

- ▼ I. Opening notes:
 - A. Prof Paula Franzese
 - B. Methodology: metaphor, acronyms, imagery, vivid mental associations, songs—all help memory.
 - C. Stay calm. It's a marathon, not a sprint. forget about the likes and dislikes, and do what must be done —G. Bernard Shaw
- ▼ II. **Estates in Land**, aka "feudal interests" (future interests are in another video)
 - A. The origins come from William the Bastard in 1066.
 - ▼ B. Three essential questions about each interest:
 - 1. What language creates the estate?
 - ▼ 2. Once identified, what are the estates' distinguishing attributes?
 - a. Is the estate devisable (can it pass by will)?
 - b. Is the estate descendable? Will it pass by statutes of intestacy if its holder dies w/out a will?
 - c. Is the estate alienable? Is it transferable *inter vivos* (during its holder's lifetime)?
 - 3. Is there a future interest to accompany the estate?
 - ▼ C. Four interests:
 - ▼ 1. Fee Simple Absolute (FSA)
 - a. Language that creates it: "to A" or "to A and his heirs"
 - ▼ b. Distinguishing attributes:
 - i. Absolute ownership of potentially infinite duration. Best estate a taker could hope for.
 - ii. Freely devisable, descendable, and alienable.
 - ▼ c. NO future interest accompanies the FSA.
 - i. If "O conveys to A and his heirs," A is alive and well, what do A's heirs have? Nothing.
 - ii. Sinead O'Connor rule of property: A living person has no heirs. Living people may have heirs apparent, or prospective heirs, but they don't matter to the FSA.
 - ▼ 2. Fee Tail (FT)
 - a. Language: "To A and the heirs of his body."
 - ▼ b. Distinguishing attributes:
 - ▼ i. Virtually abolished in U.S. today.
 - 1) If you try to create a FT today, you'll end up creating instead an FSA.
 - ii. Historically, the FT would pass to the grantee's lineal blood descendants, no matter what. Purpose was to keep land in the family to maintain and protect family dynasties.
 - iii. Accompanying future interest? Yes. A future interest in O, the grantor, it was called a "reversion." Future interest in a 3rd party would be a "remainder." (To A and the heirs of his body and then to B: B has the remainder.)
 - ▼ 3. Defeasible Fees (three types—*frequent testing ground and vital in practice*)
 - ▼ a. Two important rules of construction for all defeasible fees:
 - ▼ i. Words of mere desire or hope or intention are insufficient to create a defeasible fee.
 - 1) Courts disfavor restrictions on the free, unencumbered use of land. Therefore, courts avoid finding a defeasible fee unless clear durational language is used.
 - 2) i.e.: "To A for the purpose of constructing a daycare center." A has an FSA.
 - 3) i.e.: "To A with the expectation that the premises will be used for a drugstore." A has an FSA.
 - ▼ ii. Absolute restraints on alienation are void.

- 1) An absolute restraint on alienation is an absolute ban on the power to sell or transfer. Can't do that. If you see that, you know it will be considered a nullity.
 - 2) i.e.: "To A so long as she never attempts to sell." You can't do that. Discard the condition; A has an FSA.
- ▼ b. Fee Simple Determinable (FSD)
- ▼ i. Language to create: "To A for so long as...." or "To A during...." or "To A until..."
 - 1) Grantor must use clear, durational language. If stated condition is violated, forfeiture is automatic.
 - ▼ ii. Distinguishing attributes: It's devisable, descendable, and alienable.
 - 1) i.e.: Paul conveys to Ringo so long as the premises is used as a music studio. Ringo transfers to Mick Jagger. Jagger wants to convert premises to a bowl-a-rama. Can Jagger do that? No, not w/out violating the condition.
 - 2) Mick Jagger rule of real property: You can't always get what you want.
 - ▼ iii. Yes, future interest: Possibility of reverter—exists in O, the grantor.
 - 1) *This comes up all the time on exams and on the bar.*
 - 2) FSD, POR = Fee Simple Determinable, Possibility of Reverter (or: Frank Sinatra Didn't Prefer Orville Reddenbacher)
- ▼ c. Fee Simple Subject to Condition Subsequent (FSSCS)
- ▼ i. Language to create: "To A, but if X event occurs, grantor reserves the right to reenter and retake." Two specific requirements:
 - 1) Grantor must use clear, durational language.
 - 2) Grantor must carve out the right to reenter.
 - 3) i.e: Ross conveys to Rachel, but if coffee is ever consumed on premises, grantor reserves right to reenter and retake.
 - ▼ ii. Distinguishing characteristics: It's devisable, descendable, and alienable—always subject to the condition.
 - 1) This estate is *not* automatically terminated if condition occurs, but it can be cut short *at grantor's option*.
 - 2) The Bobby Brown of estates: "It's my prerogative." If I want I'll terminate you.
 - iii. Accompanying future interest: Yes. Grantor has the right of reentry, aka: the power of termination.
- ▼ d. Fee Simple Subject to Executory Limitation (FSSEL)
- ▼ i. Language to create: "To A, but if X event occurs, *then, to B*."
 - 1) i.e.: To Barry Manilow, but if Manilow ever performs music on the premises, then to Mandy.
 - ▼ ii. Distinguishing characteristics:
 - 1) Just like the FSD (fee simple determinable), except here, if the condition is broken, the estate is automatically forfeited in favor of someone *other than* the grantor.
 - 2) So forfeiture is automatic. If Manilow sings, Mandy gets it.
 - iii. Accompanying interest: Yes. It's called "the shifting executory interest."
- ▼ 4. Life Estate (LE)
- ▼ a. Language to create: "To A for life."
 - i. Must be measured in explicit lifetime terms, and never in terms of years.
 - ii. i.e.: The "Romantic" Estate—"I will love you all my life." (not for 50 years)

- iii. "To A for 60 years if she lives that long" is not a LE. You'll have a term of years, a leasehold interest.
- ▼ iv. Variation: Life Estate Pur Autre Vie—a life estate measured by a life other than the grantee's.
 - 1) Language to create: "To A for the life of B."
- ▼ b. Distinguishing characteristics:
 - i. Rooted in the concept of *waste*. Life tenant's entitlements are linked inextricably to doctrine of waste.\
 - ii. Life tenant is entitled to all ordinary uses and profits from the land.
 - iii. Life tenant must not commit waste, meaning he/she must not do anything to harm the future interest-holders.
 - ▼ iv. Three types of **waste**:
 - 1) Voluntary or Affirmative Waste: Actual, overt conduct that causes a decrease in value. (overt destructiveness)
 - ▼ 2) Permissive Waste (neglect): Occurs when land is allowed to fall into disrepair, or life tenant fails to reasonably protect the land.
 - Life tenant must *maintain* premises in reasonably good repair.
 - ▼ 3) Ameliorative Waste: Life tenant must not engage in acts that will *enhance* property's value, unless all future interest-holders are known and consent.
 - Property law's attempt to honor sentimental value. Future interest holders may not want "improvements."
 - c. Accompanying interest: If the interest is held by O, the grantor, future interest is called a "reversion." If held by a 3rd party, the future interest is a remainder.
- ▼ III. **Concurrent Estates (law of co-ownership):** Three types of concurrent estates
- ▼ A. Joint Tenancy (JT): Two or more own w/the right of survivorship.
 - ▼ 1. Distinguishing Characteristics:
 - a. Right of survivorship—when one joint tenant dies, his share passes *automatically* to the surviving joint tenants.
 - b. A joint tenant's interest *is* alienable; however, it is *not* devisible or descendable (b/c of right of survivorship).
 - c. The Destiny's Child Tenancy: "I'm a survivor, I'm gonna take yours, I'm a survivor, I'm gonna keep yours."
 - ▼ 2. How to create:
 - ▼ a. First, you must have the four unities: TTIP = Tenants must take interests at the same Time, by the same Title, with Identical, equal interests, and w/identical rights to Possess the whole:
 - i. same Time
 - ii. same Title
 - iii. Identical, equal interests
 - iv. identical rights to Possess the whole
 - b. Grantor must also clearly express the right of survivorship.
 - c. Law requires all these hoops because law disfavors joint tenancies. JT can avoid probate and law doesn't like that.
 - ▼ d. To create, you often need to use a Strawman:
 - ▼ i. i.e.: Dave owns Blackacre in FSA, but he wants to own it as a JT w/his best friend Paul. How can Dave accomplish that result?

- 1) Dave can't just transfer to himself and Paul as a JT because of 4 unities.
- ▼ 2) Dave must use two pieces of paper:
 - 1) Dave conveys to Strawman (Dave's attorney, a friend, whatever).
 - 2) Straw conveys back to Dave and Paul as JTs w/the right of survivorship.
- ▼ 3. How to sever a JT: Two principle options:
 - ▼ a. Sale
 - i. A JT can sell or transfer her interest during her lifetime. She may even do so secretly, w/ out other JTs' knowledge or consent.
 - ii. One JT's sale severs the JT as to the seller's interest (b/c it disrupts the 4 unities). Result: Buyer becomes a Tenant in Common. Other JTs remain JTs; the JT remains in place for them. *This is frequently tested.*
 - ▼ iii. Hypo: O conveys Blackacre to Phoebe, Ross and Monica as JTs w/the right of survivorship. Each owns a presumptive 1/3 share (same time, title interests, right to possess whole). Phoebe sells her interest to Chandler. What result?
 - 1) Phoebe's sale severs JT as to her interest. Chandler becomes a Tenant in Common, holding 1/3. Ross and Monica remain JTs—they each still hold 2/3 as JTs.
 - ▼ iv. Hypo 2: Suppose Ross dies, leaving Rachel as heir. What result?
 - 1) Monica takes Ross's share. Ross and Monica were still JTs w/right of survivorship. Monica now holds 2/3, Chandler holds 1/3; they are tenants in common. Rachel gets nothing.
 - ▼ b. Partition—three variations (all available w/Tenancy in Common, as well):
 - i. Voluntary Agreement: An allowable, peaceful way to end the relationship.
 - ii. Partition in Kind: A judicial action for physical division of Blackacre, if in the best interests of all. (Works best for actual land, not so much for a building.)
 - iii. Forced Sale: A judicial action if in best interests of all, where land is sold and proceeds are divided proportionately. (Works best for a building or something that doesn't lend itself to easy physical division.)
- ▼ B. Tenancy by the Entirety (TbyE): A protected marital interest between H and W, with the right of survivorship. (Recognized in roughly 21 states today.)
 - ▼ 1. How to create:
 - a. Can only be created by husband and wife, who share the right of survivorship.
 - b. In jurisdictions that recognize TbyE, it arises presumptively in any conveyance made to H and W, unless clearly stated otherwise.
 - ▼ 2. Distinguishing characteristics: The MC Hammer Tenancy: You can't touch this. It's a highly protected form of co-ownership.
 - a. Creditors of only one spouse can't touch the tenancy.
 - b. Neither tenant acting alone can defeat the right of survivorship by a unilateral conveyance to a 3rd party.
- ▼ C. Tenancy in Common: Two or more own, w/no right of survivorship.
 - ▼ 1. Three features:
 - a. Each co-tenant owns an individual part, and each has a right to possess the whole.
 - b. Each interest is descendable, devisable, and alienable. There are no survivorship rights between tenants in common.
 - c. Presumption favors tenancy in common.
 - 2. The Natalie Cole Tenancy: I'm Devisable.

▼ D. Rights and Duties of Co-Owners (for all above tenancies unless otherwise noted)

- ▼ 1. Hypo to illustrate the following rules: Greg and Marsha own Blackacre as co-owners. Greg gave 90% of purchase price, Marsha gave 10%.
 - a. Presumptively they're tenants in common b/c they own different shares, but these rules apply to other tenancies as well
 - 2. Possession: Each co-tenant is entitled to possess and enjoy the whole. One tenant cannot partition the property and exclude other co-tenants from it. If one co-tenant wrongfully excludes another, he has committed wrongful ouster.
- ▼ 3. Rent: Absent ouster, a co-tenant in exclusive possession is not liable to the others for rent.
 - a. Suppose Marsha leaves for three months on vacation. Does Greg owe her rent if he stays? No.
- ▼ 4. Rent from 3rd parties: A co-tenant who leases all or part of the premises to a 3rd party must account to his co-tenants, providing them their fair share of the rental income.
 - a. Suppose Greg leases basement apt. to Alice. Is Marsha entitled to portion of rental income? Yes.
- ▼ 5. Adverse Possession: Unless he has ousted the other co-tenants, one co-tenant in exclusive possession for the statutory adverse possession period cannot acquire title to the exclude of the others.
 - a. Suppose Marsha leaves for 20 years. Can Greg acquire full title in her absence? No.
 - b. Hostility element of adverse possession is missing. There's no hostility when there is no ouster.
- 6. Carrying Costs: Each co-tenant is responsible for his/her fair share of carrying costs (taxes, mortgage interest payments, etc.), based on his/her undivided share.
- ▼ 7. Repairs: The repairing co-tenant enjoys a right to contribution for necessary repairs, provided she has told the other co-tenant of the need for he repairs—based on proportionate share.
 - a. Suppose a football goes through the window and Marsha tells Greg about it, then pays to fix the window. Does Greg have to compensate Marsha for the repair? Yes.
- ▼ 8. Improvements: During the life of the co-tenancy, there is no right to contribution for so-called improvements. However, at partition, the improver gets a credit equal to any *increase* in value caused by her efforts. The so-called improver bears full liability for any *decrease* in value caused by her efforts. (The "upside/downside doctrine." At partition, improver gets credit for any upside of improvements, but bears full cost of any downside.)
 - a. Suppose Marsha wallpapers the den, Can she make Greg pay his fair share? No. One co-tenant's "improvement" could be another's nightmare.
- ▼ 9. Waste: A co-tenant must not commit waste. A co-tenant *can* bring an action for waste during the life of the co-tenancy. He/she doesn't have to wait for partition. *Be on the lookout for this.*
 - a. Voluntary
 - b. Permissive
 - c. Ameliorative
- 10. Partition: A JT or T in Common has right to bring an action for partition. (To dissolve a TbyE we'd look to a divorce proceeding.)

▼ IV. Landlord Tenant Law:

▼ A. Four Leasehold interests (the non-freehold estates):

- ▼ 1. Tenancy for Years (Estate for Years, Term of Years)
 - a. A lease for a fixed, determined period of time (1 day to 50 years or more). When you have termination date from start, you have a TforY.

- b. B/c the term of years tells us from the start when the leasehold will end, no notice is necessary to terminate.
- c. A term of years greater than one year must be in writing to be enforceable (b/c of SOF).
- ▼ 2. Periodic Tenancy (PT)
 - ▼ a. A lease that continues for successive or continuous intervals, until LL or T give proper notice of termination.
 - i. i.e.: "To T from month to month" or "To T from year to year" or "To T from week to week."
 - ▼ b. Notice must be given to terminate the periodic tenancy. At common law the notice had to be given prior to actual termination; the period was at least equal to the period of lease itself, unless otherwise agreed. I.e.: a week-week periodic tenancy required one week's notice.
 - i. If tenancy is from year/year or greater, only 6 months notice is required.
 - ii. Parties can vary the period required for notice by contract.
- ▼ 3. Tenancy at Will:
 - a. A tenancy for no fixed period of duration.
 - b. i.e: "To T for as long as LL or T desires."
 - ▼ c. At least theoretically, it may be terminated by either party at any time.
 - i. By statute in most states, a reasonable demand to vacate is typically required.
- ▼ 4. Tenancy at Sufferance:
 - a. Created when T has wrongfully held over past the expiration of the lease. T is a holdover.
 - b. This leasehold is a mechanism to allow the LL to collect rent from the holdover.
 - c. TS is short-lived; lasts only until L either evicts T or elects to hold T to a new term.
- ▼ B. LL/T Relationship:
 - ▼ 1. T's duties:
 - ▼ a. Duty to repair:
 - i. Baseline standard: T is responsible for keeping the premises in reasonably good repair.
 - ii. T must not commit waste.
 - ▼ iii. The Doctrine of Waste is linked inextricably to the law of Fixtures: When a tenant removes a fixture, he commits voluntary waste.
 - 1) A fixture is a once-moveable chattel (thing) that, by virtue of its attachment to realty, *objectively* shows the intent to permanently improve the realty.
 - 2) common examples of fixtures: heating systems, customized storm windows, a furnace, certain lighting installations
 - 3) T must not remove a fixture, *no matter that she installed it*. Fixtures pass w/ownership of the land. *This is frequently tested*.
 - ▼ 4) Two ways to know if a T installation qualifies as a fixture:
 - The parties' private agreement on the matter is binding and controls. If T negotiated ahead of time that X was not a fixture, T can remove it.
 - In the absence of agreement, T may remove her installation so long as removal does not cause substantial harm to the premises.
 - If removal will cause substantial harm, then, *in objective judgment*, T has shown the intention to install a fixture; the fixture in this case must stay put.
 - ▼ b. Duty to pay rent:
 - ▼ i. T's duty when T is in breach of the duty and still in possession of premises:

- ▼ 1) LL has two options:
 - Evict through the courts and sue for rent owed.
 - Continue the relationship w/this tenant, and sue for the rent owed.
 - Note: LL *must not* engage in self-help: LL must not change the locks or forcibly remove T or any of T's possessions. Self-help is punishable civilly and criminally.
- ▼ ii. T's duty when T is in breach of the duty but is no longer in possession of premises (when T wrongfully vacates w/time left on a lease): SIR
 - ▼ 1) S = Surrender: LL can choose to treat T's abandonment as an implicit offer of surrender which LL accepts.
 - Surrender means that T demonstrates by words or conduct that she wishes to give up the leasehold.
 - ▼ 2) I = Ignore: LL can ignore the abandonment and hold T responsible for rent, just as though T were still there.
 - This option available only in a minority of states.
 - ▼ 3) R = Relet: The LL can re-let premises on T's behalf and hold T liable for any deficiency.
 - Majority rule: LL must at least try to relet. LL must be duly diligent in at least attempting to find a substitute tenant. (LL must make a good faith effort to mitigate losses.)
- ▼ 2. LL's Duties:
 - ▼ a. Duty to deliver possession: LL must put T in actual physical possession of the premises.
 - i. If prior holdover is still there at start of T's lease, LL is liable.
 - ▼ b. **Implied covenant of quiet enjoyment.** Applies to both residential and commercial leases. A fundamental, implicit promise that every LL makes: T has a right to quiet use and enjoyment of the premises w/out interference from LL.
 - ▼ i. LL can breach two ways:
 - 1) By actual wrongful eviction or exclusion.
 - ▼ 2) Breach by **Constructive Eviction** (CE). Elements of CE = SING
 - SI = Substantial Interference attributable to LL's actions or failure to act. Does not nec. mean permanent interference; looking for a chronic problem that's fundamentally incompatible w/T's quiet enjoyment.
 - N = Notice: T must give LL notice of the problem and LL must fail to respond meaningfully.
 - G = Goodbye or Get out: T must vacate w/in a reasonable time after L fails to correct the problem.
 - ▼ ii. Is LL responsible for the bothersome conduct of other Ts? Generally, No. Two exceptions:
 - 1) LL has a duty not to permit a nuisance on the premises. I.e., if LL rents apt. above you to a dance troupe and the noise drives you nuts, LL is liable.
 - 2) LL has a duty to control and police common areas.
 - ▼ c. **Implied Warranty of Habitability:** Premises must be fit for basic human habitation; bare living requirements must be met.
 - i. Applies only to residential leases.
 - ii. Non-waiveable; a T cannot modify or displace this entitlement.
 - ▼ iii. Appropriate standard could be satisfied in two ways:
 - 1) Local housing code

- 2) Independent judicial conclusion
- iv. Examples of breaches: failure to provide heat in winter, lack of plumbing, lack of running water.
- ▼ v. T's entitlements if LL breaches implied warranty of habitability: Mr. Cubed (MRRR)
 - 1) M = Move out and terminate the lease.
 - 2) R = Repair and deduct. Allowed by statute in a growing number of states.
 - 3) R = Reduce rent or withhold all rent until ct. determines fair rental value. Typically T must place withheld monies in escrow to show good faith.
 - 4) R = Remain in possession, pay rent, and sue for money damages.
- ▼ d. Doctrine of **Retaliatory Eviction**:
 - i. If T lawfully reports LL for a housing code violation or similar (if T is a good faith whistleblower), LL is barred from penalizing T.
- ▼ C. Assignment v. Sublease:
 - 1. Unless the lease says otherwise, the law allows a T to transfer her interest.
 - ▼ 2. Assignment:
 - a. When T transfers her interest in whole, she has accomplished an assignment.
 - ▼ b. Legal Consequences:
 - i. Hypo: T1 has 10 months left on a 2-yr term of years lease and transfers all 10 to T2. This is an assignment.
 - ii. LL and T2 are in *privity of estate*, meaning LL and T2 are responsible to each other for all promises in original lease that run w/the land. Most promises in original lease *will* run w/ the land—promise to pay rent, repair, pay taxes, etc.
 - iii. LL and T2 are *not* in *privity of contract* unless T2 expressly assumes all promises in original lease.
 - iv. LL and T1 are no longer in privity of estate.
 - v. LL and T1 remain in privity of contract, meaning LL and T1 are secondarily liable to each other.
 - ▼ vi. Hypo 2: LL rents to T1, T1 assigns to T2, T2 assigns to T3. T3 then engages in active waste.
 - 1) Can LL proceed against T3, the direct wrongdoer? Yes, b/c of privity of estate.
 - 2) Can LL proceed against T1, the original tenant? Yes, b/c of privity of contract—T1 is secondarily liable to LL. This means that if T3 is unavailable or bankrupt or otherwise judgment-proof, T1 is liable.
 - 3) Can LL proceed against T2? No. Privity of estate ended once T2 assigned to T3, plus there was never privity of contract (unless you've been told that T2 expressly assumed all promises in original lease).
 - ▼ 3. Sublease
 - a. If T transfers only a portion of her leasehold interest to someone else, she has accomplished a sublease.
 - ▼ b. Legal consequences:
 - i. LL and sublessee are in neither privity of estate nor contract.
 - ii. T2 is responsible to T1, and vice versa.
- ▼ V. **Law of Servitudes**
 - ▼ A. Component members:

- ▼ 1. Easement: The grant of a non-possessory property interest that entitles its holder to some form of use or enjoyment of another's land that is called "the servient tenement."
 - ▼ a. Two types:
 - ▼ i. Affirmative easement: The right to go onto and do something on servient land.
 - 1) Most easements are affirmative
 - 2) i.e.: The privilege to lay utility lines on another's land, or easement giving holder a right of way across another's land.
 - ▼ ii. Negative easement: Entitles its holder to compel the servient holder to refrain from doing something that would otherwise be permissible.
 - ▼ 1) recognized in four categories = LASS
 - Light—refrain from doing something to block my light (i.e. the John Hancock building in downtown Boston is reflective because the Trinity Church has a negative easement for light over the Hancock building)
 - Air—refrain from doing something to block my air
 - Support—refrain from excavating or digging on your parcel in a way that would cause subsidence, etc. on my parcel.
 - Streamwater from an artificial flow—refrain from doing something that would
 - (A few jurisdictions (i.e. CA) allow a negative easement for a scenic view.)
 - 2) Negative easements can only be created expressly in a writing signed by the grantor. There's no natural or automatic right to a negative easement.
 - ▼ 3) An easement is either appurtenant to land, or held in gross.
 - ▼ An easement is *appurtenant* to land when it benefits the holder in his physical use or enjoyment of his property. It takes two—an easement is appurtenant when two parcels of land are involved:
 - A dominant tenement which derives the benefit of the easement.
 - A servient tenement which bears the burden of the easement.
 - i.e.: A grants B a right of way across A's land (1—the servient tenement), so that B can more easily reach B's land (2—the dominant tenement). B has an easement appurtenant to B's dominant tenement. A's land is serving B's easement.
 - Transferability: Appurtenant easements transfer automatically w/the dominant tenement, regardless of whether it is even mentioned w/the conveyance.
 - ▼ An easement is held *in gross* when it gives its holder only a personal or commercial gain that is not related to his use and enjoyment of his land. Here, servient land is burdened, but there is no dominant tenement.
 - i.e.: Right to place a billboard on servient land requires an easement in gross. Right to lay power lines on another's land, or to fish in another's lake, etc. —all easements in gross. Servient land is burdened, but there is no dominant tenement.
 - ▼ Transferability: Easement in gross is not transferable unless it is for commercial purposes.
 - i.e: A has easement entitling her to swim in B's lake. This is not freely assignable or transferable.
 - If Starkist has easement entitling it to fish in B's lake for bait, that's commercial and transferable.
- ▼ b. Four ways to create an affirmative easement: PING
 - ▼ i. P = Prescription

- ▼ 1) An easement may be acquired by satisfying the elements of adverse possession (COAH)
 - C = Continuous use for given statutory period
 - O = Open and Notorious use
 - A = Actual use
 - H = Hostile use, meaning w/out the servient owner's permission
- ▼ ii. I = Implication
 - ▼ 1) Sometimes called the easement implied from existing use. Classic prototype:
 - ▼ A owns 2 lots. Lot1 is hooked to sewer drain located on Lot2. A sells 1 to B, w/no mention of B's right to continue to use the drain on A's Lot2. The law may imply an easement on B's behalf if:
 - the previous use had been apparent, and
 - the parties expected that the use would survive division b/c it is reasonably necessary to the dominant land's use and enjoyment.
 - ▼ iii. N = Necessity
 - 1) The landlocked setting—an easement of right-of-way will be implied by necessity if grantor conveys a portion of his land w/no way out except over some part of grantor's remaining land.
 - ▼ iv. G = Grant
 - 1) An easement to endure for more than one year must be in a writing that complies w/the formal elements of a deed b/c of the SOF. The writing is called a deed of easement.
- ▼ c. Scope of an easement:
 - i. Set by the terms or conditions of the grant that created it. IOW, unilateral expansion of an easement is not allowed.
- ▼ B. License:
 - 1. A mere privilege to enter another's land for some delineated purpose.
 - 2. No writing required; not subject to SOF; a much more informal species of servitude.
 - 3. Licenses are freely revocable at will of licensor, unless estoppel applies to bar revocation.
 - ▼ 4. Classic license cases:
 - ▼ a. The ticket cases: Tickets create freely revocable licenses.
 - i. i.e.: You purchase tickets to theater, all other ticket holders are admitted except you. Can they do that? Yes.
 - ▼ b. Neighbors talking by the fence: Nothing good comes when neighbors are talking by the fence. (Oral promises only create freely revocable licenses.)
 - i. Suppose A talking by fence w/B says "You can have that right of way across my front lawn." That oral easement is unenforceable—it violates the SOF. Instead, this oral easement creates a freely-revocable license.
 - 5. Estoppel will apply to bar revocation, but only when licensee has invested substantial money or labor or both in *reasonable* reliance on the license's continuation.
- ▼ C. The Profit:
 - 1. Entitles its holder to enter servient land and take from it the soil or some substance of the soil (timber, minerals, oil, etc.).
 - 2. Profits share all rules of easements.
- ▼ D. The Covenant:

- 1. A promise to do or not do something related to land. (Very different from easement. Begins as a mere contractual limitation regarding land.)
- ▼ 2. A restrictive (negative) covenant is a promise to refrain from doing something related to land.
 - a. i.e.: I promise not to build for commercial purposes on my land.
 - b. Negative covenants are necessary because negative easements are limited to the four categories of LASS.
- ▼ 3. An affirmative covenant is a promise to do something related to land.
 - a. i.e: I promise to water our common garden or maintain our common fence.
- ▼ 4. Determining a covenant from equitable servitude. In problems, the facts will look similar, so how do you decide? Construe based on relief P is seeking.
 - a. If P wants money damages, you must construe the promise as a covenant. The covenant is a legal device, so it takes its remedies at law (money damages).
 - b. If P wants an injunction, you must construe the promise as an equitable servitude.
- ▼ 5. When will the covenant run with the land? When it is capable of binding successors. And when is that?
 - ▼ a. Prototype: A promises B that A will not build for commercial purposes on A's property.
 - i. One tract is burdened, the other is benefitted. Here, A's is burdened, B's is benefitted.
 - ii. Later, A sells burdened parcel to A1, B sells benefitted parcel to B1. A1 then builds for commercial purposes. B1 decides to sue A1 for money damages. Therefore, you construe the promise as a covenant.
 - ▼ iii. Two contests:
 - ▼ 1) Does the *burden* of A's promise to B run from A to A1? In order for the burden to run, remember WITHIN:
 - W= Writing: Original promise between A and B must have been in writing.
 - I = Intent: Original parties, A and B, must have intended that covenant would run.
 - T = Touch and concern the land: The promise must affect the parties' legal relations as landowners (not simply as members of the community at large).
 - ▼ H = Horizontal and vertical privity are both needed for burden to run.
 - ▼ Horizontal privity refers to the nexus btwn originally promising parties, A and B. Requires that A and B be in succession of estate, meaning they were in a grantor/grantee or landlord/tenant or debtor/creditor relationship, or that they shared some servitude in addition to the covenant now at issue. Very difficult to establish.
 - Absence of horizontal privity is the reason why many burdens will not run with the land.
 - ▼ Vertical privity requires some non-hostile nexus between A and A1, such as contract, devise, or descent.
 - The only time vertical privity is absent is if A1 acquired her interest through adverse possession.
 - N = Notice: A1 must have had some notice of the promise when she took.
 - ▼ 2) Does the benefit of A's promise to B run from B to B1? Does B1 have standing to make this claim? WITV
 - W = Writing: Original promise between A and B must have been in writing.
 - I = Intent: Original parties must have intended that the benefit would run.
 - T = Touch and concern: the promise must affect the parties as landowners.
 - V = Vertical privity: some non-hostile nexus between B and B1.

- Horizontal privity *is not required* for the benefit to run. Therefore it's easier for the benefit side of the equation to run than for the burden side to run. The law will more easily confer benefits than it will require burdens.

▼ E. Equitable Servitude:

- 1. A promise that equity will enforce against successors. Accompanied by injunctive relief.
- ▼ 2. To create an equitable servitude that will bind successors: WITNES
 - a. W = Writing: Generally, but not always, the original promise was in writing.
 - b. I = Intent: The original parties intended that promise would be enforceable by and against assignees.
 - c. T = Touch and concern: the promise must affect the parties as landowners.
 - d. N = Notice: The assignees of the burdened land had notice of the promise.
 - e. ES = Equitable Servitude: *Within the realm of the equitable servitude, privity is not required to bind successors.*
- ▼ 3. The Implied Equitable Servitude, aka the general or common scheme doctrine:
 - a. Recognized in the vast majority of states, but a minority (eg MA) do not imply equitable servitudes—they require a writing.
 - ▼ b. Classic factual paradigm:
 - ▼ i. A is a subdivider. She subdivides her land into 50 lots. She sells lots 1-45 through deeds containing covenants restricting use to residential purposes. A then sells one remaining lot to a commercial entity, B, by deed w/no such covenant. B now wants to build a c-store. Can B be *enjoined*? Yes.
 - 1) (Enjoined means Ps seek injunctive relief, therefore you must construe the promise as an equitable servitude)
 - ▼ 2) Yes, according to implied equitable servitude doctrine, B can be enjoined if the 2 elements of the general or common scheme doctrine are present:
 - When the sales began, subdivider A had a general scheme of residential development, which included B's lot now in question.
 - ▼ Our D (B) had notice of the promise contained in the prior deed. Three forms of notice attributable to D: (AIR)
 - Actual notice: D had literal knowledge of the promises contained in prior deeds.
 - Inquiry notice: Neighborhood seems to conform to common restrictions. The lay of the land. Take a look around!
 - ▼ Record notice: The form of notice sometimes imputed to buyers on basis of publicly recorded documents.
 - Cts. in U.S. are split about imputing record notice to D.
 - Some say a subsequent buyer *is* on record notice of contents of all prior deeds transferred to others by a common grantor. This imposes a fairly onerous burden on D's title-searcher.
 - Others say subsequent buyer does *not* have record notice of contents of prior deeds transferred to others by common grantor. Imposes less of a burden on D's title-searcher.

▼ VI. Adverse Possession:

- A. Possession for a statutorily prescribed period of time can, if certain elements are met, ripen into title.
- ▼ B. Elements of adverse possession: COAH
 - 1. Continuous: Possession must be continuous, uninterrupted for the given statutory period.

- 2. Open and Notorious: The sort of possession the usual owner would make under the circumstances.
- 3. Actual: The entry cannot be hypothetical or fictitious or symbolic.
- 4. Hostile: Possessor does not have the true owner's permission to be there.
- C. Possessor's subjective state of mind is irrelevant. Doesn't matter what possessor was actually thinking at the time—whether possessor knew he was trespassing or not. Relevant inquiry is gauged by an objective standard.
- ▼ D. Tacking:
 - 1. One adverse possessor may tack on to his time on the land his predecessor's time, so long as there is privity, which is satisfied by any non-hostile nexus, such as: blood, contract, deed, or will.
 - 2. Tacking is not allowed when there has been an ouster.
- ▼ E. Disabilities:
 - 1. SOL will not run against a true owner afflicted w/disability *at the inception of the adverse possession*.
 - 2. Disabilities are by statute, but commonly include: infancy, insanity, imprisonment.
- ▼ VII. Land Conveyancing
 - ▼ A. Every conveyance of real estate will always consist of a two-step process:
 - ▼ 1. Step 1: The land contract—relatively short-lived, expires w/closing.
 - a. SOF: land contract typically must be in writing signed by defendant, the party against whom enforcement is sought. It must also describe the land and mention some consideration.
 - ▼ b. Exception to SOF: The doctrine of part performance — satisfied by any two of the following three circumstances:
 - i. B takes possession of the land.
 - ii. B remits all or part of the purchase price.
 - iii. B makes substantial improvements to the premises.
 - ▼ c. Two implied promises in every land contract:
 - ▼ i. Seller promises to provide marketable title, meaning title free from reasonable doubt, lawsuits and threat of litigation.
 - ▼ 1) Three circumstances will render title unmarketable:
 - Adverse possession. Acc. to majority rule, seller must be able to supply good *record* title. If even a portion of the title resides in adverse possession, the title is unmarketable.
 - Encumbrances: Marketable title means unencumbered fee simple; therefore, servitudes and mortgages render title unmarketable, unless you see that buyer has waived them.
 - Zoning violations: Title is unmarketable if property violates a zoning ordinance.
 - ▼ ii. Seller promises not to make any false statements of material fact.
 - 1) Majority of states now hold seller liable for failing to disclose latent material defects. This means that seller is liable for material lies and omissions.
 - ▼ 2. Step 2: The closing, where deed is now the controlling document.
 - ▼ a. When all goes well, deed passes legal title from seller to buyer. To work its magic, the deed must be LEaD: Lawfully Executed and Delivered.
 - i. Lawfully Executed: Deed must be in writing, signed by grantor, and comports w/all statutory pre-requisites.

- ▼ ii. and Delivered: Delivery could be satisfied when grantor physically or manually transfers deed to grantee. However, delivery does not nec. require actual physical transfer of the instrument itself.
 - 1) Standard for delivery is a legal, not literal, standard: Did grantor have present intent to be immediately bound? Did grantor have present intent to part w/legal control? Regardless of whether deed itself has been literally handed over to grantee.
- ▼ b. Three types of deed
 - i. Quitclaim: contains no covenants. Grantor isn't even promising he has title to convey. This is the worst deed a buyer could hope for. (Shaggy: "It wasn't me.")
 - ▼ ii. General Warranty Deed: Makes a series of promises on behalf of grantor and grantor's predecessors. Warrants against all defects in title, including those attributable to grantor's predecessors.
 - 1) The best deed a buyer could hope for. (Mother Theresa of deeds.)
 - ▼ 2) Six promises of the General Warranty Deed:
 - ▼ Present Covenants: Breached, if ever, at the time the deed is delivered. This means the SOL for breach of a present covenant begins to run the instant of delivery.
 - Covenant of Seisin: Grantor promises he owns estate he now claims to convey.
 - Covenant of Right to Convey: Grantor promises he has the power to make this conveyance, meaning there are no temporary restraints on grantor's power to sell.
 - Covenant Against Encumbrances: Grantor promises there are no servitudes or mortgages on the land.
 - ▼ Future Covenants: Not breached, if ever, until grantee is disturbed in possession. SOL for breach of a future covenant will not begin to run until that future date.
 - Covenant of Quiet Enjoyment: Grantor promises that grantee will not be disturbed in possession by a 3rd party's lawful claim of title.
 - Covenant of Warranty: Grantor promises to defend grantee should there be any lawful claims of title asserted by others.
 - Covenant for Further Assurances: Grantor promises to perform whatever future acts are reasonably necessary to perfect grantee's title if it later turns out to be imperfect.
 - ▼ iii. Statutory Special Warranty Deed: Provided for by statute in many states. Some states call it the "bargain and sale deed." Grantor makes no promises on behalf of his predecessors in interest. Instead, grantor makes two promises only on behalf of himself:
 - 1) Grantor promises that he has not conveyed this estate to anyone other than grantee.
 - 2) Grantor promises estate is free from encumbrances made by grantor.
 - ▼ B. Recording Systems for land conveyancing
 - 1. Recording questions always involve the case of the dirty double-dealer: O conveys to A, then later conveys the same parcel to B. In battle of A v. B, who wins?
 - ▼ 2. Two bright line rules:
 - a. If B is a bona fide purchaser (BFP) and we're in a notice jurisdiction, B wins, regardless of whether she records before A.
 - b. If B is a bona fide purchaser and we're in a race-notice jurisdiction, B wins *if* she records properly *before* A does.
 - ▼ 3. Recording statutes exist to protect bona fide purchasers (BFP) and mortgagees. They do not protect donees, heirs, or devisees.

- ▼ a. A BFP is:
 - i. One who purchases for value (value means substantial pecuniary consideration), and
 - ▼ ii. W/out notice that anyone else got there first.
 - ▼ 1) Three forms of notice potentially chargeable to B: (AIR)
 - Actual notice: Prior to B's closing, B was literally advised of A's existence.
 - Inquiry notice: B is on inquiry notice of whatever an inspection of the land would reveal, whether B bothers to inspect or not.
 - Record notice: B is on record notice of A's existence if, at the time B takes, A's deed was recorded properly w/in the chain of title.
- ▼ 4. Proper recordation; Deed must be linked to the chain of title, the sequence of recorded instruments capable of giving record notice to subsequent takers.
 - a. Usually established through title search through grantor/grantee index.
 - ▼ b. Problem of the wild deed:
 - ▼ i. Classic case: O sells to A who does not record. A sells to B, who records.
 - 1) The A to B deed, although recorded, is not connected to chain of title b/c that chain contains a missing grantor—the O to A link is missing from public records. The A to B deed is therefore a "wild deed."
 - ii. Rule of the wild deed: If a deed entered on the records has a grantor unconnected to the chain of title, the deed is a wild deed, meaning it is incapable of giving record notice of its existence.
 - ▼ iii. Now, suppose O sells a second time, this time to C. C records. In contest of B v. C, who wins? C wins in both a notice and race/notice state.
 - 1) C wins in notice state b/c when she took she was a BFP.
 - 2) C wins in race/notice state b/c she's a BFP who wins the race to record. (Be recorded first, but B's recordation was "wild" and therefore it's like it didn't happen.)
- ▼ 5. Estoppel by Deed: a bizarre chain of title problem
 - ▼ a. Classic case: In 1950, O owns Blackacre. Later in 1950, X, who does *not* own Blackacre, sells it to A. In 1950, A records. In 1960, O finally does sell Blackacre to X. X records. In 1970, X sells again to B. B records. Two contests emerge:
 - ▼ i. Between X and A, who owned Blackacre from 1960 to 1969? A did b/c of estoppel by deed.
 - 1) Estoppel by Deed: one who conveys land in which he has no interest (i.e. X in 1950), is estopped from denying the validity of that transfer if he subsequently acquires the land that he had previously transferred.
 - ▼ ii. Who owns Blackacre in 1970 when B enters scene? B, as long as he's a BFP.
 - 1) B wins in a notice system because he is a BFP.
 - 2) B wins in race/notice system b/c he is a BFP who wins the race to record. (A's 1950 recordation is a nullity; it was a wild deed at that time. A recorded too early. B's title searcher would never find X's pre-ownership transfer to A.

▼ VIII. Water Rights

- ▼ A. Two systems for allocating water from water courses (streams, rivers, lakes)
 - 1. Riparian Doctrine: Water belongs to those who own the land bordering the water course. These are Riparians. They share the right of reasonable use of the water.
 - ▼ 2. Prior Appropriation Doctrine: Water belongs initially to the state. Right to divert and use water can be acquired by an individual, regardless of whether she is a riparian owner.

- a. Rights are determined by priority of beneficial use. Norm is: First in time, first in right.
- ▼ IX. Possessor's rights: Possessors have right to be free from trespass and nuisance:
 - ▼ A. Trespass: The invasion of land by tangible, physical object.
 - 1. To remove trespasser, you bring an action for ejectment.
 - ▼ B. Private Nuisance: The substantial, intentional, and unreasonable interference w/another's use and enjoyment of land.
 - 1. Unlike trespass, nuisance does not require tangible, physical invasion. This means odors and noise could give rise to a nuisance claim, but not a trespass claim.
- ▼ X. Imminent Domain
 - A. The Gov'ts 5th amendment power to take private property for public use in exchange for just compensation.
 - B. Explicit Takings: An act of governmental condemnation.
 - ▼ C. Implicit or regulatory taking: Gov't regulation that, although not intended to be a taking, has the same effect. Private landowner argues that gov't regulation has economically wiped out his investment.
 - ▼ 1. Remedy for regulatory taking: Gov't must either:
 - a. Compensate owner for the taking.
 - b. Terminate the regulation and pay owner for damages that occurred while regulation was in effect.
- ▼ XI. Zoning:
 - A. Pursuant to its police powers, gov't may enact statutes to reasonably control land use.
 - ▼ B. Variance: the principle means to achieve flexibility in zoning. Permission to depart from the requirements of a zoning ordinance.
 - ▼ 1. Proponent of area variance must show
 - a. undue hardship, and
 - b. that granting variance won't work detriment to surrounding property values.
 - 2. Variance is granted or denied by a zoning board.
 - ▼ C. Non-conforming use: A once lawful, existing use now deemed non-conforming by a new zoning ordinance.
 - 1. The non-conforming use cannot be eliminated all at once unless just compensation is paid; otherwise it could be deemed an unconstitutional taking.