


PROPERTY II OUTLINE
Professor Volpp - Spring 1999

I. The Estates System

A. Central Issues

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1. Estates are interest in possession of real property.
 2. The property owner controls who owns property in the future:
present owner has a present interest
future owner has a future interest
 3. The grantor can specify when the interest will shift from present to future interest.
 - a. No control when ie, life estate O to A.
 - b. interest can shift if used for a specific purpose; contingent on use or act.
(ie, O to A so long as used for church, then to B)
 4. interest exists at the moment of creation, even if not given possession.
Therefore, at moment of creation, given a legal right to possession of property.

B. Policy Concerns

1. Dead Hand problem: Liberty & Efficiency

Prior owners who wish to control future use or disposition of their property by creating restraints to influence the future. The costs of renegotiating the property arrangement may be so high that they interfere with efficient readjustment of property relations.

-Interferes w/

a. Efficiency: efficiency may be increased by invalidating such restrictions when transaction costs impede renegotiation.

b. Liberty: by allowing prior generations to impose restrictions on current owners, inhibit the ability of current owners to use their property as they wish.

2. Problem of Social Hierarchy:

Imposing restraints on alienation & use has the effect of concentrating ownership in the hands of certain groups and excluding others.

-Putting the property in the marketplace would facilitate access to property and disperse ownership of property & give owner the power to use their own property to satisfy their needs.

C. Present Interests (6)

1. Fee Simple Absolute

O to A

O to A and her heirs

O to A in fee simple

[present interest = A has a fee simple absolute]

- a. owner has right to all present & future interests - has it all
- b. no limits to use - has full rights to sell, dispose of property.
- c. no other person has claim on this property
-A's heirs have no ownership rights/interests in the property.
-unless, A specifically leaves property to them in a will
or A dies w/o a will, A's heirs may inherit property

2. Life Estates

O to A for life

[present interest = A has a life estate]

**[future interest = O has a reversion
3rd party has a remainder]**

a. Characteristics:

- 1) present interest ends upon the death of the holder.
A owns the property during his lifetime.
-A has a right to sell as long as he/she lives.

ie, *O to A for life, then to B.*
O has nothing
A has a life estate
B has a remainder

- 2) 3rd party (B) can buy a life estate from A, but B's interest will end when A dies.

B's interests = *life estate for the life of another*
or a life estate per autre vie

ie, *O to A for the life of B.*
A has a life estate per autre vie
O has reversion
B has nothing.

- 3) future interest is given to someone else.
- 4) Limitations -- Since interest is limited to present use, property cannot be used wastefully.
- 4) No right to determine who owns property upon death - cannot dispose by will.

3. Fee Tails

O to A and the heirs of his body

- a. fee tail is an estate whose purpose is to keep the property in a family dynasty.
- b. measured by time = property is passed to successive generations until the bloodline ends. (ie, inherited by first male)
- c. After the bloodline ends, the property passes to the future interest of O.
- c. Property is encumbered by future interest, & therefore there is a limited right to use property.

4. Defeasible Fees

-Defeasible Fees are present interests that terminate at the happening or nonhappening of a specified event, other than the death of the current owner, then...

1. *Interest goes back to Grantor O*

or 2. *Interest goes back to a Third Party B*

a. Fee Simple Determinable

- 1) O retains future interest (in theory, lasts forever)
- 2) Automatic reverter: If the condition is violated or upon the happening/nonhappening of the stated event, then the future interest reverts automatically to the grantor O.

-Note: O does not have to take any action to get property back.

- 3) Durational language: *so long as,*
while used for,
during,
unless used for

ie: *O to A so long as used for residential purposes*

O to A while used for residential purposes

[present interest = A has a fee simple determinable]

[future interest = O has a possibility of reverter]

b. Fee Simple Subject to Condition Subsequent

- 1) Grantor O retains future interest.
but O needs to assert property right.
- 2) (*Not automatic*) - When the condition is violated, then O needs to affirmatively assert property right. If O does not assert her rights, ownership stays with current owner.
- 3) Conditional language: *on condition that,
but if used for,
provided that*

ie: *O to A on condition that the property be used for residential purposes; in the event it is not so used, O shall have a right of entry.*

ie: *O to A, but if used for nonresidential purposes, O shall have a right of entry.*

ie: *O to A, provided that the property is used for residential purposes; if this condition is violated, O shall have a right of entry.*

[present interest = A has a fee simple subject to a condition subsequent]

[future interest = O has a right of entry]

c. Fee Simple Subject to an Executory Limitation

- 1) future interest goes to a 3rd party B (not grantor O).
 - 2) Upon occurrence of a contingent event, ownership shifts automatically to a 3rd party B (rather than reverting to the grantor)
- present interest* = A has a fee simple subject to an executory limitation
-*future interest* = B has an executory interest.
ie: *O to A so long as used for residential purposes, then to B.*

-[present interest = A has a fee simple subject to an executory limitation]

-[future interest = 3rd party has an executory interest]

D. Future Interests (5)

- O **1. Reversion** (follows life estate)
 - when grantor O retains future interest after a life estate/ estate goes back to O.
 - when A passes away, O has a reversion.
- O **2. Possibility of Reverter** (follows fee simple determinable)
 - future interest retained by O after fee simple determinable
 - a. possibility of reverter kicks in automatically, given the holder an immediate right of possession.
 - b. The statute of limitations starts running immediately, and if the holder of the possibility of reverter does nothing for the statutory period, the title will shift back to the current possessor.
- O **3. Right of Entry** (follows fee simple subject to a condition subsequent)
 - future interest retained by grantor O or her heirs after fee simple subject to a condition subsequent. Right of entry does not become possessory until the holder asserts a right of possession.
 - If O does not assert her rights, ownership/title stays with current owner A.
 - Hypo: Sally is O's daughter. O dies.
 - 1) future interest - Sally has inherited right of entry
 - 2) note: statutory limitation to take land, otherwise lose right to land.

3) if Sally does not enter land within 20 years to assert her rights, she will lose right to ownership of the land & A retains right of ownership (30 yr statute of limitations & adverse possession is 10 yrs),
-no adverse possession b/c in order for the clock to start to run, Sally has to retake the land.

3rd party
B

4. Remainder (follows life estate)

- when 3rd party retains future interest after a life estate/ life estate goes to 3rd party.

a. Vested Remainder (known)

-3rd party person who has the remainder is 1) *known* or 2) *born* or 3) *there is no condition that must occur before they will have the right to control that property.*

-B owns future interest in property at moment of creation.

-B cannot get possession until A dies.

1) absolutely vested remainders - remainder is not subject to change.

-B is living & does not have to do anything to have right.

ie, *O to A for life, then to B* - known that B will receive property

2) vested remainders subject to open - remainder that may be divided among persons who will be born in the future.

-condition has been met, but class of persons may be open in the future.

ie: *O to A for life, then to the children of B.*

Rationale: -B's children have a vested remainder, if B has any living children at the time of conveyance

-this vested remainder is subject to open b/c any children of B born after the conveyance from O to A may share in the property rights, where B's children will own the property jointly.

3) vested remainder subject to divestment - remainder that may be destroyed by a subsequent event that occurs after the original conveyance.

ie: *O to A for life, then to B, but if B has flunked out of law school, the property shall revert to O.*

Rationale: -B has vested remainder (b/c B is known at time of conveyance to A, and there are no conditions precedent to B's taking the property)

-B's vested remainder is subject to divestment (b/c if condition is met & B flunks out of law school, then B will lose his right to obtain the property on the death of A)

b. Contingent Remainder (uncertain)

- the person who has the remainder is 1) *unknown* or 2) *as yet, unborn, or 3) a condition needs to happen that is not certain to happen.*

ie, *O to A for life, then to the children of B (where B has no children at the present).*

ie, *O to A for life, if B graduates from law school.*

3rd party

5. Executory Interest (follows fee simple subject to an executory limitation)

- future interest belongs to a 3rd party after a fee simple subject to an executory limitation.

- Hypo: *O to A so long as used for residential purposes, then to B*

Rationale: O has nothing -

A has fee simple subject to an executory limitation

B has an executory interest (not definite, unless A violates provision)

E. Interpretation of Ambiguous Conveyances:

1. Guidelines:

- a. 1st, court will seek to implement the *intent of the grantor*
subjective intent
objective intent (language)

then b. *Presumption against forfeiture* or finding a future interest - If grantor's intent is ambiguous, the court should presume that the grantor gave away whatever interests he had in the property and did not retain any future interests. The presumption is against loss of the property by the current owner. Avoid having a current owner forfeit his interest & keep property in hands of current owner.

ie, fee simple determinable vs. fee simple subject to a condition subsequent
=Fee simple subject to a condition subsequent is preferred b/c the current interest is not automatically forfeited.

ie, life estate vs. fee simple
=fee simple interest is preferred.

2. Presumption Against Forfeitures and the Grantor's Intent

Presumption against Forfeiture

- a. Wood v. Board of County Commissioners of Fremont County - hospital
Rule: If there is no express intent by the grantor from the specific language of the fee [no durational language (fee simple determinable) or no conditional language (fee simple subject to a condition subsequent)], the court will presume against forfeiture → ct prefers fee simple subject to a condition subsequent b/c grantor required to affirmatively act.

Grantor's Intent b. Forsgren v. Sollie (p.553)

P grantor conveyed land to Sollie; P reentered property to mow/mend fence/pay tax. Sollie sold land to D; P reentered property & brought action to quiet title.
Rule: *Even though the language of the fee is ambiguous, granting the grantor's intent is more important and the court should implement the subjective intent of the grantor, (as exemplified by the grantors' actions).*

There is no absolute need for specific language, b/c even there is no conditional language/specific language re: *right of reentry* in fee simple subject to a condition subsequent, the court will grant grantor's intent. In this case, the court held that there was a clear intent by the grantor to grant a fee simple subject to a condition subsequent b/c reentry.

F. Rules Regulating Restrictions on Use or Ownership to Promote Marketability

Rule Against Unreasonable Restraints on Alienation

The courts generally limit the ability to alienate or restrict the marketability of property.

1. Policy goals:

- a. efficiency - promote efficiency & social utility by allowing property to shift easily to a more valued use.
- b. liberty - promote liberty/individual autonomy by vesting control of resources in current owners & by freeing current owners from undue restrictions imposed by past owners.
- c. equality - promote equality both by promoting dispersal of ownership and preventing racial restrictions.

2. *Rule: Restraints upon the alienation of a fee simple are void b/c they are conditions that restrict the ability of the owner to sell or give away property.*

2. 3 kinds of total restraints on alienation, that will be found to be null and void:

1) Disabling Restraint

- directly forbids owner from selling land.

ie, O conveys property to A and her heirs, but any transfer of the property shall be null and void.

2) Promissory Restraint

- A gets property from O on promise that she will not sell it.

3) Forfeiture Restraint

- A gets property but loses it if she sells it to someone else.

ie, O conveys property to A, but if A attempts to transfer the property, then to B and her heirs.

3. Partial Restraints on alienation:

1) Limit transfer to certain persons.

2) Limit amount of time that particular persons can own property.

3) Require that original owner or neighbor consent to sale.

4) Grant right of first refusal or preemptive right to a particular group or person - giving that person the right to purchase the property in preference to anyone else if she offers fair market value for the property (first dibs) or if she matches an offers made by 3rd parties (match the price).

4. Repugnant to the Fee [Old Test - Is the restriction repugnant to the nature of the fee?]

Direct restraint on alienation

a) Riste v. Eastern Washington Bible Camp (p. 561) *Disabling restraint is void*
Grantor = Eastern Bible Camp (Defendant) Riste tried to sell property, required prior approval by grantor & can only be sold to members of the church
→*Rule: Restrictions requiring prior approval by grantor and limit transfer to certain persons are repugnant to the nature of an estate in fee, and should be null and void.*

1. When the grantor transferred a fee simple estate to the grantor, grantee takes property free of conditions. Grantee did not promise to do or forfeit anything by taking the property and therefore, conditions were in effect disabling restraints directly forbidding owner from selling land.

2. Restrictions based on creed/religion are invalid on public policy grounds b/c conflicts w/ state code restricting discrimination based on creed.

Direct Restraint on alienation

b) Hankins v. Mathews (p. 563) Time-limited restraint is a total restraint & void
Deed conveyed 25 acres to Jim Grubb, restricted from selling land for 10 years, otherwise would revert to A's heirs.

D - forfeiture restraint - if he transfers property, he will lose it.

P - partial restraint - limited as to how long restraint will exist

→*Rule: Time-limited restraint for a period of time is a total restraint on alienation which is repugnant to the nature of the fee & void.*

Even tho restraint meant to last for only a period of years, grantee cannot sell land at all and is therefore repugnant to the nature of an estate in fee b/c contrary to purpose of encouraging reasonable use of the property.

Hypo:

vs.

restriction where can't sell to anyone with a last name Kelly.

Court held that this is not a total restriction, b/c not restricting too many people. Therefore, restriction is not null and void.

Grantor Consent clause

c) Northwest Real Estate Co. v. Serio (p. 567) *grantor consent clause is void*
Provision that the land should not be subsequently sold/rented, prior to a designated date, without the consent of the grantor = grantor consent clause.

→Rule: *Grantor consent clause is repugnant to the nature of the fee and is therefore void.*

-through a grantor consent clause, trying to create a "desireable high class residential section." & therefore suggesting that Serio is not a desireable, high class person.

Dissent: Restrictions are not against public interest b/c allowing Serio to enter into property would be destructive to the value of the estate.

-counterargument to dissent

-efficiency of property; liberty

-equality/fairness - is it fair to allow a grantor to develop a criteria (permissible or impermissible)

5. **Void if Unreasonable** [Modern Test: Is the restraint reasonable?]

4) Horse Pond (p. 569) *Void only if Unreasonable*

Old test: Is the restriction repugnant to nature of the fee simple?

-Court argues that any kind of restraint on alienation is repugnant to the fee, that don't want to restrict land

-shift away from formalist reasoning/analysis -- legal fiction that the nature of a fee simple absolute conflicts with restrictions on land and therefore must be repugnant to the fee. (circular reasoning/formalist nonsense)

→*New Test/Modern rule*: Is the restraint reasonable?

(depends on perspective - *reasonable* in view of justifiable interests of parties)

Facts: Restriction in a deed that can't be alienated unless 100% of club votes.

Club wants to swap land with another land. One member of club votes against.

Issue: Is the restriction requirement (100% vote) unreasonable? Yes.

→Rule: *Disabling restraints that cannot be waived by anyone are uniformly held to be void as unreasonable.*

Note: *Charities* - Rule of reasonable restraints does not apply to charities.

G. Rule Against Perpetuities (p. 590)

No interest is good unless it must vest if at all no later than 21 years after the death of some life in being at the creation of the interest.

-Defeats Dead Hand problem by limiting ability of current owners to create future interests.

1. *Definition of terms*:

a. vest - the moment when a contingency occurs so that the future interest takes into effect and the future interest holder can possess that property.

b. life in being - *people named in the conveyance* (ie, O, A, B)

& including *intervening generations*, specifically people who are alive at the time of conveyance/at the time of creation of the grant. (ie,then to B's grandchildren □ look at B, B's children & B's grandchildren).

- is it all possible? (as opposed to likely)

2. *Application*:

a. Rule applies to: *executory interest*

& *contingent remainders*

- executory interest follows a defeasible fee - B has an executory interest

- contingent remainders follow a life estate, but B is unknown or unknown whether condition will be met.

- b. RAP does apply to *vested remainders subject to open* b/c partially contingent.
- c. does not apply to future interest owned by O or vested remainder of 3rd parties

3. *Steps:*

- 1) Identify future interest & determine whether interest is covered by ROP.
- 2) Is there any chance that the future interest [executory interest/contingent remainder in ____] could vest more than 21 years after the death of any person alive at the creation of the interest [O, A, B, B's children, etc.]?
- 3) If future interest is too speculative/ might not vest w/in time, violates RAP.
- 4) *Remedy:* If the future interest violates the rule,
 - a. *traditional:* strike out offending language (strike by clauses) & see what is left. Does it still comply with RAP?
 - executory interest:* fee simple (absolute in A)
 - or fee simple determinable in A,
 - with a possibility of reverter in O
 - contingent remainders:* life estate in A; O has a reversion.
 - b. *modern modifications:*
 - i. **Wait & See test:** the interest does not automatically vest, and the state will wait & see for whole RAP period whether the interest does vest after people named in conveyance have died.
 - If vested, does not violate RAP.
 - If does not vest, then destroy future interest by striking out offending language. → fee simple absolute.
 - ii. **Cy Pres doctrine:** age limitation greater than 21, can modify & reduce age limitation, so that the grant is good.
 - ie,has child within 25 years - change 25 yrs to 21 yrs.
 - iii. **Corporations:** If grant is to a corporation, assume that corporation is not a life in being, but calculate interest beginning from the date of conveyance of the interest + 21 years.

Note: If someone is alive & can have children, don't assume can't have children, even if the person is 80 yrs. old.

H. Rules Regulating Current Owners to Promote Equality, and Liberty

1. Rule Against Waste -

Rule: The present owner cannot damage the estate to the detriment of the future owner.

- a. *waste* - implies neglect or misconduct resulting in material damage 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.
- b. 3 types of waste:
 - 1) *voluntary* - result of deliberate, affirmative acts of possessory tenants
 - 2) *permissive* - result of neglect or deterioration, where the possessory tenant has failed to perform an affirmative duty imposed upon him for the benefit of owners of the future interests in the land.
 - 3) *ameliorating* - increase value or utility of property, but not in a way that the future interest wants.

Ordinarily destruction would constitute waste

-But, courts have held that life tenant is entitled to make fundamental changes to property, if a complete and permanent change

of surrounding circumstances has deprived property of its value and usefulness as previously used.

c. Moore v. Phillips (p.616) remaindermen sued life tenant to recover damages for deterioration of a farmhouse resulting from neglect by the life tenant.

2. *Protection of Equality: Racially Discriminatory Covenants and Conditions*

Racially restrictive covenants - limit sale, lease, occupancy of real property to members of a particular race or excludes members of a particular race(s).

a. Historically, targeted against primarily blacks (also, including Jews, Asians)

1) Civil Rights Act of 1866

- section 1982 - rights of all citizens to sell, lease...

- Prohibited state-created disenfranchisement.

- But, not originally understood to extend to private providers of housing.

2) 14th Amendment applied only to state actions

3) minority of state common law and statute declared such covenants void and unenforceable as contrary to public policy.

4) White owners had to follow restricted agreements, even tho they did not sign agreement. Based on civil procedure, white owners should have been allowed to question validity of restriction.

b. Shelley v. Kraemer (1948) (p. 622) [outcome-focused decision]

-30 property owners signed agreement restricting land aimed against "Negro or Mongolian race" At time, 5 black families lived & owned property for years before agreement. Kraemers brought suit to divest black family of property.

→*Rule: Racially restrictive covenants imposed by private individuals are void and unenforceable under the 14th Amendment b/c judicial enforcement of restrictive terms of covenant constitutes state action.*

1. on its face, the restrictive covenant does not violate the equal protection clause of the 14th amendment b/c it is private action.

2. But, state court action is state action b/c affirmatively acted and used full coercive power of the government to enforce restrictive covenant & deny persons from property. (broad reading of state action)

3. Limitations to protecting rights - Court will protect individual's rights so long as does not interfere with others' similar rights.

4. Effect → promotes freedom by guaranteeing to all citizens the right to participate in the housing market on an equal basis (liberty/equality)

5. State action vs. State inaction

-judicial enforcement & nonenforcement means that these people are denied rights on equal footing.

- judicial enforcement of state common law, but does not mean state is immunized from 14th amendment.

c. Evans v. Abney (1970) (p.629) [formalistic decision]

Senator Bacon from Macon created public park for the exclusive use of white persons. Closed park b/c discriminated on basis of race. Land reverts to heirs b/c condition cannot be satisfied & therefore, trust is void.

-Ps (black citizens) argue that termination of the trust violates equal protection & due process under 14th Amendment & should apply cy pres to strike racial restriction and keep park public.

Issue: Does the 14th amendment apply to refusal of the court to apply the cy pres doctrine, to change contingency in order to validate future interest?

→*Rule:* Judicial enforcement of discriminatory contracts does not constitute state action in violation of 14th amendment, without showing more state involvement.

→*Rule:* Refusal to strike a racially restrictive contingency in order validate a future interest does not constitute state action in violation of the 14th Amend.

- No state action, but merely a private action. The specific intent of the donor/owner was clear and since intent was not being carried out, the trust failed = private action. Transfer of ownership occurred automatically at the moment the condition was violated & no state action was involved in transferring ownership from park commission to heirs.

-Ct was following state common law at time - allowed to write racially specific grants.

-*Dissent:* (J. Brennan) Discriminatory closing did constitute state action & state action violates equal protection of black citizens.

1. Large financial investment in park & state employees = treat as public park by the city.

2. state action by the courts - whenever the state enters into an agreement to compel or enforce reversion, there is state action; no distinction btwn future interests (whether automatic reverter, or affirmative action for reversion)

3. sends the message of stigmatization - effects on hearts and minds if carry out segregation.

-Dissent: (J. Douglas) - No constitutional way to ensure that property will not serve blacks. *Ironic:* If put this property in hands of heirs, this does not mean that property will be segregated (like private club) and if use property for commercial purposes, cannot put racially restrictive covenant b/c of Shelley.

d. Distinguishing Evans vs. Shelley

State action?

1. Coercive state action (Shelley) - physically take people from property vs. automatic reversion (Evans) - the minute the property was desegregated, the property reverted back to the heirs.

Policy

2. *Slippery slope* - Do we always want to define/enforce everything as state action?

-Shelley - broad definition of state action.

-Evans - limit/retract definition of state action - require to show more state involvement.

3. intrusion into our freedoms -

-state as an oppressive instrument (big brother/paternalistic - govt regulation of all "private" conduct

vs. -markets will be oppressive without state enforcement - state as a protector of rights/freedoms.

4. mutual principles - different rulings depending on fact situations.

e. Hermitage Homes problem (p. 643) Trusts to schools, "whites-only" provision

O to A so long as [], then to B so long as...., then to E.

-The final beneficiary was to Hermitage Methodist Homes no racial restrictions.

-Issue: Should the court respect the grantor's intent or strike down racially restrictive conditions (Shelley)?

Arguments:
[Shelley]

-Plaintiffs Prince Edwards : Want O to A as final outcome [fee simple absolute]

1. state action b/c allowed creation of racially discriminatory trust
-violates spirit of Shelley - racially discriminatory conditions are void
2. legal fiction - automatic reversion is a fictitious legal instrument that does constitute a state action.
3. private persons may not have intended to discriminate
[distinguished from Evans - discriminatory intent of settler]
3. liberty - willing parties (schools and students) want to contract with each other and the state is preventing them from doing so →punishing property holder [individual] →liberty to participate on equal grounds
4. efficiency - restraint on property (contrary free market exchanges)
5. inequality /public policy (J. Brennan Evans dissent) - racial discrimination thru funding conveys message of stigma
6. cy pres doctrine: if general intent of the trust to educate the students, should strike the condition as a restraint on alienation.

[Evans]

-Defendant Hermitage: [formalistic argument] respect grantor's intent

1. grantor had a specific charitable intent - to educate white students & court should respect intent of the original grantor. (formalistic)
2. court did not force the settler to make the trust. Rather transfer of ownership occurred automatically the minute the condition was violated (Evans) Therefore this is a private action, not state action.
3. no coercion by the state but court is refraining from action by refusing to act (distinguish from Shelley - physically taking property away)
4. public policy (equality)- no discrimination, b/c final gift to E will have no racial restrictions (distinguish from Evans).
5. liberty - grantor autonomy- right to craft trust in manner that want.

f. Themes:

1. (un)equal rights of people.
2. concentration of power
3. promote alienability - property should be freely alienable/subject to the free market.
4. shift from concentrated power to individual power
5. autonomy & liberty to participate in the market on equal grounds.

State action -

-state action as a vital protector of individual liberty & privacy by exempting private conduct from regulation by constitutional doctrine

or -state action promotes freedom by guaranteeing to all citizens right to participate in housing market on an equal basis

3. *Protection of Equality and Liberty: **Restraints on Marriage***

Rule: *Restraints on marriage are void against public policy, but with exceptions:*

a. Tension between freedom to marry vs. grantor autonomy

1. grantor autonomy - right of donors who want to attach conditions to gifts. Depends upon whether reasonable/capricious intent of conditioning the gift.

2. freedom to marry - idea that marriage should be free choice.
- *b. *Reasonable purpose vs. capricious intent*
 - 1) reasonable purpose - desire to furnish financial support until that person gets married, suggesting that need male financial support before get married.
- c. *Coercive vs. Right re: Marriage*
- d. Public Policy -
 - 1) reinforces stereotypical view of women as dependent upon the husband.
 - 2) so fundamental a right that some rights should not be restrained.
- e. Lewis v. Searles

Issues: 1. Lewis wants to strike all references to marital status b/c illegal

2. In any event, whether or not strike, this is a fee simple determinable:

2 options:

 - 1) O to A for life, then 1/3 to A, B, & C.
 - or 2) O to A so long as unmarried, then 1/3 to A, B, & C. (Lewis)

Holding: Court held that this is a fee simple determinable.

 1. text - no wording indicating a life estate.
 2. even if uphold restraint, she is no worse off, b/c she is getting a substantial part of the estate even if she does get married.
- f. *Mary Joe Frug, Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook:*
 1. Analysis through gender definitions is limiting, b/c -no matter how innocently the opinion is stated, the opinion reinforces gender stereotypes of weak women and strong men.
 2. Should install provisions where the court will protect both genders in the same way.
- g. Shapira v. Union National Bank (p. 650-1)

-Facts: Condition that he be married to a Jewish girl. Son argues that there are slim pickings. & cited Loving v. Virginia - court struck down antimiscegenation statute prohibiting white and black persons from marrying each other (prohibit interracial marriages).

- Holding: Court held that seven years is plenty of time to look.

The condition is prohibiting marriage, just preventing the son from taking property & promoting heterosexism.

4. Themes: in agreements by owners to control what happens to property...
 - a. *liberty* - promote autonomy
 - b. *efficiency* - promote access to market
 - c. *equality* - prevent discrimination

II. Zoning

Zoning is public land use regulation

- A. *Zoning ordinance* - state delegates state police power to local government (state municipality) to protect the public welfare & safety of people within local states.
- B. Theme: Police Power vs. Property Rights

What limits should there be on state power to promote the public welfare?

and what is a fair/legitimate burden that the public should or should not bear on private use of property?

C. Types of zoning:

1. use zoning - ie, industrial
2. area zoning - size of the lots, height of buildings

D. Exclusionary Zoning

1. exclusionary zoning -- form of use zoning to purposely exclude certain groups from a particular community by making them economically out of their reach.

Majority rule: Exclusionary zoning is not invalid, b/c grant municipalities are granted great deal of latitude in furthering "general welfare."

Minority rule

2. Southern Burlington County, NAACP v. Township of Mount Laurel (NJ 1975)(p.664)

Facts: Restrictive land use regulations in Township Mt. Laurel unlawfully had effect of excluding low/moderate income families from living in the municipalities. Ps represent the minority group poor (black and hispanic) & include those who can't afford property, in interest of keeping down taxes

→*Rule:* A developing municipality may not exclude/limit categories of housing through land use regulation, but must afford a realistic opportunity to low/moderate-income people to obtain adequate housing, at least to the extent of the municipality's fair share of the present and prospective regional need of low to moderate income housing.

-New Jersey explicitly interpreted state constitution & individual rights to limit exclusionary zoning:

- a. NJ state constitution - general welfare guaranteed under the equal protection clause under the NJ state constitution. Zoning power is police power of the state & local municipality who is delegated this power thereby impacts state's citizens, not just municipality. Therefore, a municipality whose zoning practices fail to advance the general welfare of the region/state by excluding/limiting categories of people, violates the state constitution.

b. Individual rights -

- a. *right to housing* - U.S. Constitution does not provide right to housing.
- b. *right to shelter* - while not part of U.S. Constitution, state constitution provides that shelter is required for basic survival & adequate housing is essential to the general welfare of the region.

→*c. Test* - whether the developing municipality has provided a realistic opportunity for low/moderate-income people to obtain decent housing?

- a. Focus on developing municipalities with growth.
- b. Must make realistically possible for low/moderate income people.
- c. whether or not the developing municipality deliberately set up restrictions to maintain tax base (motivation)? Look at effect (not intent).
ie, reject property tax rationale: may not have intended to discriminate but in effect did discriminate in the interest of keeping down taxes.

→*d. Applying principle:*

- a. zoning is presumptively against general welfare
- b. burden shifts to municipality to show that there are valid reasons for imposing zoning.

e. Remedy - good faith expectation that Mt. Laurel will amend zoning law

f. Result - Mt. Laurel ignored ruling & just rezoned 1/4 of 1%.

3. Mt. Laurel II (p. 673) (8 years later)

→*Holding*: Imposed new requirements on municipalities requiring that municipalities must provide a realistic opportunity for decent housing to low/moderate income families & extended requirements to cover all municipalities in the state.

a. All communities identified as "growth" areas were obligated to provide a municipality's fair share of the *regional* housing need for low and moderate-income persons.

b. Affirmative remedies to encourage the construction of low- and moderate-income housing. (not just removing exclusionary provisions of zoning codes)

(p.674):

1) Government subsidies

2) incentive zoning

3) mandatory set-asides

4) builder's remedy

5) appointment of a master to revise the zoning ordinance

4. Mt. Laurel III [took teeth out of Mt. II]

a. Weakened Mt. Laurel II by watering down enforcement, by cutting back on affirmative remedies.

1) got rid of builder's remedy

2) permit transfer of up to $\frac{1}{3}$ fair share of housing needs for region.

Municipalities could buy out of providing fair share of regional housing & neighboring communities could absorb up to half of another's fair share.

b. NJ legislature enacted *Fair housing Act* of 1985, which *transferred authority to state administrative agency implementing the constitutional obligation to prevent exclusionary zoning practices.*

c. Reasoned by analogy to Brown I, II & fact that we have de facto regulation. -Education vs. Zoning - parallels between educational legislation and zoning.

d. Interpret laws in politically unpopular ways -

How does the court enforce decisions when they are political unpopular?

5. Themes:

a. regulation vs. deregulation

1) *Developer's perspective* - regulation of property rights, where municipalities would be subject to new kinds of restrictions & restraints on alienation/marketability.

a. restrictions would determine what developers build.

b. Mt. Laurel - could build what developers want.- (deregulation)

2) *Low & moderate income people's perspective* - enter into mutually advantageous relationship w/ developer

a. restrictions - determine what gets built

b. Mt. Laurel - would free up possibility of building what they wanted. (deregulation)

3) *Upper income resident's perspective* - concern that their property will be devalued by having low & moderate income housing which will lower their tax base & marketability of their property.

b. Infringe vs. protect property rights

1) right of exclusion (Locke) - rule of labor& infringe on property rights

2) distribution - right to transfer -

c. Restraints on alienation or marketability

- exclusionary zoning negatively effects finances b/c regressively redistribute govt costs.
 1. Everyone contributes to city govt. But as people move out & work in suburbia, less contribution to city government tax base & therefore, the city becomes more expensive to run & city is funded by community least able to pay for it.
 2. reverse commutes - commute from city to suburbia to work b/c workers are not able to afford living in suburbia.
- d. Efficiency - Are government-mandated inclusionary zoning efficient?
 1. *Inefficient use of land* - zoning effectively imposes tax on new construction, b/c some units that otherwise would not be profitable must be included in development, therefore raising costs of providing new housing. Cost of new housing are artificially raised by govt reg. → less housing provided and thereby exacerbating existing shortage of low income housing.
 2. *Efficient* - removes inefficient restrictions on development, remove artificial increase cost of limiting low-income housing to urban areas → increasing social welfare.
- d. Role of developer vs. role of courts
 - Does general welfare of people warrant judicial intervention or -Must the developer build low & moderate income property? (restricting profit maximization)

E. Limits to Zoning Laws Designed to Protect Preexisting Property Rights

-Doctrines to protect private property owners from retroactive zoning schemes, when those laws unfairly surprise owners who invested in reliance on preexisting laws by denying them the ability to use the property in a manner that was permitted before the zoning law was instituted or changed.

Theme: property owners' reliance on zoning & investment vs. state's need for flexibility in promoting public welfare.

-*Issue:* What is the appropriate limit to retroactive land use restrictions?

1. Prior Nonconforming Uses

Rule: An existing nonconforming use will be permitted to continue only if it is a continuance of substantially the same kind and intensity of use as that which the premises were devoted at the time of the passage of the zoning ordinance.

Test: Owner needs to continue the same kind of use and intensity of use to be exempt from restrictions. (examine the character of use, before and after change)

Note: If doubt as to substantial change, doubt is resolved against current property owner

b. Town of Belleville v. Parrillo's, Inc. (p.677)

Facts: Restaurant rezoned into residential area, but existing nonconforming use was permitted out of fairness. Restaurant later reopened as a disco.

Holding: Found substantial change in premises, where the entire character of the business was altered & therefore, too much of a change to still be exempt from zoning restrictions.

c. *Policy Arguments:*

- 1) Protect reliance interest of the property owner □ Property owner relied on pre-existing zoning law & invested in creating this type of property in conformity with prior zoning law.
- vs. 2) All are relying on new zoning law, and all should expect interests to change with new zoning ordinance.
- 3) Define pre-existing use narrowly & place burden on property owner not to make a substantial change in use of premises.
- 4) Creates an incentive to change use in compatible manner.

2. Variances - private property owner granted relief against enforcement of ordinance.

a. Test:

- 1) show undue hardship - if variance is denied, no effective use can be made of the property.
- 2) cannot self-impose undue hardship - ie, buy land & sell half of land and create a property that is too small to build anything.
- 3) what affirmative efforts has the property owner made to bring the property in compliance with the ordinance's specifications.
- 4) allowing variance cannot create a significant detrimental impact on public good or the intent of the zoning ordinance.

c. Commons v. Westwood Zoning Board of Adjustment (NJ 1980) (p. 680)

Facts: single family home & property was too small to effectively use property.

3. Vested Rights - Property owner invested so much before zoning change that deserve compensation.

a. *Test*: (differs between jurisdictions)

- 1) must have already started to build
- or 2) the minute an application for a permit is filed in order to start construction, you have a vested interest.

c. Stone v. City of Wilton

Facts: P paid for architectural fees and engineering services in preparation & secured a loan from the government.

Holding: P did not have a vested right.

- 1. P's expenses (architectural fees, engineering expenses, & loan) was not enough to create a vested right in the property.
must either build or apply for a permit.
- 2. Land-use restrictions which are reasonable should be upheld - must promote general welfare, safety, health, morals, etc. Property rights/use are subject to reasonable changes in conditions.
- 3. Not a taking - P took only preliminary steps & so, P incurred no undue hardship & therefore held no vested rights. In order for there to be a taking, P must be deprived.

Taking: some restrictions are so onerous they require compensation.

Note: being deprived of your most beneficial use is not a taking.

- 4. Landowners do not have a right to use their property for the most profitable purpose.

4. Hypo: Day Care becomes a School for Deaf High School Students (p. 690)

a. Arguments for Day Care:

1. *Prior Non-Conforming Use*: very similar use - children, service, educational or sorts; no real change in traffic; similar hours; not detrimental to the community; no unwarranted expansion; little effect on property values; protect the community interests; owners relied on. No unlawful extension.
2. *Variance*: 1) undue hardship - if variance denied & not allowed to build school for deaf, would have to tear down building or pay same cost for destruction; 2) not self-imposed (rise insurance costs were not our fault); 3) not significant detrimental impact b/c no change in the safety issues; reasonableness of use; will not create a further disturbance □ children, same traffic
3. *Vested Rights*: 1) Filed for application before neighborhood protect → vested interest. 2) unclean hands issues? But 20K has already been invested (but we knew that this was not within our rights) Euclid □ required to pay more than 75% of costs to be considered substantial.

b. City's Arguments:

1. *Prior Non-Conforming Use*: Substantial change in kind & intensity of use b/c *entire character of business changed* [Parillo's]- not "negligible" enough to allow the non-conforming use: different environment; high school students would be different from children; students will need to be bussed in to the school (pollution); parking problems; teens will hangout at night and have a negative effect on the area; school is for profit, rather than not-for-profit.
AND any unresolved *doubts are resolved against the current owner* & therefore the city should prevail & should not be allowed to change.
2. *Variance*: 1) Insurance is not an undue hardship which was caused by the city; property can be sold for fair market value so there are alternative uses; 2) no affirmative efforts to conform to ordinance 3) Significant negative/ detrimental impact on the community - traffic.
3. *Vested Rights*: Day Care already knew that her building did not conform to the neighborhood. [unclean hands]
 - permit process is a form of notification to city & owner.
 - judicial inefficiency - can't get a vested right until after you get a building permit (clear standard)

F. Limits on Preferential Zoning

1. Special Exceptions

- a. special exceptions are zoning uses permitted when legislatively established conditions are met.
- b. Read in specificity
- c. Require sufficient direction to the zoning board to avoid abuse of discretion by zoning board.

2. Spot Zoning

- a. selective rezoning of one or a few parcels of land.
- b. Gives owner a discriminatory benefit that is inconsistent with zoning of surrounding area, is detrimental to community, and is not justified as a police power measure designed to promote the public welfare.

3. Slapp Suits

- a. in response to public protests over a proposed development, developers file suit in order to silence criticism of the proposed development.
- b. most commonly bring suit on grounds of defamation & interference with business transaction.

- c. Arguments: Inhibit First Amendment rights □ free speech rights to petition the government & statements of opinion. David & Goliath - little people vs. large companies.

III. Common Ownership of Residential Property

common ownership - ownership shared in the present time (not renting property)

A. General Overview: Co-ownership Rights and Obligations of Co-Owners

1. Tenancy in Common and Joint Tenancy
2. Tenancy by the Entirety
3. Tenancy in Partnership - common ownership of businesses

B. Tenancy in Common and Joint Tenancy [SECURITY vs. LIBERTY]

1. *Tenancy in Common* -

- a. Each tenant in common has the right to possess the entire parcel, no matter how small.
- b. unequal interests
- c. No right of survivorship
 - when one person dies: interest goes to the *heirs or devisee*
 - ie, A B are tenants in common. When A dies, A's interest goes to A's heirs, not to B.
- d. tenancy in common may be transferred in a deed or will:
 - O conveys [or devises] Blackacre to A and B as tenants in common.*
 - O conveys [or devises] Blackacre to A, B, and C as tenants in common, with a 1/4 undivided interest in A, a 1/4 undivided interest in B, and a 1/4 undivided interest in C.*

2. *Joint Tenancy* -

- a. Each joint tenant has the right to possess the entire parcel
- b. Each required to possess equal fractional interests in the property.
- c. Right of survivorship
 - When a joint tenant dies, her property interest is immediately transferred to the remaining joint tenants in equal shares.
 - ie, A B C: A dies, interest goes to B and C, not to A's heirs.*
 - Note: if A devises joint tenancy in will, will is void, b/c A has no interest to transfer.
- c. Formalities of creation: require unity of time, title, interest & possession:
 - 1) *Time* - interest of each joint tenant must be created at the same moment of time.
 - 2) *Title* - All joint tenants must acquire title by the same instrument. (not ordinarily by intestate succession - by will)
 - 3) *Interest* - All joint tenants must possess equal fractional undivided interests in the property & their interest must last the same amount of time.
 - 4) *Possession* - All joint tenants must have the right to possess the entire parcel.

3. *If ambiguous language:*

- a. traditional rule: interpret the conveyance as a *joint tenancy*
- b. modern rule: presume that created a *tenancy in common*

4. *Severance* -

Rule 1: When a joint tenant transfers his property interest, the right of survivorship of fellow owners is destroyed & the grantee's interest is held as a tenancy in common with the other owners.

ie, If A sells \square undivided interest to C,
the joint tenancy is severed & B's right to survivorship is destroyed.
As a result, B & C will own the property as tenants in common

Rule 2: Severance occurs only between the selling owner and the remaining owners; it does not change relations of the remaining owners among themselves. (B & C are still joint tenants)

ie, If A, B, C own property as joint tenants

$A \frac{1}{3} \quad B \frac{1}{3} \quad C \frac{1}{3}$

-and A conveys his interest to D, D owns $\frac{1}{3}$ interest as tenant in common with B and C.

$D \frac{1}{3} \quad B \frac{1}{3} \quad C \frac{1}{3}$

-when D dies, her $\frac{1}{3}$ interest will go to her heirs and devisees.

-but, when B dies, B's interest will go to C as a surviving joint tenant, who will then own $\frac{2}{3}$ interest as a tenant in common with D.

$D \frac{1}{3} \quad C \frac{2}{3}$

c. An owner who wishes to destroy the joint tenant's right of survivorship while retaining ownership of her interest, may convey her interest to a 3rd party who reconveys the interest back to A. Since this destroys the unity of title and time, A and B will now own the property as tenants in common.

ie, Husband secretly signs document and gives it to his daughter w/o telling wife. When he dies, he attempts to leave 50% interest to his daughter on the assumption that his wife's right of survivorship has been destroyed by this severance.

?Should this procedure be contingent on giving notice?

d. Creating Indestructible right of survivorship - ensuring that none of the parties can destroy right of survivorship:

O to A and B as life tenants, with a remainder in A if A survives B, and a remainder in B if B survives A.

-alternative contingent remainders in A and B.

-whoever dies 2nd will obtain the remainder and the property in fee simple absolute.

5. Partition:

a. Judicial partition - court will divide physical property or proceeds.

b. Voluntary partition - property owners can divide physical property on own.

6. Benefits and Burdens of Co-Ownership

a. Benefits:

1) Each have right to possess entire property.

2) No duty to pay rent to each other, unless ousted co-owner*

3) Duty to share rents paid by 3rd parties.

4) Cotenants has right to lease his interest w/o consent of co-tenants.

a) Lessee obtains lessor's rights, including right to possess the entire parcel. [lessee's rights]

b) cotenants then have a right to share in the rents only if they agree to be bound by the leasehold, thereby waiving their own rights to possess the property.

c) policy arguments: Cotenants have a right to use property as they like & therefore, have a right to lease property to whoever they want. (liberty)

vs. -security of other's interests

b. Burdens:

- 1) Duty to share basic expenses needed to keep the property (ie, mortgage payments, property taxes, property insurance)
- 2) No duty to share the costs of major improvements (adding new room)
- 3) If co-owner exclusively possesses property, he must bear the entire burden of expenses, if the value of his occupation of the premises exceeds payments of those expenses.

7. Ouster:

- a. *Traditional Ouster* - affirmative act to wrongfully and intentionally exclude others from jointly owned property.
- b. *Constructive Ouster* - make it difficult for a tenant to be there.
- c. *Duty to pay rent to ousted co-owners*
 - joint tenants & tenants in common *do have a duty to pay rent* to their co-owners if have ousted them.
 - Amount of rent owed is the fractional share of the rental value owned by the co-owners out of possession
- d. *Adverse possession*
 - Require affirmative act notifying nonpossessory tenant that the co-owner is asserting full ownership rights to the property to the excluding of other co-tenants, in order to start statute of limitations.
 - w/ co-tenancy, each cotenant has legal right to possess property & does not necessarily mean that intended to oust tenants.

9. Conflicts over Rent and Ouster in the Context of Divorce

Olivas v. Olivas (New Mexico 1989) (p. 715) -Constructive ouster in divorce

Facts: Husband & wife hold property as tenants in common. Husband claims that he was constructively ousted (where divorce made joint occupancy impossible/impractical) & therefore is entitled to receive rent.

→*Holding (New Mexico)* - Court presumed that w/ the divorce, the spouse who no longer resides in the home was constructively ousted & therefore entitled to receive rent (equal to □ fair rental value).

-When the emotions of a divorce make it impossible for spouses to continue to share the marital residence, the spouse who departs from the residence has been constructively ousted and is therefore entitled to rent from the remaining spouse.

vs. →Other states - Cotenants in possession have no duty to pay rent, unless they have affirmatively ousted their spouse by notifying them of an intent to exclude them from the joint property (*traditional ouster*).

Hypos -- Domestic Violence situation with abusive husband (p. 718) :

Problem 1: Throws husband out of house, separated for 2 yrs & then divorced. Wife is awarded ownership of house. Husband brings suit for □ fair rental value of home beginning with his ouster from home until the divorce date.

(no win situation)

1. Under Olivas rule, wife would have to pay rent (equal to □ fair rental value) b/c divorce made joint occupancy impossible/impractical.

-regardless of fault (Olivas - husband left house to live with another woman), wife is required to pay rent.

2. Traditional ouster - affirmative acts - wife threw him out, tells him not to come back. → would still have duty to pay husband rent.
- 3. Needs-based analysis: determine whether the person who would receive the rent needed the money.

-*Public policy reasons for changing the doctrine*: battery as defense to ouster; look at intent & facts (not textual analysis); not wrongful/intentional; he chose to leave, therefore not ousted; wife was not in an equal bargaining relationship.
Problem 2: (p.718-19) Wife moves out. Husband asks her to return but she refuses. She sues husband for □ of fair rental value of house during the 2-year period they were separated.

-Constructive ouster - Husband's battery of wife should be recognized as constructive ouster b/c he was making it impossible for her to live there (cycle of domestic violence argument)

8. Transfers:

- a. Each co-owner has right to transfer interest to a 3rd party
- b. transfers can be done w/o consent of co-owners.
- c. 3rd party fills shoes of co-owner.

Rules: Lease does not sever joint tenancy, b/c no clear intent; legal fiction
 Lease does not survive death

10. *Conflicts over Transfers by One Co-Owner* [SECURITY vs. LIBERTY]

- a. Family Conflicts over Use of Common Property:

Carr v. Deking - Father and son were TIC and leased land to Deking. Father made an agreement with lessee w/o son's consent. Son disagreed with father on the use of common property & wanted to declare the lease invalid.

-Son - *security interest argument* - obligation to ensure that use of property benefits both parties, where prevent prospective lessee from going behind back of one tenant in common to obtain a more favorable lease from the other.

vs. -*Liberty interest argument* - each owner has right to exclusive ownership of their property & should have right to do what wants with property

→*Holding: Liberty interest* - son is not entitled to eject lessee, b/c cotenant may lawfully lease own interest in common property to another w/o the consent of the other tenant & w/o his joining in the lease. Lessee steps into shoes of cotenant and becomes a tenant in common with the other owner for duration of the lease.

Remedy: partition or accept to terms of lease & get rent

b. Death

Rule: Lease by one joint tenant does not survive death of the lessor.

-b/c As soon as the joint tenant dies, he does not have a property interest and therefore cannot lease rights that extend beyond his death. (Tenhet v. Boswell)

c. Divorce

Rule: Lease by a spouse does survive Divorce

Kresha v. Kresha (p. 725) Husband and wife are TIC. W/o wife's consent /knowledge, husband gives son lease. Divorce & wife awarded property & holds land in fee simple absolute.

Issue: Whether the mother's title takes the property subject to the lease?

Holding: Yes. Lease by a spouse does survive divorce.

1. difference between tenancy in common and life estate/joint tenancy
 - a. joint tenancy/life estate - once a life tenant defaulted (ie, in a divorce), that life tenant does not have a property interest & cannot lease his rights that do not exist.
 - vs. b. tenants in common - *no right of survivorship* & therefore, father's property interest would pass onto his heirs or devisees (ie, son)
 - d. Public policy arguments: Who's interests do we want to protect
 1. tensions between husband's liberty interest & wife's security interest.
 - liberty interests*: husband's liberty interest to do what he wants.
 - security interest*: wife's interest in securing property after divorce.
 2. Justifiable expectations
 3. Fairness
- e. Arguments as to why lease should survive divorce:
 - 1) *Liberty interest*: each owner has right to exclusive ownership of property & therefore should have right to do what owner wants with property; interest in maintaining ability to use property as you want.
 - 2) *Efficiency* - Marketability of land/ prevent alienability of land
 - few will rent property if they know their possessory rights will end upon divorce.
 - 3) *Reliance interest* of tenant - [Lessee 's security interest]
 - who will rent property if faced with problem that marital difficulties will terminate a tenant's lease.
 - lessee obtains lessor's rights, including right to own land.
 - 4) husband could have sole property interest without wife's consent & therefore, has a right to lease property without wife's consent.
 - 5) *equality* - promote equality by promoting dispersal of ownership.
 - 5) Unlike life estate, not leasing beyond life time.
 - husband had fee simple ownership & therefore had right to lease beyond his lifetime. (Tehnet)
 - 6) not fraudulent conveyance.
- d. Arguments as to why lease should not survive divorce:
 - 1) *liberty* - Don't want to have land encumbered (by lease)/alienability of land -free owner from restrictions imposed by past owner.
 - 2) *efficiency* - Inhibit marketability of property - make it easier for property to be bought or sold, since buyer/potential lessee does not have to worry about obtaining consent of another property owner.
 - 3) *Life tenant analogy* (Tehnet) b/c husband does not have property interest anymore & wife has gained his property interest.
 - Upon divorce, husband does not have property interest b/c property acquired during marriage is subject to equitable distribution on divorce & therefore cannot lease rights that extend beyond his interest.
 - 4) *equality* - Don't want spouse to affect another's rights
 - 5) *Fairness* - Divide interests depending upon a person's needs (discretion, not a blanket or general rule)
 - 6) Judicial efficiency - ownership interest should terminate in divorce decree b/c don't want to clog up litigation system.

C. Tenancy by the Entirety

1. Definition - tenancy by marriage - legal fiction where husband & wife become one person, where the wife no longer becomes a legal person & husband held all property interest.
2. *Requirements*: 5th unity - unity of marriage + 4 unities of joint tenancy
 - Right to survivorship
 - No severance
3. At *common law*, husband had complete & full control over property.
 - Wife only had a right to survivorship that could not be destroyed w/o her consent, even if the property was conveyed to a 3rd person.
 - When the husband died, she had right to possession of the property.
 - Cannot be partitioned, except in divorce proceedings
4. *Reform: Married Women's Property Acts*
 - women can receive, dispose personal/real property
 - Act can be interpreted in different ways re: equality between husband & wife:
 - a. either husband/wife can convey his/her interests (act as individuals with full and complete control over property w/o other's consent)
 - = act like the husband
 - b. neither husband/wife can convey their interests alone w/o consent of other (cannot unilaterally convey interest)
 - = act like the wife
 - creditor cannot attach debts to property

Which interpretation is better to protect rights of women for gender equity?

5. *Sawada v. Endo* (Hawaii 1977) (p.728)

Facts: Creditors brought action against husband/wife, seeking to set aside conveyance of real property from judgment by debtor.

Rule: Creditors cannot attach debt to tenancy by entirety w/o consent of spouse, while the spouse is still living.

1. Creditors cannot reach property held in the form of tenancy by the entirety to satisfy debts of one spouse b/c cannot attach debt w/o consent of wife (follow interpretation b - husband's property interest acts like traditional wife)

2. Public policy -

- a. High demand for single family, fee simple property.
 - Hawaii - real estate is expensive; military area.
- a. Real property is the most important aspect of a family & basis for emergency expenses. If allow creditor to attach debt to property, it would be more difficult for family to account for emergency expenses.

Dissent: Both spouses acting like husband (adopt rule a)

1. share burden of debt equally.
2. women can control property just like men & does not require that one spouse cannot act without consent of other.

vs. -some states, creditors can attach debt interest of a tenancy by entirety, subject to a right of survivorship in that tenant's spouse.
-courts have discretion to deny a partition of property while other spouse is still living on property.

arguments:

6. When there is historical inequality, how do we reach equality?
 - a. Difference feminism (Catherine McKinnen) -- Cannot achieve equality b/c women are different from men due to gender differences in how we think, which is based on social construction or biological construction.
 - b. No difference between men & women - treat as formal legal equality
 - c. Problem is general society, which is not good for either men/women
ie, Family Medical Leave Act - where men cannot take & can be fired for taking maternity leave.
7. Which interpretation is more empowering for women?
 - a -act like men, where husband/wife can convey his/her interest (liberty interest)
-women are given more economic equality b/c she is free to do what she wants with her property interest. & can attach debt to interest of tenancy by entirety.
 - b -act like women, when requires consent of the other(security interest) (Sawada)
-security interest - she won't lose property b/c of her husband's actions.
-holding spouses hostages to each other
8. Hypo: Same sex couple (p. 734) *Will the court recognize same-sex marriage?*
[Full Faith & Credit argument: If get married in Hawaii, when return to own state, that state will recognize as legitimate marriage.]
-Given that same-sex marriages are outlawed (where law defines marriage as a relationship btwn a man and woman), can they achieve tenancy by entirety through a contract between partners?
-Through a private contract, will create same legal benefits that come with marriage (ie, limit right to partition, restraint on alienation, attempt to limit ability of creditors to reach parties' individual interests)
 1. political reasons for crafting similar rights of marriage:
courts reject, b/c have refused to recognize similar written agreements (ie, adoption) in order to *protect the sanctity of heterosexuality* (public policy reasons)
 2. bundles of common law rights that comes w/marriage
-Is the covenant enforceable? Void b/c
 1. Attempt to create a new estate
 2. Unreasonable restraints on alienation
[counter - not total restraint on alienation b/c definite time limitation until they end their relationship & courts may accept limited time restraint.]

IV. Landlord - Tenant Relations

Leases are both contracts and conveyances of a property right

A. 4 Types of Tenancies

1. Term of Years

- a. def. - tenancies lasts for a specified period of time determined by the parties.
- b. future interests:
 - landlord retains a reversion.
 - 3rd party retains a remainder.
- c. the death of either LL or 3rd party does not terminate the tenancy.

2. Periodic Tenancy (month-to-month tenancies)

- a. def - renew automatically at specified periods unless either the LL or tenant chooses to end the relationship.

- b. Notice -- Require notice before either party can terminate tenancy.
- c. Death of LL or tenant does not terminate tenancy.

3. *Tenancy at Will*

- a. Like a periodic tenancy, but does not need notice to terminate tenancy.
- b. Death of a LL or tenant will terminate tenancy

4. *Tenancy at sufferance*

- a. A tenant rightfully in possession who wrongfully stays after the leasehold has terminates (*holdover tenant*).
- b. If a LL accepts the check and takes the money, LL has agreed to a new contract with that tenant.
- c. Remedy: LL has to proceed with eviction procedures.

B. Landlord's Rights:

- 1. Right to receive the agreed upon rent.
- 2. Right to have the premises intact & not damaged (tenant's duty not to commit waste).
- 3. Landlord's right of reversion at the end of the lease term.

C. Landlord's Remedies When Tenant Breaches and Refuses to Leave: Summary Process

- 1. The LL may sue for *possession and backrent*
 - a. Tenant's defenses:
 - 1) implied warranty of habitability
 - 2) retaliatory eviction
 - 3) unlawful discrimination based on family status, disability, race or gender.
 - b. Court decides: [relation between nonpayment and defense]
 - 1) whether not paying rent is linked to defense, which can abate rent.
 - 2) whether defense is independent from reasons for nonpayment of rent.
- 2. If the holdover tenant continues to pay rent,...
 - a. If LL accepts rent, will create a new tenancy/leashold.
 - 1) majority: creates a periodic tenancy - month-to-month tenancy
 - 2) minority: creates a new tenancy of a term of years.
 - b. If LL refuses to accept check, can sue for possession
- 3. LL *may not use self-help* to remove tenant
 - due to judicial concern over violence, if resort to self-help, must evict the tenant through court proceedings.
- 4. *Summary Process*
 - relatively fast judicial determination of landlord's claim of a right to regain possession of her property.

D. Landlord's Remedies When Tenant Breaches and Leaves

- 1. LL can accept tenant's surrender
 - Therefore, tenant is not legally obligated to pay future rent.
 - LL can still sue for damages for breach of lease for:
 - a. back rent owed but not paid for before tenant abandoned premises.
 - b. damages for breach of lease - estimated amount that LL lost b/c of tenant's failure to perform his obligations under the contract
damages = agreed rental price - fair market price
- 2. LL can relet on tenant's account
 - LL refuses to accept surrender, so that if no one shows up to lease apartment, tenant is still accountable for rent.
- 3. Wait & Sue at end of the lease term.
 - traditional rule - no mitigation required - LL is not required to do anything.

-modern rule - LL has duty to mitigate damages & find another tenant.

E. Landlord's Duty to Mitigate Damages

Traditional Rule: LLs have no duty to mitigate damages.

Modern Rule: LL has a duty to mitigate damages for getting rents from defaulting tenants, due to modern notions of fairness & equity (contracts)

a. LL has burden to prove that he used reasonable diligence in attempting to relet property.

b. Tenant has to pay for reasonable expenses in LL's attempt to relet property.

2. Sommer v. Kridel (NJ 1977) (p. 787)

Facts: Term of years lease (2 years). Tenant was discharged from army (Vietnam vet), a student, broken engagement & wrote compassionate letter to LL to release himself from lease. LL never responded. A 3rd party specifically asked about renting that apartment, but the LL claimed that the apartment was rented.

Holding: NJ court held that LL has a duty to mitigate damages out of fairness and equity. [Court rejects applying antiquated doctrines of thinking re: property]

Property interest vs. contracts:

-*property laws* - lease conveys to tenant a property interest which forecloses any control by the LL. Therefore, LL naturally be concerned with tenant's abandonment of his own property. & burden of proof is on the landlord -easier for LL to show that will relet property

- *contract - as a matter of fairness & equity*, LL has a duty to mitigate damages & breaching party has burden on question of damages.

3. Arguments for creating duty to mitigate:

a. efficient b/c encourages LL to rent the premises, rather than leaving them vacant & wasting resources & create a loss of social wealth. LL can be compensated.

b. otherwise, creates loss of social wealth - force tenant to give up opportunity elsewhere & remain locked in to the apartment.; old tenant able to get out of an arrangement no longer in her interest & new tenant has a new apt.

c. liberty/freedom to contract - promote individual autonomy to determine use of apartment, where parties have equal power to *bargain* with each other

d. therefore, want to avoid judicial intervention where the courts are changing relationship & rights between landlord and tenant.

e. with residential property, LL may want more control over terms of lease b/c they live there. Therefore, courts may provide greater power to residential landlord (vs. commercial property owner) therefore LL should have duty to mitigate.

vs.

4. Argument against creating duty to mitigate:

a. no efficiency loss - LL bargained for the right not to have to look for another tenant before the end of the lease term.

b. security interest - property right that the LL owns; tenant has no right to take this right from the LL without offering adequate compensation. The only adequate compensation is the remainder of the bargained-for rent.

F. Rent Control

1. Statutory Interpretation: Who is Protected?

-Definition of family/family member: *Who is considered a member of the family within the meaning of the statute which allows family members to stay in rent-controlled apartments?*

-Rule: *Cannot be evicted, if tenant is a surviving spouse.*

New York

Braschi v. Stahl Associates (NY 1989) (p. 795)

Facts: A gay couple is living in a rent controlled apartment. One dies and his name is on the lease. The other partner wants to stay in the apartment. LL argues that he is a licensee and not a tenant.

Holding: Since rent control laws are for the public good, then statute should be interpreted broadly to include more people. Life partner is a family member and cannot be evicted from rent controlled apartments.

1. Broadly defined "family member," instead of looking to plain meaning or formal logic - This man was partner to the deceased in every way except legally married - shared bank accounts, shared expenses, regarded by family & friends as spouses, executor of the estate, etc.

-formally connected families is legal fiction b/c modern family life = emotional & financial commitment over a long period of time; interrelationship.

2. Broad definition is consistent w/dual intent of legislation (rent-control laws):

a. protection of tenants from sudden dislocation.

b. gradual transition to a free market system & free bargaining.

-The law is essentially trying to avoid those people who are not eligible family members who merely want to move into the apartment b/c it is rent-controlled.

Dissent: Majority has expanded the language of the regulation beyond the legislative intent of rent regulation. By adopting a broad definition of family, majority has expanded the class indefinitely to include anyone who can satisfy an administrator that he or she has an emotional & financial commitment to the tenant. Fear of abuse.

-rights of property owners are being derogated.

-court should follow the ordinary & popular definition of family in the traditional sense

→shift away from antiquated property rules on modern family life.

b. NY city rent regulations were amended to codify Braschi.

c. East 10th Street Associates v. Estate of Goldstein (NY 1990) (p. 799)

Court extended Braschi to cover rent -stabilized apartments.

Legislature contained a specific enumerated list that did not include gay and lesbian couples.

Therefore, court expanded definition to include gay & lesbian couples.

d. Hudson v. Weiss (NY 1983) (p. 800)

Holding: Tenant in an unmarried heterosexual relationship is not part of tenant's immediate family and therefore can be evicted from rent-controlled apartment.

-Hudson is distinct from Braschi b/c

1) homosexual couple never has option to get married.

2) LL wants to kick out the tenant as violation of terms of lease, not rent-control statutes.

2. The Economics of Rent Control

a. *The Argument Against Rent Control*

1) Increase demand for rent-controlled housing - artificially raising demand for housing above an efficient level.

- therefore
- 2) decrease quantity supply housing services (LLs) who can remain in mkt. in competition with rent-controlled housing.
 - 3) creates a shortage of rental housing - economically inefficient b/c misallocates resources.
 - 4) reduce current/future investment in supplying rental housing below socially optimal level, →exacerbating shortage over long run.
 - 5) Increase demand for rental housing above what would be if consumers had to pay true costs →overconsumption by existing tenants.
 - 6) provide subsidy to existing tenants who may may not be poor at expense of LLs and homeless poor.

Therefore, court should let market rule.

b. The Argument for Rent Control

- 1) rent control may not reduce supply of housing
 - argument presumes that supply and demand for housing would be determined by a competitive, unregulated market.
 - government does influence demand for home ownership through federal tax and banking policy.
- 2) rent control may not interfere with future investment in new housing.
- 3) rent control may not increase demand for housing to appropriate level
- 4) even if rentrol control leads to decrease in housing, its efficiency and distributive effects may be positive, where property protect existing tenants' abilities to remain secure in their homes. [benefits existing tenants by granting security of tenure and discouraging would-be tenants from market]

G. Conflicts About Occupancy

1. Landlord's Duty to Deliver Possession

- a. Traditional rule* - LL has only the duty to deliver the right to possession, but no duty to deliver actual possession. T has duty to take the property & is legally obligated to pay the rent, even though she is not in possession.
- b. Modern rule* - LL has duty to deliver actual possession of rented premises to tenant at the beginning of the leasehold. If prior tenant wrongfully holdover, the LL has duty to evict prior tenant & the new tenant does not have to pay rent.

2. Tenant's Right to Leave and Transfer the Leasehold vs. Landlord's Right to Control Occupancy

Note: LL/Tenant entered into a Contractual relationship

- a. Transfer of the Landlord's Reversion [LLs right to control occupancy]
 - LL has right to reversion - the right to obtain possession when the lease term ends & the bargained-for right to collect rent from tenant, subject to other terms of the agreement btwn the parties.
 - either party (LL/Tenant) may transfer her property interest.
- b. Tenant's Right to Assign or Sublet
 - Assign*: Entire property interest is assigned to tenant #2, who becomes liable to landlord in privity of estate; all covenants in the lease apply to tenant # 2. Although LL & T#2 are not in privity of contract, T#1 has given up all his interest. Therefore, LL & T#2 share interests, creating a privity of estate. [LL → T#2]
 - Sublease*: Tenant #1 retains some future interest or right to control property in the future (privity of estate btwn LL and T#1). Contractual obligation between T#1 & T#2 and LL has no recourse against T#2. [T#1 → T#2]

1) *When the Lease is Silent*, the tenant has the right to transfer interest in the property by assignment or by subletting.

-Justified b/c of policy of promoting alienability.

-ie, *S lease to J. J subleases/assigns to E. E doesn't pay, & damages apt.*

-if assigned, then S can sue E and J. [T1 & T2]

-if sublet, then S can only sue J. [T1]

-if S consents to the second tenant sublet, by verbal or written agreement the, S can sue T#2 b/c the LL is a 3rd party beneficiary. (if subtenant expressly promises tenant to pay rent to LL, LL may sue subtenant as a 3rd party beneficiary of contract between tenant & subtenant).

2) *When the Lease Requires the Landlord's Consent*

-Clause within lease, stating "no subletting without the landlord's consent" or "subletting allowed subject to the landlord's consent."

a. *Traditional/majority rule* - LL may unreasonably or arbitrarily refuse to approve assignee, no matter how suitable & no matter how unreasonable the objection. (strict reading of lease)

reasonableness requirement?

b. *modern trend* - focus on the intent of the parties; LL does not have implied duty to act reasonably in LL/T residential cases

c. *trend in commercial leases*: adopt an implied reasonableness term in lease clauses, where impose duty on LL to act reasonable, based on promoting alienability & efficient use of property.

Issue: Is there a implied duty for the LL to act reasonably in accepting assignee/ subletter?

Kendall v. Ernest Pestana (CA 1985) (p. 811) - *commercial lease*

Holding: The LL has an implied duty to act reasonably in accepting an assignee or subletter in a commercial lease b/c LL has duty of good faith and a duty to mitigate damages in a commercial lease.

-nature of lease as conveyance, which forbids unreasonable restraints on alienation. (efficient use of property)

-nature of lease as a contract, where parties have duty of good faith & fair dealing. (reliance on agreements)

Slavin v. Rent Control Board of Brookline (MA 1990 (p. 817)

Facts: Under Brookline Rent Control law, tenant cannot sublet their apartment w/o obtaining LL's written consent. T did sublet.

Holding: LL does not have an implied duty to act reasonably in a residential context.

-interest being protected in commercial leases are not protected in residential context b/c issues in commercial property (unfair financial gain & restraint on alienation) are not issues in residential property. [vs. Kendall]

-LL has a right to refuse undesirable tenants b/c LL lives there.

-LL has a legitimate interest in having tenant living on their property.=not unreasonable decision to refuse new tenant.

- fairness* - reasonable, b/c T not restricted from subleasing apartment, just need LL for consent; not fair for courts to rewrite agreement.
- security* - lose control over property interest- put terms into lease & expect clause to be honored.
- liberty* - LL/T have not bargained for change in agreement.
- Contrary to judicial efficiency - b/c difficult to decide what is actually reasonable and will lead to more litigation.
- against decision [for implied duty of reasonability]
- problem b/c encourages alienability, not efficiency
- contrary to liberty - violates tenant's freedom of movement & cannot rebargain for new lease.

-Distinguishing between residential & commercial leases:

- residential residents are less sophisticated parties & have less bargaining power = unequal bargaining power btwn LL/T.
- LL has a stronger interest in property, b/c he lives there.

3. *Tenant's Right to Stay vs. Landlord's Right to Recover Possession*

a. Just Cause Eviction -T cannot be evicted, unless for just cause.

1) Private Housing Market

New Jersey Anti-Eviction Act (p. 828)

-In 447 Associates v. Miranda, impossible for the tenant to pay the rent on the 1st, but could at the end of the month. NJ statute gives tenant the right not to be evicted unless for just cause (true in D.C.)

2) Publicly Subsidized Housing (p. 830)

Section 8 housing - government subsidized housing provided to low-income families, where federal govt pays significant portion of tenant's rent owed to private landlords. T finds the apartment and obtains agreement with LL to participate in program.

-Amended statute in 1981 to prohibit eviction of tenants in Section 8 housing without "good cause."

H. *Tenant's Right to Habitable Premises*

1. *Covenant of Quiet Enjoyment* - tenant has right of quiet enjoyment of premises without LL's interference.

-if not expressly written in lease, implied within lease.

-Breach when LL materially impairs T's enjoyment.

2. *Constructive Eviction* - when LL substantially interferes with tenant's quiet enjoyment of premises (LL has done something or failed to do something that has made it impossible for tenant to live there) (consequence of violating covenant of quiet enjoyment).

-defense of constructive eviction allows tenant to terminate lease, by vacating premises, & stop paying rent. LL's actions functionally equivalent to physically barring tenant from the premises.

-partial constructive eviction - T can show that LL's actions have substantially deprived T of the use and enjoyment of a portion of property. Defense of partial constructive eviction may allow T to continue to live in remaining part of the premises from which T does not claim to have been constructively evicted.

(Minjak)

Remedy - partial abatement of rent.

-vs. actual eviction - where LL breaches the lease by physically barring tenant from property (ie, change the locks), T does not have obligation to pay rent.

-partial actual eviction - LL has barred T from part of the leased apartment.

Constitutes a breach of lease and provides T with justification to move out before end of lease term & T will not be liable for rent after moving out.

-If T chooses to stay:

traditional rule - T completely relieved of obligation to pay rent.

current rule - abate the rent/ reduce rent to the fair market value of the property that remains

Minjak Co. v. Randolph (New York 1988) (p. 832) *Partial Constructive Eviction*

Facts: T had stopped paying rent. Upstairs neighbors build a health spa leading to major water damage on T's music equipment, & sandblasting.

Issue: Whether the Tenants can assert a constructive eviction defense on the basis of partial eviction? [before, can only assert constructive eviction defense if tenant had been evicted]

→*Holding:* Even if tenants abandoned only a portion of apartment, and tenant can use defense of *constructive eviction* as an affirmative defense where was partially evicted.

-punitive damages - LL had engaged in intentional and malicious conduct & Ct. imposed punitive damages on grounds of health & safety reasons.

3. Landlord's liability for acts of other tenants

a. *Traditional rule:* LL is not responsible for acts of other tenants, unless the lease specifically includes an obligation to control the conduct of other tenants.

b. *Modern Trend:* (Blackett) where the LL has control to prevent violations of quiet enjoyment, LL is liable for acts of other tenants.

Blackett v. Olanoff (MA 1976) (p. 835) *Covenant of Quiet Enjoyment*

Facts: Noisy neighboring tenants. LL leased next door property to bar/cocktail lounge. LL sued for rent. T asserted defense under covenant of quiet enjoyment.

Issue: Is a landlord liable for acts of other tenants?

→*Holding:* Although the covenant was not expressly provided w/in the lease, the courts will imply a covenant of quiet enjoyment & the LL is liable for acts of other tenants.

1. Role of LL - LL has control over tenant

2. Explicit duty written w/in lease that tavern would not violate covenant of quiet enjoyment. Indicates that LL knew of potential problems with lounge. & LL has a right to evict a noisy tenant.

3. Remedy if LL does not change situation?

-T would have to engage in proceedings against the other tenant. But since T does not have relationship with other tenant, T would be left with option of pursuing nuisance claim.

4. Implied Warranty of Habitability - not suitable for residential use.

a. Historical background

-Before 1970s, LL had no implied duty to repair rented premises.

-only duty to fix latent defects known to them and not easily discoverable by T.

-otherwise, T had to bargain for warranty or make a contractual obligation.
-independent contractual obligations - T cannot use nonpayment of rent as defense. T had to continue to pay rent, even tho LL had not repaired property.
-After 1970s, court reasoned that there was a implied warranty of habitability based on principles of contract. Most states have adopted the Javins rule.

b. Javins v. First National Realty Corp. (D.C. Cir. 1970) (p. 842)

Facts: 1500+ housing code violations. Ts do not pay rent. LL filed actions seeking possession of apts on ground that each had defaulted in rent payment. Ts raise defense that LL violated implied warranty of habitability.

Issue: Whether warranty of habitability is implied into leases, when not written within the lease?

Holding: Yes, lease includes an implied warranty of habitability.[Majority rule]

Implied warranty of habitability is a private enforceable right that cannot be waived by private agreement.

Change in analysis: (blurring of tort law & property)

1. views lease as a contract, where tenants have bargaining power.

Before, analysis based on factual assumptions of agrarian land, not urban housing value of land vs. value of building

agrarian tenants were more capable of fixing own premises

2. policy considerations - poor housing is bad for all of us in society

-consumer protection law - analogy to buying a car - buy car to be used for a short time period.

-in LL/T relationship - T has unequal bargaining power due to housing shortage, where the T has little leverage, must sign standard form leases, & are subject to endemic race/class discrimination

3. Judicial activism -

-court has a duty to reappraise antiquated doctrines.

4. D.C. Housing Code - city has a duty to enforce statutes

-courts have used housing regs/rights against LLs in tort laws.

-Therefore, T should have ability to use legal duties & rights to enforce housing regs against LLs in the form of a private action.

c. Problem #2 (p. 853) ***

5. **Retaliatory Eviction**

Rule: Landlords cannot evict tenants in retaliation.

a. Hillview Associates v. Bloomquist (p. 861)

Facts: Mobile home residents in trailer park, formed a tenant's association, b/c they were unhappy with the physical conditions of the trailer court. Ts raised defense of retaliatory eviction, when LL brought notice of eviction.

Holding: Yes. Retaliatory eviction is a suitable defense for eviction proceedings.

Ct did find that LL had legitimate nonretaliatory reason for evicting Davenport. b/c limits type of conduct that will be tolerated. Davenport crossed line of legitimate behavior when he struck LL on face.

Test: -Shifting burdens - [note: burden of proof vs. burden of production -burden to come forward with evidence, but don't have to prove to trier of facts]

1. *Tenants* have burden of production to show that in the previous 6 months that LL was retaliating, show reasons for complaint.

2. Then, LL has burden of production to show that had legitimate nonretaliatory reasons for evicting tenants.

3. Then burden shifts back to T, where T has burden of proof to show that LL's evidence is a pretext.

-nonretaliatory reasons for eviction:(p. 864)[LLs defenses to retaliatory eviction]

1. LL decision was reasonable exercise of business judgement
2. good faith desire to dispose of entire leased property free of tenants.
3. good faith desire to make a different use of leased property.
4. LL lacks the financial ability to repair the leased property & therefore in good faith, wishes to have it free of any tenant.
5. LL was unaware of tenant's activities which were protected by the statute.
6. LL did not act at the first opportunity after he learned of the tenant's conduct.
7. LL's act was not discriminatory.

→*Rule: Retaliatory defense must relate to activities of the tenant incidental to the tenancy. Tenant's actions must be directly related to T's habitability of premises or incidental to his tenancy in order to raise retaliatory defense.*

b. Imperial Colliery Co. v. Fout (W. Va. 1988) (p. 866)

Facts: T (mine worker) was on strike with company. T claimed that LL was related to company he was organizing against. T was evicted.

Holding: T's involvement in the strike was not protected activity, T's activities were too attenuated from his tenancy.

-[reality - in a company town, mine workers have little relative bargaining power as a tenant T against LL.]

c. Robinson v. Diamond Housing Corp (D.C. Cir. 1972) (p. 869)

-Allow T to raise retaliatory eviction defense to prevent danger that LL will selectively evict and make an example out of certain Ts. (marital analogy)

-presumes that LL's motives are illicit & burden is on LL to prove otherwise.

-T's not paying rent is not a proper motive for evicting T.

-If LL can bring a proper business motive for evicting T, then can evict.

-taking apt out of market is not a legitimate business motive.

-need to show financial inability to make repairs.

-*Dissent:* LL are not outlaws; burden should not be on LL.

LL will not want to rent out property with such a high burden.

V. Family Property

A. Family, Property and the State

1. Themes:

a. Formal vs. Informal property rights

Formal - socially accrued relationship (marital, parent/child)

Informal - when are they entitled to property rights (unmarried) from implicit relationship or explicitly contracted.

b. What claims can children make on family?

c. Interaction between property rights and state

-benefits - (ie, to aid children, unemployment)

vs. -when state takes property rights away

2. *Forfeiture of Property for a Family Member's Illegal Drug Use*

Rule: Private and Public housing authorities are permitted or required to evict tenants when Ts or members of their families have sold or possess illegal drugs in the apartment.

[*fairness to innocent family members vs. deterrence*]

a. Eviction

Rule: Forfeit right to property, unless claimant can establish that the drug activity was conducted without her knowledge or consent.

Innocent Owner Defense

Requirements:

1) No knowledge of narcotics activity

-lack of "willful blindness"

or 2) if she had knowledge, she did not consent to it.

a. requires that she takes reasonable steps to prevent illegal use on premises once had knowledge of use. (ie, kick them out of the house, turn delinquents over to the police)

b. purpose - *fairness*

United States v. Leasehold Interest in 121 Nostrand Avenue

Anti-drug forfeiture statute (21 U.S.C. §881) - purpose of statute was to alleviate the drug problem & reduce locations from which illegal narcotics are sold = (affected well-being & safety) 18 people living in 3 bedroom apt. 3 family members were charged & arrested, including grandmother/ leaseholder.

Holding: (J. Weinstein) Rules in favor of fairness to innocent family members, finding that T did not consent to illegal drug activity in home.

*1. Fault lies in low standard of proof to show that property is used to facilitate a narcotics crime:

a. probable cause standard requires a low threshold, where govt. only needs more than mere suspicion to justify forfeiture of the property. -

"government must have reasonable grounds, rising above the level of mere suspicion, to believe that certain property is subject to forfeiture."

b. only requires a sufficient nexus between drug activity & property - do not need to specify person, do not need to show that a crime was committed, small quantity of drugs is sufficient.

c. in rem jurisdiction against the property.

2. Role of woman in household (Humanized P & tried to make her appear sympathetic) -P is caretaker of household/matriarch - raised kids herself, disapproved of drug use in household. Well-behaved family & appear to be subject to her control.

-Court notes that P is almost overwhelmed by household.

-Court takes judicial notice of widespread lack of knowledge of drug use in all types of families. P's lack of knowledge is not unusual in all types of families.

vs. -negative connotations of matriarch (Moynihan report) - Af-Am community is deviant b/c women are strong & men are weak; examines relationship between single family households & crime, where Af-Am men are in criminal justice system (jail)

2. public policy - Limitations of apartment forfeiture as a means of eliminating drugs from public housing b/c result of forfeiture would be homelessness.

3. Role of judge as interventionist/instrumentalist:

-Judge reasoned decision w/ policy reasons - the result would be homelessness & would break up the family & lead to foster care.

?

b. Innocent Joint Owner: Spousal Rights and Domestic Violence

Rule: Innocent Joint Owner defense has been rejected in domestic violence context.

(p. 1081)

1. United States v. Sixty Acres in Etowah County (11th Cir. 1991)

Facts: Husband convicted of selling drugs. Statute used to possess the property. Wife claims that she did not consent to these activities, invoking duress defense.

Issue: Did the wife consent to these activities?

Holding: Yes. Wife consented to husband's illegal activities & liable.

1. Ct felt she could have done something to prevent illegal activity. (ie, she could have fled or turned him in to police) Instead she was silent. → By rejecting duress defense, reveals that judge does not believe that battered woman's syndrome correlates with elements of duress b/c not immediate, just a generalized fear
2. [counterarguments to reasoning]
 - 1) if she left, she would have left her property interest.
 - 2) presumes that people are perfect actors that would act rationally during certain situations.
 - 3) fails to recognize that if wife had acted, she would have put herself in danger of greater violence

2. Bennis v. Michigan (U.S. 1996) (p. 1083)

Facts: Car jointly owned by husband & wife. Husband caught having sex with prostitute in car. Took car.

Holding: Forfeiture is fair on grounds of deterrence.

1. Deterrence is for the social good & forfeiture statute was meant to deter criminal action.

Concurrence: (J. Ginsburg)

1. Michigan statute decided to deter all johns from neighborhood blight.
2. Focuses on fact that the property (car) was of little value.

Dissent: Statute is punishing someone who did no wrong.

1. If she co-owned the car, what reasonable steps could the wife have taken to prevent husband's actions? It was as if a thief had taken the car. = Supreme Court decision ignores innocent owner defense. Legislature may amend forfeiture statutes to get rid of innocent owner defense & create a broad sense of responsibility in terms of property rights.

c. Themes:

1. Rights of innocent family members vs. deterrence
 - Rights of innocent family members - fairness
 - Deterrence - incentive to control behavior of household members when entire family is subject to eviction/forfeiture of property, when T knew about & attempted to stop activity but failed.
2. Consent - failure to take all reasonable steps to prevent illicit use of premises (preventive action)
 - a. consent in the context of domestic violence?

3. *Government Benefits and Family Obligations*

- a. Government benefits are not recognized as property rights b/c:

- 1) not vested interest [counterargument: zoning]
- 2) government interest comes from government grant, not thru labor (traditional way of obtaining property)
 - [counterargument: all property is government's property interest b/c historically, government extinguished title and gave land to settlers]
- 3) government benefits are not exchangeable on the market
 - [counterargument: leasehold & no subletting clause - cannot exchange leasehold on the market]

b. Unemployment benefits

Rule: If leave your job, you have to leave for good reason/good cause, otherwise won't get government benefits.

(p. 1091)

1. MacGregor v. Unemployment Insurance Appeals Board (CA 1984)

P wanted to leave job to go with boyfriend. Under current law, she would be allowed to leave if she was married or will be married. Denied unemployment compensation on ground that she left her job voluntarily w/o "good cause."

Holding: Moving to another city to enable an unmarried couple to raise their child together in a stable family home constituted good cause to quit on'e job & she entitled to govt benefits. [intent/fairness]

- a. The effect of decision is not necessarily to preserve unmarital relationship, but
- b. to preserve idea that daughter will have a stable family home.

2. McCourtney v. Imprimis Technology (Minn. 1991) (p. 1092)

Facts: P was persistently absent to take care of sick baby. State contended that her absences constituted misconduct that precluded her from compensation.

Holding: Absence did not constitute misconduct, but good cause b/c intent of unemployment compensation statutes is to assist those who are *unemployed through no fault of their own*.

3. Mary Frug (p. 1093)

-Criticizes business & legal system for acting as if workers do not have family responsibilities.

-working mothers have to make accommodations in order to reconcile child-rearing responsibilities with labor market participation,

-which reflects in labor market gap between the sexes.

(part-time vs. full-time)

4. govt benefits shape relationship between work and family:

- a. stream of income affects relationship within family
- b. statutes create disincentives for nonmarital relationship
- c. if legal rules preclude unemployment benefits to , statute creates a disparate impact on women, considering that women do the vast majority of child care.

5. Problem (p. 1094) Gay man leaves work to care for sick companion

- a. MacGregor -encourage stable family home (intent), not nec. to preserve unmarried relationship & promote homosexuality [informal property rights]
- b. McCourtney - intent to assist those who are unemployed thru no fault of their own
 - 1) Rewards nonmarital relationship, disregard legislative intent to preserve marital relationships.
 - 2) distinction between parent-child relationship & gay relationship, where parent-child is a legally sanctioned relationship.
 - 3) plain text - govt benefits are not property rights

B. Children's Claims on Family Assets

Can the court require support for college education when there has been a divorce?

Courts are split, due to shift in nature of wealth in the nation:

- a. before, wealth in the form of real estate
- b. now, wealth in skills and education.

Bayliss v. Bayliss (Ala. 1989) (p. 1100)

-based on public policy, the courts have the right to assure that the children of divorced parents, who are minors at the time of divorce, are given the same right to a college education before and after they reach the age of 19 yrs that they probable would have had if their parents had not divorced.

-due to keen competition & if children are to succeed in society today, parents owe children duty to provide them w/ training and education which will be of such benefit to themselves & to the state.

-govt depends on well-equipped, well-trained, well-educated citizenship

C. Marital Property

1. Historical Background

a. *Coverture, Dower, and Curtesy*

1) Coverture - husband & wife were treated as one person in eyes of the law = husband. When woman married, she lost her legal identity - Husband would acquire control over her property & had power to convey her property w/o his consent.

2) wife's dowry interest - If wife lived longer than husband, she got a life interest in 1/3 of his land and which could be inherited by couple's children.

vs. 3) husband's curtesy interest - husband's interest consisted of a life estate in all the lands in which his wife owned a present freehold estate during marriage and which was inheritable by issue of the couple. His interest goes into effect only if the couple has a child capable of inheriting the property.

b. *Married Women's Property Acts*

1) Married women had the same rights as single women and married men to contract, to hold and manage property, and to sue and be sued. Her separate property could not be controlled/taken by husband w/o her consent & her separate property could not be seized by husband's creditors.

2) Problem still exists b/c wife still has very little property that she earned & therefore controlled b/c most married women worked inside the home.

2. Community Property vs Separate Property

a. Separate Property

1) *During Marriage* - husband & wife own property separately, unless decide informally/formally to share property. Whatever you own before is your own. - Duty to support each other.

2) *On Divorce* - property is subject to equitable distribution, depends on need (ie, child support), status (maintaining lifestyle), rehabilitation (will no longer be economically dependent), contribution (treating as a partnership), fault.

-great judicial discretion in determining how property shall be shared.

-shift away from alimony (economic dependency) to rehabilitation.

3) *On Death* - *statutory forced share* of decedent's estate, which allows widow/widower to override will and receive a stated portion (1/3 to \square) of the estate.

b. Community Property

1) *During Marriage* - property is owned equally by both parties.

a) Like joint tenancy, can deal with property w/o consent.

b) Duty to manage property for the community and duty to act in good faith.

c) In a business in which both spouses participate, both parties have to agree to convey/mortgage interests in real property & in assets.

d) Can choose to transmute their property from separate to community property, and vice versa, by written agreement.

-can individually contract (ie, consenting to prenuptials w/o presence of a lawyer)

2) *On Divorce*

a) allocate \square of community property

or b) adopt "equitable distribution" principle.

3) *On Death*, surviving spouse will automatically inherit \square of property.

3. Rights in the Family Home

Domestic Violence and Protective Orders

a. Different stages of restraining or injoining conduct:

1) *temporary restraining order* - absolute order to respondent to avoid petitioner's residence.

2) *preliminary injunction* - after a more considered hearing.

3) *permanent injunction*

(ie, Wisconsin Domestic Abuse Restraining Order Statute)

p. 1110

b. Cote v. Cote (Md. Ct. Spec. App. 1992) (p 1113)

Facts: Wife petitioned for protection from domestic violence. District court issued an order barring husband from entering the home. On appeal, husband claims that order barring him from his own property constituted an unconstitutional taking of property w/o just compensation.

Holding: Not a taking b/c husband is still getting a property benefit from not being allowed in the house.

-If he is allowed back on property, he would be financially responsible for housing his wife somewhere else & it would be his fault if his wife and children do not have a home. (he is at fault - like drug cases)

-Wife and children have the use of the family home and family use over personal property. Husband is therefore using his property to properly house his children & therefore has not been deprived of all beneficial use of his property.

4. *Marital Breakup* -

a. Equitable Distribution of "Property" Acquired during Marriage

NY - equitable distribution - give wife her share in his alternative income

O'Brien v. O'Brien (NY 1985) (p. 1116)

Facts: He went to medical school, she went with him & she supported him through household work, earnings 75% of income. NY has an equitable distribution law. D claims that the medical license is not property & other courts have not classified it as property. Also, amount is speculative, and that license is not property.

→ *Holding:* Medical License/graduate degree does constitute as marital property whose value is divisible and subject to equitable distribution → wife is entitled to equitable portion [share in his future earning potential]

- Focuses on NY laws:

- a. language - "contribution to career and career potential of party."
- b. legislative history & intent - purpose is to provide economic independence.
- c. conceptual bases - working spouses sacrifice her own opportunities as a wage-earner, which is precisely the problem the statute is trying to avoid. Form of paying her back for what she did and sacrificed.

Concurrence: Assumes that the husband will maintain that career as a surgeon.

Potential for unfairness, b/c forcing husband to commit to this career choice. Husband should be able to amend his career decisions.

-Moving away from idea of alimony, if give a large amount, maintaining a long payoff

vs. Most states hold that graduate degrees are not divisible through equity distribution. & spouse are not entitled to value of degree/license as form of property.

What are the ramifications?

-Considering that men usually benefit from getting graduate degree

-Standard of living drops sharply for women, post-divorce & rises sharply for men = inequitable distribution.

-tension between viewing Marriage as a relationship and viewing marriage as an economic relationship - where required to get consent.

D's argument:

1. He earned his medical license himself, through his own labor. Locke
2. His medical license is not property b/c not exchangeable, inheritable & not transferred on the market
3. some property interest are not alienable on the market (ie, education)

cumulative product of yrs of hard work that cannot be acquired by mere expenditure of money

4. Is the value the license cannot readily be determined itself or the earnings after divorce?
5. regress to idea of alimony & economic dependence.

Different visions:

1. *Result test* - share in his future enhanced earning potential -- look at results and pay out. -cost value test. (O'Brien)
2. *reimbursement* - paying someone back either what she did or contribution of what she did through housework [*restitution* of benefits conferred and pay back for opp. costs/earnings foregone to support spouse, by calculating value of contribution]
3. *rehabilitation* - pay value of getting a similar degree or earning capacity to be on an equal status. If the court does not give her appreciation over future interest, not giving her adequately what she deserved. -- problem: she may not want to get similar training.

b. Community Property : The Problem of the Migratory Couple

Pacific Gamble Robinson Co. v. Lapp (Wash. 1980) (p. 1127)

Facts: Husband has debt. First lived in separate property state, where the debt would be considered his property. Then moved to Community property state - debt is considered a community obligation.

Holding: Creditor can only go after the separate property of the debtor. -Court balance issues of fairness:

1. deprive wife of community property system - where her property would have to cover his debt.
- or
1. deprive creditor of benefits of her property for the debt.

In community property - creditor has to get the consent of both spouses to get the unpaid debt.

some hold that creditor does not have to get consent to get unpaid debt. Like property by the entirety

D. Nontraditional Families

1. Unmarried Partners: Property Rights on Separation

Traditional response - unmarried spouse does not have property rights on separation b/c cannot enforce a contract in an illicit relationship, based on public policy grounds that such recognition will not deter nonmarital relationship.

a. Watts v. Watts (p. 1134)

Facts: Nontraditional family where appear to be husband and wife (she took on his last name, her children had his last name)

Issue: What is she entitled to, upon their separation?

→*Holding:* Woman's consideration was independent of sex. D breached b/c 1) unjust enrichment 2) public policy- would, in fact, encourage couples to enter into more nontraditional families, by encouraging those men to avoid marriage so that they won't have to share proceeds from relationship.

- *Contract theory* -

1. Intent to create a contract
 2. Other forms of consideration - change in parties circumstances
 3. Unjust enrichment - unfair to retain assets.
- b. *Clare Dalton* An Essay in the Deconstruction of Contract Doctrine (p.1139)
 Sex in contract law. presumption against finding contracts in intimate rel.
1. Assumption that did not intend for relationship to have legal consequences.
 2. Courts say that relationships are both too private and too public
 - too private - all contractual relationship are private
 - too public - for the legislature to decide, a matter of public policy
 3. Evaluating role of Sex: women are conceptualized in different ways:
 - a. women as providing certain services:
 - if viewed as whore - seeking illicit sex
 - if viewed as angel - want to do household chores, etc. for selfless reasons & not expecting an economic return.
 - b. reluctance to attribute economic intentions to relationships.
- c. *3 approaches to property rights of unmarried inhabitants:*
1. Partnership - unmarried couple formed a partnership where the nature of relationship assumes that parties relied on each other and both parties contributed their ongoing relationship.
 - does not require a contract/agreement.
 - recover is allowed based on nature of their relationship, not on real or fictitious contract.
 2. Palimony - (Marvin v. Marvin) permits enforcement of either a written or oral agreement between the parties who provided support in exchange for services. Contracts between nonmarital partners should be enforced, unless they are expressly or inseparably based on illicit considerations of sexual services.
 - how explicit should the agreement be? - in absence of express agreement, courts should attempt to determine whether parites conduct provides evidence of agreement to pool earnings and share resources.
 - respects freedom to contract/paternalism
 3. Unenforcement of meritous relationships - will not recognize any implied partnership or relationship where sole consideration is illicit sexual relations b/c against public policy & unenforceable under constitution (Hewitt v. Hewitt)
 - relationship between unmarried persons is prohibited by statute as against public policy b/c impact of such recognition of relationship would encourage formation of such rel. and weaken institution of marriage; is of substantially greater importance than rights of immediate parties.
 - women need to get married in order to get legal protection.
2. *Gay and Lesbian Partners*
- a. rely on explicit or implied contract or implied partnership theory
 - b. Avoid sexual relationship argument, otherwise leads to meritricious relationship that will not be enforced.