I. Acquisition by Discovery and Capture (and the Tragedy of the Commons)
   a. Useful definitions:
      i. **Real property**: land
      ii. **Personal property**: everything else
      iii. **Property rules**: if you own something, you can exclude others from it, not matter what the consequences for that individual
      iv. **Liability rules**: you have to give people access, so long as they’re willing to pay a reasonable price set by a third party (usually the courts)
      v. **Bundle of rights**: property doesn’t necessarily mean “things,” property includes the right to use, exclude, and transfer
      vi. **Acquisition by Discovery**: the sighting or finding of hitherto unknown or uncharted territory, frequently accompanied by a landing and the symbolic taking of possession
      vii. **Conquest**: the taking of possession of enemy territory through force, followed by a formal annexation of the defeated territory by the conqueror
   b. **Johnson v. M’Intosh**
      i. The notion of **firstness**
         1. It’s not just first **in time**, it’s first **in the right way**.
         2. First of a certain group of individuals, not necessarily first overall
      ii. Not enough to say, “you have title,” must give content to that title:
         1. Europeans have the right to occupy, transfer, conquer or purchase
         2. Indians have the right to occupy but no right to exclude
         3. Therefore Europeans have the pre-emptive right to extinguish the Indian right to occupy
   c. Conquest vs. Purchase
      i. **Conquest**: When the settlers couldn’t assimilate or co-exist with the Indians, they had the right to physically force them off their land.
      ii. **Purchase**: more efficient in many cases (especially once the Indians were weaker and starving – they could be bought off for a pittance!)
      iii. Think about costs/benefits; just because I have a right does not mean I will enforce it against you. If the costs are too high I may choose a different method (i.e. purchase the land instead of conquering it).
   d. Advantages to the law being settled:
      i. No infinite regression of ownership claims
      ii. Lack of clear property rights/entitlements/interests makes it hard for parties to interact/contract/trade with one another
      iii. Unstable property rights discourage commerce
   e. Disadvantages to the law being settled:
      i. If laws are fixed, Congresspersons have no incentive to listen to concerned citizens because they can’t change anything
      ii. When the law is settled, you can use it as an excuse
      iii. Changes in society aren’t always reflected in settled laws
      iv. Leaving laws “settled” protects the current regime and existing power elite
   f. First in time - virtues
      i. Only one person can be first – establishes an exclusive right to property
      ii. Eliminates controversy - it’s easy to identify who was physically first
iii. Reduces incentives to court challenges (because the law is so clear)
iv. Creates an incentive for competition – drives people to get there first
v. Fosters ready exchange

g. First in time (a.k.a. “original possession”) – drawbacks
i. There are other values than competition to consider; for example: a broader sense of fairness
ii. Entrenches the power regime – those who got there first will likely remain in power until they decide to give it up

h. John Locke
i. What you have mixed your labor with is yours; you own it
ii. Must be first in the right way: by being first to mix your labor with the land (gave first in time principle a moral weight)
iii. Caveat: Locke takes into account that there must be enough for all and that your property right must not take away from another’s
iv. Accession: when on one person adds to the property of another, by labor alone (creates issues in determining “ownership”)
v. Under Locke’s theory, the Indians had no ownership of the land because they hadn’t mixed their labor with it

i. Pierson v. Post

i. Holding: A hunter does not have ownership rights of a wild animal until they have mortally wounded it and then continue to pursue the animal, with the intent to bodily seize it. (Pursuit alone is not enough)
   1. This rule exists for the sake of certainty and preserving the peace and order in society (Allowing pursuit to create ownership rights would provide a fertile source of quarrels and litigation.)
   2. “First in sight” principle is difficult to establish factually
   3. The more efficient hunter should be rewarded (the one who actually kills the animal). Don’t want to reward bad hunters.
   4. Simply being in pursuit doesn’t guarantee you’re going to catch it

ii. Alternative holding: ownership of wild animals may be acquired without actually touching or wounding the animal, provided the pursuer be within reach or have a reasonable prospect of capturing the animal (Pursuit alone is enough)
   1. This rule fails for administrability, BUT:
   2. The pursuer puts in the labor, they should reap the reward
   3. It is sportsmanlike AND customary to give it to the pursuer
   4. If a hunter can see that someone else is pursuing the animal, then first in sight should apply
   5. Allowing other hunters to step in and kill a hunted animal at the last minute might breed violence
   6. This rule encourages fox hunting—we want those vermin dead!

j. Rules vs. Standards
i. Rule: 30 mph speed limit
   1. Much more clear cut, more certain, settled
   2. Makes it easier for the parties to organize themselves around the rule – if you know what the rule is, you can get around it
ii. *Standard:* “You must drive cautiously.” – the standard is *flexible*

iii. Rule and standards become more similar through:
   1. Variations in enforcement, and
   2. A wealth of case law defining application in different situations

k. **Ghen v. Rich**
   i. Killing and marking an animal is enough to claim ownership, especially if that is the only course of action possible, such as with whale hunting
   ii. Local custom is sometimes upheld by the courts as the rule of law
   iii. **Knowledge requirement:** only have to return the animal to the hunter if you know whose marking is on it
      1. Finders will always claim no knowledge
      2. THIS RULE IS BAD!

iv. Alternative policy standard: we just want the animals processed, so it doesn’t matter who reaps the profit
   1. Maybe this standard better benefits society (but it might backfire by discouraging hunting)
   2. Give the hunter a small “killer’s fee” rather than the finder a “finder’s fee” – rewards the person who finds the carcass and brings it productive use before it spoils

l. **Acheson, The Lobster Gangs of Maine**
   i. **Usufructuary rights:** not permanent ownership, but a proprietary right over a certain location. If the person who regularly occupies that location moves, others can freely move in.
   ii. **Communal property:** property controlled jointly by a community
   iii. **Open access:** no controls on usage
   iv. The tragedy of the commons occurs not because of *common property*, but because of *open access*
   v. Advantages of using customs and norms
      1. May be more efficient
         a. May be able to be more narrowly tailored
         b. More organic – arise out of real events
         c. Greater sensitivity to the stakes
      2. More flexible: evolving on a more continual basis
      3. Courts have trouble ‘getting it right’ because they’re unfamiliar with the subject matter
      4. Courts may create rules that are over-inclusive or too exclusive, but then they’re not in a position to tweak them easily
      5. It’s cheaper not to use the judicial system to resolve disputes
   vi. Disadvantages of using customs and norms
      1. Whose norm or custom do you adopt?
      2. Allowing the status quo to prevail protects those in power
      3. Fairness – the norms and customs of one society may exclude the rights of people outside that society (externalities)
   vii. Custom should be *narrow in application* and *affect only a few people*
   viii. Prohibiting trespass – *virtues*
      1. Allowing trespass would discourage land ownership
2. Incentivizes people to be unproductive—why work hard when you can just piggy back on someone else’s labor by using their land?
3. Discourages violent reaction to trespass—since you have the rule of law on your side, you don’t have to shoot someone to get them off your land
4. Without trespass laws, landowners must divert time and resources from being productive in order to protect their land from trespassers (negative impact on society—loss of that person’s productive input)

m. Demsetz, Toward a Theory of Property Rights
   i. An owner of property rights possesses the consent of fellowmen to allow him to act in particular ways
   ii. Property rights specify how persons may be benefited and harmed, and therefore, who must pay whom to modify the actions taken by persons
   iii. Externality: no harmful or beneficial effect is external to the world. Someone always suffers or enjoys the effects.
   iv. Internalizing the externality: a process, usually a change in property rights, which enables the effect to bear on all interacting persons.
   v. Communal ownership: the community denies to the state or to individual citizens the right to interfere with any person’s exercise of communally owned rights (DIFFERENT FROM LOBSTER GANGS DEFINITION)
      1. The community could come together to curtail over-consumption, but negotiating costs would be high
      2. Future generations must speak for themselves – every individual is out to maximize their current gain
      3. Results in huge externalities
   vi. Private ownership
      1. Negotiation costs are greatly reduced – only a few people need to agree
      2. Concentration of costs and benefits on owners creates incentives to utilize resources more efficiently
      3. Still results in externalities: private owners don’t take into account the effect that improvements on their land will have on their neighbors’ land – i.e. a dam
   vii. General rule: increasing the number of owners increases the cost of internalizing (negotiation costs)
   viii. Expressive function of the law: the law enforces rules, but also articulates certain values that we as a society should share, and encourages people to comply with certain modes of conduct (if the law sets out a rule, you might eventually adopt that value as your own)

n. Hardin, The Tragedy of the Commons
   i. Tragedy of the Commons: when property is communal, individual actors do not feel the consequence of over-consumption, it’s spread out over the entire community. This leads to widespread over-consumption, which ruins the communal property. (I can’t stop you from rushing to use the resource, so that makes me rush even more to use the resource.)
ii. Solutions
   1. Sell parts of the commons off as private property
   2. Keep the commons as communal property, but allocate the right to enter them
   3. Create coercive laws or taxing devices that make it cheaper for the over-consumer/polluter to cease their activity than to continue
   4. Creating guilt or responsibility is NOT a solution – there will still be free-riders and guilt is just coercion. (Only mutually agreed upon coercion, like TAXING, is acceptable.)

o. Externalities
   i. Externality: a cost or benefit that falls on some third party, that the actor is unaware of
   ii. Negative externalities: too much of some activity
      1. E.g. polluting a stream
      2. Society bears the costs of my activity (if I had to take that cost into account, I might do it less)
   iii. Positive externalities: too little of some activity
      1. E.g. building a new apartment complex in a high crime area – renders profit for the landlord but also lowers crime, increases property value, etc.
      2. We would like the actor to produce more of their activity because it benefits society, but the actor won’t produce more because they aren’t realizing the external benefit
   iv. Internalize the externality: redistribute costs and benefits so that the burden is more equitably shared among actors. Methods of internalizing:
      1. Create individual property rights (“allocate” property rights)
      2. Regulation by the state
      3. Tax or subsidize (coercion)
   v. The Coase Theorem: it doesn’t matter how you allocate property rights, the parties have the right to reallocate those rights if it’s in their best interest (the outcome is not determined by the initial allocation)
      1. Problems with transacting:
         a. Transaction costs: the cost of doing business (the initial allocation may prevail if transaction costs are too high)
         b. Bilateral monopoly: each party has an interest in driving a hard bargain, no market safety valve to keep prices low
         c. Hold out: each neighbor has to agree to a group solution
         d. Freeloading problem: you have an incentive to lie about your interest in order to avoid contributing to the common good (you can reap the benefit without contributing)
      2. Budget constraints are not an issue in the Coase model (assume unlimited access to money)

II. Alternative Theories of Property
   a. Radin, Margaret Jane: Property and Personhood
      i. Personal property: property that is bound up with the owner, that has become part of their person and is no longer replaceable
1. By virtue of that connection, the person should be accorded broad liberty with respect to control over that thing
2. Some objects can be so bound up with a person that they would cease to be “themselves” if it were taken. A government that respects persons ought not to take that property.
   ii. Fungible property: purely replaceable property
   iii. The fetish: Radin doesn’t draw a clear line. Some possessions are necessary for one person but fetishistic for others (e.g. designer suits are necessary for suit salesmen, but not for law professors)

b. Goffman, Erving: Asylums
   i. People define themselves through what they own (when you take peoples’ possessions from them, you strip them of their identities)
   ii. Control over what you own is important, not necessarily the actual object (the right to exclude)

c. Homeless persons’ property (class discussion, not Goffman):
   i. Health & public safety: don’t need this justification for removing homeless from squatters’ villages, etc. unless we acknowledge that they had a property right to that space in the first place
   ii. Space under a bridge belongs to the city, but possessions in a shopping cart are personal property. (Parking your car on the street doesn’t make it public property.)
   iii. Public space: should be open to everyone, BUT just because you use a public space repeatedly doesn’t mean you have more of a claim to that space than others (can’t claim a bench permanently)
   iv. When homeless laws aren’t enforced, then suddenly are: must enforce periodically, otherwise creates an incentive for homeless people to stake out public spaces and impinge on the rights of the rest of the population to use that space
   v. Personhood, dignity, self-autonomy, self-respect: do these values outweigh public safety and ability to comfortably enjoy the park?

d. Friedman, Milton: Capitalism and Freedom
   i. Competitive capitalism protects freedom because it separates economic power from political power
      1. Can use wealth to oppose the government because wealth is independent from the government
      2. Compare to totalitarianism, communism doesn’t work so ignore it
   ii. Free market reduces the range of issues that must be decided through political means, and therefore minimizes the need for government
   iii. 3 monopoly choices:
      1. Private monopoly (FRIEDMAN’S BEST CHOICE)
      2. Public monopoly (post office, utilities)
      3. Regulation

e. Sunstein, Cass R.: On Property and Constitutionalism
   i. Economic power matters, because it enables people to be independent from the government and also to speak out against the government (without fear of financial retribution)
The constitution must identify private rights to be protected
Communist systems bring about the tragedy of the commons
When government can redistribute wealth, discourages growth

III. Property in One’s Person

a. **Moore v. Regents of the University of California**: After body parts have been removed from the body, they’re no longer your personal property and you can’t sue the hospital/doctor for using them. Rationale:
   i. Scientists would be discouraged from doing research
   ii. Could create an incentive to sell body parts
   iii. Could create an incentive for doctors to unnecessarily perform operations, to have access to lucrative cells, organs, etc.
   iv. This is an issue for the legislature
   v. Patient’s rights are already protected by informed consent laws
   vi. Could create a liability rule: you HAVE to sell your organs once they’re removed, a fixed price for each part (similar to governmental land takings)
   vii. Pros & Cons: p. 94-99

b. What is freedom? The ability to do what you want.
   i. Having the opportunity to do what you want is more important than providing the means or guaranteeing the ends
      1. Society should ensure that everyone has the same choice set
      2. In reality, the choice sets available to different groups vary greatly
   ii. Should freedom include having the means or guaranteeing the ends? (e.g. does access to health care make a difference in your freedom?)

IV. Bundle of Rights

a. **Jacque v. Steenberg Homes, Inc.**
   i. Society has an interest in punishing and deterring intentional trespassers beyond that of protecting the interest of the individual landowner. Private landowners should feel confident that trespassers will be punished.
   ii. Policy concern here is preventing self help and violence by the landowner

b. **State v. Shack**
   i. Migrant workers housed on employer’s land have a right to receive visitors that trumps the landowners right to exclude
   ii. The right to receive visitors impacts personhood, privacy, and association rights, among others

c. RULE: If the landowner has no reasonable expectation to be able to exclude people from his property, then there has been no trespass when someone comes onto his land. His property right hasn’t been eroded because it was never there in the first place!

V. Acquisition by Find

a. **Lost property**: when an owner is unintentionally parted with his property
   i. General rule: the true owner has valid title over the finder, but the finder has valid title over a 3rd party
   ii. Without these rules, people have an incentive to “find” things
   iii. Without these rules, property owners are forced to spend inefficient time protecting their goods, and not enough time being productive
   iv. Without these rules property becomes static, changing hands constantly
b. **Armory v. Delamirie**: the finder of an object has a property right that will enable him to keep it against all but the rightful owner

c. **Premises owner**: the person who owns the premises on which the goods are found, has rights over property found on their premises
   i. The true owner may eventually return and look for the lost item
   ii. The premise owner has “constructive possession” even when the finder retains possession, because the item was found on their premises
   iii. General rule: *private* premises owners have rights over lost property found by anyone on their premises, but property found on *public* premises belongs to the finder

d. **Abandoned property**: where the true owner intentionally abandons his personal property (Must understand owner’s intent before you can label property abandoned.)

e. **Mislaid property**: property that has been intentionally placed somewhere, and mistakenly left there
   i. Owner of the premises trumps the finder because the true owner is more likely to come back for the property later
   ii. Once a certain length of time has passed and the true owner hasn’t come back, the finder still doesn’t get to take it

f. **McAcoy v. Medina**: there is a distinction between misplaced property and lost property. When a property owner sets something down and neglects to pick it up again, the “finder” does not acquire any property right in the object.

g. **Treasure trove**: any money, gold, and silver, whether or not buried underground, is to be treated like any other found property

h. **Shipwrecks**:
   i. The law of finders is applied to ships lost in territorial waters, and the finder is entitled to an abandoned shipwreck unless the wreck was embedded in land owned or possessed by another
   ii. The United states asserts title to any abandoned shipwreck embedded in submerged lands of a state and simultaneously transfers its title to the state in which the wreck is located

i. RULE: “A finder of property acquires no rights in mislaid property, is entitled to possession of lost property against everyone except the true owner, and is entitled to keep abandoned property.”

VI. **Adverse Possession**

a. **Voluntary transfer** (reasons to promote):
   i. Allows the property owner to set their own price, and promotes efficiency by matching buyers with sellers
   ii. Ensures that the land will end up in the hands of the best user (the one who is willing to pay the highest price)
   iii. Creates incentives to be productive (landowners won’t invest in the land unless they know the government can’t force transfer)
   iv. Discourages landowners from going outside the law to protect their property
      1. Discourages violent self-help measures (can use the law instead)
2. Promotes efficiency by allowing landowners to be productive instead of wasting time guarding their land

b. *Adverse possession:* when a person occupies someone else’s land for a sufficiently long amount of time, at the end of that time title transfers to them. There is no requirement that the possessor pay the original owner for the land.

c. *Statute of limitations:* when the statute of limitations for bringing an action of eviction/trespass runs, the landowner loses the right to exclude.

d. General elements of adverse possession:
   
i. Actual entry, giving exclusive possession to the adverse possessor
      1. Can’t bring trespass/eviction charges until there’s been an actual entry
      2. Actual entry provides notice to the landowner that someone’s using their property
      3. Informs the landowner of the extent of the possessor’s claim (how much of the property they’re possessing)
      4. Ensures that people aren’t arbitrarily claiming land that they’re not occupying (can’t just drive by and declare everything you see)
   
ii. Possession must be open and notorious
      1. Landowner must be given notice so that they have the option to bring an action for ejectment
      2. There’s not requirement to actually notify, constructive notice is sufficient. The landowner must have the ability to ascertain that someone is occupying their land
      3. The adverse possessor must be occupying your land in a way that you could observe if you visited the property
   
iii. Possession has to be adverse or hostile to the true owner
      1. Can’t by there by permission (like in a landlord/tenant situation)
      2. Mental state of the adverse possessor (3 choices for evaluation):
         a. Who care
         b. Trespasser must have believed he/she owner the property
         c. Trespasser must have intended to make the land his own
   
iv. Possession has to have been continuous
      1. Must be using the property in the normal way that the true owner would have used it, consistently over a period of time prescribed by statute
      2. Purpose is to ensure actual owner has adequate notice. If the adverse possessor only uses the owner’s summer home in the winter, the owner never gets adequate notice of the possession
   
v. Statute of limitation must have run


e. Protections against adverse possession available to property owners:
   
i. Show up every once in a while (or hire someone or do surveillance)
   
ii. Give permission to possess the property but charge rent. Bring an action for ejectment if they don’t pay or if they won’t leave
   
iii. Give permission to use the property. Put up a sign saying you invite others to use the property (destroys claim of “adverse” possession)
iv. Interrupt the public’s use for certain amounts of time (block access for 24 hours once a year)

f. Radin: if an owner is not using the property, it must be fungible and not personal. The person who IS using the property may have made it their personal property. The adverse possessor should therefore have title because they are bound up w/ it

g. Relation to “first in time”: it’s not just who was there first, it’s who was there first IN THE RIGHT WAY

h. Coase theorem: in the end, it doesn’t matter who we award title to because the party that values the land most will be willing to pay for it (bilateral monopoly problem arises, though)

i. Endowment effect: once a buyer has purchased property, the value they place on that property will increase substantially. Once they possess it, the property is worth more to them (they become averse to loss, when they weren’t before)
   i. Coase theorem doesn’t take this into account
   ii. Landowner: doesn’t feel the loss of the title until it is actually revoked from him (he wasn’t even using the land, but the thought of having to give it up to an adverse possessor makes him value it again)
   iii. Adverse possessors: they will feel the loss of the land much more heavily than the landowner, b/c they’ve been using it and becoming bound up w/ it

j. The issue of payment
   i. Current rule: once the elements are proven, the adverse possessor is under no obligation to pay for the land. Title simply passes.
   ii. Alternative liability rule: if the adverse possessor is willing to pay a judicially determined fair price, the property owner is forced to sell

k. Van Valkenburgh v. Lutz
   i. Majority rules:
      1. Must occupy and be using the ENTIRE plot in order for title to transfer under adverse possession
      2. If you admit at any time that you don’t believe you have title to the land, your possession is not adverse and hostile
   ii. Minority rule: a claim of title may be made by acts alone, quite as effectively as by the most emphatic assertions

l. Mannillo v. Gorski: when the encroachment of an adjoining owner is of a small area and the fact of the intrusion is not clearly and self-evidently apparent to the naked eye, a presumption of “open and notorious” possession is unjustified (in other words: with minor encroachments, constructive notice is not enough)

m. Howard v. Kunto: Continuity of possession may be established although the land is used regularly for only a certain period each year (i.e. summer homes)

n. Tacking: when an adverse possessor can tack his period of occupation onto the previous owners’ period(s) of occupation in order to create a valid claim
   i. So long as there is a voluntary transfer among the occupiers
   ii. Involuntary transfer breaks the period of occupation (triggers a start-over)

VII. Possessory Estates
   a. RULE: There are no new estates!!
   b. Present estates: right to occupy the property today (generally transferable, inheritable, and divisible)
c. Future estates: right to occupy the property at some point in the future

d. Alienability: the ability to freely transfer property interests
   i. If many people have interest in the same land, that may restrict alienability (transaction costs, bilateral monopoly problems, resource problems)
   ii. Allowing a transferor to place restrictions on the transferee may PROMOTE alienability (when rights are clearly defined, people feel comfortable to transfer—otherwise they might hang onto land forever!)

e. Fee simple: absolute ownership, transferred indefinitely to any heirs
   i. The largest estate
   ii. Can be inherited, transferred by will, sold, given away
   iii. Restrictions on the alienability of fee simples are generally prohibited
   iv. Magic words: “transfer the property from O to A” (don’t need to refer to the fee simple, courts assume it exists when no other is indicated)

f. Defeasible fees: (each one has its own separate future interest) Present interests that MAY last forever, but may come to an end upon some event occurring or failing to take place in the future
   i. Generally alienable (future interests are generally transferable as well)
   ii. Three types of defeasible fees:
      1. Fee simple determinable: future interest is the possibility of reverter, future interest held by the grantor
      2. Fee simple subject to condition subsequent: future interest is the right of entry (right to retake), future interest held by the grantor
      3. Fee simple subject to executory limitation: future interest is the executory interest, held by some third party (not the grantor)

g. Fee simple determinable:
   i. End automatically upon the happening of some stated event, or upon some condition no longer existing
   ii. Possession of the property transfers automatically to the grantor, their heirs, or to whomever the grantor has transferred the future interest
   iii. Words that are indicative of the purpose but aren’t binding on the grantee do not create a fee simple determinable

h. Fee simple subject to condition subsequent:
   i. Ends upon the happening of some stated event, or upon some condition no longer existing, IF THE GRANTOR TAKES ACTION to recover
   ii. Once the condition has been violated, a buyer is unlikely to purchase a fee simple subject to condition subsequent (they would have no certainty that they would be able to retain the land, since the grantor has the right to retake at any moment)

i. Fee simple subject to executory limitation:
   i. The only difference between a fee simple determinable and this is WHO HOLDS THE FUTURE INTEREST
   ii. When some condition ceases to be satisfied or some event take place, the right of possession transfers to the 3rd party automatically

j. Life Estates: an estate in land that someone has so long as they are alive
   i. Lasts for the life of the present holder, followed by a future interest:
      1. Reversion in the grantor OR
2. **Remainder** in some 3rd party
   
   ii. A holder of a life estate cannot pass her interest in property to someone through a will, but can transfer her interest while she is alive
   
   iii. The transferee receives a life estate that last only UNTIL THE ORIGINAL OWNER dies
   
   iv. General goal: to ensure that the grantor continues to exert control over the property after the grantee dies
   
   v. Magic words, “O to A for life”

k. **White v. Brown:**
   
   i. If the expression of the will is doubtful, the doubt is resolved against the limitation and in favor of the fee simple absolute
   
   ii. Potential heirs bear the burden of proof to overcome the presumption of fee simple absolute

l. **Mahrenholz v. County Board of School Trustees:**
   
   i. Common law: neither a right to entry nor a possibility of reverter can be transferred. They can only be retained by the grantor and his heirs
   
   ii. Holders of less than absolute estates can BUY the right of entry or possibility of reverter and create a fee simple absolute in themselves

m. **Mountain Brow Lodge No. 82, Ind’t Order of Odd Fellows v. Toscano**
   
   i. Express restrictions on alienation are void
   
   ii. A condition restricting USE of the land to the grantee only is not a restriction on alienability, it’s just a fee simple subject to cond. subs.
   
   iii. Dissent: restricting the land to use by the grantee only is tantamount to restricting the sale of the land to another person. It is a restriction on alienability IN PRACTICE (as opposed to express) and is void

VIII. Future Interests

a. Two key distinctions in future interests:
   
   i. Future interests held by the grantor vs. future interests held by some third party
   
   ii. Future interests that vest to the grantor automatically vs. future interests that vest only if the grantor asserts his rights

b. **Vested remainders:** 1) belongs to an ascertainable person AND 2) there are no conditions present for the remainder to become possessory after the person dies
   
   i. Absolutely/Indefeasibly vested remainder: certain to become possessory
   
   ii. **Vested remainder subject to open:** when the remainder is to a class of individuals that could increase in the future (i.e. potential for later born children) (O to A for life, then to the children of B.)
   
   iii. **Vested remainder subject to divestment:** where the remainder person could be divested upon the happening of some future event. (O to A for life, then to B. But if B drops out of law school, then to C.)

   c. **Contingent remainders:** 1) either you can’t ascertain the person OR 2) there is a condition to the future interest becoming possessory (O to A for life, then to B if she graduated from law school.)
   
   i. Subject to the **Rule Against Perpetuities:** the remainder must be able to vest within 21 years of the stated event
d. In most jurisdictions, neither a contingent remainder, nor an executory interest are transferable during life, except in certain circumstances.

IX. Concurrent Estates (Co-ownership)
   a. Concurrent ownership: (as opposed to consecutive rights of possession) aka “co-ownership”, both parties have the right to possess the property at the same time
   b. Tenancy in common
      i. Each tenant in common has a separate but undivided interest in the property. Each tenant owns an undivided share in the whole. Each tenant in common has the right to possess THE ENTIRE property.
      ii. Ownership interest is fractional: proceeds and obligations are awarded according to fractional interests (50/50, 25/25/50, etc.)
      iii. Tenants in common may reallocate the use via contract (A uses it in the summer, B in the winter)
      iv. The rights of each tenant in common are alienable, inheritable, devisable. Transfers don’t change the nature of the interest. Each transferee remains a tenant in common
   c. Joint tenancy
      i. Key distinction: joint tenants have the “right of survivorship” (If A and B are joint tenants, when A dies B becomes the sole owner)
      ii. The law conceptualizes joint tenants as a single owner
      iii. Each tenant has an interest in the undivided whole (like tenants in com.)
      iv. “Nothing passes” when a joint tenant dies, the right of possession simply extinguishes. Nothing passes, but their fraction of interest does increase
      v. Most common in spouses
      vi. The four unities: (enforced at common law, generally loosened today)
         1. Time: interest must be acquired or vest at the same time
         2. Title: interest must be acquired by the same instrument or by joint adverse possession
         3. Interest: must have equal undivided shares
         4. Possession: each must have right to possession of the whole
      vii. Joint tenant’s interest is NOT devisable or inheritable.
      viii. **If a joint tenant conveys their interest to a 3rd party, the right of survivorship is defeated and the parties become tenants in common
      ix. Note: creation of a will that transfers the joint tenancy to someone else does not sever the joint tenancy. The transfer must occur during life.
      x. Three points to remember:
         1. A joint tenancy becomes a tenancy in common upon severance
         2. A single joint tenant can unilaterally sever that tenancy
         3. Another way to sever joint tenancy is through an action for partition
   d. Tenancy by the entirety:
      i. Key distinction: neither tenant can defeat right of survivorship by conveying his/her interest to a 3rd party. Only way to defeat the right of survivorship is if husband and wife JOINTLY transfer their interest
      ii. (Only about ½ the states still have this tenancy) A form of joint tenancy available to married couples, created in a husband and from a wife
iii. Surviving tenant has a right of survivorship
iv. No right of partition (cannot contractually agree to a partition)
v. Tenancy by the entirety is ended by divorce
e. Presumption: tenancy in common (can be defeated by including the phrase “joint tenants with right of survivorship”)
f. Riddle v. Harmon: one joint tenant may unilaterally sever joint tenancy without the use of a “strawman” (in other words: one joint tenant may terminate the joint tenancy by conveying the interest to him/herself as a “tenant in common”)
g. Delfino v. Vealencis: partition by sale should be offered only when 1) the physical attributes of the land are such that a partition in kind is impossible or impracticable AND 2) the interests of the owners would be better promoted by it
h. Delfino v. Vealencis: partition by sale should be offered only when 1) the physical attributes of the land are such that a partition in kind is impossible or impracticable AND 2) the interests of the owners would be better promoted by it
i. You can’t just look at the economic gain of ONE tenant, must look at the gain/detriment to both tenants
ii. Radin: $\Delta$ has a business and a home on her property, shouldn’t be forced to sell her land
iii. Coase theorem: the party that most wants the land will be willing to pay for it (assumes infinite resources). Allocating the parties a property right through partition in kind gives them the ability to bargain.
i. Partition (today courts generally prefer partition by sale)
  i. Partition by sale: the court sells the property and divides the proceeds
  ii. Partition in kind: the court divides the property according to the fractional interest of each party
j. Constructive ouster: when you can’t reasonably expect the parties to get along and therefore can’t expect them to share the property peacefully
k. Spiller v. Mackereth: In order for a cotenant to charge rent to another cotenant, there must be evidence that the occupying cotenant has refused access to the co-owned property

X. Leasehold Estates
a. Garner v. Gerrish: A tenancy at will granting only the tenant the right to terminate is enforceable as such. Options for the court:
  i. Liability rule: force the tenant to accept a buy out from the landlord
  ii. Allow the right to lease to terminate at landlord’s death, but build in a sufficient notice requirement for eviction
  iii. Allow tenant to stay for a set period of time (i.e. 1 year) before evicting
  iv. Allow tenant to stay, but attach rent to inflation
b. Crechale & Polles, Inc. v. Smith: Landlords must decide how they are going to treat a holdover tenant and be consistent in that treatment. (Either eviction, holdover, or some other arrangement must be adhered to consistently.)
c. Term of Years: a term that last for a specific fixed period of time, or for a period that’s computable through a formula. Consists of fixing CALENDAR DATES for the beginning and end of the term.
  i. Can be determinable – terminate upon the happening of some event
  ii. No requirement of notice, the term ends on the specified fixed date
iii. We are generally resistant to “self-help” by landlords in removing tenants who stay past the end of their lease. Must bring an action of trespass.

d. **Periodic Tenancy**: a lease for a period of some fixed duration, that continues automatically for succeeding periods until the landlord or the tenant gives notice of termination (month-to-month, year-to-year)
   i. Common law: 6 months notice required to terminate a year-to-year or longer tenancy
   ii. Termination must occur at the end of the periodic term (can’t give 6 month’s notice to terminate in the middle of the term)
   iii. The length of the notice period cannot exceed 6 months (generally the length is ½ of one full term)
   iv. Modern approach: automatically converts faulty notice into the most similar legit notice. Common law: automatically invalidates faulty notice

e. **Tenancy at will**:
   i. A tenancy of no fixed period, that endures so long as both landlord and tenant desire
   ii. Terminable at any time by either party
   iii. Today, some notice of termination is generally required (30-days-notice is standard)
   iv. Common law: required that BOTH PARTIES have the ability to terminate (mutuality). There has been some erosion of this rule.

f. **Tenancy at sufferance (holdovers)**: when a tenant wrongfully remains at the end of their lease. Landlord’s options:
   i. Landlord could seek a court order to remove the tenant (eviction)
   ii. *Holdover tenancy*: Landlord could consent (expressly or impliedly) to the creation of a new tenancy
      1. Prior relationship extends for a new period (rent calculation, rent amount, and all other determined relationship remain the same)
      2. Holdover tenancy is usually capped at a year (even if previous lease was for >1 year)
      3. May be advantageous to one party, if rents have gone up/down
      4. Landlord is in control of this decision

g. **Alienability**
   i. Generally landlords can sell the property
      1. *Change of control provision*: tenants can include this in the lease, gives them a right to terminate the if landlord sells his property
   ii. Generally tenants can transfer their leasehold interest
      1. Some states restrict transfer without landlord’s consent, unless the lease expressly provides that no landlord consent is required

XI. **Subleases and Assignments**

a. **Assignment**: the tenant assigns her entire interest for the entire unexpired term to a new party
   i. All of the obligations of the original lease now bind the assignee
   ii. The assignee and the landlord are in **privity of estate**, but not **privity of contract**. The original tenant and the landlord remain in privity of K.
   iii. If the assignee breaches, the landlord can go after EITHER party
iv. The assignee can EXPRESSLY ASSUME all of the obligations of the lease. Then the assignee and the landlord become in privity of K. (The landlord must agree to release the original tenant from the contract.)

b. **Sublease**: a tenant transfers something less than what they have under the lease
   i. The subtenant has NEITHER privity of estate nor privity of contract with the landlord
   ii. Landlord cannot directly sue the subtenant for any breach of the lease. The landlord can only go after the original tenant
   iii. The original tenant can then sue the subtenant for not fulfilling their obligations under the sublease

c. **Ernst v. Condit**:  
   i. If the transfer is a sublease, no privity of contract exists between the subtenant and the landlord.
   ii. If the instrument transfers less than the ENTIRE remainder of the term (even by one day), or if the transferor retains a reversionary interest, the instrument is a sublease

d. **Kendall v. Ernest Pestana, Inc.**: a landlord cannot withhold permission to sublet/assign UNREASONABLY. A commercial landlord may deny a request on “commercially reasonable” grounds ONLY. A desire to make more money from the next tenant is not commercially reasonable.
   i. Parties are free to contract out of the reasonableness requirement (but they’d look pretty bad if they wouldn’t agree to be “reasonable”!)
   ii. Price is always adjustable as a “valve” for negotiating (convince the landlord to grant permission by agreeing to pay a higher price)

XII. **Tenant Who Defaults**

a. **Berg v. Wiley**:  
   i. Common law: a landlord can use self-help to retake leased properties from a tenant without incurring liability for wrongful eviction, if:
      1. The landlord is legally entitled to possession AND
      2. The landlord’s means of re-entry are peaceable
   ii. Modern law: the only lawful means to dispossess a tenant who has not abandoned nor voluntarily surrendered but who claims possession adversely to a landlord’s claim is by resort to JUDICIAL PROCESS

b. **When tenant destroys the premises**  
   i. “Destroy” doesn’t necessarily mean taking a bat to the premises, it could mean improvements that are expensive to remove
   ii. When the only course of action for the landlord is a lawsuit, this results in unnecessary/additional damage to the premises
   iii. Always have to worry about whether the tenant in breach has money. If we disallow self-help and then the landlord can’t recover damages, we’ve seriously harmed the landlord and unjustly enriched the tenant
   iv. On the other hand, if we allow the landlord to exercise self-help, we give them the power to decide when a breach has occurred. People should not be able to adjudicate their own cases!
c. **Sommer v. Kridel:**
   i. Landlord has a duty to mitigate damages where he seeks to recover rents due from a defaulting tenant
      1. Did landlord offer to show the apartment to prospective tenants?
      2. Did the landlord advertise the apartment?
      3. Did the tenant offer other suitable tenants?
   ii. Ordinarily the court requires the defaulting tenant to bear the cost of any reasonable expenses incurred by a landlord in attempting to re-let the apt.

d. Duty to mitigate:
   i. When a tenant has wrongfully vacated, landlord’s options are:
      1. Terminate the lease and sue for anticipatory breach
      2. Try to re-rent the apartment
      3. Forget it, do nothing, and sue tenant for all the rent
   ii. Common law rule: the landlord MAY, but need not mitigate the damages by attempting to re-let the premises
   iii. Modern rule: the landlord MUST attempt to mitigate the damages by re-letting the premises (must make a “reasonably effort”)
      1. Landlord can sue for the difference between the new rent and the previously collected rent (must be in good faith—cannot re-rent for less than the premises are worth, just so you can sue)
      2. Most courts apply the duty to mitigate in commercial settings also
      3. The burden of proof shifts according to the case (some courts require the landlord to prove they mitigated, others require the tenant to prove they didn’t)
   iv. Efficiency: presumably the tenant is breaching because that makes them better off. The landlord is presumably in the same position (if they are able to rent to someone else) than if you had stayed in the lease. Since the tenant is better off and the landlord is no worse off (if they mitigate), AND the second tenant is now better off, then the entire transaction is efficient and we should encourage it

e. Consequences of the prohibition on self-help:
   i. Tenant could pay lower rent in exchange for the landlord’s right to use self-help (not available under the current legal system)
      1. Could create an unfair situation (in a monopoly) where the buyer is forced to contract out of their rights in order to get an apartment
      2. Even outside of a monopoly situation, barriers to a free rental market exist (cost of moving, losing a job, etc.)
   ii. Landlord could do more extensive background checking
   iii. Landlord could refuse to rent to certain tenants
   iv. Landlord could require large security deposits

f. Commercial vs. Residential: should there be the same rule governing self-help?
   i. Amplified emotions in residential settings (more likely to induce violence)
   ii. Residential tenants may be less sophisticated than commercial tenants (might have unequal bargaining power)
iii. Radin: a residential tenant is more bound up with their property, so we should be more protective of that interest and should limit self-help remedies

XIII. Landlord’s Duties

a. **Reste Realty Corp. v. Cooper:**
   i. When a lease contains an express or implied covenant of quiet enjoyment for the term of the lease, and it is breached substantially by the landlord, the courts will apply the doctrine of *constructive eviction* as a remedy for the tenant
   ii. The tenant’s right to claim a constructive eviction will be lost if he does not vacate the premises within a reasonable time after the right comes into existence

b. **Implied duties:**
   i. Common law: landlord can have no implied duties, the tenant was required to take the property “as is”
   ii. Modern law: implies certain duties on landlord for habitability and use of the premises. Tenants have certain rights and remedies that correspond with the landlord’s duties (withholding rent, vacating premises, etc.)

c. **Implied covenant of quiet enjoyment:** the landlord will not interfere with the tenant’s possession, use, and enjoyment of the property
   i. Many leases have an express covenant also, but all have an implied one
   ii. Related to the idea of actual eviction:
      1. Tenant is actually removed or denied access
      2. Tenant is relieved of duty to pay rent, can also terminate lease
      3. Tenant can sue for damages or injunctive relief
   iii. *Constructive eviction:* when certain acts by the landlord (or failures to perform certain obligations) so substantially interfere with the tenant’s use and enjoyment of the property that it justifies the tenant ABANDONING the property, VACATING, and ceasing to pay rent
   iv. Most courts require the tenant to actually vacate the premises within a reasonable time of when the breach occurs
   v. To guard against action by the landlord, a tenant may seek a declaratory judgment from the courts when they move out, to pre-empt any suit

d. **Hilder v. St. Peter:** The implied warranty of habitability:
   i. Any dwelling rental comes with an *implied warranty of habitability* (whether the contract is oral or written), which provides: that the premises must be safe, clean, and fit for human habitation
   ii. A tenant who enters into a lease agreement with knowledge of defects cannot be said to have “assumed the risk,” nor can the implied warranty of habitability be waived
   iii. A tenant must show that they 1) notified the landlord of the problem AND 2) that within a reasonable time the landlord had not yet responded
   iv. Damages allowed due to breach of implied warranty of habitability:
      1. Difference between the value as warranted and the value as is
      2. Damages for discomfort and annoyance
      3. Tenants may withhold payment of rent
4. Tenant may deduct the expense of any repairs they do on their own from the future rent
5. Punitive damages may be available when landlord’s actions are particularly malicious or fraudulent
v. Tenant does NOT need to abandon the premises and claim constructive eviction in order to sue for breach of the implied warranty of habitability
e. **Implied warranty of habitability**: (Paredes)
   i. Implies generally that the premises have an adequate standard of habitability
   ii. Considered breached when the premises are uninhabitable by a REASONABLE person
   iii. Generally non-waiveable (a few jurisdictions will allow an informed tenant to knowingly waive the warranty)
   iv. Options when the warranty is breached, tenant has a lot of options!: 
      1. Terminate the lease, stop paying rent, and vacate
      2. Tenant can stay and seek a rent reduction or abatement (if tenant then fails to pay the reduced or abated rent, THEY are in breach)
      3. Cannot be relieved of ALL duty to pay rent
      4. Tenant can repair the premises and deduct the cost from total rent
   v. Negative externalities: dangerous, run-down premises are bad for neighbors as well as tenants (fire hazard, rodents, general community deterioration, etc.). Think also about how landlords respond to policies protecting tenants—may end up hurting tenants!

XIV. Rent Control
   a. **Chicago Board of Realtors, Inc. v. City of Chicago**: famous Posner decision, lays out the reasons that rent control fails as a policy to protect low income renters
      i. Creates economic incentive for the landlord to convert their property to non-rental units (i.e. condos)
      ii. Creates an economic incentive to reduce services: stop mowing the lawn, stop conducting repairs, etc.
      iii. Landlords might require a large security deposit and then find ways to keep it
      iv. Landlords might require a large security deposit and then find ways to keep it
      v. Landlords might buy out your right to stay in the building at an artificially reduced rent (tenant is paying a below-market rate—landlord will be willing to pay them off to get them to move)
      vi. Landlord may become more selective in who they rent to (may discriminate)
      vii. Finders fees: tenants become willing to pay the landlord thousands just for the privilege to sign a lease with someone (when housing shortages make finding apartments impossible—San Francisco) “the price of entry”
      viii. No means testing when it comes to who gets the benefits of rent control: the program is designed for poor people, but rich people frequently get rent controlled apartments and hang onto them
ix. BOTTOM LINE: if landlords can’t get their value through rent, they’ll find other ways to extract value from tenants or get out of the game, resulting in a reduction in the number of rental units available and lower quality housing across the board
x. **Only works when demand increases while supply remains stagnant or increases at a slightly slower rate (housing shortages screw rent control)**

b. Benefits to rent control:
   i. Creates a stable community
   ii. Radin: protects personal property that persons are bound up with

XV. Nuisance (Judicial Land Use Controls): Remedies and Substantive Law
   a. **Estancias Dallas Corp. v. Schultz**: (Houston air-conditioning case) even when a jury finds facts constituting a nuisance, there should be a “balancing of equities” to determine if an injunction should be granted
   b. **Injunction**:
      i. Effect: ends a nuisance
      ii. Must consider that granting an injunction may force an operation to shut down completely. Maybe that’s the best option.
      iii. The winner of the injunction may SELL non-enforcement of it (Coase bargaining)
      iv. Parties are free to refuse buy-out (especially if they have idiosyncratic reasons to avoid post-injunction bargaining)
      v. The courts must take into account the financial situation and community benefit of each party’s land use, and balance the issues to declare a winner
      vi. We should assign the property right to the MOST EFFICIENT use (?)
   c. **Boomer v. Atlantic Cement Co.**: an injunction was issued, but the injunction would be vacated if Δ paid “permanent damages” to π (damages for ALL harms: past, present, and future)
      i. Dissent argued that this solution, in effect, licenses a continuing wrong
      ii. **Property rule**: you don’t have to sell you right to an injunction unless you agree to the price
      iii. **Liability rule**: you have to accept the damage calculation set by the courts and must sell your right to injunction if Δ offers to pay you off
      iv. Do we trust the court to set the right amount?
   d. **Spur Industries, Inc. v. Del E. Webb Development Co.**: (Sun City develop.)
      i. **Private nuisance**: affects a single individual or a definite small number of persons in the enjoyment of private rights not common to the public (Remedy: damages)
      ii. **Public nuisance**: one affecting the rights enjoyed by the citizens as a part of the public (Remedy: injunction)
      iii. **Coming to the nuisance**: the residential landowner may not have relief if he KNOWINGLY came into a neighborhood reserved for the “nuisance” activities (e.g. industrial or agricultural uses) and then suffers damage by it
      iv. Awarding of relief to the enjoined party: limited to a cases wherein a developer has, with foreseeability, “come to the nuisance” by bringing a population into a formerly agricultural or industrial area
e. **Nuisance:** when a property owner uses their land in a way that interferes with their neighbor’s use. 2 step threshold inquiry:
   i. Is the interference **SUBSTANTIAL**?
   ii. Is the substantial interference **UNREASONABLE**?

f. **Private nuisance:** an unreasonable interference with the use and enjoyment of land, causing harm to a PARTICULAR property owner
   i. Any affected property owner can bring suit for nuisance
   ii. Can only bring suit for “unreasonable” interferences (inherently vague!)
   iii. Requires a “balancing of the equities” (benefit to the actor vs. nuisance to the affected landowner). Determined on a case-by-case basis.
   iv. Coase: negative externalities (nuisances) must be internalized

g. **Public nuisance:** some act that interferes with a broader community interest or the comfort of the public at large
   i. Air and water pollution, loud noises, harboring vicious animals, etc.
   ii. A nuisance may give rise to BOTH a public and private nuisance
   iii. Environmental regulation frequently deals with public nuisances

h. **Balancing of the equities:**
   i. The extent and character of the activity (e.g. playing a stereo really loud at 3pm is OK, but at 3am it’s unreasonable)
   ii. The extent and character of the harm (e.g. if air pollution harms your flower garden, not a big deal. But if air pollution harms your health, that’s a big deal)
   iii. The social value of the π’s use of his/her land (if π has a summer home, not likely to be grounds for an injunction, but if π runs a children’s hospital, that is a definite social good)
   iv. Suitability of the parties’ land use in that particular locality (pig farm in rural MO vs. pig farm in downtown Clayton)
   v. The burden on the plaintiff of avoiding the harm (if π can avoid the harm by a simple act, nuisance injunction is unlikely)
   vi. The burden on the Δ of avoiding the harm (if the cost of fixing the nuisance is extremely high, may not issue an injunction)
   vii. The social value of Δ’s conduct (if it’s the only employer in the town, then it has high social value and we don’t want to shut it down)

i. **Substantial interference:** an alternative theory to “balancing the equities.” Do the Δ’s actions “substantially interfere” with π’s enjoyment of their property? If so, an injunction should be issued.

j. **Coming to the nuisance:**
   i. If assumed the risk
   ii. If is interfering with Δ’s use of his property (she’s the one who showed up and tried to use the land for a different purpose!). Externalities and nuisance are RECIPROCAL, either side can interfere with land use
   iii. If you come to the nuisance, you’re in the best position to mitigate harm
   iv. If you came to the nuisance, you probably paid a lower price originally (the price was low BECAUSE of the nuisance—it would be unjust to let you benefit from that fair bargaining)
   v. First in time
k. Liability vs. property rules: (and the allocation of property rights)
   i. Property rule: the activity must be abated (granting an injunction to π).
      Gives π a property right.
   ii. Liability rule: the activity can continue IF the Δ pays damages to the π
      (injunction will be enforced IF Δ does not pay). Gives π a property right.
   iii. Property rule: let the activity continue by denying π all relief. Gives Δ a
      property right.
   iv. Liability rule: abate the activity IF π pays Δ damages. Gives Δ a property
      right. (This is the Spur Industries decision.)

l. Issues to consider when making a decision about allocation:
   i. Transaction costs and post-injunctive bargaining
   ii. Distributional costs (who do we care most about—who must pay whom?)
   iii. Who might be the least cost-avoider?
   iv. How do you calculate damages? (If damages are wrong, the level of
      activity will be wrong—the goal is to regulate activity)

XVI. Easements (private land use controls)
a. Easements: the right to use land being divided between 1) the person who owns
   the land, and 2) somebody else who has a right to USE the land for some limited
   purpose (does not have the right to POSSESS the land in the way the owner does)
   i. Divides the right to use (different from co-tenancy: right to possess)
   ii. Right of way: the right to cross someone’s land to get where u want to go
   iii. An interest in land, not just a contractual right (real property!)
   iv. Can have durations similar to any fee
   v. Can be created by:
      1. Express agreement between the parties
      2. Estoppel
      3. Prescription (analog of adverse possession)
      4. Prior existing use
      5. Necessity
b. Easements appurtenant: benefit the owner of the easement in the use of some land
   belonging to the owner of the easement (benefits a PIECE OF LAND)
   i. Dominant tenement: the land being benefited by the easement
   ii. Servient tenement: the land across which the easement exists
   iii. Think about it as “attached to the land”, easements appurtenant are always
      transferred with possession of the land
c. Easements in gross: benefits the holder of the easement without regard to the
   holder’s ownership of any other parcel of property (benefits a PERSON)
   i. Ownership/possession of some piece of land is NOT a requirements in
      order to retain control of the easement
   ii. Example: a property owner grants someone access to ride bikes on his
      property, or swim in the pond on his property
   iii. Generally transferable
d. Presumption: courts generally construe in favor of an easement APPURTENANT
e. License: when you give someone permission to come onto your property when it
   would otherwise be a trespass. A one-time allowance.
   i. Example: having friends over for dinner, allowing a plumber in the house
ii. Licenses are REVOCABLE, easements are not.

f. **Easements from necessity:** (often comes up when parcels are landlocked)
   i. Must have been unity of ownership between dominant and servient parcels
   ii. Requires real necessity (not just useful or convenient necessity)
   iii. The necessity had to exist at the time of the severance of the parcels (no requirement of prior existing use)—cannot be a necessity created later!!

g. **Holbrook v. Taylor:** Easement by estoppel
   i. An easement is created when the owner of a tenement openly, peaceably, continuously, and under a claim of right adverse to the owner of the soil, AND with his knowledge and acquiescence, used a way over the lands of another for statutorily set period of time
   ii. When a license includes the right to erect structures and acquire an interest in the land, the licensor CANNOT REVOKE the license once the licensees have exercised such benefits (estoppel)

h. **Easements by estoppel:**
   i. Party possessing the license must have made substantial investments in reliance on the license
   ii. The property owner must have either expressly or implicitly consented to the substantial investment (seeing trucks going to and fro is enough)
   iii. Least cost-avoider argument: (whichever one it is should bear the burden)
      1. Licensor can always MAKE CLEAR to their licensees that the license is revocable.
      2. Licensees can always attempt to purchase the licensed land.

i. **Van Sandt v. Royster:** Easements from prior existing use
   i. *Quasi-easement:* a landowner can use one part of THEIR OWN land to benefit another part of the land. Once this part is transferred, though, it becomes a real easement.
   ii. When one grants a parcel of land in its entirety, without mention of any express reservation, there can be no reservation by implication UNLESS the easement is one of strict necessity
   iii. Appearance and visibility are NOT the same. The fact that a pipe, sewer, or drain may be hidden underground does not negate its character as an “apparent condition”

j. **Easements from prior existing use:**
   i. Common grantor
   ii. At the time that the tracts were separated, one tract was used to benefit the other (the quasi-easement)
   iii. Use must be:
      1. *Apparent:* not the same as visibility
      2. *Continuous:* use must have been ongoing, and the original owner must have INTENDED for the use to go on when they transferred their interest
      3. *Reasonably necessary:* the easement must be necessary for useful and convenient usage of the dominant tenement, or truly necessary
   iv. We don’t require the dominant tenement to pay the servient tenement when a prior existing use is found, because we assume that the servient
tenement should have known or already did know about the easement (they probably paid a lower purchase price b/c of the easement!)

k. **Othen v. Rosier**: Easements by necessity/Easements by prescription
   i. When a buyer owns a piece of land surrounded by the lands of a stranger, there is an implied reservation of a right of way BY NECESSITY over the land when the buyer has no other way out
   ii. Necessity is only a valid claim when the tracts of land were originally owned by a single owner
   iii. Prescription is only a valid claim when the use of the easement is adverse and hostile (having permission negates the existence of an easement by prescription)
   iv. Easement by prescription cannot exist when the use of the land is not exclusive
   v. The prescription period cannot begin until the dominant and servient tracts are no longer under the same ownership

l. **Easements by prescription**: similar to adverse possession, except with USE instead of possession
   i. Actual use
   ii. Exclusivity – not necessarily exclusive from the owner, just from other potential adverse users (some courts reject this)
   iii. Open and notorious
   iv. Continuous (no substantial interruption)
   v. Adverse and hostile (permission becomes a major issue)
   vi. Relevant period (statute of limitations) must have passed

m. **Brown v. Voss**: An easement appurtenant to one parcel of land may not be extended by the owner of the dominant estate to other parcels owned by him, whether adjoining or distinct tracts, to which the easement is not appurtenant

n. Question of scope: whatever the REASONABLE use of the easement would be defines the scope of the property right. When creating easements, be sure to narrowly define the scope or you might be granting a right of possession.

o. **Termination of easements**:
   i. Holder of the easement signs a release
   ii. Set timeframe for expiration (in a written agreement)
   iii. When the holder of the dominant and servient estates come to be owned by the same person (“merger”)
   iv. Abandonment – the holder of the easement may have abandoned their right, BUT not using the easement for a period of time does not necessarily constitute abandonment. Must engage in some conduct that SIGNIFIES abandonment

XVII. Covenants (private land use controls)
   a. **Covenants**: when two landowners come to an agreement with one another about how to use their land, and they want to bind their successors as well. Covenants “run with the land” to subsequent owners of the property
   b. **Real covenants**: a promise or obligation with respect to the use of the land that runs with the land to subsequent owners
      i. Common law: enforced by damages
ii. Contract based, an actual written agreement between the owners of the properties must exist

iii. A real covenant cannot arise from estoppel, prescription, prior existing use, etc. (unlike easements)

iv. 3 requirements for real covenants to “run with the land”
   1. Intent: landowners must INTEND to bind their successors. The intention should be written in the agreement.
   2. Touch & Concern: the covenant must touch and concern the land
   3. Privity: for the BURDEN to run, must be in both horizontal and vertical privity. For the BENEFIT to run, must be vertical privity.

c. Horizontal privity: Requires that the two parties have some mutual interest in the land (i.e. grantor-grantee, dominant tenement-servient tenement, concurrent owners, landlord-tenant, etc.). Neighbors DO NOT have horizontal privity.

d. Vertical privity: privity of estate between one of the original contracting parties and that party’s successor in interest to that land
   i. Common law: for there to be vertical privity, the successor had to take the original party’s ENTIRE interest. Also, there must be both vertical and horizontal privity for the benefit or the burden to run.
   ii. Modern law: you don’t necessarily need to take the entire interest to have vertical privity with the original landowner. Horizontal privity is not required for the benefit to run (only the burden).
   iii. Example: A ↔ B are not in horizontal privity, but they have a covenant. A → C and B → D. C and D can sue A or B for violating the covenant, but A and B cannot sue C or D for violating the covenant. (Only the BENEFIT of enforcing the covenant can run with the land, not the BURDEN of abiding by it.) If A ↔ B are in horizontal privity, the burden and the benefit run to C and D, and the covenant is enforceable.

e. Equitable servitudes: distinguishable from contracts because they run with the land to successors if NOTICE is given, regardless of privity. 3 requirements:
   i. Intent: landowners must INTENT to bind their successors
   ii. Touch & Concern: the covenant must touch and concern the land
   iii. Notice: (replaces the privity requirement) actual notice, constructive notice, OR inquiry

f. Subdivisions: a form of equitable servitude
   i. Implied reciprocal servitudes: where a common grantor develops land for sale of lots, and includes a common scheme or plan of restrictions on each plot for the benefit of all owners, the grantees acquire BY IMPLICATION the right to enforce the same restriction as is in their deed, on the lots that are retained by the grantor, or on the lots that are subsequently sold by the grantor to a purchaser WITH NOTICE of these restrictions
   ii. Intent: the intent when you ORIGINALLY subdivided the property is the only intent that counts

g. Touch & Concern: different from personal promises that have nothing to do with the land (i.e. a promise to sing Christmas carols every year). It matters because:
   i. Goes to the greater value: restrictions that touch & concern the land are ones that all the landowners might desire
ii. Majoritarian default rules: if we think that the original owners and MOST successors would like the restriction to remain in place, allowing covenants to run with the land by default reduces transaction costs (parties don’t have to renegotiate the covenant each time title transfers)

iii. Contracting around the agreement: allocating a property right to the other landowners allows them to bargain with subsequent landowners. The covenant can by “bought” and “sold”. (Although transaction costs are high when there is a subdivision full of landowners to deal with.)

h. Tulk v. Maloney: If a person has notice, they shall not be allowed to use the land in a manner inconsistent with the contract entered into by the previous landowner

i. Sanborn v. McLean:
   i. Reciprocal negative easement: if a common owner sells off parts of his land with equitable servitudes attached AS PART OF A COMMON SCHEME, all the other parcels he sells must have identical equitable servitudes, and all subsequent purchasers are bound to the originally conceived agreement
   ii. Reciprocal negative easements are not personal to owners, they are connected to the land (appurtenant rather than gross)
   iii. Intent, touch & concern, and notice all must exist for a reciprocal negative easement to be binding

j. Neponsit Property Owners’ Ass’n, Inc. v. Emigrant Industrial Services Bank
   i. It is impossible to state any absolute test for when a covenant “touches and concerns” the land
   ii. Affirmative covenants: agreements to DO something (rather than to refrain from doing something), do NOT run with the land

k. Western Land Co. v. Truskolaski: enforcement under “changed circumstances”
   i. So long as the original purpose of the covenants can still be accomplished and there is still substantial benefit/value to the homeowners, the covenant stands even though the property may have greater value if used differently
   ii. A zoning ordinance cannot override privately-placed restrictions, and a trial court cannot be compelled to invalidate restrictive covenants merely because of a zoning change
   iii. In order for community violations to constitute an abandonment, they must be so general as to frustrate the original purpose of the agreement

l. Rick v. West: the hold-out problem & the endowment effect
   i. Restrictive covenants will be enforced, unless the attitude of the complaining owner (the hold-out owner) in standing on his covenant is unconscionable or oppressive
   ii. However, when the restriction is not outmoded AND when it affords real benefit to the person seeking enforcement, the court will uphold the covenant rather than award monetary damages

m. Covenants can end by:
   i. Common ownership
   ii. A negotiated release
   iii. When the covenant is, by its terms, limited in duration
iv. Abandonment (the π himself may be violating the covenant, or the π may have let others breach the covenant, or the π may have allowed the Δ to invest substantial resources in reliance on the idea that the covenant would not be enforced—estoppel)

v. Changed circumstances

n. Ways to resolve a dispute regarding a breach of a covenant

i. Property rule: enjoin the breaching party; allocates a property right to the party seeking to enforce the covenant

ii. Liability rule: grant damages to the party seeking to enforce the contract which the breaching party has to pay; allocates a property right to the party seeking to enforce the covenant

iii. Property rule: deny all relief to the beneficiary of the covenant; allocates a property right to the breaching party

iv. Liability rule: prohibit the breach so long as the party seeking to enforce the covenant pays damages; allocates a property right to the breaching party

XVIII. Zoning (legislative land use controls)

a. Zoning: government’s attempt to regulate what you do with your land

i. Zoning is not unconstitutional (the Supreme Court has ruled)

ii. One of the most important activities of local government

iii. In the absence of zoning, the other option is residential covenants (the problem is that covenants are always concerned with PRIVATE interests, so externalities will always be imposed on neighboring communities)

iv. No federal zoning laws exist

b. Euclidian/cumulative zoning: industrial, commercial, residential

i. Highest use: residential; Lowest use: industrial (which is not to suggest that “higher” uses are more valuable, in fact it’s usually the opposite)

1. Factory: industrial zone only

2. Commercial store: industrial or commercial zone only

3. House: industrial, commercial, or residential zone

ii. Euclidian zoning is not always cumulative, in some areas industrial zones are limited to ONLY industrial development

iii. Not just restrictions on use, also restrictions on: types of buildings, size of buildings, density limitations, etc.

c. Why zoning instead of nuisance law?

i. Nuisance lawsuits may be more costly than zoning disputes

ii. Efficiency: zoning ensures efficient use through segmentation of property uses. We don’t know what will be considered a nuisance ahead of time, so we don’t know how the property will divide itself if we leave it to nuisance lawsuits to determine what activity is allowed where

d. Takings clause

i. 5th Amendment: it is unlawful for the government to take someone’s property for public use without giving them just compensation

ii. Zoning is not about the government physically taking or occupying your property, it’s about restrictions on USE

iii. Under certain situations, regulations constitute a “taking”. It takes away sticks in the bundle of sticks. The government deprives you of value.
e. **Nonconforming use**: a pre-existing permissible use, which was then zoned out of existence by a new zoning scheme. From that moment going forward the landowner has a nonconforming use
   i. *Amortization*: a period of phasing out, after which time landowners are required to be in compliance. Uses the accounting principle of “depreciation.” Must allow a reasonable time. Factors to consider:
      1. Nature of the use
      2. Amount invested in the property
      3. Type and extent of the improvements
      4. Harm to the public of allowing this nonconforming use to exist
   ii. Idea of nonconforming use is limited to CURRENT ACTUAL USE of the property only (no protection for future prospective uses)
   iii. Another way to think of nonconforming uses: they’ll go away eventually, no reason to take action to end them. This conception creates a problem: a nonconforming use could exist FOREVER. In fact, once the zoning law restricts other competing businesses from the area, the nonconforming use is even more valuable and will be clung to at all costs
   iv. Mechanics of nonconforming use:
      1. Generally runs with the land (otherwise alienability is destroyed)
      2. If the landowner terminates their use for a significant period of time, they may lose the benefit of the nonconforming use
      3. The amortization period tends to be longer if the property is out of compliance with some new restriction on the physical building (if the zoning requires fundamental changes in the building)
      4. Landowners cannot expand the nonconforming use (can’t move to a lower usage, for example) but there’s a lot of flexibility in determining what “expansion” means
   v. *Reasonable investment-backed expectations*: must always evaluate to what extent the property rights of the nonconforming landowner have been frustrated by the zoning scheme
f. **PA Northwestern Distrib., Inc. v. Zoning Hearing Board**: nonconforming use
   i. (*not the law*) Amortization is unreasonable in all cases
   ii. Zoning boards may not prevent the owner of a nonconforming property from making those necessary additions to an existing structure as are needed to provide for its natural expansion, so long as such additions would not be detrimental to the public welfare, safety, and health
   iii. A lawful nonconforming use establishes in the property owner a vested property right which cannot be abrogated or destroyed, unless it is a nuisance, or it is abandoned or extinguished by eminent domain
g. **Variances**: the right to vary from a zoning scheme
   i. Most zoning ordinances set up a board or zoning body with the right to grant/deny requests for variances
   ii. Most variances will be conditional upon certain land-use requirements, decided by the zoning body
   iii. Variances run with the land
   iv. 2 general categories:
1. **Use variance**: the ability to USE the land in a way that is not allowed by the zoning scheme

2. **Area variance**: lot size, frontage, etc.

h. **Special exceptions**: uses contemplated by the zoning scheme itself. The zoning scheme allows these activities to take place, but monitors and controls them to certain extent (special requirements that the special exception must satisfy, or possibly just a blanket exception for uses that benefit the public good)

i. **Commons v. Westwood Zoning Board of Adjustment**: variances
   
i. When strict application of the zoning restrictions would result in **exceptional and undue hardship** to a developer, the board of adjustment should grant a variance
   
ii. **Undue hardship**: when no effective use can be made of the property if the variance is denied. HOWEVER, developer is not entitled to the most profitable use
   
iii. If the developer or his/her predecessors in title created the nonconforming condition, the hardship may be deemed **self-imposed**. A self-inflicted hardship does not satisfy the criteria for undue hardship (e.g. if a property owner refused to sell at a “fair and reasonable price”, he would not be considered suffering an undue hardship)

iv. Applicants for a variance must show:
   
   1. That they suffer an undue hardship unless the variance is granted
   
   2. That granting the variance won’t do violence to the zoning scheme

v. **Coase bargaining**: neighbors can buy out the variance. If neighbors are not willing to pay a judicially determined “fair market value” for the variance, then the property owner values the land more and it is being used efficiently (this hinges on the judge determining the correct value)

XIX. **Eminent Domain**

a. **Eminent domain**: a liability rule—forced sale of private land to the government.
   
i. Must be for public use
   
ii. Landowner must be justly compensated

b. **Hawaii Housing Authority v. Midkiff** (Supreme Court of the U.S.)
   
i. Once the public purpose has been established, Congress can use the land however they choose. Deference to the legislature’s “public use” determination is required until it is shown to involve an impossibility. If the legislature **rationally could have believed** that their act would promote a public use, the taking is legitimate.
   
ii. One person’s property may not be taken for the benefit of another private person without a justifying public purpose, even with compensation
   
iii. The transfer of land taken by eminent domain to private beneficiaries does NOT condemn the taking as having a private purpose
   
iv. It is not essential that the ENTIRE community, nor even any considerable portion, directly enjoys or participates in any improvement in order for it to constitute a “public use”
   
v. **Public use**: actually means **public benefit**

c. **Restraints on eminent domain**:
   
i. **Budget constraints**: giving “just compensation” can be expensive
ii. Accountability: legislatures have to prove the taking was for public use
iii. Can be applied in limited cases (HI case was b/c of a land monopoly)

d. **Poletown Neighborhood Council v. City of Detroit** (GM plant case)
   i. Economic improvement can be a “public use” (the city can condemn private property and give it to a company for use as a factory, if it improves the economic situation in a town)
   ii. This is actually taking private land and giving it to another private entity

e. Arguments for/against Poletown
   i. Deference to local authority: developer will argue that if local authorities think it will benefit the community, than public use is established
   ii. Corruption: whenever the legislature condemns land for corporations to use, there is a concern of special influence, efforts to placate certain constituencies, and corruption
   iii. Monopolists: GM and other large corporations are monopolists in some towns, their threat to go elsewhere creates panic and allows them to demand concessions from cities if they stay
   iv. Rent-seeking: giving local authorities the ability to decide when public use exists gives corporations an incentive to rent-seek.

f. **Kelo v. City of New London**: before Supreme Court now. Court must decide if Pfizer plant which includes housing for employees and visitors benefits the public enough to warrant the condemnation conducted by the city of private lands

g. **Just compensation**: why do we have it?
   i. Efficiency: ensures that the government taking the property values it more than the person it is taking it from
   ii. Encourages productive activity: if government can take land at any time without paying for it, landowners won’t invest in their land and put it to productive use (property rule would be better, but liability rule is OK)
   iii. Restrains the state: cannot take property at will
   iv. Fairness and justice concerns
   v. Protect the powerless: protects people who do not have a meaningful political voice and would otherwise have their property taken w/o $
   vi. Protects the powerful and wealthy: deters government from using eminent domain as a method of wealth redistribution

h. Problems with just compensation:
   i. Doesn’t take into account subjective valuation, only requires payment of market value
   ii. Reasons I may value at a higher cost than market value:
      1. Endowment effect
      2. Owner may be putting property to a special use that is more valuable in his hands than in the govt’s or someone else’s
      3. Relocation costs: expensive to move and relocate
      4. Radin: personhood values
   iii. Why don’t we award personal values?
      1. Administrative problems: too hard too calculate personal value
      2. People may lie, inflating costs
      3. Would cost taxpayers more money
iv. Options for solving the undervaluation of takings:
   1. Give some kind of bonus above market value
   2. When it is likely for there to be high personal value, heighten the
      public use test (not just ANY public purpose)

XX. Physical Occupation (Takings)
   a. **Loretto v. Teleprompter Manhattan CATV Corp.**
      i. **Permanent physical occupation (no matter how minor) is a categorical
         per se taking, and must be accompanied by just compensation.** (No
         balancing test — this is just the law.)
      ii. Once the fact of occupation is shown, a court should consider the extent of
          the occupation as one relevant factor in determining the compensation due
      iii. This holding does not alter the State’s power to require landlords to
            comply with building codes and provide utility connections, mailboxes,
            smoke detectors, fire extinguishers, etc. in common areas of the building,
            so long as these regulations do not require the landlord to suffer the
            physical occupation of a portion of his building by a THIRD PARTY
   b. Is rent control a permanent physical occupation?
      i. No, all we are doing is setting prices with rent control
      ii. Yes, could be a physical occupation because you have to allow previous
          renters to stay at the low price. No longer have the right to exclude. Even
          if the tenant is not permanent, the regime is.
      iii. No, it only forces landlords to take any tenant at a reduced price, doesn’t
          actually force them to take any particular tenant
      iv. No, you always have an out to rent control — you can always sell
   c. Does temporary commandeering of private property constitute a permanent
      physical taking?
      i. Not permanent, so not a per se categorical taking
      ii. Doesn’t mean it’s not a taking, though — must calculate the loss through a
          balancing test
      iii. Severability: can I sever out that time period and count it as a total taking?

XXI. Regulatory Takings
   a. **Regulatory takings:** when regulations ceases to be just a law and becomes an
      impermissible taking of property, requiring just compensation
      i. The government is still allowed to enforce the law, they just have to pay
      ii. Types of regulations that may constitute a taking:
         1. Zoning
         2. Landlord/Tenant: rent control, warranties of habitability, other
            requirements placed on landlords
         3. Environmental regulations: wetlands regulation, moratoriums on
            development
   b. When does a regulation = taking?
      i. Regulation ALWAYS constitutes a taking
         1. (-) Unlimited liability for the government
         2. (-) To avoid liability, govt. will pass cost on to public or simply
            will not regulate, losing the benefits of regulation
3. (+) If the public good is really the reason for regulating, then the public should be willing to pay for that benefit
   ii. Regulation NEVER constitutes a taking
       1. (-) Government will regulate without regard to detriment to owners
   iii. At some point, regulation goes too far. SOMETIMES regulation constitutes a taking
       1. (-) Courts have the tricky position of drawing a line when regulation goes too far (Pennsylvania Coal Co. v. Mahon)

c. Pennsylvania Coal Co. v. Mahon (Supreme Court of the U.S.)
   i. Majority: So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought
   ii. Minority: The purpose of a restriction does not cease to be public because incidentally some private person may receive gratuitously valuable special benefits from its enforcement

d. Dimunition-in-value test:
   i. Holmes: a balancing test. Looking at the benefit from the regulatory regime vs. the detriment to the private property owner from the regulation
   ii. To what extent has the private property owner suffered a hit to his/her interest in the property? (How much of the VALUE have they lost?)
   iii. Reasonable investment-backed expectations: A property owner’s EXPECTATIONS about their ability to develop/use the property defines their interest. We must know what you HAVE before we know how the regulatory regime impinges on your rights. Unreasonable expectations will not be compensated.
   iv. Average reciprocity of advantage: the property owner who is burdened by the regulation may also receive some benefit from it. To the extent such reciprocity of advantage exists, it is at the very least a factor to consider in whether or not the regulation goes too far. A considerable benefit can negate the finding of a taking without just compensation

e. Penn Central Transportation Company v. City of New York (S.C. of the U.S.)
   i. The Takings Clause is designed to bar govt. from forcing some people ALONE to bear the public burdens which, in all fairness and justice, should be borne by the public as whole.
   ii. The Supreme Court has ruled that govt. may execute laws or programs that negatively impact certain parties’ economic situation. Dimunition in property value, standing alone, cannot establish a taking.
   iii. Conceptual severance is NOT allowed—the court must examine the economic impact to the property as a WHOLE.
   iv. Dissent:
       1. Conceptual severance is OK (represents the complete devaluation of a stick in the bundle)
       2. **Zoning doesn’t constitute a taking because the regulation takes place over a BROAD cross-section of land and impacts many

f. 4-Step Test to evaluate a takings claim:
i. *Ad hoc factual inquiry:* decisions will be made on a case-by-case basis, no broad rules or standards

ii. *Extent of the economic harm:*
   1. Court focuses on the economic impact on the property owner (diminution in value, reasonable investment-backed expectations)
   2. As long as the property owner can use the property in a reasonably profitable way after the regulation is imposed, it does not constitute a taking

iii. *Character of the government action:*
   1. To the extent that no physical invasion has actually occurred, courts are more deferential to regulation
   2. A taking will more readily be found if the regulation results in a physical invasion and not just land use controls

iv. *The importance of what the government is trying to do:*
   1. How necessary is the regulation to promote the public purpose (must identify what the public purpose is, then how necessary the regulation is to it)
   2. *Singling out:* the idea that relatively few property owners are being burdened in order to benefit the rest of society (an under-riding concern of the Takings Clause)

g. **Lucas v. South Carolina Coastal Council** (Supreme Court of the U.S.)
   i. Courts are the proper body to determine public use, not the legislature
   ii. Two categories of regulatory action are prima facie compensable:
      1. Actual physical invasion of the property by govt. or 3rd party
      2. Where regulation denies all economically beneficial or productive use of the land
   iii. Nuisance will not excuse just compensation UNLESS the permanent physical occupation or regulatory taking was pre-existing or a “background principle” when the land was purchased. (Coming to the nuisance.)
   iv. A *total taking* inquiry requires analysis of (balancing-of the equities):
      1. The degree of harm to public lands and resources, or adjacent private property, if the regulation is not enforced
      2. The social value of the landowner’s activities and their suitability to the location in question
      3. The relative ease with which the alleged harm can be avoided through measures taken by the claimant or the government
      4. The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any “background principles” or common-law prohibition. So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant
   v. Dissent (Blackmun): Land can continue to have “economic value” when the only residual uses are campaign and recreation
   vi. Dissent (Stevens): A takings inquiry is always an ad-hoc inquiry, it can’t be reduced to a formula.
h. When does a regulation constitute a taking?
   i. **Lucas v. South Carolina Coastal Council** is the intersection of 2 ideas:
      1. *Dimunition in value*: when the value of land to the owner is destroyed by a regulation, it constitutes a taking
      2. *Nuisance*: suggesting that if the govt. is simply regulating in a way to prevent some public harm, that is NEVER a taking
   ii. Lucas gives another categorical rule: when the property value is completely wiped out, the regulation constitutes a per se categorical taking
      1. *Total wipe out*: takes away every stick in the bundle of property rights, destroys all reasonable investment-backed expectations
      2. Akin to eminent domain (condemnation) or physical occupation
      3. Leaves no reciprocal benefit for the property owner to benefit from
   iii. Few regulations result in total wipeouts (so the govt. is not overburdened by having to pay for property every time they enact a regulation)
   iv. What’s the right denominator: when have you been denied all valuable use
      1. The value of the entire parcel vs. the restricted portion of the parcel
      2. *Conceptual severance*: allows landowners to sever out the property sticks that are restricted into a separate and complete property interest, and then claim a taking because their rights have been “totally wiped out”
      3. If we allow conceptual severance, then complaining party will always win. There is always a story to be told for total wipe out.
   v. Lucas backs away from a broad nuisance approach: laws designed to protect against common law nuisances should not constitute a taking, because you never had the right to engage in that process. But “anytime the law prevents a public harm” is a bad standard, because legislatures will always be able to tell a story for broad public harm

i. **Palazollo v. Rhode Island**
   i. A regulation that otherwise would be constitutional absent compensation is NOT transformed into a background principle by mere passage of title from the original owner to a later owner. (Just because you buy the land after the law is passed doesn’t mean the law is a background principle.)
   ii. **Paredes**: there is not need for the court to articulate this rule
   iii. A state may not evade the duty to compensate on the premise that the landowner is left with a TOKEN interest