

## Exam Outline

### I. Introduction

#### A. Policy Themes

- i. Fairness
- ii. Social Policy
- iii. Certainty
- iv. Other Frequently Occurring Rationales

Note: This class was very policy oriented and therefore probably not your typical property class. Therefore, if your class is less policy oriented, you can probably ignore some parts of this outline.

- a. **Alienation** -- Can usually make an alienation argument on both sides.
- b. **Economics** -- A good counter to an economic argument is recognizing intangible aspects.
- c. **Precedent/Tradition** -- Courts resist changing the law because 1) their role is to interpret law and 2) people form reliance interests around established laws.
- d. **Efficiency**
- e. **Reliance Interests**
- f. **Privacy**

#### B. Ownership

##### i. First-in-Time Rule

- a. **Fundamental Rule** -- The first person to take possession of a thing owns it.

##### ii. Rule of Capture (Occupational Theory)

- a. **General Rule** -- Prior in time wins. The first person to take possession of a thing owns it. The prior possessor prevails over a subsequent possessor.
  1. **Rationale** -- Possession is ownership (occupation theory). A theory based on individualism. Go out and claim property, possess it, defend it.
- b. **Wild Animals** -- Must be captured to be owned. Mere chase is not enough (*Pierson*).

##### iii. Reasonable Prospect (Labor Theory)

- a. **General Rule** -- A property regime that gives people ownership based upon their investment or labor expended into the property.
  1. **Rationale** -- **Investment** is ownership. Society should reward a person that invests in labor.

#### C. The Right to Exclude

##### i. General

- a. **Right to Exclude** -- Owners have the right to exclude non-owners and physical objects from their property. The right to exclude varies according to the status of the land (e.g., public/private in nature, shared use/possession).
  1. **Policy**
    - a) *Right to Exclude* -- Right to exclude is generally supported by privacy and security concerns.
    - b) *Right to Access* -- The right to access is generally supported by the interest of freedom, fairness, and reasonable expectations of the parties (e.g., a business who holds itself out to the public creates the reasonable expectation that it will not arbitrarily exclude).
  2. **Exceptions**
    - a) *Consent* -- Explicit or implicit
    - b) *Estoppel* -- e.g., irrevocable licenses
    - c) *Necessity* -- Save lives or property
    - d) *Public Policy* -- A social need may trump right to exclude (*Shack*)
    - e) *Prescription* -- e.g., adverse possession, easement by prescription
- b. **Trespass** -- Unprivileged intentional intrusion on property possessed by another.
  1. **Limitation** -- Right to exclude is not absolute. There is a balance between **freedom** and **security/privacy**. The more the owner has opened his property to the public, the more likely it is that the court will find public rights of access to the property.
  2. **Example (*Shack*)** -- In *Shack* the right to access of the poor immigrant trumped the right to exclude of the farmer.
    - a) *Policy* -- Property rights serve human values. They are recognized to that end, and are limited by it.

##### ii. Public Accommodations Law

###### a. Common Law Right to Exclude (Majority)

1. **General Rule** -- The common law rule varied by the status of the property:
  - a) *Public Accommodations* -- Innkeepers and common carriers have a duty to serve the public without discrimination. Therefore, they must have a good cause (right of reasonable access) to exercise the right to exclude.
  - b) *Other Businesses* -- Other businesses are free to exclude arbitrarily (*Lloyd*).

## 2. Rationale

- a) *Monopoly Rationale* -- Inns and common carriers were more likely to be local monopolies. Therefore, discrimination was tantamount to denying the ability to travel away from home.
- b) *Relationship to Travel* -- Similar to the monopoly rationale, the denial of accommodations could risk that individuals would be subjected to the elements or highway bandits.
- c) *Public Reliance* -- Innkeepers and common carriers hold themselves out as ready to serve the public and the public relies on this representation.

b. **Uston Approach** -- In *Uston* the NJ court expanded the good cause standard to all businesses. Many states have **not** followed *the Uston* approach.

### 1. Rationales

#### a) *For Uston Approach*

- ▶ The driving force behind the traditional rule is that inns generally had local monopolies. Today, with big box retailers and chain hotels, the distinction between an inn and other businesses is less obvious.
- ▶ The more property is open to the public and devoted to public use, the more it must accommodate the rights of individual members of the general public (a pseudo waiver argument).

#### b) *Against Uston Approach*

- ▶ The market can take care of a business that discriminates because discrimination will hurt a business' reputation. There may even be specific businesses catering to the excluded. Regulations are costly, chilling on business, and lead to increased litigation.
- ▶ No fundamental right to travel involved.
- ▶ Do not want owners to have to worry about the possibility of a lawsuit every time they exclude an individual.

c. **Federal Law: Title II, CRA of 1964** -- Prohibition against discrimination or segregation in places of public accommodation.

**Note: See appendix for relevant statutory text -- Probably want to use the statute on the zam!**

1. Public Accommodation -- Lists four categories: 1) inns, 2) restaurants, 3) place of entertainment, 4) anything inside those places.

a) *Interpretation* -- Could interpret the list as **illustrative** and read in retail stores. Majority of courts don't read in retail stores, however.

2. Exclusions -- Excludes private clubs and other establishments.

3. Discrimination -- To establish discrimination one must prove: 1) discrimination (not allowed full and equal enjoyment), 2) on the basis of race (or some other protected category), 3) in a place of accommodation.

## d. **Beaches & Public Trust Doctrine**

1. General Rule -- Ownership over land flowed by tidal waters, which extended to the mean high water mark is entrusted in the state for the people (**Matthews**).

a) *Applied in the Abstract* -- Fundamental need to preserve certain resources for particular public uses ---> then your just arguing private ownership over public.

2. Right to Access -- Since the public owns the tidal area it follows that under some circumstances private property rights of the beaches must yield to give the public access to the publicly owned tidal area. Without access to the tidal area the ownership of said area would be meaningless.

a) **Matthews Factors** -- factors used to determine if the private right to exclude must yield to the public's right of access.

- ▶ Location of the dry sand area in relation to the foreshore
- ▶ Extent and availability of publicly-owned upland sand area
- ▶ Nature and extent of the public demand
- ▶ Usage of the upland sand land by the owner

b) *Remedy* -- Where the public trust doctrine is applied there can be no residency restrictions. Reasonable fees may be charged, but no more than necessary for the operations.

## iii. **Adverse Possession** -- **Note: Don't be fooled into applying A/P, P/E, or any easement to the general public**

★ a. **Burden of Proof** -- In some states the burden of proof is a **clear and convincing evidence**.

b. **General Rule** -- A person who adversely possesses land for the entire statutory period may obtain title to the land in a quiet title action. Adverse possession is established by 1) actual possession that is 2) exclusive, 3) open and notorious, 4) continuous and 5) adverse.

### c. **Elements (Gobble -- Illustrative Case)**

1. Actual Possession -- Possession must be consistent with the ordinary use typical of a true owner depending upon the land's character/location. Adverse possession claim is limited to land actually possessed geographically see --> **Nome 2000**.

- a) *Color of Title* -- If there is color of title the actual possession element does not limit the geographical borders of the land adversely possessed.
  - 2. Exclusive -- Adverse possessor must exercise her right to exclude in a way consistent with the manner of an average true owner under the circumstances.
  - 3. Open and Notorious -- The possession must be sufficiently visible to put others in the community on notice -- so that the true owner, if she wishes, can assert her property rights. True owners knowledge may be actual or constructive.
  - 4. Continuous -- Property must be possessed in the manner of an average true owner under the circumstances for the entire statutory period (21 years in Ohio).
    - a) *Color of Title* -- If there is color of title or paid property taxes, some states shorten the statutory period. Deed is sufficient for color of title even w/ defects (**Romero**).
    - b) *Tacking* -- Succeeding periods of possession by different persons (provided there was no forcible ousting) may be added together.
  - 5. Adverse (Hostile)
    - a) *Objective View (Claim of Right)* -- Possession without the true owners permission and inconsistent with her legal rights. Courts generally apply a presumption of non-permission (burden of proof on true owner). Subjective intent of possessor is irrelevant.
    - b) *Subjective Views*
      - 1) *Bad Faith View* -- Objective view plus the subjective intent of the possessor to oust the true owner. Sometimes called claim of right or intentional dispossession.
      - 2) *Good Faith View* -- Objective view plus the subjective belief of the possessor that she actually owns (good faith) the land.
- d. **Policy Arguments**
- 1. Housekeeping -- Provides a means for settling disputes that may endlessly fester without statutory periods. Can make ownership more certain.
  - 2. Maximize Land Use -- Encourages people to use their land rather than just letting it sit.
  - 3. Maximize Social Utility -- The possessor values the land (in economic terms) more than the record owner. Therefore, there is a greater overall utility in assigning the property right to the possessor (e.g., kind of like efficient breach theory in contracts).
  - 4. Fairness -- Over time, land becomes tied to the possessors "personhood" whereas the true owners interest becomes more fungible. This argument recognizes the intangibles of property ownership.

#### iv. **Prescriptive Easements**

- a. **General Rule** -- If one **uses** someone else's property in a manner that is visible, continuous, and non-permissive for a period established by the statute of limitations, one can acquire a prescriptive right to continue that use. Illustrative case: **Community Feed**.
- b. **Elements**
  - 1. Use -- Use must include physical presence on the servient estate. This prevents negative easements from being prescribed.
  - 2. Open and Notorious -- The use must be made in such a way as to give the true owner actual or constructive knowledge of the use.
  - 3. Continuous -- User must engage in periodic acts which, given the nature of the type of easement claimed, give notice to the owner that an easement is being claimed for the entire statutory period.
    - a) *Tacking* -- One prescriptive user can tack on to his period of use to a predecessor in interest.
  - 4. Adverse (Hostile) -- Use **without** the permission of the land.
    - a) *Objective Test* -- The acts must appear in the community to be under a **claim of right**.
      - 1) *Acquiescence* -- Acquiescence is generally not considered permission. Some courts require the user to prove acquiescence.
      - 2) *Presumption of Non-Permission* -- The majority of courts presume open and notorious use is without permission (**Community Feed** -- Adverse presumed).
      - 3) *Permissive Use* -- Use that is initially permissive can become adverse if the user acts beyond the scope of the permitted use.
    - b) *Subjective Tests*
      - 1) *Bad Faith* -- Objective view plus the subjective intent of the user to oust the true owner.
      - 2) *Good Faith* -- Objective view plus the subjective intent of the user to lawfully use the property.
  - 5. Acquiescence -- Landowner must know (or should know) and allow use to continue without granting permission. Owner must not have asserted her right to exclude.

## II. Easements

### A. General

#### i. Terminology

- a. **Easement** -- An easement is a non-possessory grant of property in land, that stays with the land, that entitles a person to **use** the land possessed by another.
- b. **Affirmative Easement** -- The holder of an affirmative easement has the right to go onto the land of another and do some act to the land.
- c. **Negative Easement** -- The holder of a negative easement can prevent another from doing some act on the servient estate.
- d. **Dominate Estate** -- The property that is benefited by the easement
- e. **Servient Estate** -- The property that is burdened by the easement
- f. **Profit** -- The right to enter another's land, without liability for trespass, and remove stuff
- g. **License** -- Permissive use of the property that is revocable at the will of the land owner.

#### ii. Appurtenant or in Gross

- a. **General Rule** -- All easements must either be appurtenant to other land or in gross.
- b. **Definitions**
  1. Appurtenant Easement -- An appurtenant easement benefits its owner in the use of another tract of land.
  2. Easement in Gross -- An easement in gross does not benefit its owner in the use and enjoyment of his land, but merely gives him the right to use the servient land.
- c. **Appurtenant Easement Presumed** -- If the instrument creating the easement is ambiguous, courts generally construe it as creating an easement appurtenant to the land. See **Green**.
  1. *Rationale* -- 1) People usually intend to create easements to benefit land. 2) Easements are generally more useful to successor owners than the old owner. 3) An appurtenant easement increases the value of the land it benefits. 4) Alienability: don't want to buy land that is burdened with easements to all kinds of random people.

#### iii. Scope of Easements

- a. **General Rule** -- The scope of an easement is determined by the grantor. If ambiguous, most courts resolve ambiguities in favor of grantee. See **Cox, Henley** for illustrations.
- b. **Kind Contemplated** -- Often litigated is whether the use of the easement is of the kind of use contemplated by the grantor. The intent of the grantor generally yields to technological progress because courts presume that the grantor anticipated any technological advancement.
- c. **Unreasonable Burden** -- Whether the use is so heavy that it constitutes an unreasonable burden on the servient estate not contemplated by the grantor. May maintain, repair or improve in a manner reasonably calculated to promote purposes of easement as long as it won't create an undue burden (e.g., usually cant widen a road).
- d. **Divisibility or Apportionability**
  1. Easement in Gross
    - a) *Exclusive* -- When the grantor, or owner of the servient estate, has reserved for herself the right to use the easement in conjunction with the grantee, the easement is generally **not apportionable**.
    - b) *Non-Exclusive* -- When the grantor has no right to use the easement in conjunction with the grantee, the easement is generally **apportionable**.
  2. Appurtenant Easements -- The benefits of an appurtenant easement move to each portion of the dominant parcel upon its subdivision and transfer of the various pieces.
- e. **Changed Conditions** -- (See covenants below for the rule) --> restatement (third) extends the doctrine of changed conditions to easements.

### B. Express Easements

#### i. Express Appurtenant Easement

##### a. Elements

1. Writing -- Must be granted in a writing that is sufficient to satisfy the statute of frauds.
2. Intent -- The grantor must express the intent for the benefit to run with the land.
  - a) *Ambiguity* -- Appurtenant easements are presumed (see above).
3. Notice --
  - a) *Actual* -- The person in fact knows.
  - b) *Constructive* -- Deed is recorded and easement is in chain of title --> Owner should have known.
  - c) *Inquiry* -- Visible signs of use such that a reasonable owner would do further investigation to discover whether an easement exists.

- ★ b. **Third Parties** -- A parcel cannot be sold while reserving an easement over it by a third party.
  1. Circumventing the Rule -- Attorneys get around the rule by performing a two step transaction --> 1) convey to the third party, 2) have the third party convey with the easement attached.
  2. Restatement -- The restatement abandons this approach.

#### ii. Express Easement in Gross

- a. **Elements** -- The grant must be 1) in writing, 2) express the intent for the benefit to run with a person, 3) there must be notice (actual, constructive, inquiry).

### C. Implied Easements

#### i. Easement by Estoppel (Irrevocable License)

- a. **Definition** -- When an owner 1) gives someone else permission to use her property in a particular way, 2) licensee invests substantially in **reasonable reliance** on that permission, and 3) revocation of license would result in injustice. Illustrative cases: *Holbrook, Castle Mountain*.

- ★ b. **Acceptance of Rule** -- Not all courts accept easement by estoppel!

- c. **Rationale** -- 1) Protects reliance interest of the licensee. 2) effectuates intent of the owner, 3) only applies in clear/predictable circumstances, 4) reasonable licensor should have known that the licensee understood permission as a permanent grant of an easement.

1. *Counters* -- 1) those who want easements should bargain for them, 2) relaxation of SOF will increase uncertainty and litigation, 3) allows for people to make false claims about getting an oral easement.

#### ii. Implied Easement by Prior Use

- a. **Definition** -- Courts imply an easement to enforce the presumed intent of the parties that was imperfectly expressed in the formal documents in cases where omission of the easement was clearly a mistake. See *Granite Properties*.

#### b. Elements

1. Common Owner -- There must have been a common owner that severed the parcel.
2. Use in Place before Severance -- The common owner must have engaged in the use prior to the severance.
3. Use Visible or Apparent Prior to Severance -- Use was apparent and obvious, continuous and permanent. The standard is not necessarily visible. Things that can be uncovered upon reasonable inspection are also apparent (e.g., sewer lines).
4. Necessary for Enjoyment of Dominant Estate -- In most jx's the easement need only be **reasonably necessary**.
  - a) *Implied Reservation* -- Seller reserves for herself an easement across property being conveyed. A minority of jx's require a higher standard of necessity (strict necessity) because grantor should have been more responsible.

#### iii. Easement by Necessity

- a. **Definition** -- An easement for egress and ingress can be implied if it is strictly necessary for the enjoyment of a parcel of land (e.g., the property is land locked). An easement by necessity lasts only as long as the necessity does. See *Finn*.

#### b. Elements

1. Common Owner -- There must have been a common owner that severed the parcel.
2. Necessity -- No access to a public roadway. The permission of strangers cannot defeat necessity (e.g., owner of landlocked property has access to public roads via private roads from neighboring property owners who are strangers to the deed).
3. Existence of Necessity at Time of Severance -- The necessity must have existed at the time of severance.

- c. **Rationale** -- Land that is inaccessible is worthless and cannot be alienated.

## III. Covenants & Equitable Servitudes

### A. Real Covenant v. Equitable Servitude

#### i. Definitions

- a. **Real Covenant** -- A contractually created land use restriction that runs **with the land (must tie burden and benefit to land --> courts do not like to enforce covenants w/ benefit held in gross)**. Damages are the only possible remedy.
- b. **Equitable Servitude** -- Mostly the same as a real covenant but is a product of the courts of equity so equitable relief is a possible remedy.

ii. Chart: Elements Compared

Covenants v. Equitable Servitudes -- Elements				
	Covenants		Equitable Servitudes	
	Benefit	Burden	Benefit	Burden
Intent	●	●	●	●
Notice		●		●
Touch and Concern	●	●	●	●
Horizontal Privity		●		
Vertical Privity	●	●		

Note: Writing is an element for all

Note: Some courts (**but not all**) will enforce an equitable servitude without privity. Thus, you should probably discuss privity regardless of what you are arguing for!!!

B. Real Covenants

i. Burden/Benefit

- a. **Burden Run** -- The burden of a covenant will run with the land if: 1) in writing, 2) intent of the parties is clear, 3) restriction touches and concerns, 4) instantaneous horizontal privity (not required in some jx), 5) vertical privity, and 6) the assignee has notice.  
**Note:** If privity is missing, some courts will enforce the covenant as an equitable servitude.
- b. **Benefit Run** -- The benefit of a covenant will run with the land if: 1) covenant is in writing, 2) intent that the benefit run, 3) touches and concerns the dominant estate, 4) horizontal privity (many courts eliminate for benefit), and 5) relaxed vertical privity.

ii. Elements

- a. **Writing** -- Writing must satisfy the statute of frauds.
  1. Deed or Lease -- Some states require that the restriction be specifically in the deed or lease. Majority of states find that a prior-recorded declaration is sufficient.
  2. Sales Literature -- Generally, representations are not sufficient to satisfy the writing requirement.
    - a) Estoppel -- Some courts relax the requirement and apply the doctrine of estoppel to enforce representations made in sales literature or orally when buyers rely on them.
- b. **Notice** -- The notice requirement exists to protect the owner of the servient estate (thus **not required** for the benefit to run). There are three types (see Winn-Dixie):
  1. Constructive -- If the covenant was recorded in the registry of deeds along with the deed or lease creating the covenant or if a declaration containing the restriction was recorded prior to the sale.
  2. Actual -- If buyer or lessee is actually told or otherwise was made aware of the covenant.
  3. Inquiry -- If any condition of the premises indicated that the property was burdened by a covenant.
- c. **Intent**
  1. Generally -- The grantor must have intended (express or implied) the covenant to run with the land.
    - a) Heirs and Assigns -- The covenant is made to the g'or or g'ee and their heirs of assigns **and/or**
    - b) Intent to Bind -- IT is intended to bind future owners of the parcel described in the deed or explicitly states that the covenant is intended to run with the land.
  2. Presumption -- Courts generally presume that a covenant benefiting the owner of neighboring land is intended to run with the land so long as it touches and concerns the land.
- d. **Touches and Concerns** -- Identifies the kinds of obligations that should run with the burdened estate because they are intended to and legitimately will benefit current and future owners of the dominant estates.
  1. Burdened Side -- An obligation touches and concerns the burdened estate if it relates to the use of the land and the obligation is intended to benefit current and future owners of the dominant estates.
  2. Benefited Side -- An obligation touches and concerns the dominant estate if it improves enjoyment of that land or increases its market value.
    - a) Benefits Held in Gross
      - 1) Traditionally -- Courts refused to enforce covenants when the benefit is held in gross by applying the touch and concern test. The servient estate would not get the offset of a compensating benefit to the other land.
      - 2) Restatement -- Allows enforcement in gross if the beneficiary can demonstrate a legitimate interest in enforcing the servitude.

3. Affirmative Obligations
    - a) *Dues for HOA* -- Well accepted that these touch and concern the land because they increase the value of the dominant estate.
    - b) *Paying Money* -- There is a split in authority on how covenants to pay money (that aren't HOA dues) should be treated.
  4. Restatement -- Touch and concern element is abolished. Instead, covenants will run with the land unless they are unconscionable, without rational justification, or otherwise violate public policy.
- e. **Privity**
1. Horizontal -- Regulates the relationship between the original covenanting parties.
    - a) *Mutual* -- Two owners have a simultaneous interest in the same parcel of land (e.g., landlord -- tenant).
      - 1) *Massachusetts Test* -- When an owner of one parcel has an appurtenant easement over another owner's parcel, the owners are in privity of estate and a covenant between them will be enforceable.
    - b) *Instantaneous* -- A covenant intended to burden one parcel for the benefit of another can become attached to both parcels if it is created at the moment the owner of one parcel sells the other parcel.
 

**Note:** Some courts do not require horizontal privity for the benefit to run.
  2. Vertical -- The relationship between the original covenanting parties and subsequent owners of each parcel. Three approaches:
    - a) *Strict* -- The grantor cannot retain any future interest in the land (e.g., grantor who leases property does not have vertical privity).
    - b) *Relaxed* -- Burden can be imposed on any future possessor of the burdened land and the benefit of the covenant on any future possessor of the benefited land.
    - c) *Restatement* -- Drops the strict vertical privity requirement and allows the benefit and burden to pass to subsequent possessors.
  3. Restatement -- Abolishes the privity requirement.

## C. Equitable Servitudes

### i. Burden/Benefit

- a. **Burden Run** -- The burden of a covenant will run with the land if: 1) in writing, 2) intent of the parties is clear, 3) restriction touches and concerns, and 4) the assignee has notice.
- b. **Benefit Run** -- The benefit will run with the land if: 1) in writing, 2) intent of the parties is clear, and 3) restriction touches and concerns.

### ii. Elements

- a. **Writing** -- Must satisfy SOF.
- b. **Intent** -- See element above.
- c. **Notice** -- See notice element above. Not required for benefit to run.
- d. **Privity** -- Some courts will enforce without privity. See above.
- e. **Touch and Concern** -- See element above.

## D. Termination of Covenants/Equitable Servitudes

### i. Reasonableness/Public Policy

- a. **General Rule** -- Covenants and servitudes are enforceable unless they are 1) illegal, 2) unconstitutional or 3) violate public policy.
  1. Public Policy
    - a) *Racial Restrictions* -- See discussion in estates, below.
    - b) *Discriminatory Charitable Trusts*
    - c) *Unreasonable Restraints on Alienation*
      - 1) *Disabling Restraints* -- Forbid owner from transferring interest in property
      - 2) *Promissory Restraints* -- Covenants by which grantee promises not to transfer her interest in the property
      - 3) *Forfeiture Restraints* -- Provide ownership of property will shift to specified person if current owner attempts to transfer.
    - d) *Unreasonable Restraints on Competition* (see *Whitinsville*; Compare *Davidson Bros.*)
    - e) *Strong Public Policy Interest* (see *Blevins* -- didn't actually void the covenant but interpreted in a way favorable to mentally disabled)
- b. **Relation to Touch and Concern Element** -- Some courts use the touch and concern element as a general reasonableness test. While others go the public policy route (**Reasonableness test:** see *Davidson Bros.*). The restatement goes the public policy route.

## ii. Changed Conditions (Dominant Estate)

- a. **General Rule (Bethany Beach)** -- Covenants will not be enforced if there has been such a fundamental change in character of the neighborhood since the creation that the perpetuation would be of **no substantial benefit** to the dominant estate. Application of the doctrine is rare.
  1. Change in Zoning -- Is not dispositive but is additional evidence of changed conditions.

## iii. Relative Hardship (Servient Estate)

- a. **General Rule** -- Covenant will not be enforced if the hardship to owner of the servient estate will be greater by a **considerable magnitude** than the benefit to the owner of the dominant estate (Appel). If the benefit is substantial courts are unlikely to apply the doctrine.

## iv. Other Equitable Defenses

- a. **Acquiescence or Abandonment** -- The complaining party may be barred from enforcing the covenant if he has tolerated or failed to object to other violations of the covenant. Toleration may indicate an intent to abandon the covenant, and the defendant may reasonably rely on the failure to enforce the covenant in investing in her property.
- b. **Estoppel** -- An owner of a dominant estate who orally represents to the owner of a servient estate that she will not enforce the covenant may be estopped from enforcing if the owner of the servient estate changes his position in reasonable reliance.
- c. **Laches** -- If the covenant has been ignored or breached for a substantial period of time (but less than the time necessary to establish prescriptive rights) the court may find that unexcused delay in enforcing the covenant prompted investment in reliance on the failure to object to the violation and that enforcement of the covenant would be unconscionable.
- d. **Marketable Title Acts** -- As with easements, many states have marketable title statutes that terminate restrictive covenants if they are not re-recorded after a specified period of time.
- e. **Other Ways to Terminate**
  1. Language in Instrument -- Some covenants actually terminate within a certain number of years.
  2. Merger -- If both estates become owned by one party then the covenant will terminate.
  3. Release -- Both parties mutually agree to terminate the covenant -- in writing.
  4. Prescription -- Open and notorious violation for the entire statutory period without permission may terminate the covenant.

## E. Implied Reciprocal Negative Servitudes

### i. Definition

Covenants restricting land in a subdivision are mutually enforceable by and against all owners if the properties were all **intended** to be a part of a **common scheme** or **general plan**.

### ii. Two Common Issues

- a. **Subsequent Purchasers** -- A subsequent purchaser may have a restriction in the deed but not satisfy the technical requirements of privity (e.g., earlier buyer wants to enforce against a later buyer but **horiz privity** is lacking). Courts will nonetheless enforce the restriction by implying a reciprocal promise made between the grantor and the other parties involved when the deed was created.
  1. Example -- Bear Creek: First lots not restricted. No restrictions contained in deed, no declaration previously recorded restricting property. Therefore court found no restriction.
- b. **Deeds without Restrictions** -- Problem may occur when an individual deed in a subdivision lacks the restriction. A court will nonetheless enforce the restriction if there is enough surrounding parcels for the court to infer that the developer had intended to create a general plan of restrictions.
  1. Example
    - a) Pollock -- Last lots not restricted. Court held that the developer had created a general plan but that at least one of the properties in question were outside the scope, no explicit/implicit promises made about that property.
    - b) Sanborn -- Defendant wanted to build a gas station. Majority of surrounding lots had restrictions in deed but defendants did not. Court **inferred** an intent to create a common plan from the surrounding lots even though a great number of the properties didn't have a restriction in their line of title.

## IV. Estates

### A. Fee Simple

#### i. Fee Simple Absolute

- a. **Definition** -- Property ownership without a future interest. The interest is freely sold, devised or able to descend (through intestacy statutes).
- b. **Creation** -- If seller does not indicate his intent (or its unclear) to create a future interest the creation of an estate in fee simple absolute is presumed (Wood, Edwards). Otherwise, can be created by the following:
  - ◆ O to A

- ◆ O to A and her heirs
- ◆ O to A in fee Simple

## ii. Defeasible Fees

- a. **Generally** -- A fee simple is defeasible on the happening of a certain event. Defeasible fees are thus not absolute but still are fee simple because they **may** potentially last forever.
- b. **Fee Simple Determinable** -- Estate **automatically** ends when some specified event occurs.
  1. Creation -- The language of the grant is determinative. Language must indicate the land is to revert to the grantor on a happening of some condition -- **Temporal Word** (e.g., as long as, until, while, or unless).
  2. Future Interest Held -- Grantor retains a future interest in **possibility of reverter**.
- c. **Fee Simple Subject to Condition Subsequent** -- The interest **does not** automatically terminate upon the happening of the specified event but may be devised at the grantor's election when the condition occurs.
  1. Condition Subsequent -- An event that brings an end to something else.
  2. Creation -- Language must specify a condition with subsequent right of **re-entry** -- **conditional words** (e.g., but if, on the condition that, however).
  3. Future Interest Held -- The grantor has a future interest of **right of re-entry**.
- d. **Fee Simple Subject to Executory Limitation** -- Grantor creates a fee with an interest that automatically shifts to a third party on the occurrence of some condition.
  1. Creation -- Any language that would create a fee simple determinable or fee simple subject to condition subsequent. There is no distinction.
  2. Future Interest Held -- The third party holds an **executory interest**.
    - a) *Shifting Executory Interest* -- Cuts short the estate of the **grantee**.
    - b) *Springing Executory Interest* -- Cuts short the estate of the **grantor**.

## B. Life Estates

### i. General

- a. **Definition** -- A life estate is an interest which lasts for the lifetime of a person. Ordinarily, the lifetime by which the life estate is measured is that of the holder of the life estate.
- b. **Creation** -- Created by language indicating the land is to be held for life (e.g., during his life, for life).
- c. **Life Estate Per Autre Vie** -- A life estate measured by the life of another (not the grantee).
- d. **Future Interests** -- Two types depending on who holds the interest:
  1. Reversion -- When property reverts back to the grantor.
  2. Remainder -- When property goes to a 3rd party.

### ii. Types of Remainders

- a. **Contingent Remainder**
  1. Definition -- A remainder is contingent if, at the time of the conveyance, there is:
    - ◆ Uncertainty as to **who** will take; **OR**
    - ◆ There is a **condition precedent** to taking
      - ▶ *Condition Precedent* -- A condition precedent is an event (condition) that must occur (or fail to occur) before an interest becomes vested (for a remainder) or possessory (for an executory interest).
  2. Destructibility of Contingent Remainders -- If a contingent remainder failed to vest before termination the prior estate is destroyed.
- b. **Vested Remainder** -- A vested remainder is a remainder in which the holders are ascertained persons and no condition precedent exists.
  1. Absolutely Vested Remainder -- A remainder with no condition subsequent and is not a class gift subject to open.
  2. Vested Remainder Subject to Open -- When a life estate divests to a group of persons identified by description, the group is open if people can still enter into the group (e.g., vested remainder to X's children).
  3. Vested Remainder Subject to Divestment -- If there is a condition subsequent that can cause future interest holders vested remainder to divest, there is a vested remainder subject to divestment.

### iii. Additional Rules

- a. **The Doctrine of Worthier Title** -- A remainder in a **grantor's** heirs gets converted into a reversion to the grantor (e.g., "O to A for life, remainder in the heirs of O" --to--> O to A for life, remainder in O").
  1. Modern Use -- Modern courts apply as a rule of construction that can be overcome by sufficiently clear language indicating that the grantor actually intends to give a remainder to his own heirs.
- b. **The Rule in Shelley's Case** -- Converts a remainder to the **grantee's** heirs into a remainder in the grantee (e.g., "O to A for life, remainder to A's heirs" --to--> "O to A in fee simple absolute").
  1. Modern Use -- Abolished in a **majority** of states.
  2. Circumventing -- "O to A for 100 years if A lives so long, then to A's heirs"

## C. Chart: Estates Quick Reference

Estates System: Freehold Interests			
Present Interest	Words Used to Create	Future Interest	
		In Grantor	In Third Party
Fee Simple Absolute	"to A" "to A and her heirs"		
Fee Simple Determinable	"as long as" "while" "during" "until" "unless"	Possibility of reverter	
Fee Simple Subject to Condition Subsequent	"Provided that" "on condition" "but if"	right of entry (for condition broken) or power of termination	
Fee Simple Subject to Executory Limitation	"until..., then to..." "unless..., then to..." "but if..., then to..."		executory interest --> automatic no matter the language
Life Estate	"for life"	reversion	Remainder -- vested -- contingent

## D. ☠ Rule Against Perpetuities ☠

### i. Traditional Rule

- a. **Rule** -- Future interests are invalid unless they are certain to vest or fail to vest within the lifetime of someone who is alive (in being) at the creation of the interest or no later than 21 years after death.
  1. Creation of the Interest -- A future interest is created at the moment of the conveyance or created in a will at the moment the testator dies.
  2. Vesting -- The moment when the contingency (or when the contingency disappears) occurs that renders the interest certain to come into possession.
  3. Lives in Being -- Any person on earth who is alive at the creation of the interest. A corporation cannot be a life in being.
- b. **Non-Vested Interests (Interests that RAP Applies to)**
  - ◆ Executory Interests (doesn't apply when both present and future interest holders are charities)
  - ◆ Contingent Remainders
  - ◆ Vested Remainders Subject to Open

**Note:** All future interests held by the grantor are not subject to the RAP
- c. **Policy Rationales**
  1. Dead Hand -- Designed to prevent remoteness of vesting and thereby leave control of the wealth of the world more in the hands of the living than in the hands of the dead.
  2. Alienation -- Promotes the free transfer of property in the marketplace by limiting the creation of future interests. Could also argue the other way (e.g., people may not want to buy land if they know that they can't have a say in how its used after they die).
  3. Countervailing Rationale -- Allowing owners to determine who will own their property in the future and under what circumstances.

### ii. Application of the Traditional Rule

- a. **Identify Interests Subject to the Rule** -- Identify all future interests that are either 1) executory interests, 2) contingent remainders, or 3) vested remainders subject to open.
- b. **Test the Applicable Interest** -- Once the applicable interests have been identified they must be tested to see if they may vest, if ever. If there is **ANY** possibility that the interest will not vest in 21 years after the death of any person alive at the creation of the interest, it is invalid.
  1. Perpetuates Period -- The time between the creation of the interest and 21 years after the death of the last person alive at the creation of the interest.
  2. Validating Life -- Person within whose lifetime the interest is certain to vest, if it ever does vest. Can be any person in the world.

- c. **Determine what Interests Remain** -- To determine what remains simply strike out the invalid interest until there is a valid interest left.
  - 1. *Class Gifts* -- Some class gifts are partially valid and partially invalid. There is a split in authority on how to deal with this situation.
    - a) *All or Nothing Rule* -- The whole interest is void, even the valid one.
    - b) *Split the Difference Rule* -- The valid interests remain while the invalid ones are struck.

### iii. Modern Modifications

- a. **Wait and See** -- Under the wait and see test, courts will not hold that a future interest violates the rule against perpetuities until the perpetuities period has passed.
- b. **Equitable Reformation (Cy Pres)** -- If a conveyance contains an age limit greater than the perpetuities period, the court will modify the age limit to the perpetuities period to keep the conveyance valid.
  - 1. Example -- "O to A for life, then to the first child of B to attain 25 years of age" ---convert to---> "O to A for life, then to the first child of B to attain 21 years of age"
- c. **Uniform Statutory Rule Against Perpetuities** -- Adopted in nearly half the states.
  - 1. Donative Transfers (Created in Gifts, Trusts, or Wills) -- Validates donative transfers that would otherwise violate the traditional rule if the interest vests at any time **within 90 years** of the date of its creation. --> basically **wait and see** w/ 90 year perpetuity period.
    - a) *Conveyances that Violate the 90 Year Rule* -- If an interest violates the 90 year rule courts reform the deed, will, or trust in the manner that most closely approximates the transferor's manifested plan of distribution.
    - b) *Transfers that are Exempt* -- 1) premarital separation agreements, 2) transfers to governmental or charitable entities when the future interest is held by another charitable entity ----> these interests are valid **regardless** of when they vest.
- d. **Abolition of the Rule** -- At least 15 states have abolished or substantially altered.

## E. Trusts

### i. General

- a. **Trust** -- A "trust worth" person is responsible for managing property for the benefit of persons in need of protection.
- b. **Trustee** -- The person who holds legal title to the property and is thus the legal owner and fiduciary.
  - 1. Powers -- Trustee can sell trust assets and reinvest the proceeds in other assets unless the settlor intended the particular property to be retained in the trust.
  - 2. Duties -- The trustee has some duties that if breached he will be personally liable for.
    - ◇ Administer the trust in the interest of the **beneficiaries**
    - ◇ Trust property must remain separate from trustee's property
    - ◇ Act impartially between trust's present income beneficiary and remainder holders.
- c. **Beneficiaries** -- The equitable owners.
- d. **Settlor (Testator)** -- The person who establishes the trust is the settlor (living) or the testator (dead).
- e. **Testamentary Trust** -- Trust that is part of a will.

### ii. Charitable Trusts and Cy Pres

- a. **Cy Pres (Abney)** -- When a settlor establishes a 1) **charitable trust** and has a 2) **general intent** to contribute to charity, and the particular charitable purpose becomes 3) impracticable or impossible to achieve, the **cy pres** doctrine allows courts to carry out the settlor's charitable intent as far as possible by **authorizing trust income to be used for some other charity**.
  - 1. Three Elements:
    - ◇ Charitable Trust
    - ◇ Impracticable to Fulfill Settlor's Intent
    - ◇ General Charitable Intent -- Cannot have specific intent.
  - 2. Original Intent -- If grantor were alive today, given the current state of things would he have wanted the same thing?
    - a) *Issue* -- It is hard to know if grantor really intended discrimination, since some JX during certain periods **required** racially restrictive trusts.
- b. **Racially Restrictive Trusts and Cy Pres**
  - 1. Government Administered Trust -- If governmental, equal protection clause issues due to state action doctrine. Either strike the discriminatory provision **OR** let the trust fail.
    - a) *General Policy* -- There is a general policy to promote charitable trusts. Therefore, courts will not allow them to fail unless there is a **specific** commitment to racial discrimination.
  - 2. Privately Administered Trust -- Probably enforceable but may raise **public accommodation** issues.

## F. Waste

### i. Definition

Waste is neglect or misconduct resulting in material damages to or loss of property, but does not include ordinary depreciation of property due to age and normal use over a comparatively short period of time (**Moore**).

- a. **Modifications** -- Reasonable modification is permissible even if it decreases the market value.
- b. **Ameliorating** -- Actions in changing the property that cause the property to increase in the value or utility of the property. Waste is sometimes but not always found by courts.
  1. **Example** -- Pabst Brewing obtained a property in life estate (per autre vie). They demolished a large house on the lot and graded the land. Ordinarily, destruction of a dwelling would constitute waste. But the surrounding area had changed and the house was surrounded by factories thus the graded property was worth more.
    - a) **Rule** -- If a complete and permanent change of surrounding conditions has deprived the property of its value and usefulness as previously used the life tenant is entitled to make fundamental changes.

### ii. Types of Waste

- a. **Voluntary Waste** -- Waste that is the result of deliberate affirmative acts of the possessory tenant.
- b. **Permissive Waste** -- Waste that is the result of the failure of the possessory tenant to perform an affirmative duty imposed upon him for the benefit of the owners of future interests in the land.

### iii. Remedies

- Damages for Injuries Sustained
- Injunctive Relief
- Receivership

## G. Restraints on Alienation

### i. Racially Discriminatory Covenants

- a. **General Rule** -- Racially restrictive estates are void.
- b. **State Action** -- Enforcement of racially restrictive covenants constitutes state action and are struck down because they create an equal protection issue (**Shelley**).
  1. **Reverter Clauses** -- Because reverter clauses operate automatically, courts have said that no state action is involved when a racially restrictive condition is subject to reverter. --->

### ii. Restraints on Marriage

- a. **Traditional Rule** -- Restraints on marriage were typically held to be void.
- b. **Modern Rule** -- Enforceable if the motive was to provide for the woman while she was single (as a practical matter, they generally wind up getting enforced unless there was an intention to prevent marriage shown). See **Lewis**.
  1. **Rationale** -- Stay out of personal relations (privacy). If conditions of estates affect people's personal decision, it might be illegal for states to enforce interference w/ family relations.
  2. **Divorce** -- Any rule encouraging divorce is certain not to be enforced.
  3. **Re-Marriage** -- Restraints on remarriage are more likely to be upheld than restraints on first marriages.

### iii. Restraints on Alienation

- a. **Forfeiture Restraints** -- Limitations on transfer/sale of property rights that trigger future interests.
  1. **Old Rule** -- Any restraint on alienation of fee interest is VOID
  2. **Modern Rule** -- Unreasonable restraints on alienation are void (strong presumption that alienation attached to fee simple is void). Complete restraints on alienation are **repugnant to the fee** (**Serio**).
    - a) **Example** -- "O to A and his heirs, but if A ever attempts to alienate the property, it shall revert to O" ---> VOID!
    - b) **Rationale** -- For reasons of autonomy and social utility, owners should be able to transfer their property freely.
  3. **Leases** -- Valid in leaseholds.
- b. **Acceptable Restraints**
  1. **Condo Associations** -- More leeway is given to condo associations to impose restraints.
    - a) **Rationale** -- The board is elected by owners, seems more democratic. Almost like zoning law. Moreover, restrictions are mutual.
  2. **Life Estates** -- Restraints on the alienation of life estates are generally okay.
  3. **Partial Restraints on Alienation** -- e.g., limiting the time period during which the restraint exists or identify a limited class of people to whom the property cannot be transferred.
  4. **Charities** -- Allowed if both present and future estates are held by charities.

## V. Concurrent Ownership

### A. Co-Ownership

#### i. Tenants in Common

- a. **Creation** -- By deed, will, or inheritance. Note that a tenancy in common can be devised.
  - a) **Ambiguity** -- If the conveyance is ambiguous a tenancy in common is presumed.
- b. **Possession** -- Each co-tenant has the undivided right to possess the **whole** estate.
- c. **Sale** -- Sale of a tenant in common's interest can be made unilaterally. Tenants in common can sell only their own interest. Therefore, the purchaser will become a tenant in common with the other co-owners.
- d. **Termination**
  1. **Partition** -- May end by petitioning the courts for partition. Courts will either physically divide the property or sell the property and divide the proceeds.
  2. **Merger** -- Entire title vests to one person by purchase or otherwise.

#### ii. Joint Tenants

- a. **Creation (4 Unities)** -- Common law requires that the 4 unities (time, title, interest, and possession) be present at the time the joint tenancy is created. Modern courts require that the intent to create a joint tenancy be clear, otherwise the conveyance is a tenancy in common. Some **modern courts** do not require unity of interest while other courts **abolish** the 4 unities all together and look to the intent of the grantor.
  1. **Time** -- The joint tenancy must be created at the same time for all joint tenants.
  2. **Title** -- The joint tenancy must be created in a single document.
  3. **Interest** -- Each tenant must hold an equal interest in the property.
  4. **Possession** -- Each tenant must have the right to possess the whole.
- b. **Possession** -- Each joint tenant owns an undivided share of the whole property.
- c. **Sale** -- Joint tenants cannot sell their interests if they want to preserve the joint tenancy. The sale of a joint tenancy destroys the 4 unities between the joint tenants.
  1. **Unilateral Sale** -- A sale may be made unilaterally.
- ★ d. **Right of Survivorship** -- When one joint tenant dies, his interest vanishes and the others' share increases proportionately.
  1. **Indestructible Right of Survivorship** -- Can create a right to survivorship that is indestructible by creating dual life estates with alternative contingent remainders.
    - a) **Example** -- O to A and B for life, then to B if B survives A, or to A if A survives B.
- e. **Termination** -- A sale transforms a joint tenancy into a tenancy in common; partition ends co-ownership.

#### iii. Rent and Expenses

- a. **Other Co-Tenants**
  1. **Rent** -- The co-owner who is in possession has no duty to pay rent to the other co-owners who are out of possession.
  2. **Expenses** -- The co-owner in possession must pay the full cost of expenses (e.g., mortgage, property taxes, etc) if it is less than the fair rental value belonging to the co-owners out of possession.
- b. **Third Parties** -- A co-tenant may rent to a third party unilaterally (**Carr**).
- c. **Ousters** -- A co-tenant who wrongfully excludes another co-tenant.
  1. **Traditional Ouster** -- Rent due when co-tenant wrongfully excludes another co-tenant through affirmative actions.
  2. **Constructive Ouster** -- Presumed in the context of divorce or separation. The character of the property must be such as to make joint occupancy impossible or impracticable.
    - ★ a) **Needs and Resources (A family law doctrine)** -- Does the tenant in possession have the resources to pay rent and an obligation to support the tenant out of possession.

#### iv. Severance

- a. **Definition** -- A joint tenant can destroy the right of survivorship at any time by **severing** the joint tenancy. Upon severance the tenancy becomes a tenancy in common.
- b. **Does a Lease Sever Joint Tenancy?**
  1. **Majority** -- No, leasing does not sever a joint tenancy.
    - a) **Rationale** -- Modern courts take a more relaxed view of the unities.
  2. **Minority** -- Yes, leasing does sever a joint tenancy.
    - a) **Rationales**
      - 1) Unities -- The conveyance of a lease destroys the unity of interest because the lessor joint tenant has a reversion in the property while the other joint tenant has a fee simple.
      - 2) Alienability -- Who wants to lease a property that could end as soon as grantor dies.

- c. **Does a Lease Survive Death of Joint Tenant?**
  - 1. Split in Authority
    - a) *No Survival (Majority)* -- A person can only convey what he owns. Lessor has no power to convey the lease beyond his death because he had no power to convey his own interest after his death. See **Tenhet**.
    - b) *Survival* -- If the lessor can destroy the right of survivorship he should also be able to encumber his interest with a lease beyond his death (Counter: dead hand).
- d. **Does a Mortgage Sever Joint Tenancy?**
  - 1. General Rule -- Whether joint tenancy is severed depends on of the mortgage is just a security interest or if it actually transfers the title. Courts take different views of what the legal effect of a mortgage is.
    - a) *Title View* --If it transfers the title then the mortgage severs the joint tenancy because the four unities are destroyed.
    - b) *Security Interest View* -- If it is a mere security interest the joint tenancy is not severed.
- e. **Does a Mortgage Survive Death of Joint Tenant?**
  - 1. Rule -- see above. Again depends on whether the court takes the title view or the security interest view. In **Harms** (note case) the court took the security interest view. Since the joint tenancy was not severed the mortgage ended on the death of the joint tenant.

## B. Family Property

### i. Tenancy by the Entirety

- a. **Creation** -- Requires the four unities plus legally married spouses.
  - 1) Presumption -- Some states presume that a conveyance of property to a husband and wife creates a tenancy by the entirety.
- b. **Possession** -- Each owns an undivided share of the whole.
- c. **Sale** -- One party cannot sell without consent of the other (**No Unilateral Sale**).
- d. **Right of Survivorship** -- One tenant automatically receives the interest of the other tenant when he/she dies.
- e. **Termination** -- Partition can only be made by divorce.

## VI. Leaseholds

### A. General

#### i. Commercial v. Residential Tenancies

Courts distinguish between commercial and residential tenancies. Many of the rules are the same but courts analyze each tenancy separately because there are different **policy concerns** that underlie them and the parties **justified expectations** may differ.

- a. **Source of Law** -- Generally, courts are more willing to adopt common law rules regulating residential leases rather than commercial ones. The assumption is that commercial tenants are more likely to have sufficient bargaining power and expertise to shape the contractual arrangement in their best interests.
- b. **Interest of the Grantor** -- The landlord holds a **reversion** if it reverts back to her on the termination of the lease. If interest reverts to a 3rd party, the 3rd party holds a **remainder**.

#### ii. Leasehold Definition

Transfer of possession of real property for either a determinate or indefinite period. When the leasehold ends the right to possession reverts to the original owner.

- a. **Exclusive Right to Possession** -- The exclusive right to possession is what distinguishes a lease from other property interests like a license or an easement.

#### iii. Statute of Frauds

Interests in real property must be in writing. Leases of more than one year must be in writing. Leases of a year or less are generally enforceable whether written or oral.

## B. Types of Leaseholds (Tenancies)

### i. Term of Years

- a. **Definition** -- Any lease that expires at the end of a defined period. It terminates automatically but may end prior to the defined ending period on the happening of some event or condition stated in the agreement. Death does not terminate.

### ii. Periodic Tenancy

- a. **Definition** -- A lease that renews automatically at specified periods (e.g., month-to-month). Advanced notice is typically required to terminate (30 days in most jx). Death of either party does not terminate.

### iii. Tenancy at Will

- a. **Definition** -- A lease that renews automatically at specified periods but can be terminated without notice. Mostly abolished b/c most jx require notice to end any lease. Death terminates.

#### iv. Tenancy at Sufferance (Holdover Tenant)

- a. **Definition** -- A tenant at sufferance is someone who stays after expiration of the lease. A tenant at sufferance is distinguished from a trespasser b/c the trespasser never had a right to possess. A landlord can eject a trespasser (self-help) while a tenant at sufferance may require court proceedings to be ejected.

### C. Conflicts About Occupancy

#### i. Landlord's Duty to Deliver Possession

- a. **Majority Rule** -- The landlord has the duty to deliver possession of the rented premises to the tenant at the beginning of the leasehold.
  - 1) Holdover Tenant -- In a majority of jx the landlord has an obligation to remove the prior tenant within a reasonable period of time by either instituting eviction proceedings or convincing the holdover to leave.
  - 2) Failure to Deliver -- The failure to deliver actual possession of the premises to the new tenant constitutes a breach of the lease by the landlord. The tenant may terminate the lease and recover damages or withhold rent during the period which he could not possess the property.
- b. **Traditional Rule** -- In a majority of jx the landlord has only the duty to deliver the right to possession but no duty to deliver actual possession. Under this rule it is the new tenant's responsibility to evict the holdover. The new tenant may go after the holdover for damages.

### D. Transfer of Leasehold Interests

#### i. Landlords Right to Transfer the Reversion

- a. **General Rule** -- Either party may transfer her property interest in a leasehold. The lease even survives death or divorce of the landlord.
  - 1) Mortgaged Property -- Whether the lease survives depends on timing. If the lease is first in time (relative to mortgage), then the lease takes priority and survives. If the mortgage came first, the mortgage takes priority and the lease ends (unless there is a statute or precedent that indicates otherwise).

#### ii. Tenant's Right to Assign or Sublet

- a. **Majority Rule** -- A tenant may transfer her leasehold by sublet or assignment as long as the lease does not restrict the tenants ability to do so.
  - 1) *Rationale* -- To promote alienability.
- b. **Sublease v. Assignment**
  - 1) Sublease -- Tenant retains some future interest or the right to control the property in the **future**. The covenants do not run with the land as real covenants. Therefore, the landlord has no right to sue the subtenant to enforce any of the original lease.
    - a) *Third-Party Beneficiary* -- If the subtenant promises the original tenant to pay rent to the landlord, the landlord may be able to sue the subtenant as a third-party beneficiary to the contract made between tenant and subtenant.
  - 2) Assignment -- An assignment conveys all of the tenant's remaining property interests without any future rights to enter the property. Traditionally, the assignee is responsible directly to the landlord for all the undertakings under the original lease.
    - a) *Privity of Estate* -- Courts under the traditional rule use privity of estate to say that the covenants of the lease run with the land. Landlord and assignee are in privity of estate because they share an interest in the property.
- c. **Lease Prohibits Assignment or Sublease** -- Restraints on alienation of leaseholds are very likely to be upheld by courts. Therefore, a clause that prevents subletting or assignment in a lease is generally enforceable. A violation will generally entitle the landlord to evict tenant for breaching a material term.
- d. **Lease that Requires the Landlords Consent** -- Generally enforceable.
  - 1) Ambiguity (Traditional Rule) -- A lease that limits subletting but not assigning will be strictly construed to limit only subletting. The rationale is to promote alienability of leaseholds.
  - 2) Ambiguity (Modern Rule) -- The focus is on the intent of the parties because modern usage sometimes employs the term subletting to mean any transfer of the leasehold interest. Rationale is to uphold the reasonable expectations of the parties.
- ★e. **Consent and Reasonableness**
  - 1) Majority Rule -- The landlord can exercise rent for any reason.
  - 2) Modern Trend -- A modern (minority) trend is for courts to infer a consent clause is not an absolute condition but infer a duty to exercise reasonableness when the landlord exercises her consent.
    - a) *Commercial Tenancies* -- The trend appears to be toward adopting an implied reasonableness term in lease clauses that give the landlord the right to consent or to sublet or assignment. Some courts don't go so far and apply a good faith/fair dealing standard. See *Kendall*.
    - b) *Residential Tenancies* -- Courts seem less willing to apply the modern trend to residential tenancies. See *Slavin*.

### ★ c) Policy Arguments

#### 1) Majority Rule

- (a) Common Law Rule -- The court should not upset the reasonable expectations of people. A change in law should be through the legislative process, not the courts.
- (b) Market Conditions -- The landlord should receive the benefit of a change in market conditions.
- (c) Freedom of Contract -- Courts should not re-write the terms of a contract.
- (d) Classic Property Argument -- The landlord gave the stick (possession, rent) to the lessee and should only have to go to the lessee for that stick (rent). Kind of a concept of what property should be.

#### 2) Modern Trend

- (a) Efficiency -- Lessor gets the same thing (a person paying rent) so it really makes no difference where the money comes from.
- (b) Alienability -- Restraint on alienation must be justified. To be justified a restraint must be reasonable. Therefore, an unreasonable exercise of consent is an unreasonable restraint on alienation.
- (c) Contracts Argument -- Good faith and fair dealings is required by contract law. It should be required in property too.

## E. End of Tenancy

### i. General Principle

Landlords may evict tenants at the end of the lease term but not before unless the tenant has breached the lease. The landlord has no obligation to renew a leasehold and may not renew for any reason.

### ii. Exceptions

- a. **Discrimination** -- Anti-discrimination statutes prohibit landlords from failing to renew leaseholds if the landlord's motivation is discriminatory.
- b. **Rent Controls** -- Tenants in units that are subject to statutory or local rent control are typically protected from eviction unless the landlord can show **just cause**.
- c. **Converting Apartments** -- Some jx also regulate eviction for the purpose of converting apartment units into condominiums.
- d. **Public Housing** -- Federal housing law protects occupants of public housing from eviction without just cause.
- e. **Retaliation** -- Tenants are protected from eviction if the landlord's motivation is to retaliate against them for asserting their right to habitable premises by calling the housing inspector, for example to report housing violations.

## F. Conflicts About Rent

### i. Three Primary Rights Reserved to the Landlord

- a. **Rent** -- The right to receive the agreed-upon rent.
- b. **No Waste** -- The right to have the premises intact and not damaged.
- c. **Reversion** -- The right to regain possession at the end of the lease term.

### ii. Landlords Duty to Mitigate Damages

- a. **General Rule** -- If the tenant moves out before the end of the lease there are three possible remedies that the landlord may choose:
  - 1) Accept Surrender -- Just accepts it and moves on.
  - 2) Re-Let -- Find a new tenant to occupy the now vacant unit.
  - 3) Wait and Sue v. Mitigate Damages -- The landlord used to be able to wait and sue at the end of the lease term. Modern courts reject this and find that the landlord must mitigate damages by taking steps to find a new tenant (**Sommer**).

### iii. Security Deposits

Three typical regulations that states may place on security deposits:

- a. Amount -- Limit the amount that can be required for a security deposit.
- b. Storage of the Deposit -- Require the landlord to place the deposit in a separate account.
- c. Repayment -- Landlord required to repay security deposit to tenant with interest at the termination of the lease less any amounts deducted to pay for repairs necessitated by damage.

### iv. Rent Controls

Laws are passed to protect the rights of tenants to continue living in their homes while allowing landlords to obtain a reasonable return on investment. Rent controls are not considered unconstitutional taking of the landlord's property.

## G. Tenants Rights to Habitable Premises

### i. Covenant of Quiet Enjoyment and Constructive Eviction

- a. **Covenant of Quiet Enjoyment** -- The covenant of quiet enjoyment insures the tenant 1) maintains **possession** of the premises, and 2) its use is not **substantially** impaired 3) by the action or non-action of the landlord. Unless the tenant is actually or constructively evicted, there is no breach of the covenant of quiet enjoyment. The covenant is **implied** in every lease.
- b. **Constructive Eviction** -- Where, 1) through the **fault of the landlord**, there 2) occurs a **substantial interference** with the tenant's use and enjoyment of the leased premises, so that the tenant can 3) **no longer enjoy** the premises as the parties contemplated, the tenant may terminate the lease, vacate the premises, and be excused from further rent liability.
  - 1) Substantial Interference -- A substantial breach of the covenant of quiet enjoyment because of some wrongful act or omission by the landlord and the premises becomes uninhabitable.
  - 2) Fault of Landlord -- The interference must be caused by the landlord's wrongful acts. See **Blackett** --> violation can flow from the natural and probably consequences of LL's actions.
  - 3) Tenant Must Vacate Premises -- Tenant must vacate premises. In some courts tenant can show **partial constructive eviction** (see **Minjak**) if he had to vacate a portion that was uninhabitable.

### ii. Warranty of Habitability (**Javins**)

All **residential** leases have an implied warranty of habitability measured by the local housing code or community standards for suitability for occupancy. Rent payment is dependent upon the landlords compliance with this warranty. In a majority of states the warranty is non-disclaimable.

- a. **Notice** -- Landlord must be given notice of the problem and a reasonable opportunity to cure.
- b. **Rationales**
  - ◆ Contract v. Property -- Modern residential leases look more like service contracts than conveyances.
  - ◆ Landlord is required to deliver the property in accordance with the housing code at the beginning of the lease. It makes sense that he should have to continue that for the duration of the lease.
  - ◆ Social utility -- slums are a burden on all of society.
  - ◆ Efficiency -- Landlord is in the best position to make repairs. Modern tenant is no longer the "jack of all trades" farmer. Further, tenant may not even have access to the areas needed to make the repair.
  - ◆ Fairness/Reasonable Expectations -- Tenants are more transient today and therefore have no reason to invest in the long term maintenance of the property.
  - ◆ Reasonable Expectations -- Tenant thinks that she is signing up for having a habitable place to live.
- c. **Remedies**
  - 1) Rescission -- The right to move out before the end of the lease w/o liability for the remaining rent.
  - 2) Rent Withholding -- Tenant generally has the right to stop paying rent and remain in possession when the landlord breaches the warranty of habitability. This remedy is usually regulated by statute, requiring things like notice and escrow.
  - 3) Rent Abatement -- Tenant usually entitled to a reduction in rent.
  - 4) Repair and Deduct -- Tenant may repair the problem then deduct the costs from the rent. Most jx regulate by statute.
  - 5) Injunctive Relief/Specific Performance -- Some jx allow tenant to bring a lawsuit to have the repairs made by court order.
  - 6) Administrative Remedies -- Some jx set up a system where the tenant can call a housing inspector and if the inspector finds a violation he will get with the tenant and order for the necessary repairs to be made.
  - 7) Criminal Sanctions -- Some housing codes permit criminal fines.
  - 8) Compensatory Damages -- Some claims may seek amount of money that exceeds the rent. This may occur if the defect harms tenants personal property.
  - 9) Receivership -- If there is massive violations throughout a building, a court may place the property under the management of a court appointed "receiver" instructed to arrange the repairs ---> court actually takes a portion of the title.
- d. **Commercial leases** -- Only a few jx provide a warranty of suitability for intended purposes (the commercial lease parallel to warranty of habitability). However, most courts will find covenants in a lease to be dependent. Some courts still apply the old rule, finding that covenants in the lease are independent.

### iii. Retaliatory Eviction

- a. **General Rule** -- Under residential leases a landlord is not permitted to evict/raise rent in order to retaliate against the tenant for asserting legal rights protected by the implied warranty of habitability.
  - 1) Rationale -- If landlord could do this tenants would in effect have a limited warranty of habitability because they would be too scared to assert their rights.

b. **Establishing Retaliation**

- 1) Uniform Residential Landlord and Tenant Act -- An eviction is **presumed** to be retaliatory if it comes within **one year** of the tenant taking an action that was intended to protect or further his rights to habitable premises. The landlord then has the burden of production in showing the action was legitimate. The tenant then has the burden of proof.
  - a) *Rebutting the Presumption* -- The presumption can be rebutted if the landlord can show a **legitimate business reason** for evicting the tenant or **otherwise** demonstrate that motive was not retaliatory (e.g. *Bloomquist* -- Tenant got violent; *Fout* -- Striking minor could be evicted b/c activity had nothing to do w/ housing).
  - b) *Showing Legitimate Business Reason* -- Loss of profits nor wanting to take the property off the market is generally not enough. Must have a serious economic hardship. See *Robinson*.
- c. **Policy Rationales** -- The major policy tension is the landlords right to reversion versus the tenants right to habitability. Moreover, if landlord could engage in retaliatory eviction the policy underlying the housing codes would be undermined.
  - 1) Two Major Policies to Discuss
    - ◇ Social Policy
    - ◇ Fairness
  - 2) Other Considerations -- Consider the effects on 3rd parties (e.g., the aggregate effect of allowing the landlord to selectively close down a property).

## VII. Fair Housing Law

### A. Fair Housing Act

i. **Introduction** -- **Note: See appendix for relevant statute. Probably a good idea to use if on exam question.**

- a. **General** -- Outlaws private discrim. in housing transactions, including the selling, renting, advertising, and financing of housing. Also outlaws racially discrim. covenants and discrim. by government entities.
- b. **Prohibits** -- 1) intentional discrimination and 2) facially neutral policies that have an unwarranted disparate impact on protected groups.
- c. **Protected Groups** -- Race, color, religion, sex, national origin, disability, familial status
  1. Unprotected Groups (by this law) -- Age, sexual orientation, marital status.
- d. **Scope** -- Applies only to the residential market.
  1. Exemptions
    - a) *Certain Types of Dwellings* -- Owner-occupied multi-unit dwellings, single-family homes.
      - 1) *Note Exempt* -- §3604 (c): Non-discriminatory advertising.
    - b) *Religious Orgs* -- See §3607(a)
    - c) *Private Clubs* -- See §3607(a)
    - d) *Housing for Older Persons* -- see §3607(b)
- e. **Standing** -- Aggrieved persons including testers, whites who are denied housing because of association with blacks all have standing.
- f. **Remedies** -- Can get compensatory and punitive damages. Can file a complaint with HUD, who has the power to investigate and mediate, and hear and adjudicate claim. Defendant can elect for federal court, however.
- g. **Justifications for FHA**
  1. Efficiency -- If people had perfect information, they would not be prejudiced. This is what they would want.
  2. Harm to Society -- Racial and other forms of prejudice have harmful externalities on society, costs of deferring to such prejudice outweighs the benefits, transaction costs prevent those who wish to prevent it from contracting with those who seek to engage it = promotes social welfare.
  3. Fairness (Strong) -- Discriminatory preferences are wrong and should not be indulged.

ii. **Intentional Discrimination**

- a. **Definition** -- Discrimination because of race, sex, ...etc.
- b. **Steps at Trial (*Asbury*)**
  1. Prima Facie Case -- If established a rebuttable presumption of discrimination is created.
    - ◇ Member of a racial minority or other protected class.
    - ◇ Plaintiff applied for and was qualified to rent/purchase unit.
    - ◇ Plaintiff was denied the opportunity to rent or buy.
    - ◇ Unit remained on the Market
  2. Burden Shifts to Defendant -- Defendant may establish a legitimate, non-discriminatory reason for denial of sale or rent (e.g., fear would not be able to pay rent; no post hoc rationalizations).
  3. Plaintiff Must Prove Reason is Pretextual -- To show pretext plaintiff must prove defendants justification is false.

### iii. Disparate Impact

- a. **General Rule** -- Facially neutral policies that have a discriminatory impact on protected groups will violate the FHA unless they further a "legitimate, bona fide governmental interest" and "no alternative course of action could be adopted that would enable the interest to be served with less discriminatory impact" (*Huntington*). See also *Starrett City*.
- b. **Private Defendants** -- Disparate impact claims can also be brought against private defendants.
- c. **Steps at Trial**
  1. Prima Facie Case -- Statistical evidence (percentages) that D's policy or practice has a significantly greater impact on a class of persons protected by the FHA than others (percentages). **OR** the policy or practice tends to perpetuate segregation.
  2. Defendant Provides Justification -- The defendant must provide a valid justification for the policy. Cannot be a post-hoc rationalization. There must be no other less discriminatory alternative.
  3. Balancing of Justification v. Disparate Impact
    - a) *Plan-Specific Problems* -- The specific housing plan is not adequate for certain reasons.
    - b) *Site Specific Problems* -- The proposed plan is not feasible because of geographical limitations. Much more likely to be an acceptable defense although plaintiff can rebut by showing that other sites are available which would alleviate the problems.
    - c) *Plaintiffs Defenses*
      - ▶ Government's interest is a pretext and result of a post-hoc rationalization.
      - ▶ The government interest is not legitimate.
      - ▶ A less discriminatory alternative exists.

## B. Income Based Discrimination

- i. **General Rule** -- Courts don't provide protections for this form of discrimination.

## C. Zoning

### i. Introduction

- a. **Source of Power** -- Zoning is generally justified under the state police power.
- b. **Zoning Enabling Acts** -- State governments delegate the power to zone to local municipalities through zoning enabling acts.
- c. **Two Types of Zoning Regulations**
  1. Use Zoning -- Accomplished by dividing the municipality into districts and regulating the kinds of uses allowed within each district.
    - a) *Euclidean Zoning* -- Segregation of land uses into specified geographic districts and dimensional standards stipulating limitations on development activity within each type of district.
    - b) *Cumulative Zoning* -- Zoning that uses a pyramid structure to the types of uses that are permitted (e.g., residential use can be in a commercial district but not the other way around).
  2. Area Zoning -- regulates the size of lots, the height of buildings, and requirements to set back structures a certain distance from the property borders.
- d. **Comprehensive Plan** -- Modern jurisdictions create a comprehensive zoning plan that is separate from the zoning ordinance. The comprehensive plan shows the general divisions of the municipality as a whole.
  1. Planning Commission -- Comprehensive plans are usually created by a planning commission who holds hearings and takes the advice of city planners.

### ii. Exclusionary Zoning

- a. **Definition** -- Exclusionary zoning is zoning to exclude certain people (e.g., the poor, families, etc...).
- b. **Justifications**
  - ◆ More stable tax base
  - ◆ Aesthetics/Character
  - ◆ Property values -- Note: kind of bleeds into aesthetics/character
  - ◆ Promote Traditional Family Values (compare *Bell Terre*; with *Dinolfo*)
- c. **Countervailing considerations**
  - ◆ Integration
  - ◆ Providing necessary low income housing in suburban communities (*Mt. Laurel*)

## VIII. Takings

### A. Introduction

#### i. US Constitution -- Limitations on Takings

- a. **Takings Clause: Fifth Amendment** -- The 5th amendment provides: "nor shall private property be 1) taken for 2) public use, 3) without just compensation."
  1. A Taking -- A taking can extend to all property rights and can even occur through regulation.
  2. For Public Use -- A taking must effectuate a legitimate public purpose.

3. Without Just Compensation -- Compensation is usually equivalent to the fair market value.
- b. **Fourteenth Amendment** -- As applied to takings it means that no property shall be taken without due process or equal protections of the laws. The 5th amendment is applied to the states by the 14th amendment via substantive due process.

## ii. State Justification for Takings

- a. **Police Power** -- When the state acts within the legitimate sphere of the police power, the infringement on private property interests is damage without redress.

## B. Per Se Taking

### i. General

- a. **General Rule** -- A *per se* taking is a **permanent**, forced physical invasion by a stranger through either transfer of title or an easement.

### ii. Categorical Takings

#### a. Categories

1. Physical Invasion -- A physical invasion is a *per se* taking. A physical invasion occurs when the government physically invades or occupies private property permanently, **OR** by statute or regulation authorizes a third party's physical invasion or occupation of private property permanently.
  - a) *Permanently* -- Doesn't have to be explicitly permanent, just can't be temporary.
  - b) *Government Defenses* -- If a physical invasion is established, the government has no defenses. The public policy involved nor the impact on the owners land is a defense.
2. Core Property Right -- Physical invasion principles can also be applied to core property rights such as the right to exclude.
3. Economically Viable Use -- When a government regulation prohibits **all (100%)** economically beneficial or productive use of private land, a *per se* taking has occurred.
  - a) *Exception* -- All laws and regulations that duplicate results reached under common law property or nuisance laws do not amount to a taking. In other words, the right was never in the bundle of sticks to begin with.

## C. As Applied Taking (Regulatory Taking)

### i. Ad Hoc Test

- a. **General Rule** -- For a regulatory law to constitute a taking **fairness and justice** must require the cost of the regulatory law to be shared among taxpayers.
- b. **Fairness and Justice (*Penn Central* Factors)** -- To determine what fairness and justice requires courts **weigh the private and public interests** by considering three factors:
  - a) Character Government Action -- The state is generally empowered to legislate to protect the public (police power) without compensating those whose property interests suffer a resultant economic impact.
  - b) Economic Impact -- The greater the diminution in value, the more likely regulation will be characterized as a taking. Complete deprivation of any "economically viable use" is likely to be a taking unless the regulation denies property rights than never existed in the first place (e.g., the right to commit nuisance).
    - i) *Diminution in Value* -- The extent of the diminution in value depends on how the courts define the property interest.
  - c) Interference with Investment Backed Expectations -- If a citizen has 1) substantially invested in 2) reasonable reliance under the guidance of an 3) existing statutory scheme, then a taking is more likely. Conversely, a taking is less likely if the regulation prevents the owner from realizing an expected benefit in the future.
- c. **Policy Oriented Considerations** -- In addition to the *Penn Central* Factors courts may consider policy oriented considerations when distinguishing between a regulatory taking and a legitimate regulation. Three common considerations are tradition, efficiency and distributive justice.
  1. Tradition!!! -- Looks to the traditional definition of property interests. Since property concepts have changed over time, this may lead to difficulty in defining tradition.
  2. Efficiency -- Compensation should be required when it will help to promote efficient (wealth maximizing) legislation. In other words compensation should be used to deter the government from making legislation that is inefficient.
  3. Distributive Justice -- Regulations prevent owners from engaging in activities that harm the public welfare. Therefore, they should not be compensated for taking away their right because their right was never legitimate in the first place.

## D. For Public Use and Just Compensation

### i. Constitution

- a. **Fifth Amendment** -- Property can only be taken for "public use." Owner must be **justly compensated**.
- b. **Constitutionality of a Taking** -- If there has already been a taking the constitutionality of it depends on whether it fits into the definition of the "public use."

### ii. Legitimate Public Purpose + Private Ownership

- a. **General Rule** -- Public use requirement is met if the taking serves a legitimate public purpose, even if property is not used exclusively by the public.
  1. Legislative Deference -- Court should give great deference to legislatures as to what it determines serves a public purpose.
  2. Re-development Plans -- A municipality is not required to re-develop on a piecemeal basis -- lot by lot, building by building. In other words, not every part of a re-development must be blighted.
  3. Incidental/Pre-Textual Benefits -- Benefits conferred on a private entity with only incidental or pre-textual public benefits, are forbidden by the public use clause.
- b. **States and Legitimate Public Use** -- Some states follow the supreme court interpretation in *Kelo* while others take more narrow approaches advocated by Kennedy, O'Connor or Thomas.
  1. Kennedy Approach -- For there to be a public use the public benefits and characteristics of the intended use substantially predominate over the private nature of that use.
  2. O'Connor Approach -- Property cannot be taken and transferred from one owner to another unless the nature of the property itself justifies the taking.
  3. Thomas Approach -- Public use means "public ownership" or "use by the public" thereby denying the power to take property from any private person if it is to be transferred to another and used privately rather than by the public at large.
- c. **State Statutes** -- Almost all states have responded to *Kelo* by passing legislation that limits the power of municipalities. There are several approaches:
  1. Repudiation of Kelo -- The use of eminent domain to take property from one person to transfer it to another person is prohibited if the taking is for economic development purposes.
  2. Literal Approach (Thomas) -- See Above.
  3. Blighted Property -- Taking is prohibited unless the property being taken is blighted thus raising health and safety concerns.
  4. Procedural Methods -- Some use procedure to increase public participation in the process.
  5. Increased Compensation -- Some states require higher compensation than usual fair market value if a persons home is taken.

### iii. Just Compensation

- a. **General Rule** -- The supreme court has held that just compensation requires **fair market value** of the property prior to taking. Compensation is measured by the damage suffered to the owner not the benefit attained by the government; thus any increase in value of the property caused by the taking is not owed by the owner.
  1. Subjective Value -- To fully compensate for an owners loss the amount of compensation would have to be more than market value in some cases. However, this measure is unconstitutional because it is to difficult to figure out how much the owner subjectively values his property.
  2. Moving Costs/Business Goodwill -- The supreme court has held that "property" that must be compensated for is limited to only the physical property taken. Therefore, moving costs and the loss of business goodwill are not something that can be compensated for --> these are merely incidental results of the taking.
    - i) *Exception: Temporary Taking --Kimball Laundry*: the government temporarily took over a factory during WWII. Because the taking was temporary, the owner was unable to reestablish business elsewhere during the war. Court held that this was compensatable.
    - ii) *Exception: State Law* -- Some states have statutes that require compensation for loss of business good will.
- b. **Defining "Property"** -- Leases and improvements on land can be treated as a taking, however, some problems arise figuring out precisely what the value of these forms of property should be. The lessee is entitled to be compensated for the value of the improvements on the land over their useful life based on evidence that the lessor would likely have continued to renew the lease ant that the lease could be alienated. One the other hand fair market value does not include special value of property to the owner arising from its adaptability to his particular use.
- c. **Partial Takings** -- The owner is entitled to diminution of property value of the remaining property. If there is a special benefit Courts will typically offset the damages by the amount of the benefit to the owner. Some courts allow an offset for both special and general benefits accruing to the remaining property.