

- I. Common ownership
  - a. Varieties of common ownership – property rights may be divided as well as shared. When they are shared, each has a concurrent right to possess the whole property – they decide how to use it together.
  - b. There are many forms of common ownership; some give freedom to manage; some designate management
    - i. Tenancy in common
      - 1. each tenant in common, no matter how small their fractional interest, has the right to possess the entire parcel unless the cotenants otherwise agree. When a tenant in common dies, his interest goes to his devisees under his will/to his heirs.
      - 2. tenancy in common can be transferred by language: O conveys property to A and B as tenants in common.
    - ii. Joint tenancy
      - 1. like tenants in common, each joint tenant has the right to possess the entire parcel. Unlike tenants in common, joint tenants have traditionally been required to possess equal fractional interests.
      - 2. the major difference between joint tenancy and tenancy in common is the right of survivorship. When a joint tenant dies, interest goes to the remaining tenants in equal shares.
      - 3. Certain formalities are traditionally required to make a joint tenancy – unities of time, title, interest, and possession –
        - a. Interests created at the same moment in time
        - b. Acquire title by the same instrument
        - c. Possess equal fractional interests for same time
        - d. Right to possess the whole property
      - 4. can destroy a joint tenancy by transferring to a straw person and back to self, therefore destroying unity of time and space. This destroys the relationship only between the person who transfers and the remaining tenants, not among the remaining tenants.
      - 5. a joint tenancy can be created by this language: O conveys property to A and B as joint tenants.
      - 6. this is a destructible right of survivorship; you can create an indestructible one with a life estate with alternative contingent remainders: O to A and B as life tenants, with a remainder to A if A survives B and to B if B survives A.
      - 7. if it is unclear whether one who conveys created a joint tenancy or tenancy in common, the courts usually use tenancy in common.
      - 8. joint tenants/tenants in common have the freedom to transfer without the consent of coowners and can file a lawsuit for judicial partition of commonly held property.

Before that, one can have a voluntary partition between tenants.

9. Cotenants can agree among themselves not to partition; this was originally held void as a restraint on alienation, but is likely to be upheld today if it is reasonably limited in time and purpose.
  10. Concurrent owners are obligated to share benefits and burdens, unless they vary by contract
    - a. A tenant in possession has no duty to pay rent to a tenant not in possession unless they ousted them
    - b. Share rents paid by 3<sup>rd</sup> parties (even when leased without permission)
    - c. Share basic expenses – mortgage, property taxes, property insurance, but not major improvements unless they agree.
    - d. Remedy for non-contribution is to sue for accounting
  11. Adverse possession/ouster – one cotenant cannot obtain adverse possession against another unless the possessing tenant makes clear to the nonpossessory tenant that he is asserting full ownership rights in the property to the exclusion of other cotenancy (some affirmative acts to let the non-possessory tenant know of adverse claims).
- iii. Tenancy by the entirety
1. a form of joint tenancy available only to married couples and still available only in 20 states. It is joint tenancy, except:
    - a. coowners must be legally married
    - b. property cannot be partitioned except through divorce
    - c. individual interests of each spouse cannot be transferred without the other's consent and right of survivorship cannot be destroyed
    - d. cannot attach property held by the entirety for the individual debt of one spouse
- iv. *Olivas v. Olivas* 780 P2d 640 (New Mexico Ct. App. 1989)
1. Defendant Olivas husband appeals divorce property decision. In divorce, there was a lengthy time between the divorce decree and property division.
  2. They split up in June of 1983, and wife filed for divorce in August of 1983. Husband moved out voluntarily. He contests the finding that he was not constructively ousted.
  3. Ordinarily a cotenant incurs no obligation to other cotenants by exclusive occupation but the result is otherwise when one cotenant ousts the other.

4. The term “ouster” suggests an affirmative physical act; an obligation of cotenant to pay rent may arise when, without the fault of the other cotenant, they just cannot share occupancy. “Constructive ouster” is ouster in effect without a physical act.
  5. Applying constructive ouster to divorce is just another way of saying that spouses continue to share the property pending divorce. Common law precedent supports this.
  6. Husband had the burden of proving constructive ouster in this case – we cannot compel a finding of constructive ouster. The evidence may have sustained such a finding, but there is contradictory evidence as well.
  7. There is ambiguity on “chose to move out” and the courts should recognize it – but here, a finding of no constructive ouster was not unfair. It therefore stands.
- v. Carr v. Deking 765 P2d 40 (Wash. Ct. App. 1988)
1. Joel Carr and his father owned a parcel of land as tenants in common and leased it to Deking from 1974-1986 on a year-to-year oral agreement for 1/3 of the crop yield.
  2. in 1987, little Carr said he wanted cash for rent; Deking was not receptive. He did not respond; instead, he talked to big Carr and worked out a cropshare lease. Little Carr neither consented nor allowed Big Carr to act as agent.
  3. Little Carr tried to evict on argument that no valid lease existed.
  4. Little Carr says that the rights of the lessee are subordinate to those of a nonjointing tenant in common. Still, each tenant in common may use, benefit, or possess the entire property subject only to the equal rights of cotenants. A cotenant may thus lawfully lease his interest in common property to another without the consent of the other tenant. The nonjoining tenant = not bound by the lease. The Lessee steps into the shoes of the leasing cotenant. Non-joining tenant may not demand exclusive possession against the lessee, but may only demand to be let into copossession.
  5. Proper remedy = partition; until that occurs, lessee can be on property. Can choose between prior oral agreement and written lease.
- vi. Tennet v. Boswell 554 P2d 330 (CA 1976)
1. A joint tenant leases his interest in joint tenancy and dies during the term of the lease. The lease does not sever the joint tenancy.
  2. Decedent executed a lease which plaintiff seeks to terminate as surviving joint tenant.

3. Four unities essential to joint tenancy – interests, time, title, possession – if an essential unity is destroyed, joint tenancy is severed and tenancy in common results; this kills the right to survivorship.
  4. Option to lease is not so inherently inconsistent with joint tenancy as to create severance.
  5. Inasmuch as the estate arises only through express intent (which is often the express intent of the tenants themselves), we decline to find a severance in circumstances which do not clearly and unambiguously establish that either joint tenant desired to terminate the estate.
  6. There are a number of express ways in which one can terminate a joint tenancy; they didn't; it still existed at the time of the lessor joint tenant's death. So, what do we do now?
  7. Does the other joint tenant's right of survivorship come with or without the encumbrance of the lease?
  8. By the very nature of joint tenancy, the interest of the non-surviving joint tenant extinguishes at death. The lease = only valid as long as the interest in the lessor of joint property exist; which is until his death.
  9. In a mortgage case, the court held that the deceased joint tenant had no interest in the property, so neither did his creditor mortgage company.
  10. A joint tenant may during his lifetime grant certain rights in joint property without severing his tenancy which become unenforceable on his death – this lease is one of them; any other result would be defeating to the justifiable expectations of the surviving joint tenant.
  11. Still, not insensitive to someone who leases not knowing this – this makes them do some expensive research. Still, cannot allow extraneous factors to erode the function of joint tenancy = no longer valid.
- vii. *Kresha v. Kresha* 371 NW2d 280 (NE 1985)
1. Plaintiff boy Kresha and plaintiff girl Kresha were husband and wife coowners of two tracts of land, parents of defendant child Kresha.
  2. Father by written instrument and without consent of mother leased land to son for six years. Mother learned of lease and filed an action for separate maintenance which father turned into an action for divorce.
  3. The dissolution decree awarded the subject lands to the mother. The mother terminated the son's lease.
  4. This jurisdiction recognizes that one of several tenants in common can lease his or her own interests to third persons.

The father did and could encumber his own interests when leasing to the son, but did not and could not encumber the mother's interest.

5. Then, did the mother, when assuming the entire ownership, take the father's interest subject to its encumbrance? Yes.
6. Not that different from purchase from a fee owner when you know it is encumbered by a lease. Cases in which leases have been terminated = where people have encumbered more than they owned. Here, husband encumbered a fee interest that he owned. That was okay.
7. Courts have created an exception for fraudulent conveyance and hiding leases in marital relations; neither happened here.
8. From the notes:
  - a. Should one owner get to lease without the other's permission?
  - b. How do you remedy leases by one cotenant? "They can stay" is the easy part. What do you do with the rent? How is the threat of partition leverage?
  - c. Courts = divided on whether a lease severs joint tenancy or not. In Tennet, how is it not circular to ask if something is inconsistent with something the court is being asked to define? It can be said that survivorship = in flux anyway because of the ever-present risk of sale. What rule = the best use of property?
  - d. Courts = also divided on the question of whether mortgages terminate joint tenancy. Key point = question whether a mortgage is a transfer of title (old theory) or just a lien (new theory)

## II. Landlord-Tenant Law

### a. Leasehold estates

- i. Landlord agrees to transfer possession of property for a specified period of time to the tenant in return for tenant's promise to make a periodic rental payment. When the tenancy is over, possession reverts to the landlord (unless she sold her interest).
- ii. Courts divide tenancies into two categories: commercial and residential – residential = for the purpose of establishing a home; commercial = for a profit or non-profit business. Vast majority of rules = the same for both types of tenancy, but some differences on the assumption that the underlying policy considerations are different. Courts are more inclined to adopt common law rules in regulating residential leases and rely on contracts in commercial leases because commercial tenants = more likely to have sufficient bargaining power/expertise to shape leases in their best interest.
- iii. Four major types of tenancy:

1. term of years – specified period determined by the parties which ends automatically at the end of the period but can be terminated before the end of that period by other conditions in the contract. The future interest of the landlord = a reversion (or a remainder, if transferred). The death of either party does not terminate tenancy.
  2. periodic tenancy – renews automatically at a specified date unless landlord or tenant chooses to end the relationship. By statute or common law, notice is required before an end to a periodic tenancy. The death of either party does not end tenancy.
  3. tenancy at will – like a periodic tenancy but can be ended with no notice by either party. Death of either party terminates. While many states still require notice, their may be important differences – like absolute right to evict rather than it being subject to a defense.
  4. tenancy at sufferance – a tenant who rightfully possessed but wrongfully stays at the end of the leasehold (as opposed to a trespasser, who never had the right to the land). It is lawful to just evict a trespasser, a tenant at sufferance still gets an eviction proceeding. A landlord who accepts rent checks from the holdover tenant may inadvertently agree to a new month-to-month lease agreement.
- iv. Statute of frauds – every state has a statute of frauds, requiring interests in real property to be enforceable to be in writing. Most states require that leases of one year or more be in writing; oral leases (including month-to-month leases that last for years) of less than one year are enforceable.
- v. Regulation of landlord-tenant relationships:
1. regulation = heavy
  2. procedural regulation = how to create a landlord-tenant relationship, how to terminate it (notice and eviction proceeding)
  3. substantive regulation = define parties' obligations to each other, such as habitability and quiet enjoyment.
- vi. Tenants get a lot of stuff non-tenants do not: process, right to occupy, different remedies.
- vii. NJ Anti-Eviction Act
1. in order to evict, good cause needed. Good causes are:
    - a. failure to pay rent
    - b. disturbing the peace
    - c. willful/grossly negligent destruction
    - d. continual violation of the rules after written notice if rules = reasonable
    - e. willfully ignoring a not-unconscionable increase in rent

- f. landlord seeks to board up property for health code violations/fix them/correct illegal occupancy
  - g. governmental eminent domain
  - h. closure of building
  - i. at renewal time, landlord proposed reasonable changes to lease tenant refuses to accept.
  - j. Landlord conditioned tenancy on employment with the landlord in some capacity and employment has been terminated.
- viii. Vasquez v. Glassborough Service Assn Inc 415 A2d 1156
1. Glassboro = organization that farmers contracted with for migrant farm labor; Glassboro paid workers, farmers paid Glassboro.
  2. In workers' contracts, they paid for transit from Puerto Rico, if they completed their contract they were reimbursed for it; if not, they were not. Provision for physical unfitness but not being tired.
  3. Contract allowed that the Puerto Rican department of labor could investigate a termination, and, if they thought it was unfair, represent the worker against Glassboro.
  4. Glassboro provided labor camps without charge pursuant to the contract (even though some workers were charged when they lived on farms). The contract didn't require farm workers to live there, but both parties thought they would.
  5. Vasquez was fired and does not challenge that – he was not permitted to stay overnight despite vacant spaces = Vasquez was unable to speak English and without funds to return to Puerto Rico. Seeks to be allowed back into housing.
  6. At common law, one who occupies premises as an employee of the owner received use as a part of compensation and is not a tenant.
  7. Question is whether or not the NJ legislature intended to include migrant farm workers in the “in some other capacity” wording of section M of the statute against eviction about employment. In the statute, the words “in some other capacity” follow superintendent and janitor, suggesting a class that migrant farm workers are not in. A migrant worker is not an employee-tenant. Special circumstances like no rent, no privacy, intermittent occupancy, and interdependence of employment and housing support this conclusion.
  8. Next, look to the contract to see if notice is required before dispossession. The contract was negotiated between the Puerto Rican department of labor and Glassboro; no worker

ever participated. No record on whether the workers and the Department of Labor have a coincidence of interest. The contract is written in English; the plaintiff signed it even though he clearly doesn't read English.

9. Plaintiff depended on Glassboro for employment, transport, food, housing; 1300 miles from home and family where he didn't speak the language. Lack of alternative housing emphasized the inequality between plaintiff and Glassboro. When fired, farmworker lost job and shelter. In this situation, compare contract to public policy interests.
  10. Public policy eludes precise definition; based on federal and state legislation and judicial decisions – in the past, public policy has been a reason not to enforce contracts in NJ.
  11. The courts and the legislature of NJ have shown a progressive attitude when it comes to providing for migrant farm workers. *State v. Shack* = “quest is for a fair adjustment between the competing needs of the parties, in light of the realities of the relationship between migrant workers and the operators of housing” – recognizes the fundamental right of a farm worker to live with dignity.
  12. This approach – used here. Basic tenant law of contracts = that they should be enforced as made by the parties. Still, this assumes relative equality, a flaw of which the courts are increasingly aware.
  13. In a variety of contracts, courts have revised when there = a substantial inequality of bargaining power; it has been applied to leases and migrant farmworkers have even less power than leaseholders.
  14. In the contract, when he was fired, he was out of housing. No one's interest = served by sending him adrift before he has reasonably time to find alternative housing. Status of the migrant worker = like consumer who must accept a standardized form contract to buy goods and services → don't negotiate, must accept as presented, affects a lot of people and public policy
  15. Absence of a provision for time to find a new house bespeaks Glassboro's superior bargaining position *and* is inconsistent with NJ's enlightened attitude towards migrant farm workers.
  16. We require judicial eviction proceedings for an equitable resolution of this problem.
- ix. Alan Schwartz, “Justice and the law of contracts: A case for the traditional approach” (1986)
1. by justice, mean two things:

- a. (utilitarian) just outcomes occur when people are permitted to do the best they can, given their circumstances. They maximize their utility, which maximizes society's.
  - b. (distributive) ensure that the circumstances in which people are trying to do their best aren't terribly unfair to them.
- 2. on a, 19<sup>th</sup> century logic was that people could make pretty much any deal and have it enforced
- 3. in the 20<sup>th</sup> century, this view = held obsolete and a hindrance to justice because it lets the strong oppress the weak in the name of freedom of contract.
- 4. traditional theory was basically correct, several reasons:
  - a. though there are evils in the market, judges can seldom rectify them
  - b. competition prevents exploitation
  - c. even though poor people have fewer choices than rich people, but they do have free will. If a judge bans a particular contract clause in the interest of the poor, they are taking away an option for a poor person and preventing poor people from doing the best they can in the realm of contractual choice.
- x. Robert Hale, "Bargaining, Duress, and Economic Liberty" (1943)
  - 1. We live in a free economy, or at least we did before the New Deal and the war.
  - 2. Government didn't tell us what to do, it was determined by "freedom of contract" but that process was much more coercive than it sounded.
  - 3. To live, we need a lot of stuff, most of which is produced by collective effort - turned out collectively and consumed individually. We rely on bargaining to get the part of the stuff that we need.
  - 4. If you work for a shoe factory, you're okay for shoes, but you can't live on shoes - buy food or starve.
  - 5. Without money, little chance of access to goods. Question, then, of how one gets money. One sells goods that one owns, but some people don't own goods - of the enumerable producers of shoes, one owner acquires title to them - others have waived their claim to ownership through bargaining that gets them a money income.
  - 6. Though these bargains lead to vast differences in economic positions of different persons, all have entered into contract without any explicit requirement of the law. Even without explicit legal requirement, one's freedom to decline is circumscribed. One chooses to enter into any given transaction to avoid the occurrence of something worse.

7. The fact that one has exercised a choice does not indicate a lack of compulsion. Private citizens cannot threaten to jail people but they can work on the fear of starving. In consenting to any bargain, each party yields to threats from the other – can threaten to exercise any legal right no matter how detrimental to the other party.
  8. That transactions do not deviate from normal market value does not show a fair relation between the parties. Because of what we call laissez faire, the economic liberty of some is constrained for the benefit of others. Absolute freedom on economic matters is of course out of the question – it would be impossible to allow unrestricted use of goods of which there are not enough to go around.
  9. Liberty to consume = conditioned on payment of the market price. We do not have slave labor but there are nonetheless compulsions to work. The degree to which men surrender liberty in the sphere of production in order to increase their freedom to consume = different. Ability and education get you a higher price and therefore more freedom to consume.
  10. Employer's power to induce people to work = based on the fact of restricted consumption and the employer's ability to provide some freedom from it. It is with unequal rights that men bargain and exert pressure → unequal fruits of bargaining.
  11. Different rules about property rights → different distribution with just as little government interference. Give the weak a little more power to resist the bargaining power of the strong.
- xi. From the notes:
1. summary process v. self-help – can always use self-help to remove licensees; tenants are sketchier. Summary process laws are a speedy alternative.
  2. license v. lease – often a question of which one happened. If the owner transferred exclusive possession, a lease will be found. Look to the extent to which the owner retained control, and the importance of the things that they maintained control over. Policies underlying summary process laws:
    - a. avoiding violence
    - b. quick recovery
    - c. stop wrongful eviction
  3. Could the issue be avoided if the two parties had a written agreement? Depends on laws re: self-help.
  4. easement v. lease – is a billboard a lease or an easement? Giving a license rather than professory rights – Golden

West Baseball v. Anaheim – use of a baseball stadium for 80 days a year = easement not a lease despite a contract which calls it a lease.

b. Right to rent

- i. Landlord's rights to receive rent
  1. receive agreed-upon rent
  2. have premises intact and not damaged
  3. reversion (right to regain possession at the end of the lease)
- ii. most lawsuits by landlords against tenants are because of tenants' failure to pay rent – the landlord sues for back rent owed and to regain possession (evict)
- iii. smaller # of cases look to evict tenants for breaching other express or implied terms of the lease – damage, quiet enjoyment by neighbors.
- iv. The landlord's rights when a tenant breaches and refuses to leave are called “summary process” – if a tenant wrongfully stops paying rent, landlord can sue for eviction and back rent. Tenant can defend by asserting rights like implied warranty of habitability/retaliatory eviction/discrimination.
- v. If a tenant wrongfully holds over at the end of the lease and keeps paying rent, the landlord's acceptance of the rent establishes a new month-to-month tenancy. Landlord = also free to treat the tenant as at sufferance and sue for possession.
- vi. A major issue when tenant breaches and refuses to leave = whether or not the landlord is entitled to self-help. A majority of states now hold that a landlord cannot use self-help when evicting a tenant but must go through court proceedings.
- vii. Berg v. Wiley – owner locked tenant out of restaurant; Minnesota Supreme Court said that the only way to evict a tenant who has not voluntarily given up right to premises = judicial process.
- viii. Summary procedure is a fast but non-violent alternative to self-help; it allows relatively fast judicial determination of landlord's claim to regain possession from tenant. Other names are “forcible entry and detainer,” “unlawful detainer,” “summary proceedings,” and “summary ejectment” – often limits the issues which can be addressed; used to limit tenant's defenses, but it has become much less “summary” in recent years. Some states still don't allow defenses and the Supreme Court has held that landlord's and tenants' issues = separate and that's not a 14<sup>th</sup> amendment violation.
- ix. Landlord's remedies when the tenant breaches and leaves (right of possession = of no use because the tenant has surrendered possession) – choose among 3:
  1. accept the tenant's surrender – sue for back rent plus damages for breach of lease (which is different than future rent). Damages are not the remaining rent but the

remaining rent minus the fair market value plus the cost of finding a new tenant.

2. re-let on the tenant's account – re-lease at a reasonable price and sue tenant for difference in price. The issue that arises here is how the landlord can make a clear refusal of tenant's proffered surrender? (why does it matter if the surrender is accepted? 1 year contract, moves out after 6 months. Replace with month-to-month tenant at same rent, moves out after 4 months. If accepted surrender, can't sue for two months. If didn't, can.
  3. Wait and sue for the rent at the end of the lease term – most states don't like this one.
- x. Sommer v. Krydel 378 A.2d 767 (1977)
1. 1972 defendant Krydel entered into lease with plaintiff apt owner – 2 years w/rent concession for six weeks. Defendant's engagement broke up and he could not take the apt. He wrote to plaintiff who didn't respond. Someone tried to rent the apt and the plaintiff refused to rent it. Plaintiff sued for \$7000, trial judge ruled for the defendant.
  2. In the interest of justice and fair dealing, landlord had to try to relet the premises. Also, plaintiff's failure to respond to the offer to surrender was tantamount to acceptance. Appellate division reversed; we granted certification.
  3. Weight of the authority in this state supports the proposition that the landlord = under no duty to mitigate damages; this has been followed in the majority of states. Nevertheless, there is still a split of the authority and the trend among recent cases tends to be for forced mitigation.
  4. In theory, a lease = a transfer of the landlord's interest in the land to the tenant; it would therefore be counterintuitive to force the landlord to concern himself with the tenant's abandonment of his own property. Yet the distinction between a lease for residential purposes and an ordinary contract can no longer be considered viable; evolving social factors have increasing influence on the law of estates.
  5. This court has taken a lead on requiring landlords to provide services to tenants at tension with the old, "uninvolved landlord" image.
  6. Application of the contract rule requiring the mitigation of damages to a residential lease = justified as a matter of basic fairness; the majority rule = plagued with inequity and will yield to more realistic standards.
  7. Various courts have adopted this position – antiquated understanding of property that = ground for the existing rule shall no longer be controlling.

8. Landlord's duty to mitigate → to treat the apartment as if it were one in his vacant stock. As a part of his action, landlord must prove due diligence in an attempt to relet because the landlord is in a better position to offer that evidence.
9. Here, landlord needlessly increased the damages by turning away a tenant who wanted to lease the apartment.
10. From the notes
  - a. Many states still adhere to the "no duty to mitigate" rule, as does the restatement 2d of property. Still, many states have changed their minds. This is a strong trend, but not complete.
  - b. Duty to mitigate damages = not an enforceable obligation. Just means that we get mitigated damages. Landlords = well-advised to look for a new tenant, because even traditional rule states may change soon. Question of acceptance of offer of termination still matters.
  - c. Some argue that the duty to mitigate = economically efficient because it encourages landlords to lease the premises rather than leave them unoccupied. Others argue there's no such efficiency gain – the landlord owns the property and the tenant has no right to take it away without adequate compensation.
  - d. Does it matter that the landlord talked to the tenant about not wanting to find a new one? Should the rules be different for little landlords and big ones?
  - e. In a "mitigate damages" district, would you tell a tenant to tell the landlord before she leaves? Would this take care of her obligation?
  - f. Acceleration clauses – some landlords attempt to contract around the responsibility to mitigate damages thru an acceleration clause which gives "liquidated damages" in the entire amount of the remaining rent if the tenant leaves or breaches. Some courts enforce these on the grounds that the parties voluntarily agree to them; others call them a penalty or unconscionable.
- xi. The role of security deposits – many landlords protect themselves from the possibility that the tenant will fail to pay the rent by asking for a security deposit. Some states regulate this:
  1. limiting the amount of the security deposit
  2. requiring the landlord to repay tenant with interest minus any damage → apartment.
- xii. *Braschi v. Stahl Associates* 543 NE 2d 49 (NY 1989)

1. Appellant lived with tenant of record in a rent-controlled apt. When tenant died, Stahl issued appellant a notice to cure saying he was a mere licensee and would be evicted.
2. In construing the statute, the legislature showed intent to be the controlling factor. Statutes → ordinarily interpreted so as to avoid objectionable consequences and prevent hardship and injustice.
3. Dispute arises because the word “family” in the law is not defined in the rent-control code – all that is known is the general intent of the rent control code.
4. Rent control addresses public emergency of shortage in dwellings that led to abnormal and unwarranted increase in rent and to prevent exactations of unreasonable rent/dislocation.
5. The manifest intent of this provision is to restrict the eviction of a small class of people other than the tenant of record; juxtaposed against the goal of regaining free rental market.
6. Defendant argues that “family member” means blood, consistent with the second of these goals. While this one is a goal of rent-control laws generally, it is not a goal of the non-eviction provision. The non-eviction provision, on the contrary, is to protect a class of people from losing their homes.
7. “Family” – it includes adult life partners and those having normal familial characteristics – this is consistent with both goals.
8. Look → objective nature of the relationship between parties – longevity/exclusivity, level of emotional and financial commitment, presentation in everyday life, and reliance on each other for family services.
9. This couple lived together for ten years and were regarded as spouses. Appellant clearly considered the apartment his home. They had all joint accounts, appellant was tenant’s power of attorney and the beneficiary of his life insurance. They were family.
10. Simons’ dissent: the majority takes the word “family” far beyond what can actually be read into it – weigh interest of certain people living with the tenant at the time of death against the interest of the landlord in regaining the possession and getting rid of the rent control. “Family” is warranted by the other things that real family members must do upon death.
11. From the notes
  - a. What was the NY court of appeals’ understanding of family?

- b. Court extended Braschi despite a law with the express definition of family that confined it to blood relatives because this was a more realistic understanding.
- c. Athineous v. Thayer – landlord attempted to evict a woman who had been reared as a daughter by the couple in a rent-controlled apt but never formally adopted – she was a member of the family because all involved considered her as such.
- d. In Hudson v. Weiss, landlord sought to evict a tenant for being in violation of her lease for living with someone who was not a member of her family (a man with whom she had a loving relationship) – and she lost. Is this consistent with Braschi?
- e. After Braschi, NY rent laws were amended to codify it – was it appropriate to define family member so broadly? Or does later codification prove it was okay?

xiii. The economics of rent control

- 1. rent control laws → to allow landlords a reasonable return on their investment while protecting people's right to live in their homes. Routinely held as constitutional despite landlords' complaint of unconstitutional infringement on property rights.
- 2. wisdom = long debated; fixture in some cities but most eschew it. Economists argue that it fails on both distributive and efficiency grounds.
- 3. efficiency argument: in an unregulated market, rent and quality will be determined by supply and demand. Rent control increases demand while decreasing supply.
- 4. therefore, housing shortage. Those who cannot afford to live alone may try because they do not have to pay the full cost. Inefficiency results when actors do not have to internalize the full costs of their conduct.
- 5. By decreasing supply, we may increase homelessness, plus redirect investments away from valued uses.
- 6. rent control therefore = (Richard Epstein)
  - a. shortage of rental housing
  - b. reduce investment in providing housing below optimal level
  - c. increase demand above optimal level
  - d. subsidize existing tenants at the expense of the homeless
- 7. Still, there is an argument for rent control – the picture painted by the critics = to simple

- a. The market is not unregulated without rent control – taxes and interest rates still exist
  - b. Rent control may have no effect on future investment in housing as most rent control laws are 2<sup>nd</sup> generation and do not affect new housing. [Critics answer that districts where rent control exists still have less investment in new housing; despite this logic, since investors fear extension; but extension has never happened. Even if it did, rent control always allows for profit].
  - c. Available evidence does not indicate that rent control → housing abandonment or reduced maintenance. Abandonment seems to have other causes like the inability of tenants to pay even rent-controlled rents and high interest rates for improvements.
  - d. Even if housing decreases, efficiency and distributive effects may be positive. Demand for housing = willingness and ability. This shifts security from landlords to existing tenants.
- c. Right to occupancy
- i. Landlord has a duty to deliver possession of the rented premises to the tenant at the beginning of the lease. If there is a holdover tenant, landlord must either evict or convince to leave. Failure to deliver actual possession of the premises to the new tenant → breach of lease by the landlord. Therefore, tenant can:
    - 1. terminate lease/sue for damages
    - 2. withhold rent for that period
    - 3. recover damages for alternative housing costs
  - ii. a minority of jurisdictions follow the traditional rule, where a landlord must deliver the right of possession, but not actual possession, then the new tenant must evict the old tenant and the new tenant is obligated to pay rent even though she is not the possessor
  - iii. Tenants' right to leave/transfer v. Landlord's right to control occupancy.
    - 1. tenant's leasehold – right to possess property in exchange for rent; landlord's rights include collection of rent and reversion.
    - 2. either party may transfer – landlord may sell (leases still valid) or tenant may sublet.
    - 3. 3 cases of tenant's right to sublet:
      - a. lease is silent on the question of assignment/sublet: yes, tenant can transfer unless lease restricts the ability to transfer. Although restraints on transferring fee interests = rejected by the courts,

restrains on other property interest transfers – accepted. Still, if lease doesn't say “no” then the tenant can do it – promoting alienability. The form = assignment (*all* remaining property rights) or sublease (*some* of the remaining property rights). Under an assignment, the new tenant is responsible directly to the landlord. Under sublease, the new tenant is responsible to the old tenant who is responsible to the landlord. Use the concept of privity of estate to understand assignee's responsibility to the landlord. When a sublease defaults, the landlord sues the original tenant not the subletter, except when subtenant explicitly promises to pay rent to landlord; sometimes then the landlord can sue the subtenant as third party beneficiary. In assignment, can sue both people. In both situations, can evict them both. Tenant is always only liable for the amount owed to the landlord; remains that they can keep any extra money from sublease and must make up any deficit.

b. When the lease requires the landlord's consent to sublet or assign – it is a much-litigated question of whether reasonableness is required (see Kendall, Slavin)

c. When the lease prohibits it outright

iv. Kendall v. Ernest Pestana, Inc. 709 P.2d 837 (CA 1985)

1. effect of a provision in a commercial lease that says that there will be no assigning or subletting without the lessor's written consent.
2. lease of hangar space at San Jose municipal airport. City of San Jose leased to Perlitch who assigned to Pestana who subleased to Bixler who wants to assign to Kendall.
3. sublease to Bixler said that Pestana had to give written consent to assignment; failure to get that consent could render the lease voidable at the option of the lessor.
4. proposed assignees, who have stronger financials than the lessee, say unreasonable denial = unfair restraint on alienation.
5. law favors alienability → weighing of interest of lessee and leaseholder; especially true when forfeiture interest is involved. Law permits contractual restrictions on alienability of leaseholds
6. still, majority rule – that an approval clause gives license to arbitrary disapproval no matter how suitable the assignee or how unreasonable the objection –

7. growing minority say that the objection must be commercially reasonable. For the following reasons, we conclude that the minority rule = the preferable position.
8. two directions → impetus for change; reflect dual nature of leasehold as conveyance and leasehold interest as contract.
9. policy against restraints on alienation = conveyance issue: we recognize that our economy's increasing dependence on conveyance of commercial space matters. Restatement 2d of property 15.2(2) adopts the minority rule: "a restraint on alienation without the consent of the landlord of a tenant's interest is valid, but the landlord's consent cannot be withheld unreasonably, unless explicitly freely negotiated.
10. reasonable concerns include personal qualities, financial capability, compatibility.
11. 2<sup>nd</sup> impetus = from the nature of the lease as a contract; new development since the making of the majority rule → from contracts, the obligation of good faith and fair dealing requires reasonableness, which makes reasonableness and acceptable question under the minority rule. Taste, convenience, or sensibility are not reasonable, nor is looking for more money.
12. 3 traditional justifications for the majority rule, none of which are compelling, plus a 4<sup>th</sup> one that the respondent brings up, which does not cut it either.
  - a. Lease – conveyance of property; lessor, having chosen and warned "no substitute" is under no obligation to look to someone else for rent (undermined by the duty to mitigate damages and the fact that the original lessee remains the guarantor of performance).
  - b. Approval clause = unambiguous reservation of absolute discretion over assignments. The lessee could have bargained for a reasonableness clause and did not (the very fact that so many people interpret approval clauses so diversely mean that they are not "clear and unambiguous" and it is not rewriting a contract to recognize a good faith obligation in performance).
  - c. Stare decisis – leases rely on this rule (weak; changing nature of real estate/real estate law means that we could see this one coming from miles away. Changing life lets courts change law for law to remain vital.
  - d. Increased market value belongs to the lessor not the lessee (the lessor is trying to get more than he bargained for here).

13. Sublessee could assign because sublessor needed to be reasonable in rejecting the assignment.
  14. Lucas' dissent: plain written language of this contract says that lessor can just without consent – majority rewrites contract = mischief by breeding uncertainty into an otherwise unambiguous contract.
- v. *Slavin v. Rent Control Board of Brookline* 548 NE2d 1226 (MA 1990)
1. brookline rent control bylaw says you can recover possession only by evicting, and evict only for breach of contract
  2. plaintiff landlord applied to defendant rent control board for order of eviction because tenant allowed someone to occupy without landlord's express written consent
  3. board refused – tenant had been looking for a new cotenant since the first one moved out; landlord had denied every one. Landlord had to consent, but consent withheld had to be reasonable, tenant argues.
  4. issue of whether tenants' obligation to get landlord's consent implied a duty of landlord reasonableness = not yet decided here. Majority rule = arbitrariness is completely acceptable. Minority rule = *Kendall*.
  5. We should be guided by two concerns:
    - a. Power to withhold = used for unfair financial gain
    - b. Necessity of alienation → economic growth
  6. The new minority rule is not applicable in a rent control case.
  7. from the notes:
    - a. in commercial leases, trend = to adopting an implied reasonableness std, but Indiana says assignment of such a duty goes beyond the scope of the judicial branch and places the court at the negotiation table with the parties
    - b. suppose a lease specifies “for any reason whatsoever” – should this be held to be an unreasonable constraint on alienation? What if the “reason” turned out to be discrimination?
    - c. Do the distinctions between commercial and residential leases in *Slavin* make sense? Do the reasons for implying reasonableness differ in residential context?
    - d. Does a basis in common law or statute matter? Why does *Slavin* think it does?
- vi. Tenant's good faith duty to operate
1. *The College Block v. Atlantic Richfield Co.* 254 Cal Rptr 179 (Ct App 1988)

- a. The College block leased land to ARCO for 20 years at \$1000/month or % whichever is greater. ARCO operated a station for 17 of the 20 years, then closed it and paid only \$1000 per month, arguing that is all they owed because there is no clause obligating operation
- b. College block said there was an implied duty to operate – percentage lease provides lessor with a hedge against inflation and automatically adjusts the rent when the property becomes more valuable. Thus, both parties share implied and inherent business risks.
- c. Contracts will be read as reasonable without violating the intention of the parties; covenants will be implied when it is so obvious that the parties had no reason to state the covenant, the implication arises from the language of the agreement, and there is legal necessity.
- d. This lease has a million terms about what the gas station will be and will look like and ties the rent to the gas station's revenues. The rent clause did not set a minimum payment irrespective of gas delivered but irrespective of number of gallons.
- e. In the context, the \$1000 was 20 years old, nowhere near what they had been getting, but both parties should get to present evidence on whether or not this was a substantial return on college block's investment.
- f. From the notes:
  - i. Most courts refuse to find an implied covenant to operate a business simply from a percentage contract if the base rent = substantial
  - ii. Shopping centers have anchor stores that serve to attract customers to smaller stores – does an anchor store have an implied obligation to continue operating?
- vii. Tenant's right to stay v. landlord's right to recover possession
  - 1. cannot evict a non-breaching tenant until the end of the leasehold but under no obligation to renew the leasehold. Still, some exceptions:
    - a. antidiscrimination law says you cannot refuse to renew on discriminatory grounds.
    - b. Rent controlled tenants cannot be evicted without just cause
    - c. Can't evict to turn apartments into condos.

- d. Can't evict people in public housing without just cause
- e. Can't evict to retaliate
- 2. Just cause eviction
  - a. Private housing market
    - i. NY and DC are the only places where you have to have just cause to refuse to renew a leasehold. Also, in NJ, landlords cannot make "unreasonable changes" like stopping accepting late rent.
    - ii. In determining reasonableness of change, consider text, manner of the lease changes, communication, tradition, hardship
  - b. publically subsidized housing (section 8)
    - i. cannot evict without "good cause" which is "repeated violation of law, criminal activity"
    - ii. public housing = the same way
    - iii. landlord wanted to get out of the Section 8 program; weighing landlord's interest against tenant's interest against arbitrary eviction – tenant wins. Fair?
    - iv. Many municipalities regulate condo conversion, either for specific classes or generally, either by saying "no" or giving tenants the right of first refusal.
- d. tenants' rights to habitable premises (the covenant of quiet enjoyment and constructive eviction)
  - i. Minjak Co v. Randolph 528 NYS 2d 534 (app Div 1988)
    1. plaintiff landlord → summary non-payment action v. defendants
    2. defendants contend that they were unable to use 1/3 of their space due to plaintiff's construction, and are therefore entitled to 2/3 rent abatement. On the remaining 1/3 of their rent, they claim that they are entitled to rent abatement for the failure to supply essential services.
    3. tenants therefore counterclaimed for breach of warranty of habitability.
    4. At trial, plaintiff won, defendant needed to pay 2 years of back rent but got rent abatement and damages.
    5. defendants had a commercial lease for a residential purpose; had their music studio in 2/3 of their apt.
    6. Leak from the health spa upstairs 40 times, destroyed expensive musical equipment, then sand leaked.
    7. Plaintiffs then started turning it into a real commercial building – work created enough dust to make the defendants sick and their instruments useless.

8. defendants attempted to protect themselves but workmen ripped down their sheeting. They also almost fell into a hole in the stairs and their door was raining bricks.
  9. appellate court held that constructive eviction could not be used as a defense in a non-payment case where tenant did not move out and reversed defendant's award.
  10. we agree with the holding and reasoning of East v. City of Boston that a tenant may assert as a defense to the nonpayment of rent the doctrine of constructive eviction, even if he or she has abandoned only a portion of their demised premises, defendants get their abatement.
  11. real question = allowance for punitive damages
    - a. breach of contract → generally only compensatory damages except to “deter morally culpable conduct” where the conduct implies a “criminal indifference to civil obligations”
    - b. punitive damages may be awarded in breach of warranty of habitability cases when landlord = intentional or malicious
    - c. here, morally culpable conduct = “dangerous and offensive manner of construction” and “indifference to health and safety” – punitive damages are sustained.
- ii. Blackett v. Olanoff 358 NE2d 817 (MA 1976)
1. defendant in each of the consolidated cases was successful in constructive eviction defense; judge found that they were “very substantially deprived of quiet enjoyment for a substantial time”
  2. the noise came from a bar in the building. The landlord did not make the noise, but could have controlled the condition of the premises.
  3. landlords knew, tried to help, and failed. They contend that they did not make the noise and are therefore not accountable for it.
  4. constructive eviction by an alleged breach of implied covenant of quiet enjoyment sometimes have stated that the landlord must perform some act with the intent of depriving of enjoyment. Still, in some cases, just the probable consequence of doing, failing to do, or permitting conduct, not intention. This was the warrant for the lower court ruling.
  5. this situation is different from the usual annoyance of one residential tenant by another where the landlord has not been chargeable. Here, the landlord entered into a lease with one tenant which the landlord knew permitted the tenant to

engage in an activity which would interfere with the rights of another tenant.

6. Disturbance was a natural and probable consequence of permission to operate a bar – landlords shouldn't get rent where premises cannot be used. This was malfeasance by the landlord
7. from the notes
  - a. express and implied terms of the landlord-tenant relationship – it is governed by both. Implied terms (importantly, implied warranty of habitability/quiet enjoyment) may or may not be waivable for the parties.
  - b. The structure of the landlord-tenant relationship = ongoing contractual agreement; suit = usually from breach of implied warranty of habitability or failure to pay rent.
    - i. Landlord can seek:
      1. Back rent
      2. Possession
      3. Damages resulting from breach of lease
    - ii. tenant can:
      1. say he didn't breach the lease or cause damages
      2. assert a defense
      3. make a counterclaim
  - c. actual eviction – if the landlord breaches the lease by physically barring the tenant from the property, tenant's obligation to pay rent ceases entirely. The tradition rule = to apply this even when only partial barring. New trend = abatement (restatement 2d)
  - d. constructive eviction = when the landlord substantially interferes with the tenant's quiet enjoyment of the premises; this is functionally equivalent to physical barring. Tenant stops paying the rent or moves out before the end of the lease. If the tenant stays, it can be used as evidence that the interference was not substantially serious to justify stopping payment.
    - i. Easthaven/Minjak = partial constructive eviction
    - ii. Restatement 2d 6.1 – “there is a breach of the landlord's obligations if, during the period the tenant = entitled to possession of the leased property, the landlord, or someone whose conduct is attributable to

him, interferes with the permissible use of the land.

1. departs from the traditional rule:
    - a. requires “more than insignificant” rather than “substantial”
    - b. allows 3<sup>rd</sup> party liability
    - c. rejects forcing tenant to move.
  - e. landlord’s liability for acts of other tenants – under the traditional rule, the landlord = not responsible for the acts of other tenants unless the lease specifically includes an obligation to control other tenants. The lease with the bar in *Blackett* contained a clause obligating the tenant not to disturb the quiet enjoyment of the other tenants. Would the case have turned out the same way if it didn’t? Does a landlord have not only the right but the obligation to evict tenants in violation of their lease?
- e. Implied warranty of habitability
- i. Before the 1970s, no implied duty to present in reasonable condition/fix and the contractual obligation of the tenant and landlord was independent rather than dependent.
  - ii. In recent years, most states have repudiated both the lack of duty to repair and maintain and the independent covenants rule. Traditional rule unraveled after Javins, one of the most famous property cases ever decided.
  - iii. *Javins v. First National Realty* 428 F2d 1071 (DC Cir 1970)
    1. question of whether housing code violations which arise during the term of the lease have any effect on the tenant’s obligation to pay rent. We hold an implied warranty of habitability set by the housing code.
    2. defendant appellants rented from plaintiff landlord who looked for possession on the grounds that defendants did not pay rent for April. They admit that but claim 1500 violations of housing regulations that arose since the lease commenced.
    3. in traditional analysis, lease = conveyance of interest in land, usually used sale transactions rules govern; still, this is largely a dark-ages conception. Lease as conveyance may have made sense in a rural, agrarian society; it may still make sense in leases of agricultural and commercial land. Here, the value to the tenant is the land itself.
    4. in the case of the modern apt lease, the value of the lease is that it gives the person a place to live – heat, light, ventilation, plumbing, secure windows and doors.

5. Courts have gradually been introducing more modern concepts into interpreting leases. Our turn.
6. Modern contract law recognizes that the buyer of goods and services must rely on the skill and honesty of the supplier about the quality; therefore there is an implied warranty. The rigid principles of property law have stopped implied warranties from being applied to real estate.
7. Now, courts have begun to hold sellers and developers of real property responsible for the quality of their product. Builders of new homes have been held liable to purchasers because of violations of an implied warranty of fitness. Despite this trend in the sale of real estate, many courts have been unwilling to imply warranties of quality → leases of apartments without convincing explanations of why.
8. In our view, the old no-repair rule cannot coexist with obligations imposed by modern housing code, and must be abandoned for an implied warranty of habitability. Three justifications:
  - a. Old rule based on factual assumptions that are no longer true; cannot be justified on its own terms.
  - b. Consumer protection cases require the old rule to be abandoned in favor of an interpretation that brings landlord tenant law into harmony with the rest of the cases on which these principles rest
  - c. The nature of today's urban housing market dictates the abandonment of the old rule.
9. Common-law no repair rule = 18<sup>th</sup> century agrarian; assumes land is the most important part of the lease and requires payment even if the building goes away. Today's urban tenants are not interested in the land but in housing suitable for occupation. Today's city dweller can do one thing well, and it is not fixing his apartment.
10. The landlord is a commercial businessman not a seller of land. Tenant may legitimately expect apartment to be habitable for period of leasehold. Rationales:
  - a. Products liability
  - b. Unequal bargaining power
  - c. Social impact of bad housing
  - d. Housing code implies habitability of houses it covers
11. two previous decisions of this court have held the housing code as an appropriate subject of civil litigation. If serious violations of the code void a lease before it starts, they cannot be inconsequential after it starts. The structure of

the housing code demands that it be read into housing contracts because its provisions cannot be waived or shifted by agreement - - this creates an implied warranty of habitability over covered property.

12. here, landlord sued tenant for failure to pay rent. Tenant's obligation to pay rent is conditioned on the landlord's non-breach. In order to determine whether or not rent is owed, the tenants must be given an opportunity to prove the housing code violations alleged as a breach of the landlord's implied warranty of habitability.
13. At trial, the finder of fact makes two findings:
  - a. Whether the alleged violations existed during the period for which past due rent is owed
  - b. What portion of the tenant's obligation to pay rent was suspended by the landlord's breach.
14. from the notes:
  - a. the implied warranty of habitability = majority rule either buy statute or common law
  - b. allowing tenant to raise landlord's housing code violations prolongs process, seemingly contradiction the quick eviction policy interest – how does that work? Was this decision illegitimate judicial activism?
  - c. What remedies are available to vindicate rights under an implied warranty of habitability?
    - i. Rescission (or the right to move out before the end of the lease)
    - ii. Rent withholding (put rent in escrow and notify landlord of the problem and the withholding)
    - iii. Rent abatement (tenant withholds the rent, waits to be sued, and then argues he didn't have to pay it)
    - iv. Repair and deduct from the rent
    - v. Injunctive relief/specific performance (ordering compliance with the housing code)
    - vi. Administrative remedies (housing inspectors)
    - vii. Criminal penalties (by code)
    - viii. Compensatory damages (can exceed the back rent when possessions of the tenant are damaged)
- f. arguments and counterarguments on compulsory contract terms (which are non-waivable rights implied in certain contractual relationships)
  - i. rights arguments
    1. freedom of contract arguments

- a. enforce voluntary contracts: freedom of action
      - b. unequal bargaining power: coerced contracts entered into under duress are not voluntary
    - 2. distributive considerations
      - a. on implied warranty of habitability = unfair burden
      - b. having the landlord fix = only justice in ongoing social relationships
    - 3. paternalism
      - a. people can self-determine
      - b. there are limits to assent
        - i. actual intent of parties
        - ii. cognitive distortion – we should protect people from making mistakes they will regret later
        - iii. there are minimum standards, the absence of which are unconscionable.
  - ii. omitted
  - iii. economic arguments
    - 1. incentives to invest in safety and maintenance
      - a. landlords need money to pay for repairs
      - b. only effective enforcement of the housing code is to deprive of rent
    - 2. allocative efficiency in the housing market
      - a. compulsory contract terms = necessarily inefficient because they impede parties' bargaining for mutually beneficial terms; kills pareto optimality.
      - b. Market imperfections (effects of substandard housing)
        - i. Externalities
        - ii. Imperfect information
    - 3. Effects on distribution
      - a. Landlords raise rent and decrease supply
      - b. Effects depend on the previous conditions of the market – impossible to predict a priori; may have no effect at all if everyone is still earning enough, or even if some are not
- g. Hillview associates v. Bloomquist 440 NW2d 867 (Iowa 1989)
  - i. Gracious estates (IA) = mobile home park owned by Hillview (CA) managed by Tandem
  - ii. Tenants concerned about conditions established a tenant's association; met with management for five minutes which ended in a physical fight.
  - iii. The management served an ultimatum requiring all tenants to sign the park rules or be evicted; also sought out tenants to start a rival association. Plaintiff then attempted to evict tenants who did not sign.

- iv. Iowa has a mobile home landlord and tenant act that prohibits retaliation and provides it as a defense in a suit for possession. Still, the landlord can sue for possession when the tenant violate housing code or is more than 30 days in default.
- v. 1968 US court of appeals for DC held eviction impermissible by statute and public policy.
- vi. Still, tenant who proves retaliation cannot stay forever; once illegal reason dissipates, tenant can be evicted for a legitimate reason or even no reason at all.
- vii. The IA law creates a presumption in favor of the tenant – the landlord must produce evidence of legitimate non-retaliatory reason to rebut. If the landlord doesn't meet the burden of production, the statute would compel a finding of retaliatory termination.
- viii. In determining whether a tenant has established a defense of retaliatory eviction, look to:
  - 1. landlord's decision → reasonable exercise of business judgment
  - 2. landlord in good faith desires to dispose of the entire lease, free of all tenants.
  - 3. landlord in good faith desires to make a different use of the property
  - 4. landlord lacks financial ability to repair and therefore in good faith wishes to have it free of any tenant
  - 5. landlord was unaware of tenant's activities which were prohibited by statute
  - 6. landlord did not act at first opportunity he heard of tenant's conduct
  - 7. landlord's act was not discriminatory
- ix. here, tenants have offered substantial evidence of retaliatory termination. They were members of a group looking out for tenants' rights. The landlord answers that they only evicted ones participating in physical violence.
- x. Tenant davenport did start the fight, leaving tenant issues for violent personal attack. Tenants' associations are protected by IA law, even screaming and shouting. Not hitting, though, there is a limit. The termination of the instigator's lease was legitimate. The others, however, were not, and were clearly retaliatory for membership in the tenants' association.
- xi. Hillview argues the need to prove specific intent on the part of the principle (Hillview) but the activities of the agent (Tandem) = attributable to the principle (requiring principle specific intent would always absolve since principle is not involved directly).
- h. Imperial Colliery Co v. Fout 373 SE2d 489 (West VA 1988)
  - i. Defendant appeals summary judgment dismissing claim for retaliatory eviction based on W.Va. summary eviction statute. He

sought to defend against eviction claiming it was because of his participation in a labor strike.

- ii. Case presents two issues
  1. whether a tenant being evicted by summary eviction can bring a defense of retaliation
  2. whether retaliation motive must relate to tenant's exercise of a right incidental to tenancy
- iii. defendant's boss' related company was tenant's landlord in a house for \$1/year. They gave him a month's notice on the lease then evicted him. Defendant's attorney said he could not move right then; plaintiff agreed to two month extension. After that, sued for possession. Defendant alleges that eviction is in retaliation for labor strike.
- iv. The original retaliatory eviction decisions weighed the importance of reporting code violations and decided that as a matter of public policy there people should be protected. Under W.Va. code, a tenant is entitled to a fit and habitable dwelling.
- v. Central theme of retaliatory eviction = a tenant should not be punished for claiming benefits entitled under the health and safety statutes for his protection. Generally, rights that bear some legitimate relation to tenancy prevail. Still, a few courts recognize that even where tenancy is only indirectly related to the conduct, it may be protected if it would undermine the tenancy relationship.
- vi. People can have retaliation defenses – here, defendant says he's like these people, but we disagree because the issue that he points to for retaliation is simply unrelated to his tenancy, and it must be
- vii. First amendment rights = not protected under the retaliation defense. They may, however, be vindicated independently . . .
- viii. From the notes
  1. robinson v. Diamond Head: landlord tried to evict tenant for non-payment of rent and failed because of landlord's violation of the implied warranty of habitability. Landlord sued again, this time, just wanting to end the periodic tenancy by giving notice. Resident argued that it was retaliatory; landlord argued that they could not afford to fix it and just wanted to take it off the market. Court held that this = retaliatory eviction – not the fear of taking units off the market, but the fear of doing so selectively to set an example. Plaintiff argued they will never get rent and they will never get the guy out under this rule. Retaliatory eviction deals with landlord's subjective state of mind →revenge; examined either truly subjectively or through objective manifestation. Landlord = right that they will never get rid of the tenant because they just want to for revenge; but they don't have to keep him forever. Just get a legitimate business reason and mean it. If the landlord

were closing down or unable to fix whole premises, this would be okay – but they aren't

2. Robb's "blistering dissent" – a landlord who wants to remove an apartment from the market without breaking a lease may damn well do so.
3. How long may the tenant stay once a finding of retaliatory eviction is handed down in her favor? Until there's a legitimate reason, most courts hold. Some say until the repairs are done plus time to find other housing. Some states have interpreted retaliatory eviction to apply to the non-renewal of the lease. Some states just prohibit retaliation for x number of days.

### III. Housing Discrimination

#### a. Discriminatory treatment

##### i. Fair Housing Act

1. 3601. Policy of the United States to provide, within constitutional limits, fair housing throughout the United States
2. 3602. Definitions
3. 3603. Doesn't apply to single-family unadvertised and unlisted sales
4. 3604. Discrimination in sale or rental of housing and other prohibited practices –cannot refuse to sell or rent because of race, color, religion, sex, familial status, or national origin, or discriminate in terms, publish preference, or represent unavailability.
5. 3605. Also cannot do it in loans/construction.
6. 3607. Exemption
  - a. religious organizations and private clubs can give preference unless it is on race or open to the public
  - b. number of occupants, older persons, drugs
    - i. no exceeding maximum #
    - ii. doesn't apply to housing for older persons
    - iii. can discriminate for trafficking
7. Enforcement by private persons
  - a. Civil action
  - b. Appointment of an attorney by the court
  - c. Relief: actual and punitive damages, injunction, tro, fees
8. 3617. can't interfere, intimidate, or coerce

##### ii. discrimination by housing providers

1. Ashbury v. Brougham 866 F2d 1276 (10<sup>th</sup> Cir 1989)
  - a. Plaintiff sued under 42 USC 1982 (equal right to property) claiming that defendant refused to rent her a townhouse on the basis of her race and/or sex.

Got compensatory damages of \$7500 and punitive damages of \$50000.

- b. First, sufficiency of evidence for racial discrimination. – must prove discriminatory intent
  - i. When race is a factor in a decision to deny a minority applicant an opportunity to rent (it need not be the only factor)
  - ii. Can't tell false information about availability because of race.
- c. three-part burden of proof test in McDonnell Douglas v. Green
  - i. plaintiff proves prima facie case of discrimination
    - 1. she is a member of a racial minority
    - 2. she applied to and was qualified to rent
    - 3. she was denied the opportunity
    - 4. the apartment remained available.
  - ii. defendant has the burden to prove that refusal to rent was based on legitimate, non-racial reasons
  - iii. plaintiff shows that these reasons were pretextual
- d. in this case, the plaintiff established her prima facie case – she was black, she tried to apply for housing, she was qualified, and the jury could have determined that the housing remained available. A white person tried the next day and was offered housing. Since she met her burden → prima facie case, the burden of proof shifts to the defendants to prove a legitimate non-discriminatory reason.
- e. Defendants claim that their policy about children → legitimate reason, but there is evidence that there were child-friendly townhouses available and that exceptions have been made. Jury could have discredited this. Defendant also claims that evidence of high percentage of minorities conclusively rebuts a race discrimination claim, but statistical data is not dispositive of a claim of intentional discrimination.
- f. Does the evidence support the punitive damage award? Punitive damages → evil motive or intent, reckless or callous indifference to federally protected rights of others. Plaintiff had two theories → punitive damages.

- i. Landlord's own discriminatory conduct in establishing rental policies, procedures, and rules.
    - ii. Authorization/ratification of employees' discrimination.
    - iii. There is sufficient evidence to establish liability on either theory.
  - g. there was substantial evidence for plaintiff's case – therefore the jury was reasonable in finding for the plaintiff.
- 2. United States v. Starlett City Associates 840 F.2d 1006 (2<sup>nd</sup> Cir 1988)
  - a. Defendant is the biggest housing development in the country; 46 high rises with 5881 apts. Seeks race quotas: 64% white, 22% black, 8% Hispanic – to keep white tenants – this has been stable since 1975.
  - b. Tenancing requires telling race – files are separated by race for apartment sizes and income levels – applicants are acknowledged, told nothing is presently available, and that they will be told when they can have one.
  - c. 1979 black applicants sued; 1984 settlement that Starlett would leave 35 more units available to blacks per year for 5 years. Government then sued in the summer of 1984 to address the legality of the practice.
  - d. Defendant said that the policy was meant to maintain racial diversity in the face of white flight. Still, the policy in question = clearly of discriminatory effect.
  - e. Although racial classification = presumptively discriminatory, race-conscious affirmative action does not violate the Constitution if it is temporary in nature with a defined goal but quotas should be aimed at a history of discrimination. In programs designed to ensure minority access, “access quotas” have been upheld → ceiling quotas are different because they “single out” the least well represented in the political process to bear the brunt of a “benign” program.
  - f. Still, defendant's use doesn't have this stuff –
    - i. Only goal of integration maintenance but with no foreseeable end.
    - ii. No evidence of prior discrimination against whites

- iii. Do not provide minorities access but create a ceiling.
  - g. race is not always an inappropriate consideration in efforts to promote integrated housing, but no rigid quotas of indefinite duration
  - h. Newman's dissent: statute was meant to end segregation; that's what defendant was doing.
- 3. from the notes
  - a. 1988 amendment extended punitive damage potential and statute of limitations; can file both with HUD and in federal court
  - b. standard of liability = disparate treatment or disparate impact
  - c. prima facie case for discriminatory treatment claims
  - d. defendant's justification as an answer to prima facie case
  - e. many fair housing act cases are against "racial steering" – showing African American customers housing in certain areas and not telling them about housing in other areas – using "testers" to see what happened.
  - f. Standing – who is entitled to bring suit? Those who are being denied housing because they are black or white and associate with blacks or whites who want to live in integrated communities or testers or an organization devoted to equal access?
  - g. Advertising – direct demonstration of preference = clearly illegal, but can you indirectly express preference? Ragin v. NYT, using all white models could violate fair housing act
  - h. Tipping – potential conflict between integration and nondiscrimination – a landlord can actively recruit white tenants to promote integration
- iii. Marital status: unmarried couples: McCready v. Hoffius
  1. Did defendants violate civil rights act when they refused to rent to unmarried plaintiffs? Yes, on the basis of marital status.
  2. Defendants married couple refused to rent to plaintiffs two unmarried couples. Told testers that they didn't rent to unmarried couples because of religious beliefs. They argue that the civil rights act does not protect unmarried cohabitation and if it does it is unconstitutional as applied because of defendant's freedom of religion.
  3. Does plaintiff's interest in equal access supersede defendant's religious rights? Act says clear as day not

discrimination for marital status; clearly the intent is to protect these people.

4. Defendants argue that they didn't discriminate because of the plaintiffs' marital status but because of the perception of their conduct, but their marital status is what makes their perceived conduct immoral. We can laud marriage and still not discriminate against those who do not have it.
5. Defendants cite a lewd and lascivious conduct statute to say that the Civil Rights Act should not protect criminal behavior. But there's no evidence that these people intended to violate a law that has not been enforced in forever, so the main issue = religion.
6. Test for religious freedom: a law burdening religious practice must be neutral and generally applicable. Defendants admit that the act is neutral, but claim that since it has exceptions (like dorms) and not a religious exception, it is not generally applicable. Cannot agree with this – prohibits all discrimination and has no religious motivation. Therefore, not a first amendment violation.
7. The Michigan constitution requires five elements to be considered:
  - a. Sincere belief
  - b. Religious in nature
  - c. State regulation burdens
  - d. Compelling state interest
  - e. Availability of less intrusive regulation
8. It is on the fourth one that the scale tips against the defendants – they do not have to join the rental market (and therefore do not have to violate their religious beliefs; the need for housing is fundamental and the state did not have another way
9. Eliminating housing discrimination = highest priority, this accomplishes it
10. Boyle's dissent: marital status refers to the status of being married, not the status of an unmarried couple. Other states that have interpreted differently do not have statutes criminalizing cohabitation.
11. From the notes
  - a. Conflict in the law – the Michigan Supreme Court vacated and remanded the above decision – there have been conflicting decisions. Two issues:
    - i. status v. conduct
    - ii. religious freedom
  - b. courts are about equally divided on the status and conduct argument

- c. courts generally hold that fair housing laws do not violate religious freedom if they require rental to unmarried couples. Still, a minority disagrees. Still, there is a compelling argument that religious freedom does not bestow the right to enter the marketplace and discriminate.
    - d. Religious freedom restoration act (RFRA) – granting exceptions from government acts that burden the practice of religion in the absence of a showing of compelling state interest. Supreme Court held in unconstitutional insofar as it went beyond the first amendment control over states . . . so states passed it. If state RFRA's are constitutional, the above result might change
  - iv. sexual orientation – state ex rel Sprague v. city of Madison
    - 1. defendants appeal from a decision that their rejecting an applicant for housing was sexual orientation discrimination in violation of an ordinance of the city of Madison.
    - 2. defendant leased house, could get other tenants. Talked to plaintiff, knew sexual orientation, offered spot, then withdrew offer because they were uncomfortable living with someone of that sexual orientation.
    - 3. Madison law clearly prohibits refusing to rent on sexual orientation; defendants admit that is what they did. We fail to see anything that makes that law inapplicable to this case.
    - 4. defendants argue that applying this to a housemate makes it unconstitutional in its application, but there's no privacy/first amendment issues here like the cases they cite, therefore reject challenge to constitutionality as applied.
    - 5. from the notes:
      - a. at least 12 jurisdictions prohibit sexual orientation discrimination
      - b. the Sprague court found the statute unambiguously applied to the choice of a roommate. Do you agree? What is the counterargument?
      - c. Some decisions define gay life partners as family
      - d. Damages – penalty for emotional abuse on the basis of sexual orientation = high.
  - v. persons with disabilities
    - 1. (AIDS) Poff v. Caro 549 A2d 900 (NJ 1987)
      - a. Can a property owner refuse to rent to gays because they might get AIDS?
      - b. Law against discrimination protects the handicapped from discrimination on the basis of that handicap. AIDS = clearly a handicap

(debilitating disease; almost certain early death → severe handicap under law of discrimination. The persons here do not have a AIDS and therefore do not have a handicap, but the perception of a handicap is covered too,

- c. Strong prima facie case for discrimination bolstered by the fact that this could be actionable under disability, sex, and marital status parts of the law
  - d. From the notes
    - i. How do you calculate mental anguish damages for sexual orientation discrimination?
    - ii. Federal rehabilitation act of 1973 prohibits discrimination on the basis of a handicap in federally funded programs so long as applicants are otherwise qualified.
2. Reasonable accommodations of persons with disabilities
- a. In *Schuetz Investment v. Anderson*, court ruled a landlord had to accommodate a handicapped tenant's trouble moving boxes.
  - b. In *Whitter Terrace Associates v. NH*, the court held that an apartment complex could not take away a psychologically handicapped person's dependence on their cat
  - c. Fair housing act requires landlords to make suitable accommodation of handicap when such accommodation is essential to afford equal opportunity to use and enjoy, including
    - i. Seeing eye dog
    - ii. Widen doors
    - iii. Permission to install grab bars
    - iv. Handicapped parking
- b. Disparate impact
- i. The right to be somewhere and the problem of homelessness
    1. ACLU sued Miami, challenging the city's sweep of homeless people from city parks – Miami had many more homeless people than shelters.
    2. district court judge ordered police to stop arresting homeless people for innocent and harmless acts and establish two homeless safe zones – balancing the homeless people's need to exist with government's interest in orderliness. Logic:
      - a. people don't choose to be homeless
      - b. homeless people are socially isolated
      - c. consequence and cause of physical and mental illness

- d. many assistance programs = unavailable
    - e. no alternative place to go, no privacy
  - 3. Jeremy Waldron: everything that is done is done somewhere. No one is free to perform an action unless there is a place that he is free to do it. It is only that public land exists that lets the homeless be.
  - 4. Is there or is there not a constitutional right to somewhere to be? A homeless person cannot be punished for doing the things necessary to life in public, since “in public” is the only place they have to do it.
- IV. Land transfer agreements
  - a. Structure of the transaction
    - i. Attorney’s role
      - 1. prepare contracts (brokers fill in the blanks); most land sale contracts are signed without the aid of an attorney on either side
      - 2. some contracts have an “attorney approval clause” giving parties a specified time to talk with their attorney and bail
      - 3. increasing marginalization of lawyers in home sales → decreasing cost but increasing vulnerability.
    - ii. Some sales of property are person-to-person, but most involve a realtor or broker – 3 sorts of broker listing:
      - 1. exclusive right to sell –profit on any sale
      - 2. exclusive right to agency –profit unless sold by owner
      - 3. open, non-exclusive –profit only if first to find a buyer
    - iii. several types of brokerage agreement now illegal
      - 1. net listing where broker gets anything over seller’s price
      - 2. option listing – broker has the option to buy at a certain price, and only reveals commission when this option is exercised.
    - iv. What if the buyer backs out? Until the middle of the century, commission was due when purchase and sales was signed, regardless of the deal going though. Seller must now pay commission only if the deal goes through or it is the seller’s fault that it doesn’t.
    - v. Unauthorized practice of law – every state requires a license to practice law; a broker who provides legal advice is in trouble, including one who drafts deeds or mortgages, gives opinions of statutes, or conducts closing. Still, some states have passed laws to allow brokers to do some of the things lawyers used to do to reduce the cost so every buyer and seller does not have to hire a lawyer.
    - vi. The broker = an agent of the seller, but many buyers feel that the broker is working for them too. Courts agree and impose certain fiduciary obligations on the broker towards the buyer, like

revealing relevant information. Court made a broker tell a buyer that the property was next to a landfill.

- vii. If a buyer enlists a broker, the broker finds the property, and the buyer buys it without the broker, the broker can sue the buyer. In recent years, buyers have been hiring their own brokers, who get a percent, a fixed fee, or an hourly rate. There's a conflict when one firm works for the buyer and seller.
- viii. When the buyer likes someplace, they make an offer, usually lower than the asking price. There is then a negotiation. A price is agreed on, and a purchase and sales is drawn up. The written contract is usually written by a lawyer. The parties agree to transfer title at a specific date when the closing takes place. The buyer deposits 10% of the price. The closing is scheduled for 1-2 months later, and the contract is usually conditioned on
  - 1. seller's ability to convey marketable title
  - 2. buyer's ability to get financing
  - 3. inspection
- ix. executory period (between purchase and sales and closing)
  - 1. inspections are done. The buyer hires a professional to provide opinions of the condition of the property.
  - 2. then, the buyer applies to the bank for a loan to pay the rest of the purchase price. The bank will almost always insist on a mortgage to accompany the loan – mortgage states that if the owner defaults on a loan, the bank can foreclose the property and sell it to satisfy the buyers' debt to the bank. Second set of agreements for the buyer = loan agreements with the bank. The bank will not give a loan without assuring that the buyer can pay it and the seller actually owns the house. They can do the latter by:
    - a. searching for the title in the registry of deeds
    - b. requiring the buyer to hire a lawyer to do so
    - c. requiring the buyer to buy title insurance where someone else researches it
  - 3. many lawsuits come from disagreement and desire not to go through with it in the executory period.
- x. Closing
  - 1. transfer of money and title, immediate recording of the deed.
  - 2. the real estate settlement and procedures act prevents kickbacks and unfair closing costs
  - 3. after the closing, the deed replaces the P & S and becomes a complete agreement between the parties. If the parties intend the P & S to "survive the deed" they must be explicit about it. Some obligations survive even if they are not explicit (buyer can sue seller for fraud even after closing).
  - 4. sample offer form 868

5. sample purchase and sales 869
6. sample deed 873
- xi. the sales contract –statute of frauds v. part performance and estoppel
  1. Burns v. McCormick 135 NE 273 (NY 1922)
    - a. Halsey, old man, told plaintiffs that if they gave up their house to care for him he would leave them his on his death. They did so, but there is no written record of his promise. Defense = statute of frauds. Must be upheld.
    - b. “not every act of part performance will leave a court in equity, though legal remedies are inadequate, to enforce an oral agreement with regard to the rights to the land. Performance must be ‘unequivocally referable’ to the agreement (performance which without the words of the promise = unintelligible; the conduct itself must be a symptom of the promise of conveyance.
    - c. The plaintiffs’ service may have been for some other reason (like lodging) or indefinite reward (they were family and hoping).
    - d. He was the owner while he lived; nothing he accepted from the plaintiffs evinces that he intended they be owners when he died. Plaintiffs’ part performance = not unequivocally referable to oral promise. Mr. Halsey made a promise that the law does not compel him to keep. Don’t even know if his not keeping it was negligent (he forgot to rewrite his will) or intentional *but* the law requires writing
  2. Hickey v. Green 442 NE 2 37 (MassAppCt 1982)
    - a. Green owns a lot advertised or sale. July 11 and 12, Hickey discussed buying it and orally agreed to a price of \$15000
    - b. Green accepted \$500 deposit that said it was a deposit on the back subject to a zoning variance which it turns out was not needed.
    - c. Hickey sold his house, Green backed out and said that she was selling to someone else for more money. Hickey offered more and was refused. Hickey sued for specific performance, the defense was the statute of frauds
    - d. Restatement 2d: substantial change in reasonable reliance so specific performance needed to prevent injustice. Frequently, actual exchange of possession

has been required for estoppel in property cases, but that has been relaxing.

- e. Green does not deny the oral promise she made a promise on which they promptly relied and nearly as promptly revoked for a better opportunities. Both parties thought they had a deal; neither thought that writing was required. It therefore wasn't. We violate no public interest by holding green to this. Therefore, we do.
3. Gardner v. Garner 454 NW2d 361 (IA 1990)
    - a. Mark and James Gardner (brothers) conveyed interest in farmland to brother Harry as security for a loan he was getting. Loan did not come through and they wanted their remainder interest back.
    - b. Father had conveyed 1/3 to mother in fee simple and the other 2/3 to Harry in life estate with remainder to issue if he had any, siblings if he did not.
    - c. Harry was heavily indebted to citizen's bank. Brothers agreed to give him remainders to get a new loan; if he can't get a loan, he gives them back. They transferred, loan was denied, and Harry didn't return.
    - d. The party who partially performs under an agreement may avoid the statute of frauds and introduce evidence of an oral contract.
    - e. Brothers contend Harry admitted oral contract and that it might be established on that ground alone. Trial court found that he admitted he had made that promise; there was sufficient evidence to support such a finding. Affirmed.
  4. from the notes:
    - a. in Burns, Cardozo refers to housekeepers as wymyn and landowners as men, even though plaintiff married couple claimed to be both. Why are services feminine and improvements masculine?
    - b. Family roles gender intends to convey property absent writing – both through feminization of the places women belong and the delegalization of the private – women are just supposed to do certain things for free. If a woman is a housewife for free, it is assumed that she normally does that and doesn't expect to be paid.
    - c. Part performance used to be “unequivocally referable,” now just

- i. Payment of all or a substantial part of the purchase price
    - ii. Possession
    - iii. Improvements
  - d. Promissory estoppel
    - i. Clear and definite promise which promisor should reasonably expect to induce action
    - ii. Promise acted in reasonable reliance to his detriment
    - iii. Injustice can only be avoided by enforcement
  - e. What constitutes a writing?
    - i. Identify parties/show contract between them
    - ii. Indicate nature of the contract and subject matter
    - iii. State essential terms
  - f. Formality- what are the pros and cons of enforcing rigidly or creating exceptions for part performance?
  - g. What does it mean about judicial roles for judges to read exceptions into the statute of frauds?
  - h. Should an exception to the statute of frauds be made among family members?
- xii. Misrepresentation and fraudulent non-disclosure
  - 1. Johnson v. Davis 480 So2d 625 (FL 1985)
    - a. Contract for \$310000 – plaintiff paid \$5000 and P&S and \$26000 within five days. Before the \$26000, buyer noticed some peeling that the seller said was minor.
    - b. Rainstorm → flood. Roofers disagreed on whether it was fixable. Buyers sued for breach and sought rescission. Sellers wanted deposit for liquidated damages.
    - c. Fraudulent misrepresentation occurred. It is:
      - i. False statement concerning a material fact
      - ii. Representor knows it is false
      - iii. Intention that representation induce another to act
      - iv. Injury by the party acting
    - d. Caveat emptor does not excuse seller from statements to induce the buyer to act. When a seller says something, the buyer may rely on it. While the action/inaction distinction creates a problem, the rule is clear on fraudulent action - \$26000 goes back.
    - e. Also, the old rule that failure to disclose material facts of which the seller is aware = okay has not

stood the test of time. Instead, an evolving duty to disclose things that would not be obvious to a diligent buyer.

- f. “we hold that where a seller of a home knows of facts materially affecting the value of the proerty which are not readily observable and are not known to the buyer, the seller is under a duty to disclose them to the buyer. This duty is equally applicable to all forms of real property, new and used.”
- g. Johnsons knew before taking any money – it all goes back.
- h. Boyd’s dissent: rule = flood of litigation with unjust outcomes. If the well-settled law of the state is to change, it should be done at the hands of the legislature. The court = wrong that the distinction between affirmative misrepresentant and simple non-disclosure = immaterial. Also, change in law is unnecessary. Prudent people inspect, and Johnsons had a mortgage on it.

2. From the notes:

- a. Traditional distinction between misrepresentation, suppression, and non-disclosure.
  - i. Misrepresentation = material fact known to be false and relied on to detriment (requires statement)

b. Deeds and title protection

V. Zoning

VI. Takings

a. Takings

b. Just compensation and public use

VII. American Indian nations

a. In the mid-15<sup>th</sup> century, there were 15 million native Americans; cultural extermination and disease made there only 200,000 by 1910 . . . more gradual than a nuclear holocaust but proportionally equal to one. The coming of the Europeans → struggle over property rights, both among Europeans and with native Americans

b. France, England, Spain induced or forced the transfer of land rights from Native Americans. Sometimes native Americans understood temporary permission to use land where colonists understood permanent transfer. Johnson v. M’Intosh considers the process of transfer of sovereignty from natives to colonists to US (which inherited colonists’ title upon independence. Here, two non-indian claimants – one that got it from the Indians and one that got it on assignment from the government. Supreme Court had to justify the taking of the land, but Marshall’s opinion has since protected many Indian possessions.

c. Johnson v. M’Intosh

- i. Plaintiff title from the Indians, defendant from a US government grant
- ii. Native Americans used to own all the land; European right to soil was obtained either by conquest or purchase from various native American tribes
- iii. The French-Indian war of 1756 was over land rights, as a result, the British government ceded some land to the Indians.
- iv. In 1773, plaintiffs bought the land in question from the Indians for \$60000.
- v. In 1776 VA became independent and in 1778 it established the territorial bounds of Illinois. In 1783, it joined the United States. In 1818, the United States government granted M<sup>r</sup>Intosh the land in question.
- vi. Plaintiffs say:
  1. Indians owned then sold them the land
  2. the British government did not and could not effect their right to sell
  3. proclamation that you cannot buy land = clearly void on face
  4. VA legislature cannot take away private, vested rights.
- vii. defendants denied that Indians could be recognized as owners who could be bought from, and even were they, they had long since ceased to be so and didn't have fixed property to sell
- viii. Marshall for the court: these chiefs were acting representative of their tribes on their lands, the real question, then, is the power of Indians to sell and private individuals to receive title to land.
- ix. When Europeans arrived, they tried to grab up all the land (that's the nature of conquest); they now let Indians live on it as an apology for conquest.
- x. Discovery gave title to the nation whose subject made it; they got to acquire the land from the natives and settle it exclusive of other European nations. The relationship between the discoverer and the native was regulated by themselves, and the rights of the natives were "never entirely discarded" but "necessarily impaired"
- xi. Nations of Europe saw natives as occupants but saw ultimate dominion in themselves – title to grantees subject to Indian right to occupancy. There has been a universal recognition of these principles in the history of America.
- xii. When Great Britain lost the revolutionary war, it transferred title to the US, subject only to Indian right to occupy. It was therefore the exclusive right of the US to extinguish Indian title. Conquest gives title to the conqueror, which the courts cannot deny.
- xiii. "although we do not mean to engage in the defence of those principles which Europeans have applied to Indian title, they may, we think, find some excuse, if not justification, in the character and habit of the Indians.

- xiv. Title by conquest → acquired and maintained by force but there are rules about how you treat the conquered – usually integrated into society. But the Indians fought back – they were neither integrated nor governed. Europeans had fight wars or relinquish land. Frequent and bloody wars, started by both sides, ensued.
- xv. Plaintiffs don't have a valid title.
- xvi. from the notes
  1. what = difference between title of occupancy and ultimate title?
  2. how does this define Indian nations?
  3. have American Indians been conquered?
  4. did the Indians' property law matter?

- d. Tee-Hit-ton Indians v. US 348 US 272 (1955)
  - i. Reed's opinion for the court on the 5<sup>th</sup> amendment claim
  - ii. Indians from Alaska for loss of timber → United States; claim not statutory but constitutional
  - iii. Indians claim "full proprietary ownership" or at least recognized right to unrestricted possession. Government claims that Indians' right, if any, is just to use the land at the government's will. Congress did not ever recognize permanent Indian rights in Alaska.
  - iv. "Indian title" – permission from whites to occupy; mere permission not specifically recognized as ownership – not a property right. This position has long been justified by the effect of conquest (M'Intosh)
  - v. "no case in this court has ever held that taking of Indian title required compensation. The American people have compassion for the decedents of the Indians who were deprived of their homes and housing grounds by the drive of civilization. They seek to have the Indians share the benefits of our society as citizens of this nation. Generous provision has willingly been made to allow tribes to recover for wrong as a matter of grace not legal liability."
  - vi. Indian occupation of land without government permission → no rights protected by the 5<sup>th</sup> amendment. We leave with Congress (where it belongs) the decision whether or not to pay Indians.
  - vii. From the notes
    1. what happened to the Tee-hit-tons title of occupancy? Is it correctly valued here?
    2. why doesn't the court recognize this claim? Are they right?
    3. does "conquest" mean something different here?
    4. although not compelled, Congress paid \$462 million to the Alaskan Indians.
    5. Indians are not the only minority group whose property rights get less than equal protection – immigrants/African Americans

- VIII. Uses and limits of property
  - a. Uses

- i. Review of Pierson v. Post
  - 1. from the notes
    - a. was seizing the fox at the last moment uncourteous or unkind? If it was unfair why was it not unlawful?
    - b. What role does social utility play in determining what justice is?
    - c. Does certainty matter? Why or why not?
    - d. Does trespassing matter? Why or why not?
- ii. Eliff v. Texon Drilling Co 210 SW2d 558 (TX 1948)
  - 1. plaintiffs can sue for damages from a blowout gas well – they owned the surface/royalty rights to the land.
  - 2. defendants were drilling → blowout → fire → crater; jury found that the defendants were negligent in failing to use drilling mud of sufficient weight
  - 3. does the law of capture absolve defendant from liability?
  - 4. Supreme Court of LA says adjoining owner = without right of action for gas wasted in common pool by neighbor. That doesn't apply to use because they don't recognize the absolute ownership of gas and we do.
  - 5. In TX, you have absolute title to the gas under your land subject to the law of capture and police regulation. Usual remedies against trespassers who appropriate minerals or destroy market values.
  - 6. Some states used to treat gas like a wild animal to be escaping and captured; no oil and gas producing state still does. Still, gas in a common pool migrates from adjoining lands → low pressure, and you are entitled to the gas that migrated too. Still doesn't give defendant absolute ownership.
  - 7. Here, defendant could have “sucked up” neighbors oil, but is limited to legitimate methods, not reckless or lawless irresponsibility. A certain amount of waste is necessary but should not include negligent waste and destruction. Even though the neighbor can use the gas, he cannot waste it. Respondents did something that it was common knowledge would waste gas. Law of capture does not apply. Plaintiffs can get damages.
- iii. Kenneth Vandavelde, “The new property of the 19<sup>th</sup> Century: the development of the modern concept of property” (1980)
  - 1. the emergence of oil and gas → new theory of property required with little precedent – absolute ownership or animal doctrine?
  - 2. nature of oil → confusion to the absolutist concept because multiple landowners have access to the same oil. The total inapplicability soon became obvious.

3. *ferae naturae* – you can have the oil if you have access to it, but this led to a race to extract, regardless of waste. Now, taking gas from the pool must be reasonable.
4. Designation of something as “property” doesn’t always tell us about our rights to the property – public policy decides that.

iv. Water

1. surface water is generally considered a nuisance, but other sources are valuable commercial resources.
2. Aquifers tapped by wells to drink, irrigate, and power. Withdrawing from your aquifer can take water out from under someone else’s land. Withdrawal by one owner may hurt others’ ability to withdraw. Each owner = free to do so, except to waste (majority rule).
3. Minority rules:
  - a. Reasonable use test where we accommodate each others’ interest
  - b. Correlative rights (on percentage)
  - c. Prior appropriation: owner who first invests in withdrawing the water
4. streams: surface streams = useful; lawsuits arise when one owner’s use interferes with others’ – the majority rule is reasonable use, the minority rule is prior appropriation

v. Finders – *Charrier v. Bell* 496 So2d 601 (LA Ct App 1986)

1. plaintiff former corrections officer/amateur archeologist obtained permission from someone to excavate – found a town.
2. leased collection to a museum, but initially did not disclose where he got it. Could not sell collection because of doubt over the title.
3. plaintiff sued 6 non-resident landowners for title to the artifacts, or, in the alternative, unjust enrichment for his time and expenses. State of LA bought the property and the artifacts from the landowners.
4. who owns – digger, state, or Indians? Trial court says Indians – because plaintiff looked for these things and did not find them “by chance” – trial court also denied unjust enrichment claim, claiming it was the plaintiff’s own fault.
5. Indians own their own graves – they don’t lose ownership because someone else digs them up.
6. The criteria for compensation:
  - a. Enrichment
  - b. Impoverishment
  - c. Connection between enrichment and impoverishment
  - d. Absence of cause

- e. No other remedy for the plaintiff
- 7. plaintiff has failed to show that his conduct did not contribute to his problem or that their enrichment = unjustified.
- 8. from the notes:
  - a. lost, mislaid, or abandoned property
    - i. lost – accidentally misplaced it
    - ii. mislaid – intentionally left and forgot where
    - iii. abandoned (intended to relinquish rights)
  - b. conflicts between true (original) owner and the finder – finders' keepers doesn't apply unless it is abandoned.
  - c. Conflicts between the finder and third parties – finder prevails over everyone but the true owner.
  - d. Conflicts between the finder and the owner of the property of discovery – landowner wins if finder was trespassing or if stuff was embedded in the soil
  - e. Finders' statutes sometimes tip the balance here
  - f. Native American graves and repatriation act of 1990 – stuff found on public property goes back to the Indians.

b. Limits