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* Class meets from 1:00 p.m. to 2:50 p.m. in our regular room (makeups for Sept. 14 and 23).
† GMUSL Monday classes meet this day at regular time and room.

I. GENERAL COURSE GUIDE

Property in Context

This course explores the fundamentals of one of the three great branches of the common law. Property law considers individuals’ ownership of rights with respect to things. Contract law considers the consensual exchange of those rights. Tort law deals with the rectification of harm to property rights. In large measure, Criminal Law and Constitutional Law also consider protection for property rights.

“Property” is a very broad concept, applicable not only to physical things, but also to intangibles (such as corporate stock), intellectual property (such as patents and copyrights), and rights to integrity of one’s physical person (vindicated by tort suits for physical injury) and character (the basis of tort suits for defamation).

This course deals primarily, although by no means exclusively, with private ownership and government regulation of real property (i.e., land and permanent improvements to land), and with residential real estate transactions. Property is the prerequisite to courses in Real Estate Finance and Development (which primarily treats commercial real estate transactions) and Land Use Planning (which deals with government regulation of land uses and eminent domain). Property also is a principal gateway course to Trusts and Estates, and Estate Planning.

Other courses also have large property components. For instance, Taxation involves government exactions based primarily on accretions and diminutions in value of property owned by taxpayers. Much of family law is concerned with the disposition of marital property. Business law courses (including Bankruptcy) also are devoted in large measure to the control and disposition of property.

Goals for this Course

In this course you will learn (1) basic legal skills, such as how to read a case, (2) property law theory, (3) property law doctrine, and (4) how lawyers apply theory and doctrine in dealing with typical property transactions and disputes.

Attendance and Class Preparation

The Law School posts requirements for class attendance on its web site. You should become familiar with these before the first class. I am obligated to take attendance. Should your absences exceed those permitted, you will be dropped from the course. If you have questions about GMUSL’s attendance policy, please check with the Recorder’s Office.
The first year of law school is difficult, and you will have to spend a substantial amount of time preparing for each class. The generally accepted minimum is six hours of preparation for each two-hour class meeting. I suggest that you begin by reading the assigned cases and materials quickly at first to get their overall flavor. Then go back and reread them very carefully, this time taking notes. There will be words that clearly will be foreign to you. Obviously, you should look those up in your law dictionary. However, and more treacherous, you will come upon idiomatic expressions that you do not recognize, or words that not look exactly right in context. Often, these denote legal terms of art. You should check such usages in the legal dictionary, as well.

Your careful review of each principal case should culminate in your preparation of a summary, called a case brief. There are many styles of legal case briefs available. You should select the method with which you are most comfortable, and which best enables you to describe the case and to answer questions posed in class.

Under the most common style of class brief, abbreviated “IRAC,” you would sequentially state the issue raised by the case; the legal rule that governs its resolution; the application of the governing rule to the particular facts; and the court’s conclusion. In addition, it is important that you understand the procedural posture of the case. For instance, a trial court would employ a different standard in reviewing a motion to dismiss a case based on the initial pleadings than it would in deciding the case after all the evidence is heard. Likewise, an appellate court reviewing a trial court’s decision typically would use a different standard for reviewing the facts than that employed by the trial court.

You should beware of purchasing commercial “canned briefs.” These are of very uneven quality. Much more important, the prime benefit that comes from creating your own case briefs lies not in having them in your possession, but rather in going through the process of reading and thought of which they are the culmination. It is possible for you to jot a few words in the margins of your casebook in lieu of a fully prepared brief. Some upper-class students may get by with a so-called “book brief,” but my long experience suggests that it is folly for first year students to try it.

Perhaps the most important aspect of your brief is the first component under the IRAC system—identifying the issue before the court. Refining the legal issue is much harder than it looks. Since you cannot resolve the issue before you correctly define it, you should devote lots of attention to this.

In Class

The typical undergraduate lecture course permits students a passive role in the classroom. Law school classes are more demanding. Most law classes have some lecture component, typically regarding preliminary or secondary matters. The heart of the class, however, is the Socratic dialogue. The instructor asks questions about the
case or other subject at hand, and the student responds. Sometimes the student has volunteered, but often responds to a cold call.

It is natural for you to feel uncomfortable with being placed on the spot. For that reason, I want to emphasize that the law school practice of cold calling reflects that the primary purpose of legal education is to prepare you for the practice of law. It is much better to start becoming acclimated to the need for careful preparation, to thinking on your feet, and to defending your position now, than it would be for you to first experience the process in front of a judge, with opposing counsel anxious to pounce on your every mistake, with a client whose property or liberty is in your hands, and with a legal stenographer taking down every word you say.

The Socratic method permits you to make rookie mistakes in class, and to learn from them. Indeed, getting the “wrong” answer in class sometimes results not from your having made an error, but rather from your being unacquainted with considerations germane to resolving the issue not apparent from your readings. I and your other instructors do not necessarily expect that you will give the “right” answer in response to a question. We do expect an answer reflecting a good faith effort to prepare for class and to grapple with the issues. If your answers reflect preparation and thought, you can be sure that some of your classmates will have thought the issues through in the same way you did. Your comments and the resulting discussion will be instructive to them, as well as to you.

I very much urge you to volunteer in class. You might find it fun, and you certainly will learn more if you take an active part in the discussion. Also, it is a wonderful way to get instant feedback on how you are doing.

One caveat: While any good faith answer helps advance the discussion, you should never bluff in class. If you are unprepared, you should say so. That is much better for all than wasting your classmates’ time.

Some instructors, I not among them, ban laptop computers in class. That is less because of beguiling distractions than because of the ease with which laptops allow you to take notes. That seems counterintuitive. However, when you write in longhand, you can jot down very little. You are forced to listen attentively for the outline of the argument and the most salient points. Correspondingly, fast keyboarding permits you to copy much more, and to assume that you can make sense of it later. It doesn’t work that way. Your main job in class is to listen carefully, follow the discussion, and participate. Your notes will be sparser, but you will learn more. A recent article in The Atlantic discusses empirical evidence on point:

http://www.theatlantic.com/technology/archive/2014/05/to-remember-a-lecture-better-take-notes-by-hand/361478/

Your laptop computer is a job tool—and your job is not that of legal stenographer.
Supplemental Readings and Examination Review Material

There are many supplemental materials available for explication of topics you find interesting or difficult, and for exam review. This selective list includes some that might be particularly helpful. In addition to the materials mentioned here, the casebook web site contains much useful information. The casebook contains access information.

General

William B. Stoebuck & Dale A. Whitman, The Law of Property (3rd ed. 2000). This classic West Hornbook is fairly complete and remains an excellent property law reference. You should consider buying it for your permanent library.

Julian C. Juergensmeyer & Carol Necole Brown, Property (5th ed. 2011). This Westlaw “Quick Review” publication is a useful skeletal outline of property law.


John G. Sprankling, Understanding Property Law (3d ed. 2012). This Lexis Publishing paperback is midway in length between the West Hornbooks and shorter study guides. It restates basic property principles with some case illustrations.

Roger Bernhardt & Ann M. Burkhart, Black Letter Outline on Property (6th ed. 2012). The West "Black Letter Outline" series are study aids stressing basic legal principles and are designed for exam review purposes.


Coleen Medill, Acing Property (2d ed. 2012). This West “Acing” series book features checklists to lead students through the analytical steps necessary to evaluate and resolve property issues.

Estates in Land

Sheldon F. Kurtz, Moynihan's Introduction to the Law of Real Property (6th ed., 2015). This short West Hornbook, an updated version of the classic text in this field, is an excellent review of common-law estates in land (including future interests and the Rule against Perpetuities).
Raymond R. Coletta, *Workbook on Estates and Future Interests* (West, 2007). This workbook contains estates in land problems and, on the opposite page, model answers.

**Real Estate Finance**

Grant Nelson & Dale Whitman, *Real Estate Finance Law* (5th ed. 2007). This classic West Hornbook remains an excellent and comprehensive guide to commercial real estate finance.

Alex M. Johnson, Jr., *Modern Real Estate Transactions* (3d ed. 2012). This Lexis Publishing paperback is midway in length between the West Hornbooks and shorter study guides. It restates basic real estate finance and commercial real estate law principles, with some case illustrations.

Jon Bruce, *Real Estate Finance in a Nutshell* (6th ed. 2008) is a very useful West Nutshell. It is especially recommended for review.

**Final Examination and Grade**

Your grade will reflect your performance on the examination. However, I reserve the right to adjust grades for outstanding class participation, or for chronic lack of preparation or unprofessional conduct.

The final examination will be closed book, three hours in length, and containing both essay and multiple-choice components. It will cover most major areas of the course and will reflect assigned readings and class discussion. My emphasis is on whether you understand, and are able to apply, the concepts and doctrines we stress in class. If you can answer the questions that are discussed the classroom, your prospects are good for the exam room.

I very much encourage you to take the essay part of the exam on your laptop computer. The exam software will lock out other files. The Recorder’s Office will distribute information about use of laptops in the exam late in the semester.

**Instructor Contact Information and Office Hours**

My office is in Room 317, and my office hours are on Mondays and Wednesdays from noon to 2:00 p.m. In addition, whenever my office door is open you should feel free to inquire if that is a good time to talk.

Since I often work at home or travel on non-class days, the preferred and easiest way to reach me is by e-mail at seagle@gmu.edu. Please be sure to include “Property Class” on the subject line and your full name and contact information. My office telephone number is (703) 993-8054. My assistant, Ms. Jane Barton, is very helpful. Her
desk is at the center entrance to the faculty wing on the third floor, and her telephone number is (703) 993-8030.

Final Comments

My job is to help you master the fundamentals of property law, and, more broadly, our legal system in the context of our evolving society. This course guide provides basic information and should answer many of your questions. If you believe that something should be here that isn’t, I would appreciate your feedback.

Your job is to apply your talents, perseverance, and imagination to your legal education. Much in law school (even Property!) is fun, but law is a craft as well as an art, and you have to start with the basics. As Euclid responded to Ptolemy when the ruler wanted a shortcut, “there is no royal road to geometry.” If you engage fully in your studies and in other opportunities that the law school offers, you will be well on your way to a legal career that is rewarding in every sense of the word.

II. NOTES FOR INDIVIDUAL CLASSES

Notes for August 19:

8DK 18–23: Prepare Pierson carefully, analyzing the interrelationship between the majority and dissenting opinion.

23–26: A quick read should suffice.

26–29: Prepare Ghen carefully, analyzing the relationship between it and Pierson. Would a modern court regard this case as important?

30–32: Prepare Keeble carefully, analyzing the relationship between this and prior cases. What was the property interest at stake here?

32–40: Concentrate on 33–34, Probs. 1–4; and 37–39, Notes 1 and 2.

Notes for August 24:

8DK 40–46: The Demsetz article is foundational. Our discussion will concentrate on when will private property rights be created, and what are the relative merits of private and communal property.

46–50: Externalities are pervasive in property, but the concept is hard to pin down and externalities are only sometimes relevant to decisionmaking. Our discussion will focus on 49–50, points a) through c).

50–56: We touched on some of this material earlier. We will look now primarily at 53–55, the “tragedy of the commons,” the “anticommons,” and the useful commons.
Notes for August 26:

8DK 104-110: *Jacque v. Steenberg Homes* and *State v. Shack* are archetypical cases involving a landowner’s right to exclude others, which some commentators believe is the most important property right. In *Shack*, New Jersey Chief Judge Joseph Weintraub declared: “Property rights serve human values.” (8DK 107, last full ¶.) Is that the end of the inquiry, or the beginning? For two positions, see Alexander, “The Social-Obligation Norm,” (bot. 109) and Epstein (110 n. 3).

110–116: Normally, individual can disclaim their privileges. Should ownership of real property be treated differently?

118–124: Is *Eyerman* a case involving abandonment? Do we know why the decedent, Ms. Johnson, acted as she did? What if her diary could have illuminated a vital public issue, and she had ordered the executor to burn it? Despite the case, might Johnson’s heir destroy the house? Why should the wishes of decedents generally prevail?

Notes for August 31:

8DK 125–129: Both *Amory v. Delamirie* and the notes that follow are quite important and deserve careful study.

129–135: Pp. 134–35, Notes 1–3, pose crucial questions. Looking at the issues afresh, could you suggest some disposition of this case that *Hannah v. Peel* did not discuss?

135–144: Do you agree with the approach of the court in *McAvoy v. Medina*? The notes that follow help illuminate the lost/mislaid distinction.

Notes for September 2:

8DK 144–50: It seems counterintuitive that a person with no legal right should wind up with ownership of land simply for occupying it for a period of time. The present discussion focuses on the theoretical aspects of adverse possession. We will discuss its more practical implications when we study conveyancing. It is important that you consider the reasons and practical implications for each of the adverse possession requirements.

175–76: Does a person accruing ownership by adverse possessor acquire some sort of property right in the interim? If so, can a successor tack on to it? We will discuss Problems 1–3.

177–78: Is the fact that the public is the ultimate owner of government land a good justification for the immunity of government from adverse possession claims? Are there other (perhaps better) reasons?

189–92: These pages are an introduction to acquisition of property by gift. The three requirements, intent, delivery, and acceptance, are simple in theory. Why are they difficult in practice? Consider 191–92, Probs. 1–4.
Notes for September 9:

This class marks the beginning of the second major unit of the course, the Anglo-American system of ownership rights in land. Yes, the system seems arcane. As Justice Holmes noted [bot. 207] sometimes old rules are slavishly followed. But sometimes old formulations are retained because they are useful in new contexts. In any event, as William Faulkner wrote in Requiem for a Nun, "The past is not dead. It's not even past." Courts often resort to old distinctions, which is one reason we study them here. Also, many estates in land terms are similar, but have different meanings. If we don’t use terms precisely, it’s easy to get lost.

8DK 209–215: While he had considerable merit as a military leader, William the Conqueror’s true genius was as an administrator. As you read this excellent condensation of the development of early English land law, remember that William’s Norman lieutenants were a rough-hewn lot, with little appreciation of doctrinal niceties. The rules described here might seem arcane, but they were intended to be practical, and these readings will give you an idea of why that was so.

215–222: The fee simple is the most basic and inclusive measure of private land ownership. We will focus on the two sets of problems, on pp. 219 and 221. We also will note very briefly the fee tail, which is of historical interest only (see p. 225)

Notes for September 10:

8DK 226–232: Life estates are still very much with us. As the casebook notes (p. 226), most life interests now are within trusts that are professionally prepared and managed. But some are provided for in what I call “kitchen table” instruments—home drawn wills, sometimes in longhand. White v. Brown is important both as an illustration of how courts deal with such instruments in light of the underlying circumstances, and also as our principal case for considering the conventions for interpretation of legal instruments.

232–234: Why should the common law have come down so heavily against restraints on alienation? The valuation issue pertains to the time value of money, which we shall discuss.

235–239: A court in equity has the power to ensure the fair apportionment of a fee simple between the current tenant and owners of the reversion. How does that underlie this lawsuit? Why is the judge puncting Baker v. Weeden back to the chancellor? Is there any lapse by the plaintiffs’ attorney that you could point to?

239–242: Consider the reasons for and against the creation of legal life interests.

242–244: The concept of “waste” is important where the owner of a future interest in real property might be prejudiced by actions of the present possessor. We will discuss the types of waste and their practical import. “Seisin” is an archaic term for “ownership.” Some flavor of how it differs from its modern counterpart is contained in p 212, note 4. Some modern instruments and pleading still speak of a party being “seised” of an interest in property.
Notes for September 16:

8DK 244–247: A defeasible estate is an estate that a person now possesses, but might lose. Analyze carefully the types of defeasible estates described in these readings.

248–256: The Mahrenholz case is important for two reasons. First, it illustrates how easily complicated problems arise from lack of precision in drafting. Second, it will serve as our vehicle for analyzing complex cases. I find the best way to approach such cases is to 1) read through them quickly to get their flavor, 2) jot down all the important facts in what seems to be chronological order, and 3) to make a chart, or abstract, of the case, having time on the vertical axis and the competing chains of claims on the horizontal axis.

258–264: Mountain Brow Lodge and the notes that follow discuss private restrictions on landowners’ rights, and the extent to which those restrictions are upheld. As you review these materials, keep in mind the various interests that courts and legislatures should take into account.

271–272: Why should legislatures and courts involve themselves with the conditioning of estates in land on the conduct of grantees?

Notes for September 21:

8DK 275–288: Property rights may be split temporally, as we have seen regarding present interests (e.g., life estate). We now turn to future interests. A list of the six permissible future interests in our legal system is provided on p. 276. The key thing to remember is that the label “future” interests is a misnomer. The more accurate description would be present interests in future possession.

My experience is that pouring over sets of definitions is much less useful than learning how to analyze future interests as they arise in specific problems. Therefore the heart of our work will be going over the problems on pp. 278, 281, 283, and the materials discussing the differences between examples 7 and 8 on p. 283–284.

Another important element of future interests is the distinction between vested and contingent remainders (p. 285), and how the common law treatment of contingent remainders also was reflected in the prohibitions against shifting and springing interests (pp. 286–287).

Notes for September 24:

8DK 288–294 These materials discuss the rise of the modern executory interest and the trust. Our primary vehicle for exploring the executory interest is a review of the problems on p. 292. The modern significance of the executory interest as a distinct interest in land is much attenuated (pp. 293–294) and the Restatement (Third) of Property relies on the generic “future interest” (p. 294–295).

295–303: The modern trust is the bedrock of estate planning, shielding the equitable owner of the trust property (the beneficiary) from the legal owner of the property, the trustee. But, might the shielding of property go too far? The Broadway National Bank case, the critiques of the spendthrift trust that follows, and the rise of the perpetual trust all raise this important issue.
Notes for September 28:

8DK 303–307: Rules permitting contingent future interest have the great virtues of fairness and flexibility, but the great vice of injecting prolonged uncertainty into property ownership. At common law, contingent remainders were destroyed if the contingency was not resolved by the end of the prior possessory estate. Most states no longer adhere to this rule. The Rule in Shelley’s Case and the Doctrine of Worthier Title (pp. 306–307) also eliminate contingent interests. These are almost exclusively of historic interest only, and you are not responsible for them beyond the basic statements of the rules.

307–314: The common law Rule Against Perpetuities was designed to limit contingent remainders essentially to the lives of those living when the grant was made plus time for a subsequent generation to come of legal age. John Chipman Gray’s classic statement of the RAP (middle p. 308) is our starting point. We will work largely with the problems on pp. 312–313. While some applications of the RAP can be very difficult, our purpose is not to make you an expert, but rather to understand the basics and to be aware of RAP issues, so that early in your practice you could consult with someone more experienced. The RAP savings clause, (pp. 313–314) is an important way to avoid problems. I will discuss briefly in class alternatives to the RAP, such as wait-and-see, the flat 90-year period of the Uniform Statutory Rule Against Perpetuities, and the judicial modification after two generations Restatement Third approach. Think about what good, and harm, is done by perpetual trusts.

343–354 While future interests is concerned with the temporal division of property, now we turn to the ownership of property by two or more persons concurrently. We will discuss the problems on p. 346. Riddle v. Harmon and the notes that follow consider the merits and demerits with unilateral severance of the joint tenancy.

Notes for September 30:

8DK 359–361: Harms v. Sprague and the notes that follow also consider severance of joint tenancies, but now as a result of the involvement of third parties. We also get a glimpse of the roles of legal formalism and substantive intent in the formulation of property rights. The “joint” bank account is ostensibly simple, but can raise lots of problems, as the notes and problems on pp. 359–361 illustrate.

361–371: Each cotenant can make full use of the cotenancy property, subject to the rights of the other(s) to do the same. In some situations, this is easier said than done! If the cotenants can’t work out their differences (including through mutually satisfactory sale to one of them or an outsider), a court will have to order partition, the cotenancy equivalent of a divorce. In theory, the preference is for partition in kind, when each cotenant gets an equitable part of the real estate. Under certain circumstances, a court can order a partition by sale, in which case the cotenants get equitable shares of the net proceeds. But, as Delfino v. Vealencis and the subsequent materials indicate, it’s easy for substantive fairness to go awry. Our discussion will focus on the adequacy of counsel in Delfino and on pp. 370–371, notes 3–8.

371–380: Spiller v. Mackereth and Swartzbaugh v. Sampson illustrate the problem of a cotenant’s practical remedies in the face of perceived unfairness by another cotenant or one holding
under that cotenant. In the context of the notes following the two cases, we will discuss a cotenant’s rights, and how they might be enforced. Partition is available, but sometimes not very helpful.

380–382: Property held in tenancy generates implicit and explicit income, as well as costs. The Note discusses the principal examples.

Notes for October 5:

As the introduction to the chapter (p. 441) indicates, what we call “Landlord and Tenant Law” actually is a subset of Estates in Land otherwise known as the law of non-freehold estates (i.e., the law of interests less than a life estate). The topic is broken out for separate treatment because of the importance of landlord-tenant law, and also because of the “Landlord-Tenant Revolution” of the 1960s and `70s, that changes the framework for considering residential tenancies while leaving commercial tenancies mostly to the traditional common law rules.

8DK 443–453: The term of years and periodic tenancy are basic building blocks. How would you think that p. 444, Probs. 1 and 2, might be resolved before the 1960s and now? How prevalent might the tenancy at will (p. 445) be? Do you regard Garner v. Gerrish as correctly decided? See the notes that follow the case. Is a tenancy at sufferance (pp. 449–450) a tenancy at all? The note on “The Lease,” (pp. 450–453) is full of valuable insights. Please read it carefully.

453–461: Discrimination in provision of housing based on race was forbidden by the Civil Rights Act of 1866, and the federal Fair Housing Act of 1968 (as amended) forbids housing discrimination based on “race, color, religion, sex, familial status, or national origin.” Landlords claim freedom of association or of religion in some instances. Despite laws against it, evidence indicates that housing discrimination remains widespread. We will discuss these issues in the context of pp. 456–459 (Probs. 4 and 5(a)).

461–465: In Hannon v. Dusch, the parties entered into a residential lease, and the landlord put the tenant in undisputed legal possession. Should that be the end of the story? See also p. 465, Probs. 1 and 2.

Notes for October 7:

8DK 465–482: Subleases and assignments sometimes are entered into by residential tenants, and more often by commercial tenants. At common law both were freely permitted unless restricted by the lease, which generally is the case. It is important that you understand the differences between subleases and assignments, why landlords typically want to restrict both, and the legal basis for rights to possession and liability to pay rents in typical sublease or assignment cases. Of our two principal cases, Ernst v. Conditt focus on the mechanics and Kendall v. Ernest Pestana on public policy issues in permitting landlords to impose restrictions.

Notes for October 13:

8DK 482–492: When a tenant defaults on promises made in the lease, the landlord is entitled to a remedy that might include possession or money damages. The common law provides some
baseline provisions, the lease others. However, statutes and court rulings limit the tenant’s liability and the landlord’s rights, especially regarding residential leases.

*Berg v. Wiley* (p. 482) might be viewed as a routine case involving tenant abandonment of the premises—a traditional ground for landlord termination of a lease. The jury found that the tenant had not abandoned, and that the landlord therefore was not entitled to possession. The Supreme Court of Minnesota upheld this finding as supported by sufficient evidence. Should the court have any further role under these circumstances? Is a prohibition on landlord self-help good for tenants as a class? Is the prohibition justified by the availability of summary actions for possession?

492–504: In *Sommer v. Kridel* (p. 492), the tenant did abandon the residential premises. The landlord pursued his remedy under the lease. The materials through p. 502 enunciate the benefits and pitfalls in abrogating the common law rule favoring the landlord.

**Notes for October 14:**

8DK 504–515: Under common law, a tenant who is evicted or deprived of quiet enjoyment of the premises as provided in the lease could regard the lease as terminated, and have no subsequent liability for rent. *Village Commons* (p. 505) analyzes these concepts. The common law concepts are in tension with evolving views of residential tenancies, and *constructive eviction, partial eviction*, and expanding notions of common law *quiet enjoyment* have resulted in some confusion, as discussed on pp. 511–514. We will take these issues up largely through the problems on pp. 514–15. The *illegal lease* is discussed in the Note on p. 515. I will discuss it very briefly.

515–526: The *implied warranty of habitability (IWH)* has supplanted the illegal lease. Other courts had fleshed out the doctrine in earlier cases, so that *Hilder v. St. Peter* (p. 515) is its polished reprise. The Confucian doctrine of *rectification of names* means that people should use the right words to describe things, and that things should live up to their names. Discord between what things are called and what they are almost inevitably leads to difficulties. Is the IWH implied? Is it a warranty? We will discuss the problems on pp. 522–525, which in large measure try to harmonize how things are with what they are called.

526–528: These materials deal with two types of landlord liability. One arises from *retaliatory eviction* as a way of punishing and discouraging tenant reporting of housing code violations. In this regard, consider whether the New Jersey rule requiring that landlords who refuse to renew expiring leases have “good cause” changes the nature of the lease to something else. The other is tort liability for landlord negligence, which we will discuss in the context of the problems on pp. 527–528.

**Notes for October 19:**

8DK 528–530: Tenants have the duty—generally not very well defined—to keep the premises in good condition. The duty is limited by, among other things, ordinary wear and tear, casualty losses, and expensive repairs the value of which would inure mainly to future occupants or the landlord.
531–540: As we will have observed, the market does not provide housing in the quantity and quality that legislatures and courts might desire, and attempt to provide via ordinance and judicial decree. Judge Posner’s “majority opinion” (but not the court’s judgment) in Chicago Board of Realtors (p. 531) discourses on why the problems of low- and moderate-income tenants might not be resolved by statute. The notes following the case present a range of views about the “affordable housing” problem. I welcome your discussion in class of these points, and others that come to your mind.

Notes for October 21:

While I haven’t assigned them, a quick read of pp. 543–558 will give you somewhat of an overview of the real estate conveyancing process if you’re unfamilar with it.

8DK 559–570: The first assigned materials involve real estate brokers. While a lawyer should develop some wariness of brokers, you should keep in mind that even large-scale and sophisticated developers often hire outside brokers to sell their new units. Brokers do have a fiduciary duty towards their principals, for which they are accountable in clear-cut cases (Licari v. Blackwelder, p. 559). But, as the notes on pp. 562–570 indicate, the area is rife with misunderstandings. The use of multiple listing services and disputes over when brokers earn their commissions are large contributors to this, and we will discuss these.

570–576: The contract for sale and purchase is at the heart of the real estate transaction, and lays out the rights and responsibilities of the parties. Hickey v. Green (p. 571) and the notes that follow discuss the mechanics of the complying with the Statute of Frauds (including electronic communications), as it is tempered by considerations of equity.

576–582: The essence of the real estate transaction is an exchange of money for ownership (reified as “title”). A certified or cashier’s check generally suffices for good funds, but good title is a more difficult concept. A buyer wants a house—not a lawsuit with a third party. But, as Lohmeyer v. Bower (p. 577) reveals, nailing down the concept of marketable title is easier said than done. Please analyze the case carefully.

Notes for October 26:

8DK 582–593: One way to protect residential purchases is to require that sellers disclose defects. (Real estate brokers have been primary advocates of mandatory disclosure—do you understand why?) Stambovsky v. Ackley (p. 582) is almost irresistible to casebook editors, but Johnson v. Davis (p. 586) approaches the issues more analytically. We will concentrate on Johnson and the notes that follow. The separate note on Merger (p. 593) is short but important.

593–602: The implied warranty of quality is generally analogous with the implied warranty of habitability and is the subject of Lempke v. Dagenais (p. 594). Lempke and the notes discuss the extent to which privity of contract should be disregarded in ascertaining duties. How far down a chain of purchasers should a builder’s warranty extend? Should homebuyers be liable under the warranty to subsequent buyers?

602–614: What are the appropriate remedies for breach of the sale and purchase contract? We will focus on Jones v. Lee (p. 603–606) and the notes and questions on pp. 610–614.
Notes for October 28:

8DK 614–628: Another device to protect residential purchasers is to obtain specific promises from sellers pertaining to title in the deed itself (thus, among other things, avoiding the merger problem). The six usual express deed warranties are given on pp. 619–620. Brown v. Lober (pp. 620) is a fascinating case involving how these warranties work. Please analyze it and the notes that follow carefully. Frimberger v. Anzellotti (p. 624) and the notes that follow deal with a different issue, the extent to which a landowner should be responsible for violations pertaining to land use that are unconnected with traditional real estate law or noted in records customarily searched by title examiners.

628–635: Yet another issue involving deed warranties is the extent to which deed promises run in favor of successors to the original grantee. In Rockafellar v. Gray (p. 629) discusses, among other things, the effects of a present covenant in a suit brought by a remote grantee. The facts are a little complex and should be charted carefully. Perhaps the court’s opinion is less straightforward than it could have been because of its metaphysical speculations. The problems on pp. 633–634 will permit us to delve into the extent to which a remote grantee can benefit from a violation on a deed covenant. The short note on estoppel by deed (pp. 634–635) introduces an equitable device that is very useful in a number of property law contexts.

Notes for November 2:

8DK 645–651: Prior to the 1930s, American residential mortgages were typically issued for a duration of 5 years, but amortized over 30 years. That meant that all mortgages except the final one were not paid off at termination. Rather, the homeowner had to make a huge “balloon” payment, to be financed by the next mortgage. Most people who lost their homes during the Great Depression did so not because they couldn’t make regular payments on their existing mortgages, but rather because they couldn’t find a new lender to refinance. The remedy, from the late 1930s through the mid 1980s, was the New Deal innovation of the 30-year self-amortizing mortgage. But there often were feasts or famines of local mortgage money, and during the 1980s home mortgages became wrapped into the international money markets. The editors pick up the story, as well as explain mortgage basics, in a concise and fascinating account on pp. 645–650. Pay close attention to pp. 650–651, Notes 1–3. According to a recent Harvard Joint Center for Housing Studies report on “The State of the Nation’s Housing 2015,” the homeownership rate has fallen from 69% in 2004 to 63.7% in the first quarter of 2015. http://www.jchs.harvard.edu/research/state_nations_housing.

651–659: Murphy v. Fin. Dev. Co. (p. 651) is a good case for instructional purposes, since it sets forth the basics of how mortgage foreclosures work. Following the case, Notes 1–4 raise some issues you should think about. Note 5 refers to the debate as to whether the recent mortgage crises is more attributable to government attempts to broaden homeownership or to rapacious conduct by lenders. Note 6 discusses the deed in lieu of foreclosure, which can have consequences for both borrower and lender not noted here that I will mention. Finally, Note 7 raises issues of who is liable for payment of a mortgage debt where the homeowner sells to another. The answer can be tricky, and resembles the situation we discussed earlier in the term where there has been an assignment or sublet of leased premises and rent is owed.
659–661: What could they have been thinking? Lenders and trustees of pools of mortgage-backed securities hired servicers (who actually dealt with homeowners) on a low-bid basis. Trustees could not cut borrowers slack that would benefit everyone for fear of being sued by security holders. Borrowers, who were victims of fraud, parties to fraud, or both; or simply oblivious, assumed debts way over their heads. If you’re interested in pursuing the subject, I recommend you read Carmen M. Reinhart and Kenneth Rogoff, *This Time Is Different: Eight Centuries of Financial Folly* (2009).

661–668: *Commonwealth v. Fremont Investment & Loan* and the notes that follow illustrate attempts to harmonize black-letter mortgage law with exigencies resulting from the financial crisis.

**Notes for November 4:**

8DK 809–811: If one person owned all of the land, he or she would use it so as to maximize his or her beneficial enjoyment (which might or might not mean maximization of wealth). Where there are several owners of adjoining or nearby parcels, they could increase the aggregate value of their parcels through private land use coordination. If you like archeological digs, where one city is found buried underneath another underneath a third, you will love the fact that when American law innovated from easements to real covenants to equitable servitudes, it did not eliminate the earlier bodies of law, covering much the same subject matter with different terminology and rules.

As the editors note on p. 810, the *Restatement (Third) of Property, Servitudes*, attempts to merge the three bodies of law onto one simplified concept called the “servitude.” However, there are two problems: The change isn’t coming along fast enough to benefit you now. Also an expert can achieve predictable results under the current system, whereas the *Restatement (Third)* approach stresses “reasonableness,” but leaves figuring out what that means to a judge.

811–819: *Willard v. First Church of Christ, Scientist* (p. 814) is a good vehicle to explore easements. The court ultimately breaks from common law principles in favor of the intent of the parties. But how does it know what that intent is? The notes on 818–819 are quite useful.

820–833: Licenses are very important in modern society. Unlike easements, which are interests in land, licenses are personal rights that are revocable—except when they’re not. *Holbrook v. Taylor* (p. 820) and the notes that follow should give you a good understanding of the circumstances, and extent, to which licenses might be irrevocable. Yet a different problem is presented by implicit easements, referred to as quasi easements. *Van Sandt v. Royster* (p. 825) and the following notes demonstrate how those work, the distinction between implied easements by grant and by reservation, and how contemporary courts deal with the traditional rigidities of those devices and their notions of substantive justice.

**Notes for November 9:**

8DK 865–875: An easement gives its owner the right to use another’s property, but how much use is permitted? In *Brown v. Voss* (p. 865), the challenge is to a basic rule, that easements might benefit only the dominant estate. The court says it upholds the rule, but does it? See the distinction between property rules and liability rules, a very important concept briefly discussed on p. 161, note 18. Notes 2–8 following Brown (pp. 872–875) are practically important, and we will discuss those.
887–889: The initial discussion (pp. 887-888) is a good description of why English law was so hostile to expanding the list of permissible negative easements beyond the four enumerated in the first paragraph. As the discussion indicates, circumstances were different in the United States. See p. 889, first paragraph (noting Peterson v. Friedman, and statutes regarding solar collectors). Sometimes similar results occasionally have been reached via nuisance law (see Prah v. Maretti, p. 785, first full paragraph).

889–892: Conservation easements are perpetual primarily because infinite duration is a requirement for federal tax deductibility. Some have objected to taxpayer abuse of conservation and also historic easements. Others object more generally to the dead hand of a donor locking up resources forever. What is your view?

Notes for November 11:

8DK 892–875: Real covenants are promises the burden or benefit of which, under certain circumstances, run to subsequent owners of the contracting party’s estate in land. (“Promises that run with the land” is a convention, but less accurate, formulation.) One requirement for the running of covenants was associated with the concept of privity of estate. Traditionally, the contracting parties had to be in horizontal privity for the burden of the covenant to run. This was defined as tenurial privity (i.e., landlord and tenant) in England, and either successor privity (seller-buyer) or (less commonly) mutual privity (ownership of parcels respecting which the parties had some prior existing relationship) in the United States. Despite the scowls of commentators, and the Restatement (Third), the horizontal privity requirement still lingers on in some American jurisdictions and in case law. Vertical privity referred to the relationship between an original party and a successor. Traditionally in America, the benefit of a real covenant would run if the person seeking to enforce it succeeded to part of the estate, whereas the burden would run only if the successor assumed all of the predecessor’s estate. We will discuss the problems and notes on pp. 896–898, which explain further.

893–903: Equitable servitudes are promises respecting land use that are enforceable in equity instead of law. The classic case is Tulk v. Moxhay, where the parties did not have the tenurial privity of estate required for a real covenant. Were the three requirements for an equitable servitude (pp. 901–902, note 3) met in Tulk? Contemporary cases almost always involve equitable servitudes rather than real covenants. Do you understand why?

903–909: Liability under an equitable servitude is premised on the existence of a servitude, and upon notice. Both of these are important issues in Sanborn v. McLean (p. 903). Please review the case and the notes that follow carefully.

Notes for November 16:

8DK 909–921: As we’ve seen, courts have been reluctant to impose novel burdens on landowners. Neponsit Property Owners’ Association, Inc. v. Emigrant Industrial Savings Bank (p. 909) is an important case because it the homeowners association is seeking to enforce a lien requiring that the owner of land that the bank acquired in foreclosure pay money. The groundbreaking opinion discusses, among other things, whether the association has standing to sue on behalf of its members, and if the burden of an affirmative covenant to pay money for maintenance and
repairs runs with the land. The notes after the case are helpful, especially (pp. 918–921) Note 5, which summarizes traditional law and the Restatement Third approaches to privity and affirmative covenants, and Note 6, which discusses whether non-owners can enforce affirmative servitudes.

927–936: A fertile ground for litigation regarding covenants is that changed conditions in the surrounding area make enforcement inequitable. Thus, the surroundings of the covenanted residential subdivision in Western Land Co. v. Truskolaski (p. 927) seem now much more conducive to commercial development, and Rick v. West (p. 931) presents an initial buyer who now refuses to release residential covenants so as to permit the construction of a needed hospital. As quoted on p. 933, the Restatement Third would evaluate changed conditions cases in terms of reasonableness. Note 1 on pp. 933–934 asks if more imaginative solutions than enforcement vs. non-enforcement might be arrived at.

**Notes for November 18:**

*This last part of our semester’s study is an introduction to the law of public land use controls and eminent domain.*

8DK 967–987: The chapter begins with a fairly short (and very well done) description of the “historical background” of contemporary American zoning (pp. 967–971). Next is the foundational Village of Euclid v. Ambler Realty Co. (p. 971), which established the constitutionality of comprehensive zoning. Euclid was seen by both sides as a test case, with leading Progressive lawyers and public officials supporting the village, and the landowner receiving much support from the National Association of Manufacturers and similar organizations.

980–982: We will discuss Notes 2–4. In Note 2, the editors refer to “substantive due process.” More precisely, from the last part of the 19th century through the mid-1930s, the Supreme Court emphasized economic substantive due process, which placed a premium on individual property and contract rights. The Great Depression and its aftermath discredited this view, and in response to President Franklin Roosevelt’s “court packing plan,” the Court executed what some wags called “a switch in time that saved nine.” In the famous Footnote Four of United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) the Court stated that “[t]here may be a narrower scope for operation of the presumption of constitutionality when legislation ... [reflects] prejudice against discrete and insular minorities” than there would be for the ordinary run of economic and social legislation. As the editor’s observe, “substantive due process” is not dead, it was “redirected to support personal rather than economic liberties.”

982–987: While most large cities engaged in comprehensive zoning in the 1920s, it was only in the 1950s, after they realized that society was dynamic and that zoning had to be updated, that they established planning departments. As the casebook discussion points out, comprehensive plans were required in the Standard Zoning Enabling Act as a framework for specific zoning ordinances, but, generally speaking, the need for planning has not be well adhered to, and zoning races to catch up with societal change. We will discuss the merits and drawbacks of government land use planning. As you read through the materials, please consider points you might make one way or the other.
Notes for November 23:

8DK 987–996: The prior nonconforming use has presented an important legal and political problem as zoning was enacted and modified. Most nonconforming existing uses were not really nuisances, and owners hardly could be asked to stop operations or even demolish structures overnight. But nonconforming uses could not go on forever. Should officials wait for them to fade away? Should such uses be deprived of modernization or expansion? Should there be a time limit on them? All of these devices were tried, and more.

996–1008: Euclidean zoning, with its use, area, height, bulk, and setback restrictions, provided development approval “as of right” for plans that met the objective requirements. However, Euclidean zoning inherently is fairly coarse grained, and its rigid requirements necessarily could not take into account the particularities of individual parcels. Hence the variance, which is the subject of Commons v. Westwood ZBA and the notes that follow (pp. 997–1001). Likewise, the general requirements of Euclidean zoning could not cover the more specialized requirements of certain land uses. For instance, gas stations might be permitted in general commercial districts, but raise certain environmental and safety issues that require detailed review. The special exception covers these situations, as illuminated by Cope v. Inhabitants of Brunswick and subsequent notes (pp. 1001–1004). Obviously, inadequacies in existing zoning can be cured through rezoning, but this is subject to a number of constraints, including zoning being in “accordance with a comprehensive plan,” which we discussed earlier, and the danger that small-scale rezoning would result from private deals to reward or punish individual landowners (the spot zoning problem). State v. City of Rochester and the following notes cover this (pp. 1004–1008). Note 3 and the Fasano case (p. 1007–1008) is particularly salient.

1008–1010: Flexibility in zoning can be enhanced through contract zoning (bilateral contract with the applicant), conditional zoning (unilateral contract), floating zones (text amendment not accompanied by map amendment), cluster zones (same overall density with structures clustered to preserve open space), and planned unit developments (PUDS) (typically allowing mixed office space, shopping, and high-rise residences). The benefit is flexibility, but, unlike archetypical Euclidean zoning, nothing is allowed of right. Negotiations can result in favoritism for preferred developers on one hand, or government extortion on the other.

Notes for November 30:

8DK 1107–1110: The first part of this last class sets forth a very basic introduction to eminent domain, which was the inherent power of the sovereign to take private property for the public health, safety, and welfare. This power devolved on the States at the time of Independence. The Takings Clause of the Fifth Amendment implicitly recognizes the federal power of eminent domain through limitation upon it: “[N]or shall private property be taken for public use, without just compensation.” Normally, a condemnor will file an eminent domain action in the appropriate court (“direct” condemnation). Sometimes, government will regulate property so severely that the owner claims it constitutes a regulatory taking and files an action in “inverse” condemnation for just compensation. The assigned materials provide an overview and some justifications for eminent domain. The following is a brief summary of the most important takings cases, which we will discuss in class. Obviously, this will give you only a skeletal view of the subject matter. However, I think it important that you have some exposure to it.
**TAKINGS**

Pumpelly v. Green Bay Co., 80 U.S. 166 (1872)
Takings liability does not require formal condemnation. Here, the construction of a government-authorized dam placed the private land behind it permanently beneath 12 feet of water.

Mugler v. Kansas, 123 U.S. 623 (1887)
Even a great loss in value resulting from a law forbidding a nuisance is not compensable. Here, the enactment of prohibition made a brewery almost worthless.

Pennsylvania Coal Co v Mahon, 260 U.S. 393 (1922)
*Generally regarded as the seminal regulatory takings case.*
“The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” *Id.* at 415. A prohibition on mining pillars of coal for the benefit of private surface owners constituted a taking.

*This case remains the Court’s general regulatory takings exposition, and conventionally is described as setting forth a three-factor test.*
“[T]his Court, quite simply, has been unable to develop any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. * * * In engaging in these essentially ad hoc, factual inquiries, the Court’s decisions have identified several factors that have particular significance. [1] The economic impact of the regulation on the claimant and, particularly, [2] the extent to which the regulation has interfered with distinct investment backed expectations are, of course, relevant considerations. So, too, is [3] the character of the governmental action. A ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.” *Id.* at 124 (citations omitted). Upholding a refusal, based on historic preservation, of the railroad’s application to construct an office building on top of New York’s Grand Central Terminal. Note that, logically, the second factor is a subset of the first.

There is a categorical exception to the balancing test required by *Penn Central* where there is a permanent physical invasion of private property. *Query: What does this mean for the third Penn Central test?*

Personal property is protected against public appropriation as much as real property. Here, the government asserted the right of its “Raisin Administrative Committee” to seize raisins as part of a raisin price regulation scheme.

There is a categorical exception to the balancing test of *Penn Central* “where a regulation denies all economically beneficial or productive use of land.” A beachfront management act precluded the owner from building on his oceanfront lot.
Note that while *Pennsylvania Coal* and *Penn Central* are balancing tests, *Loretto* and *Lucas* are “categorical” in that they do not require balancing the *Penn Central* factors.

**PUBLIC USE**

“Public use” is not limited to the traditional use by the general public, use by the government, and use by a heavily regulated common carrier. It also includes “public benefit.” Here, homes were taken for development of commercial and park uses adjacent to a new pharmaceutical research center, for the purpose of relieving locally depressed economic conditions and unemployment. Just compensation was paid and was not an issue.

**EXACTIONS AS A CONDITION OF DEVELOPMENT APPROVALS**

Government cannot require an exaction of real property as a condition for issuance of a development permit unless there is an “essential nexus” between the regulator’s powers and the exaction sought. Here, the Commission demanded an easement of way along the beach behind the landowners’ house as a condition for expansion of the house, although the statute provided it the power to protect the view of the ocean from the road in front of the house.

Where there is an essential nexus between the regulator’s powers and the exaction sought, the exaction must (1) be “roughly proportional” to the police power burden that granting the application would impose, and (2) that this must be ascertained through an “individualized determination.” Here, blacktopping a parking lot and expanding a hardware store would cause additional flooding potential and traffic congestion, but the requirement that pedestrians be able to use the flood abatement area behind the store was not responsive to a burden, and a mandated contribution of a right-of-way for a bicycle path in front of the store that “could” reduce congestion was not a policy supported by an individualized determination.

“Property” included in the ambit of *Nollan* and *Dolan* includes cash as well as real property. An order refused a permit because of refusal to accede to an exaction has not suffered a taking. However, “Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation.” *Id.* at 2589–90.

*Should you want to read more, these cases are in Dukeminier, Krier. You also could consult my treatise Regulatory Takings (5th ed.), which is available on Lexis under the filename “regulatory takings.” All of these materials are discussed in greater detail in our course in Land Use Planning. However, for the exam, you are responsible only for the summaries contained here and our class discussion.*
Concluding comments and your questions:

The balance of the class will be devoted to some final comments on what we’ve covered and to your questions.