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What is property?

1. Property is all about the allocation of scarce resources.
 - a. Duke campout example
2. The issue of legitimacy is important to property.
3. Property is all about social **relativity** – your claim in comparison to others.
4. What does it mean to say you own something?

Pierson v. Post (1805)

5. FACTS: Post is hunting a fox. He’s about to catch it, then Pierson comes out, kills the fox, and takes it.
 - a. Pierson says possession is key, you can only possess something if you physically have it, which Post never did.
 - b. Post says he was in active pursuit, intent was clear. That makes it his.
6. Options for rules: If you’ve wounded it, you own it.
 - a. Pursuit is enough.
 - b. Possession is key.
 - i. But this ignores who made the animal “catchable.”
 1. Need to think of the policy implications. Are the Posts going to keep investing in catching foxes if possession is key?
 2. Court Opinion: Makes efficiency cost argument – Post winning leads to an unclear law, which will lead to more court cases debating these vague terms. Just chasing a fox does not give you the right to the catch.
 - a. The dissent says: We hate foxes and wanna get rid of them, so make a rule to favor those who actually do that for us, which is the Piersons of the world, who put effort in.
 - i. Instrumentalist Argument: craft the rule b/c you’re trying to achieve something
 - b. Court cites Puffendorf or Barbeyrac because, though they’re ancient, they represent societal customs. Defer

ruling to social customs, look at what huntsman over time do, and respect their time honored tradition.

7. Rule v. Standard
 - a. Rule is a firm line. Ex: speed limit is 55
 - i. Easier for courts to administer. Discourage litigation because the parties know the rule ahead of time.
 - b. Standard is more fluid and requires discretion. Ex: you can't take a final if you miss an unreasonable amount of class.
 - i. Sometimes standards seem fairer, but it's more costly.

Keeble v. Hickeringill (1701)

8. Facts: Keeble has a decoy pond set up to attract ducks. Fake ducks are in the pond to trick ducks into landing, then Keeble hunts the ducks.
 - a. The property here is the ducks.
 - b. Hickeringill has a decoy pond on his land, so he fires guns to scare the ducks away from Keeble's pond, then they fly and land in Hickeringill's pond. When the ducks land there, they become his property.
9. Holding: H doesn't get property rights when he scares ducks onto his land, because he committed behavior that courts do not want to promote. If H just made a better pond, then he gets possession. But the court's not trying to promote unconstructive, nuisance, socially unproductive behavior to prevail in society, so he won't be rewarded.
10. Both Pierson v. Post and Keeble's rulings are used by the court to promote something the courts' want. In Pierson – future efficient court use and in Keeble – productive competition.

Managing the Commons

1. Open Access Commons: Anyone can get to it to use it.
 - a. Ex: Where the Pierson v. Post argument happened.
 - b. Examples of commons (not necessarily open access) : Park, Oil, Groundwater, Air...
2. Tragedy of the commons: in a group setting, dealing with a resource we all share, it is in your best interest to keep taking, polluting, using, etc. because you'll keep all the benefits to yourself, but share the consequences. So the good you receive outweighs the bad.
 - a. Sense that, even if you hold back on using a resource, others won't so you just lose out.
3. Private property helps fix the problem of the tragedy of the commons, because you owning it makes you the 100% recipient of the bad.
4. A utilitarian perspective applies to the allocation of tangible resources. Argues efficiency. Sometimes private property, but for some things, like security, group ownership is the way to go.

5. **Open Access with Community Norms – no one owns the property in terms of area, anyone can hunt of the whales:** 18-19th c. whaling industry made rules to settle who got the whale when it had been attacked/chased/hurt by multiple boats.
 - a. American courts used these for property laws.
 - b. If whale is attached to boat at all or has a flag stuck in it, and the boat is clearly in the process of getting it, it belongs to that boat. If the whale gets free, it's anybody's game.
 - c. **WHALE HYPOTHETICAL:** things to think about when crafting a whale possession rule:
 - i. Want to encourage effective action/hunting, discourage unproductivity
 - ii. Low transaction cost- you're on the seas, no time for legal disputes
 - iii. Legitimacy- no cop on the ocean, so if the rules aren't fair, no one will follow them
 - iv. Efficient hunting
 - v. safety

Ghen v. Rich

6. **FACTS:** Ghen lived in a town where this is how harpooning goes = you harpoon the whale from shore with your signature harpoon, then when it washes ashore later, someone sees it and tells you. You pay them a finders fee.
 - a. Some guy found Ghen's whale and sold it to Rich. Ghen is suing Rich for the \$. Several previous cases are cited which amount to this -> if you put the main work into killing the whale, it's yours. Not finder's, keeper's. So it's Ghen's. Rich pays back oil profits made off whale.
7. **Privatize the :** In oyster industry, more economic (as in more \$ earned) with private ownership of oyster land, because if you own, you'll use it efficiently. So states using communal system must be incentivized by something else, otherwise no one will re-sew the culch that oysters grow out of.
8. Native Americans didn't have private property when they just hunted for food & kept furs for themselves. When they began fur trading, it was profitable to hunt lots, leading to a tragedy of the commons, so the areas with early fur trading have some of the oldest personal property laws – hunting territories.
9. Lobsters – legally common, but practically, you can't infringe on other's turf. So it avoids tragedy of the commons through informal sanctions.
 - a. With oysters, they're too far off shore for this.
10. Lobster and whale rules are enforced by social norms. Close knit groups can keep outsiders out, but they can also keep people bound by guidelines.
 - a. So tragedy of the commons doesn't always need government regulation to fix it. You can get a **communal property regime – its like that community own the property**. But to do that you'd need

- i. Close community with shared values and
- ii. Reciprocity of sanction – everyone can enforce it – sanction and be sanctioned.
 1. Members of the community are enforcers.
- iii. Efficient Monitoring: Not expensive to monitor. No point of rules if you can't ID when they're being violated

Norms and practices

1. Recap:
 - a. Public Commons = open access with restrictions. Ex: park, but it closes at night
 - i. Not a “tragedy” but may have tragic aspects.
 - b. Communal property regime: rules agreed upon by the community are used to essentially privatize a commons, so not tragic
 - c. Just because something is a commons, doesn't mean it's a tragedy. There are ways to deal with the issue.
2. The above ways are haphazard and kind of nongovernmental ways of dealing.
3. 5 Ps - 5 classic ways government can regulate communal property issues:
 - a. Prescriptive regulations: command and control regulations.
 - i. Thou shall...., thou shall not..
 - ii. This is most regulations
 - iii. Ex: No sheep can graze for more than 10 minutes. Government figures out what's sustainable and enforces it.
 - iv. Downside
 1. Requires monitoring – inefficient. Also difficult to be accurate. How do you allocate the resource? The legislature would need to figure out what the optimal time for sheep to graze is and how do you do that?
 2. Agency capture : if the field being regulated is powerful enough to influence the agency that's supposed to regulate it. Like how oil companies are a big deal and lobby over oil co.s
 - b. Privatize- let people buy resource.
 - i. Ex: let people buy plots of grass. Motivated to take care of your area and keep it graze-possible. Theoretically, the property will end up with those who will use it most (because those people will buy up other people's) so this is the most efficient
 1. Ex: native americans and fur trade. They start investing in making resource more profitable by fencing and stuff – privatizing happens when you get an outside force/market.
 - ii. Cap and trade isn't actually giving you your own plot of sheep land, it's the right to let them graze. Use of space privatized, but not literal

space/acreage. You can sell your allowance. So if you can graze your sheep more efficiently, you'll buy/sell someone else's allowance b/c you'll make more money with it.

1. Still question of how to allocate this resource. Should you care if a company buys all the rights and the community that used to use it is now ruined. Alternately, should you care if no one new can get into the market because the town has all the resources?
 - iii. A hybrid: private property via the cap, but it's regulatorily created
- c. Penalties: penalty for abusing/over using, etc. the commons. OR you're straight up charged for the use. Ex: you pay per sheep you let graze. If too many people are grazing, you jack up the price to further limit use.
 - i. Uncertainty: what is the proper price to eliminate tragedy? Plus this is a tax, which is governmentally unpopular (think of it as the whole is a penalty for a tax)
 - ii. This isn't cap and trade because you can't trade. You pay for your own share, can't share that.
- d. Payment: government pays you NOT to graze your sheep.
 - i. Ex: we do this with farmers. This is a good strategy if you care about communities.
 - ii. Ex: pay fishermen for their boat and then destroy it.
- e. Persuasion: nonregulatory.
 - i. Ex: Billboards and stuff telling you not to overgraze.
4. Need to ask, what's the nature of the resource you're trying to regulate?
 - a. There's a whole range of ways you can regulate things, depending on what you care about.
 - i. Ex: helping people, making money...
5. Now, we move from private ordering to public ordering...
 - a. Puzzle: 2 different communities- native American and colonists, living off the same resources, but living completely differently and both being relatively successful.
 - i. Resources: land: agricultural land/hunting ; Timber; deer/fish ; water...
 - ii. Native Americans: the chief or sachen (?) holds the "title" to the land. But it's pretty communal. Title only means land is owned by the village. The NAs recognize land rights of other villages. But a deer doesn't belong to a sole person.
 1. The village as a whole has rights and gives the individuals usufructory rights to parts of it. Ex: it is not this one guy's land, but he owns the fish he fishes from it
 2. Access to clam banks, berry bushes, etc. are determined by use. After the berry season is over, they don't have rights to it anymore.

3. For use rights, you have the right to exclude while you're using it, but it doesn't extend past that.
 4. Don't really have private, individual property rights.
 5. So when NAs try to sell just a certain use of the land, like the right to hunt on it, there's a miscommunication with the English, who don't view ownership that way.
 - iii. Colonists: the king owns the title. Then divided up to individual rights – not just whole village is the essential property holder.
 1. they have rights to what they own.
 - b. The way to talk about ownership is with multiple rights. BUNDLE OF STICKS METAPHOR!
 - i. When you own something, you don't really own it, you own the rights related to it, and you don't always own ALL of those sticks.
 1. Right to exclude, possess, enjoy fruits, use, alter, transfer...
 - ii. To the English, all of those rights are encompassed in ownership.
 - c. The economic model drives everything.
 - i. English settled agriculture is what's driving these property rights.
 1. If you're a farmer, you have to invest. New England doesn't have good farming soil, so you're investing a lot. Thus, you want an absolute system to keep that investment safe.
 - ii. NAs have a hunter/gatherer, nomadic lifestyle.
 1. It would be a bad idea to limit your hunting/gathering to one area
 2. Southern NAs who did plant, didn't have plows, so they'd just burn and go. Eventually, you could come back to a burnt field that's plantable again.
 - d. With this example, Cronon challenges the idea that the nature of the resource determines the property rights. But really, if you break it down, the resources here AREN'T the same, because of how they use them.
6. Why choose one property model over another?
- a. Look at equity, efficiency, etc.
7. Locke is famous for the "labor theory of property." Focused on rights of individuals, not groups. Locke thinks government role is limited. They should ensure secured property and a dispute forum and that's it.
- a. Today, that'd be libertarianism
 - b. For Locke, the fundamental source of all property rights is yourself. You own yourself. So then anything your labor builds using unclaimed resources is yours as well.
 - i. Pervasive idea in property law because it sounds intuitive, though it does have limitations.
 - ii. Your parents created you, do they own all of your labor products?

- iii. Should you be able to sell your organs? The fundamental principle of Locke's argument is that you own your body.
- iv. Is there any limiting principle? How much labor is enough? If I blaze a trail up a mountain, do I own the mountain?
- v. What about ideas? Did your intellectual property originate solely from you? Because you probably built on someone else's ideas...
- c. Locke still underlies a lot of our ideas. Attractive idea in America because idea was that we were plentiful in resources.
 - i. Early property laws were designed to promote labor.

Popov v. Hayashi

- 8. Video shows baseball landing in Popov's glove, then a melee, and then Hayashi ends up with it. Who's ball is it?
 - a. Popov's argument is that he put the productive labor in to figuring out where to stand and brought a glove. He clearly possessed it before the melee. Siding with him might create a rule to discourage further fights.
 - b. Hayashi would say Popov touched it, but he never truly possessed it. And this rule wouldn't stop fights because there won't normally be a camera making it clear where the ball landed. He had last/final possession, which was the Pierson v. Post ruling. And is also a rule that avoids litigation
 - c. The court rules that the ball be sold and the profit split between the two.

Finding and gifts

- 1. A owns something. B comes into possession of it. Who owns it? What legal protections does the 2nd owner get?
- 2. Chattel : movable property
- 3. Real property: land and fixtures upon the land
- 4. Classic case: Armory
 - a. Kid chimney sweep finds a ring. He takes it to the jeweler who takes the jewels and won't pay the kid or give them back. Sweep wins in court because the finder wins above all others except the original owner.
 - i. Relativity of title: earlier finder wins. Why? Want to protect possession.
 - ii. Ownership is difficult to prove, so recognizing possession is a cheap and easy way to avoid complicated questions about ownership.
 - iii. Law has to choose between bonafide purchaser and original owner. Pawn shop type purchasers take a chance because the original owner could come back and take it from them (assuming they weren't the ones who sold it)

Hannah v. Peel

5. Issue: Who has superior claim to property found on someone else's land/property?
 - a. Hannah is the finder and Peel is the locus (location) owner.
 - b. Finders law: **McAvoy v. Medena**
 - i. Guy finds lost purse, gives it to shop owner to wait for claimant to come back. Never does. Court gives it to shop owner.
 - ii. Court creates 3 distinctions for property no longer with the original owner:
 1. Lost – unintentional, but no one is coming back for it. Finder has top ownership, second only to original owner.
 2. Mislaid- someone could come back for it, because it's in a specific location. Locus owner needs to keep it, because if original owner ever comes back, they need to be able to find it. But this creates an incentive to the finder not to turn it in...
 3. Abandoned – deliberate. Once abandoned, you lose all future claims to it.
 - iii. Problem is, you don't know who owned it, or their original intent...
 - c. In the US now, most states have statutes that are based more on time periods/giving items to the police, than based on the lost, abandoned, misplaced dichotomy.
6. When giving people things, need both Intent and Delivery to make the transfer legally official.
 - a. Intervivos : a gift that you give while you're alive. Once property shifts, it's done. Can't demand it back. Promising to give someone something when you die is not intervivos..
 - b. Bailee: someone temporarily holding your property, no rights to it though. Ex: valet and car
 - c. Gift Causa Mortis: common law. Gift on death bed and only happens if you actually die. Courts are very strict about this.

Newman v. Bost

7. On his deathbed, an old man says everything in the house now belongs to Newman. He doesn't physically hand her anything. Among the things Newman says she now owns is a life insurance policy, the contract of which was sitting in a desk drawer in the room where the man died.
8. The court looks strictly at intent and delivery. There may have been intent to give Newman the life insurance policy, but, if that's the case, he could've physically delivered the piece of paper to her, and he didn't. So she doesn't legally get the life insurance policy.
 - a. She does get the furniture in her room, because placing it in her room counts as delivery, but she doesn't get the rest of the house's furniture, since there was no symbolic delivery.

- b. The court rules narrowly to help prevent estate fraud, because it's hard to prove what a dead man really said or meant.
- c. So the dying man could've/should've been more explicit with constructive delivery. Said, I want you to have the bed, the piano... and given her more symbolic delivery. Ex: a sheet of music for the piano.

Discovery

Johnson v. M'Intosh

1. Question is: Who has superior property claim to this land – Johnson, who inherited it from his father, who bought it from the Native Americans, or M'Intosh, who received it from a US government grant, who had taken that from the UK crown?
 - a. In this case, Johnson had it first, but that doesn't matter if the Indians didn't have the right to sell it in the first place.
2. Basic Property Ideas
 - a. 2 ways to divide property: Metes and Bounds – ex “from the rock to the tree to the stream is your land. Or Euclidian :from this geographical specific point
 - b. Chain of title: who has the superior original title. In this case, Johnson's title originated with the Indians and M'Intosh's can be tracked to the US government.
 - c. Quiet title: when there are multiple claims to land, one of the claimants goes to court and says ‘I want to quiet the title. Here's my claim...’ the court then advertises the claim for a period. If no one else comes forward, the case is closed and the man who came forward gets it.
 - d. Title registry: once title is given, its recorded. Once that's established, no more debate over who owns what
3. Discovery: Back during colonial times, the European nations divided up land with this idea: when someone “discovers” land first, his home nation gets it. Discovery ignores Native Americans as discoverers.
 - a. The US claimed all of England's former rights to this land when they became independent. So, the NAs never had the right to transfer that land, so they couldn't have given Johnson's dad the land in the first place.
4. Marshall justifies the Indians not having the right with a pragmatic argument, saying this is how it's always been. Custom, settled expectations, investment... Courts are unlikely to rule in a way that can't be enforced, and the US would never enforce something that invalidates the nation's claim to land.
 - i. Classic example of legal realism. Marshall says policy considerations > legal argument.
 - b. Labor Argument: Great Britain put labor into the land. To give land to the NAs would leave land in wilderness. Their labor is unproductive. They don't farm (which is Marshall's idea of productive labor)

- c. Equity/Distributive Justice: NAs don't lose all their sticks, they have use, fruits, etc. But the US gov't holds the right to extinguish these rights at any time. Those are its conqueror rights.
5. Protecting private property enhances and expands liberty. The 2 are linked. You expect rights are being applied equally in democracies and property is key. Control of property is a type of power. If you control property, you can make demands on people – on those who need your property/the resources from it
 - a. Example: Nazi laws against Jews holding property. This is a classic move by restrictive governments. One of the 1st things you do to hurt a minority is take their property.
6. **Economic theory of diffusion:** if the state owns everything, it can make demands on people in exchange for jobs, food, a place to live... so far every democracy has been capitalistic because that allows for alternative sources of power beyond the state.
7. Once people have property, you can have a middle class with time/resources to demand more rights, because you have somewhere to protect and stand. (?)
8. Middle class tolerance: You're likely to be tolerant if you have a lot to lose. As the income gap widens, you have less stake in the system, and get angrier.
9. Distributive Allocation: large parts of the world (China, a bit of India) are going through capitalist changes. How will this turn out?
10. Big picture: property rights are about power. Curtailing property often = constraining rights. Property allocation/rights determines society.

Capture, Oil and Water

1. Underground deposits of oil, natural gas, etc. Problem with who gets to "suck" it out. Problems with drainage.
 - a. Some people would "slant their straws to get to deposits on other people's land.
 - b. But also, these underground reservoirs are HUGE. So you don't have to slant your straw, you could just drill straight down on your own property, but this would still effect other people's properties too.
2. 3 main types of oil traps:
 - a. Fault: oil gets trapped along a geographic fault in the earth
 - b. Anticline: most common. Occurs where impermeable rock is folded upwards, becoming inverted bow shape. (like underground, imagine a cartoon mountain, the oil is where the snowy peak is, that the peak touches right along the surface of the ground)
 - c. Stratigraphic: sand layers
3. Courts like the idea of fereā naturae: oil/water/gas as wild/natural aka a public resource. But we've realized this would cause too many conflicts.
 - a. It would encourage oil drilling, because everyone's just going at it at once, because if you don't other people will get to it first

- b. SC ruled that their oil/gas are NOT public resources. They're private property.
 - c. So now the rule in some/most states is that wells have to be spaced a certain amount away. This helps limit how much oil is in the market. Also helps keep the price high and prevents waste.
4. Split estates – mineral deeds
- a. Bundle of sticks – you can just sell the minerals on your land and keep the surface land.

Rights that the person who buys mineral rights:

- b. Right to use as much of the surface as is reasonably necessary to access the minerals.
- c. Right to convey rights (the person who buys your mineral rights can sell it to someone else)

These are the rights you can keep when you sell the mineral rights:

- d. Right to receive bonus consideration
 - i. An upfront payment
 - e. Right to receive delay rentals (if you want royalties, but the company isn't planning on fracking/drilling yet, you can make them pay you until they start, and then once they do, they stop paying you and you receive royalties instead)
 - f. Right to receive royalties
5. Forced Pooling aka Unitization (not in every state. Became semi common by the 1930s)
- a. A little bit like eminent domain for gas/oil drillers
 - b. Forced pooling compels holdout landowners to join gas-leasing agreements with their neighbors. The specific provisions of the laws vary from state to state, but drillers are generally allowed to extract minerals from a large area or "pool"--in most states a minimum of 640 acres--if leases have been negotiated for a certain percentage of that land. The company can then harvest gas from the entire area. In most cases, drillers aren't allowed to build surface wells on unleased land, so they use horizontal wells or other means to collect the minerals beneath those parcels.
 - c. State commissions can designate areas as drilling units
 - d. Rights of leased vs. unleased landowners will vary considerably
 - e. Basically, the gov't takes the pool of oil or gas and divides up the profits from developing the pool in proportion to surface ownership
6. Running water is different
- a. Much older history of historical development
 - b. Long held principle that running water is public and belongs to no one. US system holds this as true
7. Groundwater (in the ground, like well)
- a. Valuable drinking water to many areas without adequate rainfall

- b. Groundwater can be thought of as rainfall savings over millennia
 - c. Depleted due to over pumping
 - d. Different states regimes
 - e. Restrictions on use –
 - i. Correlative rights (only in CA)
 - ii. Restatement of torts (take as much as you want so long as it doesn't hurt someone else's use)
 - iii. Prior Appropriation: first in time, 1st in right. Actual use must be present.
 - iv. Reasonable use (share): more supply than demand, like duke football tickets
 - v. Rule of capture (tag): like lawn seating and people reserve space by touching it. First person to extract it gets it and fuck everyone else.
8. Natural flow: England's rule. We got rid of it/made big exceptions to it
- a. England said you have absolute right to a stream on property, but we said only true unless other people can use it reasonably, even if you own it. Example is Evans v. Merriweather

Evans v. Merriweather

9. If you're fishing, canoeing, "natural" activities, then you can use as much water as you want. If you're using it for artificial reasons, like milling, you have to leave enough water for others to use.
- a. Limited to reasonable use
 - b. Most states have some sort of reasonable withdrawal rule

10. Flowing Water:

- a. In the East, it's reasonable use
 - b. In the west, water is more scarce, so prior appropriation
11. Western water laws
- a. Western areas, like Colorado, over ruled the natural rights and riparian laws. Instead, they said "imperative necessity" – getting there first is what matters in Colorado. Coffin case
 - i. Ownership of kind gives you no water right
 - ii. Water flowing in a natural stream
 - iii. Get the right by taking it and using it beneficially
 - iv. No limitations on place of use
 - v. Actual use must be present – not held for investment
 - vi. In times of shortage, junior appropriators are cut off in temporal sequence (as in later possessors get kicked off 1st, water goes to senior possessors)
 - 1. Cardozo's justification : better for 1 or 2 of you to get enough than for no one to

Accession

1. Accession: an unclaimed/contested resource is allocated based on another resource you own
2. Doctrine of Increase: what happens when your cow goes to someone else's land and has a calf? Person who owned cow keeps calf.
3. Doctrine of Accession: What happens when someone in good faith takes your property and transforms it?
 - a. Standard based on labor, good faith.
 - b. The 2 standards:
 - i. If improvements are made in good faith and substantially transformed, then you get to keep the thing.
 - c. Ex: Weatherbee v. Green
4. Traditional view: property remedy = title shift. More equitable solution is to shift title but also have the person pay for taking the title. So even if you lose, you get compensated
5. Ad coelum: traditional rule is that you own your property to the edges down all the way and up → from the center of the earth to the sky.
 - a. Edwards v. Sims
 - i. Majority: Sims(?) can get a survey done on the cave because it might extend onto his property, it's not trespassing to use the cave entrance that Edwards.
 - ii. DISSENT: If you have an underground cave that you dug into on your land, but underground, it extends to other people's lands, then labor is the key separator. You get, because you dug the entrance.
6. Both of these are based on keeping settled expectation:
 - a. Accretion: a river changes gradually. traditionally: rule says ex: state line is midpoint of channel/river. But as river bank changes, your property does as well. Accretion says things move, deal with it. You know the river shifts, so you'll probably invest away from the river bank.
 - b. Avulsion: a river changes suddenly. if there's a sudden shift, then you get to keep the line the way it was before, because you couldn't have predicted the change and behaved in an anticipatory manner.
 - i. Ex: Nebraska v. Iowa

Adverse Possession

1. Adverse possession is very formulaic. If elements are met, it's yours. If not, no.
2. Classic way this arises:
 - a. Ejectment action: ex: come home from vacation, a squatter is living there and says it's his by adverse possession. You have to go to court, despite the fact that you're the owner.

- b. Quiet title: you're the squatter trying to get title, hoping/assuming the real owner is so neglectful of his property that he doesn't notice/fight to show that he has deed to the land.
 - i. Color of title: you have a document for a title, you're operating under good faith and think it's your property, but it's not actually a good title for some reason. Maybe title is defective, forged, never had the right to buy it...
- 3. Adverse possession is like statute of limitations in that, at a certain point, you can lay claim to a title.
- 4. 2 types of possession: actual v. constructive
 - a. Actual: legit title
 - b. Constructive: you just have color of title, but meet the other requirements
 - c. Color of title will not trump actual unless you have the other elements of adverse possession.
- 5. !!! Elements of Adverse Possession:
 - a. Statutory period - have to be possessing it for a certain period of time
 - i. A couple things that alter this time period:
 - 1. Tacking: A **claimant** (adverse possessor) may tack on time with a predecessor's time if there is privity between the two adverse possessors. Ex: someone who is adversely possessing land sells to someone unaware that they only have color of title, the time the current and previous owner lived there can be added together to fulfill the statutory period
 - a. Hypothetical: A adversely possesses B's land for 10 years. A leaves and immediately C takes over. In most states, this isn't tacking. A would need to sell to C for tacking.
 - 2. Tolling: The time period that someone would need to be adversely possessing the property is tolled (aka extended), if the **owner** (not the adverse possessor) has one of the following disabilities: incapacity, infancy, or imprisonment.
 - b. Actual possession: have to literally be there
 - i. Key point is how is the real owner supposed to know you're possessing the land? If you're literally there using the land, then the owner has the opportunity to realize and, if they want their land not to be adversely possessed, they can intervene.
 - ii. Productive activity- want useful use. No explicit requirement for this, but the assumption is that actual possession is more productive than leaving land alone.
 - iii. Notice is an implicit requirement. Owner needs indication that something's going on.

- c. Exclusionary possession: ex: the real owner can't be possessing it simultaneously
 - i. If everyone is using it, no one owns it. If everyone recognizes it as yours, and you alone use it, then you have the authority to exclude others, which is ultimately what you get if you win title by adverse possession.
 - d. Open and notorious possession
 - i. Neighbors know. Owner had the opportunity and could have known you were on their land.
 - ii. In western states, this means you pay property taxes too.
 - e. Continuous
 - i. Use property like an ordinary person.
 - ii. If it's a vacation home, it's expected that you only use it in the summer, so that's ordinary possession.
 - iii. Tacking and tolling affect this too
 - f. Hostile with a claim of right (Ex: real owner can't be letting you stay there)
 - i. If you adversely possess land it has to be hostile. The owner can't be ok with that.
 - ii. Aka adverse under claim of right: If it's permissive use, you don't get possession claim.
6. Adverse possession seems counter to the whole point of property law, which is to secure possession.

Mannillo v. Gorski (1969)

- 7. Mannillo owns a lot. Gorski owns a neighboring lot. Gorski builds additions that stick into Mannillo's lot, Mannillo claim trespassing, Gorski uses quiet title.
 - a. Court focuses on whether it's open and notorious and hostile. Did Gorski just think their property line was further over? Or did they think let's trespass even though we don't own that land?
 - b. !!!!!!! Connecticut doctrine says = doesn't matter if they knew or not, they were there for awhile, it honors that.
 - i. Ex: *Mannillo v. Gorski*
 - c. Court needs further information, so new trial.
- 8. Normally with adverse possession, you don't pay the original owner of the land

	Property	Liability Rule
Mannillo	Get stoop	
Gorski	Keep stoop	Get the property, but pay Mannillos 1/2 the settlement *court ends up here

- 9. Court moves from shifting property to property AND liability
- 10. Boundary of Disputes

- a. Doctrine of agreed boundaries: we sign an agreement saying this is our property line. If later, a survey shows we're wrong, it doesn't matter. We've signed it. It's done.

Adverse Possession – What can be adversely possessed?

1. Permissive Use: defense against adverse possession.
2. Adverse possession works against leaving land undeveloped – 18th/19th century mentality of promoting development.

Devins v. Borough of Bogota

3. Court races idea of nullum tempus through time. But ultimately rules that nongovernmental lands owned by state/local government can be adversely possessed, at least in NJ. But you can't adversely possess federal government's land.
4. Notion of institutional competency: are judges the best ones for the job? In this case, are judges knowledgeable enough about land in NJ to essentially make law like this.
5. Adverse possession: explicitly related to real property. Can't adversely possess chattel. So how do we talk about not real property?
6. You can't adversely possess federal gov't's land. Most states don't let you adversely possess state gov't land either. But in NJ you can.

Local 1330 v. US Steel Corp

7. Unions (and senator and attorney general) suing because Steel Corp is going to close and the town is dependent on it.
8. Contract theory behind this = you can have oral agreement/contract that, if people rely on it to their detriment, it is binding.
 - a. So employees say Steel has been there, probably since the town was founded. The town depends on them, to their detriment, because it would ruin them if Steel left.
9. Plaintiffs want court to force Steel to help them preserve the community, saying Steel has the "stick" to transfer, but with conditions to help.
10. Court says if people did rely on it to their detriment, it wasn't reasonable to do so. Moreover, the property right at stake here isn't clear.
 - a. Court says we wish we could help but there's no rule/precedent that would allow them to do anything.
11. Hohfeldian Idea that property is in relation to other rights. Property rights can be relational, not absolute
 - a. You get rights: these are enforceable by the state against others.
 - i. Ex: trespassing = enforcing exclusion
 - b. Duties: for every right, there's a correlative duty. If I have the right to exclude, others have the duty not to trespass.
 - c. Privileges: permission/ability to act without interference

- i. Ex: sell your house. You don't have the right to stop me from selling or a duty to buy the house though
 - d. Quasi-Property is a euphemism for there's no property. Hohfeldian offers a better, more nuanced idea of property.
- 12. Local 1330 would say the Steel Mill has the *right* to see the company, but your corresponding *duty* is to not leave the town in ruins.
- 13. At what point does art, because time has passed, become someone else's?
 - a. Nazis – took a lot of art from museums and from conquered/attacked people like Jews. Some pieces were sold, but it was probably under duress.
 - b. Lord Elgin's Sculptures
 - i. Elgin, an English man, got a pass from the Ottoman Empire saying he can take anything. He takes a ton of sculptures and later sells them to the British Museum in perpetuity.
 - ii. In 1830, Greece asks them for them back.
 - iii. 1974 –Revived Greek democracy and fervor of sculptures is back.
 - iv. Elgin Marbles: potential claims to ownership = greek government, british government, british museum, all of western civilization (common heritage of mankind – some resources are so universally important that they actually belong to everyone)
 - 1. No one's used the term adverse possession, but that's the idea here.
 - v. 2 different property ideas conflicting:
 - 1. Personal right: you have all the sticks v. Humanitarian View: property is too precious for you to have all the sticks
- 14. Statute of limitations: statute for art theft. After a certain time, there are going to be innocent purchases of previously stolen art
 - a. A case in NY said the statute of limitations for stolen art starts when the original owner knows the location of the stolen art
- 15. In practice, this is usually how it works = owners get either paid for it or agree to long term loan. Or country takes art back and gives replacement piece instead.
- 16. In US native American artifact protection statutes: unless museum can prove they had permission to take art, art goes back to tribe or direct descendent or original owner.

Property in Person

- 1. One of the big theories of why some people get scarce resources and others don't.
- 2. Today: tort and property and how they intersect.

Moore v. Regents of University of California

- 3. Facts: Moore has special white blood cells.
 - a. His doctors don't tell him, take a lot of blood, marrow, etc. make him come back for years.
 - b. Dr. makes money off of discoveries based on his blood.

4. Cause of Action: 1. Lack of informed consent
 - a. 2. Tort of conversion – wrongful exercise of ownership over the personal property of another
 - i. That means Moore’s lawyers have to show he owns his cells.
5. Counter argument: 6
 - a. There’s no law saying you own your cells. = no property right for Moore
 - i. Counter argument: just because there’s no specific law doesn’t mean there’s nothing broader
 - b. No expectation of property right – he abandoned his cells
 - c. Human ingenuity is what led to the dr. making money
6. California statute says you don’t own your cells once they’re out of your body.
 - a. The idea seems to be moore only owns them while theyre in him.
7. Accession: Drs changed cells they took from him substantially
 - a. But maybe Moore should still be honored for original contribution
 - b. Security of Body/property rights is a significant counter consideration
8. Lockian theory’s application here: labor for Moore – it’s his body, everyone you create comes from the fact that you own your body. OR Dr’s labor is what made the cells important
9. Dissent says he used Moore transfer stick, but kept the rest. The resource wasn’t his, but he still had rights to it.
 - a. Points out incongruity b/w UCLA saying you can’t own your cells once they’re out of your body but we can

Personhood Theory – Margaret Radin

10. Spectrum of resources:
 - a. From FUNGIBLE --→ Personal
 - i. Fungible ex: money
 - ii. Personal ex: your body
 - iii. Wedding ring falls on spectrum towards your body
 - b. Key idea of personhood is that market value is not enough to compensate for some personal items
11. Tragedy of the anticommons: too many property claims

Elvis Presley International Memorial Foundation v. Elvis Presley Enterprises, Inc.

12. Facts: Int’l Memorial wants to raise money for a trauma center
 - a. EP Enterprises wants to raise money for fountains at the mall
 - b. International wants Enterprises to stop because they’re tricking people with that name. so the Q is who controls the name to a dead person.
13. Court uses ‘if it looks like property, it’s property’ argument.
 - Holding: The right to publicity is a descendible right.

- Elvis Presley's right of publicity survived his death and remains enforceable by his estate and those holding licenses from the estate.

Intellectual Property – Ideas

1. IP Law: entirely a legal fiction. Gov't is trying to provide you with a sense of property because if you control your ideas, you'll make more, because they're secure.
2. 4 types of IP law:
 - a. Copyright
 - b. Patents
 - c. Trademarks
 - d. Trade secrets
3. **INS v. AP**
 - a. What is it about the news that gives you intellectual property?
 - i. 3 things court's dealing with: form (how was it expressed)
 - ii. Content (facts)
 - iii. Competition (what's the nature of the industry)
 - b. Court says INS' telegraph is disruptive, but we should wait and see what happens
 - i. Effect like the internet
 - c. Like the Keeble case, we're not saying Keeble owns the ducks, like AP doesn't own the news, but instead focus on quasi property rights.
4. **Downey v. General Foods Corp 1972**
 - a. Downey comes up with the idea to use the word wiggley. Sends idea to GF, then sees GF using the idea without paying him.
 - b. GF said they hired an add co who came up with the idea before Downey and developed it independently.
 - i. 1. First possession of the idea
 - ii. 2. Jello wiggles is something anyone can come up with = not special enough for ip protection. Too obvious
 - c. We protect ideas to generate novel things, not obvious ones
5. Justification for Property Rights
 - a. Labor
 - b. Personhood
 - c. Distributive Justice
 - d. Efficiency
 - e. Utilitarian
 - f. Custom/expectations

Photocopying Copyrighted Materials

1. Copying: for most of human history, was hard. In the 1960s photocopy tech changes it. How do courts deal w/ disruptive tech?
2. **Williams & Wilkins Co. v. US 1973**
 - a. NIH and NLM have stores of journals and docs and they'll make a copy for you upon request
 - b. Publisher says the copyright law of 1909 gives them the right to exclusive copying
 - c. Court and NIH say there's a fair use exception
3. 4 factors to determine whether something is "fair" use or unfair use
 - a. The purpose and character of the use

- i. Transformative can outweigh it being commercial, like with the parody song
 - b. The nature of the copyrighted work
 - c. The amount and substantiality of the material used in relation to the copyrighted work as a whole
 - i. How much you need depends on the purpose
 - d. The effect of the use on a copyright owner's potential market for and value of his work
4. NIH doesn't make copies for profit but for research. If they rule against NIH, they hurt research advancement of medicine
 - a. Policy driven result

AGU v. Texaco 1992

5. Texaco is making copies of AGU's work for research. AGU says that's infringement
 - a. Court says fair use isn't in play b/c it's for profit, not pure research
 - b. Plus there were other ways of going about getting legal copies, no concern, like in Wilkinson, of disrupting research
6. 3 things you need for copyright:
 - a. Originality
 - b. Fixation (written down somewhere, published)
 - c. infringement

Intellectual Property – Case Study

1. IP v. real property
 - a. There's no scarcity in IP. Also, nonrival and nonexcludable (means it's a public good).
 - b. IP builds on other people's IP. You need IP to make more IP.
2. **Campbell v. Acuff-Rose**
 - a. If something is commercial or not is only one factor. If it is a transformative work, then that makes its commercial nature less important.
 - i. Transformative – adds something new with a further purpose or different character, altering the 1st w/ new expression, meaning or message.
 - ii. A parody is something that's making fun of or criticizing the original work. A satire uses the original to criticize something else in it.
3. Perfect 10

Intellectual Property – Patents

I. Requirements for Patents

- A. patent eligible subject matter (prometheus case)
- B. utility (Brenner)
- C. novelty
- D. not obvious
- E. Section 112 (adequate disclosure)
 1. metes and bounds
 - a) shows how to make the things patented

II. Why have Patents

- A. Disclosure

1. but court cynically thinks this isn't very powerful because disclosures may bamboozle the United States Patent and Trade Office (PTO)
 2. patents are really complicated
 3. disclosure is in the patent itself
 - B. Incentive to make more information
 1. have property rights in information to incentivize people to expend resources to create it
 2. hard to create but useful to all
 3. and incentive to commercialize further and make money on your patent
 - C. Patent trolls
 1. get patents and then try to take money from those who try to commercialize the thing
 - a)** google
 - D. Adverse Possession
 1. no real rule requiring person to work the patent ever if it is not used
 2. doesn't allow for adverse possession
 - E. Race
 1. one person makes it and can commercialize it or license it
 2. solution to efficient distribution of resources
 3. licensing is good because it is a coordinating relationship
 - F. Mutually assured destruction
 1. so many patents in smart phones that they are like nuclear missiles so most companies do not fight this battle because they are are guilt and would be screwed
 2. Jobs started the war with Apple
- III. Rationales for Patents
- A. Traditional public good/“incentive to invent” rationale
 1. Markets for technology (Arrow’s information paradox)
 - B. Kitchian rationales (contra *Brenner v. Manson*, *Prometheus*, which are concerned about “preemption” via patents that are too early-stage/basic)
 1. Incentive to commercialize
 2. Avoid duplicative “races” by giving patents early (tragedy of the R&D commons)
 3. Give broad prospect – prospect owner will license to “highest and best” developer
 4. Doctrinal implications: low standard for utility; perhaps not so much “enablement”
 - a)** E.g. broad patent on all embryonic stem cells (even if owner hasn’t figured out all their uses)
 - b)** Would have given patent in *Brenner*
- IV. Other uses for patents
1. Squash Competitor (“Patent Bully”)
 2. NPE/“Patent Troll”
 3. Mutual Assured Destruction

4. Varies by technology
- V. Common Law Exceptions - Digging Deeper
 - A. Laws of nature (*Prometheus*)
 - B. Products of nature (gene patents and the *Myriad* case)
 - C. Abstract ideas (software patents)
 1. *Bilski v. Kappos* (concern that abstract ideas “preempt” future work)
- VI. Cybersource Corp. v. Retail Decisions
 - A. A method for verifying the validity of a credit card transaction over the Internet comprising the steps of:
 1. obtaining information about other transactions that have utilized an Internet address that is identified with ... credit card transaction
 2. constructing a map of credit card numbers based upon the other transactions and;
 3. Utilizing the map of credit card number to determined if the credit card transactio is valid;
 - B. (no specific fraud detection algorithm)
- VII. Do Patents confer market power?
 - A. not necessarily
 - B. but drug patents do!
- VIII. **You can patent processes, machines, and substances, but not natural processes/things**

Estates in real property and defeasible interests

1. Estates in Land
 - a. Bundle of sticks idea
 - i. Fragmenting property by what can be done with it or what I can be used for
 - b. 2 types of interests
 - i. Servitudes: non-possessory estates and land
 1. Ex: I have the right to cross your land. The right to keep you from doing things: on your land, like preventing me from crossing.
 2. Easements and covenants
 - ii. Possessory: right to use
 - c. Estate: a claim/interest which is or may become possessory over some period of time
 - i. Estates allow the original owner to transfer property but still keep some control by having stipulations/possession “chains”
 - d. When you transfer ownership, 2 types of interests = present (right to use it now) and future (may or may not get to use it in the future. But this is also an interest right now – has present value)
 - i. You can buy someone’s future interest, though it is speculative (you may never get it). So future interests have present value
2. 3 present possessory estates:
 - a. Fee Simple Absolute
 - i. Largest estate. Absolute ownership. You’ve got all the sticks. No other interest out there
 1. It is inheritable, and you can sell/give it

- b. Life estate
 - i. Not as extensive – get it for the duration of your life
 - 1. Ex: O gives property to B, but when B dies, it goes to A. B can only transfer what he owns.
 - 2. Ex: O conveys land to A for A's life. A sells to C, A dies but C is still alive. Land goes back to O. A could only sell land for their own live.
 - ii. Reversion- after life estate/term of years land goes back to O/grantor
 - iii. Remainder: land goes to a 3rd party
 - 1. Ex: O gives to A for life, then to B
 - a. A has life estate. B has fee simple absolute
 - iv. The Doctrine of Waste: future interest holder has rights if life tenant allows permissive waste (ex: not caring for property) remainderman has some claim in this instance and can take action
 - 1. Affirmative Waste: when the life estate owner wants to change the nature of the estate
 - a. ex: O gives forest to A for life estate, then to B. B has future interest.
 - b. Ex: Brokaw
 - 2. Permissive waste: when the life estate owner allows waste
 - a. ex: not caring for property
 - 3. Ameliorative Waste: when the life estate owner wants to change the estate in a way that increases the value, but the
 - a. if A wants to do something that would actually improve the property but if B doesn't want this improvement, B has interest to stop this
 - b. ex: Melms v. Pabst & what Brokaw alleged
 - v. Partition: present and future interest holders of a life estate argue, so they decide to sell the land. Generally sale of the land as fee simple absolute and the division of income between the life holder and future interests holder. Done if judges determine this is in everyone's best interest.
- c. Defeasible Estates: everything that cuts short life possession
 - 1. Think about: 1. Does the title shift automatically or does something else happen
 - 2. Does the shift have to happen if the event occurs?
 - 3. Who gets it after?
 - ii. Fee Simple Determinable : A gets restaurant unless alcohol is served. So O is a possibility reverter, because it may never revert to O.
 - 1. "so long as" "until" "while"– temporal words. requirement on the present interest holder
 - 2. Once condition is met, interest is shifted automatically
 - iii. Fee Simple Subject to a Condition Subsequent
 - 1. Title doesn't automatically shift. The grantor chooses if she wants to make claim to retake the property once the "event" happens. Requires ACTION from the grantor.
 - 2. Not temporal, but conditional wording used. "
 - 3. This is the default if its ambiguous b/w FSD and FSSCS
 - iv. Fee Simple Subject to Executory Limitation (FSSEL): same as FSD, except that interest automatically shifts from grantee to 3rd party
 - 1. Ex: R to E, but if E should use alcohol on the property, then to X

3. CASES

- a. Brokaw v. Fairchild & others (1929)
 - i. G. Brokaw, life estate holder, wants a declaratory injunction saying he can tear down house to build more efficient apartment building. Future heirs say no.
 - 1. Plaintiff is making efficiency argument – more valuable with improvememnt
 - 2. D is making a personhood argument. Brokaw Snr. left a house to his heirs, not a plot of land.

- ii. House is still livable, unlike *Melms v. PBR*. G. Brokaw isn't allowed to tear it down.
- b. *Melms v. Pabst Brewing Co.*
 - i. PBR mansion now stood entirely on industrialized area. It is unlivable. Court says its ok to demolish it.
- c. *Fitzgerald v. Modos*
 - i. F sells to Modos so long as the property is used as a High School. F says its FSSCS, meaning he gets it back now since its not a HS.
 - ii. M says it's a FSA, and they made a promise but that's not binding. YOU NEED TO BE REALLY EXPLICIT TO BE BINDING
 - iii. Court acts in the interest of equity. Fitz should've used more explicit language if he wanted it back.

Future interests in Land

1. Future = what's left over if it's not a FSA.
2. Future Interests in Grantors
 - a. Reversion –residual interest left in a grantor who gives away less than FSA
 - b. Possibility of Reverter – reversion is not guaranteed, only happens if a condition/event is met
 - c. Power of termination: grantor can terminate an interest to enforce a condition subsequent to a grant
3. Future interest for grantees:
 - a. remainder = a 3rd party gets estate immediately after natural end of term of years/life estate
 - i. contingent remainder – don't know if condition will happen/don't know who the heir is yet (like unborn child)
 1. contingent remainder: remainder only occurs if an event happens, but its not certain to happen, or if remainderant is unknown (future born kids)
 - ii. vested remainder = no uncertainty over the identity of the remainderman
 1. indefeasibly vested remainder : no condition that could lead to divestment. Just when you give life estates.
 - a. You know for sure that you or your heirs will get the estate without any conditions.
 2. vested remainder subject to open
 - a. remainder will be divided among people who aren't all here yet, like unborn babies. Class isn't closed
 - b. rule of convenience – when a class gift CAN vest, it must vest. When someone dies, if there are some heirs, like grandkids, they get it and future grandkids don't. if you die and no heirs are born yet, you wait until the class closes (meaning there is 0 chance of any more babies being born)
 3. vested remainder subject to divestment: grant contains a condition that would lead to divestment
 - b. executory interests: future interests (remainder) that cut short someone else's interest

- i. not contingent remainder because it's not following a life estate (doesn't follow the natural end of an estate like the remainders above)
- ii. ex: O to D, unless not used as a library, then to A
 - 1. D = present interest FESSEL

Restraints on alienability

1. Rule Against Perpetuities:
 - a. ONLY applies to executory interest, contingent remainders, and vested remainders subject to open
 - i. idea behind perpetuities is "Dead hand problem." – tension b/w intent and efficiency
 - ii. Estates give people right to restrict property forever. Counter to efficiency argument, but want to honor grantor's intent. So compromise. Estates/interests last 2/3 generations
 - iii. After death, you have to show it either can be used/given immediately or within 21 years, or NEVER.
 - b. So the RULE = no interest is good unless it vests or never vests within 21 years after the death of the life in being (the people who are alive at the time the interest is created)
 - c. Rule against perpetuities problems:
 - i. identify the lives in being
 - ii. kill them
 - iii. see if you can find hypos for vesting either inside or outside of 21 years
 - d. all you need is ONE hypothetical where the rule is violated for you to eliminate perpetuity
2. practice of disclaimer : if you're about to get property, but don't want it, you have the right to refuse property with a written document, then it moves to the next person
3. Trusts and estates: separates the burden of property management from property ownership.
 - a. Person who establishes trust → settler
 - i. Trust document will designate the trustee and beneficiary. Can also limit how trustee behaves
 - ii. Trustee holds legal title, but beneficiary gets the income generated
 - b. 2 types of trust:
 - i. revocable trust: settler can take it back
 - ii. irrevocable trust : tax treatment is better
 - c. 2 reasons trusts are popular
 - i. Avoid probate (hearings to divide estate upon death – taxed heavily)
 - ii. Trust babies – may not trust kids to manage assets, so you give it to a trustee
4. Restraints on Alienability (sale/transfer/ability to be sold)
 - a. Notion that property rights and the ability to restrict its use is not absolute!
 - b. Efficiency is balanced with grantor's wishes

- i. Ex: O gives house to X on condition that X lives in the house and doesn't sell it during his lifetime
 - 1. X has FSDeterminable
 - 2. disables restraint on use and availability. If we got rid of these conditions, x would have FSA
 - c. 3 kinds of restraints. These are all 3 mostly not allowed in the US
 - 1. White v. Brown
 - ii. DISABLING RESTRAINTS (complete prohibition, you cant sell at all) on alienation are presumptively invalid including per se ones.
 - 1. Riste v. Eastern Washington Bible Camp (wasn't literally disabling, but practically is)
 - iii. Forfeiture: if you try to sell the property, then that gives the person who granted you the property power of divestiture or power to give it to a 3rd party
 - 1. Generally valid on life estates
 - iv. Promissory Restraint: the grantor giving the property to you is a contract, so you trying to sell is a breach of contract and so you're liable for the breach.
5. Case:
- a. Riste v. Eastern Washington Bible Camp (1980)
 - i. Riste has to ask Bible Camp for approval before selling his nearby land –meanign he cant sell to anyone outside of their faith. And land can't be used for things camp isn't ok with, like drinking.
 - ii. Court says you're restraining the ability to sell the land, so it gets struck down.
 - iii. Creates a standard that courts can strike down disabling restraints on alienation.

Concurrent Interests

- 1. 3 types of concurrent interests
 - a. Tenancy-in-common
 - i. Multiple people have rights to the entire property.
 - ii. A can sell A's part, but not B's and C's.
 - iii. No right of survivorship – meaning, if A,B,C have tenancy-in-common, and A dies, A's rights don't go to B and C. they're passed on independently
 - iv. Individual person's right can be reached by creditors
 - v. All tenancy-in-common have to split either the natural resource on the land by what their share is or the proceeds you make off the land when the value/amount of natural resource is unclear
 - 1. White v. Smythe – ex of resource being unclear
 - b. Joint Tenancy (**right of survivorship**)
 - i. Multiple people have rights to the entire property, but its created differently from tenancy-in-common.
 - ii. To create a joint tenancy, need 4 Unities. Unity of...
 - 1. Time : interests must vest at the same moment

2. Title (equal undivided shares) : both interests must be created in the same grant and cannot be created in subsequent grants.
 3. Interest: type of interest granted to you have to be identical for each owner. Like both people would need Life Estates.
 4. Possession (right to possess whole): owners must have equal rights/access/use to all portions of the land
- iii. Severance- how you can sever joint tenancy
1. When a joint tenancy is severed, it's transformed into a tenancy in common
 - a. Sever by agreement of all the joint tenant
 - b. Simultaneous death
 - c. Divorce (in most states)
 - d. Through the unilateral act of 1 tenant
 - i. Sale
 1. If A,B, and C are joint tenants and A sells to D, B and C remain joint tenants with each other, but D becomes tenancy in common with them.
 - ii. Involuntary conveyance (bankruptcy)
 1. Same thing that happens in sale happens to the creditor who seizes the land
 2. People v. Nogar
 - a. Putting a lien on a house doesn't sever the interest, but executing it does
 - c. Tenancy by Entirety (4 unities + marriage)
 - i. Only possible in legal marriage, because it requires the 4 unities plus marriage.
 - ii. Unilateral severance is not possible. Can't sell your own share w/o permission of the other
 - iii. But you can have severance by
 1. Death
 - a. Right to survivorship, so your widow gets the whole thing
 2. Agreement
 3. Divorce

Co-tenants

2. Concurrent Interests: what happens when cotenants have conflicts?
 - a. Partition: cotenants can always split up the property
 - i. Draw new lines, sell it, get it appraised and buy other half...
 - ii. Partition is when you can't agree on one of those on your own (?)
 - b. Possession
 - i. Ouster = prevent a cotenant from accessing property. Legal claim because it's not equal. Ousted cotenant can seek injunction and damages

- c. Contribution = cotenant demands payment for incurred cost = taxes, mortgage, necessary repairs...
 - i. Can't demand payment for managing the property or for improving the property (ex: granite countertops)
- d. Accounting = cotenant got some type of income from managing the property, and the other wants some of the money.
 - i. Ex: if you sell more than $\frac{1}{2}$ (your share) of the land, then the other tenant has the right to accounting

3. White v. Smyth

a. Facts

- i. Smyth alleged that they co-owned a fee simple estate with White, including all the rock asphalt in and under the estate.
- ii. White's Mines removed a large quantity of rock asphalt and failed to account to Smyth for their portion.
- iii. Smyth asked that the rock asphalt estate be declared incapable of partition in kind and asked that it be sold and the proceeds divided and that the Whites pay them for the rock asphalt removed.

b. Issue:

- i. How do courts determine whether land can be subject to partition-in-kind?
- ii. When land cannot be partitioned in-kind, how are proceeds from natural resources divided between co-tenants?

c. Holding

- i. Land can be partitioned in-kind if the value of natural resources is of a known quantity and relatively uniform location over the land.
- ii. When land cannot be partitioned in-kind, the non-operating co-tenants do not give up title until the natural resources are disposed of by sale or until there is an established market value for them. Non-operating co-tenant's rights attach to the proceeds, not the value of the natural resource before it was removed.
 - 1. Since the resources aren't all the same, you don't have to exceed your share for the other tenant to ask for accounting
 - 2. Court says you can't just pay back whatever exceeded your share of the rock because the rocks vary in values – maybe better quality rocks/some are easier to get to and those are the ones he took.
 - 3. So instead, for it to be equal - you have to give them 8/9 of your profits.

Property	Liability
Can't take without consent	repay for depletion of more than your share
Can't take more than your Share w/o consent	Divide any profit by tenant shares and repay

Landlord/Tenant Law

1. Leasehold – someone with real simple interest leases real property to a tenant
2. Type of Lease
 - a. Term of years lease – express – must be in writing. Normal lease, for x years/time.
 - i. Statute of frauds = certain agreements must be in writing and signed by party against who it would be charged (tenant)
 1. If violated, agreement is void
 - b. Periodic lease
 - i. Also express. Repeats in periods. No specific term, but so long as tenant keeps paying, and landlord doesn't oust them, the lease term just keeps going.
 - c. Tenancy at will : pay rent as long as you're there. If you stop, you leave. And landlord can kick you out whenever. Not written – oral
3. Dependent covenant –the tenant has to the right to quiet enjoyment and the landlord has the right to terms/rent. If the landlord doesn't provide QE, the tenant is free to breach, vice versa with rent.
4. Independent covenant- if one breaches, the other is not free to breach
 - a. Ex: stove is broken, you still pay rent.
5. How to terminate lease
 - a. Death of tenant doesn't end term of years/periodic lease.
 - b. Eminent domain can terminate lease – usually tenant does get paid
 - c. Destruction of premises
 - d. Violation of statute of frauds
 - e. Breach of dependent covenant
6. 4 tenant's rights
 - a. The covenant to deliver possession →landlord has to give the tenant possession of the land/building.
 - i. Minority rule: delivery is just about giving the legal right to possess the property. Under this rule, the landlord doesn't have an obligation to make sure, say, a squatter isn't living in the apartment
 - ii. Majority rule: possession has to actually be possible. Landlord presumably is more knowledgeable about the situation, thus in a better position to make sure the new tenant can actually move in.
 - iii. Remedies if this covenant is not met

1. Tenant who can't move in under this rule can : terminate lease, go elsewhere, sue for movement costs
 2. Abate the lease, keep it but don't pay, and later sue for consequential damages
 3. Landlords/tenant could come to decision to waive this covenant (unlike habitability)
- b. covenant for quiet enjoyment
- i. traditionally, this doesn't extend to other parties, like neighbors. Increasingly, courts do hold landlord responsible for parties they can control, like other apartment tenants.
 - ii. Some states let tenant void under this covenant.
 - iii. 2 types:
 1. Actual eviction : actually oust the tenant from the land. If this happens, the tenant can terminate the lease or abate the lease and sue for damages
 2. Constructive eviction: something landlord has done substantially effects tenant's ability to quiet enjoyment of the land
 - iv. Remedies:
 1. Tenant may sue for damages, to stop whatever's altering their enjoyment, or to end the lease
 2. Can be used as defense when being sued for rent when you tried to end lease
- c. covenant against retaliatory eviction
- i. in retaliation for tenant doing a protected activity , like consulting a lawyer over housing breach
 - ii. want to encourage violations to be reported – policy argument
 - iii. court's split on how much of a landlord's motivation has to be retaliatory, ex: rent is raised – sometimes sole motivation, others requires substantial reason. Tenant has burden of proof
- d. covenant of habitability
- i. modern doctrine, because before, people wanted the land, not a building on it
 - ii. cannot be waived!!!
 1. Policy concerns about not wanting people to live in slums, plus it negatively affects surrounding area
 2. Not equal bargaining power b/w landlord and tenant
 - iii. People are more transient/don't know how to make repairs today, so if the burden was on the tenants to fix the place, theyd just move.
 - iv. Settled expectations
 - v. Javins v. First National Realty Corp

7. Cases:

- a. Jordan v. Talbot (1961) – specific to CA, which is tenant friendly

- i. Talbot, landlord, is allowed by the lease to lock Jordan out of apartment cause she didn't pay. But the judge says, despite the fact that Talbot entered peacefully, it was still **forcible entry** because the occupant was then excluded from her possessions by force or threats.
 - ii. Forcible detainer – using threat or malice to keep people from their stuff
 - iii. Doesn't matter if the lease permits this, court rules that landlord can not rely on self help.
 - iv. This ruling isn't universal. Most states allow up to unreasonable force for forcible reentry/detainer.
- b. Mitigation Doctrine :
- c. Sommer v. Kridel
- i. Holding: Landlord must *try* to rent out an apartment that the tenant can no longer occupy in order to mitigate costs, rather than act as if the apartment was full and make tenant pay full cost of rent.
 1. This is a new rule that imports some contract doctrine ideas into property
 - ii. The landlord might still end up worse off if the breached contract apt gets re-rented, but the other vacant apartments remain vacant. Only 1 rent instead of 2
- d. Javins v. First National Realty Corp (1970)
- i. Tenants withhold rent because inhospitable, landlord sues
 - ii. Court rules Habitability is an implied warranty in all residential leases and tenants can personally enforce it. Can't be waived.

Marital Property

1. Involved lots of value judgments. Like is marriage a joint venture – they share all property, or is it 2 separate people who keep their autonomy?
2. 2 basic US common law views of marital property upon divorce. Doesn't apply to alimony and child support.
 - a. Community property
 - i. No weighing of standards. Just divide property.
 - ii. Divisible pot = incomes, anything purchased by that income. Doesn't matter who holds title.
 - iii. Excluded – gifts, premarital inheritance, quasi-community property (out of state property held in equitable division states)
 1. Burden of proof is on person NOT wanting to divide assets to show that asset is part of the excluded category
 2. Stock income earnings – if you bought the stock PREmarriage, you don't split the earnings
 - iv. Doesn't take fault into account.
 - b. Equitable distribution:
 - i. Look at what's fair for each person to get. Weighs contributions.

- ii. Ex: Painter v. Painter
- 3. 3 different categories of payment from divorce
 - a. Alimony –on going payment
 - b. Child support
 - c. Marital property division- unrelated to the above 2.
 - i. In most states, gifts and inheritance are separate. Income division is the main thing “in the pot”
- 4. Women are more likely to be poor post divorce. Their standard of living declines; men’s increase
 - a. Women keep kids. Alimony/child support isn’t enough to offset the cost
 - b. Lower earning potential – either she has to work part time to care for kids, or premarriage, she didn’t work and therefore has less job training/experience
- 5. Most states do not monetize professional degrees. NY does, and Cali gives you ½ back of your out of pocket expense spent on training
 - a. Ex: Graham v. Graham – don’t count professional degrees
- 6. Prenuptials
 - a. Exceptions to prenups being valid:
 - i. If it was involuntary – high standard. Need to have used something like blackmail or extortion to count
 - ii. Unconscionable: shocks the conscious – also a high standard
 - iii. Lack of Adequate knowledge: one partner didn’t know the other’s full assets/debts
 - b. Should the default be to assume prenups are valid or invalid if unclear?
 - i. Pro valid:
 - 1. Supports certainty
 - 2. Provides exit strategy; both parties know where they stand
 - 3. Supports autonomy: let each couple decide for themselves how their divorce will be
 - ii. Pro invalid: often young when prenups are signed, assets change by divorce time
 - 1. Often an imbalance of knowledge – legal or otherwise, between the 2
 - c. Prenups CAN’T negotiate around child support
 - d. Generally alimony is negotiable
 - i. In some states you have to pay if to not pay alimony would put the spouse below the poverty line.
- 7. Unmarried/ Same sex (not married) couples
 - a. Marvin v. Marvin
 - i. In Cali, partners in a nonmarital relationship can bring claims for property division based on express and implied contracts
 - b. Baker v. State
 - i. Vermont – not letting gay people get married violates the common benefits clause- you get access to a lot of property benefits if you can get married.
- 8. Cases:

- a. Painter v. Painter (1974)
 - i. Dispute about whether assets received/gained during the marriage are marital property.
 - ii. Holding: All property, regardless of its source, in which a spouse acquires an interest during the marriage shall be eligible for distribution in the event of divorce.
 - iii. Any property owned by a husband or wife at the time of the marriage (and any value it gains during the marriage) will remain the separate property of such spouse and will not qualify as an asset for distribution.
 - iv. All property (even gifts, bequests, or property from devise or descent) acquired during marriage will be distributed.
 1. The statute on its face calls for this.
 2. Acquired by is the key word that sets up this interpretation.
 3. The results of taking the opposite stance would be unjust.
 - v. THIS IS OVERRULEDDDD
- b. Graham v. Graham (1978)
 - i. Ms. Graham paid 70% of couples expenses during marriage. Mr Graham got engineering and MBA in business degrees during marriage. His income potential is higher than Ms. G
 - ii. Ms. G wants some of his future earnings, because she supported him while he went to school.
 - iii. Court says education isn't property- doesn't fit any of the normal property definitions.
 1. Plus there's a practical difficulty in monetizing future earning capacity

Easements

1. 4 types of nonpossessory interests
 - a. Easements
 - b. Licenses (revocable permission to go onto someone else's property)
 - c. Real covenants – run with the land
 - d. Equitable servitudes –run with the land
1. Easement – nonpossessory interest. You don't own the land, you own something you can do with the land
 - a. A permanent right, either to enter or control the property of another
 - b. Not a bundle, just a twig
2. Either Affirmative or Negative
 - a. Affirmative easement: permits the holder of the easement to use someone else's property
 - b. Negative easement: holder can prevent property owner from using property in a certain way
 - i. 4 common law negative easements

1. Light, air, lateral support, and flow of an artificial stream
 - ii. Any other negative easements originate from specific state statutes
 1. 50 states have conservation easement
 3.
 - a. Dominant Tenement : one with the benefits of the easement
 - i. Ex: I can walk on your property
 - b. Servient estate: land that is burdened by the dominant estate
 - i. Ex: someone can walk on my property
 - ii. Always attached to their land
 4. Appurtenant v. In gross easement
 - a. Appurtenant easement: easement tied to the land.
 - i. The person with the dominant easement only has that easement so long as they keep their land. Ex: if you have an easement to walk across someones yard to get from your house to the road, you lose that easement if you move elsewhere. Its not attached to you, its attached to the house that had no access to the road
 - b. In gross easement: it's attached to a person, separate from any land.
 - i. Ex: someone owns the billboard, but not the land it's on, and it has nothing to do with where the billboard owner lives. Power lines, sewage pipes etc.
 - ii. In many states, must be commercial.
 - iii. Always dominant
 5. The scope of an easement isn't always fixed, it can evolve to prevent inefficiently locking in an old use. Courts can broadly interpret the intent by looking at the function of the easement in order to make it more efficient/update it
 - a. Ex: easement for railroads can be viewed as "for transportation," meaning street cars are ok. Or easement for canals also becomes for transportation.
 6. Creation of easement:
 - a. Express easement: most common and straight forward. Written.
 - i. To be valid, as to describe the interest and be signed by servient estate holder.
 - ii. Grant or reservation
 - iii. Developers dedicate easements for roads/sewers, etc. to the city for public use when they build
 - iv. Faus v. LA
 1. Purpose of easements are adaptable with contextual change
 2. Also ex: Venice canal
 - b. Conservation easements
 - i. By statute
 - c. Easement by prescription
 - i. Allows used to obtain property from another because of prior use
 - ii. 5 requirements for easement by prescription:
 1. Actual use
 2. Open and notorious

3. Continuous (not the same as adverse possession – doesn't have to be every day)
4. Under claim of right and adversely – without permission
5. Meets the statutory period
- iii. The use doesn't need to be exclusive; key difference between this and adverse possession rules.
- iv. Use specific
- v. Way to stop a prescriptive easement on your land – stop the clock
 1. Ex: give permission to use your land 1x a year, have to start over statutory period
- vi. Finley v. Botto
 1. The use was permitted, so he doesn't get an easement
- d. Easement by implication
 - i. Arises when 1 piece of land is divided into 2 or more plots.
 - ii. Must be reasonably necessary
 - iii. Either an implied grant – from original owner to subsequent owner
 - a. Ex: a grants land to B and B needs an easement across B's land to get out
 2. or reservation – original owner reserved it for themselves
 - a. A sells land to B but reserves an easement across the land for himself
 - b. Courts are skeptical of implied reserved easements
 - iv. Court has to decide if, had the parties talked about this, this is what they would have decided
 - v. By necessity or by prior use
 1. Was intent to continue use
 2. Necessity is always about accessing a public road
 - vi. **Required conditions for prior use easement:**
 1. **Land owned by one person**
 2. **Land severed/subdivided**
 3. **Perseverance, need for the easement was apparent, continuous and permanent**
 4. **Reasonably necessary**
 - vii. **Required for easement by necessity**
 1. **Land owned by 1 person**
 2. **Land subdivided**
 3. **One part of land becomes landlocked**
 4. **Most require absolute or strict necessity before granting an easement for a driveway/to get out**
 - a. Ex: Reese v. Borghi
 - i. Even though they landlocked themselves, they get an easement

- e. Easement by Estoppel: 1 person makes a promise to another. That person relies on the promise to their detriment. The easement is granted to maintain justice.
 - i. Uncommon
- 7. How easements expire:
 - a. Expiration: simplest. Either the time limit expires, or, with an easement by necessity, it becomes no longer necessary
 - b. Dominant estate terminates: (Servient cant do this)
 - i. by release – writes that it's no longer valid
 - ii. Abandonment: must show the intent to abandon. Don't need reliance to abandon
 - 1. Intent to abandon:
 - iii. Estoppel: dominant estate's words/conduct show they no longer use the easement, and the servient estate relies on this. The promise is enforced by cancelling the easement.
 - c. Owner of servient tenement ends it
 - i. By merger : buys the dominant tenement
 - 1. Or just buys the easement
 - ii. Prescriptive : either argue the dominant abandoned it or by prescription (like adversely possessing it back from the dominant estate)
 - 1. Ex: there's an easement across your land that no one uses. You build a barn there. Eventually, you can argue that it's yours.
 - d. Eminent domain: 3rd party terminates

The Public Trust Doctrine

- 1. Only applies to states
 - a. Applies to title lands for specific commercial use of land, like navigation, fishing etc.
- 2. 3 TYPES:
 - a. Diversion of Natural Resources
 - b. Alienation
 - i. Illinois Central RR v. Illinois
 - c. Access
 - i. Matthews v. Bayhead
- 3. Rediscovered in the 1960s to put forth different environmental goals.
 - a. The legal basis for the doctrine is lacking. It's not common law, because common law can't strike down legislative statutes and this does.
- 4. Idea is that some land, especially water ways, belong to no one and exist for the people as a whole. To manage this, these lands are put into a trust for the people and the state/government manages this trust for them. That means they can only lease this property, not transfer, and even then, only if its for the good of the public or in a way that doesn't interfere/improves the public's enjoyment
 - a. Ex: you can build a pier

- b. Also maybe not exclusive to land, might/does? include air as well.
 - c. Ex: Illinois Central R.R. co v. Illinois
5. Public should have access to land placed in public trust
- a. Not a universal doctrine, but in a NJ case, a quasipublic body had to allow access to nonpaying members onto their property, because otherwise, there was no practical way for the public to access a large stretch the wet sand and beach, which are public lands.
 - b. Court does not say how this would apply to the average home owner
 - c. Ex: Matthews v. Bayhead Improvement Association

Real Covenants

1. More nonpossessory titles to land
2. Real Covenants
 - a. Zoning by contract. They go further than zoning though; that's why they're useful.
 - b. Became popular with suburbs in 20th c.
 - c. Many operated to restrict who can buy – noxious covenants
3. 4 types of nonpossessory interests
 - a. Easements
 - b. Licenses (revocable permission to go onto someone else's property)
 - c. Real covenants – run with the land
 - d. Equitable servitudes –run with the land
4. Like easements, they can be dominant or servient, but they're called benefitted (uses burdened in a certain way) or burdened
 - a. A fence divides property, but the burdened estate takes care of it
5. Covenants can be negative or affirmative, but negative is more common.
6. Differences b/w covenants and equitable servitudes apart
 - a. Equitable servitudes are easier to form than covenants
 - b. ES – when broken you can get an injunction
 - i. More common today because most people want injunctions over just money
 - c. RC – can only get monetary damages.
7. Requirements for a Real Covenant ;
 - a. Intent (you want it to run with the land)
 - b. The nature of the promise touches and concerns the land
 - i. If the covenant makes your land more valuable, or if it changes the legal obligations/status of your land, then it touches and concerns the land.
 1. Ex: A HOA wanting money to fix sidewalks and stuff does touch and concern the land because it improves your property value to have fixed up surroundings.
 2. Ex: Neponsit v. Emigrant
 - ii. Eagle enterprises v. Gross – not a covenant. Just a promise
 - c. Need privity of estate
 - i. 2 different kinds of privity:

1. Horizontal : B/w you and the person you're making this covenant with
2. Vertical: vertical privity between person selling land and person buying it
 - a. Need to convey the same interest – if you have a FSA but transfer a life estate, there's no covenant on the person with the Life estate.
 - ii. Must be created at the time of conveyance of the interest in the land that is BURDENED.
 1. Meaning when that land is purchased
 2. If you establish one after it's been bought, its only a contract, so it doesn't run with the land
 - iii. A HOA counts as having horizontal privity because it represents all of the landowners, and they do have privity → Neponsit v. Emigrant
 - d. And it needs to be in writing
8. To get around the privity requirement, both parties could sell to a straw man, and then buy it back from that person immediately, making a covenant on both/one lands upon repurchase.
 - a. The one/both thing would depend on what kind of covenant you're making
 - i. Ex: if its that neither can sell their land to be industrialized, then both would need to sell and rebuy.
 - ii. If its just that one estate is burdened, then only that estate need sell
9. Terminating/Invalidating Real Covenants
 - a. Voids public policies: ex: racist covenants that say you can't sell to black people/must be white buyers
 - i. Despite the fact that this is private action, the court reasons that you'd need state interference to enforce these covenants, ex: need a cop to kick out the buyer in violation. So prejudicial covenants are outlawed under 14th amendment
 - b. Agreement: if the land gets sold, later down the vertical privity line, people can just agree they no longer want it
 - c. Release/rescission: benefitted estate can say in writing they release the land
 - d. Terms: term of years covenant
 - e. Merger: buy other covenant/estate
 - f. Unclean hands: court won't let a landowner to enjoying another landowner for violating the covenant if the 1st guy is violating it too
 - g. Change: External dramatic change. High standard to prove
 - h. Eminent domain: state can always take property, but have to compensate
10. Recording Acts: important to know how land is burdened → need notice of burdens.
 - a. Usually at the county level, there's an office of deeds. Recording system
 - i. Provides notice by consolidation whole record
 - ii. Tells you who wins if there are conflicting claims to a parcel of land
 - b. Sell same land 2x –problem if 2nd buyer knows she's not a bona fide purchaser because it's already bought.
 - c. 3 types:

- i. Race statute – in some states, whoever recorded it first wins
- ii. Race notice statute: priority to the 1st bona fide (same as good faith) purchaser to record
 1. So if you know you're 2nd, you don't get the property
- iii. Notice statute: the last/most recent good faith purchaser, assuming no one's recorded it, gets title

Equitable Servitudes

1. Servitudes: agreements that bind successors in ownership. Can be affirmative or negative.
 - a. Generally use this for injunctions ex: liens
 - b. Much easier to establish than Real Covenants.
 - c. Need:
 - i. Intent
 - ii. Touch and concern
 - iii. Notice: does not run unless the party to be held liable had notice of the equitable servitude when he acquired possession. Notice may be actual, constructive, or record
 1. No notice requirement for the benefited party
2. Reciprocal Negative Easement/Implied negative servitude(the court calls it an easement, but it's a servitude): If the owner of two or more lots sells one with restrictions of benefit to the land retained, the servitude becomes mutual, binding all the lots, whether the lot explicitly had this easement/servitude on their property or not. It binds both because the one without the explicit easement benefits from the lots around it having this easement, and it wouldn't be fair for them to all be bound and it not.
 - a. If evidence of common scene, you have to try to figure out what it is
 - b. Ex: Sanborn v. McClean
3. To Terminate: could argue the situation has changed, and the servitude, ex: to keep a lot residential, no longer makes sense. But this is a very high standard of proof and court is unlikely to grant it ex: Bolotin v. Rindge

Common Interest Communities

1. Homeowners sign a contract upon purchase, the idea being that they agree and want a CIC when they purchased.
 - a. This allows them to do a lot of things without worrying about the limits of covenants, servitudes, etc.
2. How do courts enforce CIC rules? Depends. 5 approaches
 - a. Contract/consent
 - i. Assumes that property owners in CICs purchase their interests with knowledge- either actual or constructive- of the covenants, conditions, and restrictions by which they will be governed

- ii. Expanded notion of consent called “participatory consent” maintains that members of a democratically governed association consent to particular decisions reached by participating in the decision making process
- iii. Model emphasizes the views of the larger society outside of the CIC have little or no bearing on the voluntary restrictions of the CIC
- iv. Relies heavily on notice and consent
- v. Ex: Hidden Harbor Estate I & II
- vi. Ex: Nahrstedt (Cat lady loses)
- b. Local government
 - i. Residents of CICs should receive the same constitutional protections against the effective governing authority as residents of publicly constituted govt.
 - ii. Problem is that CIC residents submit more than citizens
 - 1. Ex: law banning alcohol isn’t reasonably related to the life, property, health, so it’s not ok.
 - 2. Ex: Portola Hills → courts don’t uphold ban on tv satellites cause its not visible and people have a right to satellite access
- c. Administrative agency
 - i. HOAs become administrative agencies that have delegated constrained authority to administer a regulatory framework
 - ii. Agencies have legislative and adjudicatory powers
 - iii. Courts use a process oriented framework to review decisions of administrative agencies to balance the tension between the need to allow agencies latitude to administer functions and the need to ensure that the agency adheres to the legislative mandate and standards of reasonableness
 - 1. Ex: a law banning alcohol in common areas is reasonable, so its ok.
 - a. Hidden Harbor I
 - 2. Ex: ok for a review committee to deny your renovation plans because they don’t like the style since the review committee was included in your original contract (also contract/consent) → R Hue
- d. Corporate board
 - i. Shareholders (property owners) have delegated authority to a corporate board (the homeowners association)
 - ii. A court would judge homeowner association decisions by the same standards applied to more traditional corporate boards
 - iii. Decision making must adhere to the governing rules; board must act within its delegated authority; board members have a fiduciary duty
 - iv. Model focuses upon controlling bad faith, fraud or actions beyond delegated authority
- e. Trust
 - i. HOA acts as a trustee charged with the fiduciary duties of impartiality, loyalty, reasonable care and information reporting

- ii. Less deferential to the HOA decisions than the corporate board model because it does not apply the permissive business judgment rule
 - iii. Conceptual problem is that trusts are normally reserved for persons unable to make their own decisions; trust beneficiaries are less able than homeowners to exercise an exit option if they are unhappy with trust management
- 3. Occupancy Restrictions
 - a. A lot of CICs want to keep a certain scheme – common one is single family homes or retirement community with age restrictions.
 - i. Congress passed a law which changed the ease of age limits.
 - ii. Ex: Bellarmine Hills : defines family really broadly
 - b. Courts might void single family rule for public policy reasons: allowing halfway homes, homes for the mentally ill, etc.
- 4. Transfer restrictions: people want to live with people like them.
 - a. If you limit the right to transfer, might be viewed as alienation and struck down by court.
 - b. A total restraint, like no selling to uncongenial buyers won't be upheld.
 - i. But partial restraints, like if the board doesn't like who you're selling to, they have 30 days to find a replacement buyer, is ok, because it doesn't affect market value. →Chianese Case. Contract/consent model.
 - c. Mouatt case: ok for apartments to place subletting requirements. Ok because subleasing isn't a big concern

Nuisance

- 1. Private nuisance: unreasonable behavior that substantially interferes with the enjoyment of property
- 2. Private Nuisance test:
 - a. Is it intentional?
 - i. Intention if either : (1)on purpose or (2) substantial certainty
 - b. Was the behavior unreasonable?
 - i. Intentional conduct is unreasonable if the gravity of the harm to the plaintiff outweighs the utility of the actor's conduct
 - ii. Reasonableness = would a normal person use the land like that; reasonable at this time and place. context specific doctrine. Ex: If you're in a suburb, no one is raising chickens. Might be unreasonable for you to raise chickens then.
 - c. Was there substantial interference...
 - d. ...with the enjoyment or use of the property?
- 3. Defenses
 - a. Consent or acquiescence
 - b. Defendant has prescriptive easement for conduct
 - c. Coming to a nuisance

- i. Ex: Waschak v. Moffat. And custom & tradition behavior
 - d. “Right to farm” statutes
- 4. Remedies
 - a. Previously could just get an injunction against the offending conduct
 - b. Today “balance of equities” approach if more common to determine if injunction is appropriate
 - i. If the resulting benefit to the plaintiff is greater than the resulting damage to the defendant.
 - ii. However, the public interest in continuing or preventing the defendant’s conduct is usually weighed in the balance as well
 - c. Ex: Boomer v. Atlantic Cement Co – injunction unless the cement co pays for future damages
 - i. In the calbraisi square, the Plaintiff wins and it’s a liability ruling.
 - d. Hypo to show 4 different liability/property remedies
 - i. Retirement home sues nearby feed lot for nuisance –smells bad.

	Property	liability
Retirement home	Injunction –feed lot moves or stops	Farm pays damages, maybe for future damages too
Feed lot	Status quo remains b/c RH came to the nuisance	Injunction and money to feed lot ***

- ii. *** this is what the court decided. If you pay the FL to shut down or move they have to accept the money and go. If you don’t wanna pay, they can stay because it’s partially your fault for moving here.

Trespass

1. Test: has there been an illegal physical invasion of your property?
 - a. Should be visible: so pesticides, prob not trespass. Smoke –yes.
2. Trespass is absolute. It doesn’t matter how minor the invasion.
 - a. It’s trespass if something overhangs on the property cause you own your land all the way up too
 - b. Ex: Pile v. Pedrick (2 inch wall)
3. Courts do try to limit the blow of trespass rulings
 - a. Ex: giving you a year to remove the offensive intrusion if its something really small, like 2 inches of wall overhang.
 - b. Ex: Pile v. Pedrick and Geragosian v. Union Realty Co
4. Good faith improver: applies when someone unintentionally improved something on someone else’s land. May get to buy the land that you trespassed on by improving it (say buy building a house)
 - a. But if you had any sort of notice, this doctrine doesn’t apply)
 - b. Ex: Raab v. Casper

5. Trespass right can be limited in light of more pressing public policy concerns
 - a. Ex: concern about migrant workers living on other's land not having access to lawyers, doctors, visitors like any normal person
 - b. the property right to exclude is lesser than allowing workers to live with dignity
 - i. ex: State v. Shack
 - c. Another concern would be free speech: private-public areas, like shopping malls, can restrict your right to free speech in a reasonable time, place and matter, but can't stop you from exercising it all together.
 - i. Pruneyard Shopping Center v. Robins

Land Use Regulation

1. Zoning: the power to zone comes from the police power allowing the state to protect the health, welfare, and safety of the public
 - a. States will pass a statute, zoning enabling act, then delegates land use authority to municipalities or county to carry out zoning
 - i. planning board –local authority that implements the zoning ordinances
 - b. The delegated authority makes a master/general plan, letting everyone know the long term zoning plan. If you make a zoning change that isn't consistent with the plan, it can be challenged in court.
2. 2 types of zoning generally set up:
 - a. Use zoning – areas divided into districts with specific uses. US zoning is cumulative – your zone's use + all the zones below it. Residential is the most pristine.
 - i. Ex: Euclid v. Ambler Realty : zoning by use is ok because some uses are nuisances so its ok to keep them off on their own
 - b. Area zoning – more physical, like lot size, building height
3. 2 ways to get around zones
 - a. Variance- allow you to use land not within zone rules if you show it's not detrimental to the area and would give you an undue hardship
 - b. Through amendment – still has to be consistent with general plan
4. Recent developments
 - a. Cluster zoning: high density residential
 - b. Planned unit developments: mixed use residential and shopping and schools all together –everything on top of each other
5. some say the zoning board isn't democratic – it's governed by special interests, can constrain economic growth, and areas that don't vote are most likely to correlate with undesirable land use locations
6. Courts tend to be deferential towards zoning regulations – a zone would need to be unreasonable and have no substantial relation to be struck down.
7. Zoning for aesthetics : no obstacles to aesthetic limitations so long as they don't hurt free speech
 - a. Can't completely foreclose a type of communication

- i. If a statute is overbroad and bans, say all signs except for sale signs, that's not ok, because people have the right to accessing the sign in yard/window form of communication. You can regulate, say the size of the sign. →Ladue v. Gilleo
 - b. If your zone law is content specific, it's probably going to be struck down, but if it's content neutral it might be ok.
 - i. Ex: zoning rule saying adult theater has to be 100ft away from houses, churches, etc. court says this is content neutral because it's not about not liking the content of these theaters, it's about the secondary affect these theaters have on surrounding areas – tends to make them sketch. Rational basis review. →City of Renton v. Playtime Theatres
8. Single family housing zoning statutes: question of what's a family? Court doesn't really like statutes defining family. If you're going to do that, you need to be clear about why there's a government interest to that definition.
 - a. Ex: Village of Belle Terre – restriction has to be rationally related to the definition
 - b. Ex: State v. Baker – group of 8 who consider themselves an extended family. Court strikes family definition down

Buying and Selling a House

1. Financing (credit)
 - a. Buyer finds lender, often via Mortgage Broker.
 - b. Lender ("mortgagee") provides loan \$ to buyer/borrower ("mortgagor").
 - c. At closing, lender pays to seller the total sale price, less buyer's downpayment.
 - d. Loan is typically assigned to another lender the day after closing, so buyer will pay back loan to a new lender.
 - e. Buyer (borrower, "mortgagor") provides Lender:
 - f. (1) a promise to repay the loan ("note")
 - g. – term: e.g. 15 years, 30 years
 - h. – interest: fixed rate, or adjustable rate mortgage ("ARM" – rate is low at first, then jumps up)
 - i. (2) collateral in case Buyer fails to repay the loan: the house ("mortgage") (deed, or deed of trust)
 - j. (3) indicia of real value of repayment and collateral: buyers' incomes & other debts, appraisal of home value, title search, title insurance, inspection, etc.
 - k. (unless: "NINJA" loans ...)

Sprawl

1. Definition: method of keeping people in
 - a) Distinguishable from normal development because of the rate. There's always been development, but since the 1980s, it's exploded.

2. Characteristics

- a) Car dependent
- b) Low density/ large area
- c) Strip malls
- d) Land clearance

3. Why?

- a) White flight
- b) American Dream
- c) Lack of affordable housing in the city center
- d) Tech- don't need to go to city center
- e) Rising population

4. Results:

- a) Loss of community
- b) High costs of building infrastructure, low access to public transport
- c) Air pollution, long commutes, traffic, car dependency, more single use zones

5. Solutions

- a) Growth controls - method of keeping people out of an area
 - 1. Public choice theory : distinguishes b/w diffused interests and concentrated interests.
 - (1) Ex: tax payer would be better off without paying farm subsidy, but individually, only a little better off. But farmers would be way worse off. So they'll work hard to lobby for keeping it and others won't fight hard because they're not effected that much, so not worth their time.
 - 2. Ex: Livermore – can't build unless there's enough schools, sewage, water, etc
- b) Smart growth initiative- limit the number of 'building permits'
 - 1. Allowing growth in certain ways. Building permits only in certain areas
- c) Infrastructure limits – no building unless infrastructure is in place
- d) Urban redevelopment – invest in cities so they don't exacerbate sprawl
- e) Tax home development ; add public transit etc.
- f) Transferable development rights – want to limit building in one area and expand in another.
 - Give people in the area where they can't build anymore TDRs to compensate for their financial loss of not being able to develop. Then they can sell them to people who want to develop in the area where the government is encouraging building. So no one is worse off financially (?)

6. Court's test to see if limiting building permits is ok:
 - a) Forecast probable effects and duration of the restriction
 - b) ID competing interests
 - c) See if it represents a reasonable accommodation of the competing interests (people who live in the town already v. people who want to move there but are restricted due to the law)
 - d) This is very differential of a test. The people who are hurt by building restrictions don't live in the town, so they couldn't vote to change it.

Takings - Public Use

Test when faced with a possible taking:

1. Is this Eminent Domain?
 - a. Yes—Public Use? Berman, Hawaii, Kelo—deference unless “palpably w/o reasonable foundation) Economic development is a public purpose, and that's ok
 - b. No—Inverse Condemnation
 - i. Is this an Exaction (condition tied to permit)?
 1. Yes—(Nollen, Dolan)—often waived
 - a. Substantially advances legitimate state interest?
 - b. Essential nexus b/w condition and impacts of development?
 - c. Rough Proportionality test
 2. No—Regulatory Taking—Penn Central Test:
 - a. Advances legitimate public interest?
 2. Is it nuisance preventing? If it is, it's not a taking.
 - a. Economic Impact—Lucas Test:
 - i. Total wipeout of value? –it's a taking
 - ii. Is there Compensation? Like TDRs with Penn Central
 - b. Nature of reasonable investment backed expectations
 - c. Character of government action? Loretto Test:
 - i. Permanent Physical Occupation—“per se” taking
 - a. right to exclude gone
 - b. 3rd party doing it, not government
1. Takings clause is a limit on what the government can do to your property.
 - a) 5th amendment: “Nor shall private property be taken for public use without just compensation”
 - b) Litigation on this issue surrounds the meaning of some of these terms
 1. What's private property?
 - (1) Does limiting what you do with your copyrighted song count?
 2. What's taking?
 - (1) Is it reducing the value? If you own a wetland and can't develop it?
 3. What's public use?
2. Eminent domain – taking it 2 ways
 - a) Straight forward - Ex: State Department of Transit takes property to put in a road

- b) Ex: state authority intervenes so another individual can use your property.
- 3. Public use: sometimes it's obvious. SC has always ok-ed taking for utilities, even if it's a private company like a railroad.
 - a) More complicated with things like sports stadiums, but still pretty much public use.
- 4. Precedent: in the 50s, SC permitted state to buy out poor area and sell it to private developers to make nice apartment buildings, because there was a public *purpose*.
 - a) DC has since acknowledge that wasn't really ok of them, because it forced all the poor, predominantly black people out → *Berman v. Parker*
- 5. Court used the rationally related to the conceived purpose test to support taking land from the small wealthy minority in Hawaii that owned all the land so that they could have more people be landowners. → *Hawaii Housing Authority v. Midkiff*
- 6. *Kelo* case – city takes houses for economic development reasons. The area isn't that great and they want to rejuvenate it; maybe because Pfizer said that's what they would want before they move in there, but that's just an allegation. City's determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to court's deference. Stevens says it should be left to the legislature to stop takings.
 - a) Post-Kelo – states have enacted new laws prohibiting takings for economic development. This is what Stevens says should be done in his opinion

Takings – Physical Occupation

- 1. No matter how small the intrusion, requiring you to allow a 3rd party onto your property and putting a permanent physical occupation (PPO) on your property constitutes a taking.
 - a) PPOs are a per se taking, meaning once you've established that there's a PPO, then that's the end of the test – it is a categorical taking, without need for more debate.
 - 1. It's categorical because it's permanent – you can't get the stick back, which is usually the right to exclude.
 - b) Ex: *Loretto v. Teleprompter*
- 2. Denominator Problem: person who got taken will say you occupied the entirety of whatever you 'took,' where as the government would look at it in relation to all of your property rights/property, and therefore see it as 'we only occupied/took this tiny part of what you own,' making it not a big deal.
- 3. Exactions: sort of property trades – in exchange for a building permit that will cause some level of harm to society, the government can say that you only get the permit if you give something in return, like build a bike path or dedicate land to not be built on, etc.
 - a) In order to make sure the government isn't just using this as a means of getting property for free, the exactions have to:
 - 1. substantially advance a legitimate state interest
 - 2. Demonstrate an essential nexus (connection) between the condition and the impact of the development permitted
 - (1) Ex: if you're getting a permit for a really tall house obscuring a view, the exaction can't be an easement across your land, because that doesn't relate to the view problem.

- (2) This prevents a naked land grabs by gov'ts
- b) Beyond the above rule, there's another test: the reasonable relationship test. You need to show that the exaction and impact of the new development are roughly proportional
 - 1. Ex: exaction is that you have to add a bike path to mitigate increased traffic by your store: to do that, you need to show how much more traffic would increase v. how much you can decrease it with bike path to keep things balanced
- c) Recently, some exactions have been money put towards a public project. Instead of you building a bike path, you give the gov't money that goes towards the bike path. Constitutionality hasn't been addressed by courts yet, so it's still a thing for now.

Regulatory Takings

1. Spheres of Takings:
 - a) Eminent Domain: clearest example. Government takes land for public use
 - b) Eminent Domain when land is taking for public PURPOSE, but given to someone else/sold to a private entity
 - c) Regulatory takings: government passes regulations which take away your stick(s). Doesn't physically take property away and doesn't give the right to anyone else.
2. Reciprocity of Advantage – the restrictions on your property benefit everyone. You win some, you lose some in terms of your specific property.
3. When it comes to a total wipeout of property value – in order for this not to be a taking, the state would have to show that to build on it/to do whatever the regulation says you can't do would be a public nuisance. If that's true, then it's not a taking because you can't take something you never had, and you never had the right to cause a nuisance.
 - a) Ex: it wasn't a taking during the prohibition when those with large stocks of alcohol couldn't sell them anymore and were now valueless, because that was for health and human safety.

Takings and Vested Rights

1. Alienation - The character of property that makes it capable of sale or transfer.
 - a) A government regulation that takes your alienation right is not a taking, because you still have the rest of the bundle of sticks – you can still possess and use it, etc.
 - b) Ex: *Andrus v. Allard*
2. Is it a taking if a change in the rules/regs changes/destroys your future interest in something?
 - a) Courts go both ways. On one hand, it's future, so not guaranteed, on the other, it's settled expectation
3. Taxation is never a taking
4. Courts go both ways on whether gov't taking property by adverse possession is a taking
5. Notion of vested rights = if gov't rezoned and the building you had just built was no longer allowed in the zone, they wouldn't make you rebuild because that'd be a waste. They grandfather in your vested right.
6. If something was taken for health and public safety, then it's probably not a taking.

- a) Ex: making mining cos pay for health insurance to cover lung disease
- 7. Bennis v. Michigan
 - a) Gov't has always confiscated cars when prostitution is happening in them to prevent nuisance.
Not going to make it a taking now.