possession: evidence that they have been satisfied:
 4. actual possession (they planted a garden, maintained a fence, constructed a shed, removed weeds, picked berries and walnuts...built a tree-house)
 - a. open & notorious (the community regarded them and their predecessors as owners)
 - b. Exclusive (they and their predecessor had dominion and control of the strip of land and their claim was never objected to)
 - c. Continuous: (each of the succeeding owners maintained the tract of land continuously up to the moment they sold the land)
- D. Romero v Garcia
1. where the description in the deed is so faulty that the land cannot be located, the deed does not constitute color of title...but an indefinite and vague description in the deed may be clarified by subsequent acts of the parties;
 2. In the case at hand, evidence is clear that subsequent acts of the parties in pointing out the boundaries and other extrinsic evidence aided the surveyor in preparing the plat
- E. Nome 2000 v Fagerstrom
1. argument of the plaintiffs: the Fagerstrom's possession did not satisfy the requirements for adverse possession:

- a. no significant activity or physical improvement until 1978 (when they built the cabin)
 - b. Their possession was seasonal and hence not continuous
 - c. It was not exclusive: they let in fishers and people who picked berries
 - d. Cultural argument: Native Americans have a different notion of ownership: stewardship rather than ownership, only a first-priority claim to the resources of the land.....
- 2. The Court: the Fagerstroms' use of the land does satisfy the requirements for adverse possession (though only for the parcel of land around the cabin)
 - a. continuous and exclusive possession: there are no fixed standards, the character of the land matters: in a rural area largely used for seasonal recreation a lesser exercise of control and dominion;
 - b. open and notorious: again, the character of the property matters: possession, consistent with that type of land, such that a reasonably diligent owner could see that a hostile flag is being flown on her property;
 - c. hostile: we reject Nome's "cultural argument" (Native American notion of ownership as "stewardship"): hostility is determined by the application of an objective test: whether the possessor acted toward the land as if he owned it without the permission of one with legal authority to give permission;
- F. Hostile/Adverse Possession
 - 1. Arguments in favor of good faith
 - a. Rights/fairness: courts should not reward wrongdoers: when the claimant has acted in bad faith, knowingly intruding, her expectations are not justified;
 - b. Social utility: it encourages cooperation and efficient market transactions: if the claimant really values the property more, and intentionally intruding and claiming adverse possession is not an option, she will have to negotiate and pay for it;
 - c. Formal realizability: good faith test less predictable but does justice to the individual case;
 - d. Institutional competence: it is the job of the courts to do justice and equity;
 - 2. Arguments against good faith
 - a. Fairness/rights: requiring good faith would defeat the rationale behind a.p., i.e. The protection of the informal expectations of a longstanding possessor; an occupation starts out as wrongful but becomes rightful as time passes;
 - b. Social utility: an objective test allows allocation of the property to those who clearly value it more; for the true owner the gain would be an unexpected windfall gain that would benefit her less than the loss would harm the adverse possessor;
 - c. Formal realizability: the good faith test is highly unpredictable; an objective test is more predictable and avoids litigation;
 - d. Institutional competence: adverse possession is a long-standing rule; courts should not change the rules that assign property rights, this should be done by the legislature;
- X. Prescriptive Easements
 - A. Elements to establish private easement by prescription
 - 1. Use: actual physical use of land; non-fee interest, non-possessory interest;

- a. a prescriptive easement may not be granted if doing so would result in depriving the owner of essentially all rights in property (in this case the claimant must proceed under the adverse possession doctrine);
 - b. no prescriptive rights in a negative easement: no actual physical use and hence no notice to the owner and no opportunity to prevent the use;
- 2. Open and notorious: use such as to put a reasonably diligent owner on notice of the existence of the claimant's use of the property (concealed outlet of drainage ditch visible only immediately after rain, insufficient; to establish p.e. concealed pipes and conduits insufficient...)
- 3. Hostile:
 - a. non-permissive: a use that is not consented to or tolerated by the owner;
 - b. otherwise unexplained use which is open and notorious is presumptively non-permissive;
 - c. use may start as permissive and then become non-permissive: in this case need to prove an unequivocal, express act of hostility and
 - d. use that is claimed as a matter of right; the test is, generally, objective: the hostility of the use is assessed by the nature of the use rather than by the subjective basis of the claim of right;
- 4. Exclusive: not dependent upon similar rights of use possessed by other individuals or by the general public (right of way in common with the public is not exclusive, use of way in conjunction with operation of dairy farm is sufficiently distinct from public use of way);
- 5. Continuous and uninterrupted: claimant made use of the claimed easement whenever she desired or needed to do so;
- 6. For the period of time necessary to establish prescriptive rights: defined either by:
 - a. statute specifically applying to the establishment of prescriptive rights
 - b. or by statute applying to the establishment of title by adverse possession;
 - c. possibility of tacking if privity with a prior user;
- B. Community Feedstore
 - 1. Elements required to establish prescriptive easement are essentially the same as adverse possession: a use that is open and notorious, hostile, exclusive, continuous and persisted for a period of 15 years;
 - 2. Difference between adverse possession and prescriptive easement: lies in the interest claimed: prescription applies to the acquisition of non-fee interests, adverse possession to the fee interests;
 - 3. The extent of the easement depends on the extent of the use: need not be proved with absolute precision but only as to the general outlines consistent with the pattern of use throughout the prescriptive period;
 - 4. Open and notorious use, where no explicit permission or prohibition, is presumed to be non-permissive;
- C. Should use (not explicitly authorized or objected to) be presumptively permissive or non-permissive?
 - 1. Permissive

- a. Fairness/rights: fair because it better reflects social custom: good neighborly spirit; also it protects the security of property rights: it better protects owners from casual loss of their property rights;
 - b. Social utility: it promotes efficient cooperation and transactions between the parties: if use is presumptively permissive, acquisition of easement by prescription becomes more difficult, and hence the claimant who really values the use will have to negotiate;
 - 2. Non-permissive
 - a. Fairness/rights: acquisition of easement by prescription become easier and this is fair because it better reflects the underlying fairness rationale of the law of prescriptive easements: protecting informal longstanding expectations of use that have become reasonable and justified because of the record owner's de facto abandonment;
 - b. Social utility: easier acquisition of easement by prescription promotes efficient allocation of resources... to those who value them more
- D. Somerville v. Jacobs
 - 1. Fairness /Rights argument: it would be unfair to allow the Jacobs to be unjustly enriched: we are dealing with two innocent parties and the solution requires application of principles of equity and fair dealing;
 - 2. Precedent: other jurisdictions have said that a court of equity can grant relief to the improver who through a reasonable mistake of fact and in good faith places improvement on another's land: either award compensation to the improver to avoid unjust enrichment or, alternatively, require the owner to convey the property to the improver upon payment of the fair value of the land;
 - 3. Institutional Competence argument: it is the job of a court to do equità
- XI. Immunity from Loss: Regulatory Takings
 - A. Takings are Suspect
 - 1. Material/economic reasons
 - a. property rights are the background rules that determine how resources are allocated;
 - b. Property rules function as a system of incentives through which certain activities may be encouraged;
 - c. In 19th century US widespread consensus that property rights should be a "neutral" framework for encouraging unhindered economic development;
 - d. The government should not interfere with/take property rights;
 - 2. Ideological/cultural reasons
 - a. In 19th century US idea that property rights allow and reinforce civic virtues: autonomy, self-reliance and civic sense;
 - b. Property rights are the material foundation for creating and maintaining a good and robust social order;
 - c. Property as "propriety";
 - B. Ad Hoc Test: Miller v Schoene (1928)
 - 1. Comparison of the relevance of two classes of property:
 - a. Red cedars: ornamental value and use value as lumber
 - b. Apple trees: export, investments, employment, related development (railroads)

2. The state is under necessity of a choice: it has to choose between the preservation of one class of property in order to save another;
 3. Balance between public interest and private interest: this is not a conflict between two private interests: there is a preponderant public concern in the preservation of one class of property;
 4. The state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another that is of greater value to the public
- C. Ad Hoc Test: Penn Central Transportation (1978)
1. Plaintiffs
 - a. Taking of property rights in air space: deprived of any gainful use of their “air rights”; irrespective of the value of the remainder of the parcel, the city has taken their rights to the superadjacent space;
 - b. “Reverse”-spot zoning: a land use decision which arbitrarily singles out a particular parcel for different, less favorable use; it selects single parcels that are solely burdened and receive no benefit;
 2. Supreme Court
 - a. Untenable: takings jurisprudence does not divide a parcel of land into segments and then attempt to determine whether rights in a particular segment have been abrogated; it focuses on the nature and character of the interference with rights in the parcel as a whole;
 - b. We cannot accept this argument:
 - i. We would need to invalidate all comparable landmark legislation in the nation;
 - ii. Of course it has a more severe impact on some owners, but legislation designed to promote the general welfare commonly burdens some more than others (zoning)
 - iii. Claim that solely burdened and unbenefited: inaccurate: part of a general plan that will improve quality of the life of the city as a whole;
 3. Assessment of the magnitude of the interference:
 - a. Regulation does not interfere with the present, primary use of the Grand Terminal;
 - b. It does not abrogate any right to use the air space: it is a question of harmony with the size, shape and materials of the Grand Terminal; other plans may be approved;
 - c. The NYC Transferable-Development Rights Program mitigates the economic consequences of the regulation;
- XII. Per Se Takings: Permanent Physical Invasion
- A. Loretto (US 1982)
1. Majority
 - a. Precedent: the Supreme Court has long considered a physical invasion a taking (Pumpelly, Kaiser Aetna) distinguished Pruneyard: invasion was temporary and limited in nature;
 - b. Rights/fairness: it chops through the owner’s bundle of rights taking a slice of each: the right to possess, to use and to transfer; qualitative difference when a

stranger occupies property: owners have an expectation to be at least relatively undisturbed in the possession of property;

- c. Formal realizability: it avoids difficult line-drawing problems: where to draw the line between a swimming pool on the roof and a TV cable?
- d. Social utility: it has no dire consequences on the important policy goal of regulating fairly potentially uneven landlord/tenant relationships.

2. Dissent

- a. Formalism: the distinction between temporary and permanent invasions is talismanic and does not hold: what does “permanent” mean? What is the difference with regulations requiring landlords to provide mailboxes, smoke-detectors...etc...
- b. Precedent: no support for this talismanic distinction: the court has upheld rent control statutes permitting temporary invasions of considerable magnitude...
- c. Social utility: the regulation actually increases both the building’s resale value and its attractiveness on the rental market;

B. Pruneyard (1980)

- 1. Not every injury to property by governmental action is a taking: the test is a 3-pronged one: a) character of the governmental action; b) economic impact; c) interference with reasonable investment-backed expectations;
- 2. Here the test is not met:
 - a. Economic impact: nothing suggests that preventing the shopping center from excluding this sort of expressive activity will unreasonably impair the use or value of the property as a shopping center;
 - b. No interference with reasonable investment-backed expectations (distinguished from Kaiser Aetna);

C. Per Se Takings: Permanent Physical Invasion

- 1. A permanent physical occupation of real estate is a taking per se to the extent of the occupation
 - a. Occupation does not need to be exclusive, continuous and uninterrupted;
- 2. Without regard to:
 - a. The size of the area permanently occupied;
 - b. Whether the governmental action achieves an important public benefit;
 - c. Whether the governmental action has only minimal economic impact on the owner;
- 3. How to distinguish potential physical takings from possible torts
 - a. The government intends to invade the protected property interest or the invasion is the direct, natural or probable result of an authorized governmental activity;
 - b. The invasion must appropriate a benefit to the government at the expense of the owner or at least pre-empt the owner’s right to enjoy her property rather than merely inflict an injury that reduces the value of the property;
- 4. Limits:
 - a. Invasions that are temporary and limited (Pruneyard as distinguished in Loretto);

- b. Public policy: a) Anti-discrimination laws; (Heart of Atlanta Motel, Meadows v Edgewood;) b) “public necessity”(Block v Hirsch, limited housing supply in war time)
 - c. Permanent invasion by an invitee or party with whom the owner has a contractual relationship (Yee v City of Escondido;)
 - 5. Elements of compensation:
 - a. Loss to the owner of the rights actually taken;
 - b. Severance damages: loss to the owner from the effect of such taking on the property remaining in her hands;
 - c. Damages caused by the use of the property for the cause for which it was taken;
- XIII. Immunity from Loss. Per Se Takings: Deprivation of All Viable Economic Value
- A. Lucas
1. Critique of the SC Supreme Court “harmful or noxious use” principle:
 - a. It was the early progenitor of the current approach: an early attempt to describe in theoretical terms why government may, consistent with the takings clause, affect property values by regulation without incurring an obligation to compensate; we now reject the early idea Mugler was based on some objective notion of noxiousness; we now understand Mugler as resting on the idea that the regulation was reasonably related to the implementation of a policy expected to produce widespread public benefit;
 - b. It is very difficult if not impossible to distinguish between regulations that prevent harmful use and regulations that confer benefits on an objective, value-free basis;
 2. Per se rule: the state must compensate a landowner when a regulatory action denied the owner economically viable use of the land unless the prohibited use constitutes a nuisance;
 3. Justifications for the rule:
 - a. The total deprivation of any beneficial use is the equivalent of a physical appropriation;
 - b. It is less realistic in this case to indulge the usual assumption that the legislature is simply adjusting the benefits & burdens of economic life in a manner that secures an average reciprocity of advantage to everyone;
 - c. Regulations that deprive the owner of any economically viable use carry a higher risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm;
 - d. The rule reflects the shared historical understanding of the takings clause;
 4. Dissent: Blackmun
 - a. No evidence that the property had lost all its value;
 - b. Not consistent with precedent: this court had repeatedly recognized the rights of states to prohibit uses of property injurious to public health, safety and welfare without paying compensation; now it would make no sense to suggest that an owner has a constitutionally protected right to harm others if only he makes the proper showing of economic loss;
 - c. 3 problems with the majority’s rule:

- i. The threshold inquiry for the new rule cannot be determined objectively: the composition of the denominator in the deprivation fraction cannot be determined objectively;
- ii. Even more perplexing is the majority's reliance on the common law principles of nuisance in its quest for value-free principles; there is nothing magical and objective in the reasoning of judges long dead;
- iii. The court says the per se rule reflects the historical understanding of the takings clause: there is no shared "historical understanding";

B. Palazzolo

- 1. The fact that the owner took title with notice of the regulation does not in itself immunize the state from facing a challenge to the regulation as a taking;
- 2. Regulations do not become less unreasonable with the passage of time: if we were to accept the rule proposed by RI (no taking of the owner took title with notice of the regulation) then the post enactment transfer of title would absolve the state of its obligation to defend any action restricting land use no matter how unreasonable or extreme; a state should not be allowed to put an expiration date on the takings clause...future generations too have a right to challenge unreasonable limitations on the use and value of land;
- 3. What if an owner attempts to challenge a new regulation but does not survive the process of ripening? If the rule was the one proposed by RI the right to compensation may not be asserted by a heir or successor;

C. Babbitt

- 1. Economic impact: in the amended text of section 207 the income-generating capacity of the fractional interest is assessed over a window of 5 years before the death of the decedent (rather than 1 year); the focus however is still on the income-generating capacity rather than on the value of the land, often not trivial;
- 2. Nature of governmental action: despite the possibility to devise to someone who already owns a fractional interest in the parcel, this is still a virtual abrogation of the right to transfer property at death;

XIV. Takings: "Public Use" & Just Compensation

A. Barman v. Parker

- 1. A taking is for "public use" if it effectuates a legitimate "public purpose";
- 2. What is a legitimate public purpose is to be determined by the legislature: Institutional competence argument: deference to the legislature's determination of the "public purpose"; the role of the judiciary in determining whether eminent domain is being used for a "public purpose" is extremely narrow;
- 3. Public health, public safety, morality, peace and law & order are the traditional examples of "public purpose": they illustrate but do not limit the idea of public purpose; generally if a taking promotes the general welfare it satisfies the public use requirement; general welfare is a broad and inclusive notion that reflects physical, aesthetic as well as monetary values;
- 4. We cannot say that public ownership of property taken by eminent domain is the sole method of promoting the "public purpose" identified by the legislature: the public end decided by the legislature may be as well or better served by transferring property to a private enterprise;

B. Hawaii Housing Authority v. Midkiff (1984)

1. Where the exercise of eminent domain is reasonably related to a conceivable public purpose a compensated taking does not violate the Fifth Amendment;
 2. Institutional competence argument: deference to the legislature's determination of "public purpose"; the court will not substitute its judgment as to what constitutes public use for that of the legislature unless the use is palpably without reasonable foundation;
 3. The mere fact that the property taken was transferred to private beneficiaries does not mean that the taking has a private purpose; for the takings to be legitimate the government does not need to be the owner of the property; it is only the taking's public purpose that must pass scrutiny under the "public use" clause of the Fifth Amendment, not the mechanics of the taking;
 4. The fact that a state legislature, rather than Congress, made the public use determination does not mean that judicial deference is less appropriate;
- C. *Poletown* (1981)
1. The terms "public use" and "public purpose" are interchangeable in Michigan statutes and decisions; they both describe the concept of "public benefit"; the term "public use" has never received an *inelastic or narrow definition* by the Michigan court, rather the court has always stated that a public use changes with the *changing conditions of society*;
 2. Institutional competence argument: deference to the legislature's determination of "public purpose/use"; the legislature's determination of "public purpose/use" should not be reversed by courts unless it is manifestly arbitrary or incorrect
 3. If the power of eminent domain is exercised in ways that benefit specific and identifiable private interests, courts should inspect with heightened scrutiny the claim that the public is being benefited; such public benefit cannot be speculative or marginal, it must be clear and convincing;
- D. *Wayne County* (2004)
1. Overruled *Poletown*;
 2. "public use" is a term of art: a use is a public use if it passes a threefold test:
 - a. Public necessity of the extreme sort requires the project/taking;
 - b. The property taken remains subject to public oversight after having being transferred to a private entity;
 - c. The property to be taken is selected because of facts of independent significance;
- E. *Kelo* (2005)
1. The meaning of public use: "used by the public" or "public purpose": broad concept of public purpose
 - a. precedent, *Berman*, Hawaii Housing Authority;
 - b. social utility: a narrow notion of public use would not take into account changing social needs and allow the legislature to promptly respond to new needs;
 - c. institutional competence: deference to the legislature, the court has a narrow role in determining what is a public purpose;
 - d. formal realizability: the narrow notion of public interest would be difficult to administer;

2. Economic development is a public use/purpose: no way of exempting economic development from the broad understanding of public purpose embraced by the court;
3. when the purpose of the legislature is legitimate and its means are not irrational, empirical debates about the wisdom of the exercise of eminent domain are not to be carried out in the federal courts;
4. Nothing in our opinion precludes any state from placing further restrictions on its exercise of the power of eminent domain;
5. Dissent: O'Connor
 - a. Historical argument: the majority abandons long-held basic limitations on government's powers (*Calder v Bull*, 1798...*an act of the legislature contrary to the great first principles of the social compact cannot be considered a rightful exercise of legislative authority....*);
 - b. Institutional competence: need for an external judicial check, otherwise the public use clause would be meaningless;
 - c. Distinguishes Berman & Midkiff: the pre-condemnation use inflicted an affirmative harm on society;
 - d. Rights/fairness: unfair...too large an expansion of the meaning of public use would mean that private property may be given over for new private use as long as this new use is predicted to generate some secondary benefit to the public...
 - e. Social utility: perverse distributive results: disproportionate impact on the poor;
6. Dissent: Thomas
 - a. Textual argument: original meaning of "use" in the Constitution;
 - b. Historical argument: since Blackstone distinction between nuisance (for eliminating uses that *adversely affect* the public) and eminent domain (to provide quintessentially *public* goods...Mill Acts of the 19th century were exception to this...but highly contested)
 - c. Social consequences: disproportionate impact on poor & minorities

XV. Takings: Just Compensation

A. Elements of Just compensation

1. Fair market value of the property at the time the taking occurs:
 - a. Property valued at its highest & best use:
 - i. Use that is legally permissible
 - ii. Financially feasible
 - iii. Physically possible
 - b. Maximally productive
 - i. Various methods for assessing the fair market value:
 - ii. Recent transactions of the property in question and adjustment for changes in market values in that area
 - iii. Recent transactions of other similar parcels of property in the area and adjustment for difference in size, location and quality of the improvements;

- iv. Rental value of the property in question and capitalizing this to reach a purchase price using a rate of return commonly used as a benchmark for real estate investments in the area
- 2. Partial Takings: fair market value of the part of property taken and “severance damages”: the reduction in value to the remaining property caused by the taking;
- 3. If the taking increases the value of the property:
 - a. Special benefits: benefits that arise from the particular relationship of the land in question to the improvement resulting from the taking; most courts will offset the severance damages by the amount of the special benefit to the remaining property;
 - b. General benefits: increase in the value of land common to the community in general, advantages that will accrue to the community from the improvement; some courts will take into account general benefits (Supreme Court of California, Los Angeles County metropolitan Transportation Authority v Continental Development, 1997)
- 4. Subjective value of the property: intangible, difficult to assess, courts will not compensate for the subjective/idiosyncratic value (some courts: fair market value + bonus);
- 5. Rescission of the regulation and damages: the government may choose to rescind the regulation and pay damages for the lost value of the property during the time the owner was illegitimately restricted in her use;
- B. Arguments for different normative approaches to “just compensation”
 - 1. Theories requiring high compensation:
 - a. Fairness/rights: just compensation as just deserts, property owners have an independent right to the full value of their property, ample property rights are the foundations of a free and just society, a property owner is entitled to full indemnification for all her losses in the event of a taking;
 - b. Social utility: forcing the government to pay more will make governmental action more expensive, hence will deter legislated transfers of property rights and encourage fair and efficient market transfers;
 - 2. Theories requiring low compensation:
 - a. Fairness/rights: lower compensation reflects the civic values of a just society: it is fair because it will reduce the economic risk of legislating and hence allow the government to legislate for the public good;
 - b. Social utility: incentives & insurance theory: if property owners expect to receive full indemnification in the event their property is taken, they will improperly ignore the risk of governmental action even when a particular action can be reasonably anticipated; private insurance usually requires an insured to pay a deductible in the event of loss; property owners should be compensated for their loss minus a deductible designed to force them to internalize some of the risk of regulatory action;
 - 3. Theories requiring context-dependent compensation:
 - a. Fairness and social utility: redistributive approaches to just compensation: property exists in a social space affecting the distribution of wealth: in a just society, a progressive takings regime would provide more protection for property belonging to members of a politically and economically

disadvantaged group; the same regulation or governmental action that works a taking on a disadvantaged group will cost the government more than when the burden is placed on an advantaged group;

C. *Almota*

1. Determination of the measure of just compensation for condemnation of a leasehold: a tenant's expectancy of lease renewal is a compensable legal interest and is to be included in the assessment of the structures the tenant built on the property;
2. Fairness: just compensation means what a willing buyer would pay to a willing seller; by failing to value the improvements in place over their usual life and by failing to take into account the expectancy of a renewal of the lease, the lower court failed to recognize what a willing buyer would have paid for the improvements;
3. Precedent: the court distinguished *Petty Motor* (1946): in *Petty Motor*, the court said that the measure of just compensation for condemnation of a leasehold is the value of its use and occupancy for the remainder of the lease term and refused to elevate an expectation of renewal of the lease into a compensable legal interest...but there was no question as to the fair market value of improvements; here we are not creating a legal cognizable value where none existed....the petitioner has made improvements and seeks their fair market value ;

D. *US v 564.54 Acres of Land*

1. Fairness: fairness requires a good balance between the interest of the owner whose property has been condemned and that of the public; of course property often has a greater value to the owner because of subjective factors, but loss of this subjective value is properly treated as part of the burden of common citizenship; departing from the objective fair market value rule may be fair in special circumstances, for example when the value of the property is difficult to assess because the property is a type of property that is traded only very infrequently...but this is not the case
2. Formal realizability: need for an objective working rule: the principle that the owner should be put in as good a position as if her property had not been taken has never been given full and literal force because of practical difficulties

XVI. Easements by Estoppel

A. *Holbrook v. Taylor* (1976, Ky Sup Ct)

1. we have long recognized that a right to use a roadway over the land of another may be established by estoppel;
2. where the license is not a bare, naked right to entry but includes the right to erect structures and improvements, the licensor may not revoke the license and restore her premises to the former conditions after the licensee has exercised the privilege given by the license and erected the improvements at considerable expense;
3. Whether or not the Taylor's use was with Holbrook's permission, they expended a great deal of money on improvements with knowledge and in reliance that they would continue to be allowed to use the road;

B. *Rase v Castle Mountain Ranch* (1981, Mont Sup Ct)

1. Where a buyer takes title with knowledge of occupants' expectation of long term occupancy and subject to the seller's condition that occupants' license not be terminated, the buyer holds the land in constructive trust for the occupants;
 2. The district court properly concluded that the equitable lien may be satisfied by either:
 - a. Continued use of the cabins for a period of time;
 - b. Compensation for the value of the structures;
 3. The 3 counterarguments of the defendant are to be dismissed:
 - a. Parol evidence rule: there is an exception when the validity of the agreement is the fact in dispute
 - b. Statute of frauds: exception for any trust arising out of or being extinguished by implication or operation of law;
 - c. Waiver: a finding of waiver in the license agreements would be inconsistent with the court's conclusion that the license agreements do not reflect the true intention of the parties at the time;
- C. Easements by Estoppel
1. To **effectuate the intent** of the parties when:
 - a. Easements granted orally, failure to comply with the writing requirement of the statute of frauds
 - b. Deed ambiguous
 - c. Writing does not comply with the specific requirements of the statute of frauds
 2. **Against the will** of the owner when:
 - a. The owner/licensor created the impression that the license would not be revoked
 - i. Oral statements,
 - ii. Fraudulent or misleading conduct or representation
 - iii. Mere silence, acquiescence or failure to affirmatively deny an easement is not enough (see Holbrook, acquiescence to erection of structures and improvements);
 - b. The licensee believed and reasonably relied on the impression/representation;
 - c. The revocation of the easement would be detrimental to the licensee: detriment to be determined by the circumstances:
 - i. Substantial expenditure
 - ii. Other detrimental effect
 - d. Since the estoppel to terminate a license arises out of action taken in reliance upon misleading representations as to the duration of the license, the extent of the estoppel is measured by the extent of the action taken: extent necessary to prevent the licensee from being unfairly deprived of the fruits of the expenditures made;
- D. Constructive Trust
1. A trust imposed by courts to do equity and to prevent unjust enrichment when the transferee of property breaches a confidential relationship with the transferor:
 - a. Example: a constructive trust may be imposed when a heir/devisee/legatee violates a promise to the testator expressly made or inferable from words or

conduct to hold an inheritance, devise or legacy for the benefit of another, promise upon which the testator relied in making the will

2. Constructive trusts are fraud-rectifying trusts in which the court does not infer or presume that any intent to have a trust existed, but the court uses the terminology of trust as the most convenient method for working out justice and preventing one party from unjustly enriching herself at the expense of the other;

XVII. Easements implied from prior use & by necessity

A. Easements Implied from Prior Use

1. The dominant estate and the servient estate were formerly owned by a single party;
2. The dominant and the servient estates were severed;
3. before the conveyance severing the parcels, the owner used one parcel for the benefit of the other parcel;
4. This use was obvious, long-continued and manifest (apparent or known) ; (not casual or temporary)
5. At the time of severance the parties impliedly conveyed or reserved an easement/intended to convey an easement (the intent was imperfectly expressed in the formal document);
6. The claimed easement is reasonably necessary and beneficial to the enjoyment of the parcel conveyed or retained by the grantor, enjoyment for the purposes to which similar property is customarily devoted; (*necessity even when the parcel is not totally landlocked, if the use of an additional way would greatly enhance the market value of the dominant estate*);
7. The scope of the easement is determined by the prior use and may not be expanded to meet an increase in the dominant estate's need;
8. Not extinguished merely because the reasonable necessity ceases to exist: necessity must be established only at the time of conveyance;

B. Easements by Necessity

1. The dominant estate and the servient estate were formerly owned by a single party;
2. The dominant and the servient estates were severed;
3. a route of access across the servient estate is necessary in order to permit beneficial use of the dominant estate; substantial degree of necessity:
 - a. some states require "strict necessity": essential to permit access to the dominant estate or an alternative way may be hypothetically possible but legal or physical barriers make construction of such way a practical impossibility;
 - b. other states "reasonable necessity": precise degree of necessity varies on the basis of factual circumstances, in any event the benefits derived from the easements must outweigh the burden on the servient estate;
4. Necessity must exist at the time of severance (cannot be created by later events) and continue to exist (right of way expires if the owner of the dominant estate acquires access through other means);
5. At the time of the severance the parties impliedly created an easement;
6. Scope may be expanded as the need of the dominant estate increases;

C. Are Easements Implied from Prior Use Fair?

1. Arguments that all easements should be in writing: no implied easements

- a. Formal realizability: rigid rule requiring a writing increases predictability and is easier to administer; prevents unnecessary litigation;
 - b. Rights/Fairness: it would be fairer to both parties: both have the right to rely on their written contract as the final statement of the deal they made; especially fair in the case of easement by reservation;
 - c. Social utility: clear rules means lower transaction costs and hence facilitate market transactions and investment in real estate development;
 - d. Institutional competence: let the easement claimant purchase it if she really values it so much, let the market take care of this rather than courts assigning ownership by fiat;
2. Arguments in favor of Implied Easements
- a. Formal realizability: it is flexible and achieves justice in the individual case by enforcing the contract the parties actually thought they were making; the required elements make it less unpredictable than you might think;
 - b. Right/Fairness: it fair to allow the parties to rely on prior use, it protects their informal reasonable expectations; holding the parties to the strict terms of the contract is unfair, it would contradict the will of the parties and allow one party to unfairly breach the implied agreement the parties made;
 - c. Social utility: promotes market transactions and investment by promoting good faith and fair dealing in transactions and hence trust in the market; and it promotes efficient allocation of property rights, property interest will go to the person who values them more;
 - d. Judicial role: it is a long-recognized doctrine, the legislature should change it, not the courts;

D. Granite

- 1. Elements: unity of title, prior to severance one parcel derived benefit from other, use obvious and continuous, the claimed easement is reasonably necessary;
- 2. Among the circumstances that prove the intention of the parties: who is the claimant, the terms of the conveyance, the consideration given, the extent of the necessity, the extent to which the prior use was known to the parties
- 3. The degree of necessity required to reserve an easement by reservation is greater than that required for an easement by grant;
- 4. If the previous use is continuous and apparent the degree of necessity is different than that required for easement by necessity: flexible and elastic necessity, reasonably convenient; the more apparent and continuous the prior use the less the degree of necessity required;

E. Finn v Williams

- 1. When an owner conveys a parcel of land which has no outlet to a highway except over the remaining land of the grantor or over the land of strangers, a way by necessity exists over the remaining tract of the grantor;
- 2. If at one time there has been unity of title, the right to a way by necessity may be dormant through several transfers of title and pass with each transfer as appurtenant to the dominant estate and can be exercised at any time;
- 3. The fact that the way was not used for many years because the plaintiffs have been allowed to use other ways is immaterial: when permission to use other ways is denied, the plaintiffs may avail themselves of the dormant easement;

XVIII. Express Easements

A. "Appurtenant" (running with the land) or In "Gross"?

1. Easement is appurtenant only if:
 - a. It is in writing: a deed, a description in the deed granting the property, the deed granting the property may refer to an earlier recorded writing (it is in "the chain of title");
 - b. The parties intended it to run with the land
 - c. The buyer of the servient estate is on notice:
 - i. Actual notice
 - ii. Inquiry notice: there are visible signs of an easement and a reasonable buyer would do further investigation to discover whether an easement exists;
 - iii. Constructive notice: the buyer should have known, a reasonable buyer would conduct a title search and discover the existence of the easement;
2. If the deed is ambiguous:
 - a. The intent of the parties is inferred from the language of the deed in light of the then existing situation of the property and the current surrounding circumstances
 - i. Commercial utility: the easement is useful or marketable apart from ownership of land (presumption that in gross)
 - ii. Personal character: it was intended to be a private accommodation to benefit a particular person for non-commercial purposes (presumption that in gross)
 - b. General presumption in favor of appurtenant easements: why? In order not to interfere with the alienability of land:
 - i. it limits the number of possible easements by limiting easements to neighboring landowners, freeing the land from numerous burdensome encumbrances
 - ii. Easier to find neighboring landowner and try to buy the easement back, thereby freeing the land

B. Scope of the Easement (appurtenant)

1. Determined by the intent of the grantor: language of the deed in light of surrounding circumstances:
 - a. Many courts resolve ambiguities in favor of the grantee, because the easement owner is entitled to the full enjoyment of the easement;
 - b. In the case of easement reserved by the grantor over land conveyed to the servient owner, ambiguities are solved in favor of the grantor;
2. Kind of use (quantity/intensity):
 - a. Some courts: narrow interpretation of expressly stated uses;
 - b. Most courts: expressly stated uses should be broadly construed: every right necessary for the enjoyment of the use is included by implication (Cox);
3. Divisibility: when the dominant estate is subdivided, the new owners of each parcel have a right to use the easement unless the terms of the easement provide otherwise or if the increase in intensity of use constitutes an unreasonable increase in the burden on the servient owner;
4. Extension to other land:

- a. Most courts: appurtenant easements only benefit the dominant estate and may not be used to obtain access to other land (other land owned or purchased by the owner of the dominant estate) unless the terms of the easement provide ;
 - b. Some courts: the easement may be used to obtain access to land different from the dominant estate if it does not result in material increase in the burden on the servient estate;
- C. Scope of the Easement (in gross)
 - 1. Most courts: an owner of an easement in gross may extend the use to other purposes not inconsistent with the principal use granted:
 - a. Usually *right of passage* does not include the right to lay utility lines;
 - b. Owners of *utility easements* may extend their use to other utilities;
 - 2. Are easements in gross transferable?
 - a. Old rule: easements in gross are not transferable;
 - b. Current majority rule:
 - i. Transferable if they are commercial in nature;
 - ii. Not transferable if they are personal in nature (*recreational* uses generally personal and not transferable;
 - 3. Are easements in gross apportionable (can the easement owner grant others similar rights to use)?
 - a. Yes, if they are exclusive, i.e. the owner of the servient estate has not retained a right to use the easement in the same way as the easement owner
 - b. No, if they are not exclusive;
- D. Relocation of an Easement
 - 1. Most courts: no relocation without the consent of the owner of the easement; the easement has a fixed location bargained for by the parties, relocation may reduce the value of the easement;
 - 2. A minority of courts: easement may be relocated as long as:
 - a. The change is reasonable;
 - b. It does not significantly lessen the utility of the easement;
 - c. It does not frustrate the purposes for which it was created;
 - 3. Supreme Court of Colorado (2001, Roaring Fork Club): servient owner may relocate an easement only after obtaining a declaration of a court that the relocation would cause no damage to the owner of the easement;
 - 4. Very few courts: relocation by the servient owner is allowed as long as damages are paid;
- E. Green v Lupo
 - 1. Intent of the parties is to be construed from the language of the deed, and, where the language is ambiguous from the surrounding circumstances;
 - 2. Strong presumption in favor of easements appurtenant: an easement is not in gross when there is anything in the deed or in the situation of the property which indicates that it was intended to be appurtenant;
 - 3. When the dominant estate is subdivided into parcels, each parcel continues to enjoy the use of the servient estate;
 - 4. A servient owner is entitled to impose reasonable restraints on the easement to avoid a greater burden than originally contemplated as long as such restraints do not unreasonably interfere with the dominant owner's use of the easement;

F. Cox v Glenbrook

1. When the grant is unclear the scope of the easement must be construed as broadly as necessary to carry out the purposes for which it was granted:
 - a. The owner of the easement may make any repair or improvement as long as it does not cause an undue burden upon the servient estate nor an unwarranted interference with the independent rights of other who have a similar right of use;
 - b. As to width: the intention of the parties at the time of the grant controls;
 - c. Use of the easement by purchasers of the subdivided parcels may not impose an undue burden on the servient estate or cause an unreasonable interference with the similar rights of others.

XIX. Covenants

A. Covenants run with the land if:

1. Writing (Statute of Frauds): in a deed, lease, recorded declaration; courts in certain circumstances may enforce oral statements relying on the doctrine of equitable estoppel
2. Intent to run: to be inferred from the language (mention of “successors” and “assigns” of the parties) and the surrounding circumstances (“personal character of the obligation”);
3. Notice: the buyer of the servient estate must be on notice: actual/inquiry notice/constructive notice
4. Privity of estate: general idea: burden/benefit framework: the law will attach a burden to ownership of the servient estate only when it is justified by a compensating benefit to the dominant estate;
 - a. Horizontal privity: relation between the original covenanting parties: the parties have a simultaneous interest in the property
 - i. **Mutual privity:** the covenant is contained in a lease transferring the property from landlord to tenant, the covenant is contained in a deed that divides property ownership between a present and a future estate, ex: a life estate and a reversion in the grantor,
 - ii. **Instantaneous privity:** the covenant is contained in a deed of sale that creates the restriction and states that the covenant is intended to benefit remaining land of the grantor
 - b. Vertical privity (now relaxed): relation between the original covenanting parties and their successors in interest: when someone succeeds to the interest held by the original covenanting party: succeeds either in the entire estate (buyer, fee simple) or in a lesser estate (lease, life estate);
5. Touch & concern: the thing required to be done affects the quality, value, or mode of enjoying the property conveyed (now, Restatement Third abolishes the touch & concern: covenants run with the land unless they are without rational justification or violate public policy);

B. *Davidson Bros. V Katz*

1. Rigid adherence to the touch & concern (and hence rule that anti-competitive covenants do not run with the land, because do not touch & concern, are mere economic benefits rather than related to the use of land) test is anachronistic.

2. The test is reasonableness: a non-competition covenant runs with the land, and hence will be enforced against a purchaser with notice, if it is reasonable;
 3. Reasonableness is flexible and fact-sensitive: factors to be taken into account are: the intention of the parties, whether it has a viable purpose, whether it is reasonable concerning time, duration and area, whether it imposes an unreasonable restraint on trade or creates a monopoly, whether it is no longer reasonable because of changed circumstances...etc...
- C. Should covenants run with the land or not?
1. Liberal approach to "running with the land"
 - a. Fairness/rights: it is fair because it protects both the parties contractual freedom, owners should be free to make promises restricting land use for their mutual benefit, and owners' interest in security of their property rights: owners should be secure that neighboring parcels will not be used in ways that conflict with their interest;
 - b. Social utility: an efficient way of promoting and planning development: transaction costs would certainly prevent a potential purchaser from negotiating with every single person who might someday buy neighboring property; it increases the value of land: the security of knowing that neighboring property is restricted increases the value of land;
 2. Restrictive approach to "running with the land"
 - a. Fairness/rights: it protects freedom to use land: owners should be able to use their land as they wish unless they have personally promised otherwise, no obligations should be imposed on property owners who have not voluntarily adopted them;
 - b. Social utility: it increases the alienability of land: restricted land is by definition less adaptable than unrestricted land; an owner wishing to change the use of restricted land cannot do so unless she obtains the consent of the owner/owners of the dominant estate

XX. Implied Reciprocal Negative Servitudes

- A. Residential Subdivision: two problems with "privity"
1. (the deed contains only grantee covenant by which buyer agrees to restrict the use of their own land): earlier buyers cannot enforce the restrictive covenant between the developer and later buyers because:
 - a. there is no privity between earlier buyer and later buyer (neither privity of estate, i.e. conveyance of a property interest or simultaneous interest in the same parcel)
 - b. There is no longer privity between the developer and the earlier buyer: the developer no longer owns the land of the earlier buyer
 2. Last buyer: makes a promise to restrict use of her land, but to who?
 - a. The developer no longer owns any land,
 - b. and there is no privity between the last buyer and earlier buyers.
 3. (the deed includes both a grantor covenant and a grantee covenant: both promise to restrict the use of their land): earlier buyer can enforce the grantor covenant against the later buyer, since the later buyer is the developer's successor in interest :

- a.**but** in this case, later buyers are bound not because of their own promise made in the deeds from the developer, but because of the developer's promise to earlier buyers to restrict her remaining land
- B. Implied Reciprocal Negative Servitudes
 1. Doctrine based on the idea of third party beneficiaries: it allows contractual promises to be enforced by someone for whose benefit a promise was made even though the promise was not made to that person;
 2. When a common grantor/developer pursues a course of conduct which indicates that she intends to inaugurate a general plan of development for the benefit of her remaining land and of the purchasers of the various lots, and by numerous conveyances inserts in the deeds *substantially uniform restrictions*, the grantees acquire by implication an equitable right, called a reciprocal negative servitude, to mutually enforce the covenants against each other and to enforce restrictions against the part of land retained by the grantor and subsequently sold without restrictions to a purchaser with actual or constructive notice of the restrictions;
 3. Factors that show the existence of a general plan:
 - a. The presence of a restriction in most deeds to property previously owned by the developer
 - b. A recorded plat showing the restrictions
 - c. Observance by owners of similar development of their land and conformity to written restrictions
 - d. Language stating that the covenants are intended to run with the land
 - e. The recording of a declaration stating that covenants are intended to be mutually enforceable
 - f. Sales literature and oral statements may constitute supplement of evidence
- XXI. Limits to the Enforceability of Covenants: Reasonableness & Public Policy
 - A. Davidson Bros v. Katz (1994)
 1. No covenant can be enforced if it is inconsistent with the public interest or detrimental to the public good: New Jersey courts have consistently refused to enforce contracts that violate public policy; the rehabilitation of inner cities is a public policy embodied in several major legislative acts;
 2. Very detailed analysis of the anti-competitive covenant's impact on the public good:
 - a. Sociological & demographical profile of the George Street neighborhood: the city's greatest concentration of disadvantaged persons;
 - b. Impact on the population's health;
 - c. Impact on overall city/neighborhood decay;
 - B. Appel v Presley Companies (1991)
 1. Provisions allowing amendment of subdivision restrictions are subject to a requirement of reasonableness:
 - a. This court has long recognized the importance of enforcing protective covenants where the clear language of the covenant as well as the surrounding circumstances indicate an intent to restrict the use of the land: to permit lots to be relieved from the burden of such restrictive covenants *in the absence a clear expression* in the instrument so providing would destroy the right to rely on restrictive covenants;

- b. We agree with the trial court that here the language allowing amendment of the restrictive covenant is clear...but...
 - c. Courts have also determined that provisions allowing amendment of subdivision restrictions are subject to a requirement of reasonableness:
 - i. A clause allowing the owner to amend the restrictions in its sole discretion is valid as long as it is exercised in a reasonable manner so as not to destroy the general scheme or plan of development ;
 - ii. Reasonableness is to be assessed with due regard for the property rights and investment of the persons who relied upon the restrictive covenants;
- C. O'Buck v Cottonwood Village Condominium Association
- 1. Condominium rules and bylaws granting a board the authority to enact rules and restrictions will withstand judicial scrutiny if they are reasonable;
 - a. The board has the authority to ban antennas: textual argument: two provisions authorize the board to adopt rules governing the use of common areas which include the roof;
 - b. The argument as to the absence of an express authorization is unpersuasive: it would be impossible to list all restrictive uses in a declaration of condominium;
 - c. Reasonableness test: the court balances the interests pursued by the ban on antennas (*solve the roof problem, uniform aesthetic appearance of the building, increased marketability*) and O' Buck's interest (id it was an important civil liberty ...we would look at the restriction with suspicion and require compelling justification...but O'Buck suffered *one little loss: a monthly fee to receive TV*)

D. Neuman v Grandview (2003)

- 1. A categorical prohibition on all religious services in a common area of a condominium is a reasonable restriction rather than an unreasonable restriction on owners' right to peaceful assembly:
 - a. Condominium is a little democratic sub-society of necessity more restrictive as it pertains to use of condominium property than may be existent outside the condominium organization;
 - b. The right to peaceful assembly is wider: the right to meet and discuss public and governmental affairs: a categorical ban on any assembly would be unreasonable but the rule in question bans a particular form of assembly which has a particularly divisive effect on the community;

XXII. Modifying or Terminating Covenants

A. Terminating Covenants

- 1. Changed Conditions (focus on the dominant estate)
 - a. Covenants will not be enforced if conditions have changed so drastically inside the neighborhood restricted by the covenant that:
 - i. Enforcement will no longer be of substantial benefit to the dominant estate
 - ii. the essential purpose of the covenant can no longer be achieved
 - iii. the covenant is valueless to the parties
 - b. The doctrine is applied particularly strictly when changes have occurred outside the restricted neighborhood that affect lots located on the fringe of the

restricted area: the doctrine applies only when the changes have so adversely affected every lot in the restricted area that enforcement is pointless

2. Relative Hardship (focus on the servient estate)

- a. A covenant will not be enforced if the harm caused by the enforcement, i.e. the hardship to the owner of the servient estate, is greater by a considerable magnitude than the benefit to the owner of the dominant estate

B. Changed Conditions

1. Arguments in favor

a. Fairness:

- i. fair because it effectuates the implied intent of the parties: if the parties had considered the matter at all, they would have understood that circumstances might change in a way that the covenant would lose its utility...rather than trying to anticipate changes and incur in the cost of providing for alternative covenants, they left the matter open anticipating that the law would extricate their successors from intractable problems...
- ii. permitting enforcement of covenants after they have lost their utility turns law into an instrument of extortion: the only reason the beneficiary might insist is to exact an unreasonably high price for releasing an encumbrance....

- b. Social utility: it promotes the free use of land once the covenants have lost their utility...and hence promotes the alienability of land;

2. Arguments against

- a. Fairness: unfair because courts should protect and effectuate the will of the parties as reflected in the covenant, rather than guessing what the implied intent of the parties is: the parties did not expressly provide that the covenant would terminate without their unanimous consent of all those affected...
- b. Social utility: it impedes efficient market transactions: if the servient owner wants to get rid of the restriction...let her negotiate and pay for it...if the owner of the dominant estate refuses to negotiate that means that the covenant has a subjective value to her;

C. Terminating covenants

1. By their own terms: provision that covenant will terminate within a stated period of time unless renewed;
2. Merger: servient estate and dominant estate come to be owned by the same person;
3. Release: all parties affected agree in writing to terminate the covenant;
4. Unclean hands: enforcement denied if the complaining party has violated the covenant herself;
5. Waiver: the servient owner has violated the covenant (multiple repeated violations) and the owner of the dominant estate fails to object (if general scheme: many owners have violated the covenant without objection);
6. Laches: the owner of the dominant estate has waited too long to claim enforcement and the owner of the servient estate has changed her position in reliance on such failure;

7. Abandonment: in a subdivision, violations are so general and widespread as to indicate an intention (on the part of the entire neighborhood) to abandon the general scheme intended to be maintained by the restrictions;
8. Estoppel: if the owner of the dominant estate represents by conduct, words or silence an intention to terminate the covenant and the owner of the servient estate changes her position in reliance, the dominant owner may be estopped from enforcing the covenant;
9. Adverse possession: open and notorious violation of the covenant for the statutory period without permission;

D. El Di

1. A court will not enforce a restrictive covenant where a fundamental change has occurred in the character of the neighborhood that renders the benefits underlying imposition of the restrictions incapable of enjoyment: here the change has been significant and substantial (no longer a quiet summer resort, 85% of the town now unrestricted, zoning ordinance, brown bagging...);
2. Public policy: the license would allow Holiday House a better control of alcohol consumption while enforcing the covenant would subvert the public interest in control of alcohol;

E. Blakeley v Gorin

1. None of the restrictions should be enforced but damages should be awarded:
 - a. The restrictions are still of *actual and substantial benefit* to Gorin and not obsolete but...
 - i. Changed conditions: the neighborhood has drastically changed...the unobstructed passageway is still of actual and substantial benefit to Gorin, but in light of the changes, the 12-story bridge would have *only a very limited impact*....
 - ii. Restrictions impede the reasonable use of land for its most suitable purpose: a free-standing building would not be possible because of the limited size of the lot, the proposal for a hotel/apartment building connected by a bridge to the Ritz is the best use of the lot....
 - iii. Public interest: the lot has been vacant for 10 years, beneficial effect on the tax base of Blakeley's proposed multimillion dollar project;

XXIII. The Estates System

A. Fee Simple

1. Magic words: "from O to A";
2. The largest possible package of rights;
3. It is alienable: the owner has the power to transfer ownership during her lifetime
4. It is inheritable: the owner may write a will identifying who gets the property at her death or if the owner does not leave a will, her property passes to her heirs as identified in the state intestacy statute;

B. Defeasible Fees

1. Fee simple determinable:
 - a. Magic words: "O to A as long as used for school purposes";
 - b. ends automatically upon the happening of a stated event and transfers possession back to the grantor or her heirs/devisees;
 - c. A has a fee simple determinable, O a possibility of reverter;

- d. If the condition occurs, and O does nothing to assert her rights, such as demanding A to leave, or bring an action in ejectment, and A possesses in an open and notorious way for the period set by the statute of limitations, A regains ownership back by adverse possession;
 - e. Possibility of reverter in O is alienable (new rule, traditional rule was that it is not alienable);
 - 2. Fee Simple Subject to Condition Subsequent:
 - a. Magic words: "O to A but if property is used for anything other than school purposes, O shall have a right of entry for condition broken;
 - b. Allows the grantor, O to reclaim the property upon occurrence of condition , does not make transfer of ownership automatic;
 - c. If the O never asserts her right , ownership stays with A, even though the condition has been violated (some courts have limited the amount of time O can wait to assert her right by applying the doctrine of laches, others may find that the right has been waived if it is not exercised within a reasonable time;
 - d. Adverse possession: the statute of limitations starts running only when O asserts her right, asking A to leave, and A refuses;
 - e. O's right of entry is alienable;
 - 3. Fee Simple Subject to Executory Limitation:
 - a. Magic words: "O to A but if the property is not used for school purposes, then to B";
 - b. A has a fee simple subject to executory limitation, B has a an executory interest;
 - c. (usually) Automatic shift of ownership when the condition is violated;
 - d. Rights of first refusal or preemptive rights are often clasied as executory interests: a right to purchase property when and if the current owner decides to sell, usually by matching any offers made by third parties or paying the fair market value of the property;
 - e. Executory interests are alienable;
- C. Life Estates
- 1. Lasts for the life of the present holder and is followed by:
 - a. A reversion in the grantor: magic words: "O to A for life": gives a life estate to A and a reversion to O or her heirs;
 - b. A remainder in a third party: maigc words: "O to A for life then to B": gives a life estate to O and a remainder to B ;
 - 2. Life estates are transferable but the grantee, C, obtains only what the grantor, A, owns, an estate for the life of A;
 - 3. Remainder may be:
 - a. Vested: remainder belongs to an ascertained person and there are no conditions precedent that must be satisfied before the remainder becomes possessory: "O to A for life and then to B" (B is alive, if B dies before A the remainder passes to B's heirs who will obtain possession when A dies):
 - i. Absolutely vested: O to A for life then to B" (B is alive)
 - ii. Vested remained subject to open: open to a class that may increase: "O to A for life then to the children of B (B is alive and has children...she might have other children....so class is open)

- iii. Vested remained subject to divestment: “O to A for life, then to B, but if B drops out of law school, then to C”
 - b. Contingent: it belongs to an unascertained person (“O to A for life then to the first child of B”, not born at the moment), or there is a condition precedent that must be fulfilled before the remainder becomes possessory (“O to A for life and then to B if she graduated from law school”); they are not destroyed if the condition does not happen (if B has not graduated from law school when A dies, the property goes to O, but if B later graduates the property will spring from O to B)
- 4. Remainders are alienable;

D. 2 Important Doctrines

1. Doctrine of Worthier Title

- a. If conveyance is: “*from O to A for life and then to the heirs of O*”, courts will interpret the remainder in the heirs of O as a reversion in O;
- b. Why?
 - i. a way to fight tax avoidance: originally this type of conveyance was intended to avoid inheritance taxes: if A died after O, O’s heir will get the property not as “heirs” of O but through the prior inter vivos conveyance from O to A;
 - ii. Alienability of property: it makes it possible for the life estate and the future interest to be merged in a third party, C, and a fee simple absolute to be created: if C wants to buy will negotiate with A and with O (while we might not know who the heirs of O are until O dies, so no negotiation possible);

2. Rule in Shelley’s Case

- a. If conveyance is: “*from O to A for life and then to the heirs of A*”, courts will transform the contingent remainder in A’s heirs into a vested remainder in A;

XXIV. Unreasonable Restraints on Alienation

A. Reasonableness test

- 1. The law bars unreasonable restraints on alienation: while a total & permanent restraint on alienation is unreasonable and void, a partial & temporary one may be reasonable;
- 2. Reasonableness requires a *cases by case* analysis based on the facts and circumstances of the particular case; relevant factors are:
 - a. the duration of the restraint
 - b. if the person imposing the restraint has some interest in land which that person is seeking to protect by the enforcement of the restraint;
 - c. if the restraint accomplishes a worthwhile purpose
 - d. whether the restraint has been imposed by mutual consent
 - e. whether the restraint allows a substantial variety of transfers
 - f. whether the restraint is limited as to the number of persons to whom transfer is prohibited
 - g. whether the restraint increases the value of the property
 - h. whether the restraint is imposed on property that is not otherwise marketable (life estates)

B. Horsepond

1. The alienability of property is essential and hence restraints on alienation must be reasonable in view of the justified interests of the parties
2. Generally the rule of reasonable restraints on alienation does not apply to charitable entities: a gift, a charitable trust, a charitable corporation;
3. yet, land owned by a charitable entity can be sold, despite the restraint on alienation, if a court of equity determines that, due to unforeseen circumstances, the sale is necessary and would be in the best interest of the charity;

C. Northwest v. Serio

1. Majority: the restraint imposed by the deed of the Northwest Company upon sales by its grantees (aimed at preserving a *desirable high class residential neighborhood*) is clearly repugnant to the fee simple title which the deed conveyed;
2. Dissent: there is nothing against public policy in this restraint:
 - a. its purpose is to give the developer the power to control the character of the development for a time long enough to secure a return of his investment and to give early purchasers some security in their investment;
 - b. development is risky and one of the most substantial risks is the invasion into the new neighborhood of an element of population which the developer did not have in mind...

D. Riste

1. Restriction n. 8 (*property shall not be resold without the written consent of the seller or its agent*) is void as repugnant to the nature of the fee simple conveyed;
2. Restriction n. 6 (*no resident s or occupants shall conduct themselves in such a manner as to be in conflict with the general practices and principles of the General and District Council of the Assemblies of God*) is invalid because it violates the Washington Law against Discrimination (every provision in a written instrument relating to real property which purports to restrict the conveyance or occupancy to individuals of a specified race, creed....is void);

E. Aquarian

1. A clause permitting a condominium association to arbitrarily withdraw its consent to transfers is an unreasonable restraint on alienation;
2. A condominium is a little democratic sub-society of necessity more restrictive as it pertains the use of condominium property than may be existent outside the condominium organization....accordingly restrictions on a unit owner's right to transfer her property are a valid means of ensuring the association's ability to control the composition of the condominium...indeed the restrictions may even have a certain degree of unreasonableness...
3. However such restrictions are invalid if they violate some external public policy or constitutional right of the individual;
4. The basic public policy behind the prohibition of unreasonable restraints on alienation is that the free alienability of property fosters economic growth and commercial development;
5. The test to determine whether a restraint on alienation is reasonable or not is **whether it impedes the development or marketability of property**: if it does not, no matter how absolute or broad, the restraint will be valid.

F. Wolinsky

1. A board must exercise a right of first refusal reasonably upon consideration of the purchaser's qualifications in light of the economic and social reasons which justify the restraint ; the criteria for testing the reasonableness are:
 - a. Whether the reason for refusal is rationally related to the protection, preservation or proper operation of the property and the purposes of the association as set in the governing instruments;
 - b. Whether the power was exercised in a fair and non-discriminatory way;
2. Condominium association officers and board members become fiduciaries when they take office and they have a fiduciary duty to the member of the association: they must act in a way reasonably related to the exercise of that duty...the duty requires strict compliance with the bylaws....failure to do so will result in liability for the association and the individuals themselves;
3. The board violated the Chicago Condominium Ordinance (no person shall be denied the right to purchase or lease a unit because of race, religion....marital status) because it acted on the basis of a report that Wolinsky was going to occupy the property as an unmarried female with her children;

G. Woodside

1. Condominiums are little democratic sub-societies...a declaration of condominium is the "constitution" of the association and may contain restrictions....
2. Restrictions contained in a declaration of condominium will be presumed valid (very strong presumption of validity) unless shown to be arbitrary, against public policy or in violation of a fundamental constitutional right;
3. Courts have recognized the authority of condominium unit owners to amend the declaration, amendments have been upheld (*Seagate Condominium v Duffy*) even as they applies to unit owners who acquired their units prior to the amendment (unit owners do not have a vested right in the status quo);
4. Amended restrictions are presumed valid unless shown to be arbitrary, against public policy or in violation of a fundamental constitutional right;

XXV. Racially Restrictive Covenants

A. Shelley v. Kraemer

1. The enforcement of covenants is state action:
 - a. Precedent: we have said that the action of *state courts* and of *judicial officers* in their official capabilities is to be regarded as state action in cases dealing with: jury service, unfair judicial proceedings, action of state courts in enforcing a substantive common law rule;
 - b. Delegation of full coercive power of the state: these are not cases in which the states have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit....rather these are cases in which the state has made available to such individuals the full coercive power of the government....
2. State action has deprived the petitioners of the equal protection of the laws:
 - a. Petitioners show no case in which courts have been called to enforce a covenant excluding members of the white majority from ownership on grounds of race

- b. More fundamentally, equal protection is not achieved through indiscriminate imposition of inequalities
- c. The historical context of the 14th amendment: the primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the states based on considerations of race

B. Evans v. Abney

- 1. The cy pres doctrine (if the settlor had a *general charitable intent*, but the intent is *incapable of execution in the exact manner* provided by the settlor, a court of equity will carry it into effect in such a way as will *as nearly as possible* effectuate the intent of the settlor) may not be applied because the Bacon had no general charitable intent beyond the establishment of a segregated park: segregation was an essential element of Bacon's intent.
- 2. We agree with the petitioners that when a city park is destroyed because the Constitution requires it to be integrated there is reason for everyone to be disheartened**but** the action of the Georgia Supreme Court in declaring the trust terminated does not violate any constitutionally protected right:
 - a. The will of the senator and Georgia law (trust law, longstanding and neutral as to race) justifies the imposition on the city of a penalty, forfeiture of the park, for complying with the constitution
 - b. The analogy with the case where city owns a park in fee simple and closes it to avoid the effect of a previous court decision mandating integration, is not a good one: there it is the state and not a private party which is injecting the discriminatory motivation....

XXVI. Common Ownership

A. Tenancy in Common

- 1. A form of concurrent ownership in which two or more persons own the same property at the same time;
- 2. Magic words: "*From O to A and B as tenants in common with a 75% undivided fractional interest in A and a 25% undivided fractional interest in B*";
- 3. "undivided" fractional interest, because each has the right to possess the whole, but A is entitled to 75% of the proceeds from a sale and B only to 25%;
- 4. Although each has the right to possess the entire property, A and B might agree that only one will do so or that they will use different parts of the property;
- 5. Each tenant's interest is alienable, inheritable and devisable;
- 6. If A transfers her 75%, her grantee, C, will receive exactly what A owned, 75%, unless A sells less than her full 75% interest. C will be a tenant in common with B;

B. Joint Tenancy

- 1. Magic words: "*O to A and B as joint tenants*"
- 2. It requires "the four units":
 - a. Time : the interest of each joint tenant must be created at the same moment in time
 - b. Title : all joint tenants must acquire title by the same instrument
 - c. Interest: all joint tenants must have equal undivided fractional interests: A and B 50% each, or A,B and C 1/3 each

- d. Possession: all joint tenants must have the right to possess the entire parcel
 - 3. Each joint tenant's interest is not inheritable or devisable: joint tenancy is characterized by a **right of survivorship** in the other joint tenants:
 - a. If A and B are joint tenants and A dies before B, A's interest immediately passes to B who will now own a 100% interest in fee simple
 - b. Similarly, if A, B and C own property as joint tenants, each with a 1/3 share, and A dies, her interest passes in equal shares to B and C so that each will now own a 50% interest as joint tenants;
 - c. If A, B and C die simultaneously, courts will treat their interest as if they owned as tenants in common with each deemed to own her proportional share that will be inherited by their heirs or devisees.
 - 4. A joint tenancy is **severed** if one of the joint tenants transfers her interest during her lifetime: each undivided equal fractional interest is freely alienable without the consent of the other joint tenants, but this will sever the joint tenancy and destroy the right of survivorship: the transfer converts the joint tenancy into a tenancy in common:
 - a. If A and B own as joint tenants and B conveys her 50% interest to C, B and C will own the property as tenants in common (no right of survivorship)...so if A wants to sever the joint tenancy but retain her interest, A will transfer her share to a *strawman*, C, who will then transfer it back to A: A and B are now tenants in common;
 - b. If A, B and C own as joint tenants, and A transfers to D, then D will own a 1/3 interest as tenant in common, with B and C, while B and C will still own their 1/3 interest as joint tenants with each other:
 - i. when D dies her interest goes to her heirs and devisees;
 - ii. when B or C dies, their interest will go to the one who survives: if B dies her interest will go to C who will now own as tenant in common with D or her heirs/devisees.
 - 5. Severance may also result from the transfer of less than the entire interest of a joint tenant: if A and B are joint tenants, A, who has a 50% fee simple, may convey to C a life estate: this will result in a **severance *pro tanto***: if A dies during the continuance of the life estate, there is no immediate right of survivorship in B, but upon termination of the life estate, the joint tenancy revives and B will get a 100% fee simple;
 - 6. Severance may result from an involuntary transfer: by virtue of a sale in execution of a judgment against A;
 - 7. Alternative form: "*O to A and B as life tenants with a remainder in A if A survives B and with a remainder in B if B survives A*"; this creates contingent (will take effect *only if* the other dies first) alternative (*only one* of the remainders will take effect) remainders in A and B: major difference with joint tenancy: one of the remainders is certain to take effect because a transfer of a life estate does not destroy the remainder, in other words, severance is not possible);
- C. Tenancy in Common and Joint Tenancy: Partition

1. Voluntary partition: A and B agree among themselves, express agreement (or agreement implied from conduct of the parties inconsistent with the continuation of the joint tenancy);
 2. Judicial partition: they file a suit for partition: the court will either divide the property, physically or order the property to be sold and the proceeds divided;
 3. A and B may also agree that the property will not be partitioned: this is, de facto, a restraint on alienation, hence courts will enforce the agreement only if reasonable;
 4. In a condominium, where common areas are owned by the unit owners as tenants in common, partition is not an available remedy for disputes over common areas;
 5. Adverse possession: because co-owners have the right to possess the whole, no adverse possession claim can exist unless one of the co-owners effectively excludes the other/s. such exclusion is called ouster: this requires notice to the co-owner being ousted that the co-owner in possession intends to exclude the co-owner out of possession;
- D. Tenancy by the Entirety
1. Requires the 4 unities, plus a 5th one, marriage;
 2. It differs from joint tenancy because:
 - a. The individual interests cannot be transferred without the consent of both spouses;
 - b. The individual interests cannot be reached by the creditors of the individual spouse
 - c. Partition is unavailable as a remedy (it can be severed only by divorce)
- E. Management of Common Property
1. Commonly owned property is managed jointly by co-owners: each has an equal right to manage or control how the property is used: they may agree one or more of them will manage the property for the others. In case of disagreement on management the remedy is partition;
 2. Contributions for maintenance & repairs:
 - a. Some courts hold that co-owners have no enforceable obligation to pay for necessary repairs to the property absent an agreement between them to do so.
 - b. Other courts hold that co-owners are obligated to share the costs of necessary repairs: if such obligation is found to exist, a co-owner who has paid more than her fair share of expenses may sue the other/s for an accounting to obtain contribution for their fair share of the expenses
 - c. All courts agree that co-owners have no obligation to contribute to the cost of major improvements unless they have previously agreed to share these costs;
 3. When conveyance is ambiguous there is a general constructional preference for tenancy in common over joint tenancy (in the 19th century the opposite was true)
- F. Olivas
1. Mere occupation by a tenant of the entire estate does not render her liable to her co-tenant: the co-tenant in possession has no duty to pay rent; the right to possess the whole is one of the incidents of tenancy in common;
 2. Ouster: while an ouster of a cotenant normally suggests an affirmative physical act, a constructive ouster can occur when the emotions of a divorce make it impossible for the former spouses to continue share the marital residence;

3. In case of constructive ouster the tenant in possession is obligated to pay rent to the ousted co-tenant who can no longer be expected to benefit from his share of the marital home;
 4. Under the facts of the case the evidence revealed that the husband left the marital home voluntarily to be with his new girlfriend;
- G. Carr v. Deking
1. A co-tenant may lawfully lease his own interest in the common property without the consent of the other tenant and without his joining in the lease: it is established law that each tenant in common may use, benefit from and possess the entire property subject only to the equal right of the co-tenant;
 2. The non-joining co-tenant is not bound by the lease;
 3. The lessee steps into the shoes of the leasing co-tenant and becomes a tenant in common for the duration of the lease;
 4. The non-joining co-tenant may not demand exclusive possession, only co-possession;
 5. Joel Carr is not entitled to eject Deking, the proper remedy is partition;
- H. Tenhet v. Boswell
1. A lease entered into by a joint tenant does not sever the joint tenancy: for a joint tenancy to be created, California Civil Code requires an express declaration in a written instrument; likewise, severing a joint tenancy requires a demonstration of a clear and unambiguous intent to terminate the estate;
 2. A lease entered into by one joint tenant expires upon death of the lessor/joint tenant; fairness argument: any other result would frustrate the legitimate expectations of the surviving joint tenant (right of survivorship);
- I. Sawada v. Endo
1. The interest of one spouse in real property held in tenancy by the entirety is not subject to levy and execution by his/her individual creditors, absent consent of both spouses:
 - a. The very nature of the estate: the indivisibility of the estate except by joint action of the spouses is an indispensable feature of the tenancy by the entirety: neither spouse has a separate divisible interest that can be reached by creditors or conveyed...
 - b. Public policy: balancing the interest of the creditors and the interest of the family: the latter prevails: when a family can afford to own real property it becomes the most important asset...so long as it remains whole during the joint life of the spouses it is always available in its entirety for the use and benefit of the family (for example loans for education or other emergency expenses)

XXVII. Introduction to Leaseholds

A. Term of Years

1. is a leasehold for specific term, such as a year. The term can be for any period, from 1 week to 99 years. There is no common law limitation on the length of the lease. Some state statutes impose maximum terms for specific types of lease such as agricultural, mining...etc
2. The tenancy ends automatically when the term is up

3. However this does not mean that the landlord is entitled to recover possession at that precise moment.....
 - a. state law may well not allow the landlord to remove a holdover tenant without going to court to obtain an eviction. This means that the tenant may be legally entitled to remain after the end of the lease term until a court judgment grants the landlord possession and orders the tenants to vacate.
 - b. Even when a judgment is granted courts may be statutorily empowered to delay execution of the judgment to give the tenant some time to find a new place.
 4. Alienability: both the tenant's term of years and the landlord's reversion are alienable unless the lease agreement prohibits transfer of the tenant's leasehold. If the landlord transfers her reversion, the grantee takes the property subject to the lease and has no power to terminate the lease unless the lease agreement provides otherwise.
 5. Inheritability: Because the party's interests are for a *fixed* duration they also survive the death of either party: if a tenant dies her leasehold passes to her heirs or devisees. If the landlord dies her reversion will similarly pass to her heirs.
 6. Form: Short term leases are enforceable if they are oral, but the *statute of frauds* requires long term leases to be in writing. Most states require writing for leases of *more than 1 year*.
 7. Some states have statutes prohibit eviction without good cause.
- B. Periodic Tenancy
1. is for a period that is renewed automatically unless either party terminates the arrangement. It may also be understood as a tenancy for an indefinite period with periodic rental payments. The tenancy continues until either party gives notice, at the end of a period, of an intent to terminate the arrangement. The most common is the month to month tenancy, (tenant pays a monthly rent and can remain in the premises indefinitely);
 2. The period of tenancy may or may not be the same as the period of the rent payments. For example the parties may agree to a year to year tenancy but agree that the yearly rent will be paid in monthly installments. In general however, if the parties agree on monthly rental payments the courts will infer an intent to create a month to month tenancy.
 3. The periodic tenancy, like the term of years, is both transferable & inheritable unless the lease agreement provides otherwise.
 4. Form: Again, many states require leases of more than a year to be in writing.
 5. Courts usually require notice to terminate a year to year tenancy (however most states now have statutes regulating notice).
 6. If the landlord fails to give adequate notice:
 - a. some courts have held that the notice is a nullity and ineffective to terminate the tenancy at any date,
 - b. while other courts hold that the notice is effective at the end of the next period.
 7. Some states require the notice to terminate both to provide the requisite number of days **and** to terminate the tenancy on the last day of a period.

- a. For example, if a month to month tenancy runs from the first to the last day of the month, the landlord could not notify the tenant on March 15th that the tenancy would terminate on April 15th.
- 8. When the landlord wants to continue renting and raise the rent to an existing month to month tenant the landlord must provide the required notice to terminate the existing tenancy along with a separate offer to begin a new tenancy at an increased rent.
- C. Tenancy at will
 - 1. is terminable at any time by either party:
 - a. however most states require notice to terminate a tenancy at will: such notice requirement effectively converts the tenancy into a form of *periodic tenancy*
 - b. other states require the landlord to give the tenant a reasonable time to vacate the premises
 - 2. at times a tenancy at will is imposed by law:
 - a. if the landlord grants a tenant the right to move in and take possession of the premises but the parties have not agreed upon how long the tenant will be in possession the courts may infer an intent to create a tenancy at will
 - b. if a tenant holds on after the end of a prior tenancy with the consent of the landlord and the parties have not reached any agreement as to term or payment of rent
 - 3. it is not inheritable: it will terminate with the death of either landlord or tenant
 - 4. it is not transferable: a transfer of the landlord's title also terminates the tenancy at will
- D. Tenancy at sufferance
 - 1. it arises when the tenant wrongfully holds over after the termination of a prior tenancy
 - 2. the landlord will choose:
 - a. evict the tenant: the landlord will recover possession by summary eviction proceedings, the fair rental value of the premises during the wrongful occupation and damages;
 - b. hold her to a new tenancy: the new tenancy will be, in most states, a periodic tenancy: the term of the period of the new tenancy is determined by either the previous term of years or on the basis of the manner in which rent was paid under the previous agreement
- E. Vasquez
 - 1. At common law, one who occupies premises as an employee of the owner and as part of the compensation is not a tenant;
 - 2. The NJ statute does not apply: principles of statutory construction and the absence of any illuminating legislative history mandate this conclusion: *when general words follow a specific enumeration*, the general words are applicable only to the same class of things already mentioned: here "in some other capacity" follows "janitors and superintendents": a migrant farm worker is not part of the class;
 - 3. The Glassboro contract:
 - a. In New Jersey courts have long refused to enforce contracts that violate the public policy of the state: the Glassboro contract violates a well-established

progressive policy of providing legal protection to migrant farm workers;
(court cites legislation and State v Shack)

- b. A basic principle of contract law is that courts should enforce contracts as made by the parties, however this principle assumes that the parties are in a position of relative equality and their consent is freely given: courts have been increasingly sensitive to inequalities of power in residential leaseholds....farm workers have even less power: the lease resembles a contract of adhesion, they must accept the contract presented to them...(and then the court elaborates on the particular magnitude and significance of the inequality of bargaining power between Vasquez and Glassboro);

XXVIII. Tenant's Duty to Pay Rent

A. Sommer v. Kriedel

- 1. Two different rules that rest on different conceptualizations of a lease:
 - a. Majority rule: landlord has no duty to mitigate damages: based on the old idea that a leasehold is a transfer of possession of real property...it would be anomalous to require the landlord to concern herself with the tenant's abandonment of the property;
 - b. New rule: landlord has a duty to mitigate damages: rests on the idea that lease is governed by contract precepts, a shift motivated by the social change: the complexities of modern life have created new problems for the lessor and lessee, problems dealt with in covenants...this has introduced a predominantly contractual ingredient in leases
- 2. Arguments in favor of the "new rule":
 - a. General policy orientation of this court: protecting tenants by imposing implied duties on landlords;
 - b. Fairness: it would be unfair and unrealistic to permit the landlord to stay idle by the vacant premises, treat them as property of the tenant and then recover full rent....

B. Kendall v. Pestana

- 1. Two rules:
 - a. If the lease contains an approval clause the lessor may arbitrarily refuse to approve a proposed assignee no matter how suitable the assignee appears and how reasonable the lessor's objection;
 - b. Lessor may withhold consent only if she has a commercially reasonable objection to the assignment
- 2. Arguments against the old rule:
 - a. Traditional rules of conveyancing: landlord under no obligation to look at anyone but the tenant for rent...but in California duty to mitigate damages by seeking a substitute lessee
 - b. No approval clause is an unambiguous reservation of absolute discretion: it is not so clear and unambiguous: the idea of absolute discretion is untenable
 - c. Stare decisis: the old rule is far from universally held and the new rule should come as no surprise to someone aware of the changes in property law over the course of the 20th century

- d. Social utility: the lessee takes the risk of being paying too much in the vent of a depression in the rental market, so she should also be able to reap the benefits of a fortuitous inflation in the rental market;
- 3. Arguments in favor of the new rule:
 - a. Lease as property: unreasonable restraints on alienation: the California Code requires a balancing of the justification and the quantum, the Restatement explains that the lessor may refuse approval only on reasonable commercial grounds;
 - b. Lease as contract: in contracts increased recognition by the courts of an implied duty of good faith & fair dealing: neither party should do anything that has the effect of *destroying the right of the other party to receive the fruits of the contract*;
- 4. Factors to consider in reasonableness test:
 - a. The financial responsibility of the proposed assignee
 - b. The suitability of the use for the particular property
 - c. The legality of the proposed use
 - d. The need for alteration of the premises
- C. Slavin
 - 1. Majority rule: lessor has no duty of reasonableness in withholding approval;
 - 2. The minority rule is not convincing because:
 - a. It applies in cases of commercial leases, where the concern is that the landlord may withhold approval of the assignment for unfair financial gain: higher rent and better terms....there is no such risk in the case of a residential lease in a rent control jurisdiction...
 - b. The second concern behind the new rule is a desire to limit restraints on alienation in light of the fact that the necessity of reasonable alienation of commercial space has become paramount in our ever-increasing urban society....we are not persuaded, in the absence of a demonstrable trend involving residential leases, that there is such a necessity of reasonable alienation of residential space;

XXIX. Landlord's Duties

- A. Minjak
 - 1. A tenant may assert the defense of constructive eviction for the non-payment of rent even if she abandoned only a portion of the premises,
 - 2. Punitive damages may be awarded when to do so would deter morally culpable conduct, in cases where the landlord's actions or inactions were intentional and malicious;
- B. Blackett
 - 1. Where a landlord permits conduct of third parties which substantially impairs the right of quiet enjoyment of other tenants, it is a constructive eviction;
 - 2. In general landlords must perform some act with the intent of depriving the tenant of the enjoyment and occupation of the whole or part of the premises;
 - 3. There are occasions, however, where a landlord has not intended to violate a tenant's rights but there was nevertheless a breach of the landlord's covenant of quiet enjoyment whhc flowed as the natural and probable consequence of what the landlord did, failed to do, or permitted to be done;

4. The landlord's conduct not her intention is controlling;
5. The landlord had within their control to correct the condition which caused the tenants to vacate their apartment;

C. Javins

1. The common law itself recognizes an implied warranty of habitability: 3 separate considerations mandate this conclusion:
 - a. The old rule was based on certain factual assumptions that are no longer true: the old rule was designed for a feudal and agrarian society; the model-tenant was the "*jack of all trades farmer*"; the modern urban dweller has a single specialized skill unrelated to maintenance, she cannot be assumed to have the *knowledge or financial ability* necessary for repairs in modern buildings;
 - b. Consumer protection requires the old rule to be abandoned: the landlord is a *businessman* that sells housing and has much greater capacity and opportunity to take care of maintenance, the tenant must rely upon the skill of the landlord, as a *car buyer* must rely upon the car manufacturer;
 - c. The nature of today's urban housing market also requires abandonment of the old rule: the *inequality in bargaining* power is well documented, tenants have very little leverage to enforce demands for better housing;
2. The DC Housing Regulations:
 - a. create privately enforceable duties ;
 - b. Section 2501: The basic validity of every housing contract depends upon substantial compliance with the housing code at the beginning of the lease term and during the lease term.

XXX. Retaliatory Eviction

A. Hillview

1. A landlord is not free to evict a tenant in retaliation for the tenant's report of housing code violations (precedent, *Edwards v Habib*, 1968);
2. Burden of proof: the URLTA and the Mobile Homes Act prohibit retaliatory eviction: the burden of proof of the affirmative defense of retaliatory termination of the lease is upon the tenant, but... evidence of a complaint within 6 months prior to the alleged act of retaliation creates a presumption that the landlord's conduct was in retaliation; burden upon the landlord to overcome the presumption by producing evidence of legitimate non-retaliatory reasons;
3. Factors to be considered in deciding whether a tenant has established a defense of retaliatory eviction:
 - a. Landlord decision is a reasonable exercise of business judgment;
 - b. Landlord in good faith desires to make different use of the property
 - c. Landlord lacks financial ability to repair
 - d. Landlord was unaware of the tenant's activities protected by the statute
 - e. Landlord did not act at the first opportunity
 - f. The landlord's act was not discriminatory
4. In this case:
 - a. Tenants have shown substantial evidence of retaliatory eviction and landlord has not showed non-retaliatory reasons;
 - b. Tenant Davenport: eviction was not retaliatory...there is a limit to the type of conduct that can be tolerated...

B. Imperial Colliery

1. Relation between the tenant's activity and the retaliation:
 - a. Some courts have held that even when a tenant's activity is only indirectly related to the tenancy it may be protected against retaliatory eviction if such conduct would undermine the tenancy relationship (*Windward*: month to month tenants who opposed the re-designation of the farm from agricultural to urban....their action was effective....allowing the landlord to evict them would frustrate the policy of open consultation pursued by the municipality);
 - b. In this case, however, the activity is unrelated to the habitability of the premises: free speech rights do not arise from the tenancy relationship...

XXXI. Marital Property

A. Separate Property

1. Each spouse owns the property she acquired before marriage, the property she individually earned or received by gift or inheritance before marriage;
2. Property earned after the marriage, including dividends and wages, is also owned separately;
3. Of course, spouses may decide to take joint title to property, such as purchasing a house as tenants by the entirety or establishing a joint bank account under a joint tenancy arrangement;
4. Each is individually liable for her/his debts. Creditors cannot go after a spouse's property to satisfy a debt individually taken by the other spouse;
5. The only major qualification to the principle of separate ownership is that spouses have a legal duty to support each other and this duty may require a sharing of property earned during marriage. A spouse who fails to comply with this obligation may be forced to do so by a *court order for maintenance*, although this kind of lawsuit rarely happens outside divorce or separation

B. Separate Property: Divorce

1. Upon divorce: all states that adopt the separate property regime have statutes that provide for equitable distribution of property:
 - a. Some states allow equitable distribution of all property owned by the parties, including property acquired prior to marriage.
 - b. A few states that limit equitable distribution to property acquired during the marriage, allow property acquired before the marriage to be distributed in restricted circumstances.
2. The division is made on the basis of a wide range of factors:
 - a. need, support for *necessities* including child support,
 - b. statute, maintain the *lifestyle shared* during the marriage,
 - c. rehabilitation support sufficient to allow one spouse to attain marketable skills such that support will no longer be needed,
 - d. contribution, treating the marriage as a *partnership* and dividing the assets jointly earned from the enterprise.
 - e. About $\frac{1}{4}$ of the states allow marital fault to be considered and another $\frac{1}{4}$ explicitly exclude marital misconduct as a factor.
 - f. Specific factors that may be taken into account include age, health, occupation, vocational skills, dissipation of property during the marriage.
 - g. Time: in general,

- h. short term marriages are likely to result in less property redistribution than long term marriages,
 - i. for long term marriages some states have adopted a presumption of equal distribution of marital assets on divorce while others grant trial judges significant discretion in this regard.
3. Separate property states also have court-ordered alimony or maintenance: periodic payments from one spouse to the other. Before the 60s alimony was *routinely awarded* to women who were thought to be dependent on their ex husbands income, however today alimony has become exceptional and when awarded is often temporary. Current policy in most states aims at eventual if not immediate financial independence for the parties.

C. Community Property

- 1. Premise: husband and wife are equals, together in marriage they form a marital partnership analogous to a business partnership;
- 2. Property owned prior to the marriage and property acquired after marriage by gift or inheritance is separate property, all other property acquired during marriage, including earnings are community property owned jointly and equally by both spouses;
- 3. Management:
 - a. the spouses are fiduciaries: they have the duty to manage the property for the good of the community and to act in good faith to benefit the community;
 - b. both parties, however, must agree to convey or mortgage community property
- 4. Debts:
 - a. Premarital debts:
 - i. can be satisfied by the separate property of the debtor spouse and separate property of the non-debtor spouse cannot be reached;
 - ii. Creditors may obtain payment for separate premarital debts by reaching the portion of the community property attributable to the debtor spouse (but California, no community property can be used to satisfy premarital debts)
 - b. Debts incurred during marriage:
 - i. separate property is reachable by the creditors of that spouse for debts individually incurred during marriage, not by creditors of the other spouse
 - ii. Community property cannot be reached by creditors of individual spouses
 - iii. some or all separate property can be reached to satisfy debts jointly incurred by both spouses during marriage;
- 5. Divorce:
 - a. In some states property is allocated mechanically by giving each spouse his or her separate property and half of the community property;
 - b. equally apportion property on divorce

D. How to distinguish separate and community property

- 1. General presumption in favor of community property, placing the burden on the spouse who wishes the property to be designated as separate property to prove this;

2. Earnings on separate property remain separate property (but in some states earnings on separate property acquired during marriage, including interests, rents and profits, become community property);
3. Property acquired before marriage but paid for during marriage :
 - a. Some states: inception of title approach: the property is separate if title is acquired before marriage;
 - b. Other states: pro-rata apportionment approach: the *percentage* paid off before marriage is separate property while the *rest* community property;
4. What happens of property acquired before marriage if exchanged for other property during marriage (car acquired before marriage by one spouse is sold during marriage):
 - a. The proceeds are separate property (courts trace the source of the funds)
 - b. If the proceeds are used to buy a new car: the car will be separate property
 - c. If the proceeds are commingled with other funds in a bank account or used, along with community funds for some expense: if the funds can still be traced they are separate property, if they are no longer traceable, they become community property;

E. Pre-Marital Agreements

1. Pre-marital agreements are generally enforceable;
2. Most states review them for procedural fairness: review to see if they are voluntary, spouses may be required to disclose their assets to each other prior to marriage to ensure that both are voluntarily agreeing to give up rights they otherwise would have had under equitable distribution laws.
3. Some states review them for substantial fairness: to ensure that neither spouse is left with an inequitable share of the marital assets;
4. The UPAA provides that pre-marital agreements are not enforceable against a party if:
 - a. The party did not execute the agreement voluntarily;
 - b. The agreement is unconscionable and the party was not provided a fair and reasonable disclosure of the property or financial obligations of the other party, did not waive the right to disclosure in writing, and did not have an adequate knowledge of the other party's financial assets;

F. O'Brien

1. Husband's arguments:
 - a. precedent: cases in other states have said that graduate degrees are not marital property subject to equitable distribution
 - i. The court: not controlling, cases in other states rely on their own statutes...so we will look at our NY statute:
 - Broad language: "*all property....regardless of the form in which the title is held...is subject to equitable distribution*" and "in making an equitable distribution of property courts shall consider....*any direct or indirect contribution, including contribution as a spouse, parent, wage earner...to the career potential of the other party*"
 - Legislative intent: the idea was to remedy the inequities caused by the application of the traditional common law approach and to replace the

old approach with equitable distribution of property based on the idea that marriage is among other things an economic partnership

- b. Graduate degrees do not fit the common law concept of property:
 - i. The statute creates a new category of property, of no meaning during the normal course of marriage....it arises full grown like Athena upon the signing of the separation agreement
 - ii. Analogy: in *Majauskas* we said that vested but un-matured pension benefits are marital property subject to equitable distribution
- c. There are alternative remedies: rehabilitative maintenance or reimbursement for direct financial contribution:
 - i. Maintenance award: is contrary to the economic partnership idea of marriage, it retains the inequitable and uncertain economic ties of dependence that the legislature wanted to eliminate
 - ii. Reimbursement: completely at odds with the statutory requirement that courts give full consideration to direct and indirect contributions....the value of the license lies in the enhanced earning potential it affords, the wife should have an equitable portion of that, not a return of funds advanced....

2. *Watts*

- a. Breach of Contract: the *Watts* had entered into a contract, either an express or implied in fact contract, to share equally the property accumulated, the defendant breached this contract; this result is supported by:
 - i. Fairness: the result of a court's refusal to enforce the contract would be that one party keeps all the assets accumulated...while the other party, not more or less guilty, is deprived of property she helped accumulate....the refusal will not undo the relationship...it will only encourage a partner with greater income potential to avoid marriage;
 - ii. Public policy: does not preclude unmarried cohabitants from entering such a contract so long as the claim exists independently of the sexual relationship and is supported by separate consideration;
- b. Unjust Enrichment: in New Jersey requires 3 elements: a) a benefit conferred by the plaintiff upon the defendant, b) appreciation or knowledge of the benefit by the defendant, c) acceptance or retention of the benefit by the defendant under circumstances making it inequitable for the defendant to retain the benefit...the plaintiff has proven all 3 elements;

XXXII. Fair Housing Law: Racial Discrimination

A. *Ashbury*

- 1. Prima facie case under the FHA:
 - a. She is a member of a racial minority;
 - b. She applied and was qualified for renting an apartment from Brougham Estates;
 - c. She was denied the opportunity to rent
 - d. The housing opportunity remained available
- 2. Defendant failed to prove legitimate non discriminatory reasons:

- a. Policy that families with child are allowed to rent townhouses only: plaintiff was not provided any information about the terms and conditions that gave rise to the exceptions;
 - b. Evidence if high percentage of minority occupancy: although such statistical evidence is relevant, it is not dispositive, there was other evidence from which the jury could have determined that race was not a motivating factor in defendant's decision;
- 3. 2 theories supporting defendant's liability for punitive damages:
 - a. Brougham's own conduct in establishing rental policies, procedures and rules;
 - b. Brougham's authorization and ratification of the manager's discriminatory's conduct;
- B. Starret
 - 1. A race-conscious plan has to be:
 - a. Temporary: with defined goals and a termination point;
 - b. Motivated by a history of prior racial dicrimination;
 - c. Aimed at promoting minorities with access;
 - 2. The Starret system lacked all these characteristics:
 - a. It is not temporary: appellants predict that plan will continue for 15 years but fail to explain how they have reached this conclusion;
 - b. Starrett does not assert the existence of prior racial discrimination;
 - c. Quotas establish a ceiling, rather promote minorities' access;
- XXXIII. Fair Housing Law: Discriminatory Treatment because of Sex, Family status, sexual orientation
 - A. Edouard
 - 1. 2 categories of sexual harassment :
 - a. Quid pro quo harassment: request for sexual favors or conduct of a sexual nature when submission to or rejection of these requests is made explicitly or implicitly a term for housing availability, conditions or decisions;
 - b. Hostile environment harassment: requests for sexual favors have the purpose or effect of unreasonably interfering with an individual's housing conditions by creating a hostile and humiliating environment;
 - B. Labrie
 - 1. Intentional discriminatory treatment because of familial status may be shown by direct evidence or by circumstantial evidence: although direct evidence is often difficult to obtain, plaintiffs have presented direct evidence: evidence of an openly discriminatory practice prior to 1989 (no occupants under the age of 18) and evidence that the 1989 change (no more than 2 occupants) was adopted for the purpose of eliminating or limiting persons with minor children from the park;
 - 2. Defendants' justifications (a legitimate non-discriminatory occupancy limit, because of septic and water capacity considerations):
 - a. the Vermont FHPA is remedial, hence we construe it generously and read exemptions narrowly: here no credible evidence that an increase in the number of occupants would affect the water and septic system; less restrictive alternatives are available;
 - b. The FHA allows reasonable federal, state or local restrictions on the maximum number of occupants per dwelling; by analogy courts have found

privately imposed occupancy limits valid, but they must be at minimum reasonable (here defendants have failed to show reasonableness);

C. McCready

1. CRA prohibits discrimination on the basis of marital status, marital status refers to married couples only: we do not agree
 - a. The CRA is remedial and should be construed liberally;
 - b. Legislative intent: preventing discrimination based on membership in certain classes, eliminating the effect of offensive and demeaning stereotypes
 - c. Legislative history: nothing limits the term marital status to protecting married couples only
 - d. Precedent: California Supreme Court recently determined that statutory language banning discrimination based on marital status carries both meanings, married and unmarried
2. Discrimination because of conduct not because of status: we do not agree, marital status and not cohabitation or sexual intercourse is at the heart of the defendants' objection;
3. Lewd and lascivious conduct:
 - a. Social change: the lewd & lascivious behavior statute has not been used to successfully prosecute unmarried couples who were cohabitating for nearly 60 years
 - b. The statute does not prohibit cohabitation per se...to be found guilty the couple must lewdly and lasciviously associate...in this case insufficient evidence;
 - c. Not pertinent: the issue before the court is *not whether plaintiffs violated the statute prohibiting lewd & lascivious behavior*...it is *whether the defendants violated plaintiff's civil rights*;
4. Religious defenses:
 - a. US constitution: 2 prong test: a law burdening a religious practice must be neutral and of general applicability: the CRA does meet the general applicability prong: it prohibits all discrimination and it has no religious motivation;
 - b. Michigan constitution: 5 prong test: a) belief is sincerely held, b) belief is religious in nature, c) the regulation imposes a burden on the exercise of such belief, d) a compelling state interest justifies the burden imposed upon the belief, e) whether there are less obtrusive means available to the state:
 - i. Here there is a compelling state interest (equal access to housing) and there are no less obtrusive means available

XXXIV. Fair Housing Law: Disparate Impact

A. Plaintiff's Prima Facie Case

1. Prima facie case: The plaintiff may create a rebuttable presumption that a defendant's policies or practices create an unlawful disparate impact either by showing:
 - a. statistical evidence that the defendant's policies have a significantly greater impact on a class of person protected by the FHA than it does on others,
 - b. or that the policy or practice tends to perpetuate segregation.
2. In establishing a disproportionate effect:

- a. the plaintiff ordinarily should rely on local statistics but national statistics may be deemed relevant as well. Those statistics should focus on the relative percentages of people in each group affected by the policies more than their absolute numbers.
- b. Moreover the challenged discriminatory effects must be significant.

B. Defendant's Justifications

- 1. If plaintiff can establish a disparate impact prima facie case, the defendant is obligated to proffer a valid justification for its policy in order to overcome the plaintiff's prima facie case: the nature of the defendant's burden has been defined somewhat differently among the circuit courts.
- 2. The 2nd circuit for example held that the defendant must present:
 - a. bona fide and legitimate justifications for its action The bona fide element requires defendant to demonstrate that the asserted policy is the real reason for the defendant's actions and not merely a post hoc rationalization designed to serve as a cover for intentional discrimination.
 - b. with no less discriminatory alternatives available.
- 3. Other courts, the 7th circuit for example, consider the impact and the justification as two of four factors relevant to determining whether an unlawful disparate impact has been shown. The factors are:
 - a. the strength of the discriminatory effect,
 - b. whether some evidence of discriminatory intent exists,
 - c. whether defendant had legitimate non-discriminatory reasons for its policy,
 - d. whether the defendant was being asked affirmatively to provide housing or simply to refrain from interfering in a developer's project.
- 4. Once defendant provides justification for its policy some courts have held that this ends the matter. Most courts have required balancing the justification for the policy against the disparate impact, adding another step to the analysis. Once plaintiff has shown disproportionate or segregatory effect and defendant has provided a valid justification for its policy the court must weigh the adverse impact claim against the defendant's justification