1. Please provide an Analytical Overview of the Topic.

This is the last topic we will cover for the semester: the law of servitudes. There are two types of land use restrictions, the one is public or zoning and the other is private or servitudes. Servitudes are private agreements between real property owners, usually involving two or more parcels of land, for the purpose to increase the total value of all the parcels involved.

2. What distinguishes a contractual agreement as to use between two property owners and a property rights established between them?

Often, landowners desired that these arrangements or agreements be not merely contracts between themselves but that the arrangements bind on and be enforceable against successors (subsequent owners) of the two or more parcels. For example, if A and B might have agreed for a nominal sum ($10) paid by A to B to allow A a license to cross B’s land to get to a public highway. But if A wanted to permanently increase her land by acquiring a permanent easement of right of way across B’s land (a non-possessory interest) then A might have negotiated for a right of way in which A paid B a greater sum ($200). If an easement were created, A (and those to whom A sold her land to a subsequent owner) would have the permanent right to cross B’s land (and a right of way over the land when B sold to a subsequent owner). Or a real estate developer might create a subdivision of land in which the new owners are restricted to residential use only.

3. What kind of use agreements might property owners choose to establish between themselves?

A right of way, a profit, residential use only, racially-discriminating covenants, unobstructed view of the bay, access to one’s swimming pool, subdivision maintenance agreement, etc.

4. Why do property owners establish private use agreement?

The purpose is to benefit the property owners and possibly add value to the property, or to satisfy owner’s individual interest in the property’s use.

5. What other land use restrictions have we discussed to date?

Defeasible estates, mere motive, constitutionally prohibited restrictions, absolute restraints on alienation.
6. **How does a use restriction in a defeasible estate different from that in a servitude?**

Defeasible, violating the use becomes the triggering event that will or might terminate an estate and put another in possession. Whereas in a servitude, violating the use restriction leans to an action for damages or injunctive relief.

7. **What are the various types of servitudes?**

There are five types of servitudes: a profit, a license, an easement, a real covenant, and an equitable servitude.

8. **What is a profit?**

Profits are legal rights to the fruits of land, such as the right to remove sand and gravel, pick apples, cut timber, capture wild game, fish, or to mine minerals (oil, gas, and coal). (See example #2, p. 677, but please note that there is both a profit, to remove something attached, and a license, to enter the land.)

9. **What is a license?**

Licenses are legal rights of permission to use or to enter property. Mere licenses work as contractual interest, and are usually easily revocable. Licenses coupled with an interest are quasi-easements, usually irrevocable, and are treated as a property interest.

10. **What is an easement?**

Easements are legal interests such as the easement owner’s right of way to go onto or usually across an adjacent land owner’s property. (See an affirmative easement, example #1, p. 677, although an easement is usually a continuing right to cross another’s land such as a right of way. And see a negative easement, example #3, p. 677.)

11. **What are covenants?**

Generically, covenants are promises involving property. They may be meant to be legally unenforceable (where they lack consideration). Or they may be meant to be legally binding and enforceable only between the parties to the agreement. Of they may be meant to be binding on successors in title and assigns, as to the benefit and the burden of the covenant or run with the land. When they are meant to run with the land, they are meant to be property interests.

12. **What kinds of property right covenants are there?**
There are two property right covenants. The first is a real covenant, which are certain land use restrictions that were enforceable in the law courts in very limited circumstances (See examples #1, 4, and 5, p. 677 depending on several factors including the remedy sought.) And equitable servitudes, which are a broad group of land use restrictions that are the most used today. (See examples #1, 4, and 5, p. 677 depending on several factors including the remedy sought.) While the law today sometimes confuses these various types, they are very distinct and you are required to know each of them, their history, and their elements specifically.

13. How are the majority of servitudes created?

Most importantly, the majority servitudes are created in writing, pursuant to the Statute of Frauds, by deed and for valuable consideration, but as we will see many are created in other ways.

14. How long might a servitude last?

Easements may be in fee simple (perpetual duration), for life, or for a term of years.

15. What is rationale behind servitudes?

They represent society’s utilization (and the law’s regulation) of enclosures, fenced fields, away from open land use or commons.

16. What is the distinction between easements in gross?

Easements are non-possessory interests in land in which one person (in gross) or estate (appurtenant) (dominant estate) has a right over another person’s estate (servient estate). Often the properties affected by an easement are two in number and are often adjacent (neighboring or next to one another), although they can involve several parcels of land and need not be adjacent to one another.

Easements are also classified into appurtenant or in gross. An easement appurtenant give the right to whomever owns the parcel of land that the easement benefits (and burdens whomever owns the parcel of land that the easement burdens). An easement appurtenant is meant to remain with the owner of the land (the dominant estate’s successors in title) and to continue to burden the successors in title to the granting or servient estate. [The text states that appurtenant easements are usually transferable, because it can be made personal to the easement owner only, and not transferable. I disagree and it is easier and more accurate to consider all appurtenant easements as property interest, and automatically transferable.]

17. What is an easement appurtenant?
By comparison, an easement in gross gives a right to some person over another’s land without regard to the first party’s ownership of the land. For example, it A grants B (for consideration) the right to enter A’s land and swim in A’s swimming pool with the understanding that the interest was transferable and could be sold (or assigned) by B and that A would respect B’s assignee, then it would be an easement in gross. Easements in gross may be alienable if they were granted to be so. Their transferability raises special problems as discussed on pp. 709-16. See p. 676, note 4.

18. What is an affirmative easement?

Easements may be affirmative or negative easements. Affirmative easements are granted by a servient owner and grant a dominant owner the right to enter or perform an act on the servient land. There are a limited number of recognized, affirmative easements. The most common is the right of way, in which one property owner A has the right to enter and cross over the adjacent property of another B as a permanent property interest, the benefit of which passes on to A’s successors in title and the burden of which passes on to B’s successors in title. Affirmative easements have grown in both type and extent of use made by the dominant owner over the servient land.

19. What is a negative easement?

There are a limited number of negative easements wherein a granting landowner (servient estate) grants to another owner (dominant estate) that the granting landowner will restrict the use of his land such as not to block one’s windows. See list of negative easements, pp. 736-7, including blocking your windows, interfering with air flowing to your land in a defined channel, removing the support of your building, and interfering with the flow of water in an artificial stream.

20. How are easements usually created?

The majority of easements are created as most possessory estates, future interests, and leasehold interests in land are created. They are conveyed or granted from the Grantor to a Grantee, in a written deed (pursuant to the Statute of Frauds), signed by the Grantor, acknowledged (notarized), and recorded in the county courthouse records, for valuable consideration, following a written contract and negotiation. This point is easily missed in the text because the text focuses on the various exceptional ways by which easements are created.

21. How are easements created as exceptions to the Statute of Frauds?
One exceptional way in which easements are created is through exceptions to the Statute of Frauds, such as fraud, part or full performance, estoppel, etc. (See p. 671, 472-79.)

22. In addition to a written grant and to exceptions to the Statute of Frauds, how are easements created?

Other exceptional ways by which easements are created are 1) by reservation, 2) by implication (easement by necessity), 3) a quasi-easement), or 4) by prescription (adverse possession).

23. When is an easement by reservation?

An easement by reservation occurs when an owner of land grants a subdivision of that land to another owner (usually by sale or by gift) but reserves to himself expressly or by implication a right over that granted land. At common law, the Grantor was said to reserve the easement, and usually only for the Grantor (and not another third party) although the Grantor could later convey the easement by reservation to a third party. An easement could be reserved by the Grantor and possibly conveyed to a third party (see Willard case, p. 672) whereas an exception could not. See p. 673, fn 9. A reservation of easement is a newly created interest at the time of the grant of the subdivided estate, whereas an exception excludes from the grant creating the subdivided estate some preexisting servitude on the land. (See note 3, p. 676.) The rationale for allowing a reservation easement to be conveyed to a third party was the legal fiction that the original grant from A to B reserved by regrant from B to A the easement. Whereas the exception did not automatically transfer the interest to a third party. The modern rule, Restatement of Servitudes, allow the Grantor to reserve for the benefit of a third party.

24. What is the topic of the Willard case?

Easement by reservation.

25. Who is the plaintiff and what is the plaintiff seeking?

Donald and Jennie Willard filed to quiet title.

26. Who is the defendant and what do the defendant want?

The First Church of Christ, Scientist

27. What is the procedural posture of the Willard case?

Trial court for the plaintiffs. Supreme Court for the defendant.

28. Does the legal status of the parties matter? Would it matter in contract law?
Assignees and successors in title may not benefit nor be burdened by a contract if they are not in privity of contract, nor in property if the covenant does not run with the land to a stranger (third party beneficial to the grant).

29. What are the legal issues raised in the Willard case?

Whether a grantor may, in deeding real property to one person, effectively reserve an interest in the property in another person.

30. What in the legal title to the property is at issue?

A clause in the deed from McGuigan to Petersen to Willard that provides the conveyance is “subject to an easement for automobile parking during church hours for the benefit of the church on the property at the southwest corner of the intersection of Hilton Way and Francisco Boulevard… such easement to run with the land so long as the property for whose benefit the easement is given is used for church purposes.”

31. What kind of servitude does this language appear to create?

Easement in fee simple determinable.

32. Were the Williard aware of the easement when they purchased the property from Petersen?

Apparently not, as the deed with the restriction was not recorded until after the one between Petersen and Willard.

33. What legal rules and authority are recognized in the Willard case?

Trial court, invalid easement because a grantor could not reserve an easement in a third party, a stranger to the transaction. Supreme Court says it is alright.

34. What is the ruling or decision in the Willard case?

Yes, a grantor can reserve to a third party.

35. What is the Court’s reason or rationale for changing the rule of law in this case?

To free the law from feudal principles, to respect the intent of the grantor, and for fairness as the price probably reflected the value of the easement.

36. By what authority does the Court change the rule of law?

Past California cases and Kentucky and Oregon Supreme Court.
37. How should the rule apply retroactively to prior grants?
   
   Should be determined on a case by case basis.

38. Was there any ambiguity in the granting language?
   
   Yes, according to the plaintiffs but not according to the Supreme Court.

39. What is the court’s application to the particular facts in Willard?
   
   Apparently for defendant in protecting the Church’s interest.

40. Should the Supreme Court have remanded the case back to the trial court on the application of this new rule to the specific facts of the case?
   
   Yes, because of the recordation issue and as to whether the easement was meant to run and did run to successors in title. And whether the Willards should be bound by the easement for lack of notice.

41. Is what was created an easement appurtenant or an easement in gross? What does it matter?
   
   Appurtenant would run to the future owners on the particular parcel where the church is as long as it was used for church purposes. In gross, the First Church could use the lot for parking even if it relocated to a different plot of land.

42. What could have McGuigan’s attorney done differently to avoid this lawsuit?
   
   They could have sought a grant with an express regrant from Petersen to the Church directly for consideration.

43. What should have the Willards done in this matter rather than sue the Church?
   
   Negotiated with the Church to extinguish the easement for a price to be paid to the Church would have saved everyone the cost of litigation. Or could have sought mediation or arbitration.