Volume 5 | Issue 1

Summer 2002

Dear Landlord: Please Don't Put a Price on My Soul: Teaching Property Law Students that "Property Rights Serve Human Values"

Keith Sealing
Syracuse University

Follow this and additional works at: <https://academicworks.cuny.edu/clr>

Part of the [Legal Education Commons](#)

Recommended Citation

Keith Sealing, *Dear Landlord: Please Don't Put a Price on My Soul: Teaching Property Law Students that "Property Rights Serve Human Values"*, 5 N.Y. City L. Rev. 35 (2002).
Available at: 10.31641/clr050102

DEAR LANDLORD: PLEASE DON'T PUT A PRICE ON MY SOUL:* TEACHING PROPERTY LAW STUDENTS THAT "PROPERTY RIGHTS SERVE HUMAN VALUES."

*Keith Sealing***

INTRODUCTION

"Property rights serve human values."¹ Every law student needs to emerge from the crucible of first-year property law with a clear understanding that when "O conveys Blackacre to A for life, remainder to B and his heirs," O has created a life estate in A² and a future interest, a vested remainder,³ in B; or that when "O conveys Blackacre to A and his heirs, but if A ever builds a liquor store on Blackacre, then to B," O has created a fee simple subject to executory limitation and has violated the common law rule against perpetuities.⁴ But, every student also needs to learn that property rights serve human values if she is to become a lawyer who understands and appreciates that the law must serve everyone: persons of color, the poor, those of every gender and sexual orientation, and must also be called upon to protect the environment. "O" may be African-American, "A" may be gay and "B" may be living in poverty, but all are affected by property law decisions.

In this article, I describe the cases and materials I use in my

* "Dear Landlord" © 1968 Dwarf Music, BOB DYLAN, LYRICS 1962-1985 (1998) 259.

** Visiting Assistant Professor of Law, Syracuse University College of Law. J.D., 1985, Temple University School of Law; B. S., 1982, University of Northern Colorado. In a prelude to its January, 2000 Annual Meeting the Association of American Law schools stated, "[i]t is our belief that the unequal distribution of income and wealth affects virtually all aspects of the legal system and should be an important element in a wide variety of courses across the legal curriculum. These courses include, at least, real property . . ." Association of American Law Schools Newsletter Number 2000-4 at 10. The conference presented a number of insights that have been incorporated into my teaching and this article, particularly the Workshops on "Property Wealth and Inequality," the Concurrent session on "Pedagogy of Teaching Property Law," chaired by Professor Reginald Robinson, Howard University, and "Property, Wealth and Inequality," chaired by Robinson, and including speakers John Brittain, Texas Southern University, Martha Mahoney, University of Miami, Frank Michelman, Harvard, and Laura Padilla, California Western.

¹ State v. Shack, 277 A.2d 369, 372 (N.J. 1971).

² THOMAS BERGIN & PAUL HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 34-38 (2d ed. 1984).

³ *Id.* at 62-73.

⁴ *Id.* at 116-17.

first-year property class to introduce students to what I hope will be a career-long awareness of the relationship between property law and social justice. In so doing, I work with an existing casebook supplemented by additional cases and articles and sometimes by dissents or portions of cases abbreviated in the text. Herein, I examine the various casebooks available and note throughout the article the degree to which they provide cases and other materials that emphasize the relationship between property law and social justice.⁵ I do so with the idea that a concern for teaching social justice can be blended into a first-year property course using available texts and minimal supplementation.⁶ In many cases, I can simply add a particularly thoughtful dissent, or even just a passage omitted from a case because it did not fit the text author's pedagogic purpose.⁷ I prefer using an available text rather than a massive stack of supplemental material for a number of reasons. First, this approach avoids additional expense for the students. Second, it does not greatly increase the amount of reading students are required to do. Finally, the casebook adds a sense of legitimacy to the materials that a homemade supplement might lack.⁸

Further, this article examines the major cases that I use (and some that I do not) to demonstrate that property rights serve human values.⁹ I note which authors include the case under discussion, either as major cases or as note cases, whether they substitute interesting alternate cases that accomplish the same goal and the degree to which any additional notes and questions or hypotheticals advance the goal.¹⁰ Although some texts provide very little in the way of useful cases, it should be emphasized at this point that I am in no way suggesting that the authors of these texts are insensitive to the issues with which this article is concerned, rather one assumes that they believe it more appropriate to discuss

⁵ I examine fifteen casebooks in this article. I am only aware of two extant (as of February 2001) casebooks that I do not include as they are rather old and without recent supplementation.

⁶ See *infra* notes 12-80, and accompanying text.

⁷ I have attempted to document this occurrence throughout by referencing when I am quoting from a passage of a case that is not included in the abbreviated excerpt in the casebook.

⁸ See Leslie Bender, *Teaching Torts as if Gender Matters: Intentional Torts*, 2 VA. J. Soc. POL'Y & L. 115, 125 n. 18 (1994) (describing how using solely one's own reproduced materials created problems of legitimacy in students' eyes for a feminist torts professor).

⁹ See *infra* note 90, and accompanying text.

¹⁰ See *infra* note 7, and accompanying text.

these topics in other courses, such as Constitutional Law or, for example, Poverty Law.

As a final introductory note, one is warned that of the many reasons why legal education can impede learning, "one is the tendency of some law professors to self-indulge in their own intellectual interests to the exclusion of their responsibility to educate future members of the legal profession."¹¹ Thus, I prefer not to "beat them over the head" with social justice issues to the exclusion of other important material, but instead to maintain an integrated approach.

I. TEXTS CONSIDERED

My first reference is generally to the seventh edition of John Cribbet, Corwin Johnson, Roger Findley and Ernest Smith's *Property Cases and Materials*,¹² as that is the text from which I teach. I was essentially assigned Professor Cribbet's text, then in its sixth edition, when I began teaching property. At that time I had the luxury of teaching property as a two-semester, six-credit course. Now at Syracuse, property is a one-semester five-credit course, still a relative luxury, as much has been written about property being reduced to a four- or even three-credit offering.¹³ One of the text's strengths is that it was designed for a six-credit course,¹⁴ and, thus, covers just about any topic one would want to include in a property course.¹⁵ Importantly, it allows the instructor to introduce any themes she may want, as I have done with the theme that property rights serve human values.¹⁶ In addition, a professor with a re-

¹¹ See Arnold, *infra* note 31, at 898 (citing Judge Harry Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992)).

¹² JOHN CRIBBET, CORWIN JOHNSON, ROGER FINDLEY & ERNEST SMITH, *PROPERTY* (7th ed. 1996).

¹³ See, e.g. Roberta Rosenthal Kwall and Jerome Organ, *The Contemporary Property Law Course: A Study of Syllabi*, 47 J. OF LEGAL ED. 205 (1997). The authors conducted an unscientific but representative survey of forty Property syllabi from thirty-seven schools and noted a significant trend in the reduction of hours for Property courses. The authors noted that, although most schools taught Property as a six-credit course in 1976, fourteen of the thirty-nine schools surveyed had reduced Property to a four-credit course, nine had reduced it to five credits and fourteen had maintained it at six. Further, of the latter fourteen, two were planning to reduce the number of hours, one to four and one to five, at the time when the article was written in 1997. See *id.* at n. 7.

¹⁴ See CRIBBET, *supra* note 12, at vi.

¹⁵ Except that, unlike most property texts, there is no case on acquisition of ownership of wild animals.

¹⁶ The text is a bit light on economic analysis, although Cribbet does include brief excerpts from POSNER, *ECONOMIC ANALYSIS OF LAW* (1973), see CRIBBET, *supra* note 12, at 6, 462; and cases such as *Eads v. Brazelton*, 22 Ark. 499 (1861) (first finder of

duced amount of time to teach the course can pare off a variety of topics that may be covered in other courses. For example, the text thoroughly covers regulatory takings with a substantial eighty-five pages and seven major cases, which may be covered in Constitutional Law,¹⁷ and also ventures into torts with three cases on nuisance doctrine.¹⁸ Further, the last section of the book contains materials that may be shifted to a course such as Real Estate Transactions.¹⁹

abandoned property who made no timely efforts to exploit it did not acquire property interest therein) *see* CRIBBET, *supra* note 12, at 102, and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) (in light of oligopolic holding of fee interests in land in Hawaii, it was appropriate under the Public Use Clause of the Fifth Amendment for Hawaii to take land from lessors with compensation and sell back to lessees), *see* CRIBBET, *supra* note 12, at 783, all of which can be used to highlight the role of economics in legal analysis.

¹⁷ *See* CRIBBET, *supra* note 12, at 815-900. Cribbet includes *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (where, as under the Kohler Act, diminution of property rights reaches a certain point, it is a taking that must be compensated), *Penn Central Transportation Co. v. New York*, 438 U.S. 104 (1978) (regulation is not a taking where normal use continues and investment-backed expectations still realized), *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470 (1987) (second Pennsylvania coal-mining regulation not a taking where only two percent of coal made unavailable), *First English Evangelical Lutheran Church of Glendale v. Los Angeles*, 482 U.S. 304 (1987) (a regulatory taking must be compensated even if temporary), *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (taking has occurred where one million dollar beachfront lot rendered unbuildable by environmental laws), *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) (conditioning building permit on granting of public easement a taking where condition did not serve legitimate police power purpose), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (where granting of permit is conditioned on some reciprocal action by landowner, no taking where there is an essential nexus between a legitimate state interest and a condition exacted by government and a rough proportionality between the condition sought and the use desired), all of which are contained in, GERALD GUNTHER & KATHLEEN SULLIVAN, *CONSTITUTIONAL LAW* (13th ed.). Professor Gunther covers all of the above mentioned cases in about twenty pages. *See id.* at 486-504. However, Professors Kwall and Organ noted that the amount of time devoted to regulatory takings had actually significantly increased since 1976, which is perhaps not surprising when one looks at the dates of the critical cases listed above. *See* Kwall & Organ, *supra* note 13, at 209.

¹⁸ *See* CRIBBET, *supra* note 12, at 663-77. CRIBBET includes *Rose v. Chaikin*, 453 A.2d 1378 (N.J. 1982) (noisy windmill in upscale residential development a private nuisance), *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219 (1970) (equitable solution of forcing cement mill to pay money to nearby homeowners utilized where closure of nuisance would cost three hundred jobs), and *Spur Industries v. Del E. Webb Development Co.*, 494 P.2d 700 (Az. 1972) (where new homeowners were "coming to the nuisance" feed lot was moved but developer paid for its cost), all of which are included in, VICTOR SCHWARTZ, KATHRYN KELLY & DAVID PARTLETT, PROSSER, WADE & SCHWARTZ'S *TORTS* 802-832 (10th ed. 2000). That casebook devotes thirty pages to nuisance and includes *Boomer* and *Spur Industries*.

¹⁹ *See* CRIBBET, *supra* note 12, at 947-1364. Professors Kwall and Organ noted a significant decline in the amount of time devoted to real estate transactions. *See* Kwall & Organ, *supra* note 13, at 208-09. This drop may be because students who wish to do so can generally cover the material in a more advanced class. For example, students

Professors Dukeminier and Krier's text is tremendously popular,²⁰ boasting a commanding market share, perhaps in excess of fifty percent.²¹ It is clearly a comprehensive treatment of traditional property law materials and entitled to its status.²² It begins with good coverage of *Johnson v. M'Intosh*,²³ has a substantial section on marital interests,²⁴ including three pages on same-sex issues,²⁵ and some useful coverage in the landlord-tenant and zoning areas,²⁶ but it is not the best text to use to accomplish what I want to accomplish.²⁷

Professor Chused's text is unique in its structure and approach.²⁸ As noted throughout the discussion below, it presents excellent in-depth material on the various cases that demonstrate that property rights do indeed serve human values. But, as noted above, my approach is to present this concept in the context of a fairly traditional property course, and the text is thin in the traditional topic areas of the estates in land and future interests.²⁹ It must be noted, however, that the text is very strong in the use of

at Syracuse can opt for courses in Real Estate Transactions I and II if they wish. See SYRACUSE UNIVERSITY COLLEGE OF LAW CATALOG 1999-2000, at 16.

²⁰ JESSE DUKEMINIER & JAMES KRIER, *PROPERTY* (5th ed. 2002). For reviews of this text, see Andrew Morris, 22 SEATTLE U. L. REV. 997 (1999) (book review), Charles I. Nelson, *A Walk Through the Woods of the Property Course with Dukeminier and Krier's Casebook on Property*, 22 SEATTLE U. L. REV. 1013 (1999) (book review), June Carbone, *Dukeminier and Krier as Narrative: The Stories we Tell in the First Year Property Course*, 32 HOUS. L. REV. 723 (1995), Peter T. Wendell, *The Perfect Blend of Methodology, Doctrine & Theory*, 22 SEATTLE U.L. REV. 1031 (1999) (book review).

²¹ See Morris, *supra* note 20 (reporting estimates of fifty percent market share), and Wendell, *supra* note 20, at 1031-32 (describing the text as possibly the most popular legal casebook, regardless of subject matter).

²² In no way do I intend to infer any derogatory slant to the term "traditional."

²³ See *infra* note 153-66, and accompanying text.

²⁴ See DUKEMINIER & KRIER, *supra* note 20, at 382-441.

²⁵ See *id.* at 438-41.

²⁶ See *id.* at 460-75 (unlawful discrimination in leasing and the Fair Housing Act), and 1064-91 (exclusionary zoning based on race, status and on household composition).

²⁷ Professor Morris faults the text for its lack of economic and historical context. Morris, *supra* note 20 at 1002. Professor Morris' comments regarding the text's treatment of *State v. Shack* are discussed *infra* note 207-20.

²⁸ RICHARD CHUSED, *CASES, MATERIALS AND PROBLEMS IN PROPERTY* (2d ed. 1999).

²⁹ The basic estates are explicated in just five pages with no cases included, see *id.* at 340-44; the basic future interests are presented in four pages with no cases, see *id.* at 344-47; destruction of Contingent Remainders is given a paragraph with one hypothetical, see *id.* at 371-72; the Rule in Shelly's Case and the Doctrine of Worthier Title are treated with similar brevity under the heading "Other Relics," see *id.* at 372. These topics are of decreasing relevance, but then students are unlikely to ever encounter as a client a fox hunter who has been deprived of his quarry by a farmer. Further, substantial numbers of professors cover these materials. See Kwall & Organ, *infra* note 71, and accompanying text.

defeasible fees to enforce racial segregation, so the defeasible fees are not left uncovered.³⁰

Professors Rabin, Kwall and Kwall's text³¹ is one of two problem-oriented casebooks surveyed. I would not select the text for my own use because I do not use the problem method, but this is not the place to engage in the debate over problem- versus case-oriented instruction.³² Further, I like using historical cases to develop an understanding of why some of the black letter law of property is counterintuitive and the text is heavily oriented toward recent cases.³³ Finally, as noted throughout, the text places less emphasis on the social issues that are the main theme of this article. I see no reason why a problem-oriented approach could not be used to develop students' awareness of social issues in property law, however.

Professors Bruce and Ely's text³⁴ also follows a problem approach, although the problems and the materials are less fully integrated than in the Rabin, Kwall and Kwall text. Some of the same comments regarding problem-oriented texts discussed above hold. The text generally provides very little material for discussion of the social issues inherent in property law.

Professors Casner, Leach, French, Korngold and VanderVelde's text³⁵ is another straightforward, comprehensive survey of

³⁰ See CHUSED, *supra* note 28, at 350 (discussing and reproducing Charlotte Park Recreation Commission and Evans v. Abney).

³¹ EDWARD RABIN, ROBERTA ROSENTHAL K WALL & JEFFREY K WALL, *FUNDAMENTALS OF MODERN PROPERTY LAW* (4th ed. 2000). For reviews of the third 1992 edition, see Craig Arnold, *How Do Law Students Really Learn? Problem-Solving, Modern Pragmatism, and Property Law*, 22 SEATTLE U. L. REV. 891 (1999) (book review) and Vada Lindsey, *Review: the Essence of Property Law*, 22 SEATTLE U. L. REV. 977 (1999) (book review).

³² For the debate over the problem- versus case-method, see Arnold, *supra* note 31 at 900-02; Lindsey, *supra* note 31, at 985-88, 986, n. 43 (citing other commentators). See also Cynthia Hawkins-Leon, *The Socratic Method-Problem Dichotomy: The Debate Over Teaching Method Continues*, BYU EDUC. LAW J. 1 (1998).

³³ Professor Arnold points out (in reference to the third edition), that ninety-three percent of the cases covered were decided after 1950 and only one, Spencer's Case, (77 Eng. Rep. 72 (1583)) (burden of a covenant will run with the land if the original parties intended that it do so and if the covenant touches and concerns the land), was decided before 1800. See Arnold, *supra* note 31, at 909-10. Spencer's Case was dropped from the fourth edition, which uses three modern cases, one of which quotes from Spencer's Case, to illustrate the issue. See RABIN, K WALL & K WALL, *supra* note 31, at 501-40. But see Lindsey, *supra* note 31, at 978 ("My use of the casebook also enables me to teach Property Law from a historical perspective by exploring the evolution of American property law, its derivation from early English common law, its modern reforms, and its future.").

³⁴ JON BRUCE & JAMES ELY, JR., *CASES AND MATERIALS ON MODERN PROPERTY LAW* (4th ed. 1999).

³⁵ A. JAMES CASNER, W. BARTON LEACH, SUSAN FLETCHER FRENCH, GERALD

traditional property law. Its strengths, from the perspective of this article, are in the areas of marital property³⁶ and in a chapter on "Protection Against Discrimination in Housing."³⁷

Professors Berger and Williams' text³⁸ presents some excellent background material for *State v. Shack*³⁹ in a sub-chapter entitled, "The Liberal Dignity Strain: Property Rights Serve Human Values,"⁴⁰ which fits well the theme of this article. They also set the stage for semester-long themes with excerpts from thoughtful articles such as those by Professors Rose⁴¹ and Radin.⁴² Useful materials are scattered throughout, including a section on conflicting views of landlords,⁴³ marital property,⁴⁴ exclusionary zoning,⁴⁵ a chapter on discrimination⁴⁶ and a brief section on "redlining" in the chapter on real estate transactions.⁴⁷

Professor Singer's text⁴⁸ is a leader in the coverage of property in the context of Native American law.⁴⁹ He also includes excellent coverage, *inter alia*, of slaves and former slaves,⁵⁰ homelessness,⁵¹

KORNGOLD & LEA VANDERVELDE, *CASES AND TEXT ON PROPERTY* (4th ed. 2000). See BARRY BROWN, *The Old Chestnut Explored: Thoughts About the Survival of Casner's Cases and Text on Property Long Past Its Prime*, 22 SEATTLE U.L. REV. 947 (1999) (review of the third edition). Professor Brown, who was a student of Mr. Casner's and, as of last report, teaches out of the text, provides a highly favorable review of the text, but, by way of constructive criticism, believes the text could be enhanced by inclusion of materials on property-related gender issues, the impact of property law on the poor and minorities and social analysis in the area of landlord-tenant law. See *id.* at 962-63.

³⁶ CASNER, ET AL., *supra* note 35, at 589-647. The section includes the gay rights case of *Hubert v. Williams*, discussed *infra* note 449, and accompanying text.

³⁷ See *id.* at 829-90.

³⁸ CURTIS BERGER & JOAN WILLIAMS, *PROPERTY LAND OWNERSHIP AND USE* (4th ed. 1997).

³⁹ See *infra* notes 206-18, and accompanying text.

⁴⁰ BERGER & WILLIAMS, *supra* note 38, at 90-107.

⁴¹ See *id.* at 68 (quoting Carol Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J.L. & HUMAN 37, 38-42 (1990) (brief excerpt)).

⁴² See *id.* at 108, (quoting Margaret Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959-960, 987-90 (1982)).

⁴³ See *id.* at 239 (contrasting residential landlords as "slumlords" versus "honest, struggling entrepreneurs").

⁴⁴ See *id.* at 441-97.

⁴⁵ See *id.* at 973-99.

⁴⁶ See *id.* at 1047-1110.

⁴⁷ See *id.* at 1249.

⁴⁸ JOSEPH SINGER, *PROPERTY LAW RULES, POLICIES AND PRACTICES* (3d ed. 2002).

⁴⁹ See *id.* at 3-26, 92-98, 1183-2000, 1293-99. See *infra* notes 137-68, and accompanying text for discussion of Native American issues, particularly in the context of *Johnson v. M'Intosh*.

⁵⁰ See *id.* at 1264-78.

⁵¹ See *id.* at 191-95.

the public trust doctrine,⁵² racially discriminatory covenants,⁵³ restraints on marriage,⁵⁴ exclusionary zoning⁵⁵ and an entire chapter on "Fair Housing Law."⁵⁶ It does so without skimping on any areas that I would like to see covered, and, thus, would make an excellent text for use in a course that intended to teach concerns for human values.

Professors Dwyer and Menell's text⁵⁷ includes in the opening materials a lengthy excerpt about Native American view of land ownership and use,⁵⁸ and then introduces *Johnson v. McIntosh* as its first case, but then offers little in the way of discussion-generating material following the case.⁵⁹ The text includes some coverage of interest, including marital property,⁶⁰ a chapter on "Market Institutions" which includes landlord-tenant issues such as discrimination, rent control and low-income housing⁶¹ as well as exclusionary zoning.⁶²

Professor Bernhardt's text⁶³ generally contains a few cases that illustrate the social policy aspects of property law, but leaves out many topics I would prefer to see covered, and often fails to include materials that would be useful in generating discussion of the cases that are provided.

Professors Johnson, Salsich, Shaffer and Braunsteins' text⁶⁴

⁵² See *id.* at 182-91.

⁵³ See *id.* at 492-511.

⁵⁴ See *id.* at 631-38 (including an excerpt from Frug, *infra* note 355).

⁵⁵ See *id.* at 997-1042.

⁵⁶ See *id.* at 939-1042.

⁵⁷ JOHN DWYER & PETER MENELL, *PROPERTY LAW AND POLICY A COMPARATIVE INSTITUTIONAL PERSPECTIVE* (1998). For a review of this text see Louise A. Halper, *Q. Why is This Course Different From All Other Courses? A. Maybe It's Not*, 22 Seattle U. L. Rev. 965 (1999).

⁵⁸ See *id.* at 21-47 (quoting WILLIAM CRONON, *CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND* 37-49, 53-75, 128-31 (1983)).

⁵⁹ See *id.* at 69. Prior to the case, the text states:

The decision is a minor aftershock in the far more momentous collision between Indians and European cultures between the fifteenth and nineteenth centuries. Nevertheless, it raises (even if it does not satisfactorily answer) some important questions about the cultural contingency of every conception of property and about the origin and justification of property rights. *Id.*

⁶⁰ See *id.* at 216-72.

⁶¹ See *id.* at 581-721.

⁶² See *id.* at 974-1005.

⁶³ ROGER BERNHARDT, *PROPERTY CASES AND MATERIALS* (1999). Professor Bernhardt, who boldly states in his preface, "[w]elcome to the most exciting course you will take in law school," *id.* at *v*, does not include a table of cases, so I may have omitted some references to cited cases in his notes.

⁶⁴ SANDRA JOHNSON, PETER SALSICH, JR., THOMAS SHAFFER & MICHAEL BRAUNSTEIN, *PROPERTY LAW CASES, MATERIALS AND PROBLEMS* (1998).

should be commended for best integrating alternative dispute resolution concepts.⁶⁵ It has a number of useful cases, beginning, as many do, with *Johnson v. M'Intosh*, and a lot of good material on that case,⁶⁶ but its most obvious strength lies in the direction of its orientation.

Professors Nelson, Stoebuck and Whitman's text⁶⁷ contains a great deal of landlord-tenant law,⁶⁸ and conveyancing,⁶⁹ but is not particularly strong in the area of social justice.

Professor Burke, Burkhart and Helmholz' text⁷⁰ is a fairly traditional presentation of property, beginning with *Pierson v. Post*,⁷¹ and follows along conventional lines. It seems to make little effort to incorporate social issues and, thus, is not very compatible with my goals.⁷²

Professors Hylton, Callies, Mandelker and Franzese's text⁷³ also begins with *Pierson v. Post*.⁷⁴ It includes an entire chapter with seven major cases on environmental issues⁷⁵ and a chapter entitled "Housing Discrimination."⁷⁶ These cases and materials, along with such rarities as a reference to the comparative law of aboriginal rights in Australia,⁷⁷ and *Commonwealth v. Aves*,⁷⁸ make the book a useful tool, especially for professors with a strong interest in introducing environmental law to first-year students.

⁶⁵ See *id.* at 69, 81, 248, 406, 928.

⁶⁶ See *id.* at 2.

⁶⁷ GRANT NELSON, WILLIAM STOEBUCK & DALE WHITMAN, *CONTEMPORARY PROPERTY* (1996).

⁶⁸ See *id.* at 390-556.

⁶⁹ See *id.* at 773-1032 (taken from a text written by two of the authors, GRANT NELSON & DALE WHITMAN, *REAL ESTATE TRANSFER, FINANCE, AND DEVELOPMENT CASES AND MATERIALS* (4th ed., 1992)).

⁷⁰ BARLOW BURKE, ANN BURKHART & R. H. HELMHOLZ, *FUNDAMENTALS OF PROPERTY LAW* (1999).

⁷¹ 3 Cai. R 175, 2 Am. Dec. 264 (N.Y. 1805) (wild animal becomes the property of the first person to capture or kill it), reproduced in BURKE, BURKHART & HELMHOLZ, *supra* note 70.

⁷² The text does, however, have a section on exclusionary zoning, see BURKE, BURKHART & HELMHOLZ, *supra* note 70, at 916.

⁷³ J. GORDON HYLTON, DAVID CALLIES, DANIEL MANDELKER & PAULA FRANZESE, *PROPERTY LAW AND THE PUBLIC INTEREST* (1998).

⁷⁴ See *id.* at 3.

⁷⁵ See *id.* at 701-56.

⁷⁶ See *id.* at 617-50.

⁷⁷ See *id.* at 28. See *infra* note 141, and accompanying text.

⁷⁸ 35 Mass. 193 (1836) (slave lawfully owned in Louisiana and brought to Massachusetts could not be forcibly detained or taken back to Louisiana against her will), reproduced in HYLTON, ET. AL., *supra* note 73, at 28.

Professors Kurtz and Hovenkam⁷⁹ present the law of marital property in an interesting way in a chapter entitled, "Property and Cohabitants."⁸⁰ Further, they include a full chapter on housing discrimination⁸¹ and otherwise integrate similar useful materials throughout.

The casebooks treat these issues in three different ways. Texts that follow an integrated approach organize the cases and materials along traditional property law lines, but include cases that touch on human values issues. Professor Cribbet's text follows this model. Others devote specific sections of the text to human values issues. This sectional approach is embodied in Professor Singer's text and Professor Chused's text. Finally, for some authors, human values issues are marginal or peripheral to property and very few cases dealing with such issues are included.⁸²

The cases I use to introduce these concepts are presented below, grouped by the themes of race and racism,⁸³ environmental racism or environmental justice,⁸⁴ poverty and socio-economic status,⁸⁵ gender,⁸⁶ sexual orientation and familial status,⁸⁷ the differently abled⁸⁸ and the environment.⁸⁹ In class, I track the order of the text fairly closely. This approach, of course, yields a more coherent march through the law of property

II. DISCUSSION

The following are cases I use to teach traditional property law doctrine, simultaneously demonstrating that property rights serve human values. I am not advocating that every case mentioned necessarily be taught. In some instances, it will be necessary to pick and choose because of time constraints, or the professor may have found a better case introducing the same concept. The cases are presented as a possible roadmap only.

⁷⁹ SHELDON KURTZ & HERBERT HOVENKAMP, CASES AND MATERIALS ON AMERICAN PROPERTY LAW (3d ed. 1999).

⁸⁰ See *id.* at 358-426.

⁸¹ See *id.* at 941-88.

⁸² I do not suggest that the authors of these texts deem human values unimportant, only that they apparently believe it appropriate to relegate discussion of them to other courses.

⁸³ See *infra* notes 90-180, and accompanying text.

⁸⁴ See *infra* note 204, and accompanying text.

⁸⁵ See *infra* notes 206-340, and accompanying text.

⁸⁶ See *infra* notes 355-416, and accompanying text.

⁸⁷ See *infra* note 426, and accompanying text.

⁸⁸ See *infra* note 456, and accompanying text.

⁸⁹ See *infra* note 496, and accompanying text.

A. Race Generally

Because property is of such fundamental importance in society from the perspectives of economic development, social advancement, and education it is not surprising that many of the major cases in the history of race relations in this country involved some aspect of real property law. I will discuss five cases that are reasonably specific about race, but the list bears the constitutional flaw of being both underinclusive and overinclusive. Further, the order of presentation is based on the primary responsibility of teaching property law and, thus, the cases are not presented in the manner best suited to teaching from a civil rights or constitutional law perspective.

1. State Action, *Jones* and *Shelley*

I include the first case in the introductory materials presented in the first week. I begin the discussion of *Jones v. Alfred Mayer Co.*⁹⁰ with a very brief survey of the major civil rights acts and constitutional amendments that preceded *Jones*,⁹¹ which the students are probably seeing for the first time in a law school context. Thus, we

⁹⁰ 392 U.S. 409 (1968), included in CRIBBET, *supra* note 12, at 46. For each case that follows, I include reference to the type and depth of coverage each of the other mentioned fourteen texts give it. In some cases I note treatments of the case or issue that warrant special mention, and in some instances I note cases that substitute for the case I use. If a casebook is not mentioned, it can safely be assumed that the case or topic is not covered therein. Although I have tried to be thorough in this regard, I apologize in advance for any omissions; some of which may have been caused by vagaries in the indexes of the texts but all of which are my responsibility. The case is included in DUKEMINIER & KRIER, *supra* note 20, at 463 (note case only) and in CASNER, ET AL, *supra* note 35, at 839. The Casner text includes a chapter on discrimination in housing that begins with a quote from DOUGLAS MASSEY AND NANCY DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993) and then proceeds to *Shelley v. Kraemer* and then *Jones*. The text moves in a very coherent fashion through private discrimination based on race, handicap, familial status marital status and sexual orientation. It is included in BRUCE & ELY, *supra* note 34, at 695; SINGER, *supra* note 48, at 131 (noted in the context of materials on the Public Accommodation Statutes and Anti-discrimination Policy), and 960 (noted in materials on "Fair Housing Law"). Also, it is included in HYLTON ET AL, *supra* note 73, at 611 (note case in discussion of racially restrictive covenants, following *Shelley*); CHUSED, *supra* note 28, (noted at 502, 503, 1099); HYLTON, ET AL, *supra* note 74, at 611, 617-18 (note case only); and KURTZ & HOVENKAMP, *supra* note 79, at 953 (note case only).

⁹¹ Petitioner *Jones* filed a complaint alleging that the Alfred H. Mayer Company had refused to sell him a home in the Paddock Woods community solely because he was African American, see *Jones*, 392 U.S. at 412. However, the District Court dismissed the case, 255 F. Supp. 115 (D.C.Mo. 1966). The Court of Appeals affirmed, holding that § 1982 only applies to state action and did not bar private discrimination, see *Jones*, 379 F.2d 33 (8th Cir. 1967). The Supreme Court reversed, holding both that § 1982 barred all discrimination, public and private, in the sale and rental of housing and that the Act was a valid exercise of the power granted to Congress by

first look at the Thirteenth Amendment,⁹² then the "Black Codes,"⁹³ the Civil Rights Act of 1866,⁹⁴ which included current 42 USCA § 1982,⁹⁵ the Fourteenth Amendment,⁹⁶ and, finally, the Civil Rights Act of 1968⁹⁷ and its component, the Fair Housing Act, Title VIII. Such an approach leads to a discussion of the importance of property in society and the following quote from Justice Stewart:

Just as the Black Codes, enacted after the Civil War to restrict the free exercise of those rights, were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.⁹⁸

At this point, I reserve a more detailed analysis of the debate⁹⁹ as to whether the Act was aimed at private conduct and whether the passage of the Civil Rights Act of 1968 should have prompted the Court to decline further consideration of *Jones*.¹⁰⁰

I begin the discussion of *Shelley v. Kraemer*¹⁰¹ by reminding the

the Thirteenth Amendment, *see Jones*, 392 U.S. at 413. Thus, the Court did not reach the Equal Protection Clause argument, *see Jones*, 392 U.S. at 413, n. 5.

⁹² U.S. CONST. Amend. XIII (1865).

⁹³ The Black Codes were Southern states' laws which, "saddled Negroes with 'onerous disabilities and burdens, and curtailed their rights *** to such an extent that their freedom was of little value ***.'" *Jones*, 392 U.S. at 426, (quoting *Slaughter-House Cases*, 16 Wall. 36 (1873)).

⁹⁴ Act of April 9, 1866, c. 31, s. 1, 14 Stat. 27, re-enacted by sec. 18 of the Enforcement Act of 1870, Act of May 31, 1870, c. 114, s. 18, 16 Stat. 140, 144, and codified at sec. 1977 and 1978 of the Revised Statutes of 1874, now 42 U.S.C. §§. 1981 and 1982.

⁹⁵ "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C.A. § 1982.

⁹⁶ U.S. CONST. Amend. XIV (1868). I explain briefly that the Fourteenth Amendment was enacted, in part, to assure the constitutionality of the 1866 Act. *See Jones*, 392 U.S. at 436. *See also* Keith Sealing, *The Myth of a Colorblind Constitution*, 57 WASH. U. J. OF URBAN & CONTEMP. L. 157, 163-64 (1999).

⁹⁷ Pub. L. 90-284, 82 Stat. 81. The 1968 Act was passed after the Court of Appeals for the Eighth Circuit held that section 1982 only applied to state action and did not cover private refusals to sell to minorities. The Court stated that the enactment of the 1968 Act had no effect on section 1982 or the case at hand. *See Jones*, 392 U.S. at 416-417.

⁹⁸ *Jones*, 392 U.S. at 442-43. It is also instructive to excerpt from Justice Douglas's extensive quote from Frederick Douglass. *See id.* at 446 (Douglas, J., concurring) (quoting Frederick Douglass, *The Color Line*, *The North American Review*, June 1881, 4 THE LIFE AND WRITINGS OF FREDRICK DOUGLASS 343-44 (1955)).

⁹⁹ *See Jones*, 392 U.S. at 420-37; *see also id.* at 452-76 (Harlan, J., dissenting)

¹⁰⁰ *See id.* at 476-80 (Harlan, J., dissenting).

¹⁰¹ 334 U.S. 1 (1948), included in CRIBBET *supra* note 12, at 83; DUKEMINIER & KRIER, *supra* note 20, at 905-10; CASNER, ET AL, *supra* note 35, at 830; BERGER & WIL-

students that *Jones* involved strictly the private action of an individual found to be in violation of 42 USCA § 1982, which was, in turn, found to be unconstitutional under the Thirteenth Amendment. By contrast, *Shelley* involved a restrictive covenant requiring enforcement through state action, triggering the Fourteenth Amendment's Equal Protection Clause.¹⁰²

I then walk the students through the Court's carefully ordered reasoning, noting its emphasis on the importance of property in the context of civil rights.¹⁰³ First, the Court observed that it faced a case of first impression, the applicability of the Fourteenth Amendment to state courts' enforcement of racially restrictive cov-

LIAMS, *supra* note 38, at 145 (note case pointing out that the case's "state action" theory has been much criticized even by scholars sympathetic with [it], citing Louis Henkin, *Shelley v. Kraemer. Notes for a Revised Opinion*, 110 U. PA. L. REV. 473, 622 (1962) (in a seven-page treatment of racially restrictive covenants, which includes a copy of a racially restrictive deed and a magazine advertisement depicting a new community of "The Right Sort of Neighbors," Achieved by Selling to 'Approved Purchasers' under 'Rigid Conditions'"), and 738 (noting that Chief Justice William Rehnquist, and Presidents George Bush and John F. Kennedy had been criticized for owning homes subject to racially restrictive covenants). Also, included in BRUCE & ELY, *supra* note 34, at 688 (with some notes following, but suggesting that "[t]he full implications of *Shelley v. Kraemer* are best left explored in another course."); SINGER, *supra* note 48, at 493-99, including a photograph of the Shelley family, which the text follows with *Evans v. Abney*, discussed *infra* note 119, and accompanying text; DWYER & MENNELL, *supra* note 57 (note case only at 771, 866, 868, 879); JOHNSON, ET AL, *supra* note 64, at 709, 751 (note case only); NELSON, ET AL, *supra* note 67, at 671 (note case only); HYLTON ET AL, *supra* note 73, at 603; included in CHUSED, *supra* note 28, at 445. Professor Chused presents *Corrigan v. Buckley*, 299 F. 899, *aff'd*, 271 U.S. 323 (1924) (restrictive racial covenant upheld under "separate but equal" theory); see also KURTZ & HOVENKAMP, *supra* note 79, at 942 (as the first case in a chapter on housing discrimination).

¹⁰² *Shelley* involved two consolidated cases. The first, *Kraemer v. Shelley*, 198 S.W.2d 679 (Mo. 1946), involved a restrictive covenant in St. Louis, Missouri that required that owners only sell to white buyers. The Shelleys, African Americans, purchased the property in violation of the covenants, and other property owners brought suit to try to prevent them from taking possession and divesting them of title. Despite the facts that owners of only forty-seven of the fifty-seven parcels in the subdivision had signed the covenants, that one parcel had been occupied by African Americans since 1882, thirty years before the covenants were signed, and that four African American families lived in the subdivision at the time of the suit, see *Shelley*, 334 U.S. at 5, the Supreme Court of Missouri held for the plaintiffs, reversing the trial court. The second case, from Michigan, involved a similar fact pattern of mutual covenants restricting ownership and occupancy to whites. When an African American family acquired title to a parcel and occupied it, other homeowners sued and the trial court entered a decree ordering the African-American family to move out within ninety days. The Michigan Supreme Court affirmed. See *Sipes v. McGhee*, 25 N.W.2d 638.

¹⁰³ The Court stated, "[i]t cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property." *Shelley*, 334 U.S. at 10.

enants.¹⁰⁴ The Court then stated that restrictive covenants would clearly be violative of the Fourteenth Amendment if imposed by state statutes or local ordinances.¹⁰⁵ But, the Court noted the restrictions in *Shelley* were created by agreements among private individuals, and the Fourteenth Amendment does not protect against discriminatory or wrongful private conduct.¹⁰⁶ "But here there is more," the Court stated, and proceeded to demonstrate that the purpose of the agreements can only be effectuated by judicial enforcement in state courts.¹⁰⁷ After demonstrating that judicial action is clearly state action,¹⁰⁸ the Court used evocative words – "full panoply of state power" and "full coercive power of government"¹⁰⁹ – and concluded that the African-American petitioners had been denied the equal protection of the laws.¹¹⁰

The Casner text asks, "[c]ould privately created racial covenants have been outlawed on the grounds of public policy rather than by stretching the concept of state action to fit them under the 14th Amendment?"¹¹¹ The answer was "probably not" at the time. However, "[t]oday, it is likely that racially restrictive covenants would be held to violate public policy under the common law in most states."¹¹²

There are a number of future interest cases that can illustrate racial discrimination. Professor Cribbett uses *Capitol Federal Savings v. Smith*,¹¹³ which is intended to illustrate a technical point regarding how a shift automatically occurs where the condition of an ex-

¹⁰⁴ See *id.* at 8.

¹⁰⁵ See *id.* at 11.

¹⁰⁶ See *id.* at 13.

¹⁰⁷ See *id.* at 13-4.

¹⁰⁸ See *id.* at 15-8.

¹⁰⁹ See *id.* at 19.

¹¹⁰ See *id.* at 20.

¹¹¹ CASNER, ET AL., *supra* note 35, at 837, n. 2. A Canadian case that did just that is excerpted. See *id.*, (citing *Re Drummond Wren*, [1945] O.R. 778, 4 D. L. R. 674). As noted above, *supra* note 101, the Berger and Williams text notes the same issue. See BERGER & WILLIAMS, *supra* note 38. See also Shelley Saxer, *Shelley v. Kraemer's Fiftieth Anniversary: 'A Time for Keeping; a Time for Throwing Away'?* 47 U. KAN. L. REV. 61 (1998).

¹¹² SINGER, *supra* note 48, at 508. Professor Singer devotes several pages to this issue, including useful references to some of the many articles on point. *Id.* at 508-11.

¹¹³ 316 P.2d 252 (Co. 1957), included in CRIBBET, *supra* note 12, at 46; BERGER & WILLIAMS, *supra* note 38, at 146 (note case only, but including the quote I reproduce at note 118 and accompanying text); BRUCE & ELY, *supra* note 34, at 694 (mentioned briefly in a note following *Shelley v. Kraemer*); SINGER, *supra* note 48, at 628-29 (note case). Professor Singer also includes *Charlotte Park and Recreation Commission v. Barringer*, 88 S.E.2d 114 (N.C. 1955), which reached the opposite conclusion. *Id.* at 627-28; see also KURTZ & HOVENKAMP, *supra* note 79, at 947 (discussed following *Shelley*).

ecutory limitation has been violated. If a professor follows Cribbet's sequencing faithfully, students will have already become familiar with *Jones v. Alfred Mayer Co.*,¹¹⁴ and, more on point, *Shelley v. Kraemer*.¹¹⁵

In *Capitol Federal*, a group of landowners signed covenants which provided that if any of them sold property to "colored persons" the title would be forfeited and the land would go to the rest of the owners in the subdivision.¹¹⁶ It could be argued that this was a fee simple subject to an executory limitation with an executory interest (shifting use), which is, indeed, the primary point of the case in the context of the subject of defeasible fees and future interests. If this automatic shift was not state action, then the rule from *Shelley v. Kraemer* should not apply and the restrictive covenant should stand.¹¹⁷ The Court's response is perhaps less legal than provocative of discussion, "[h]igh-sounding phrases or outmoded common-law terms cannot alter the effect of the agreement embraced in the instant case."¹¹⁸

However, two other cases are very useful; I would suggest using at least one or the other. First, *Evans v. Abney*¹¹⁹ was the last in a series of cases resulting from a conveyance in the 1911 will of Geor-

¹¹⁴ Discussed *supra* note 90-100, and accompanying text.

¹¹⁵ Discussed *supra* note 101-12, and accompanying text.

¹¹⁶ *Capitol Federal*, 316 P.2d at 253. Plaintiffs were African Americans who had purchased land in the subdivision and sought a declaratory judgment that the agreement was void and, thus, the cloud on their title that it created should be removed. Defendants counter-claimed by asserting title to the properties in question. The trial court issued a declaratory judgment holding that the plaintiffs were owners in fee simple and clearing their titles, finding that enforcement of the clause would be violative of the Equal Protection Clause of the Fourteenth Amendment, and the defendants appealed. See *id.* at 253-54.

¹¹⁷ In fact, defendants argued that *Shelley v. Kraemer* did not apply because that case involved a restrictive covenant rather than an automatic forfeiture and a future interest. See *Capitol Federal*, 316 P.2d at 254.

¹¹⁸ *Capitol Federal*, 316 P.2d at 255. The court continued, "[w]hile the hands may seem to be the hands of Esau to a blind Isaac, the voice is by astute counsel, it is still a racial restriction judicial approval or blessing to a contract such as is here involved." See Genesis 27:1-30 (Blind Isaac told his oldest son Esau that if he hunted game and prepared it as a feast for him he would bless him. After Esau departed for the hunt, Rebekah, Isaac's wife and Esau's mother, who had overheard the conversation called upon the younger son, Jacob, whom she favored over Esau, and told him to kill kids from his flock, prepare a feast and disguise himself as Esau. Jacob did so. When Isaac sought assurance that it was Esau before him, hairless Jacob presented his hand, covered with an animal skin, as the "hands of [hirsute] Esau." Thereupon, Isaac bestowed the blessing intended for Esau upon Jacob).

¹¹⁹ 396 U.S. 435 (1970). Included in CRIBBET, *supra* note 12, at 46; CASNER, ET AL, *supra* note 35 at 839; BERGER & WILLIAMS, *supra* note 38; BRUCE & ELY, *supra* note 34 at 695; SINGER, *supra* note 48, at 499-508; DWYER & MENNELL, *supra* note 57; JOHNSON, ET AL, *supra* note 64; CHUSED, *supra* note 28, at 361 (most extensive coverage).

gia's United States Senator A. O. Bacon. Bacon conveyed land in trust to the city of Macon, Georgia to be used as a public park for whites only. In 1966, the Court held that the park could no longer be used for whites only.¹²⁰ The Georgia Supreme Court then refused to apply the doctrine of *cy pres* to continue to operate the land as a park but as an integrated park and instead terminated the trust and allowed the land to revert to Bacon's heirs.¹²¹ In the final case, although "disheartened,"¹²² the court majority's held that the state's highest court had correctly applied Georgia's trust law, finding *Shelley* "easily distinguishable."¹²³ Writing in dissent, Justice Brennan argued that, "[n]o record could present a clearer case of the closing of a public facility for the sole reason that the public authority that owns and maintains it cannot keep it segregated."¹²⁴ Further, Brennan argued that *Shelley* applied.¹²⁵

Second, in *Charlotte Park and Recreation Commission v. Barringer*,¹²⁶ Osmond Barringer and others conveyed land to the Charlotte Park and Recreation Commission to form Revolution Park. However, the Barringer deed contained the restriction that the land was to be "used and enjoyed by members of the white race only."¹²⁷ Moreover, if that restriction were violated, the deed provided that the land would automatically revert to Barringer, with an imposed fee of \$3,500.¹²⁸ When a group of African-Americans peti-

¹²⁰ *Evans v. Newton*, 382 U.S. 296 (1966).

¹²¹ *Evans v. Newton*, 148 S.E. 2d 329, 330 (Ga. 1966).

¹²² *Evans*, 396 U.S. 435, 443-44.

¹²³ *Id.* at 445. The Court stated that *Shelley* had involved state-supported discrimination against African-Americans, whereas closing the park hurt both whites and African-Americans.

¹²⁴ *Id.* at 452 (Brennan, J., dissenting).

¹²⁵ *See id.* at 456-57 (Brennan, J., dissenting).

¹²⁶ 88 S.E.2d 114 (N.C. 1955), *cert. denied*; *Leeper v. Charlotte Park & Recreation Commission*, 350 U.S. 983 (1956). Included in CRIBBET, *supra* note 12, at 46; HYLTON, ET AL., *supra* note 73, at 611 (note case only, noting that correctness of the decision is "still at matter of debate."). As noted above, CHUSED, *supra* note 28, at 350-58 contains the most detailed discussion of the case. Included in CASNER, ET AL., *supra* note 35, at 839; BRUCE & ELY, *supra* note 34, at 694-95 (note case only); SINGER, *supra* note 48, at 627-28 (note case only); DWYER & MENNELL, *supra* note 57; included in CHUSED, *supra* note 28, at 352 (most extensive coverage); HYLTON, ET AL., *supra* note 74, at 611 (note case only); KURTZ & HOVENKAMP, *supra* note 79, at 947 (note case only).

¹²⁷ *Charlotte Park & Recreation Comm'n*, 88 S.E.2d at 122.

¹²⁸ *See id.* This restriction raises an issue that makes the case a great property case regardless of the social issues presented. The court goes out of its way to find that the deed creates a fee simple determinable estate, which *automatically* reverts to the grantor, rather than a fee simple subject to a condition subsequent, which requires that the grantor take action to reenter and retake the estate and would probably require state action. Thus, the court can state that, "[t]he operation of this reversion provision is not by any judicial enforcement by the State Courts of North Carolina, and

tioned to use the golf course in the park, the commission sought a declaratory judgment to determine would happen to the land if it allowed minorities to use it.¹²⁹ After exhaustive review of the case law regarding fee simple determinable estates,¹³⁰ the court concluded that such an interest had been created and stated that, "[i]t is a distinct characteristic of a fee determinable upon limitation that the estate *automatically* reverts at once on the occurrence of the event by which it is limited."¹³¹ Because the reversion was automatic, the court concluded that *Shelley v. Kraemer* "has no application."¹³² With one eye firmly on *Shelley*, the Court apparently was able to keep the other on *Brown v. Board of Education (I)*,¹³³ decided just the year before, stating:

We know of no law that prohibits a white man from conveying a fee determinable upon the limitation that it shall not be used by members of any race except his own, nor of any law that prohibits a negro¹³⁴ from conveying a fee determinable upon the limitation that it shall not be used by members of any race, except his own.¹³⁵

Thus, the Court concluded, a holding that the fee would not revert to Barringer if the golf course were used by African-Americans would be a taking without adequate compensation under the Fifth Amendment.¹³⁶

2. Native American Issues

The casebooks take a variety of approaches to the inclusion of Native American law. For example, Professor Singer includes an entire section on federal Indian law.¹³⁷ Professor Chused is also

Shelley v. Kraemer [334 U.S. 1 (1948)] has no application." See *id.* at 123. But, is it really a fee simple determinable rather than a fee simple subject to a condition subsequent if Barringer had to pay to get his reversion? See CHUSED, *supra* note 28, at 358. Arguing to the contrary, does making a payment to the commission constitute state action? Perhaps the court did not want to take the chance.

¹²⁹ *Charlotte Park & Recreation Comm'n*, 88 S.E.2d at 119.

¹³⁰ See *id.* at 120-22 (citing cases from Connecticut, Massachusetts, Missouri, Vermont, Tennessee, Oregon, Arkansas, Illinois, Kentucky, Pennsylvania, Ohio and New Hampshire).

¹³¹ *Id.* at 122 (emphasis added).

¹³² *Id.* at 123.

¹³³ 347 U.S. 483 (1954) (abolishing the doctrine of "separate but equal" in public education).

¹³⁴ The lack of capitalization is in the original.

¹³⁵ *Charlotte Park & Recreation Comm'n*, 88 S.E.2d at 119.

¹³⁶ U. S. CONST. Amend. V. (1791).

¹³⁷ See SINGER, *supra* note 48, at 1183-2000; including *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980). HYLTON, CALLIES, MANDELKER & FRANZESE, *supra* note 73, makes only a brief mention of such rights but does cite to *Mabo v. State of Queen-*

very strong on Native American issues.¹³⁸ Others have no cases whatsoever or only *Johnson v. M'Intosh*. As many schools offer a separate course in Native American Law, it appears that time restrictions limit coverage of this area.¹³⁹

a. *Power and Appropriation*

I use *Johnson v. M'Intosh*¹⁴⁰ in my International Law classes and in a seminar I have taught from time to time entitled "Law and Social Problems," because Chief Justice Marshall, for whatever reasons,¹⁴¹ so blatantly and unflinchingly lays out the racist and imperialist assumptions of his era.¹⁴²

sland, 107 A.L.R. 1 (1992) (reversing Australia's traditional rejection of aboriginal claim of rights to lands occupied when Europeans arrived).

¹³⁸ See CHUSED, *supra* note 28, at 6-78 (§ 1.03 Early Native American Land Claim Cases; § 1.04 Contemporary Consequences of the Dawes Act Era), 101 (Indian Land and Adverse Possession; Tribal Artifacts).

¹³⁹ See, e.g., Native American Law in SYRACUSE UNIVERSITY COLLEGE OF LAW CATALOG 1999-2000 at 15.

¹⁴⁰ 21 U.S. (8 Wheat.) 543 (1823). Included in CRIBBET, *supra* note 12, at 46; DUKEMINIER & KRIER, *supra* note 20, at 3-10; RABIN, KWALL & KWALL, *supra* note 31, at 789 (brief mention in footnote); CASNER, ET AL, *supra* note 35, at 839; BERGER & WILLIAMS, *supra* note 38, at 25, 27 (note case only); BRUCE & ELY, *supra* note 34, at 695; SINGER, *supra* note 48, at 4-15; DWYER & MENNEL, *supra* note 57, at 69; JOHNSON, ET AL, *supra* note 64, at 2; CHUSED, *supra* note 28, at 8; HYLTON, ET AL, *supra* note 74, at 28 (note case only, with brief comment on aboriginal property rights); KURTZ & HOVENKAMP, *supra* note 79, at 68.

¹⁴¹ See *infra* note 158-65, and accompanying text for a discussion of Justice Marshall's intent.

¹⁴² In non-property courses, it is more appropriate to spend additional time on a comparative law treatment of the property rights of various indigenous peoples. Because of personal interests and the availability of materials, I compare the American and Australian experiences. See John Skinner, *Native People, Foreign Laws: A Survey Comparing Aboriginal Title to Property in the United States and Alaska*, 19 SUFFOLK TRANSNAT'L L. REV. 235 (1995) (arguing that both the United States and Alaska should enact legislation to place title of traditional aboriginal lands back in the hands of indigenous populations); Beth Ganz, *Indigenous Peoples and Land Tenure: An Issue of Human Rights and Environmental Protection*, 9 GEO INT'L ENVTL. L. REV. 173 (1996) (arguing for the creation of a permanent framework by which to recognize indigenous land rights); Karen E. Bravo, *Balancing Indigenous Rights to Land and the Demands of Economic Development: Lessons From the United States and Australia*, 30 COLUM. J.L. & SOC. PROBS. 529 (1997) (arguing for the formulation of fundamental criteria that must be fulfilled in order to assure the protection of indigenous rights); Gilda C. Rodriguez, *Wik Peoples v. State of Queensland: A Restrained Expansion of Aboriginal Land Rights*, 23 N.C. J. INT'L L. & COM. REG. 711 (1998) (arguing that the Australian High Court's holding that native title can co-exist with a pastoral interest may have far-reaching consequences because of the large percentage of pastoral lands in Australia); Geoffrey Robert Schiveley, *Negotiation and Native Title: Why Common Law Courts are not Proper Fora for Determining Native Land Title Issues*, 33 VAND. J. TRANSNAT'L L. 427 (2000) (explaining why the common law court system is an inadequate forum for determining native rights and arguing for negotiation as an alternative to litigation).

The case arose because the plaintiffs claimed title to the land based on two grants made by Indian¹⁴³ chiefs.¹⁴⁴ Indians were in possession of the land at the time of the conveyance. The facts are fairly straightforward and the issue is clear-cut: did Indians have power to give title that can be recognized in United States courts? A springboard for discussion of the ultimate basis of rights to land in the Anglo-American system, as flowing from William the Conqueror,¹⁴⁵ the case also contrasts the European concept of property with the indigenous view of property.¹⁴⁶ I concentrate on Marshall's opinion, which speaks for itself:

On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.¹⁴⁷

Justice Marshall then states that the rights of the inhabitants were thereafter not "entirely disregarded" but rather were "to a consid-

¹⁴³ For a discussion of the propriety of the term "Indian" versus "Native American," see JAMES WILSON, *THE EARTH SHALL WEEP A HISTORY OF NATIVE AMERICA* (1998) xv (discussing the difficulties in arriving at the proper terms for use in describing the indigenous peoples of North America).

¹⁴⁴ Johnson, 21 U.S. at 571-72.

¹⁴⁵ See WILLIAM STROEBUCK & DALE WHITMAN, *THE LAW OF PROPERTY* (3d ed. 2000) 14-16.

¹⁴⁶ Wilson, *supra* note 145, at 23-24 notes that:

Most groups – hunters and plant-gatherers as well as agriculturists – viewed land as a common resource rather than a commodity that could be *owned*. Tribes and families had the right to hunt, fish or grow crops in defined places, but the concept of a fenced-off parcel of land being the exclusive property of an individual would have been utterly alien to most, if not all, Native Americans.

¹⁴⁷ Johnson, 21 U.S. at 572-73.

erable extent, impaired.”¹⁴⁸ Declining to consider the “abstract principles” of whether an industrialized society has the right to expel hunters from their land, Justice Marshall states, “[t]he title by conquest is acquired and maintained by force.”¹⁴⁹ Having acquired titled, the conquered can normally be blended in to the conquering race (one presumes, if they are of the same race) or can be governed as a distinct people.¹⁵⁰ However, such was not possible with the Indians:

But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence. What was the inevitable consequence of this state of things? The Europeans were under the necessity either of abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword, and by the adoption of principles adapted to the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct society, or of remaining in their neighbourhood, and exposing themselves and their families to the perpetual hazard of being massacred.¹⁵¹

In the fifteen casebooks surveyed, *Johnson v. M'Intosh* is given a wide range of coverages. A few mention it briefly or not at all. Others include it as a major case, and several make it the first case in the book.¹⁵² The Dukeminier, Casner and Johnson texts, in particular, have excellent notes and comments. The various texts introduce two interesting lines of discussion. First, how did the white

¹⁴⁸ *Id.* at 574. There, Marshall stated:

In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

¹⁴⁹ *Id.* at 589.

¹⁵⁰ *See id.* at 589-90.

¹⁵¹ *Id.* at 590.

¹⁵² *See, e.g.,* DUKEMINIER & KRIER, *supra* note 20, at 10; JOHNSON, ET AL, *supra* note 64, at 2.

conquerors justify taking land that was already inhabited? Second, what were the unvoiced reasons for Marshall's opinion?

As to the former, Dukeminier and Krier first discuss the concepts of acquisition of land by discovery or conquest. Noting that acquisition by conquest has now been proscribed by international law, the law of the time allowed the first "discoverer" to deal as he saw fit with any existing populations. But, how could one discover land that was already occupied? According to Dukeminier and Krier, "[t]he answer is discomfiting. During the so-called classical era of discovery (1450-1600), prior possession by aboriginal populations (which were sometimes called savage populations, or semi-civilized ones) was commonly thought not to matter."¹⁵³ Dukeminier and Krier next discuss the influence of John Locke's labor theory on the European belief that Indians had not invested enough labor to perfect a property interest in the land, thus allowing Europeans to claim the land "by righteous reference to their own ethnocentric conception of what amounted to actual possession."¹⁵⁴

Professor Casner presents the recent scholarship of Professor Kades, which includes the following quote from President James Monroe:

The hunter or savage state requires a greater extent of territory to sustain it than is compatible with the progress and just claims of civilized life, and must yield to it.

The earth was given to mankind to support the greatest number of which it is capable, and no tribe or people have the right to withhold from the wants of others more than is necessary for their own support and comfort.¹⁵⁵

Professor Johnson's discussion of the case quotes John Quincy Adams, who asked, "[s]hall [the Native American] forbid the wilderness to blossom like the rose? Shall he forbid the oaks of the forest to fall before the axe of industry and rise again transformed into the habitations of ease and elegance?" He juxtaposes these words with the statements of Chief Seattle of the Duwanish Indians: "The Great Chief in Washington send word that he wishes to buy our land. How can you buy or sell the sky – the warmth of the land? The idea is strange to us." The text also presents the theory that dispossession of the Indians was justified by the "nomad myth"

¹⁵³ DUKEMINIER & KRIER, *supra* note 20, at 12.

¹⁵⁴ DUKEMINIER & KRIER, *supra* note 20, at 16-17.

¹⁵⁵ CASNER, ET. AL, *supra* note 35, at 101 (quoting Eric Kades, *The Dark Side of Efficiency: Johnson v. M'Intosh and the Expropriation of Indian Lands*, 148 U. PENN. L. REV. 1065 (2000)).

derived from the English colonization of Ireland in the sixteenth century.¹⁵⁶ It also relates the origins of the right of conquest ideology, placing it as a derivation of the Christian European legal tradition of cultural racism and discrimination against non-Christians dating back to the Crusades.¹⁵⁷

As to Marshall's motivation for wording his opinion so strongly, Professors Dukeminier and Krier state that Marshall's "sarcasm and irony" are caused by embarrassment about what he had to write and that he was sympathetic to the plight of Native Americans.¹⁵⁸ The Casner text argues that, "[M]arshall sought to maintain the Court's constitutional powers while protecting some property rights of the Indians."¹⁵⁹ The Berger text states that, "[o]ne way of reading *Johnson v. M'Intosh* is as an attempt to protect Native Americans by making it impossible for whites to 'buy' land in sales in which whites often took advantage of Indians, rather than as a statement of the limited nature of their property rights."¹⁶⁰ Professor Johnson places the case in the context of Chief Justice Marshall's political struggle over the place and prestige of the Supreme Court. According to him, *Johnson*, along with *Cherokee Nation v. Georgia*,¹⁶¹ and *Worcester v. Georgia*,¹⁶² carved out Supreme Court "turf" in much the same way as *Marbury v. Madison*,¹⁶³ but also provided Indians with the "necessary legal space" to begin their own economic development.¹⁶⁴ Finally, Professor Chused suggests that Marshall arguably "tried to exercise a paternalistic sense of responsibility" toward those tribes willing to peacefully cede land.¹⁶⁵

Professors Dukeminier and Krier also use the case to provide

¹⁵⁶ CASNER ET. AL., *supra* note 35, at 11-2 (citing William Bassett, *The Myth of the Nomad in Property Law*, 4 J. OF LAW & RELIGION 133 (1986)).

¹⁵⁷ See JOHNSON, ET AL., *supra* note 64, at 12 (citing Robert Williams, *Columbus' legacy: The Rehnquist Court's Perpetuation of European Cultural racism Against American Indian Tribes*, 39 FED. B. NEWS & J. 358 (1992)); see also ROBERT WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990).

¹⁵⁸ See DUKEMINIER & KRIER, *supra* note 20, at 12, n. 5.

¹⁵⁹ See CASNER ET. AL., *supra* note 35, at 101, n. 1.

¹⁶⁰ See BERGER & WILLIAMS, *supra* note 38, at 27.

¹⁶¹ 30 U.S. 1 (1831) (Supreme Court has appellate jurisdiction, not original jurisdiction over disputes between the State of Georgia and Cherokees). See also CHUSED, *supra* note 28, at 23.

¹⁶² 31 U.S. 515 (1832) (federal government, not the states, has jurisdiction over Indian tribes). See CHUSED, *supra* note 28, at 36.

¹⁶³ 5 U.S. 137 (1803).

¹⁶⁴ See JOHNSON, ET AL., *supra* note 64, at 14-5 (citing David Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CALIF. L. REV. 1573 (1996)).

¹⁶⁵ See CHUSED, *supra* note 28, at 19.

an introduction to Critical Legal Studies and Critical Race Theory and provide excellent additional source material for students seeking additional information on these concepts.¹⁶⁶

I ask my students to consider whether the attitudes expressed in *Johnson v. M'Intosh* are mere relics by introducing the following: "[a] superior culture expands, by trade or cultural imperialism or conquest or all of the above, and will find its tenets embraced by the erstwhile captives even when the era of expansion is over."¹⁶⁷ By raising these issues, I go far outside the scope of property to a discussion of cultural clashes, often concluding by recommending Jared Diamond's Pulitzer Prize winning book, *Guns, Germs and Steel The Fates of Human Societies*, a source that repudiates the view of cultural superiority expressed above and in many tracts that rationalize the origins of American property rights.¹⁶⁸

Some casebooks include one or more modern cases on Native American issues; for example, *Tee-Hit-Ton Indians v. United States*¹⁶⁹ and *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*.¹⁷⁰ Other Indian issues include American Indian remains, as described in *Wana the Bear v. Community Construction, Inc.*¹⁷¹ and cultural objects, as discussed in *Charrier v. Bell*.¹⁷²

3. Discriminatory Zoning

The "important and celebrated"¹⁷³ case of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*¹⁷⁴ illustrates two

¹⁶⁶ DUKEMINIER & KRIER, *supra* note 20, at 8, n. 7.

¹⁶⁷ WILLIAM A. HENRY III, IN DEFENSE OF ELITISM 31 (1994) (describing what he considers to be the seven criteria of a superior culture).

¹⁶⁸ JARED DIAMOND, GUNS, GERMS AND STEEL THE FATES OF HUMAN SOCIETIES (1998). Diamond's Pulitzer Prize-winning book describes how coincidences of geography and the distribution of cultivatable grains and domesticable animals – as opposed to racial superiority – led to geographic expansion and the conquest of some groups by other groups.

¹⁶⁹ 348 U.S. 272 (1955).

¹⁷⁰ 492 U.S. 408 (1989).

¹⁷¹ 180 Cal. Rptr. 423 (Ct. App. 1982).

¹⁷² 496 So. 2d 601 (La. Ct. App. 1986).

¹⁷³ *Metropolitan Development Corp. v. City of Arlington Heights*, 469 F. Supp 836, 841.

¹⁷⁴ 429 U.S. 252 (1977), included in CRIBBET *supra* note 12, at 901; RABIN, Kwall & Kwall, *supra* note 31, at 702 (principal case following problem assignment); CASNER, ET AL., *supra* note 35, at 1251 (long note case following Cleburne Living Center); BERGER & WILLIAMS, *supra* note 38, at 739 (note case); BRUCE & ELY, *supra* note 34, at 867; SINGER, *supra* note 48, at 1004-05 (note case following Huntington Branch NAACP); DWYER & MENNELL, *supra* note 57, at 980 (note case in a section on exclusionary zoning); NELSON, ET AL., *supra* note 67, at 1098 (note case only), BURKE, BURKHART & HELMHOLZ, *supra* note 70, at 917, included in HYLTON, *supra* note 73, at 180.

very difficult concepts: first, the difficulty in proving that a government entity's housing decision was racially motivated, even where racial impact can be much more easily shown, and second, the very real clash between the legitimate desire to maintain property values and the need to provide low-income housing.¹⁷⁵

Why did Arlington Heights, a well-to-do Chicago suburb of 63,973 whites and twenty-seven African-Americans¹⁷⁶ decline to allow a zoning change that would have significantly increased the number of minorities in the Village?¹⁷⁷ If students are too quick to conclude that racism was at work here, I ask them whether the Village would have objected to an all-white low income housing project. Is it not true that low-income, high-density housing situated next to low-density expensive homes will lower the value of those homes, apart from any issue of race? Is it not true that the existing homeowners had a legitimate expectation interest in continued low-density construction?¹⁷⁸ It can be quickly established that there are no easy answers here. Once it is agreed that there are always legitimate reasons to oppose low income housing, the question is asked: absent some foolish admission of racial animus, are not local municipalities always shielded from Equal Protection problems in zoning decisions, since they can always show non-racial property-values-based reasons for their denials? In other words, is the Equal Protection Clause rendered toothless in the zoning context by this decision?

This issue leads to a discussion of whether the Fair Housing Act is a more useful weapon in this context. Ultimately, the Court remanded to the Court of Appeals to consider the question of whether the Fair Housing Act had been violated, but although the Court of Appeals held that it had, the parties' settlement left the

¹⁷⁵ The Court held that the Equal Protection Clause required a showing of racial intent, not racial impact alone.

¹⁷⁶ *Arlington Heights*, 429 U.S. at 255.

¹⁷⁷ In 1971, the Metropolitan Housing Development Corporation ("MHDC") applied for a zoning change in order to build a 190-unit low and moderate-income housing project. See *Arlington Heights*, 429 U.S. at 257-58. It was clear to Village officials and residents that the development would be racially integrated. *Id.* at 257. At three public hearings on the rezoning request the "social issue" of integration was raised, as were other non-racial concerns. *Id.* at 257-58. The District Court found that the denial was not motivated by racial discrimination but rather by the desire to preserve property values and dismissed the suit. *Metropolitan Housing Development Corp. v. City of Arlington Heights*, 373 F. Supp. 208 (N.D. Ill. 1974). The Court of Appeals reversed on a finding of discriminatory effect. *Metropolitan Housing Development Corp. v. City of Arlington Heights*, 517 F.2d 409 (7th Cir. 1975).

¹⁷⁸ See *Arlington Heights*, 429 U.S. at 270.

final answer undetermined.¹⁷⁹ There is ample additional discussion available to students who wish to look further into the case.¹⁸⁰

4. Slaves as Property

A number of texts discuss the topic (obviously no longer directly relevant) of slaves as property.¹⁸¹ Doing so in the context of an initial exploration of the question, "What is property?" is an excellent way to infuse an important early topic in property law with social relevance. Professor Chused includes *Dred Scott v. Sanford*¹⁸² in a chapter on "Autonomy and Community: Property in Human Beings."¹⁸³

B. Environmental Justice

"Real property lawyers must become experts in both state and federal environmental law."¹⁸⁴ Nevertheless, the casebooks take a widely varied approach to the subjects of environmental law in general and the emerging discipline of environmental justice or environmental racism in particular. Only Professor Cribbet has a section on environmental justice *per se*.¹⁸⁵ Twelve pages are devoted to the topic, including two cases-in-chief: *Bean v. Southwestern Waste*

¹⁷⁹ See *id.* at 566-67. On remand, the Court of Appeals reiterated its finding that the Village could not ignore the discriminatory effect of its decision and remanded to the District Court. See *Metropolitan Housing Development Corp. v. City of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977). Upon remand, the parties negotiated an alternative plan to build a low and moderate income housing development near to but outside the city limits of the village and asked the District Court to approve the settlement, which it did. See *Metropolitan Housing Development Corp. v. City of Arlington Heights*, 469 F. Supp. 836 (N.D.Ill. 1979). Finally, the Court of Appeals approved the settlement. See *Metropolitan Housing Development Corp. v. City of Arlington Heights*, 616 F.2d 1006 (7th Cir. 1980).

¹⁸⁰ See, e.g., Daniel Mandelker, *Racial Discrimination and Exclusionary Zoning: A Perspective on Arlington Heights*, 55 TEX. L. REV. 1217 (1977) (arguing that the federal courts should not expansively read the Fourteenth Amendment to require a wholesale review of exclusionary zoning practices absent proof of discriminatory intent); Robert G. Schwemm, *From Washington To Arlington Heights And Beyond: Discriminatory Purpose in Equal Protection Litigation*, 1977 U.ILL.L. FORUM 961 (1977); Comment, *Proof of Racially Discriminatory Purpose Under the Equal Protection Clause: Washington v. Davis, Arlington Heights, Mt. Healthy And Williamsburg*, 12 HARV. C. R.C. L. L.REV. 725 (1977) (surveying court decisions in the area), all cited in *Metropolitan Development Corp. v. City of Arlington Heights*, 469 F. Supp. at 842, n. 1.

¹⁸¹ See, e.g., HYLTON, *supra* note 73, at 28, discussing the case of *Commonwealth v. Aves*, 35 Mass. 193 (1836) (Louisiana child slave, brought to Massachusetts by her owner, not considered property in Massachusetts and, thus removed from owner and placed in court-ordered custody).

¹⁸² 60 U.S. 393 (1857).

¹⁸³ CHUSED, *supra* note 28, at 1075-188.

¹⁸⁴ SINGER, *supra* note 48, at 1075.

¹⁸⁵ CRIBBET, *supra* note 12, at 931-43.

*Management Corp.*¹⁸⁶ and *Coalition of Concerned Citizens Against I-670 v. Damian*.¹⁸⁷ Both, although only District Court-level cases, have been the topic of a good deal of discussion.¹⁸⁸

In *Bean*, the court was faced with the issue of whether the placement of a solid waste disposal facility 1700 feet from an un-air conditioned, predominantly African-American high school was racially motivated and, thus, whether the plaintiffs had a substantial likelihood of showing the placement to be in violation of 42 U.S.C. § 1983.¹⁸⁹ The facts in *Bean* demonstrate the difficulty of proving intent, particularly in a case that included statistical evidence. The court notes that an almost identical application for a waste treatment plant was denied in 1971 when the adjacent school was predominantly white but was granted in 1979 after the school had become primarily African-American.¹⁹⁰ However, following a lengthy consideration of the statistical evidence put together by the parties, the court is not sufficiently persuaded to allow the case to go forward.¹⁹¹ But, the court appears quite skeptical of the defendants' motivations, even going so far as to state, "[i]f this court were [the Texas Department of Health], it might very well have denied this permit. It simply does not make sense to put a solid waste site so close to a high school, particularly one with no air conditioning. Nor does it make sense to put a land site so close to a residential neighborhood."¹⁹² But, this court concludes that the Supreme Court's holding in *Village of Arlington Heights* precluded it from offering the plaintiffs even the opportunity of going forward and proving their case with the protection of a temporary restraining order and preliminary injunction.¹⁹³

¹⁸⁶ 482 F. Supp. 673 (S.D. Tex. 1979). This case is not included in any of the other texts, which, as noted, do not have sections devoted to environmental justice or environmental racism.

¹⁸⁷ 608 F. Supp. 110 (S.D. Ohio 1984). Included in CRIBBET at 931, but, as discussed, not included in any other texts.

¹⁸⁸ *Bean* has been at least mentioned in approximately 140 law review articles, and *Coalition of Concerned Citizens Against I-670* in at least thirty-six.

¹⁸⁹ 482 F. Supp. at 674-75. The plaintiffs sought a temporary restraining order and preliminary injunction when the Texas Department of Health granted Southwestern Waste Management a permit to build a solid waste facility in Harris County. *See id.* The court denied defendants' motions on abstention, laches, lack of state action and failure to name a party grounds, *see id.* at 675-76, but held that there was not a substantial likelihood that the plaintiffs would succeed on the merits because they could not prove discriminatory intent. *See id.* at 677.

¹⁹⁰ *Bean*, 482 F. Supp. at 679.

¹⁹¹ *See id.* at 677-79.

¹⁹² *Bean*, 482 F. Supp. at 679-80.

¹⁹³ *Id.* at 680. The court goes on to talk about what the plaintiffs should attempt to show at trial, presumably while the solid waste facility is being built.

Why, if the decision to locate the solid waste facility near an un-air conditioned African-American school was both "unfortunate and insensitive,"¹⁹⁴ where there was strongly suspicious non-statistical evidence of intent, and where the statistical evidence was equivocal at best, but certainly did not demonstrate that plaintiffs' arguments were without merit, did Judge McDonald feel *Village of Arlington Heights* forced him to deny the plaintiffs' requested relief? Does it matter that *Village of Arlington Heights* was an equal protection case in which the Supreme Court held that intent must be demonstrated to show a Fourteenth Amendment violation? Thus, does *Bean* demonstrate that § 1983 and the Equal Protection Clause are equally toothless in their inability to protect minorities from zoning decisions and facilities placement decisions reflecting environmental racism?

In *Coalition of Concerned Citizens Against I-670*, the court had to decide whether the placement of a highway had a disparate racial impact. An extension of Interstate 670 from downtown Columbus to the Columbus Airport was to pass through an area that was fifty to ninety percent African-American.¹⁹⁵ How did this case differ from *Bean* and *Village of Arlington Heights*? Since the highway was to be constructed, in part, with federal funds, the Civil Rights Act of 1964 was implicated.¹⁹⁶ Unlike the other two cases, which involved the Equal Protection Clause and § 1983, which both require discriminatory *intent*, the Civil Rights Act of 1964 can be violated by discriminatory *impact* alone without a showing of discriminatory *intent*.¹⁹⁷

If the plaintiffs had "made a prima facie showing of disparate effect upon racial minorities,"¹⁹⁸ should they be granted the relief

¹⁹⁴ *Id.*

¹⁹⁵ *Coalition of Concerned Citizens Against I-670*, 608 F. Supp. at 113-14. Sixty households and 191 persons were to be displaced. The residents of one-third of the displaced households were living below the poverty line; about three-quarters of the displaced persons were African-American.

¹⁹⁶ *Id.* at 126. Title VI of the 1964 Act provides that "[n]o person in the United States shall, on the grounds of race, color, or national origin . . . be subjected to discrimination under any program or activity receiving Federal financial assistance." *Id.* (quoting 42 U.S.C. § 2000d.)

¹⁹⁷ *Id.* (citing *Guardians Ass'n v. Civil Service Com'n of the City of New York*, 463 U.S. 582, 583 (1983) (plaintiffs need not prove discriminatory intent to establish a violation of Title VI because administrative regulations only require showing of effect); *Lau v. Nichols*, 414 U.S. 563, 568-69 (1974) (San Francisco Unified School District violated Title VI of the Civil Rights Act of 1964 and the Department of Health, Education, and Welfare's regulations by failing to establish a program for students who complained of language problems).)

¹⁹⁸ *Coalition of Concerned Citizens Against I-670*, 608 F. Supp. at 127.

they sought?¹⁹⁹ Have we finally found a statute that will effectively counter environmental racism? Apparently not. The court first concludes that Title VI of the Civil Rights Acts of 1964 does not constitute a *per se* prohibition of actions that have discriminatory impact,²⁰⁰ but that once plaintiffs have made a *prima facie* case of such effect, defendants can still triumph "by articulating legitimate nondiscriminatory reasons"²⁰¹ for the decision. Further, the plaintiffs are still burdened with demonstrating that there were alternative, less discriminatory alternatives to consider.²⁰²

*Chester Residents Concerned for Quality Living v. Seif*²⁰³ seemed to provide a way out of the effects but no intent conundrum, holding that private individuals may sue under discriminatory effects regulations promulgated pursuant to Title VI of the Civil Rights Act of 1964. However, the Supreme Court reversed the case without comment in 1998.²⁰⁴

C. Poverty, socio-economic status

I devote the time to consider eleven cases to the intersection of poverty law and property law. In addition to the introductory case discussed first below, the poverty law cases fall into two basic categories: landlord and tenant law, which includes six cases, and exclusionary zoning, illustrated by four cases.²⁰⁵

1. Landlord and Tenant law

For obvious reasons, many of the cases at the intersection of poverty law and property law fall in the area of landlord and tenant relations.

¹⁹⁹ *Id.* at 112. Plaintiffs were seeking both declaratory and injunctive relief, although the project had proceeded along quite far before the case was handed down.

²⁰⁰ *Id.* at 127.

²⁰¹ *Id.*

²⁰² *Id.* at 127-28.

²⁰³ 132 F.3d 925, 930 (3d Cir. 1997), *rev'd*, 524 U.S. 974 (1998) (mem.).

²⁰⁴ See Jerome Balter, *Environmental Justice: Time for Meaningful Action*, 18 TEMP. ENVTL. L. & TECH. J. 153 (Spring 2000); Kristen L. Raney, *The Role of Title VI in Chester Residents v. Seif: Is The Future of Environmental Justice Really Brighter?* 14 J. NAT. RESOURCES & ENVTL. L. 135 (1999); Amanda C.L. Vig, Case Note, *Using Title VI to Salvage Civil Rights From Waste: Chester Residents Concerned for Quality Living v. Seif*, 67 U. CIN. L. REV. 907 (Spring 1999).

²⁰⁵ *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973) (Texas system of allocating school funds based on property tax of school districts was not violative of Equal Protection Clause) is clearly a case at the intersection of poverty and property law, but I reserve it for Constitutional Law. *But see* CHUSED, *supra* note 28, at 573.

a. *The right to exclude*

During the first week of class²⁰⁶ I use *State v. Shack*²⁰⁷ to illustrate that the special needs of the poor, such as migrant workers, may outweigh traditional property rights such as the “essential”²⁰⁸ right to exclude.²⁰⁹ I ask students to note the date of the case and remind them of the civil rights struggle being waged by migrant workers at that time, including the boycotts led by Cesar Chavez and the United Farmworkers.²¹⁰ The court declined to hear the defendants’ constitutional arguments,²¹¹ but instead did a good job of addressing these social issues from a pure property law perspective, stating, “[h]ere we are concerned with a highly disadvantaged segment of our society.”²¹² It also described the farmworkers as

²⁰⁶ As noted, I use CRIBBET, which includes *State v. Shack* in its introductory materials.

²⁰⁷ *State v. Shack*, 277 A.2d 369 (N.J. 1971), included in CRIBBET *supra* note 12, at 14. See also RABIN, KWALL & KWALL, *supra* note 31, at 9 as part of the first problem in the problem-oriented text; CASNER, ET AL., *supra* note 35, at 14; BERGER & WILLIAMS, *supra* note 38, at 96 (including photograph of migrant worker housing and lengthy notes which include a long quote from RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 32-35 (4th ed. 1992), as well as the quote with which I open this article; BRUCE & ELY, *supra* note 34, at 674; SINGER, *supra* note 48, at 106-11; DWYER & MENNELL, *supra* note 57, at 372; JOHNSON, ET AL., *supra* note 64, at 71; CHUSED, *supra* note 28, at 557.

²⁰⁸ *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979).

²⁰⁹ In *Shack*, *supra* note 207, the complainant, Tedesco, was a farmer who employed migrant workers and housed them on his property as part of their compensation. *Id.* at 370. The defendants were Shack, a staff attorney for the Farm Workers Division of Camden Regional Legal Services (“CRLS”), a nonprofit federally funded corporation, and Tejas of the Farm Workers Division of Southwest Citizens Organization for Poverty Elimination (“SCOPE”), also a nonprofit federally funded corporation). *Id.* Tejas had gone to Tedesco’s farm earlier to take Tona Rivera, a migrant worker, to the hospital because a wound on his face was festering due to a lack of treatment, but had been driven away by an armed Tedesco. The next day Tejas, Shack and New York Times reporter Ronald Sullivan went to Tedesco’s farm, the site of previous disagreements over access. *Id.* Tedesco intercepted the two and insisted that they only talk to the migrant workers in his office and in his presence. They declined and all three were arrested for trespassing. *Id.* at 370-71. The trial court convicted two defendants. *Id.* at 370. Sullivan’s case was severed because of the First Amendment overtones, and the reporter’s counterclaim for battery. See CHUSED, *supra* note 28, at 555-56 for additional factual background not contained in the court opinion.

²¹⁰ See PETER MATTHIESSEN, *SAL SI PUEDES (ESCAPE IF YOU CAN): CESAR CHAVEZ AND THE NEW AMERICAN REVOLUTION* (2000). Professor Morris recommends the works of Professor Marc Linder regarding the flight of farm workers. See, Morris, *supra* note 20, at 1005, n. 31 and materials cited therein.

²¹¹ The defendants in *Shack*, *supra* note 207, at 372, argued that their First Amendment rights had been violated, citing to the “company town” case, (*Marsh v. Alabama*, 326 U.S. 501 (1946)), and that application of the trespass statute violated the Supremacy Clause, because it defeated the purpose of federal statutes under which SCOPE and CRLS were funded.

²¹² *Id.*

"unorganized and without economic or political power."²¹³ The court makes a clear statement of what will become a theme of the semester, "[a] man's right in his real property of course is not absolute."²¹⁴ I always try to lead the class to suggest that it may be in the farmer's interest to keep the workers ignorant of the rights to which they may be entitled.²¹⁵ I end the discussion of *Shack* with the following quote, "[t]hese rights are too fundamental to be denied on the basis of an interest in real property and too fragile to be left to the unequal bargaining strength of the parties."²¹⁶

State v. Shack is discussed during the first week of class, not because of any insight on my part, but because Cribbet includes it in the introductory chapter. The Dukeminier and Krier text, Rabin, Kwall and Kwall, the Casner text, Berger and Williams and Johnson all do the same. However, not all of the texts do much in the subsequent notes to put the case in context,²¹⁷ a weakness Professor Morris points out in regard to the Dukeminier and Krier text.²¹⁸ Professors Berger and Williams do an excellent job. However, the most extensive treatment is in Professor Chused's text,²¹⁹ which includes a great deal of factual background, citations to the New York Times' coverage of the events and the case, and a fruitful discussion of the case as an example of judicial application of natural law theory.²²⁰

²¹³ *Id.*

²¹⁴ *Id.* at 373, (citing BROOM, LEGAL MAXIMS 238 (10th ed. Kersley 1939)).

²¹⁵ The court noted that the ends to which SCOPE and CRLS are dedicated "would not be gained if the intended beneficiaries could be insulated from efforts to reach them." *Id.* at 372. Further, the court stated, "[w]e find it unthinkable that the farmer-employer can assert a right to isolate the migrant worker in any respect significant for the worker's well-being." *Id.* at 374.

²¹⁶ *Id.* at 374-75.

²¹⁷ See, e.g. DUKEMINIER, *supra* note 20, at 101-03.

²¹⁸ Morris, *supra* note 20, at 1003-07. Professor Morris points out that neither the case nor accompanying materials present Mr. (Morris postulates that the court never mentions his first name as a sign of scorn) Tedesco's side of the story. *Id.* at 1005-06. [His first name was Morris.] This discussion thread is left up to the professor. It is my experience that there is always someone in any given class that will side with the property owner and get the real discussion rolling.

²¹⁹ See CHUSED, *supra* note 28, at 554-65.

²²⁰ *Id.* at 565. Professor Chused argues that the keynote statement of the case - "Property rights serve human values" - "affirms that the natural value of each person is more important than property rights held by [the landowner.]" He places *Shack* within the natural law framework of Johnson's Great Society and the Civil Rights Movement [the capitalization is Professor Chused's.] He concludes, "[m]ight it have been making an attempt to use natural law theories of justice to aid its efforts to constrain the impact of the state's trespass statute?" *Id.*

b. *Housing Codes*

A number of landlord and tenant cases provide fertile grounds for discussion.²²¹ In *Brown v. Southhall Realty*,²²² a suit essentially over \$230 in unpaid rent, the landlord was on notice that there were District of Columbia Housing Code violations in the basement apartment when he signed the lease with the plaintiff.²²³ The court applied the general rule that an illegal contract made in violation of a statute designed for police or regulatory purposes is void.²²⁴

*Javins, Saunders and Ross v. First National Realty*²²⁵ differs from

²²¹ I begin this discussion with this quote from a case not covered:

Miserable and disreputable housing conditions do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may depose a community as an open sewer may ruin a river.

Berman v. Parker, 348 U.S. 26, 32-33 (1954) (taking private property and then conveying back to another private party to rid the area of slums was held constitutionally permissible); quoted in *Village of Belle Terre v. Boraas*, 416 U.S. 1, 5-6 (1973) (in a portion not reproduced in CRIBBET, *supra* note 12.) See *infra* note 426-34, and accompanying text.

²²² 237 A.2d 834, 835 (D.C. Ct. Apps. 1968), included in CRIBBET *supra* note 12, at 409; *DUKEMINIER & KRIER*, *supra* note 20, at 532 (note case only); not included in *BERNHARDT*, *supra* note 63, which includes *Green v. Superior Court*, (Cal., 1974) (recognizing implied warranty of habitability in residential leases in California); *JOHNSON, ET AL*, *supra* note 64, at 351 (note case only); *HYLTON*, *supra* note 73, at 455 (with additional excerpts from a representative local housing code).

²²³ There was "an obstructed commode, a broken railing and insufficient ceiling height in the basement." *Id.* at 836.

²²⁴ *Id.* at 837. The court found no reason to fit the case into any of the exceptions to the rule, finding instead that public policy suggested it be applied.

²²⁵ 428 F.2d 1071 (D.C. Cir. 1970), *cert denied*, 400 U.S. 925 (1970). Included in *BERGER & WILLIAMS*, *supra* note 38, at 292 (introduced by an excellent discussion of the history of tenement house law as it evolved into modern housing codes (with illustrations), and followed by a number of interesting notes, cases and excerpts); *CASNER, ET AL*, *supra* note 35, at 400 (reprinting *Javins* at length, and then following it with excellent notes and cites, including: *Duncan Kennedy, The Effect of the Warranty of Habitability on Low Income Housing: 'Milking' and Class Violence*, 15 FLA. ST. U. L. REV. 485 (1987) (arguing that enforcing a nondisclaimable warranty of habitability would benefit low income tenants at the expense of their landlords), and *Bruce Ackerman, Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L. J. 1093 (1971) (analyzing housing code enforcement and its effect on slum housing); *CRIBBET*, *supra* note 12, at 447; *DWYER & MENNELL*, *supra* note 57, at 634 (includes a detailed section on tenant's rights to habitable premises, which includes an excerpt from Charles Meyers's article, *The Covenant of Habitability and the American Law Institute*, 27 STAN. L. REV. 879, 889-93 (arguing that imposition of a warranty of habitability will ultimately hurt the market for low-income housing)); *HYLTON, ET AL*, *supra* note 73, at 441; *JOHNSON, ET AL*, *supra* note 64, at 340; and *SINGER*, *supra* note 48, at 815-21. Not included in *NELSON, ET AL*, *supra* note 67.

the earlier District of Columbia case, *Brown*,²²⁶ in that the 1,500 Housing Code violations arose during the course of the lease and apparently were not present at the lease signing.²²⁷ Thus, the court could not rely on the illegal contract argument advanced previously. Instead, the court found a warranty of habitability based on standards set in the Housing Code to be implied in the leases of urban residential units.²²⁸ The remedies for breaches of such warranties are the standard remedies available for breach of contract.²²⁹ In so holding, the court had to go against traditional common law doctrine that held that the landlord has no duty to make repairs during the course of the leasehold unless there was a covenant to do so in written lease contract.²³⁰ Finding that, "[t]he continued vitality of the common law * * * depends upon its ability to reflect contemporary community values and ethics,"²³¹ the court considered the changing nature of the interests in a leasehold from feudal and rural to modern and urban, the court stated that, "poor housing is detrimental to the whole society, not merely to the unlucky ones who must suffer the daily indignity of living in a slum."²³²

Professor Cribbet notes that this was a very influential case: more than forty states followed suit and found that residential leases contained implied warranties of habitability.²³³ Do such implied warranties reflect the courts' views that tenants in general, poor tenants in particular suffer from their unequal bargaining power *vis a vis* landlords?

However, that text contains *Hilder v. St. Peter*, 478 A.2d 202 (N.J. 1984), which followed and cited *Javins*, and contains a number of good references.

²²⁶ Discussed *supra* note 222-24, and accompanying text.

²²⁷ *Javins*, *supra* note 227, at 1073. There were approximately 1,500 violations of the Housing Code in the building.

²²⁸ *Id.* at 1072-73.

²²⁹ *Id.* at 1072.

²³⁰ *Id.* at 1074. In so doing, the court quoted another theme I stress in property law: "the body of property law * * *, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical." *Id.* (quoting *Jones v. United States*, 362 U.S. 257, 266 (1960)).

²³¹ *Id.* (quoting its own earlier opinion of *Whetzel v. Jess Fischer Management Co.*, 282 F.2d 943, 946 (1960)).

²³² *Id.* at 1079-80.

²³³ See CRIBBET, *supra* note 12, at 460, n.4. Accord, SINGER, *supra* n. 48, at 822 ("almost all states"); "Judge J. Skelly Wright's eloquent opinion in *Javins*, is credited with supplying the impetus for one of the most striking reforms in the common law of property." JOHNSON, ET AL., *supra* note 64, at 349.

c. *The Fair Housing Act*

The Fair Housing Act²³⁴ has generated a number of useful cases. Three are presented below.

*Asbury v. Brougham*²³⁵ presents a fairly straightforward example of violation of section 1982 and the Fair Housing Act as well as laying out the three-part *McDonnell Douglas* analysis.²³⁶ The violation was fairly clear, Asbury, an African-American woman with sufficient income to qualify for the apartment complex in question, was told there were no vacancies at Brougham Estates, and then steered her towards Westminster Apartments, a predominantly black complex.²³⁷ However, the next day Asbury's white sister-in-law received different treatment.²³⁸ The court concluded that Asbury had made a prima facie case that several townhouses that were subsequently made available to white males could have been rented to Asbury.²³⁹ The court rejected the complex's claim that Asbury had too many children for the available units, as pretextual.²⁴⁰ It also disagreed that evidence of minority occupancy in the twenty- to twenty-five percent range conclusively rebutted the claim of intentional discrimination.²⁴¹ In upholding the award of punitive damages for outrageous conduct, the court noted that a policy of denying that there were any vacancies until after the rental manager had visually observed the prospective tenant, and

²³⁴ 42 U.S.C. § 3601 (1994), included in CRIBBET *supra* note 12, at 414; DUKEMINIER & KRIER, *supra* note 20, at 460-77 (including *Soules v. HUD*, 967 F.2d 817 (7th Cir. 1992)); BERGER & WILLIAMS, *supra* note 38, at 1048. Not included in BRUCE & ELY, *supra* note 34, but discussed in cases at 695-707 and 867-73; HYLTON ET AL, *supra* note 73, at 617 (briefly); JOHNSON, ET AL, *supra* note 64, at 287; SINGER, *supra* note 48, at 939-1042.

²³⁵ 866 F.2d 1276 (10th Cir. 1989). Included in CASNER, ET AL, *supra* note 35, at 839; CRIBBET, *supra* note 12, at 46; JOHNSON, ET AL, *supra* note 64, at 290; SINGER, *supra* note 48, at 945-50.

²³⁶ *Id.* at 1279. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under *McDonnell Douglas*, the plaintiff must first come forward with prima facie proof of discrimination. Then the burden shifts to the defendant to produce evidence of legitimate, non-discriminatory reasons for not renting or for refusing to negotiate for rental. Third, the plaintiff must then show that the reasons put forward were pretextual.

²³⁷ *Id.* at 1280.

²³⁸ *Id.* at 1280-81.

²³⁹ *Id.* at 1281.

²⁴⁰ *Id.* Asbury may have been ineligible for certain units because of her child, but there was evidence that exceptions to these rules had been granted on several occasions.

²⁴¹ *Id.* at 1281-82. African-American occupancy was twenty percent in 1983 and twenty-five percent in 1984. This figure may get some students thinking about the concept of "tipping" that figures heavily in the *Starrett* case. See *infra* notes 244-64, and accompanying text.

other policies that could be used to exclude tenants, such as the "no child rule," were not written down and, thus, could be used to exclude tenants based upon racial animus.²⁴² Finally, the plaintiff was awarded costs and attorney fees for successfully defending her appeal, but was denied damages and double costs, because, the court held, the appeal was not frivolous.²⁴³

By contrast to the unambiguous nature of the violation in *Asbury*, *United States v. Starrett City Associates*²⁴⁴ presents a more ambiguous fact pattern and generally produces a discussion that mirrors the academic literature.²⁴⁵ Starrett City is the largest housing development in the nation, consisting of 5,881 units in forty-six high-rise buildings.²⁴⁶ The developer pledged to maintain a racial distribution among its tenants of sixty-four percent white, twenty-two percent African-American and eight percent Hispanic,²⁴⁷ at least in part at the behest of the City of New York.²⁴⁸ This distribution, of course, could only be accomplished by a non-color-blind policy, which the developers argued was not motivated by any racial animus, but rather to prevent "white flight" and "tipping."²⁴⁹ However, the result of the integration plan was that minority applicants

²⁴² *Id.* at 1282-83. The policies had resulted in other complaints against Brougham Estates.

²⁴³ *Id.* at 1284. Such awards are allowed under 42 U.S.C. § 1988(10) (Supp. V 2000).

²⁴⁴ 840 F.2d 1096 (2d Cir. 1988). Included in DWYER & MENNELL, *supra* note 57, at 657; JOHNSON, ET AL., *supra* note 64, at 304; KURTZ & HOVENKAMP, *supra* note 79, at 968; RABIN, KWALL & KWALL, *supra* note 31, at 105 (as a major case with additional notes, including a quote from Professor James Kushnert, calling Starrett, "the most significant endorsement of apartheid in America since Plessy v. Ferguson, which upheld the institution of racial segregation." *Id.* at 114 (quoting James Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049, 1118 (1989)); and SINGER, *supra* note 48, at 950-54.

²⁴⁵ The bulk of the academic literature has supported the majority opinion in Starrett. However, Starrett City does have its defenders including, Judge Newman, (dissenting in Starrett City Associates, 840 F.2d at 1103); Thomas Simon, *Double Reverse Discrimination in Housing: Contextualizing the Starrett City Case*, 39 BUFF. L. REV. 803 (1991) (finding only one commentator writing in defense of Starrett City) and Dale J. Louis, Note, *Racial Integration in Urban Public Housing: The Method is Legal, the Time has Come*, 34 N.Y.L. SCH. L. REV. 349 (1991).

²⁴⁶ Starrett, 840 F.2d at 1098.

²⁴⁷ *Id.*

²⁴⁸ The United Housing Foundation (UHF) had originally planned a development of cooperatives on the site in 1971, and had received a tax abatement for it, but abandoned the project. When Starrett City announced that it wanted to take over and build rental apartments, fears that the development would be filled overwhelmingly with minorities were expressed by the surrounding community. As a result, the New York City Board of Estimate only approved the transfer of the abatement upon the condition that the development be maintained as a racially integrated complex. *Id.*

²⁴⁹ *Id.*

waited up to ten times longer than the average white applicant to obtain apartments.²⁵⁰ The resulting lawsuit presented a case of suspect decision-making and strange bedfellows – the NAACP and President Reagan's anti-affirmative action point man were on the same side.²⁵¹

Affirming the lower court on all particulars, the Second Circuit noted several points. First, the Fair Housing Act had been enacted pursuant to Congress' Thirteenth Amendment²⁵² powers.²⁵³ Second, housing practices with a discriminatory purpose and those that disproportionately affect minorities without any showing of animus, violate Title VIII.²⁵⁴ And finally, the court stated that, while "a race-conscious affirmative action plan does not necessarily violate federal constitutional or statutory provisions,"²⁵⁵ the endless time-frame, the "rigid racial quotas," and the fact that the ceiling quotas put the burden on those least represented in the political process, all called into question the validity of the program.²⁵⁶ Although white flight may be taken into account in integration decisions, "it cannot serve to justify attempts to maintain integration at Starrett City through inflexible racial quotas that are neither temporary in nature nor used to remedy past racial discrimination or imbalance within the complex."²⁵⁷

²⁵⁰ *Id.* at 1099.

²⁵¹ In December 1979, a group of African-American applicants initiated an action in the Eastern District of New York, and a class was certified in June, 1983. *See* Arthur v. Starrett City Assocs., 98 F.R.D. 500 (E.D.N.Y. 1983). A settlement providing that Starrett would make an additional thirty-five units a year available to minority applicants for five years was reached in May, 1984. Arthur v. Starrett City Assocs. No. 79-CV-3096, slip op. at 1 (E.D.N.Y. April 2, 1985). However, the federal government filed the instant suit one month later in June, 1984 to resolve the issue to determine the legality of Starrett's policy. United States v. Starrett City Associates, 605 F. Supp. 262, 263 (E.D.N.Y. 1985). The dissent seemed to question this timing. Starrett City Associates, 840 F.2d at 1105 (Newman, J., dissenting) ("Just one month after that settlement was reached, the United States filed this suit, *ostensibly* concerned with vindication of the rights of the same minority applicants for housing that had just settled their dispute on favorable terms." [emphasis added]). Why then was the suit filed? Professor Simon casts the decision in light of what he describes as the Reagan administration's "at best, feeble attempt" at enforcing the Fair Housing Act. In this context, the suit allowed William Bradford Reynolds, Reagan's Assistant Attorney General, and point man in the effort to dismantle all affirmative action programs, to demonstrate that he opposed all quotas. Simon, *supra* n. 245, at 824-825, (citing Hellman, *A Dilemma Grows in Brooklyn: Starrett City Fights to Keep its Racial Mix*, New York, Oct. 17, 1988.)

²⁵² U.S. CONST., AMEND. XIII (1865).

²⁵³ Starrett, *supra* note 246, at 1100.

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 1101, (citing United States v. Paradise, 478 U.S. 1019 (1987) (14th amendment); United Steelworkers v. Weber, 443 U.S. 193 (1979)

²⁵⁶ Starrett, 840 F.2d at 1102 (citations omitted).

²⁵⁷ *Id.* However, the court concluded that it "did not intent to imply that race is

The dissent, calling Starrett City "one of the most successful examples in the nation of racial integration in housing,"²⁵⁸ noted that the policy had been carried forward with the knowledge and financial support of Housing and Urban Development ("HUD").²⁵⁹ They concluded that, at minimum, Starrett City should be allowed to argue on the merits at trial that their scheme furthered a compelling state interest in promoting integrated housing, and was narrowly tailored to achieve that interest.²⁶⁰ Further, the dissent would have held that the plan did not violate the Fair Housing Act because it attempted to achieve racial integration.²⁶¹

Thus, the case lends itself to discussion on a number of "highly controversial issue[s] of social policy,"²⁶² in light of the two clear facts that emerge. On one hand, the intent of the scheme was to maintain integrated housing, and on the other, the effect was to make it more difficult for minorities to acquire apartments in Starrett City. Is it appropriate to acknowledge the realities of "tipping" and "white flight?" Are color-conscious solutions to real racial problems ever appropriate? Was the NAACP on the "wrong" side in the case? What were the Reagan administration's true motives?

The case of *Jancik v. Department of Housing and Urban Development*²⁶³ illustrates another aspect of the Fair Housing Act in action. Jancik came to the attention of the Leadership Council for Metropolitan Open Communities (the "Council") when he advertised an apartment for rent and included phrase "mature person preferred" in the advertisement.²⁶⁴ White and African-American testers were used.²⁶⁵ In phone calls he asked about their race and indicated he

always an inappropriate consideration under Title VIII in efforts to promote integrated housing." *Id.* at 1103.

²⁵⁸ *Id.* at 1103 (Newman, J., dissenting).

²⁵⁹ *Id.* at 1104 (Newman, J., dissenting).

²⁶⁰ *Id.* at 1105 (Newman, J., dissenting).

²⁶¹ *Id.* at 1105-06 (Newman, J., dissenting).

²⁶² *Id.* at 1107 (Newman, J., dissenting).

²⁶³ 44 F.3d 553 (7th Cir. 1995), included in CRIBBET *supra* note 12, at 418. Not included in CASNER, ET AL, *supra* note 35, at 843-44, n. 3 (note case); DUKEMINIER & KRIER, *supra* note 20 (but, as noted, the authors substitute a case on the Fair Housing Act, see *supra* note 234); JOHNSON, ET AL, *supra* note 64, at 294 in the context of a long section on the Fair Housing Act, which also includes as a principal case *Asbury v. Brougham*, 866 F.2d 1276 (10th Cir. 1989) and *United States v. Starrett City Associates*, 840 F.2d 1096 (2d Cir. 1988); RABIN, KWALL & KWALL, *supra* note 31 at 114, n. 15 (brief mention in footnote); SINGER, *supra* note 48, which includes instead *Asbury v. Brougham* at 945-50 and *United States v. Starrett City Associates*, at 950-54.

²⁶⁴ *Jancik*, 44 F.3d at 554.

²⁶⁵ *Id.* Some students will usually not know what a "tester" is until this point.

did not want anyone with children.²⁶⁶ The Council found that the advertisement violated the Fair Housing Act's prohibition on advertisements that indicate a preference based on familial status, and the phone statements did so in regard to both race and familial status.²⁶⁷

After leading the students through the mechanics of the complaint process,²⁶⁸ I turn to the significant issue of the lowered burdens of proof the plaintiffs face under this section of the Fair Housing Act. First, violation of the section was based upon an objective "ordinary reader" standard.²⁶⁹ Second, there is no need to show intent to discriminate to prove a violation of the section.²⁷⁰ However, intent to discriminate may be evidence of unlawful discrimination, and the court found such intent inherent in Jancik's questioning regarding children.²⁷¹ Here, the students need to note that, although Jancik clearly expressed a preference for adults without children, he never expressed a preference for one race over another. Thus, the familiar problem of proving intent might have presented some difficulty. Here, there was substantial evidence to support the finding of racial discrimination. First, the court stated that "[t]here is simply no legitimate reason for considering an applicant's race."²⁷² Second, the questions would "suggest

²⁶⁶ *Id.* at 554-55. The white tester first indicated that her name (Gunderson) was of Norwegian origin and Jancik then asked whether "that's white Norwegian or black Norwegian." *Id.* at 554. The African-American tester was also asked her race but did not respond. *Id.* at 555.

²⁶⁷ *Id.* The Act makes it unlawful:

To make, print, or publish, or cause to be made, printed, or published any notice, statement or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation or discrimination.

Section 804(c) of the Fair Housing Act, 42 U.S.C. § 3604(c).

²⁶⁸ The Council complained to the Department of Housing and Urban Development of Jancik's violations, and HUD's General Council issued a "Determination of Reasonable Cause and Charge of Discrimination." The matter was then placed before an Administrative Law Judge, as provided by 42 U.S.C. 3612(b), who awarded damages of \$21,386.14 to the Council. The Judge also awarded \$2,000 to the African-American tester, a civil penalty of \$10,000, an injunction against further discrimination, and, later in response to a subsequent petition, \$23,842.50 to the Council for legal fees. Jancik appealed to the Seventh Circuit pursuant to 42 U.S.C. § 3612(i). Janick, 44 F.3d. at 555.

²⁶⁹ *Id.* at 556. The court stated that every circuit that had considered the issue had applied this standard, and cited cases from the Second, Fourth and Sixth Circuits. *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.* at 557.

²⁷² *Id.* (quoting *Soules v. HUD*, 967 F.2d 817, 824 (2d Cir. 1992) (dicta)).

to an ordinary listener that the racial question was part of the same screening process" as the questions which expressed a familial preference.²⁷³ Finally, Jancik had never rented to an African-American until the Council filed its complaint with HUD.²⁷⁴

d. *Section 8 Housing*

Professor Cribbet previously used one case, *Swan v. Gastonia Housing Authority*,²⁷⁵ to illustrate some of the issues raised by the "Section 8" program.²⁷⁶ Most students need a bit of background information on the program, which built upon the Housing Act of 1937. The Act sought to provide low-income families with direct financial assistance in order to obtain adequate rental housing, while enhancing the diversity of rental housing developments containing Section 8 tenants.²⁷⁷

The Swanns were Section 8 tenants under their landlord, William Huffstetler.²⁷⁸ When Huffstetler gave them notice of eviction, the Swanns believed it to be in retaliation for their use of a legal clinic in an earlier proceeding against the landlord.²⁷⁹ The termi-

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ 675 F.2d 1342 (4th Cir. 1982). Swann was included in Cribbet's Sixth edition as a case-in-chief, but is only included in the Seventh edition as a note case. The case is not replicated elsewhere, although some texts do provide coverage of Section 8. See CRIBBET, *supra* note 12, at 441.

²⁷⁶ Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (codified as amended at 42 U.S.C. § 5301 (1998 & Supp. II 1990)).

²⁷⁷ An excellent article of manageable length for students, that introduces the Section 8 program and highlights some of its problems is, Deborah Kenn, *Fighting the Housing Crisis with Underachieving Programs: The Problem with Section 8*, 44 WASH. U. J. URB. & CONTEMP. L. 77 (1993). Professor Kenn argues that the Public Housing Agencies, which administers the program and provides payment to landlords, is obligated to stop rental subsidy payments to landlords that fail to maintain minimum housing quality standards promulgated by the Department of Housing and Urban Development. However, landlords are allowed to evict a tenant for nonpayment of rent. This a serious loophole, which allows the landlord to circumvent the requirement that the landlord must only evict a tenant for "good cause," even where the tenant is a "whistle blower" regarding a health or safety problem in the leasehold. This violates the Due Process Clause.

²⁷⁸ In 1978, the City of Gastonia acquired and demolished the Swann's home. The City helped the Swanns relocate by providing them with a Certificate of Family Participation in the Gastonia Housing Authority's ("GHA") Section 8 program. This certification allowed the family to obtain rental subsidies if they could find a landlord willing to participate. Huffstetler agreed to join the program and entered into a lease agreement, which allowed for termination by either party with thirty days' notice. However, GHA's program required that leases were automatically renewed unless a termination procedure was followed. Swann, 675 F.2d at 1343-44.

²⁷⁹ Huffstetler had previously brought an eviction action against the Swanns, and the Swanns turned to a legal aid clinic for assistance. The case was dismissed, because

nation notice was sent to the Gastonia Housing Authority ("GHA"), and the Swanns asked that it either disapprove the termination or hold a hearing before deciding the issue. An informal conference was held and GHA allowed Huffstetler to terminate the leasehold at the end of the lease term.²⁸⁰ Rebuffed by GHA, the Swanns initiated a class action suit on behalf of all present and future participants in Gastonia's Section 8 program.²⁸¹

The District Court held for the Swanns.²⁸² The Fourth Circuit found that a statutory requirement of good cause for eviction was implied in § 1437f, which requires the landlord to give notice of eviction to the agency; a requirement that would be "pointless if the housing authority was not to exercise some judgment before an eviction occurs."²⁸³ However, because the Circuit Court found no basis in the statute for the "full-fledged hearing" required by the District Court, it was called upon to address the Due Process Claim.²⁸⁴ For the Due Process Clause to apply, two elements must be met: there must be an expectation in a continued leasehold rising to the status of a property interest, and second, the eviction must constitute state action.²⁸⁵ For the former proposition the court cited *Goldberg v. Kelly*²⁸⁶ in concluding that "[i]t is now beyond question that such statutory entitlements are protected by the due process clause."²⁸⁷ Since this is the students' first exposure to the seminal case of *Goldberg, I*, accordingly, take some time explain-

there had not been adequate notice. Two months later the landlord told them their lease would not be renewed. *Id.* at 1344.

²⁸⁰ *Id.* Notice was given pursuant to 42 U.S.C. § 1437f(d)(1)(B), which required that a landlord send notice of the termination to the agency. The law allowed tenants to present their objections, however, it did not explicitly require that there be good cause for a termination. *Id.* The court noted that the law had subsequently been modified (and, thus, was not applicable to the instant case) to require good cause. *Id.* at n. 1, (*citing* § 1437f(d)(1) (B) as amended by the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 326(e), 95 Stat. 357, 407 (1981)).

²⁸¹ The Swanns filed a class action suit under 42 U.S.C. § 1983 (1976), alleging violations of the Due Process Clause of the Fourteenth Amendment and the applicable version of § 1437f, which, as noted, did not explicitly require good cause. *Id.* at 1344.

²⁸² *Swann v. Gastonia Housing Authority*, 502 F. Supp. 362 (D.C.N.C. 1980). The court held that a requirement of cause for eviction was implied in the old version of § 1437f, which was a constitutionally protected expectation of continued occupancy. Thus, absent cause for eviction there was state action. In its final order, the court outlined the elements of the hearing that GHA should provide. *See* Final Order, April 8, 1981.

²⁸³ *Swann*, 675 F.2d at 1345.

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 1345-46.

²⁸⁶ 397 U.S. 254 (1970).

²⁸⁷ *Swann*, 675 F.2d at 1346.

ing its significance.²⁸⁸ The students have already read *Shelley v. Kraemer*²⁸⁹ and, thus, they are prepared to follow the state action discussion more easily. Finally, the court concluded that the appropriate process due was adequately provided by state court eviction proceedings.²⁹⁰

e. *Rent Control*

In *Pennell v. City of San Jose*,²⁹¹ faced with the problem of "excessive and unreasonable rent increases" causing hardships upon individual tenants, the City adopted a rent control ordinance that allowed landlords to raise their rents by at least eight percent. The ordinance required, however, that a hearing officer consider, inter alia, "hardship to the tenant," in determining whether to allow a greater increase.²⁹² Landlords objected to this factor, claiming it caused a taking under the Fifth and Fourteenth Amendments.²⁹³ They argued the first six factors served the purpose of eliminating

²⁸⁸ Of course, students will read Goldberg, as a case-in-chief in their Constitutional Law and/or Administrative Law classes.

²⁸⁹ See *supra* notes 101-10, and accompanying text for a discussion of *Shelley*.

²⁹⁰ Swann, 675 F.2d at 1346-47.

²⁹¹ 485 U.S. 1 (1988). Included in BRUCE & ELY, *supra* note 34, at 155 (note case only); CASNER, ET AL, *supra* note 35, at 1163-64, n. 2 (as a note case in the context of the regulatory takings cases); CRIBBET, *supra* note 12, at 468; DWYER & MENNELL, *supra* note 57, at 694 (as part of a section on rent controls that includes excerpts from Richard Arnett, *Time for Revisionism on Rent Control?* JOURNAL OF ECONOMIC PERSPECTIVES 99, 100-02 (Winter 1995), discussing the history of "first generation" rent controls from the World War Two era and "second generation" rent controls that proliferated in the 1970s. He argues that the almost unanimous opposition of economists to rent controls has been muted by the changes in second generation rent controls, which may not have a long-term harmful effect on the market); HYLTON, *supra* note 73, at 473 (note case in the context of a sub-chapter on rent controls. It includes *Yee v. City of Escondido*, 503 U.S. 519 (1992) (discussing constitutionality of rent controls in the context of mobile homes)); SINGER, *supra* note 48, at 777-81 (note case in the context of a five-page discussion of rent control). Not included in BERNHARDT, *supra* note 63, (which substitutes *Sterling v. Santa Monica Rent Control Board*, 168 Cal. App. 3d 176 (Cal. Ct. App. 1985) (rent decreased may be based upon deterioration in conditions of a rental unit)); JOHNSON, ET AL, *supra* note 64, at 374 (note case only, but includes a three-page discussion of public housing and rent control); NELSON, ET AL, *supra* note 67, at 490 (with an additional discussion of rent control).

²⁹² *Pennell*, 485 U.S. at 4-5. If a landlord wanted to increase rent by more than eight percent and a tenant objected, the matter would be brought before a Mediation Hearing Officer, who would decide if the proposed rent increase was "reasonable under the circumstances." The officer could consider seven factors, the first six of which are objective and relate to costs and market conditions. The Court focused on the seventh factor, which is "hardship of the tenant," as that was the focus of the appellants' objection to the ordinance. *Id.* at 5, 9.

²⁹³ U.S. CONST., AMEND V (1791) ("nor shall private property be taken for public use without just compensation"), made applicable to the States by the Due Process Clause of the Fourteenth Amendment, U.S. CONST., AMEND XIV, sec. 1 (1868).

excessive rents, but the seventh forced landlords to bear “the ‘public’ burden of subsidizing their poor tenants’ housing.”²⁹⁴ Writing for the majority, Chief Justice Rehnquist held that it would be premature for the Court to consider this key issue, because no hearing officer had used the “hardship to the tenant” factor to reduce any landlord’s proposed rent.²⁹⁵ Next, the Court held that the ordinance was not “facially invalid” under the Due Process Clause, because it was not “arbitrary, discriminatory or demonstrably irrelevant to the policy the legislature is free to adopt.”²⁹⁶ Governments may intervene in the marketplace to regulate prices for the protection of consumers.²⁹⁷ Finally, the ordinance did not violate the Equal Protection Clause on its face because it was rationally related to a legitimate state interest.²⁹⁸

Although Justice Scalia agreed that the ordinance violated neither the Due Process Clause nor the Equal Protection Clause on its face, he would have considered the Fifth Amendment argument and found that the ordinance constituted a taking.²⁹⁹ Justice Scalia saw the ordinance as requiring some people to bear the burdens that ought to be borne by society as a whole, and saw the solution in a tax-funded subsidy.³⁰⁰ He viewed the program as a way to enact social welfare legislation “off the books,” and outside the democratic process.³⁰¹ But, is it true, as Justice Scalia concludes, that a landlord is called upon “to remedy a social problem that is none of his creation?”³⁰²

f. *Retaliatory Eviction*

In *Edwards v. Habib*,³⁰³ Mrs. Edwards rented housing from Na-

²⁹⁴ Pennell, 485 U.S. at 9.

²⁹⁵ *Id.* at 9-10.

²⁹⁶ *Id.* at 11 (citing *Permian Basin Area Rate Cases*, 390 U.S. 727, 769-70 (1968), (quoting *Nebbia v. New York*, 291 U.S. 502, 539 (1934)).

²⁹⁷ *Id.* at 13.

²⁹⁸ *Id.* at 14 (quoting *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976)).

²⁹⁹ *Id.* at 15 (Scalia, J., concurring in part and dissenting in part).

³⁰⁰ *Id.* at 21-22 (Scalia, J., concurring in part and dissenting in part).

³⁰¹ *Id.* at 22 (Scalia, J., concurring in part and dissenting in part).

³⁰² *Id.* at 23 (Scalia, J., concurring in part and dissenting in part).

³⁰³ 397 F.2d. 687 (D.C. Cir. 1969), *cert. Denied*, 393 U.S. 1016 (1969). Included in CRIBBET *supra* note 12, at 495 and Singer, *supra* note 48, at 836, 840-41. Not included in BERGER & WILLIAMS, *supra* note 38, at 318 (as a note case) “An early, influential case” in the context of the materials discussed, *supra* note 225, and accompanying text; BRUCE & ELY, *supra* note 34, at 133; BURKE, BURKHART & HELMHOLZ, *supra* note 70 (which substitutes *Building Monitoring Sys., Inc. v. Paxton*, 905 P.2d 1215 (Utah 1995) (following *Edwards*, and initiating the defense of retaliatory eviction in Utah)); CASNER, ET AL, *supra* note 35, at 498-499 (but cited as “the leading case on the subject” in a two-page section devoted to retaliatory eviction); DUKEMINIER & KRIER, *supra* note

than Habib on a month-to-month basis. She complained to the District of Columbia Department of Licenses of more than forty sanitary violations of the Housing Code that her landlord failed to fix. Thereafter, Habib gave her a thirty-day statutory notice to vacate.³⁰⁴ Edwards claimed it was retaliatory eviction.³⁰⁵ Although the general rule had been that a landlord did not need a reason to evict, the District Court held that promulgation of the Housing Code effected a change in the relative rights of landlords and tenants, and allowed for a defense of retaliatory eviction.³⁰⁶ Edwards made several constitutional arguments, but the Court did not rely on them.³⁰⁷ Instead, the Court based its decision on statutory construction and public policy. The Housing Code demonstrated "a strong and pervasive congressional concern to secure for the city's slum dwellers decent, or at least safe and sanitary, places to live."³⁰⁸ Congress depended on private individuals to report violations; thus, permitting retaliatory evictions would frustrate the Code's effectiveness.³⁰⁹

In a dissenting opinion, Judge Danaher found that the majority had taken a fundamental property right away from landlords.³¹⁰ Professor Cribbet omits this dissent,³¹¹ but I find it provokes useful classroom discussion. The dissent argued that if anyone, Congress, should have effected this change,³¹² and suggested that, "in riot-torn" Washington it would be hard to determine if the Housing

20 (but retaliatory eviction is discussed at 543-44); DWYER & MENNELL, *supra* note 57, at 651 (as a note case in a four-page section on retaliatory eviction); JOHNSON, ET AL., *supra* note 64, at 375 (which continues with a follow-up case to Edwards, Robinson v. Diamond Housing Corporation, 463 F.2d 853 (D.C.Cir. 1972)); NELSON, ET. AL., *supra* note 67 (which substitutes Dickhut v. Norton, 173 N.W.2d 297 (Wisc. 1970), which cites and follows Edwards, and reproducing § 5.101 of the Uniform Residential Landlord and Tenant Act; and RABIN, KWALL & KWALL, *supra* note 31, (but retaliatory eviction is mentioned at 95-96)).

³⁰⁴ Edwards, 397 F.2d at 688-89.

³⁰⁵ *Id.* at 689.

³⁰⁶ *Id.* at 690.

³⁰⁷ *Id.* at 690-98. Edwards argued that denying her the right to report problems would violate her First Amendment rights. As well, her right to petition the government is protected not only from the State's interference, but from private interference, too. Professor Cribbet omits these lengthy passages, as they are more appropriate for a Constitutional Law class. See CRIBBET, *supra* note 12, at 496.

³⁰⁸ Edwards, 397 F.2d at 700.

³⁰⁹ *Id.* at 700-01.

³¹⁰ *Id.* at 703-04 (Danaher, J., dissenting). Similar coverage of Judge Robb's dissent to Robinson is provided in SINGER, *supra* note 48, at 844-45.

³¹¹ CRIBBET, *supra* note 12, at 498.

³¹² Edwards, 397 F.2d at 704 (Danaher, J., dissenting, noting that President Lyndon Johnson had recommended to Congress that it adopt legislation prohibiting retaliatory evictions.)

Code violations were caused by landlords or by the tenants themselves.³¹³ Thirty states have statutes dealing with retaliatory eviction.³¹⁴

2. Exclusionary Zoning

a. *General Developments*

In *Stone v. City of Wilton*,³¹⁵ the plaintiffs purchased undeveloped land with the intent of developing a low-income, federally subsidized housing project. The purchase was made in June of 1979, and a preliminary plat was filed in December 1979. In March 1980, the planning and zoning commission recommended to the City Council that the area be rezoned for single-family residents, due to alleged inadequacies in sewer, water, and electrical service.³¹⁶ The plaintiffs, arguing that the service inadequacies were a mere pretext, saw the decision as motivated "by racial discrimination against the 'type' of persons who might live in plaintiffs' housing project."³¹⁷ The Court said that it would have adopted a less deferential standard of review had there been proof of discriminatory purpose, but instead held that the plaintiff had failed to meet its burden of proof on this issue.³¹⁸

Another useful case on exclusionary zoning is *Britton v. Town of Chester*.³¹⁹ Chester was a New Hampshire "bedroom community"

³¹³ *Id.* at 705, n. 7 (Danaher, J., dissenting).

³¹⁴ See, e.g. cases and statutes cited at CASNER, ET AL, *supra* note 35, at 498-99.

³¹⁵ 331 N.W.2d 398 (Iowa 1983). Included in CRIBBET *supra* note 12, at 796. Not included in DWYER & MENNELL, *supra* note 57 (but the authors devote about thirty pages to exclusionary zoning, including two Pennsylvania cases: *Surrick v. Zoning Hearing Board*, 382 A.2d 105 (Pa. 1977) (communities must bear their "fair share" of the problem of population growth rather than attempting to limit community size by exclusionary zoning), and *Fernley v. Board of Supervisors of Schuylkill Township*, 502 A.2d 585 (Pa. 1985) ("fair share" test not applicable when community attempts to exclude all multi-family housing)).

³¹⁶ *Stone*, 331 N.W.2d at 400-01. At the time of the purchase, three quarters of the land was zoned for multi-family dwellings, and one quarter was zoned for single family residential. *Id.* at 400.

³¹⁷ *Id.* at 402.

³¹⁸ *Id.* at 403. The court then went on to conclude that the plaintiff's investment of \$7,900 in the project gave it no vested rights in continued multi-family zoning, and declined to award any damages for money already spent or for lost profits. *Id.* at 403-405.

³¹⁹ 595 A.2d 492 (N.H. 1991). Included in BERNHARDT, *supra* note 63, at 651; CRIBBET *supra* note 12, at 796; JOHNSON, ET AL, *supra* note 64, at 924 (note case only). Not included in BERGER & WILLIAMS, *supra* note 38, at 987 (note case in discussion of Mount Laurel doctrine); BRUCE & ELY, *supra* note 34, at 858; CASNER, ET AL, *supra* note 35 (but the text devotes thirty-six pages to exclusionary zoning. *Id.* at 1253-89); DUKEMINIER & KRIER, *supra* note 20 (but see *infra* note 345); DWYER & MENNELL, *supra* note 57, at 1001 (note case compared to the Mount Laurel cases). The text notes

of mostly single-family homes.³²⁰ No zoning district within the town allowed multi-family housing. The plaintiffs were low- and moderate-income individuals who had been unable to find housing in the town and a builder who owned twenty-three acres that he wanted to develop as a multi-family housing development initiated legal action in 1985. The Town responded in 1986 by amending its housing ordinance to allow multi-family housing.³²¹ However, the ordinance offered illusory hope, effectively making only 1.73 percent of the Town's land available to multi-family development and erecting other subjective barriers.³²² In an opinion not based on state constitutional law arguments,³²³ the court first held that the state's Zoning Enabling Act required that local zoning decisions be made for the health, safety and general welfare of the "community," which was defined as a region greater than just the municipality itself.³²⁴ Further, "growth controls must not be imposed simply to exclude outsiders" and "towns may not refuse to confront the future by building a moat around themselves and pulling up the drawbridge."³²⁵ The court concluded that the "builder's remedy" was appropriately applied in the case.³²⁶ Finally, the court noted that zoning ordinances came about to counter uncontrolled growth, not to exclude any social or economic group, and a "blatantly exclusionary" ordinance, such as Chester's, could not stand.³²⁷

In *Associated Homebuilders v. City of Livermore*,³²⁸ the California

that, while the Mount Laurel decisions generated a great deal of interest, the case's utility was limited by the fact that the decision was based on the New Jersey Constitution. By contrast, Britton, was based upon a statute that was taken from the Standard State Zoning Enabling Act, which is the basis for virtually all states' acts and provides that property should be zoned "to promote the health, safety and general welfare of the community." BURKE, BURKHART & HELMHOLZ, *supra* note 70, at 927; CHUSED, *supra* note 28, at 517; JOHNSON, ET AL, *supra* note 64, at 924.

³²⁰ Britton, 595 A.2d at 493.

³²¹ *Id.* at 493-94.

³²² *Id.* at 494-95.

³²³ *Id.* at 496. The idea that courts avoid constitutional resolutions where a controversy can be resolved by interpretation of a statute, may well be new to first year students.

³²⁴ *Id.* at 495, citing New Hampshire Revised Statute Annotated 674:16.

³²⁵ *Id.* (quoting Beck v. Town of Raymond, 394 A.2d 847 (1978)).

³²⁶ *Id.* at 497. The builder's remedy allows the court to reward the builder who has devoted time and money to the suit. It also allows the court to fashion a rapid remedy to the problem without the delays that are likely to occur if the court simply sends the case back to the municipality. Students generally miss the separation of powers problem presented by the builder's remedy.

³²⁷ *Id.* at 498.

³²⁸ 557 P.2d 473 (Cal. 1976). Included in BERGER & WILLIAMS, *supra* note 38, at 987 (note case); DWYER & MENNEL, *supra* note 57, at 959; JOHNSON, ET AL, *supra* note 64,

Supreme Court rejected a challenge to the constitutionality of an ordinance halting all growth in the city of Livermore. The court contrasted it to ordinances that had the more obvious effect of excluding new poor settlers, but allowing more new rich settlers.³²⁹ The City had adopted by voter referendum an ordinance prohibiting the issuance of new residential building permits until such time as local educational, sewage disposal and water supply facilities complied with specified standards.³³⁰ Was the ordinance a rational measure to assure that no new growth took place until the City's services caught up to demand? Or, was it a disguised attempt to assure the "creation of an aristocracy housed in exclusive suburbs while modest wage earners will be crowded into sterile, monotonous, multifamily projects, or assigned to pockets of marginal housing on the urban fringe?"³³¹ The majority first held that the enactment of the ordinance by initiative did not violate state zoning law³³² and that the ordinance was not void for vagueness.³³³

The court then turned to the question of, whether the ordinance was an unconstitutional exercise of the police power. The plaintiff contended that the ordinance would prevent nonresidents from migrating to Livermore, infringing upon the constitutionally protected right to travel.³³⁴ The court noted that many commentators had argued that similar land use ordinances primarily excluded racial minorities and the poor and, thus, should be subject to strict scrutiny. However, the court noted that the commentators focused on ordinances that prohibited less expensive forms of housing while allowing expensive single-family homes, and, thus, were distinguishable from the Livermore ordinance banning all construction.³³⁵ The court concluded that because municipalities are not isolated islands remote from the needs and problems of the area in which they are located" the ordinance would be constitutional if it reasonably related to the welfare, not just of the residents of Livermore, but also the welfare "of those whom it significantly impacts," which could include a wider region.³³⁶

at 924; and RABIN, KWALL & KWALL, *supra* note 31, at 730 (in conjunction with problem on discouraging or controlling growth). Not included in BERNHARDT, *supra* note 63.

³²⁹ *Id.* at 475-76.

³³⁰ *Id.* at 475.

³³¹ *Id.* at 494 (Mosk, J., dissenting).

³³² *Id.* at 476-81.

³³³ *Id.* at 481-83.

³³⁴ *Id.* at 483.

³³⁵ *Id.* at 484.

³³⁶ *Id.* at 487. Because this last issue could not be resolved on the basis of the

Justice Mosk would have declared the ordinance unconstitutional on the facts before the court. Agreeing that there is an obligation to enact some limitations on growth, Justice Mosk stated:

But there is a vast qualitative difference when a suburban community evokes an elitist concept to construct a mythical moat around its perimeter, not for the benefit of mankind but to exclude all but its fortunate current residents.³³⁷

He noted that because there were no timetables imposed upon the requirement that the public services be made adequate, "procrastination produces its own reward" and the ban could go on indefinitely.³³⁸ Noting that the trend "in the more perceptive jurisdictions is to prevent municipalities from selfishly donning blinders to obscure the problems of their neighbors,"³³⁹ Justice Mosk concluded that total exclusion was both immoral and illegal.³⁴⁰

b. *Mount Laurel I*

The *Mount Laurel* cases before the New Jersey Supreme Court illustrate a proposition that many first-year law students do not yet understand: that courts do not simply announce a result and thereby achieve the desired change. In a very real sense, these cases introduce students to the difficulties of enforcing judicial decisions in a way that foreshadows *Brown I*³⁴¹ and *Brown II*³⁴² in Constitutional Law. In the first *Mount Laurel* case, based on New

information before it, the Court remanded the case for further proceedings. *Id.* at 490.

³³⁷ *Id.* at 493 (Mosk, J., dissenting).

³³⁸ *Id.* (Mosk, J., dissenting). He compared the instant ordinance with California's unsuccessful attempt to exclude migrant workers from the "Dust Bowl" states in the 1930s, and then stated:

With a patchwork of enclaves the inevitable result will be creation of an aristocracy housed in exclusive suburbs while modest wage earners will be confined to declining neighborhoods, crowded into sterile, monotonous, multifamily projects or assigned to pockets of marginal housing on the urban fringe. *Id.* at 494.

³³⁹

Id. at 495 (Mosk, J., dissenting) (citing, *inter alia*, *South Burlington County NAACP v. Township of Mt. Laurel*).

³⁴⁰ *Id.* at 497 (Mosk, J., dissenting).

³⁴¹ *Brown v. Board of Education (Brown I)*, 347 U.S. 483 (1954) (abrogating the doctrine of "separate but equal" in education). See, GUNTHER, *supra* note 17, at 673.

³⁴² *Brown v. Board of Education (Brown II)*, 347 U.S. 483 (1954) (States will make a "prompt and reasonable start" at implementing the holding of *Brown I*, and then proceed "with all deliberate speed.") See, e.g. GUNTHER, *supra* note 17, at 680. See *id.* at 771-93, for a methodology of instruction in the implementation of *Brown* and the difficulties encountered by the federal courts in doing so.

Jersey's State Constitution, the State Supreme Court, "embarked upon a far more activist role than any other court in addressing exclusionary land use regulations."³⁴³ There, in 1975, the court held, that every municipality is required to provide its fair share of *regional* needs for low and moderate income housing, not just sufficient housing for the needs of the municipality itself.³⁴⁴

c. *Mount Laurel II*

I have students read excerpts from *Southern Burlington County NAACP v. Township of Mount Laurel (Mount Laurel II)*.³⁴⁵ Eight years later, the court found that, "Mount Laurel remains afflicted with a blatantly exclusionary ordinance." Further, the court noted, "there is widespread non-compliance with the constitutional mandate of our original opinion in this case."³⁴⁶ The court reiterated that the constitutional power to zone, delegated to the municipalities, is an aspect of the police power, and thus, where it is not exercised for the general welfare violates State Due Process and Equal Protection requirements.³⁴⁷ The court used the case to more clearly define the municipalities' obligations to simplify and speed up litigation.³⁴⁸ Stating that these obligations could not be satisfied by a

³⁴³ CRIBBET *supra* note 12, at 927.

³⁴⁴ *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel*, 336 A.2d 713 (N.J. 1975).

³⁴⁵ 456 A.2d 390 (N.J. 1983). Included in BERGER & WILLIAMS, *supra* note 38, at 980. The text includes Mount Laurel I and Mount Laurel II, and discussion of the Act, but no discussion of Hills Development Corp. The text also includes a look at, whether or not the Mount Laurel doctrine was a success or failure, and a tribute to the late New Jersey Chief Justice Robert Wilentz, who authored Mount Laurel II; BERNHARDT, *supra* note 63, at 655 (note case only); BRUCE & ELY, *supra* note 34, at 865 (as part of a two-page note on cases I, II and III with citations to commentary); CASNER, ET AL, *supra* note 35, at 1254. First reproduced Mount Laurel I, then discussed Mount Laurel II, the responses thereto "including a "bizarre effort" by some mayors to overturn the decision, the enactment of the New Jersey Fair Housing Act, and finally, presents Hills Development Co. See discussion *infra* note 353, and accompanying text; CRIBBET *supra* note 12, at 927; DUKEMINIER & KRIER, *supra* note 20, at 1065-81. Dukeminier and Krier include a lengthy excerpt from Mount Laurel as well as notes and a 1997 *New York Times* article about Mount Laurel's eventual decision to build the required low- and moderate-income housing. *Id.* at 1086-89; DWYER & MENNELL, *supra* note 57, do not reproduce any of the Mount Laurel cases, but do walk students through them with a fairly detailed set of notes. *Id.* at 993-1005; HYLTON, *supra* note 73, at 185 (note case only); JOHNSON, ET AL, *supra* note 64, at 903. The text includes Mount Laurel I and II, but not III; RABIN, KWALL & KWALL, *supra* note 31, at 701-02; SINGER, *supra* note 48, at 1030-42, presents Mount Laurel I followed by four pages of notes, including a discussion of Mount Laurel II, the State Fair Housing Act and Mount Laurel III.

³⁴⁶ *Id.* at 410.

³⁴⁷ *Id.* at 415.

³⁴⁸ *Id.* at 418.

"good faith attempt,"³⁴⁹ the court outlined a panalogy of measures municipalities must take to comply.³⁵⁰ Turning to the particular cases on appeal, the court found that Mount Laurel's amended ordinance was "little more than a smoke screen attempting to hide the Township's persistent intention to exclude housing for the poor."³⁵¹

d. *The New Jersey Fair Housing Act and "Mount Laurel III"*

Two years later, the case prompted legislation that transferred the administration of the municipalities' fair share obligations from the courts to the Council on Affordable Housing, an administrative agency. In *Hills Development Co. v. Township of Bernards of Somerset County*,³⁵² the court upheld the constitutionality of the legislation over protests that it had weakened the *Mount Laurel II* holding, but warned that it would again intervene if the new legislation resulted in further delays.³⁵³ Thus, the series of cases also illustrates the battles between the courts and the legislatures in the social arena. Finally, in 1997, Mount Laurel approved a rental complex of 140 town houses for low- and moderate-income families, apparently ending the twenty-six year legal battle.³⁵⁴

D. *Gender*

A great deal has been written about the inclusion of women's issues in traditional courses, particularly in torts.³⁵⁵ A number of

³⁴⁹ *Id.* at 419.

³⁵⁰ *Id.* at 441-59. Municipalities must remove all barriers created by the city to construction of lower income housing; take affirmative steps to achieve their goals; incorporate inclusionary zoning devices, such as, incentive zoning permitting a density increase bonus to builders, and using mandatory set-asides; zoning to allow for mobile homes; and finally, providing the least cost housing possible where true low income housing cannot be built.

³⁵¹ *Id.* at 460. The court also looked at suits involving the Townships of Chester, Franklin, Clinton and Mahwah as well as the Borough of Carteret, remanding all cases in light of the new standards articulated.

³⁵² 510 A.2d 621 (N.J. 1986).

³⁵³ See CRIBBET *supra* note 12, at 927, n. 3; Paula Franzese, *Mount Laurel III: The New Jersey Supreme Court's Judicious Retreat*, 18 SETON HALL L. REV. 30 (1988). Hills is included in RABIN, KWALL & KWALL, *supra* note 31, at 710.

³⁵⁴ Ronald Smothers, *Ending Battle, Suburb Allows Homes for Poor*, NEW YORK TIMES, April 12, 1997, page A-21. Quoted in DUKEMINIER & KRIER, *supra* note 20, at 1086-89.

³⁵⁵ See Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 CORNELL L. REV. 575 (1993) (noting that feminist theorists have begun to analyze tort concepts, but substantial areas of tort law have yet to be explored); Leslie Bender, *Teaching Torts as if Gender Matters: Intentional Torts*, 2 VA. J. SOC. POL'Y & L. 115 (Spring 1995) (arguing that gender should be a vital aspect of a torts class); Leslie Bender and Perette Lawrence, *Is Tort Law Male?: Foreseeability Analysis and Property Managers' Liability for Third*

available cases illustrate how gender bias can crop up in unusual property law contexts. In addition, I present two cases on the evolving area of landlords' responsibility for rapes of tenants by third parties on the leasehold premises.

1. Restraints on Marriage

The case of *Lewis v. Searles*³⁵⁶ illustrates the sexually-based assumptions that underlie the black letter law. That is, restraints on marriage are invalid on public policy grounds.³⁵⁷ It is interesting to note that the concept is often discussed in gender-neutral terms, although it is virtually always women who are restrained from marriage. In *Lewis*, Letitia Lewis owned the land in question. At her death she had two nieces, Hattie Lewis and Letitia LaForge, and a nephew, James Lewis.³⁵⁸ Unstated, but clear, LaForge was married. Hattie, on the other hand, who was thirty-eight when the will was executed, fifty-three when the will was probated and ninety-five at the time of the trial,³⁵⁹ was never married.³⁶⁰ The will gave all of property to Hattie, but contained a provision that if Hattie should ever marry, the property would go to all three relatives equally.³⁶¹ Hattie initiated the suit, seeking to have title to the land quieted in her, as Letitia and James were by then dead. She argued that it was

Party Rapes of Residents, 69 CHI.-KENT L. REV. 313 (1993) (illustrating one way in which tort law is "male as applied" and is biased in its application); Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41 (Spring 1989) (arguing that feminist theory should be included in the teaching of torts to reflect society's diversity); Carl Tobias, *The Case for a Feminist Torts Casebook*, 38 VILL. L. REV. 1517 (1993) (surveying efforts to date, to develop a torts casebook with a feminist perspective). For similar arguments in other substantive law areas, see Susan Bisom-Rapp, *Contextualizing the Debate: How Feminist and Critical Race Scholarship can Inform the Teaching of Employment Discrimination Law*, 44 J. LEGAL EDUC. 366 (1994) (suggesting that feminist and critical race theories should be included in an employment discrimination class); Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985) (contracts); Judith Resnik, *Revising the Canon: Feminist Help in Teaching Procedure*, 61 U. CIN. L. REV. 1181 (1993) (civil procedure); Elizabeth M. Schneider, *Gendering and Engendering Process*, 61 U. CIN. L. REV. 1223 (1993) (civil procedure).

³⁵⁶ 452 S.W.2d 153 (Mo. 1970). Included in CRIBBET *supra* note 12, at 227; DUKEMINIER & KRIER, *supra* note 20, at 266 (briefly noted without comment); SINGER, *supra* note 48, at 631-34 (which follows it with an excerpt from Frug, *supra* note 355.)

³⁵⁷ See RESTATEMENT (2D) OF CONTRACTS § 189 (a promise is unenforceable on public policy grounds if it is *unreasonably* in restraint of marriage (my emphasis added)).

³⁵⁸ 452 S.W.2d at 154.

³⁵⁹ *Id.* She was about ninety-six years-old when the Missouri Supreme Court heard the case.

³⁶⁰ *Id.*

³⁶¹ *Id.*

a fee simple determinable.³⁶² She also argued that the prohibition against marriage was void.³⁶³ The heirs of Letitia LaForge and James Lewis said the will created only a life estate.³⁶⁴

Should a restraint on marriage be void as against public policy? The court notes there is case law to that effect, but that it is riddled with many exceptions.³⁶⁵ The court also notes that, "men 'have a sort of mournful property right, so to speak, in the viduity of their wives.'" ³⁶⁶ Students are asked to explain "viduity," a term that has dropped from common use.³⁶⁷ Black's Law Dictionary defines it as "widowhood,"³⁶⁸ but the implication is clear from Oxford's English Dictionary. It is of remaining a widow, *i.e.* not remarrying, after the husband's death.³⁶⁹ Or, as one court put it:

It would be extremely difficult to say, why a husband should not be at liberty to leave a homestead to his wife, without being compelled to let her share it with a successor in his bed, and to use it as a nest to hatch a brood of strangers to his blood.³⁷⁰

The court then noted the exception created by *Winget v. Gay*.³⁷¹ To the effect that if the bequest is for the widow's support, and the assumption is that upon re-marriage the new husband will take up that duty, then this is not a penalty for re-marrying.³⁷² The court in *Lewis* found that this was the grantor's intent.³⁷³

³⁶² Hence, the case's placement in the chapter on defeasible fees is presumably the primary reason for Cribbitt's selection of *Lewis*. The court found that Hattie took a defeasible fee rather than a life estate. *Id.* at 156. It is also noteworthy, from a traditional property law perspective, that only two-thirds of the fee is defeasible, since Hattie keeps one-third in any case. *Id.* at 157. Other property points include a discussion of why the other parties could have argued a life estate and generally, how wills and other grants of property are construed, *e.g.* in favor of fee interests over life estates.

³⁶³ *Id.*

³⁶⁴ *Id.* at 155.

³⁶⁵ *Id.*

³⁶⁶ *Id.* at 154 (*quoting* *Knost v. Knost*, 129 S.W. 665, 667 (Mo. 1910) (the court refused to uphold a restraint on marriage placed by father against daughter)).

³⁶⁷ Microsoft Word's spelling and grammar function insists I have spelled "viduity" incorrectly.

³⁶⁸ BLACK'S LAW DICTIONARY 1568 (6th ed.).

³⁶⁹ OXFORD ENGLISH DICTIONARY ONLINE (2000), at <http://dictionary.oed.com> (last visited 10/2/2000). The term appears to have originated in 1420.

³⁷⁰ *Commonwealth v. Stauffer*, 10 Pa. 350, 355 (1849) (*quoted in* Jeffrey G. Sherman, *Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices*, 99 U. ILL. L. REV. 1273 (1999)). Professor Sherman notes that the view that a widow should remain unmarried, even if entitled to remarriage, is traceable back to Saint Augustine.)

³⁷¹ 28 S.W.2d 999 (Mo. 1930). Of course, this was the more usual case of a husband imposing the restriction on marriage, *Lewis* is somewhat unusual in the restraint that is placed upon a niece.

³⁷² *Lewis*, 452 S.W.2d at 155-56.

³⁷³ *Id.* at 156.

2. Curtesy, Dower and the Common Law, Married Women's Acts

Many of the texts give at least some coverage to the historical evolution of women's rights in property; coverage, which demonstrates as strongly as any other topic, the history of male domination over property law.³⁷⁴ Under English common law, initially adopted by most of the states, curtesy gave the husband control of his wife's property for life if he survived her. Dower grew out of the fact that when the husband died, his property immediately went to the eldest son who could evict the dowager. The law gave the widow a one-third interest for her life. Thus, while the husband was alive, the prospective widow had a form of contingent future interest that could restrict alienation against her interests. Under the doctrine of coverture, a married woman lost her status as a legal person, including the ability to contract and control most of her property. However, in the nineteenth century, the "Married Women's Property Acts" tore down this gender-based system. This body of law is of little direct impact, but is of historical interest and clearly revelatory about attitudes that have not disappeared entirely. Thus, the texts generally provide brief coverage,³⁷⁵ although Professor Chused devotes a substantial section to the material.³⁷⁶

³⁷⁴ Compare, JOHN SPRANKLING, UNDERSTANDING PROPERTY LAW 134 (2000) ("[t]he historic foundation of American marital property law is gender bias. England's male-dominated society produced a body of common law that was overtly oriented in favor of men and against women.")

³⁷⁵ Included in BERGER & WILLIAMS, *supra* note 38, at 441-97; BRUCE & ELY, *supra* note 34, at 321-25; BURKE, BURKHART & HELMHOLZ, *supra* note 70, at 261-71; CASNER, ET AL, *supra* note 35, at 839; CHUSED, *supra* note, at 140-214. See also *infra* note 376, and accompanying text; CRIBBET, *supra* note 12, at 46; DUKEMINIER & KRIER, *supra* note 20, at 383-84; DWYER & MENNELL, *supra* note 57, at 216-72; KURTZ & HOVENKAMP, *supra* note 79, at 358-404; NELSON, ET AL, *supra* note 67, at 295-301; RABIN, KWALL & KWALL, *supra* note 31, at 323; SINGER, *supra* note 48, at 665-66.

³⁷⁶ See CHUSED, *supra* note 28, at 147. Professor Chused includes *Bradwell v. State of Illinois*, 83 U.S. 130 (1872) (States may not deny women the right to obtain a license to practice law, because it is a privilege and immunity of United States citizenship), as well as Justice Bradley's concurring opinion. Bradley stated, "[m]an is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life." *Id.* at 141 (Bradley, J., concurring). He also includes *Hancett v. Rice*, 22 Ill. App. 442 (Ill. App. Ct. 1886) (discussing the right of wives to own property separate from their husbands, before the passage of the "Married Woman's Act of 1869"), and the seminal case of *Kirchberg v. Feenstra*, 450 U.S. 455 (1981) (Louisiana statute that gave husbands, as "head and master," the right to unilaterally dispose of joint property, was held to violate the Equal Protection Clause).

3. Tenancy by the Entireties

Prior to teaching *D'Ercole v. D'Ercole*,³⁷⁷ I have already suggested that the traditional common law tenancy by the entireties³⁷⁸ would violate Due Process and Equal Protection. In *D'Ercole*, the plaintiff wife and defendant husband were married for thirty-five years and were paying for a house during that time.³⁷⁹ When they separated, the husband refused to leave the house so she had to leave and move in with a relative.³⁸⁰ Under Massachusetts law, the tenancy by the entireties estate, gave the husband exclusive control and possession during his lifetime.³⁸¹ Divorce would terminate the tenancy,³⁸² allowing her to seek partition. However, the wife was

³⁷⁷ 407 F. Supp. 1377 (D.Mass. 1976). Included in BERNHARDT, *supra* note 63, at 105; CHUSED, *supra* note 28, at 183 (noting that the statute works a real hardship on those who cannot divorce for religious reasons, he asks whether the case involves discrimination on grounds of gender and religion. *Id.* at 184. Further, he informs students that the law in question was changed to one of gender neutrality in 1980. *Id.* (citing MASS. GEN. LAW ch. 209 § 1)); CRIBBET, *supra* note 12, at 382. Not included in BERGER & WILLIAMS, *supra* note 38 (discusses tenancy primarily in the context of its effect on creditors' interests); CASNER, ET AL, *supra* note 35; Barty Brown, *supra* note 35, at 962 (suggesting in a review of the previous edition of Casner's text that *D'Ercole*, be included in the next edition); DWYER & MENNELL, *supra* note 57 (only very briefly discusses tenancy by the entirety); HYLTON, *supra* note 73 (does include *Robinson v. Trousdale County*, 516 S.W.2d 626 (Tenn. 1974) (where husband alone conveyed deed to tenancy by the entirety property, the court took the opportunity to abolish coverture), and *Hoak v. Hoak*, 370 S.E.2d 473 (1988) (holding that a wife obtains a cognizable interest in her husband's professional degree, earned during the marriage and based, in part, on her efforts)); JOHNSON, ET AL, *supra* note 64 (substitutes *Schwab v. Krauss*, 566 N.Y.S.2d 974 (App. Div. 3d Dept 1991), and focuses primarily on the rights of creditors); NELSON, ET AL, *supra* note 67 (discusses the tenancy by the entirety); RABIN, KWALL & KWALL, *supra* note 31 (the authors note that "[p]erhaps the most archaic feature of a tenancy by the entirety that existed under common law was the husband's right to use the rents and profits of the property for his own purposes." *Id.* at 280); SINGER, *supra* note 48. (Professor Singer includes *Sawada v. Endo*, 561 P.2d 1291 (Haw. 1977), and focuses primarily on the use of a tenancy by the entirety to frustrate creditors. However, Singer does include a brief note on "Marital property and male privileges," and a problem in which a gay male couple buys a house together and attempts to create a tenancy by the entirety estate through covenants. *Id.* at 659-65.)

³⁷⁸ For an excellent discussion on the history of tenancy by the entirety estates, that is not too long to recommend to overworked students, see John V. Orth, *Tenancy by the Entirety: The Strange Career of the Common-law Marital Estate*, 1997 B.Y.U.L. REV. 35 (1997).

³⁷⁹ *D'Ercole*, 407 F. Supp. at 1379. It was not clear who had paid for the house, but the plaintiff had worked during all thirty-five years of marriage. In any case, the parties agreed that the issue was not crucial to the case. *Id.* at 1379, n. 2.

³⁸⁰ *Id.* He refused to share the house, sell the house and divide the proceeds, pay the plaintiff her equitable share of the house or rent the house and divide the proceeds.

³⁸¹ *Id.*

³⁸² *Id.* at 1379, n.4.

unable to divorce for religious reasons.³⁸³

Conceding, as it did, that "the common law concept of tenancy by the entirety is male oriented,"³⁸⁴ and that, "a wife who wants the security of indefeasible survivorship can achieve it only by means of a male-dominated tenancy,"³⁸⁵ the court, nevertheless, concluded that the tenancy by the entireties does not violate the Equal Protection Clause.³⁸⁶ The court suggested, but did not hold, that it might reach a different conclusion if the choice of the tenancy had been the result of "coercion, ignorance or misrepresentation."³⁸⁷ The slender reed upon which the court supports this holding is that a Massachusetts resident may choose between any of the three tenancies: tenancy in common, joint tenancy or, assuming a married couple, tenancy by the entireties when they purchase real property.³⁸⁸ What I ask (because the court does not) is what were the relative bargaining positions of husband and wife when the house was purchased in 1962? Were there really three options available as to the form in which they held the house and was having indefeasible survivorship rights an important concern to the D'Ercoles?³⁸⁹ How are the husband and wife equally protected, if the husband's right to the property is guaranteed whereas the wife's right to the property depends upon the will of the probate court, to which access is certainly not free?

The court also made note of the fact that thousands of Massachusetts residents had opted for this form of tenancy.³⁹⁰ Finally, the court noted that Mrs. D'Ercole could still call upon the probate court for relief.³⁹¹ Of course, this route offered no guarantee.

³⁸³ *Id.* The husband apparently sought to induce his wife into divorce, by offering her a one-half interest in the house if she agreed to an uncontested divorce.

³⁸⁴ *Id.* at 1382.

³⁸⁵ *Id.* at 1379 (*quoting* Klein v. Mayo, 367 F. Supp 583, 585 (1973), *aff'd*, 416 U.S. 953 (1974)).

³⁸⁶ *Id.* at 1382

³⁸⁷ *Id.*

³⁸⁸ *Id.* at 1379.

³⁸⁹ Professor Cribbet asks, "[h]ow realistic is the court's assumption that the plaintiff had an option among several categories of concurrent ownership and freely chose tenancy by the entirety?" CRIBBET *supra* note 12, at 387, n. 1. Most would agree that the answer is "not very."

³⁹⁰ D'Ercole, 407 F. Supp at 1382.

³⁹¹ *Id.* The probate court had discretionary power to give Mrs. D'Ercole a share of the property under Mass. Gen. L. ch. 209, §§ 32, 32D and ch. 208, § 34B. *Id.* at 1381, n. 9. The defendant had raised this argument as a defense to the plaintiff's claim, but the court did not reach it because of its conclusion that the statute did not discriminate against women. *Id.*

4. Landlords' Liability for Third Party Assaults

This section is included as part of the section on gender rather than in landlord tenant law because, the majority of cases have involved sexual assaults against female tenants.

In *Walls v. Oxford Management Co.*,³⁹² the plaintiff was sexually assaulted on the premises of the apartment complex where she lived. There had been many crimes against property but none against persons.³⁹³ The court answered two questions:³⁹⁴ whether a landlord had a duty to protect tenants from attack by third parties, and whether a landlord's implied warranty of habitability required a landlord to provide security against criminal attack.³⁹⁵ Turning to the first question, the court considered two competing rules: first, all persons have a duty to exercise reasonable care not to subject others to unreasonable risk, but, secondly, no private persons have a general duty to protect others from third persons.³⁹⁶ The

³⁹² 633 A.2d 103 (N.H. 1993). Included in CASNER, ET AL., *supra* note 35, at 437-38 (brief citation in the context of a short note on the topic); CRIBBET *supra* note 12, at 482; RABIN, KWALL & KWALL, *supra* note 31, at 91-92, n. 8. The authors use *Walls*, instead *Trentacost v. Brussel*, 412 A.2d 436 (N.J. 1980) (court used implied warranty theory to find liability for failure to provide adequate security). Professor Cribbet used *Trentacost* in his sixth edition, but now mentions as a note case following *Walls*. See CRIBBET *supra* note 12, at 486. Not included in BERGER & WILLIAMS, *supra* note 38 (the text includes the topic of landlord liability and briefly discusses *Trentacost v. Brussel*, *Kwaitkowski v. Superior Trading Co.*, 123 Cal. App. 3d 324 (1981) (landlord liability for third party rape of tenant based on special relationship, foreseeability and warranty of habitability), and *Holley v. Mt. Zion Terrace Apts. Inc.*, 382 So. 2d 98 (Fla. Dist. Ct. App. 1980) (landlord liable for third party's rape and murder of tenant for negligent failure to provide reasonable security measures); DWYER & MENNEL, *supra* note 57 (which covers the issue in a long note, including reference to *Kline v. 1500 Massachusetts Avenue Apartment Corp.*, 439 F.2d 477 (D.C.Cir. 1970) and *Trentacost v. Brussel*; BERNHARDT, *supra* note 63 (substitutes *Ann M. v. Pacific Plaza Shopping Center*, 863 P.2d 207 (Cal. 1993) (rape at shopping center was not sufficiently foreseeable to impose a duty upon center's owner); BRUCE & ELY, *supra* note 34, at 89 (note case only, following *Feld v. Merriam*, 485 A.2d 742 (Pa. 1984) (narrow view of negligence holding there to be no general duty, absent a landlord's voluntary undertaking of the duty); JOHNSON, ET AL., *supra* note 64 (devotes little space to landlords' liability for criminal acts of third parties); NELSON, ET AL., *supra* note 67 (which includes *Kline*, plus an additional three pages of commentary); and SINGER, *supra* note 48, at 851, n. 5 (which only briefly mentions the concept).

³⁹³ *Walls*, 633 A.2d at 104. In the previous two years, there had been eleven automobile thefts, three attempted automobile thefts and thirty-one incidents of criminal mischief or theft, but no sexual assaults or crimes against the person.

³⁹⁴ The case was filed in the United States District Court for the District of New Hampshire, which certified the two questions discussed above to the Supreme Court of New Hampshire.

³⁹⁵ *Walls*, 633 A.2d at 104.

³⁹⁶ See Leslie Bender with Perette Lawrence, *Is Tort Law Male?: Foreseeability Analysis and Property Managers' Liability for Third Party Rapes of Residents*, 69 CHI.-KENT L. REV. 313 (1994).

court noted that at early common law, landlords had considerable immunity.³⁹⁷ The law of New Hampshire was that the rule, derived from the "values of the agrarian past," needed to be modified in a modern urban community in favor of negligence principles.³⁹⁸ Thus, landlords owed a general duty of reasonable care to their tenants. But, it would be fundamentally unfair to hold landlords liable for unanticipated criminal acts of third parties as landlords are not insurers of tenants' safety.³⁹⁹ The court then reviewed four exceptions to the rule that one is not liable for the acts of third parties: (1) where there special relationship such as innkeeper-guest, (2) special temptation has been created by the landlord, *e.g.* a known physical defect, (3) where there is overriding foreseeability,⁴⁰⁰ and (4) where there has been a voluntary assumption by the landlord of the duty to provide security.⁴⁰¹ The court rejected the first and third exceptions and limited the second and fourth.⁴⁰² In any case, no exception applied to the instant case.

Finally, turning to the second question, whether the implied warranty of habitability required a landlord to provide security from third party attacks, the court held that the implied warranty only warranted against structural defects, because it in part, was based on standards set in housing codes.⁴⁰³

A more recent Georgia case adopted a more tenant-friendly approach. In *Sturbridge Partners v. Walker*,⁴⁰⁴ the court held that landlords, while not insurers, were responsible for the foreseeable criminal acts of third parties.⁴⁰⁵ Further, the court reversed an earlier case that held, as a matter of law, prior criminal acts against property did not make rape foreseeable.⁴⁰⁶ In *Sturbridge Partners*, the plaintiff was raped and sodomized shortly after midnight in

³⁹⁷ Walls, 633 A.2d at 105. Exceptions included: (1) hidden dangers, (2) properties leased for public use, (3) property the under landlord's control (common staircase rule), and (4) negligent repairs. *Id.* at 105.

³⁹⁸ Walls, 633 A.2d at 105, (*quoting* Sargent v. Ross, 308 A.2d 528, 530 (N.H. 1973)).

³⁹⁹ Walls, 633 A.2d at 105-06.

⁴⁰⁰ Here the court cited, *inter alia*, Trentacost v. Brussel, 412 A.2d 436 (N.J. 1980) (court found landlord liable for third party assault based upon implied warranty theory, noted in CRIBBET, *supra* note 12, at page 482 n. 1; and Kline v. 1500 Massachusetts Avenue, 439 F.2d 477, 483 (D.C.Cir. 1970).

⁴⁰¹ Walls, 633 A.2d at 106.

⁴⁰² Walls, 633 A.2d at 106-07. The known defect exception would be limited by proximate causation analysis, and the assumed duty would be limited by the scope of the duty assumed. *Id.* at 107.

⁴⁰³ Walls, 633 A.2d at 107.

⁴⁰⁴ *Sturbridge Partners v. Walker*, 482 S.E.2d 339 (Ga. 1997).

⁴⁰⁵ *Id.* at 340.

⁴⁰⁶ *Id.* (*reversing* Savannah College of Art & Design v. Roe, 409 S.E.2d 848 (1995)).

May of 1992, following three daytime burglaries that occurred in vacant apartments in March and April of the same year.⁴⁰⁷ The court found these events to be "substantially similar" and, thus, foreseeable.⁴⁰⁸ To the dissent, this ruling was the equivalent of making the landlord an insurer.⁴⁰⁹ Is not this rule akin to a bizarre twist on the "one dog, one bite" rule, allowing each landlord to yield one rape for free, regardless of the number of crimes against property taking place in a given locale?

5. Biases in a Variety of Contexts

Sometimes sexual biases are unearthed in strange places. *Grayson v. Holloway*⁴¹⁰ is, in one sense, a straightforward discussion of the modern trend away from a strict hierarchical interpretation of the habendum and granting clauses of a deed. In *Grayson*, A. J. Holloway and his wife Manervy Holloway, contemplating that G. P. Holloway and his wife, May Holloway would take care of them until their deaths, conveyed him (or them) seventy acres of land. The granting clause mentioned only G.P. However, the habendum clause suggested a tenancy by the entirety in G. P. and May.⁴¹¹ When G.P. died his heirs claimed the land in fee simple, subject only to her homestead and dower rights, and May answered as a tenant by the entirety. She took the land in fee simple upon G.P.'s death.⁴¹² The Chancellor followed the traditional common law rule and held that the habendum clause was repugnant to the granting clause since the granting clause gave G.P. a fee simple and the habendum clause took away from that grant. Thus, the habendum clause was voided and G.P. had a fee simple estate.⁴¹³ On appeal, the court followed the modern trend (which is the real reason the case in the text) of disregarding the formalities of the granting clause and habendum clause and instead attempted to determine the grantor's intent from the document as a whole.⁴¹⁴ But what is fascinating is how the court determined the grantor's intent. The two were to take care of the elder Holloways in exchange for the land and May:

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.* at 341.

⁴⁰⁹ *Id.* (Benham, C.J., dissenting).

⁴¹⁰ *Grayson v. Holloway*, 313 S.W.2d 555 (Tenn. 1958), included in CRIBBET *supra* note 12, at 1120.

⁴¹¹ *Id.* at 556.

⁴¹² *Id.*

⁴¹³ *Id.* at 556-57.

⁴¹⁴ *Id.* at 557-58.

[o]f necessity, was the one who was the main dependence to see that these old people had enough food properly cooked, clean clothing and bedding. It certainly was not contemplated that the son, G. P. Holloway, would do any washing and ironing, cooking and serving meals, making up beds or perform other household duties, which usually devolve upon the wife.⁴¹⁵

Thus, a joint undertaking must have been intended.⁴¹⁶

E. Sexual orientation and familial status

The question of whether a landlord can refuse to rent an apartment to an unmarried couple because of the landlord's religious convictions remains a controversy in search of a case. In *Thomas & Baker v. Anchorage Equal Rights Commission*,⁴¹⁷ a three-judge panel opinion held that the state and local ordinances which forbade landlords from refusing to rent to unmarried couples violated the Free Exercise Clause, and that religion-based exemptions to the ordinances would not violate the Establishment Clause.⁴¹⁸

⁴¹⁵ *Id.* at 558.

⁴¹⁶ *Id.*

⁴¹⁷ *Thomas Baker v. Anchorage Equal Rights Comm'n*, 165 F.3d 692 (9th Cir. 1999). Both the State of Alaska and the City of Anchorage adopted laws making it unlawful, inter alia, to sell, lease or rent to persons because of marital status. *Id.* at 697 (citing Alaska Stat. § 18.80.240(1), Anchorage Mun. Code § 5.20.020(A)). The Anchorage ordinance, but not the state statute, also prohibited publication or advertising in connection with the leasing of property that indicated a preference based on marital status, thus giving rise to the free speech claim. *Thomas & Baker*, 220 F.3d. at 1137 (citing Anchorage Mun. Code § 5.20.020(GG)). (Although the lawsuit was initiated in 1999, the statute was enacted in 1976.) *Thomas & Baker*, 165 F.3d. at 724 (Hawkins, J., dissenting). *Thomas and Baker*, Christian landlords who believed that unmarried cohabitation was a sin and that facilitating cohabitation by renting to an unmarried couple was equally a sin filed suit against various state entities and officials seeking prospective declaratory and injunctive relief under 42 U.S.C. § 1983 and 28 U.S.C. § 2201. *Id.* at 697. Although neither had been charged with any violation of the law or been the subject of any complaint, both alleged that they had refused to rent to unmarried couples in the past and would continue to do so in the future. *Id.* The District Court agreed, resulting in the appeal to the Ninth Circuit. *Id.* The District Court also agreed that the laws violated the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-2000bb-4, but the act was subsequently held unconstitutional, see *City of Boerne v. Flores*, 521 U.S. 507 (1997), and, so, that issue was not considered on appeal. *Id.* at 697, n. 4.

⁴¹⁸ First, the court, after a lengthy discussion, concluded that the case was ripe for review even though there was little to indicate that *Thomas* or *Baker* had yet been harmed in any way. *Id.* at 697-700. Next, the court held that the laws were not constitutionally infirm because of underinclusiveness. *Id.* at 700-02. Then, the court struggled with the "hybrid rights" exception of *Employment Division v. Smith*, 494 U.S. 872 (1990), see *Keith Sealing, Polygamists Out of the Closet: Statutory and State Constitutional Prohibitions Against Polygamy are Unconstitutional Under the Free Exercise Clause*, 14 GA. ST. U. L. REV. at 375-79 (March 2001) (unpublished manuscript, on file with Georgia State University Law Review) ultimately concluding that a generally applicable law

This case would have had broad implications for religiously-based discrimination in housing, at least in the Ninth Circuit, had it been left to stand. As Justice Hawkins noted:

Its potential for harm will be seen when a landlord in this circuit refuses, on the basis of religious beliefs as honestly and firmly held as those of Thomas & Baker, to rent or sell housing to divorced individuals, interracial couples, victims of domestic abuse seeking shelter, or single men or women living together simply because they cannot afford to do otherwise, in spite of state and local laws forbidding such discrimination.⁴¹⁹

Although, in fairness to the majority, the dissent perhaps went too far in its "parade of horrors,"⁴²⁰ gay couples who, by definition are unmarried, could be added to the list. However, rehearing *en*

that placed a burden on religion would still be subject to strict scrutiny following *Smith* if there was a "colorable claim" that it also infringed upon another constitutional right. *Thomas & Baker*, 165 F.3d. at 702-07. The Court found two such rights. First, the Court found that there had been a taking under the Takings Clause of the Fifth Amendment in that the laws interfered with the landlords' dominion and possession of the property. *Id.* at 707-09. The dissent noted, however, that the statutes had been enacted in 1976 and Thomas had entered the landlord business in 1986 long after the exclusion of unmarrieds stick had been removed from landlords' bundle of sticks, effectively debunking the regulatory takings claim. (Further, the date Baker had entered the landlord business was not in the record, arguing against Baker's standing and the general issue of ripeness.) *Id.* at 724, n. 11 (Hawkins, J., dissenting). Second, the court held that the advertising prohibitions infringed upon protected religious speech and not merely commercial speech and, thus, violated the right of free speech guaranteed by the First Amendment. *Id.* at 709-11. However, the dissent pointed out that Thomas and Baker were free to speak, write or publish their views on the immorality of cohabitation in any way they saw fit, but were only prohibited from doing so in the context of the commercial act of renting property, and, therefore, should be subject to the lesser commercial speech standard. *Id.* at 725-26. (Hawkins, J., dissenting). Thus, for the majority two constitutional rights separate from the Free Exercise Clause were implicated and strict scrutiny was appropriate under the hybrid rights exception to the general rule of *Smith*. Under the strict scrutiny test, the court first concluded that the laws substantially burdened Thomas and Baker, *see id.* at 712-14, in part by distinguishing *Braunfield v. Brown*, 366 U.S. 599 (Sunday closing law did not substantially burden Jewish merchants, who for religious reasons also closed on Saturdays and, thus, could only be open for business five days a week). Next, the court concluded that there was no compelling interest in preventing discrimination on the basis of marital status, *see id.* at 714-17, doing so, in part, by severely mischaracterizing Moore. *See infra* note 435-48, and accompanying text. Finally, the court deciding that exempting Thomas and Moore from the law based upon their Christian beliefs would not offend the Establishment Clause, *see id.* at 717-18, sorting through "jurisprudential schizophrenia" to apply the "Lemon test." *See id.* at 717 (*citing* *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (applying three-pronged secular legislative purpose, principal or primary effect and excessive governmental entanglement test to determine Establishment Clause violations)).

⁴¹⁹ *Thomas & Baker*, 165 F.3d. at 726 (Hawkins, J., dissenting).

⁴²⁰ For example, if a landlord discriminated against an interracial couple the majority would probably conclude that even under strict scrutiny applied pursuant to the hybrid exception to *Smith* there was a compelling interest in the prevention of racial

banc was granted,⁴²¹ and, on rehearing, the original opinion was vacated and the case was remanded with instructions to dismiss without prejudice.⁴²² However, calling it “a case in search of a controversy,”⁴²³ the court focused entirely on the question of ripeness and did not reach the constitutional questions presented.⁴²⁴ Thus, this interesting case is problematic for inclusion in a first-year property course.⁴²⁵

1. The Non-traditional Family

Two Supreme Court cases illustrate the constitutionality of ordinances that seek to exclude on the basis of familial status.

In *Village of Belle Terre v. Boraas*,⁴²⁶ the Court upheld a small community’s ordinance restricting land use to one family dwellings.⁴²⁷ The Court found no evidence of animosity against unmar-

discrimination which justified the ordinance, in reliance on *Bob Jones University v. United States*, 468 U.S. 609 (1984). See *Thomas & Baker*, 165 F.3d. at 714-15.

⁴²¹ *Thomas & Baker v. Anchorage Equal Rights Comm’n*, 192 F.3d 1208 (9th Cir. 1999). As the dissent had pointed out, the court had “decided a controversy that does not exist, in favor of parties that had suffered no harm” and there had been just two prosecutions under the laws since their enactment twenty years ago. *Thomas & Baker*, 165 F.3d. at 718 (Hawkins, J., dissenting).

⁴²² *Thomas & Baker v. Anchorage Equal Rights Comm’n*, 220 F.3d 1134 (9th Cir. 2000).

⁴²³ *Id.* at 1137.

⁴²⁴ *Id.*

⁴²⁵ However, it lends itself to analysis in a Constitutional Law course from the perspectives of ripeness and regulatory takings, and, of course, to a course in First Amendment law, concerning the Free Exercise Clause, the Establishment Clause, freedom of speech generally and the definition of commercial speech.

⁴²⁶ *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), included in CRIBBET *supra* note 12, at 907; DUKEMINIER & KRIER, *supra* note 20, at 1044-52 (see *infra* note 431); not included in CASNER, ET AL., *supra* note 35, which instead includes *State v. Baker*, 405 A.2d 368 (N.J. 1979) in which the New Jersey Supreme Court chose not to follow *Village of Belle Terre*, finding its reasoning “unpersuasive,” in holding that an ordinance limiting the definition of “family” to exclude an extended family violated the state constitution. Included in BERGER & WILLIAMS, *supra* note 38, at 961 (note case); BRUCE & ELY, *supra* note 34, at 854; SINGER, *supra* note 48, at 1011-14; DWYER & MENNELL, *supra* note 57 at 940, 950, 951, 954, 959 (note case only) The authors include a state case, *State v. Baker*, 405 A.2d 368 (N.J. 1979) (rejecting *Village of Belle Terre* and holding that municipalities may not condition residence upon the number of unrelated persons present within the household), not included in BERNHARDT, *supra* note 63; included in JOHNSON, ET AL., *supra* note 64, at 880 (note case only); included in NELSON, ET AL., *supra* note 67, at 1145; BURKE, BURKHART & HELMHOLZ, *supra* note 70, at 936; HYLTON, CALLIES, MANDELKER & FRANZESE, *supra* note 73, at 150, 659 (note case only).

⁴²⁷ *Village of Belle Terre* at 10. The Village of 220 homes and some 700 people restricted to two the number of non-related persons that could live together in a home. *Id.* at 2. Six university students moved into one home and, after they were ordered to remedy their violation of the ordinance, three tenants and the property owner filed suit under 42 U.S.C. § 1983. *Id.* at 2-3.

ried couples, especially in light of the fact that two unmarried persons could live together under the ordinance,⁴²⁸ and found that the ordinance passed the "rational relationship" test.⁴²⁹ Professor Cribbet includes Justice Marshall's dissent in which he argued that the ordinance burdened the students' rights of association and privacy under the First and Fourteenth Amendments, and, thus, must be subject to strict scrutiny.⁴³⁰ But, Professor Cribbet omits what appears to be the motivation behind Justice Marshall's dissent.⁴³¹ After noting that federal courts had acted to insure that zoning not be used "as a means of confining minorities and the poor to the ghettos of our central cities,"⁴³² he stated:

But zoning authorities cannot validly consider who those persons are, what they believe, or how they choose to live, whether they are Negro or white, catholic or Jew, Republican or Democrat, married or unmarried.⁴³³

Thus, to Justice Marshall, the ordinance was not a simple line drawing subject to the deferential rational relationship test, but a more subtle attempt to "fence out those individuals whose choice of lifestyle differs from that of its current residents."⁴³⁴

Most students consider *Moore v. City of East Cleveland*⁴³⁵ a constitutional "no brainer," but four dissenting justices disagreed.⁴³⁶ Mrs. Moore, a grandmother, was arrested and jailed for five days and fined twenty-five dollars for violating East Cleveland's housing ordinance, which limited occupancy of a dwelling to a single family, as defined therein.⁴³⁷ Mrs. Moore's crime was living with her son and two grandchildren that were cousins rather than broth-

⁴²⁸ *Id.* at 8.

⁴²⁹ *Id.* at 10

⁴³⁰ *Id.* at 13 (Marshall, J., dissenting).

⁴³¹ DUKEMINIER & KRIER, *supra* note 20, at 1049 does not include this quote in its longer excerpt from Justice Marshall's dissent.

⁴³² *Id.* at 14 (Marshall, J., dissenting).

⁴³³ *Id.* at 15 (Marshall, J., dissenting).

⁴³⁴ *Id.* at 17 (Marshall, J., dissenting).

⁴³⁵ *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), included in CRIBBET *supra* note 12, at 911; DUKEMINIER & KRIER, *supra* note 20, at 1052-54 (note case); CASNER, ET AL., *supra* note 35, at 1230; not included in BERGER & WILLIAMS, *supra* note 38; BRUCE & ELY, *supra* note 34, at 858 (note case only); SINGER, *supra* note 48, at 1017-18 (note case only); DWYER & MENNEL, *supra* note 57 at 940, 949, 950 (note case only); NELSON, ET AL., *supra* note 67, at 1078 (briefly mentioned in a section on substantive due process), BURKE, BURKHART & HELMHOLZ, *supra* note 70, at 943, n. 3 (note case only).

⁴³⁶ Chief Justice Burger and Justices Stewart, Rehnquist and White.

⁴³⁷ Housing Code of the City of East Cleveland, § 1341.08 (1966), which allowed the members of a "family" to live together, but defined the term narrowly to exclude first cousins.

ers.⁴³⁸ Announcing the judgment of the Court, Justice Powell distinguished *Village of Belle Terre*,⁴³⁹ as a case involving an ordinance aimed at unrelated individuals and, simultaneously, as affirming the importance of family needs and family values.⁴⁴⁰ He found, by contrast, that the East Cleveland ordinance was guilty of "slicing deeply into the family itself," by making it a crime for a grandmother to live with her grandson.⁴⁴¹

Although Professor Cribbet is correct in omitting the long discussions of Substantive Due Process,⁴⁴² property rights and the Takings Clause,⁴⁴³ and Mrs. Moore's alleged failure to exhaust her administrative remedies,⁴⁴⁴ I find it necessary to supplement with Justice Brennan's concurring opinion (joined by Justice Marshall) which is the only one of the six opinions which admits that there is a racial component to the case.⁴⁴⁵ Noting that the family pattern countenanced by the East Cleveland ordinance is reflective of "white suburbia," Brennan stated, "[t]he Constitution cannot be interpreted, however, to tolerate the imposition by government upon the rest of us of white suburbia's preference in patterns of family living."⁴⁴⁶ Justice Brennan then went on to marshal sociological evidence of a more prevalent pattern of extended families among African-Americans.⁴⁴⁷ However, Justice Brennan discounted any racially discriminatory motivation for the ordinance.⁴⁴⁸

2. Sexual Orientation

There does not yet seem to be much coverage of sexual orientation issues in property law texts. The Casner text includes one case on housing discrimination based on sexual orientation, *Hubert v. Williams*,⁴⁴⁹ and lists several other useful cases and articles. Ber-

⁴³⁸ Moore, 431 U.S. at 496-97. The cousin that created the illegality came to live with Mrs. Moore when his mother died. *Id.* at 496-97.

⁴³⁹ Discussed *supra* note 426, and accompanying text.

⁴⁴⁰ Moore, 431 U.S. at 498.

⁴⁴¹ *Id.* at 498-99.

⁴⁴² *Id.* at 501-04, 541-52 (White, J., dissenting).

⁴⁴³ *Id.* at 513-21 (Stevens, J., concurring) (finding the ordinance to be an invasion of basic property rights and a regulatory taking).

⁴⁴⁴ *Id.* at 521-31 (Burger, C.J., dissenting).

⁴⁴⁵ *Id.* at 506-13 (Brennan, J., concurring).

⁴⁴⁶ *Id.* at 508 (Brennan, J., concurring).

⁴⁴⁷ *Id.* at 509-10, (Brennan, J., concurring).

⁴⁴⁸ *Id.* at 510 (Brennan, J., concurring). Indeed, as Justice Stewart pointed out, East Cleveland was predominantly African-American, with an African-American City Manager and City Commission. *Id.* at 537 (Stewart, J., dissenting).

⁴⁴⁹ *Hubert v. Williams*, 184 Cal. Rptr. 161 (Cal. App. Dep't Super. Ct. 1982); see

ger and Williams included a brief discussion, noting one case, *Braschi v. Stahl Associates*.⁴⁵⁰ Professor Singer devotes a section to discrimination based on sexual orientation, including a later version of *Braschi v. Stahl Associates*,⁴⁵¹ and also includes *Poff v. Caro*,⁴⁵² in which a landlord refused to rent to homosexuals because he feared that they might contract AIDS, and, finally, includes a case in which a community opposed the building of an AIDS hospice, *inter alia*, "because of the undesirability of having former drug users and homosexuals living in Sabana Ward."⁴⁵³ Dwyer and Mendel do not cover the topic. Bernhardt does not discuss the topic. Nelson does not discuss the topic. Bruce and Ely do not mention the topic. Johnson does so briefly.⁴⁵⁴ Hylton et al do not discuss the topic. As discussed above, the issue of religious exemption from anti-discrimination laws also is of interest in the area of gay rights.⁴⁵⁵

F. *The Differently-Abled*⁴⁵⁶

Unfortunately, there is always a recent example from the community to demonstrate that the group home cases are far from a historical anomaly. As I draft this section, the Town Board of On-

CASNER, ET AL., *supra* note 35, at 888. In Hubert, a quadriplegic male who required twenty-four hour care hired as his attendant a lesbian women, and was subsequently evicted from his apartment. *Id.* at 162. The Appellate Department, Superior Court of Los Angeles County, held that California's Unruh Act, West Ann. Calif. Civil Code § 51 *et seq.* although on its face applied only to discrimination based upon sex, race, color, religion, ancestry or national origin, "clearly" protected homosexuals as a class from discrimination in housing. *Id.* at 163. In doing so, the court relied upon *Marina Point Ltd. v. Wolfson*, 640 P.2d 115 (Cal. 1982) (under Unruh Act landlord may not refuse to rent to family because they have minor children), which was included in CRIBBET'S Sixth Edition at 436, but reduced to a note case in the Seventh Edition presumably because of expanded Fair Housing Act coverage.

⁴⁵⁰ *Braschi v. Stahl Associates*, 1987 WL 343445 (N.Y. Supp.) (unreported) (homosexual partner of deceased holder of rent-controlled lease could succeed to the lease in the same manner as legally married surviving spouse).

⁴⁵¹ *Braschi v. Stahl Associates*, 543 N.E.2d 49 (N.Y. 1989); see SINGER, *supra* note 48 at 770-74.

⁴⁵² *Poff v. Caro*, 549 A.2d 900 (N.J. Super. Ct. Law Div. 1987); see SINGER, *supra* note 48, at 987-88.

⁴⁵³ *Association of Relatives and Friends of AIDS Patients (AFAPS) v. Regulations and Permits Administration or Administración de Reglamentos y Permisos (ARPE)*, 740 F. Supp. 95 (P.R. Dec. 1990), included in SINGER, *supra* note 48 at 1019-21.

⁴⁵⁴ JOHNSON, ET AL., *supra* note 64, at 301 (*citing Braschi*), and Comment, *Braschi v. Stahl: Family Redefined*, 8 J. HUMAN RTS. 289 (1990).

⁴⁵⁵ See *supra* notes 417-25, and accompanying text.

⁴⁵⁶ See generally, Arlene Kanter, *A Home of One's Own: The Fair Housing Amendments Act of 1988 and Housing Discrimination Against People With Mental Disabilities*, 43 AM. U. L. REV. 925 (exploring the tradition of discrimination against people with mental disabilities and the strategies used to overcome such discrimination).

ondaga, a small town adjacent to Syracuse, has voted four to zero to fight a proposed group home for four developmentally disabled men after a public hearing in which nearby residents stated that the home "would pose a threat to their families' safety, lower their property values and add an unpleasant element to their neighborhood."⁴⁵⁷ Thus, the law "deeply intrudes into family associational rights that historically have been central, and today remain central, to a large portion of our population."⁴⁵⁸ The Cribbet text uses three cases to illustrate these issues, although none of them is based on the Americans with Disabilities Act⁴⁵⁹ or the 1988 amendments to Title VIII⁴⁶⁰ and none is in the context of accommodations by landlords.⁴⁶¹

*McMillan v. Iserman*⁴⁶² presents a case in which the majority of

⁴⁵⁷ See Jennifer Jacobs, *Town Opposes Group Home*, THE POST-STANDARD, October 12, 2000, page 8 (Neighbors East section). Opposition is also based on the facts that there are a number of such homes in the town already and the fact that the homes are not on the tax rolls, but nevertheless use taxpayer-funded services. *Id.* at 8. Some speakers expressed the feeling that they didn't want their children to have to look at "them." See also Janet Duncan, "Group Home in Onondaga a Matter of Human Rights," THE POST-STANDARD, October 14, 2000, page A-9.

⁴⁵⁸ Moore, 431 U.S. at 510 (Brennan, J., concurring).

⁴⁵⁹ 42 U.S.C.A. § 12101 *et seq.* (West). Discussed in BERGER & WILLIAMS, *supra* note 38, at 1082.

⁴⁶⁰ Fair Housing Amendments Act of 1988, 42U.S.C.A. § § 3601 *et seq.* (West 1994). Section 3604(f)(3), which defines unlawful discrimination, is included in BERGER & WILLIAMS, *supra* note 38, at 1083.

⁴⁶¹ See *Bronk v. Ineichen*, 54 F.3d 425 (7th Cir. 1995) (jury should be allowed to determine if dog had been taught sufficient skills to aid two deaf tenants in deciding whether landlord violated Fair Housing Amendments Act by refusing to allow them to keep dog in apartment), included in BERGER & WILLIAMS, *supra* note 38, at 1097.

⁴⁶² *McMillian v. Iserman*, 327 N.W.2d 559 (Mich.App. 1983), included in CRIBBET *supra* note 12, at 638; not included in DUKEMINIER & KRIER, *supra* note 20 (which illustrates the issue with *City of Edmonds v. Oxford House*, 514 U.S. 725, 1053 (1995) at 1056-62); not included in BERGER & WILLIAMS, *supra* note 38, which substitutes *Rhodes v. Palmetto Pathway Homes, Inc.*, 400 S.E. 2d 484 (S.C. 1991) (restrictive covenant interpreted not to exclude group homes for the mentally retarded from subdivision; restrictive covenant would violate South Carolina public policy and the Fair Housing Amendments Act); not included in SINGER, *supra* note 48, which includes instead *Familystyle of St. Paul, Inc. v. City of St. Paul*, 923 F.2d 91 (8th Cir. 1991) (state statute requiring that group homes for the mentally retarded be dispersed rather than clustered together not violative of the Fair Housing Amendment Act of 1988 because the requirement acts to place the homes in the community) SINGER, *supra* note 48, at 1021-23; not included in DWYER & MENNEL, *supra* note 57, which includes a seven-page discussion on group homes with no full cases; NELSON, ET AL., *supra* note 67, at 672 (noted as a case which held Shelley's state action doctrine inapplicable), not included in BURKE, BURKHART & HELMHOLZ, *supra* note 70, which substitutes *Costly v. Caromin House, Inc.*, 313 N.W. 2d 21 (Minn. 1981) (denying injunction and allowing construction of a group home for six mentally retarded adults and their house parents in a single-family residential zone) not included in HYLTON, *supra* note 73, which substitutes *Larkin v. State of Michigan Department of Social Services*, 89

students are probably more sympathetic to the result reached by the majority but can be profitably led to see that perhaps the dissent has the better *legal* argument. When Iserman acquired the property in question the deed contained no restrictions that would have prohibited a state-licensed group residential facility for the mentally retarded, but it did contain a restrictive covenant that allowed amendment of its restrictions by a three-fourths vote of the property owners at any time.⁴⁶³ When Iserman contracted with the Alternate Living Program and Health Assistance to lease the property for such a program the homeowners amended the original deed restrictions which included a reciprocal negative easement,⁴⁶⁴ to prohibit such use.⁴⁶⁵ Avoiding the question as an Equal Protection problem,⁴⁶⁶ the Court held that it would be unfair to force Iserman to be in breach of contract by enforcing the amended restriction,⁴⁶⁷ and that the amended restriction was void as violative of Michigan's public policy.⁴⁶⁸ Mindful of the need to limit the number of situations in which a court voids a contract on a public policy basis, the Court demonstrated that there was a clear public policy in favor of providing for the mentally handicapped by reference to case law,⁴⁶⁹ the state constitution⁴⁷⁰ and legislative enacted zoning statutes.⁴⁷¹

F.3d 285 (6th Cir. 1996) (state law regarding group homes for the mentally retarded is discriminatory in violation of the Fair Housing Act).

⁴⁶³ McMillan, 327 N.W.2d at 560.

⁴⁶⁴ The primary purpose of the case is to explicate the negative easement concept. The case cites to *Sanborn v. McLean*, 206 N.W. 496 (1925) as the "leading case" on reciprocal negative easements. My students have just read *Sanborn* in CRIBBET, *supra* note 12, at 628 and have just been reminded of *Shelley v. Kramer*, which is used in the introductory materials but referenced again in CRIBBET, *supra* note 12 at 638. Professor Cribbet notes that *Shelley* has not been extended beyond race to situations such as are now being considered, *e.g.* mental retardation. *Id.* at 561.

⁴⁶⁵ McMillan, 327 N.W.2d at 561.

⁴⁶⁶ The trial court had concluded that the newly adopted easement discriminated against the mentally impaired and therefore violated the Fourteenth Amendment. *Id.* at 560. The Court of Appeals did not reach the constitutional law question. *Id.* at 563.

⁴⁶⁷ *Id.* at 562.

⁴⁶⁸ *Id.* at 562-63.

⁴⁶⁹ *Id.* at 563, (*citing* Bellarmine Hills Assn. v. The Residential Systems Co., 269 N.W.2d 673 (1978), *lv. den.* 405 Mich. 836 (1979)) (state policy to promote "the development and maintenance of quality programs and facilities for the care and treatment of the mentally handicapped.")

⁴⁷⁰ *Id.* at 563, (*citing* M.I. CONST. art. 8, § 8. "Institutions, programs and services for the care, treatment, education or rehabilitation of those inhabitants who are physically, mentally or otherwise seriously handicapped shall always be fostered and supported.")

⁴⁷¹ *Id.* (*citing* M.C.L. § 125.216a(2); M.S.A. § 5.2961(16a)(2) (zoning ordinances not to be used to exclude small state-licensed residential homes.)) The court also

But, as the dissent pointed out, Iserman knew of the deed restrictions when he bought the property and also knew that the restrictive covenant could be amended at any time.⁴⁷² Further, he had the defenses of frustration of purpose and impossibility of performance available to him should he be sued for breach of contract.⁴⁷³ Further, the dissent argued that the Court should exercise caution in finding contracts void as against public policy, that the requirements of a zoning law should not be used in the context of a covenant and that because such facilities are "highly controversial," enforcement of the covenants would not be "cruel or shocking to the average man's sense of justice."⁴⁷⁴

The dissent was forced to face the Equal Protection issue and it is here that the dissent faltered in distinguishing *Shelley* as invalidating a covenant "directed toward a designated class of persons,"⁴⁷⁵ whereas the restrictive covenants at issue in this case did not exclude any designated class of persons but rather prohibited state-licensed residential facilities.⁴⁷⁶ Despite the fact that the number of persons in such a home was limited to six, the dissent concluded that this "fact" shifted the case from a *Shelley* analysis to a *Village of Belle Terre v. Boraas*,⁴⁷⁷ with the permissible purpose of preserving the single-family character of the neighborhood.⁴⁷⁸ In light of the fact that the covenant was amended by the land owners upon learning that a contract had been signed to create a residential home for the mentally retarded and was drafted in terms of a prohibition on state-licensed facilities for the mentally retarded, the dissent's reasoning comes across as transparently disingenuous.⁴⁷⁹

noted that other legislation prohibited excessive concentration of such homes in a given community. *Id.* at 563 (citing M.C.L. § 331.688(1); M.S.A. § 16.610(8)(1)).

⁴⁷² *Id.* at 565 (MacKenzie, J., dissenting).

⁴⁷³ *Id.* (MacKenzie, J., dissenting), citing 17 AM.JUR.2D, CONTRACTS, § § 401, 402, 404, pg. 847-50, 851-53.

⁴⁷⁴ *Id.* at 566-67 (MacKenzie, J., dissenting). Further, the dissent stated, restrictive covenants may be valuable property rights. *Id.* at 567.

⁴⁷⁵ *Id.* at 567 (MacKenzie, J., dissenting) (quoting *Shelley v. Kramer*, 334 U.S. 1, 10-11 (1928)).

⁴⁷⁶ *Id.* (MacKenzie, J., dissenting).

⁴⁷⁷ 416 U.S. 1(1974) (zoning ordinance which requiring single-family dwellings bore a rational relationship to objective of preserving single family character of the neighborhood). Hopefully, some student will note that the dissent had just finished chiding the majority for applying a state law aimed at zoning to a restrictive covenant issue before applying a case about zoning to that same covenant issue. *Village of Belle Terre*, which is discussed *supra* note 426, is later discussed as a case-in-chief in CRIBBETT. See *id.* at 568.

⁴⁷⁸ *McMillan*, 327 N.W.2d at 567-68 (MacKenzie, J., dissenting)

⁴⁷⁹ The covenant was adopted to reference M.C.L. § 125.216a; M.S.A.

Pre-dating the Fair Housing Amendments Act, *Application of Devereux Foundation, Inc.*⁴⁸⁰ illustrates the NIMBY⁴⁸¹ principle in the context of a dormitory for "mentally deficient, weak or abnormal" students.⁴⁸² The Pennsylvania Supreme Court found itself resolving a dispute between "two interests, each in itself legitimate and wholly commendable,"⁴⁸³ and came down squarely on the side of irrational prejudice. In finding that the Board of Adjustments had abused its discretion the court stated that using the building as a dormitory:

should arouse added apprehension among the neighbors, for the close presence of persons who are below the normal standards of mental capacity and are subject to psychological and psychiatric aberrations not only constitutes a depressing factor

§ 5.2961(16a) M.C.L. §125.286a(2) (defining such facilities as being for persons in need of twenty-four-hour supervision or care) and M.S.A. §5.2963(16a)(2); M.C.L. § 125.583b; M.S.A. § 5.2933(2). See *McMillan*, 327 N.W.2d at 560, 564, 566.

⁴⁸⁰ 41 A.2d 744 (Pa. 1945). *Devereux Foundation* was reprinted in JOHN CRIBBET, ET AL., *PROPERTY CASES AND MATERIALS* at 848 (6th Ed. 1990) but was unfortunately deleted from CRIBBET, *supra* note 12 (7th ed.). I continue to teach it. See also DUKEMINIER & KRIER, *supra* note 20, (which illustrates the issue with *City of Edmonds v. Oxford House*, 514 U.S. 725 at 1053 (1995), at 1056-62; not included in CASNER, ET AL., *supra* note 35, but substitutes *Hill v. Community of Damien of Molokai*, 911 P.2d 861 (N.M. 1996) (prohibition on a groups home for AIDS patients violated Fair Housing Act), CASNER, ET AL., *supra* note 35, at 847, which also includes *Salute v. Stratford Greens*, 888 F. Supp. 17 (E.D.N.Y. 1995) (refusal to accept handicapped Section 8 tenant violated the Fair Housing Act), CASNER, ET AL., *supra* note 35, at 856; not included in BERGER & WILLIAMS, *supra* note 38, which substitutes *Association for Advancement of the Mentally handicapped, Inc. v. City of Elizabeth*, 876 F. Supp. 614 (D.N.J. 1994) (municipal ordinance and state statute setting up barriers to establishment of group homes for people with mental disabilities violates the Fair Housing Amendments Act).

⁴⁸¹ "Not in my back yard."

⁴⁸² *Devereux Foundation*, 41 A.2d at 745 (*citing* Eastown Township zoning ordinance.)

⁴⁸³ *Id.* at 744. The foundation built the Devereux School, a boarding school for children with special psychological needs in 1918 and built on fourteen acres in Easton Township in 1939. The following year the township adopted a zoning ordinance, which placed the school in a district that would have allowed an educational institution as well as a dormitory for "normal" students but would not have allowed a dormitory for "mentally deficient, weak or abnormal" persons unless the Board of Adjustment granted an exception. The original school was "grandfathered in" due to the fact that it had started operations the year before. However, the school bought an adjacent tract in 1943 and desired to use a private residence on the property as a dormitory. *Id.* at 745. (The dormitory could have been built on the first parcel, but wartime building restrictions and material shortages made this practically impossible. *Id.* at 750 (Jones, J., dissenting.)) The Township's Zoning Administrative Officer denied the needed certificate of occupancy, but the Board of Adjustment granted it an exception on appeal. Unhappy homeowners appealed to the Court of Common Pleas of Chester County, which reversed. The State Supreme Court upheld the reversal. *Id.* at 745.

calculated to interfere with the enjoyment of home life but even involves the potential danger of physical disturbances.⁴⁸⁴

This pronouncement was made despite the fact that there was absolutely no evidence that the children in question presented any sort of physical danger. Although "maladjusted," they were allowed to roam freely and not confined or in need of chaperones in any way; in fact, none of the protesting owners could point to any incident in which the students had created a public disturbance or breached the peace in the last five years.⁴⁸⁵ Indeed, the real problem was that the protesting property owners found the sight of the students "depressing" and feared the prospect of embarrassment at having to explain them to their own inquiring children.⁴⁸⁶ *Devereux Foundation* serves as a great introduction to *City of Cleburne v. Cleburne Living Center, Inc.*⁴⁸⁷ handed down by the Supreme Court forty years later.

In *City of Cleburne*, the Court declined to consider mental illness as a quasi-suspect class,⁴⁸⁸ but, nevertheless, held that the zoning ordinance in question failed even the rational relationship test because it was based upon an irrational prejudice against the mentally retarded.⁴⁸⁹ The case arose when the Cleburne Living Center announced its intention to house thirteen retarded men and women in a four-bedroom house in Cleburne, Texas. The Center was denied a needed special use permit in a three to one vote by the City Council.⁴⁹⁰ After a lengthy analysis of why no heightened scrutiny was required,⁴⁹¹ the Court reviewed all the reasons for the refusal suggested by the city. I stress that the first reason considered

⁴⁸⁴ *Id.* at 747.

⁴⁸⁵ *Id.* at 748-49 (Jones, J., dissenting).

⁴⁸⁶ *Id.* at 749 (Jones, J., dissenting).

⁴⁸⁷ 473 U.S. 432 (1985) reprinted in CRIBBET *supra* note 12, at 914; RABIN, KWALL & KWALL, *supra* note 31, at 771; CASNER, ET AL., *supra* note 35, at 1241; BERGER & WILLIAMS, *supra* note 38, at 1094 (note case only, as the text focuses on post-Fair Housing Amendments Act cases); BRUCE & ELY, *supra* note 34, at 873 (note case only); SINGER, *supra* note 48, at 1026-27 (note case only); DWYER & MENNELL, *supra* note 57, at 951 (note case only); JOHNSON, ET AL., *supra* note 64, at 887 (note case only); NELSON, ET AL., *supra* note 67, at 1087 (with two pages of additional notes).

⁴⁸⁸ Of course, most students take property before Constitutional Law (or, at best, concurrently with it) and, thus, it is necessary to briefly outline the three levels of scrutiny applicable to Equal Protection analysis.

⁴⁸⁹ *City of Cleburne*, 473 U.S. at 446, 450.

⁴⁹⁰ *Id.* at 435-37. Special use permits were required for "[h]ospitals for the insane or feeble-minded, or alcoholic [sic] or drug addicts, or penal or correctional institutions." *Id.* at 436-37 (*quoting* the Cleburne Zoning Ordinance). Uses that were allowed in the zone without special permits included fraternities, sororities, apartments, nursing homes, homes for the aged and private clubs. *Id.* at 436, n. 3.

⁴⁹¹ *Id.* at 442-47. Discussion of this topic is best left to Constitutional Law.

was the negative attitude of the majority of nearby property owners. The Court held that such attitudes were not a permissible basis for treating the facility differently than other multiple dwellings.⁴⁹² The City's proffered reasons to demonstrate the lengths to which a municipality will go to shield its real motivations for an exclusionary zoning or permitting decision. For example, the City claimed it feared that because the facility was across the street from a junior high school the students would harass the occupants, but the school itself included some thirty mentally-retarded students.⁴⁹³ The Court concluded that the rejection of the permit "appears to us to rest on an irrational prejudice against the mentally retarded."⁴⁹⁴

G. *The Environment*

I believe that at least a brief taste of environmental law (as opposed to the newer discipline of environmental racism or environmental justice) should be introduced to the property law curriculum. Many students will never take an environmental law course. Alternatively, some students may become interested in environmental law as a result of exposure to just a case or two.⁴⁹⁵ Professor Cribbet includes the fascinating case of *Sierra Club v. Morton*⁴⁹⁶ in his introductory materials and includes *National Audubon Society v.*

⁴⁹² *Id.* at 448.

⁴⁹³ *Id.* at 449. The facility was also located in a five-hundred-year-old flood plain, but this aspect did not concern the City in regard to such facilities as old age homes. *Id.* The City expressed concern about legal responsibility for things the mentally retarded might do, but there was no concern about what the occupants of apartments of fraternity houses might do. *Id.* Finally, the City was worried about the number of people that would occupy the facility and the congestion they might cause, but gave no reason why the retarded required a density regulation not applicable to the other, permitted uses of the zone. *Id.* at 449-50.

⁴⁹⁴ *Id.* at 450. Justice Stevens, in an opinion joined by Chief Justice Burger, expressed his dissatisfaction with any analysis based on varying levels of scrutiny under the Equal Protection Clause. *Id.* at 451 (Stevens, J., concurring). This argument is more appropriate to Constitutional Law and is appropriately omitted by Professor Cribbet. Perhaps the same can be said of Justice Marshall's opinion, which, *inter alia*, would have applied heightened scrutiny based upon "state-mandated segregation and degradation . . . that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow." *Id.* at 462 (Marshall, J. joined with Blackmun, J., concurring in the judgment in part and dissenting in part).

⁴⁹⁵ See Joan McGregor, *Property Rights and Environmental Protection: Is This Land Made For You And Me?* 31 ARIZ. ST. L.J. 391 (rejecting the theory that people should have little or no responsibility with regard to how they use property, and arguing that property rights should consider the future community of people and the environment).

⁴⁹⁶ 405 U.S. 727 (1972), reprinted in CRIBBET *supra* note 12, at 20; HYLTON ET AL., *supra* note 73, at 701-56 includes an entire chapter on environmental protection, and seven major cases.

*Superior Court of Alpine County*⁴⁹⁷ with the water cases in his chapter on "Interests in Land of Another." However, he dropped *Sunnen Products v. Chemtech*⁴⁹⁸ that had previously been included under the chapter on "The Methods of Title Insurance" with a page or so of introductory material.⁴⁹⁹

1. Generally

In *Sierra Club*, the United States Forest Service took bids to develop the previously pristine⁵⁰⁰ Mineral King Valley area as a winter ski area and summer recreational area with ski slopes, twenty miles of highway, power lines and 14,000 visitors daily.⁵⁰¹ Walt Disney Enterprises, Inc.'s thirty-five million dollar plan was ap-

⁴⁹⁷ 658 P.2d 709 (Cal. 1983), reprinted in CRIBBET *supra* note 12, at 715; RABIN, Kwall & Kwall, *supra* note 31, at 687 (as part of a twenty-page assignment on the public trust doctrine); CASNER, ET AL., *supra* note 35, at 60, n.2 (note case); not included in BERGER & WILLIAMS, *supra* note 38 (which instead includes a three-page discussion of the public trust doctrine); not included in BRUCE & ELY, *supra* note 34 (but mentioned briefly *supra* at 349-57 in *State ex rel. Haman v. Fox*, 594 P.2d 1093 (Idaho, 1979)); not included in SINGER, *supra* note 48 but the public trust doctrine is covered with *Matthews v. Bay Head Improvement Association*, 471 A.2d 355 (N.J. 1984) SINGER, *supra* note 48, at 182-84; DWYER & MENNELL, *supra* note 57, at 112 (mentioned in brief discussion of public trust doctrine); BERNHARDT, *supra* note 63, at 486 (including a picture of Mono Lake, and selected comparative state code provisions); NELSON, ET AL., *supra* note 67, at 172 (brief note and mention of public trust doctrine); HYLTON, *supra* note 73, at 250, which includes twenty-three pages on the public trust doctrine, including *Phillips Petroleum v. Mississippi*, 484 U.S. 469 (1988).

⁴⁹⁸ 658 F. Supp. 276 (E.D. M.O. 1987), reprinted in CRIBBET, (6th ed.) at 1303, but not CRIBBET, *supra* note 12; not included in DUKEMINIER & KRIER, *supra* note 20, which discusses Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") briefly at 599-601; not included in BRUCE & ELY, *supra* note 34 (but CERCLA is discussed in a brief section on the increasing impact of environmental law on real estate transactions. *Id.* at 670-72.); not included in SINGER, *supra* note 48, but CERCLA is discussed at 1074-75, and the state equivalent of CERCLA is covered in *Acme Laundry Co., Inc. v. Secretary of Environmental Affairs*, 575 N.E.2d 1086 (Mass. 1991), at 1076-81.

⁴⁹⁹ Sunnen illustrates the workings of the 1980 CERCLA, 42 U.S.C. § 9601 *et seq.*, as amended in 1986 by § 107(a), the innocent landowner provision. After Sunnen acquired property from Chemtech that had been used for chemical manufacturing and storage between 1956 and 1978, hazardous waste contamination was detected which matched the chemicals formerly handled and stored by Chemtech. Under the original CERCLA, the owner of the land at the time of discovery would have been responsible for the cost of the cleanup, even if it exceeded the cost of the land. See *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573 (D.Md. 1986) (bank that acquired land in \$335,000 foreclosure of mortgage liable for contaminated waste cleanup costing more than \$550,000), cited in CRIBBET, *supra* note 12, at 1302. However, the amended CERCLA gave a private cause of action to Sunnen to recover the costs from Chemtech. Sunnen, 658 F. Supp. at 278.

⁵⁰⁰ The area was part of the Sequoia National Forest and had been designated as a national game refuge by Congress. *Sierra Club*, 405 U.S. at 728.

⁵⁰¹ *Id.* at 729.

proved.⁵⁰² The Plaintiff, the Sierra Club, filed suit in 1969 seeking to block the proposal.⁵⁰³ Although the District Court granted a preliminary injunction,⁵⁰⁴ the Court of Appeals reversed, holding both that the Sierra Club lacked standing to sue and that it was, alternatively, not entitled to a preliminary injunction because there was no adequate showing of irreparable injury and likelihood of success.⁵⁰⁵ The Supreme Court case turned on the Sierra Club's standing to sue in light of the fact that it had not alleged economic injuries.⁵⁰⁶ Although the Court stated that:

Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.⁵⁰⁷

Nevertheless, the Court concluded that the Sierra Club had not shown itself to be among those who would be injured by the project, a requirement of the "injury in fact" test.⁵⁰⁸ The Sierra Club had argued that its standing was based on being a "representative of the public."⁵⁰⁹ Although noting the trend toward increasing recognition that non-economic injuries could give standing to sue, the Court rejected the idea that an organization with a "mere 'interest in a problem'" would have standing.⁵¹⁰ To do so would lead down a slippery slope; all special interest organizations, "however small or short-lived" would have standing as would individual citizens.⁵¹¹

The dissent provides first-year students with their first exposure to great liberal Justice William O. Douglas. His novel solution would be to give standing to threatened entities and file suits in

⁵⁰² *Id.*

⁵⁰³ The Sierra Club first unsuccessfully sought a public hearing. *Id.* at 730. In District Court, the Club sought a declaratory judgment that various aspects of the plan violated federal laws, and preliminary and permanent injunctions to stop the project. *Id.*

⁵⁰⁴ *Sierra Club v. Hickel*, 1 Env. L. Rep. 20,010 (N.D.Cal. 1969).

⁵⁰⁵ *Sierra Club v. Hickel*, 433 F.2d 24, 25, 27 (9th Cir. 1970).

⁵⁰⁶ *See Sierra Club*, 405 U.S. at 734-35.

⁵⁰⁷ *Id.* at 734.

⁵⁰⁸ *Id.* at 735-36.

⁵⁰⁹ *Id.* at 736. The Sierra Club had apparently been conducting camping trips in the area and various members had used and would continue to use the area, but these facts were not included in the pleadings. In any case, the Sierra Club declined to rely on its individualized interest for standing. *Id.* at 735, n.8.

⁵¹⁰ *Id.* at 739.

⁵¹¹ *Id.* at 739-40.

their name.⁵¹² Although necessarily abridged, Justice Douglas' evocative language comes through in Professor Cribbet's excerpt from this classic dissent. I tell my students that Justice Douglas later received the John Muir award from the Sierra Club and had once served in an unpaid capacity on the Board of Directors.⁵¹³

2. Public Trust Doctrine

*National Audubon Society*⁵¹⁴ allows discussion of the interaction of environmental issues, water rights issues and the public trust doctrine.⁵¹⁵ Beginning in 1940, the predecessor to the California Water Board allowed the diversion of four fresh water streams for the use of the City of Los Angeles.⁵¹⁶ The streams had been flowing into Mono Lake, the second largest lake in California, the home of a large population of brine shrimp, a refuge for migratory birds and a lake of scenic, ecological and recreational value.⁵¹⁷ As a result of the diversion, the lake level dropped, salinity increased and the ecological values were threatened.⁵¹⁸ The diversion had been approved as part of California's appropriative water rights system and was made without consideration for the public trust.⁵¹⁹ Thus, the court faced the question of how the two competing systems of water allocation should interact. The court held that the public trust doctrine gave the state the power to exercise continuous supervision and control over the state's navigable waters,⁵²⁰

⁵¹² *Id.* at 741-42 (Douglas, J., dissenting), (citing Stone, *Should Trees Have Standing? – Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450). Douglas compares the admiralty action in which a ship is sued (and can counterclaim) in its own name, as well as suits in the name of corporations. *Sierra Club*, 405 U.S. at 742-43, n.2, 3 (Douglas, J., dissenting).

⁵¹³ See WILLIAM O. DOUGLAS, *THE COURT YEARS 1939-1975 THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS* (1980) 370-71.

⁵¹⁴ 658 P.2d 709 (Cal. 1983).

⁵¹⁵ *National Audubon Society*, 658 P.2d at 718. The case traces the history of the public trust doctrine, both generally and in California. The concept was initiated by the Institutes of Justinian and became part of the English common law. In California it also had an independent origin in Spanish and Mexican law. *Id.*

⁵¹⁶ *Id.* at 711.

⁵¹⁷ *Id.*

⁵¹⁸ *Id.* At the time of the litigation, there was some dispute as to the degree of future harm that continued diversion would cause. Los Angeles argued that the lake would stabilize at about fifty-six percent of its original size, whereas the Audubon Society estimated that in fifty years the lake would only be at twenty percent of its original size and might even dry up completely. *Id.* at 715.

⁵¹⁹ *Id.* at 712.

⁵²⁰ Even though the lake was navigable, the five streams were not. The court found caselaw supporting the proposition that non-navigable streams feeding navigable waters were subject to the public trust doctrine. *National Audubon Society*, 658 P.2d at 720 (citing *People v. Gold Run D. & M. Co.*, 4 P. 1152 (Cal. 1884) (gold mining

even where prior rights had been granted pursuant to the appropriate rights system.⁵²¹ The court also found that the state had the power to grant "nonvested usufructuary rights" to use water, even if such diversions harmed the public trust, so long as the public trust values were considered⁵²² and that consideration had not taken place in the context of the Mono Lake diversion.⁵²³ Should such consideration result in a change in use it would not constitute the taking of property for which compensation was required because there was no true property right in water, but only a right to use.⁵²⁴ The case lends itself to a discussion of the realities or practicalities of environmental protection: the people of Los Angeles now need and depend on the waters that could resupply Mono Lake. There is no simple answer.

IV. CONCLUSIONS

"Property rights serve human values."⁵²⁵ This is something that first-year students need to know as much as they need to know the common law Rule Against Perpetuities. Social justice issues need to be a part of the first-year law school curriculum. I have attempted to demonstrate that bringing these issues to the fore is not antithetical to the coverage of the broad range of material that must be compressed into a five- or even four-credit property course. To the contrary, whether the issue is the right to exclude and the case is *State v. Shack*,⁵²⁶ or acquisition by conquest and the case is *Johnson v. M'Intosh*,⁵²⁷ or defeasible fees and the case is *Edwards v. Abney*,⁵²⁸ cases that raise issues of social justice can serve an integral role in presenting the essentials of property. While some casebooks are very weak in this area and would require extensive supplementation to be used in this manner, others include sufficient amounts of these materials in the texts such that only minimal supplementation is required. No one text is "perfect" for my goals,⁵²⁹ but no one text is perfect for any professor's goals. But, for the professor seeking to do so, there are texts available which

procedure that dumped gravel in streams and, in turn, impaired navigation on downstream rivers violated public trust).

⁵²¹ National Audubon Society, 658 P.2d at 712.

⁵²² *Id.*

⁵²³ *Id.* Thus, such consideration "was long overdue." *Id.*

⁵²⁴ *Id.* at 723.

⁵²⁵ *State v. Shack*, 277 A.2d. 369, 372 (N.J. 1971).

⁵²⁶ See *supra* notes 207-19, and accompanying text.

⁵²⁷ See *supra* notes 140-68, and accompanying text.

⁵²⁸ See *supra* notes 119-25, and accompanying text.

⁵²⁹ I have declined to pick a "winner," but rather have attempted to describe these

make learning that property rights serve human values easier for faculty and student alike.