

Property Outline Fall 2009

Part I

1. Historical Perspective

1. Locke-right to property is pre-political. Property acquired by mixing your **labor** with an unowned thing-entirely moral. We give up liberty to join society ruled by govt. Govt. purpose is to protect prop. Sacrifice personal liberties for the government's protection of property.
2. Blackstone-law protects property to keep order.
3. Bentham-Hated Blackstone. Property is a creation of law.
4. Cohen-property right is between owner and others in relation to a thing. It is the right to exclude others

2. Acquisition

1. By discovery

1. General Rule: "the first person to take possession of a thing owns it."

1. Johnson v. M'Intosh established that, for right or wrong, title to land in the Americas derived from titles acquired through conquest or "discovery" of European sovereigns and thus could not be acquired or passed through titles held by Native Americans. "Conquest gives a title which the Courts of the conqueror cannot deny"

1. Usually conquered incorporated into conquerors but this is impossible with NA.

2. Native Americans retained a right of occupancy (theoretically)

2. "Lessons from the Americas"

1. "Possession" is a slippery word: Justice Marshall could hold that the Native Americans did not "possess" the land because they didn't treat it like Europeans did.

2. "the determination and enforcement of property rights depends on the power of the state to impose its will. Property thus both confers and rests upon power."

2. By capture

1. Wild Animals

1. Property right to animal acquired by mortally wounding, catching, or assuming control over an animal. Pursuit alone is not enough. Pierson v. Post.
2. Actual possession not required if hunter did everything required by custom to reduce animal to his possession. Ghen v. Rich. Here actual possession basically impossible.
3. Policy questions factor in. Dissent in Post-fox hunting public service. No one will do it if they are deprived of the fruit of their labors. Ghen-majority-whalers won't whale if the fruit of their labors can be taken by finder.
4. Interference by Noncompetitor-"A person who does not want to capture the animal cannot interfere." Thus, in Keeble v. Hickeringhill, the neighbor shooting at the ducks to drive them away was held liable for damages. Neighbor had no property right in the ducks.

5. Value of property comes from the assurance that it will not be taken from you
3. By Finding-Desire to give True Owner a Chance to Recover is Underlying Theme
 1. General Rule-title of finder good against everyone but the owner (**relativity of title**). Armory
 2. Anything found attached to or under owned land goes to the landowner. South Staffordshire.
 1. Treasure Trove exception
 1. American-goes to finder or landowner depending on court
 2. English-treasure belongs to the crown.
 3. Homeowners get objects found in their homes. True owner more likely to come to HO than unknown finder.
 1. If HO not in possession of home, depends on whether HO has *constructive possession* of the home (brief absence).
 1. If HO not in constructive possession, object goes to finder. Hannah v. Peel England
 4. Objects found in public places
 1. Lost property ("property that the owner accidentally and casually lost") goes to the finder (Bridges v. Hawkesworth)
 2. Mislaid property ("property intentionally placed somewhere and then forgotten") goes to the owner of the premises (McAvoy v. Medina). This gives true owner better chance of recovering.
 3. Right to Exclude-Property right is the right to exclude others-Cohen. One of the most essential sticks in the bundle of rights. Right is hollow if not legally enforceable.
 1. Premise not open to public-right strongly protected. Jacque
 2. Premise partially open- State v. Shack (NJ) holds that a farm owner cannot prevent volunteers from coming to provide migrant workers with government services and information about their rights. Property rights not absolute
 1. Balance must be struck between owner's rights and society's rights
 2. Migrant Worker can only be contacted in person.
 3. Right to exclude v. right to free speech
 1. Private prop that is sufficiently similar to public prop may be treated as public prop. Company owned town doesn't have right to exclude JWs. Marsh
 2. Shopping Malls
 1. Logan Valley 68-Malls have become "town center." No right to exclude peaceful picketing.
 2. Lloyd v Tanner- narrowed Logan Valley by saying that the center in Lloyd had not opened itself up to all public uses. Moreover, the message of the petitioners in Lloyd was to the general public, so they could have distributed their message on the sidewalks.
 3. Hudgens 76-overruled Logan. Mall not town center. Owner can prohibit.
 4. Brennan's speech 77-states can interpret their free speech provisions more broadly than SCOTUS does fed. constitution. 14th amend applies 1st to states

5. Minority of States take his advice
 1. PruneYard (Cal.) holds that the California constitution prohibits the owner of shopping center from prohibit access by people looking for signatures for petitions. They may impose reasonable time, manner, and place provisions.
 1. Powel concurring says owner's free speech rights can be infringed by being forced to clarify that protestor's views are not his. Our holding is narrow
 2. New Jersey Coalition (NJ) holds that malls, acting as community centers, must give access to persons opposing the first Iraq War even if this hurts business. 3 factor standard: 1. purpose/primary us of private prop, 2. extent of invitation to public use, and 3. purpose of expressional activity.
 3. Both holdings are narrow. Only apply to large rgnl malls
4. Adverse Possession
 1. Mill-After a "generation," it would be a greater injustice to let a long dormant claim trump the claim of the adverse possessor even if AP's acquisition was wrongful.
 2. Holmes-"If a man neglects to enforce his rights, he cannot complain if, after a while, the law follows his example..."
 3. A case study in the relativity of title. Previous to completion of the statutory period, the adverse possessor has a stronger claim than anyone but the owner to possess the land by virtue of his current possession. Once the statutory period runs, the adverse possessor has a better claim to the land than anyone, including the former owner.
 4. Adverse possession DOES NOT transfer title. Rather, the title of the original owner is extinguished and a new title is created in the adverse possessor. AP must sue to quiet title to get actual written title.
 5. Requirements of AP
 1. Actual Entry and exclusive possession
 1. Occupation requirements are suited to the nature of the property. If the property is only useful as a gravel pit, then using it periodically as a gravel pit and acting like its owner suffices as "actual entry" (Ewing v. Burnett)
 2. Constructive possession of the whole
 1. If A enters in part but under color of title to the whole (even if title invalid), then A may be deemed to adversely possess the entire property if no one else living on it.
 2. If A enters in part but NOT under color of title to the whole, A may only adversely possess the portion which she actually occupies or develops. This is evidenced by things like cultivation and fences. Van Valkenburgh
 2. Open and Notorious Possession such that true owner would have rsble notice that someone is occupying the land, i.e. use land as owner would. Ewing
 1. Minor Encroachments-are not open or notorious enough to satisfy AP. Encroacher may be required to tear down encroachment or pay true owner FMV for land encroached upon.

1. But SOL begins to run if true owner gains actual knowledge of encroachment. Mannillo
3. Adverse claim of right or Hostility
 1. AP must occupy land without the consent of the owner and with an intention to remain
 2. Different standards for claim of right based on AP's state of mind
 1. AP must have acted in Good Faith-I thought I owned it
 2. Bad Faith. I knew prop not mine, I want it anyway. (old)
 3. SoM irrelevant. Majority view
 4. EVEN THOUGH JURISDICTIONS WILL SAY STATE OF MIND IS IRRELEVANT, APPEARS THAT THEY TREAT "AGGRESSIVE TRESPASSERS" MORE HARSHLY AND REFUSE TO FIND ADVERSE POSSESSION.
4. Continuous Possession without interruption for SOL period
 1. Howard v. Kunto illustrates that periodic occupancy may suffice for adverse possession if the land is suited for periodic occupancy (e.g., summer homes)
 2. Taking-if privity of estates (voluntary transfer) exists between prior and present possessor, taking permitted. Id. (to hold otherwise would require each home buyer to have land surveyed).
6. AP and personal prop-when does SOL begin to run?
 1. Demand and Refusal (SOL doesn't start till owner finds possessor)
 2. Date/Knowledge of Theft. Pro possessor
 3. Discovery Rule-SOL starts when owner discovers certain facts
 4. NJ Rule-SOL start when loss occurs or when owner discovers or should have discovered the COA (including the identity of possessor, whichever occurs first. O'Keefe. This promotes reporting and investigating losses.

Part II

1. Gratuitous Transfers of Ownership-Gifts-Voluntary transfer of prop w/o consideration
 1. Types
 1. Inter vivos-given with no knowledge of impending death. Irrevocable
 2. Causa Mortis-made under threat of and motivated by impending death
 1. Revocable if donor recovers or if he dies of some other cause.
 2. Fear of fraud leads to courts strictly applying delivery and intent requirements. Newman (allowing only causa mortis transfer of the furniture to which keys were given, not the contents inside the furniture)
 2. Requirements for all valid gifts
 1. Donative Intent-donor must intend to transfer title, not just possession. Must intend to give some right or interest presently, not a promise to give something in the future.
 2. Delivery to donee
 1. Actual delivery: handing gift directly to donee. Strongest form
 2. Constructive delivery: giving donee means of obtaining possession when delivery is impractical

1. Newman holding that a housemaid was not entitled to an insurance policy which was in a locked bureau to which she was given the key because the policy was deliverable; she only got the furniture, as it couldn't be delivered manually
3. Symbolic Delivery: delivering object that is symbolic of possession, i.e., a written instrument.
 1. Allowed if actual delivery of the item is impracticable In re Cohn, where the stock certificates the guy gave in writing in a birthday card were located in another state
 1. Cohn test-did donor do everything he rsble could to divest himself of the gift and invest it in donee based on **the nature and circumstances** of giving
 2. Presumption-when spouse takes ownership of something as JT or TiC he gives half of it to the other spouse even if he funded it entirely.
 2. Allowed if the interest is intangible. In Gruen v. Gruen, the father's letter and its declaration that the son have the remainder interest (present right to a future interest) in the painting was deemed sufficient to effectuate a symbolic delivery of a present interest (the remainder interest).
 4. Reasons for delivery req. Make the donor feel wrench of delivery. Prevent fraud. Delivery provides objective evidence of intent
 3. Acceptance-assumed if chattel is of value
3. Revocable gifts -General presumption: There is no gift if the donor retains the right to revoke.
 1. Tygard v. McComb: The guy who opened bank accounts in his daughters' names but retains the deposit book and uses the money as he pleases. NO GIFT
 2. HUGE EXCEPTION: Revocable inter vivos trusts
4. Will Substitutes
 1. Early View: Tygard v. McComb (Mo. App. 1893) fits a bank account into the traditional gift framework, holding that since the father continued to treat the bank account as his own, there was no present delivery and hence no gift. Since there was no gift, giving the proceeds to his daughters would allow the action to have testamentary character, but the Statute of Wills prohibits that. (We are clearly stuck with the traditional framework).
 2. In re Totten (N.Y. 1904) establishes the viability of "Totten trusts," bank accounts which are payable on death to the named beneficiary but which remain in control of the settlor during life. THESE TRUSTS ARE CLEARLY REVOCABLE (AND THUS DO NOT FIT IN THE TRADITIONAL GIFT FRAMEWORK), BUT THE COURT ALLOWS THE USE OF THEM AS WILL SUBSTITUTES BECAUSE OF THEIR COMMONNESS.
 3. Later View: Malone v. Walsh (Mass. 1944) fits these into the gift framework by finding that Ms. Ryan presently gave a remainder interest to her brother and upholds his right to take the contents of the bank account upon her death.

4. CURRENT VIEW: Blanchette v. Blanchette. Allows certain widely used forms of will substitutes regardless of their testamentary character as long as intent is clear. Joint Accounts
 1. Intent used to determine who the property goes to upon death (Malone)
 2. The party arguing that the form of the substitute device should not be followed bears the burden of proof. So the guy in Blanchette, who argued that the apparent joint tenancy created by the stock certificates should be discarded, bore the burden of proof.
5. Trusts-presumed irrevocable unless explicitly specified to be revocable
 1. Requirements to create a trust- Informal or Formal
 1. sufficient words to create it
 2. a definite beneficiary for whom prop is administered by trustee
 3. a certain or ascertained object
 4. that the terms of the trust are sufficiently declared
 2. Smith sets aside 13 bonds for nephew, tells father, puts bonds in envelope with endorsement for nephew, keeps track of interest earned by bonds. No formal trust created. He dies. Bonds held to be a trust with nephew as a beneficiary. "any words that indicate with sufficient certainty, a purpose to create a trust will be effective in doing so"
 3. Elyachar-Father made "gifts" of shares of his corporation to sons, but remained in control of certificates and received promises from sons that they would never use their interest in corporation w/o his consent. Held to be irrevocable inter vivos trust because intent to make present transfer of ownership w/o transferring control during lifetime. (not gift because no intent or delivery of control of corporation)

Part III Co-ownership and the effects of family relations on ownership

1. Forms of Co-Ownership
 1. Tenancy in Common-presumed form of co-ownership for non-married co-owners unless stated otherwise
 1. separate but undivided interest.
 1. Right to possession-Each TiC can possess entire prop if no other cotenant objects.
 2. What if one tenant does possess entire prop?
 1. Majority Rule-Absent an ouster (refusing access to other cotenants), no obligation to pay rent to other cotenants. Spiller
 2. If there is an ouster, rent is divided proportionally to ownership of cotenants.
 3. No Rights of Survivorship. Cotenant can convey/devise his interest.
 4. Equal Shares presumed buy not mandatory. Can be 1/3 and 2/3 etc
 2. Any cotenant can request a partition
 1. Presumption in favor of a partition in kind-split land into individually held parcels. **BUT** this presumption is disappearing because either all parties involved or courts think sale is fairest
 1. Not done if division is impracticable. Delfino 2 part test

1. Are the "physical attributes of the land such that a partition in kind is impracticable or inequitable?"
 2. Would the "interests of the owners be better promoted by a partition by sale"?
2. Partition by sale. Sell prop and divide proceeds in proportion to cotenants' ownership. Sale is justified if prop is worth substantially more as a whole than divided. Johnson
2. Joint Tenancy- Two or more persons own the property WITH A RIGHT OF SURVIVORSHIP; when one joint tenant dies, the survivor(s) take(s) all. Avoids Probate because of fiction that nothing passes.
 1. 4 unities required for JT. All joint tenants must take their interest
 1. Time-at the same time
 2. Title-under the same instrument
 3. Interest-with interests that are equal in duration and share.
 4. Possession-each tenant has right to possession of the whole.
 2. Severance results in tenancy in common
 1. Any joint tenant can unilaterally sever JT by conveying his interest.
 2. Any JT can unilaterally sever by conveying to himself. Riddle Eliminates need to convey to straw man. Not all states follow this.
 3. Mortgage gives lender only a lien on the property. Thus, a mortgage is not a conveyance. If JT who mortgaged his interest dies, the mortgage claim dies with him. Legal fiction, nothing transfers to surviving JT. Harms (lender should have been savvy)
 3. Lease by joint tenant does not sever JT
 1. JT free to lease his rights. Lessee gets what JT had. Swartzbaugh
 2. Most Jurisdictions say lease dies with leasing JT.
 3. Remedies for non-leasing joint tenant
 1. Seek partition
 2. Ouster. Try to enter/ take possession of leased premises.
 3. Accounting-Sue to get your share of the rent.
 4. JT is often used by those without legal advice. Poor man's will. Court often construes things in JT's favor.
3. Tenancy by the Entirety-only available for husband and wife. RoS and can only be severed with consent of both parties. About half of the states have this.
 1. Creditors of one spouse cannot get to property owned in TbtE, especially the principle residence. Sawada. Creditors should know better. Me-shouldn't there be an exception for tort claim creditors?
 2. Divorce typically terminates TbtE turning it into TiC (majority) or JT.
2. Marital Rights at Death
 1. Common law. Wife had right of dower: "A wife has dower in all FREEHOLD LAND of which her husband is seised during marriage and which is inheritable by issue born of the marriage. She gets 1/3 of each parcel for her life.
 1. Abolished by almost all states. Those that have it also have forced share
 2. Curtsey- Husband received a life estate of ALL the wife's lands. Abolished everywhere.
 2. Modern Statutory Forced Share

1. Surviving spouse can either let will operate or take a forced share or percentage of decedent's estate. Usually ½ or 1/3.
 1. States are split over whether to include trusts in calculating share.
2. Inter vivos transfers
 1. Most states hold that inter vivos revocable trusts created by the decedent are subject to forced share.
 2. A few do not. For instance, Massachusetts first upheld inter vivos transfers even when those transfers were patently designed to disinherit a spouse (*Kerwin v. Donaghy*). However, Massachusetts later announced **prospectively** in *Sullivan v. Burkin* that inter vivos trusts executed during the marriage over which the decedent alone had power would be included in the decedent's estate for purposes of forced share requirements.
3. Will Substitutes-some states apply forced share and some do not. Tricky
4. Antenuptial Transfers
 1. Strong "Secret transfers made before marriage, when marriage is contemplated, may be deemed fraudulent as to the surviving spouse." Fraudulent conveyance would be canceled and annulled thus counting towards surviving spouses forced share.
 1. But fraud is difficult to prove. 5 elements
 1. conveyance made during contract to marry
 2. lack of consideration
 3. lack of knowledge by perspective spouse of the transfer
 4. fraudulent intent of transferor
 5. reliance by perspective spouse on transferred property as inducement to marry.
3. Community property-8 states- both parties contribute to the success of the marriage, and so they should share in the material possessions they acquire during marriage.
 1. What gets counted as community property
 1. Earnings of both spouses during marriage
 2. Income generated from community property (anything purchased with the (i).)
 3. If community and separate property are horribly commingled, it will ALL be treated as community property
 2. What Counts as separate property
 1. Separate Property is property acquired before marriage
 2. Property acquired during marriage by gift, devise, or descent.
 3. Neither spouse can unilaterally convey his/her share of community property
 1. Some states allow rsble gifts by one party. Some ban gifts of community property altogether.
 4. Death-a spouse can dispose by will of ½ of com. prop. No RoS unless stated.
 5. **Divorce**-all community property is divided equally. Each spouse keeps his or her separate property.
 1. Presumption-anything not shown to be SP is treated as CP.
 2. All but three have gone in direction of Discretionary Distribution

6. What if couple moves?
 1. Status of property as community or separate is determined by WHERE the property was acquired unless parties consent to changing status.
4. Property Allocation on Divorce
 1. SP states go asset to determine who bought what with what intent. Hard and expensive.
 1. Presumption-if no title and item has been used and possessed by both spouses, item is deemed to be owned jointly.
 1. Exception-does not apply to real estate.
 2. Discretionary distribution. Most states do not factor in fault.
 1. Some States only divide property acquired during marriage from earnings. Norris v. Norris (Ill. 1974) is an example of this, giving the wife a share in property held in the name of the husband only when "she has furnished valuable consideration such as money or services other than those normally performed in the marriage relation which has directly or indirectly been used to acquire or enhance the value of the property."
 2. Others divide ALL PROPERTY, regardless of time of acquisition. In Rice v. Rice (Mass. 1977), the court holds that Massachusetts statute allows the court to consider all property, marital or nonmarital, based on a 16 factor test. HUGE DISCRETION.
 2. Professional Degrees: three different approaches.
 1. NOT DIVISIBLE PROPERTY, but can be factored in for alimony. (In re Marriage of Graham)
 2. REIMBURSEMENT ALIMONY GIVEN (returns the cost of supporting the spouse) (Roberts v. Roberts)
 3. Divisible Property: New York has held that earning power increased during marriage by acquiring a professional degree or celebrity status is property subject to equitable division, so you get a share of the investment in "human capital." (Elkus v. Elkus)
 3. Marital Contracts-Pre-Nuptial agreements
 1. "Antenuptial agreements are generally enforceable, provided the agreement is fair and reasonable or—or perhaps and—it is based upon full knowledge of each other's property."
 1. Many states treat marital contracts as one factor among others for Judge to apply when discretionarily distributing
 2. MA very reluctant to take a 2nd look at premarital agreements. DeMatteo a MA ruling upholding a prenuptial agreement which is rather stingy (she got less than 1% of his assets).
5. Rights of Unmarried Partners
 1. Common Law Marriage: Has been largely abolished and would have solved some of these problems.
 2. Contracts Between Unmarried Partners Divvying Up Their Stuff on death or separation
 1. Express
 1. Majority: Enforceable-Some even say it can be an oral contract

2. Minority: Unenforceable-Against public policy and the legislature's abolishment of common law marriage
2. Implied
 1. Marvin v. Marvin (Cal. 1976) held that the conduct of the parties could create an implied contract to share, which could then be the basis for a constructive trust for division upon separation.
 2. Contract CANNOT be "meretricious," that is, just for sex
 3. Carlson v. Olsen (Minn. 1977): "In short, the trial court enforced what the evidence indicates were the reasonable expectations of the parties. Under the facts of this case, the partition statute was an appropriate vehicle to do so. Equitable principles are applicable to supplement the partition statutes."
 1. Extension of In re Cohn presumption to cohabitation-funding spouse assumed to give half to other spouse if they own as JT or TiC.
3. Implied Contract seems to be losing favor with Courts. It is too hard to prove, like fault in divorce
3. Quantum Meruit
 1. If you can't get under one of the above theories, you CAN get payment for services rendered. Not a whole lot to recover for a housewife, though.
4. Same-Sex Partners
 1. Goodridge v. Department of Public Health extends marriage in Massachusetts to same-sex couples where both persons are MA residents. Would be unconstitutional to withhold this right.

Part IV Purchase and Rental of RE

1. Lawyer-Made Law: The instruments through which real estate is conveyed are largely the result of lawyer-made law, attempts to use the law in novel and creative ways to fulfill the wishes of clients.
 1. Buyer's Service shows how serious courts take the responsibility of lawyers in this area by enjoining a Title Co. from doing anything that resembles the practice of law, i.e., examining titles, sending deeds to be recorded.
2. Property Rights and Civil Rights
 1. Civil Rights Act of 1866 (42 USC §1982)
 1. Forbids racial or ethnic discrimination ONLY
 2. Applies to ALL PROPERTY TRANSFERS, not just real estate
 3. Though the Act did not explicitly provide remedies, courts have provided injunctive relief against the landlord or seller or damages.
 2. Fair Housing Act of 1968 (TITLE VIII)
 1. It is unlawful to "refuse to sell or rent a dwelling to any person because of race, color, religion, or national origin." Amended to prohibit discrimination based on having children ("familial status") except in senior citizen housing and to prohibit discrimination against handicapped persons.
 2. Prohibits making "any public statement" indicating preference for someone on the basis of any of the factors above.
 3. EXEMPTIONS:

1. Single-family dwelling One. "A person leasing or selling a dwelling she owns is exempt if she: First. Does not own more than three such dwellings Second. Does not use a broker Third. Does not advertise in a way showing intent to discriminate
2. Small owner-occupied multiple unit "A person is exempt if she is offering to lease a room or an apartment in her building of four units or less, one unit of which she occupies, and she does not advertise in a discriminatory manner."
4. Enforcement:
 1. Person harmed may sue in federal court with a right to court-appoint
Person harmed may sue in federal court with a right to court-appointed counsel.
 2. Person may get injunctive relief, compensatory damages, and punitive damages.
3. Kinds of Discrimination-examples on pg 380
 1. Direct discrimination
 1. Disproportionate effect on one race. Starrett City holds that BOTH activities motivated by actual racial bias and those with disproportionate racial results are discriminatory under Title VIII Fair Housing Act.
3. Brokers
 1. (Majority View) The Broker, unbeknownst to most buyers, is the agent of the seller and ONLY has fiduciary duties to the seller.
 1. Licari v. Blackwelder holds that brokers have a responsibility to share information about a more lucrative future sale opportunity.
 2. Buyer's brokers counteract this problem by being fiduciaries of the buyer.
4. Marketability of Title
 1. "An implied condition of a contract of sale of land is that the seller must convey to the buyer a 'marketable' title."
 2. Title need not be free of all defects. It needs to be one that a willing and eager buyer would buy based on a reasonable person's judgment
 1. Messer-Johnson Realty Co. is an example of this, where because of old defects in the deed and a lack of evidence regarding the man's adverse possession, a prospective buyer was entitled to recover his deposit and refuse to buy.
 1. AP can have marketable title, but this requires a ton of good quality evidence. Hard to do. Better option would be for AP to file action to quiet title in himself
5. Breach of Contract-Remedies
 1. Specific performance: The court makes you do what you promised to do in the contract.
 2. Equitable Conversion: "if there is a specifically enforceable contract for the sale of land, equity regards as done that which ought to have been done." That means that the buyer is viewed as the owner from the date the contract is signed, and the seller is said to hold the house in trust for the buyer.
 3. Who bears this risk of loss between contract signing and delivery?
 1. Majority: the buyer bears the risk as "equitable conversion" has occurred.

2. Minority: the seller bears the risk of substantial loss
3. Minority: the party in possession bears the risk of loss.
4. Inheritance
 1. If equitable conversion has occurred, the seller's interest will be held to be personal property (the amount of the purchase price) and the buyer is treated as the owner of the land (real property).
6. Duty to disclose defects
 1. Caveat Emptor-Let the Buyer Beware
 1. Common law background: no duty to disclose-**Exceptions**
 1. Fraud or intentional misrepresentations
 2. Active concealment of a known defect
 3. Stambovsky (Poltergeist exception)-must disclose defects that are (1) created by the seller, (2) materially impair value, and (3) not likely to be discovered by rsblt prudent B. (this is a VERY narrow exception)
 2. Emerging Modern Majority Trend
 1. "Where the seller of a home knows, or should have known, of facts materially affecting the value of the property which are **not readily observable** and are not known to the buyer, the seller is under a duty to disclose them to the buyer." Johnson v. Davis.
 2. Materiality Tests
 1. Objective Test (Maj.)-Does the defect affect the valuation of a rsble buyer?
 2. Subjective Test (Min.)-Does the defect affect the value or desirability of the property to the present buyer?
 3. Commercial RE governed by CONTRACT law-sophisticated parties.
 1. Courts reluctant to give power to "**As is**" clauses in Res.
 4. Implied Warranty of **Quality**-Almost all jurisdictions "imply a warranty of quality or skill construction in connection with the sale of homes." Common Law had no implied warranty on express (privity req)
 1. Implied warranty of quality regardless of privity (subsequent buyers may seek remedy under implied warranty), that *undiscoverable* defects which appear within a *reasonable period* of time are compensable, and that pure economic loss from these defects is compensable. _ Lempke(N.H. 1988)
 1. Public Policy Reasons-Protect the innocent buyer
 5. Remedies for breach
 1. Buyer-Rescission, specific performance, damages
 2. Seller-Rescission, specific performance, damages
7. Deeds
 1. General Warranty Deed-warranty against all title defects
 2. Special Warranty Deed-warranty against only Grantor's acts, not others
 3. Quitclaim Deed-no warranties. Often used to get person to release small claim in the property
 4. Valid Conveyance requires two things: (Rosengrant)
 1. actual or constructive delivery of the deed to the grantee or to a third party (escrow agent)

1. physical delivery not necessary – delivery is “an act that evidences an intent to be immediately bound by the transfer”
2. Conditional Delivery is okay if deed given to third party to hold until condition is met. Sweeney
2. An intention by the grantor to divest himself of the conveyed interest presently
 1. Cannot intend to transfer only on death – that would be a will substitute. No present right given. (Rosengrant) Trust would be better

8. Estates in Land

1. To identify kind of estate-look for the technical language
 1. Common law required the technical language, but now there is a presumption that O gives to A as much an interest as he has.
2. Consider how long the estate can endure
3. If the language is contradictory, remember: IT HAS TO BE ONE OF THE RECOGNIZED ESTATES, so put it in the closest one.
4. The Four (AND ONLY FOUR) Possessory Estates in Land (ranked hierarchically)
5. The Fee Simple (the closest to "absolute ownership")
 1. FEE SIMPLE ABSOLUTE-"To A and his heirs" — required at common law
 1. Presumption favors fee simple absolute unless clearly stated otherwise. White v. Brown
 1. When ambiguous, it is presumed that a will disposes of all of the estate. Id.
 2. Heirs have NO PRESENT INTEREST in the land, even though it talks about them. A can still sell or give away the land, or devise it by will, without regard to heirs.
 3. Can theoretically endure forever
 4. No limitations on its inheritability and cannot be divested.
 5. Heritability upon Intestacy:
 1. "Heirs" is a legal term referring to those described as succeeding in REAL PROPERTY upon intestacy (death without will)
 2. "Next of kin" are those who get the PERSONAL PROPERTY upon intestate succession.
 3. "Issue": children, grandchildren, and so on.
 4. IF NO HEIRS, the estate ESCHEATS to the state.
 2. FEE SIMPLE DEFEASIBLE
 1. Fee Simple Determinable: automatically comes to an end if condition is met, reverts to grantor. But there is a presumption against automatic forfeiture. If it is ambiguous, construed not determinable "to A so long as...,""to A until...,""to A while..."
 1. grantor has a future interest called POSSIBILITY OF REVERTER
 2. Fee Simple Subject to Condition Subsequent
 1. Does NOT AUTOMATICALLY REVERT upon condition subsequent, but at the Grantor's option.
 1. "to A, but if liquor is ever sold, O may at his choice reenter"

2. Creates in the grantor a RIGHT OF ENTRY (sometimes called "power of termination" or "right of reacquisition")
3. Public policy may void some conditions (restraints on marriage, e.g.)
3. Fee Simple Subject to an Executory Limitation: Fee Simple which, on the happening of a certain event, automatically divests to a third person. Can be determinable or condition subsequent.
 1. "to X, so long as used for A, and if not, then to Y." The third party has an "executory interest" in Blackacre.
3. The Life Estate-measured by the life of a person, usually an appointee
 1. Necessarily ends at the death of a person.
 2. "To A for life"
 3. Can also be defeasible or "absolute"
 4. Reversion-goes back to grantor
 5. Remainder-goes to a third party
4. Leasehold Estates-Common law substantially covered up by K/statutory law
 1. Term of Years-starts and ends on a fixed date.
 1. can be absolute or defeasible (but not determinable)
 2. Periodic Tenancy-lease for a period of some fixed duration that continues for succeeding periods until either landlord or tenant gives notice of termination
 1. PRESUMED KIND OF TENANCY for holdovers, possessors under an invalid lease, and possessors under oral leases.
 2. Termination
 1. At common law requires notification equal to the length of the period, unless the period is a year, in which case six months' notification is required.
 2. Modern statutes often modify these harsh notification requirements, allowing for shorter notification periods (usually a month, if rent is paid monthly) or allowing notification to be effective based only on how far prior it is given, not when in the period it is given.
 3. Tenancy at Will: tenancy of no fixed period that endures so long as both landlord and tenant desire Even if lease language suggests only one party has right to terminate, the right of the other party is presumed by law.
 1. BUT-courts have construed that ambiguous agreements that resemble a tenancy at will to be a determinable tenancy (only one party has right to terminate) when doing so supports of lessor and lessee's intentions. Garner
 4. "Tenancy" at Sufferance: Arises when a tenant in possession holds over after the end of the lease.
 1. Common law options for landlords:
 1. Eviction plus damages
 2. Consent (express or implied) to the creation of a new tenancy

1. New tenancy is usually a periodic tenancy, with the periods determined by the frequency of rent payment (however, it cannot be longer than a year).
 2. Statutes often govern this now, and many require the payment of 2x or 3x rent by holdovers.
 3. Once LL chooses, expressly or through his actions, 1 or 2 he cannot change his mind. Crechale
3. Ideally, put something in K that covers holdover
9. Landlord Tenant Relations-3 layers 1.Statutes (esp. in res), 2.K (esp in com.) 3. Common
1. Duty to Deliver Possession
 1. English Rule (maj)-LL has an implied duty to deliver actual possession on 1st day of lease. After that, it is tenant's problem.
 2. American Rule min-No implied duty. LL gives T legal right to possession, it is T's obligation to take act. pos. in court if req. Hannah v. Dusch
 2. Covenant of Quiet Enjoyment (always even if implied)
 3. Subleases/Assignment
 1. Assignment – someone takes over entire remainder of term
 2. Sublease – less than remainder of term
 3. In either case, first lessor is still responsible to landlord under original lease
 4. Leases may have a provision that lessee may not assign the lease or sublet the premises w/o the lessor's consent.
 5. Two Views on whether refusal of consent may be arbitrary/unreasonable:
 1. Majority View-trend – lessor may refuse to allow subletting/assignment for any reason (including arbitrarily or unreasonably)
 2. Minority View- lessor may only refuse “where the lessor has a commercially reasonable objection to the assignment.” (Kendall)
10. Defaulting Tenant
1. Tenant in Possession-when tenant fails to pay rent but remains on premises or holds over after end of lease.
 1. Self-help-done at LL's own peril
 1. Common Law: Two requirements:
 1. Landlord must be legally entitled to possession (due to holdover or breach)
 2. Landlord must only use "peaceable" means of reentry.
 2. Modern trend (Growing minority) Landlords MUST use judicial processes (Often Summary Process) (Berg)
 1. (Shrinking majority) Landlords may use self-help
 1. In comm. self-help still may be allowed
 2. "Peaceable" requirement has been narrowly interpreted, making self-help a more "theoretical" than "practical" solution.
 2. Summary Process-was a quick way for LL to recover possession. Today, it takes a long time. It is provided in all states
 1. In many states, rent withholding for condition of the premises is a defense

2. Some States-Tenant cannot argue breach of implied warranty of habitability as a defense for withholding rent in Summary Process. Only defense for T is breach of covenant for quiet enjoyment. Lindsey
 1. Dissent makes strong points. Lease is a K, K law should govern. Due process reqs. should apply. SP too fast. violates due process.
3. Tenant who has abandoned possession
 1. Duty to Mitigate
 1. Common Law: Landlord under no duty to mitigate damages from lessee's abandonment of the premises.
 2. Modern trend-LL must make rsble effort to mitigate damages (Sommer)
 1. LL bears burden of proving he took rsble steps to mitigate
 2. Jurisdictions split on whether landlords who breach the duty to mitigate lose ALL damages against the tenant or only those beyond the difference between the rental value and the amount the landlord could have gotten had he attempted to mitigate.
4. LL Remedies-1 security deposit, 2 rent acceleration clause (absent this LL can only sue for rent as it comes due), 3 advance rent
5. Tenant Remedies
 1. Constructive Eviction-Tenant has possession but covenant of QE breached
 1. Interference must be substantial and permanent/regularly occurring Reste-regular flooding deemed permanent and substantial interference
 2. Interference must result from LL's action or from someone in LL's control. In Reste, the LL owned the driveway that caused the flooding
 3. Tenant can terminate lease and move out
 4. Commercial tenant's claim CE at their own peril
6. Implied Warranty of Habitability-based in statute and non waivable
 1. Common Law-Caveat Lessee
 1. Independent covenant, and so even when there was an express warranty of habitability breach only allowed a suit for damages, not the cessation of rent. This put LOTS of pressure on constructive eviction doctrine, which allowed for the cessation of rent.
 2. Modern Trend: "Large majority" of courts have implied a covenant of habitability (Hilder)
 1. Tenant no longer needs to abandon property to have a claim. Thus, constructive eviction no longer needed.
 2. Breach occurs when premises are uninhabitable by a reasonable person standard.
 1. What to look for in deciding if warranty breached
 1. Housing Codes, Does defect impact safety/health of tenants
 3. Tenant must notify landlord of problem and give landlord reasonable time in which to correct it.
 4. Non-waivable Berman & Sons
 5. Remedies for T
 1. Terminate lease and leave
 2. Stay and withhold rent until LL repairs. Rent must be put in escrow

1. Tenant can withhold as soon as LL has notice of defect
Berman and sons
3. Stay and make repairs(rsble)-deduct cost from rent
4. stay and recover damages-rent deduction plus damages for discomfort/annoyance Hilder
3. Posner's critiques of IWOH
 1. statute makes property more expensive=higher rents=tenants lose
 2. It helps the middle class not the lower
 3. Reduces the supply of housing
7. Retaliatory Eviction
 1. Rebuttable Presumption-if LL evicts within 90-180 days after tenant gives good faith compliant, it was in retaliation
 2. LL can overcome this presumption by showing a good legitimate reason.
Robinson
 3. RE goes against housing codes' usefulness
8. Tenant's duties
 1. Not to commit waste-make changes that have permanent negative effect on property value.
 2. Duty to Repair-so as not to commit waste beyond ordinary wear and tare
 1. This is essentially erased by implied warranty of habitability

Housing Presentation

1. Free market doesn't naturally create affordable housing. Min wage earner cannot afford decent housing.
2. Litigation Based reform has unintended consequences
 1. Habitability Code leads to LL not fixing prop and eventually abandoning them
 2. Rent control same as above. Also leads to illegal subletting to get around it
3. Litigation Can Succeed when Politics fail-court can act when political will is lacking
4. Litigation Based Reform can lead the way-Politicians often copy cat. Providing vouchers for LI people in Chicago
5. Public info can also lead to change when there is the threat of litigation
 1. Biggest gains have been from public info
 1. Home Mortgage Disclosure Act-fear of being sued and losing reputation for discrimination forced banks to change because loan data became available to public
6. Maybe the problem is the minimum standard of housing in the US is too high?

Part V The Constitutional Law of Property

1. Property and Economic Regulation-Due Process Line of Cases
 1. Calder v. Bull 1798(Retroactive law requiring a new probate trial in a particular case)
 1. Justice Chase-Court
 1. There are fundamental principles on which the constitution is founded and leg. cannot violate any of these principles. They are natural laws.
 2. Property is not a pre-political/natural right. Property rights are conferred by society.

3. Thus, leg. can may exercise great control over property. Leg. cannot, however, take from A and give to B
4. Ex Post Facto applies only to criminal law not to civil
 1. Govt. would be unable to operate if all retroactive laws were deemed ex post facto
2. Justice Iredell-agrees with result, disagrees with reasoning
 1. All fundamental principles found in Const. Act is invalid only if it violates one of them. This is easier than trying to figure out higher natural law
 2. Agrees that Leg. must have power to affect private property rights
3. The Lessons of Calder
 1. A more textualistic constitutional approach and a more "natural justice" constitutional approach will be at odds for the next 200 years.
 2. Almost all agree that the government retains power to regulate private property, but there is an undercurrent on one side (at least an undercurrent at the time of Calder) that strongly resists government's ability to severely regulate a pre-political right.
2. Lochner (1905) (Regulating the hours a baker can work)
 1. Majority: A law regulating the number of hours a baker may work is an unconstitutional violation of the right to contract in the 14th Amendment.
 1. Standard of Review: "unreasonable, unnecessary, and arbitrary interference" with right to personal liberty or right to contract.
 2. Police Power: While the Lochner court recognizes the police power, it is very strict about what will count as a valid exercise of the police power. There has to be a "material danger to the public health or to the health of the employees." This law does not do either of these..?
 3. Deference to Legislature: Very low. Court's level of review expansive. It takes a hard look at the aims of the leg. and the means used
 4. Court focuses on individual's right to contract. Liberty of the individual
 2. Harlan's Dissent
 1. Standard of Review: To be unconstitutional, enactments must be "plainly, palpably, beyond all question, inconsistent with the [Constitution]."
 2. Police Power: The statute was clearly designed to protect the health of the bakers.
 1. Police Power inquiry: Are the means chosen to enact the police power goal "germane" to that end, with a "real and substantial" relation thereto?
 2. Uses social science evidence to show that the law is not unrsble.
 3. Deference to Legislature: It is not the province of the Court to inquire into the wisdom of caring about workers' health.
 3. Holmes's Dissent
 1. Liberty to Contract is not inviolable. State can regulate it
 2. High Deference to leg.-if leg. has spoken and it is not contrary to anything in the constitution's text or traditions, the court should uphold
 1. Court should not impose its will on the constitution

3. Coppage 1915 striking down law preventing employers from conditioning employment on not belonging to union. Follows Lochner
 1. Employer has right to contract with employees as he sees fit as does employee
 1. inequality is part of contracts
 2. Exercise of Police Power must serve public health, safety, morals, or general welfare. This law does none of these. It just transfers power from employer to employee.
 4. Lochner area overturned tons of leg. Very little deference.
 1. But it did uphold rent controls and zoning ordinances
 5. End of Lochner. Nebbia (1934) (Price regulations upheld in milk industry) (14th Due Process) Brandies joins the court
 1. State can adopt whatever economic policy it wants that rsbly promotes public welfare.
 2. Contract and Property rights are not absolute. State can regulate them
 3. Higher level of deference-leg. only needs to not be unrsble arbitrary or capricious.
 4. Court like in Lochner still looked for substantial relation of ends and means, i.e., is the regulation serving some public benefit.
 6. West Coast Hotel 1937 wage fixing for minors and women
 1. This case was a dramatic turning of the tide for the New Dealers
 2. Standard of Review VERY deferential-as long as the rule is not arbitrary or capricious; it is not the court's place to decide if it is a "good" rule.
 3. Court, unlike Lochner, is willing to factor in things like bargaining power and outside social conditions
 4. Court-liberty has a social dimension. It is not just about the liberty of the individual, Lochner focused on the individual.
 7. Ferguson 1963 (law forbidding non-lawyers from doing debt consolidation) (14th Amend. Due Process challenge)
 1. The current position on Due Process challenges to property and contract cases
 2. The Court expresses HIGH DEFERENCE toward legislatures.
 1. Unless the legislation "runs afoul of some specific federal constitutional prohibition, or of some valid federal law," it must be upheld.
 2. Court will not concern itself with whether statute is wise economically, just with whether it is constitutional
 3. **Doesn't matter if statute serves social utility. It is congress's place to decide this**
2. Public Use Takings-Can govt. take for public purpose or only for public use?
 1. Berman (1954) (allowing eminent domain to take non-blighted business, giving to private redeveloper in order to implement area-wide "blight reduction" plan):
 1. PUBLIC PURPOSE = PUBLIC USE (after Berman, at least)
 2. Congress can take from A and give to B if it is part of a comprehensive plan. Congress not well situated to be in the business of redevelopment
 3. Police Power: Extends to "spiritual" ends as well as physical ones (like beauty)
 4. Deference to Legislature: EXTREMELY HIGH

1. "When the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."
2. The low level of scrutiny announced in Berman prevented cases from coming to the Supreme Court. The real action, then, was in state courts, which often interpreted their constitutional provisions more narrowly than Berman had interpreted the federal Constitution.
2. Hawaii Housing (1980s) (upholding UNANIMOUSLY Hawaii statute requiring lessors to sell certain lands to lessees) O'CONNOR
 1. Extreme deference-If state leg. has decided that combating skewed ownership (oligarchy) is a valid public purpose, Court should not interfere
 2. A purely private taking from A and giving to B is still invalid.
 1. Here, this taking is not about helping individuals, it is about helping the community as a whole. It just happens that the best way to help the community as a whole is to take from A and give to B.
 1. Court seemed very moved by the idea that the skewed ownership in Hawaii was feudal/un-American.
 3. By the end of Hawaii Housing, the Public Use cases are in lockstep with the Due Process cases (culminating in Skrupa), i.e., minimal scrutiny of public use clause.
3. Poletown MI 1981 (upholding the transfer with compensation of an entire neighborhood to GM for purposes of building an automotive factory)
 1. Public Purpose = Public Use
 2. 2 Prong Takings Test 1-needs to be substantial proof that public is primarily benefited, 2-court inspects with heightened scrutiny claim that public interest is predominate interest being advanced
 3. This test sounds strict, but court makes it toothless by applying very loosely
 4. court shows Berman like deference to leg
 5. Ryan's STRONG DISSENT-GM is now the Sovereign. Govt. can take property unchecked in the name of "economic development". Politically powerless are trampled on by the affluent
4. Hatchcock MI 2004 (striking down a taking similar to the one in Poletown)
 1. Background-Over the decades after Berman state courts began to look more closely at state regulator's use of economic public use takings.
 1. Obviously economically strapped regions encouraged by Fed Court's deference to try to use economic development to take prop
 2. But, countervailing trend-28 states passed leg limiting the application of economic development as a public use
 2. The court adopts Judge Ryan's dissent, establishing three kinds of takings which count as "public use" for takings which give to private entities:
 1. "Public necessity of the extreme sort."
 1. Why doesn't severe unemployment count?
 1. Maybe the court applies the 2 prong test from Poletown
 2. "When the private entity remains accountable to the public in its use of that property."
 3. "When the selection of the land to be condemned is itself based on public concern" (things like blight control).

3. Better economic use DOES NOT count.
 1. Standard of scrutiny: much higher. The court independently examines whether the taking is for a "public use."
5. Kelo 2005-(upholding taking as "public use" when it is given to private redevelopment agency for pure economic improvement)
 1. Upholds Hawaii, deference in ED public use= deference DP Ferguson
 1. SCOTUS sets standard floor and states can further restrict taking power if they want.
 1. Most states did this
 2. Court-these cases are so fact specific it is better to defer to the local authorities.
 3. Once the end is deemed valid, the means chosen are at leg's discretion
 2. Kennedy's Concurrence
 1. Supports a higher level of scrutiny in cases that suggest taking with purpose of favoring particular private party-Concern over local corruption
 3. O'Connor now dissenting-she wrote opinion for Hawaii
 1. There are only three kinds of takings that satisfy public use
 1. Takings from private to public
 2. Transfers to private common carriers and others who make land available for public use.
 3. transfers to private parties as part of a program to cure a public harm-oligarchy or blighted area.
 2. Concerns worried about politically powerless being abused
3. Regulatory Takings. When is a regulation a taking
 1. Hadacheck 1915 (Takings Clause challenge, NOT Due Process challenge) (requiring no compensation when ordinance prohibits brickmaker from continuing his operations at substantial loss to the value of his property)
 2. The police power of the State is held to provide authority to abate nuisances without ANY compensation even when the regulation takes substantial value from the property.
 3. "Public Nuisance" Test: Hadacheck has been read to use a "public nuisance" test whereby any regulation which is designed to cure a public nuisance in not a taking requiring compensation so long as it does not completely wipeout all economic value.
 1. This test is ROUNDLY criticized because it is so hard to determine the difference between a "public bad" and a "public good."
4. Mahon (1922) (Takings Clause challenge) (overturning Pennsylvania statute requiring coal companies to leave part of the "support estate" coal in place=Invalid Taking)
 1. Holmes-Diminution of Value Test-Act wipes out total value of subsurface rights without compensation.
 1. Act not about safety or health because homeowners knew they were only getting the surface rights.
 2. Holmes allows conceptual severance in calculating the diminution in value
 1. PA law recognizes 3 separate estates in mining property
 2. Holmes much less deferential here than in DP cases

3. Brandies Dissent
 1. Act is about health and safety, defer to leg
 2. No conceptual severance. Prop as a whole still has value
5. Penn Central 1978 (upholding zoning-landmark preservation law-which severely restricts the ability of owner to add to structure, at quite a loss) (Takings Clause) BRENNAN
 1. Between Pennsylvania Coal and Penn Central, ZERO regulations were held to effect a compensation-requiring taking.
 2. Conceptual severance is explicitly rejected in reference to the "air rights" which the company argues it has lost. Brennan seems to accept Brandeis's dissent here
 3. Brennan's Balancing Test
 1. The "nature" of the regulatory action (is it more akin to a physical invasion? Does it serve the common good?)
 1. Brennan treats permanent physical invasion as a factor rather than dispositive
 2. The economic impact of the regulation, particularly interference with direct, investment-backed expectations.
 3. Reciprocity of advantage
 4. DISSENT (Rehnquist) The regulation violates the Takings Clause because the Takings Clause applies to ALL sticks in the bundle of rights, and one of the sticks has been regulated "too far" and suffered too much diminution in value.
 1. This is discriminatory. A few are forced to bear the burden to provide public benefit
6. Loretto 1982 (finding a regulatory taking requiring compensation when the government allows cable companies to place equipment on buildings)
 1. Embodies the rejection of Brennan's bid in Penn Central to reconceptualize Takings jurisprudence. Maybe not a complete rejection of Brennan, but rather an exception
 1. REAFFIRMS the PER SE rule that a permanent, physical occupation is a taking requiring just compensation.
 2. The RIGHT TO EXCLUDE is just that important, the Court holds.
7. The 1987-88 Term
 1. Keystone (upholding statute, essentially reenactment of Kohler act, requiring minors to leave 50% of the support coal in the ground) Facts just like Mahon
 1. Now era of consumer protection-much less sympathy to the idea that homeowners knew they were only acquiring the surface right.
 2. Rejects again the idea of conceptual severance.
 3. Seems to accept Brandeis's dissent-this is a safety reg. and no conceptual severance
 4. Court supports Brennan's ad hoc case by case approach.
 1. Hard edged nuisance rule problematic. How do you define nuisance?
 2. First English (requiring compensation for the temporary regulatory taking accomplished by preventing group from rebuilding)
 1. The Court DOES NOT decide whether this is a taking. That's presumed from the record coming up to it.
 2. Conceptual Severance peeks through here: you are being deprived entirely of a certain "time slice" of your property and have to be compensated for it.
 3. Very sympathetic Ps-disabled children's summer camp

4. On remand, lower court concluded no taking occurred.
3. Nollan-The Court finds a Taking when the regulators condition approval of a building permit on acceptance of a public easement across the property.

EXACTIONS

1. Loretto's rule against permanent physical occupation is relevant here because the RIGHT TO EXCLUDE is affected.
 2. The Court holds that the regulation has to bear a "means to end" relationship with the condition of approval. (The easement had no relation to the height restrictions in question.) The regulator cannot use building permits to get concessions it otherwise would have to pay for, at least not with impunity.
 1. Scalia would have allowed requiring Nollan to build a viewing spot for the public on his prop because there a rsble connection
 3. DEFERENCE TO LEGISLATURE: Scalia shows a vague willingness to look at what the legislature/regulator has decided to do. Somewhere in between the strict scrutiny of Lochner and the extreme deference of Penn Central.
 4. Hodel(striking down statute preventing certain Native Americans from devising their miniscule interests in real property)
 1. Hodel did not get much attention as a property case. Why?
 1. It wasn't a commercial property case, so WSJ didn't cover it.
 2. Some probably thought it was just an Indian law decision.
 2. Court applies Brennan's ad hoc framework
 3. Seems to accept conceptual severance (statute only wiped out one stick in the bundle, the right to devise your property)
 4. So-a near complete removal of 1 stick in the bundle is a taking?
 1. How can this be harmonized with other cases? Very narrow holding. Special case. Maybe only applies to Native Americans.
 5. Pennell
 1. Rent controls are constitutional
 1. BUT-rent control combined with something extra like eviction control might be unconstitutional.
 2. Court refuses to rule on takings challenge because no one has yet been hurt. The suit is not ripe.
 3. DISSENT: Scalia, using a means-end relationship test similar to the one in Nolan, would find it a taking because there is no relationship between the rent control's consideration of hardship on the tenant has nothing to do with the supply of affordable housing.
 1. Also, LL has no control over tenant hardship. If public wants to help tenants in hardship, the public should bear the burden. Unfair to make a private individual bear a burden of which he is not the cause.
8. Recent Developments
1. Lucas 1992-COMplete ECONOMIC WIPEOUT=TAKING-very narrow
 1. NEW CATEGORICAL RULE: All regulatory actions which remove ALL economically viable uses of the property are per se takings.
 2. Scalia ties the "nuisance" exception to nuisances historically recognized in nuisance law. It's just too easy for the legislature to find some "nuisance" it is curing, and the distinction between "harm-preventing" and "good-promoting"

- is too fuzzy to mark a constitutional distinction.
3. Scalia's attempt to reconceptualize the whole area.
 1. He finds a categorical rule in Pennsylvania Coal (wipeout is taking).
 2. He sees a categorical rule in Penn Central (wipeout is taking).
 3. He sees the nuisance cases as NOT involving a total diminution in value, so he DOES NOT see a "nuisance" categorical rule when "nuisance" is not understood in a limited, law of nuisance kind of way.
 4. KENNEDY concurs, with special focus on the owner's reasonable, investment-backed expectations (from Penn Central)
2. Dolan 1992 (requiring compensation when permit is conditioned on providing a public easement over certain amounts of the property) EXACTIONS
 1. Extends Nolan's rsble relationship req.
 1. There must be an "essential nexus" between the condition on which the permit will be granted and the policy to be promoted.
 2. There must be "rough proportionality": "The city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."
 3. Eastern Enterprises 1998 (ruling Act forcing EE to pay for retirement benefits for employees from 50 years before is an unconstitutional taking)
 1. Plurality-Applies Brennan's ad hoc approach and finds that
 1. Act has significant economic impact on EE
 2. Interferes with rsble investment backed expec.-retroactivity
 3. Character of govt. action is unusual. EE singled out.
 2. Thomas Concurrence-Willing to reconsider Ex Post facto/Calder v. Bull
 3. Kennedy Concurs in judgment but says this is a due process case. Act is so arbitrary, retroactive, and unforeseeable that it violates due process
 4. Dissent-DP case but no violation. There is rsble relationship between EE and employees. Therefore, act is foreseeable
 4. Palazzolo 2001 (remanding for reconsideration under Penn Central after regulation removes a lot of the value of the guy's property)
 1. There's still \$200,000 development value in his upland land, so the Court remanded for consideration along the lines of Penn Central, as Lucas's "wipeout" per se rule does not apply.
 2. Property bundle of rights is pre-political-Locke
 1. States do not have unlimited power to redefine property even prospectively
 3. No final statement on conceptual severance, but court seems more open to it
 4. Palazzolo chiefly stands for the principle that being the successor in title after a regulation has gone into effect does not preclude you from bringing a Penn Central or Lucas challenge to that regulation as a taking.
 1. Court finds it significant that ownership transferred from Corp. to Palazzolo even though he was the sole shareholder.
 5. Tahoe 2002 (property owners bought land before restriction of development)
 1. Temporary total wipeout is NOT a per se taking. In other words, no conceptual severance at least temporally.

9. Take aways from regulatory takings
 1. Penn Central framework seems to clearly apply when there isn't a total wipeout of economic value.
 2. Higher level of scrutiny for cases involving exactions. But still not the level of deference shown in public use or due process cases
 1. Exaction/condition must be substantially related to the govt.'s valid regulatory objective (Nolan) and
 2. The nature and scope of the condition must be roughly proportional to the impact of the proposed objective (Dolan)
 3. Two Categories that are Per Se takings
 1. Permanent physical occupation Loretto
 2. Total Economic Wipeout Lucas
 4. Regulation to combat nuisance cases
 1. focus has shifted from harm to looking at what is the economic impact of the reg.
 1. Scalia-there is so much regulation that it is hard if not impossible to separate those that prohibit harm and those that provide benefit Lucas