**Property Outline**

* Policy Goals
  + Reward productivity and foster efficiency
  + Create simple, easily enforceable rules
  + Create property rules that are consistent with societal habits and customs
  + Produce fairness in terms of prevailing cultural expectation so fairness
  + Give correct incentives
  + Reduce litigation
  + Encourage resolution in courts; discourage self-help
  + Consider the EQUITIES involved.

1. **BASIC CONCEPTS**

* [Private Property And Public Interest] *Kelo v. City of New London* (eminent domain use to seize private property for development project; P challenged under “public use” per fifth amendment; SCOTUS approved all takings)
  + ***Economic development***qualifies as “public use” (“private property taking for public use w/o just compensation”). NOT ok to use ED for the ***purpose*** of conferring a private benefit on a particular private party, but no evidence of that here (pursuing public purpose often benefits private parties).
    - Should be very **deferential to reasoning of legislature** as to what “public purpose” meant. Minimal rational standard. Court is not in position to micro-manage urban planning. *Kelo* unique in that it was NOT a wholly blighted neighborhood. Economic development that was not necessarily tied to current condition of property.
    - **Problem:** maybe powerful local interests make unfair legislative process?
    - Permanent tension between a strong commitment to individual rights and the limits of those rights b/c we’re members of a community.
  + **Kennedy concurring:** ***primary purpose*** needs to be public benefit, NOT just incidental to benefit to a particular private party. Stricter standard of review might be appropriate.
  + **O’Connor dissent:** economic development rule is authorizing **any transfer** of private property under banner of economic development. Burden will fall onto persons who have the **least clout** in the political process. Economic development, on its own, does NOT pass constitutional muster. Bright line rule.
  + **Thomas dissent:** needs to be something that the **public uses**, NOT just general benefit to the public. If framers wanted public use to equal general welfare, they would have said it! “General welfare” is used elsewhere in the constitution. Use by the government or public, NOT some vague general public benefit.
  + 43 states passed legislation in response. Might have been solely cosmetic.

**Anglo-American Property Story**

* Locke’s Theory Of Property
  + Property is ***pre-political, natural right***. Not the creature of law or gift of sovereign.
  + Great and chief purpose of government is ***preservation of property*** 🡪 lives, liberties and estates (all encompassed by term property). Men **enter into governments for property**.
  + How man can own property if God gave land to all in common, w/o any express compact or monarch.
    - Every man has ownership of himself (asserts it), given by God. Mix labor with soil (e.g. cultivating a field or catching a fish) 🡪 removes it from state of nature and makes it property. Can take as **much as you can use** w/o spoilage and so long as there is as much AND as good for others.
    - If ppl take more than he needs? Everyone is enforcer for themselves 🡪 why we need government.
  + Property isn’t any good unless it is ***put to use***. Land that is NOT put to good use and cultivated = waste (used as rationalization for how native lands are dealt with). Emphasis on productivity. Importance that property be productive. God gave property to industrious and rational.
  + Idea of exclusiveness. Right to exclude is one of the most ***essential*** sticks in the bundle of rights. Things aren’t much use unless you can reduce them to possession, but in SoN, possession is so precarious, need know laws and judges and enforcement apparatus
  + Those who make property productive are benefactors (make it better for everyone).
  + Propertizing is ***most important***. Calls all rights above “property.”
    - Absoluteness, individuality, exclusiveness.
* Blackstone
  + Property is ***probably*** a pre-political right. Doesn’t really matter, not all regulated by law.
  + Takes Locke and brings it down to practitioners level (more pragmatic approach). **Occupancy gave original title; which excludes everyone else but the owner from use of it**. Remains his until he abandons it. Eventually became more convenient to convey the propery to someone else.
    - Idea of ***exclusiveness***. Essence of property right is right to exclude.
    - Despite rhetoric, parliament is sovereign and can take away property by imminent domain with just compensation
* Declaration Of Independence
  + Pursuit of happiness” = welfare, orderly living 🡪 taken to include the idea of property.
    - Embraces Locke’s idea of pre-political rights (“endowed by their Creator,” not by civil society). Antecedent to government.
* Bentham
  + Property is nothing but a ***basis of expectation***. A relation 🡪 ***creation of law*.** Property and law are born together, die together. Pre-political right is nonsense. Can’t have property unless it is backed up by enforcement structure. Property is entirely the creation of law (positivism).
    - Gains popularity, but Locke’s idea is still there. Opposite of Locke.
  + Definition of property: A relation between a person and a thing that serves as the basis of the expectation that the person will derive certain advantages from said thing, which we are said to possess.
    - Law protects the security of one’s property, thereby securing the expectation of benefits.
* Morris Cohen – Cohens write during new deal. Don’t displace Locke/Blackstone, but is in tension with them.
  + Property is not a material thing, but a ***bundle of rights***. Something less than absolute dominion. “Essence of private property” = **right to exclude others**. Law does not guarantee you can use property, but does guarantee that no one else can use it.
    - Property is a **legally protected *relation*** (to exclude others) between persons w/ respect to things.
    - Entrepreneurial property is similar to sovereign power but is not subject to constitutional checks and limits. Worried. Property and sovereignty 🡪 some kinds of property allow some ppl to have power over others that is like sovereign power. Not subject to same constitutional limits
* Felix Cohen
  + The economic value of property depends upon the extent to which it is legally protected.
    - Contradicts fiction in trademarks that the law only protects trademark that itself has intrinsic value; instead, the protections of the law confers its value (courts are not respecting pre-political property rights, but creating them via law).
* Charles Reich – “New Property”
  + ***Status*** = New property. Status involves money, security, convenience, and power. Status is a substitute self, thus the corporate state is empowered to take away selfhood (why it can dominate all of the thinking and activities within it).
    - Becomes the chief goal in life for many people. What happened to independence of society? Everyone is dependent on status they acquire or governmental aid 🡪 the “new property.” Statuses don’t have constitutional protection. Changing the kind of people that we are. Person whose “property” is tied to an organization is subject to the fate/power of the organization. It is a ***conditional property*** (tied to certain requirements/criteria). Conditions can be unilaterally altered.
  + People lose individual liberty in pursuing it. Worried about loss of freedom. Wage-earners dependent.
    - Status implies a tie to an organization (e.g., company), and people are subject to that organization (they determine how he advances within the org, thereby gaining higher status)
    - This gives companies broad legislative-like powers over employees, regardless of Bill of Rights. Reich wants status to be considered “property” and thereby protected by Constitution, which would limit organizations’ control over people
  + Reich – takes thought further. Dependent on entities that give us wage or on government, so important that they should be protected. Same move that Locke makes. Call them property 🡪 “new property.” Constitutional protection for new property – jobs, entitlements w/o due process of law. Here draws on Felix Cohen who said property right isn’t worth anything if government isn’t backing it up. When gov backs up property rights 🡪 delegating power to property owner. *State v. Shack* and *Marsh v. Alabama*. Tension shown in cases of right to exclude. Rough trajectory: 1946 easy case when property owner opens property so much that just like real town, need to recognize free speech. Tip toe more towards right to exclude ppl (don’t want to put too much power of the state behind trespasser). NJ says we can do it different than fed courts. At end of the day, even in NJ (and even in State v. Shack), right to exclude still has support (looks pretty strong). Interference with property rights is not very great – *Pruneyard* limits (only very large malls or universities; restrictions on time, place and manner; economic impact on business considerations).
* Cass Sunstein – Theory Of New Deal Breaking With Traditions
  + New Deal upset three understandings about property
    - 1) Challenged idea that property is natural right. No pre-political or natural rights. Idea that Common Law embodied a particular social theory, serving some interests at the expense of others (insulating wealth/entitlements from collective control 🡪 excessive protection of established property interests and insufficient protection of the poor/elderly)
      * Hence, FDR’s “Second Bill of Rights,” including right to a remunerative job, to earn enough to feed one’s family, adequate medical care, etc.
    - 2) Challenged idea that chief and great end of government is to protect property. New deal vision of property protection is that it is excessive. Tripartite system of checks and balances prevented govt from reacting flexibly + quickly to stabilize the economy and protect the poor/disenfranchised
      * Hence, enlarged presidential authority and agency autonomy.
    - 3) Challenged idea that rising tide doesn’t lift all boats (making property productive helps all others). Critique of federalism that led to shift in relationship between federal and state governments. State and local governments were dominated by private groups, and many problems called for a uniform national solution
      * Hence, dramatic increase in the exercise of federal regulatory power

**Property in European Civil Law Tradition**

* Rousseau, The Social Contract
  + Challenge to Locke on theoretical grounds. State of nature not that bad. Property and civil society ruined everything.
    - Property rights are NOT pre-political, but derived from social contract. Give all to the state, but get it back protected and stronger than ever. Kind of trustee. And sovereign has first claim to property in the name of the community. Different starting point than Locke/Blackstone type system.
    - Rousseau is not against property, but against huge disparities. Communitarian: elevation of communal rights over individual rights. State is the source of property rights
  + Right of First Occupancy. Order to be legalized, need conditions...
    - There must be no one already living on the land in question
    - Man must occupy only so much of it as is necessary for his subsistence (different than Locke in that once social contract is formed, Locke says we agree to inequality)
    - Must take possession with intention to work and to cultivate it
* France
  + French declaration of rights
    - Clause 2: property is natural and imprescriptible right.
    - Clause 17: property is sacred and inviolable right.
    - How strong are property rights? Lots of use of “equality.”
    - No judicial review in France until the 1980’s.
  + French Constitution – start to have idea of the state as the employer of last resort, provider of welfare of last resort.
  + Code Napoleon – property gets a resounding affirmation.
* Rights Language Spoken In U.S. And Continental Europe
  + Anglo-American dialect was more wary of government. Government is legitimate only so far as it does the things we want it to do. Rights more absolute. Very strong rhetoric about rights. Lots of duties/limitations but don’t get high profile. Exclusivity of property rights.
  + Continental Europe – gov. protector of rights BUT also active role in promoting benefit of society. Explicit reference to duties/limitations on rights. Property is limited in its very inception by a responsibility towards the community
* German Constitution Of 1949
  + Property and right of inheritance are guaranteed (seems strong). Red flags: “Their content and limits shall be determined by the laws.” When does a regulation become a taking? (2) Property imposes duties 🡪 serve the public welfare. U.S. tends to not make duties explicit.
    - German cases: taking property from private party A to B. Violates equality principle? Not getting just compensation, but just bonds. Court response: no guarantee that everyone will be treated the same. Nothing in constitution that says we have to have a market economy or unassailable individual rights. Property is subjected to interests of society.
    - Codetermination Case (pg. 80) German statute that says substantial participation of employees on the board. Court: statute does NOT infringe on property, only define the content and limits of property. Property in shares is NOT like ordinary property. *Kind of property* talking about has more of a social function. Personal element is lacking here. Different types of property might benefit from diff types of protection. Ex. we care more about houses v. investment property.
* Universal Declaration Of Human Rights
  + Property is included, Art 17, but not everyone agreed on its inclusion
    - “Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property”
    - Egypt, India were reluctant to include social/cultural rights --> hence Art 22 is tempered with the phrase, “in accordance with the organization and resources of each State.”
* [Customary Notions Of Property] Feudal Society – Bloch
  + Rare to speak of “ownership.” Complex set of relationship instead. Talked about lapse of time. What cases turned on = possession turning on lapse of time. More you can show you used it, better place your at. Question: who has the better right to possession?

**Idea of First Possession; Doctrine of “Discovery”**

* Three Big Ideas/Themes:
  + (1) Idea of property as an aggregate of rights (bundle). Implies that we can have ***some of those*** rights in relation to property, but not others.
  + (2) ***Relativity of title***: you can have good rights in property in respect to some people, but not others. NOT who “owns,” but who has the “**better right to possession**.”
  + (3) Fundamental notion of ***right to exclude***. How essential is this right when it comes in competition with other rights?
* [Acquisition By Discovery] *Johnson v. M’Intosh* (action of ejectment; P [land speculator] bought land from native American tribe; D [homesteader] has a later federal grant; D won)
  + Indians are “rightful possessors,” but are incapable of transferring title (ONLY have right to possession). P loses b/c he bought from ppl who didn’t have right to convey. Even though not consistent with natural rights, court says the ruling is a matter of practical necessity and reality.
    - Discovery of America gave European nations title (**First in Time Rule**), which passed title to the United States. The Native Americans did NOT count as prior possessors because they ***did not have permanent occupancy*** (nomadic, didn’t farm). Also, Europeans have title on the **alternative grounds of conquest**. Native Americans have a right of occupation, but not possession--they cannot sell the land. Even though Marshall hints that this may be unjust it is necessary as a practical matter.
    - **Action of ejectment:** get someone off land by showing title to the land or by showing you have better claim to the land than other person 🡪 relativity of possession.
  + Governing law: U.S. law. Traces back to international law (binding by consent).
    - **Original title to land under law of nations:** obtained by “discovery,” “consummated by possession.” Difference b/t discovery of occupied land and unoccupied land.
      * Francisco Victoria: you can’t discover occupied land!
      * **Discover occupied land:** (1) sell land w/ occupants on it (like apartment building); (2) acquire rights of occupants through purchase or conquest (extinguish the title of the occupants).
  + What counts as possession?
    - Locke: land was being wasted. Not being productive. Indian’s did not put in enough “labor” to perfect a property interest in the soil.
    - Clash of worldviews: Indian hunter-gatherers (we don’t own land)
    - Reminder here of Cohen’s notion of property and power.
    - Intro to what counts as possession

**Acquisition by Capture**

* Wild Animal Belongs To First Person Who Captures It. **Capture = physical control + intent to possess** (*Pierson*).
  + Pursuit is NOT enough for a property right: *Pierson*
  + *Ghen* suggests another rule: belongs to the first person who has done everything possible to make the animal his own
  + Reasons for this rule:
    - Promotes effective means of capture (since you have to catch it, not just chase it)
    - Administrable (easier to tell who actually caught it, rather than who started chasing it first)
  + Interference by a person who does not want to capture the animal is illegal (*Keeble*)
    - **Relative title**: consider the interaction between first possession and right to exclude. If something is found on someone else’s land, we probably place a higher value on that individual’s right to exclude others from coming in his boundaries and taking his resources.
* [Mere Pursuit] *Pierson v. Post* (Post was chasing fox; before Post wounded/captured fox, Pierson intervened, killed and took fox knowing that Post was pursuing it))
  + ***Mere pursuit*** is insufficient to establish ownership. Wounding, snaring might be enough (dicta). Mere pursuit rule would produce excessive litigation.
    - Rule is easy to administer and reduces disputes.
  + Livingston dissent: opinion should encourage destruction of foxes (correct incentives). Should have left to sportsman arbitration 🡪 would have decided for P.
* [Everything Could Have Done] *Ghen v. Rich* (washed-up whaling case; found whale and sold it to third party; custom says whale belongs to party who shot it)
  + Held custom to be reasonable and valid. Custom was similar to other upheld custom-cases AND custom was known and accepted w/in community in which case took place.
  + **Important dictum** (teaches about possession): pursuer did ***everything*** he could have been reasonably expected to do. Standard is ***relative test*** 🡪 hunter does everything that can reasonable could be done under circumstances to reduce the animal to his possession.
* [Malicious Interference] *Keeble v. Hickeringill* (guy scares away ducks from decoy pond)
  + **Malicious violent interference** with trade/profession/livelihood is ***unlawful***.
  + It’s OK to set up a competing business, but not to sabotage. Court says this is a good policy for society as a whole -- incentivizes people to set up decoy ponds and provide fowl to the markets. Court protects right to profit from the land, echoes Locke’s preference for putting land to good use.
    - Note: Possibility of an “abuse of right” doctrine: an owner abuses his property right when exercised with the subjective intent of harming someone (p. 32)
  + Property law strives to encourage dispute resolution in courts. Not self-help.

**Acquisition by Finding**

* General Rule: Owner of property does not lose his title by losing the property. Owner’s rights persist even if article is lost or mislaid.
  + Finder of property has rights superior to everyone but the true owner. (Ex: *Armory*)
  + **Rights of Wrongful Prior Possessor:** Prior possessors prevail over subsequent possessors, EVEN if the prior possessor is a thief. The general rule is that the prior wrongful possessor ***prevails*** against the subsequent wrongful possessor, since the prior possessor has superior title against all except the owner, despite the wrongful manner in obtaining possession (*Anderson v Goldberg*, p. 99: trespassers on third-party land steal lumber, prevail over defendant who later took the lumber from them)
    - However, Richard Helmholz’s studies have indicated that judges don’t follow this rule, and will invoke the rule of prior possession only in support of honest claimants (p. 100)
    - But not always: see Payne (p. 100)
* Finder v. Owner Of Premises:
  + **General U.S. rule:** Finder prevails over owner of premises where something is found (assuming the owner does not also own the item)
    - This is the outcome in *Hannah* (although that’s a UK case)
    - EXCEPTIONS:
      * If the finder is a trespasser then the owner of premises prevails (p. 107), although not always
      * If the finder is an employee, then the law is totally unclear (pp. 109-10)
  + Object found in a **public place** (heavily trafficked place)
    - ***Lost Property*** = accidentally and casually lost (e.g., ring slips off of finger).
      * Goes to the finder.
    - ***Mislaid Property*** = intentionally placed somewhere and then forgotten (e.g., purse set down on a table and forgotten).
      * Goes to the owner of the premises (who can better return it to the true owner).
        + Ex: *McAvoy*
  + Objects found **embedded in the soil** generally go to the owner of the land
    - EXCEPTION:
      * **Treasure Trove:** Traditionally this was money, gold, or silver intentionally buried in the ground with the intent to reclaim (like buried treasure), and it traditionally went to the state. More recently, American law has taken to include any hidden money (whether underground or not), and treats it like other found property (categorizing it as lost, mislaid, or abandoned). (See examples on p. 111)
  + **Abandoned Property:** property intentionally abandoned by the true owner, who has voluntarily given up any claim of ownership. Finder of abandoned property acquires title.
  + **Equitable division:** When there are multiple finders with equal claims, judge can order the property sold and the proceeds divided between the competing finders. Ex: *Popov*
* [Finder’s Keepers Except True Owner] *Armory v. Delamirie* (chimney sweep, finds jewel in a job; takes it to jeweler, brings it back w/ empty socket and refuses to give jewel back)
  + Finder has property right against ALL but the **true owner**.
    - What was issue? How someone who is NOT an owner maintain an action of trover. He has “such a property” that will allow him to maintain trover 🡪 he had ***possession***. Don’t have to be an owner if you are a ***prior possessor***. As finder, he has claim against all but rightful owner.
    - But we see from cases, above principle depends on circumstances.
  + Damages: he gets most valuable stone that would fit in the socket. Good incentives, and value too hard to calculate in its absent.
  + [Wrong Possessors Recover Items Stolen From Them] If chimney sweep finds jewel on table, and same facts ensue? How far will the law go in protecting right of possession? Minnesota case: guy who stole lumber was able to get it back from person who stole from him. **Prevents endless seizures/reprisals**. Prevents self-help/private settlements.
    - Helmholz: the rule of prior possession is said to be explicitly invoked only in support of ***honest claimants***.
* [Finder v. Owner Of Property] *Hannah v. Peel* (Hannah found brooch when stationed at Peel’s house that he had never lived in; Hannah took to police and recovered after a certain period of time)
  + **Two general rules:** (1) finder has good title against all except owner, *Armory*; (2) owner of the place where the thing is found prevails over ALL others ***except*** owner of thing found.
    - Court doesn’t say why it gives to finder. Goes against prior two cases (two rings embedded in mud at bottom of pool; pre-historic boat embedded in soil found by lessees). Exception to rule: “attached to or under land”?
    - For plaintiff: went about it in a responsible way (turns it into authorities). Major Peel owned the house, but he never occupied it (court mentions this three times). What is the effect of the gov requisitioning house? Kind of like shop case? Legal realism: court may have just been rewarding soldier’s good behavior.
  + America starts out with a preference for finders.
* [Lost v. Mislaid] *McAvoy v. Medina* (pocket-book laid on table at barbershop)
  + Pocket book was ***mislaid*** 🡪 belongs to owner of property. If it was ***lost*** 🡪 belongs to finder.
    - Rule is supposed to encourage the object be left where it would be most likely found by owner.
    - Most state statutes now say if over a dollar amount 🡪 turn it over to police. If not claimed, goes to common law.
* Silver and gold found in ground 🡪 goes to crown (historically). Law transformed by metal detectors. Statutes passed to cover items of great historical importance.
  + Ex. Irish father and son find trove worth 5.5m pounds. Gave to museum to evaluate. Court found museum got it 🡪 50k for finders, 50k for landowners.

**#Trespass Law and the “Right to Exclude”**

* **Right to exclude** is “one of the most essential sticks in the bundle of [property] rights” (*Jacque v. Steenberg Homes*)
  + Ex: *Jacque*, where court upholds substantial punitive damages against intentional trespasser (state protecting the right to exclude)
  + EXCEPTIONS:
    - **Migrant workers:** Under NJ state law, employers housing migrant workers cannot prevent them from gaining access to government services, and cannot prevent them from receiving visitors in their own living quarters (*Shack*)
    - **Shopping centers:** Large (privately owned) malls have replaced downtowns as public forum, so people often want to express their opinion there. This puts their freedom of speech up against the mall-owner’s right to exclude. The First Amendment does NOT require mall owners to allow access for such purposes, yet federal property rights do not necessarily preclude them. (*Lloyd Corp*, *Hudgens*)
      * However, state constitutions can adopt a right of free speech that includes free speech in a privately owned shopping center. (*PruneYard*, *NJ Coalition*)
* [Right To Exclude] *Jacque v. Steenberg Homes* (mobile home delivery service cut across land when denied access by owner; $1 nominal damages, $100k punitive damages)
  + Upheld PD. If nominal damages awarded for intentional trespass 🡪 PD can be awarded. Right to exclude for ***any purpose*** that does not invade the rights of another person. This would be a hollow legal right if system provides insufficient means to protect it. Nominal damages do NOT constitute state protection.
  + *People v. Likar* (illegal daycare, came on property to get letter) 🡪 criminal trespass. Court rejected “emergency” argument b/c envelope was waste, and was not in danger of being destroyed (also had other options to retrieve it).
    - Private home = right to exclude stronger? *Jacque* and *Likar*.
* [Property Rights Serve Human Values] *State v.#Shack* (pro-labor groups visiting migrant farmers on employer’s land to give medical aid and discuss other legal problem; group insisted they had a right to see him in private)
  + Case that’s close to emergency situation or tenant situation. ***Necessity* can justify trespass**.
    - Influential dicta: **Property rights are human values**. They are recognized to that end, and are limited by it. Didn’t want to decide case under fed constitutional law b/c it would be too ***narrow***. (?) Tells us about state property law. Property in our case is **broader** than fed law. Property rights are NOT absolute 🡪 limited in their ***inception*** and can be curtailed by society in the best interests of others. And property has to change with the times. Also, right to entertain visitors in privacy is tied to dignity, too “fundamental” to be denied because of a property right and too “fragile” to be left to the unequal bargaining strength of the parties.
      * Echo of Morris Cohen: in certain cases, property ownership that give you so much control over other ppl. needs to be limited. And more like the continental view of property, embracing social rights.
* [Property Rights v. Speech Rights] *Pruneyard v. Robbins*
  + Line of cases: *Marsh v. Alabama* 🡪 *Logan v. Food Employees* 🡪 *Lloyd v. Tanner*
  + *Marsh v. Alabama* (1946)(Jehovah’s witness going through company town; arrested for trespass)
    - ***Speech and religion.*** Company town looks so much like public town 🡪 need to permit speech and free exercise of religion.
  + *Logan v. Food Employees* (1968)– ***Speech and states right v. property***. Extends *Marsh* to large shopping center (looks like public center where ppl congregate).
  + *Lloyd v. Tanner* (1972)– ***speech rights v. property***. Court begins to have second thoughts. Shopping center allowed to exclude when ***adequate alternative avenues*** of communication are available. *Logan* limited to its facts.
  + *Hudgens v. NLRB* (1976)– ***speech and state rights v. property***. Shopping center. Overrules *Logan*. A private shopping mall is not the equivalent of a town, therefore not a state actor, therefore not subject to 1st/14th Amendment
    - 1977 Justice Brennan at HLS: above is **federal law**. States are free to interpret their own constitution in accord with *Logan*, not *Hudgens*. Can the states go their own way? 🡪 issue in *Pruneyard*. Gave green light.
  + **Majority:** how far can the states go in permitting protests in shopping center? May have reasonable **time, place, and manner** restrictions that will minimize any interference with its commercial functions. NOT every shopping center must allow speech, but how much the center ***resembles public forum*** (not a strip mall, small mall, single retailer).
  + **Concurring Powell:** Majority is unnecessarily broad. State may not compel a person to affirm a belief that he does not hold. Speech rights may be infringed when listeners will not assume that the messages expressed on private property are those of the owner.
  + **Concurring Marshall:** we got it right in *Logan*, recognizing that open-to-public shopping centers are modern public for a, and free expression should be protected by 1A (not just state constitution extensions). Appellants’ contention that states cannot revise common law rights would be a return to *Lochner* Era. States cannot abolish “core” common-law rights (e.g., could not totally eliminate the right against trespass), but that “core” isn’t touched here.
  + MOST states have not taken invitation of *Pruneyard* to diverge from *Hudgens*. But NJ did.
    - End of the day, still heavy protection of right to exclude.
    - Why didn’t take invitation? Practical. Invited too much litigation. Too much uncertainty.
* [International Contrast]
  + English statute (1996): “Right to Roam Act” if land is designated as “open land” 🡪 owners must allow public use. Would this be constitution in U.S.?
  + *Appleby v. United Kingdom* (privately owned town): do they have to allow leafleting? Protestors had other places to spread information.
* U.S. Finder’s Statute
  + 1990 – Native American Graves Protection… something – provides that certain types of items (artifacts, remains) must be turned over on request to a direct lineal descendent or tribe. Museum must turn over unless they can show possession. Adverse possession may not be invoked.
    - Issue: can the legislature retroactively take away ownership through adverse possession?
    - Maybe show possession through purchase.

**#Adverse Possession**

* Elements Of Adverse Possession**:** To acquire title by adverse possession, the adverse possessor must prove four elements. The possessor must:

1. ***Actually* enter** and take ***exclusive possession*** (possessor has excluded the public and the owner) that is
   1. **Entry:** creates the cause of action (trespass) that triggers the statute. Owner’s cause of action accrues from the moment of actual entry
   2. Entry and possession must be “use of the property in the manner that an average true owner would use it under the circumstances” – such that neighbors would think he owned it
   3. **Exclusive** – not sharing possession of land with others. If owner/members of public make only very occasional or incidental use of land 🡪 inference that it is not AP is weaker. If the owner wants to interrupt, he has to do more than just say things. Has to ***retake possession***. What if he entered land with lease or joint owner? Yes. But those cases require clear and convincing proof that leasee/joint owner that entered with equal status with owner, clearly repudiated it, and possession kept up.
2. ***Open and notorious*** (visible) – provides the owner notice. Doesn’t ***have*** to know, only needs the ***opportunity*** to know. 
   1. Must be sufficient to put the reasonably attentive owner on notice (objective test). Exception in *Minnow*.
   2. **Sleeping Principle:** underlies AP 🡪 “peanalize the negligent and dormant owner for sleeping upon his rights.”
3. ***Adverse*** to the true owner’s interest and **under a *claim of right*** (no permission but intent to stay) – inconsistent with record/title of something else.
   1. Color of title = claim founded on a written instrument which, unbeknownst to claimant, is invalid. Not required in most states, but demonstrates adverse/hostile
      1. With color of title, if claimant goes into actual possession of some significant portion of the property under color of title, she is deemed to be in AP of **the entire property described in color of title** (as long as it is one defined parcel of land).
         1. She is said to be in constructive adverse possession of the part of the tract she does not actually possess
      2. Without color of title, adverse possessor’s claim extends only to **the part of the land she actually occupies/controllers**
4. ***Continuous***for the limitations period – non-occupation can be overcome if it is normal to use the land that way.
   1. APer can come and go in the ordinary course, given the nature of the property (*Howard v. Kunto*)
      1. If the possessor ever abandons the property—**intentionally gives it up with no intent of returning**—continuity is destroyed.
         1. This element combines the subjectivity of the possessor’s state of mind (when he left the property was it always his intention to return), with objective appraisal of what the possessor actually did.
   2. **Tacking:** There is often a question of whether one can tack a prior possession to one’s own. You can ***if there is privity of estate*** (voluntary transfer from the first possessor to the second possessor of either an estate in land or an actual possession of it). If a third party ousts an adverse possessor, they may not tack.

* [Boundary Disputes] when A has been in open and notorious possession of a strip of land along his boundary, mistakenly believing it to be his (in fact, it belongs to neighbor).
  + **Majority view**: Objective test – possessor’s mistake is not determinative; possessor is necessarily holding under claim of right if his actions appear to the community to be a claim of ownership and his is not holding with permission of the owner.
    - Under this test, if A indicates the boundaries and maintains the strip, A acquires title by AP when the statutory period expires
    - HOWEVER: Exception for minor boundary encroachments: only where owner has actual knowledge of the incursion does the possession count as open + notorious (*Mannillo*)
  + **Minority view**: Maine doctrine – If possessor is mistaken as to boundary and would not have claimed the land if he had known the mistake, then the possessor had no intention to claim title and adversity is missing. (No AP)
* Adverse Possession Of Chattel
  + In these cases, a **shorter statute of limitations** usually applies.
  + The main problem is that possession of private property by its very nature isn’t inherently open or notorious. The traditional answer to this dilemma is that the **possessor is expected to use the object just as the original owner would have.**
  + Majority of courts also have a **due diligence** requirement: SoL does not begin to run as long as the owner continues to use due diligence in looking for the personal property.
    - Cause of action accrues when the owner **first knows** OR **reasonably should have known through the exercise of due diligence** where the stolen goods are.
* Theoretical/Political Justifications
  + **Statutes of limitations:** evidentiary concerns (quality of evidence; availability of witnesses). Security of titles (after certain period of time, balance of hardship shifts; more onerous on occupier). How different than normal SoL?
    - A ***new title*** is given to adverse possessor. Not a continuance from old title.
    - Once you get new title, it relates ***back to date of adverse possession***. Retroactively owned for all that time.
  + **Ballantine:** want to reward the person who is ***making the land productive***. Lockean sort of idea. BUT more important 🡪 gives ***clarity*** and ***quiets titles***. “The great purpose is automatically to quiet all titles which are openly and consistently asserted, to provide proof of meritorious titles, and ***correct errors in conveyance*** (good faith errors). PRACTICAL 🡪 what applies to most cases.
  + **Holmes:** rooted in ***deep instincts of man***. Thing that you use/enjoy for long time “takes root in your being and cannot be torn away w/o your resenting the act.”
* Three Different Types Of Statutes
  + (1) Modernized version of 1663 (*Ewing vs. Burnett*) – short and simple. Large body of case law develops around it.
  + (2) 2nd generation statute – codifies a lot of the case law.
  + (3) Short time period to gain property if paid taxes.
* How Much Land Does The AP Have At The End Of The Day?
  + **Constructive AP** – actually possession of part, claiming the whole, by document or enclosure will give you ownership. Exceptions: common sense (must be reasonable proportion to whole; don’t get parts actually possessed by somebody else).
    - **If no color of title or enclosure 🡪 only get “actually possessed”**
  + What happens with AP if statute of limitations hasn’t quite run, but AP has made **significant improvements** 🡪 equitable doctrine called ***Laches*** – make it unjust to allow owner to recover. Equitable defense.
  + ***Hard for AP to prove all elements.*** Most jurisdictions have some form AP, but are lowering time limit.
* Temporal Severance in AP
  + If O transfers Blackacre to A (life estate) and B (remainder)
    - If C enters the property ***after*** the transfer → No AP against B (does not have possessory interest until A dies)
    - If C enters ***before*** the transfer → SOL runs against both A and B
* [Act Like Similarly Situated Owner] *Ewing v. Burnett* (Symmes sold same property—a vacant lot for gravel and landfill—twice; P has old deed passed down; D got newer title directly from Symmes years later, resided and used land for long period of time)
  + Only inquiry is as to the ***nature*** of the possession kept up. ***Very fact sensitive***. AP need not be a fence, building, or other improvement; it suffices for the purpose that **visible and notorious acts** of ownership for 21 years after an **entry under claim and color of title** (claim of right; NOT TRESPASS). ***Relativity of possession*** 🡪 depends on the nature/situation of the land. What kind of possession it is capable off. Need to act like a similarly situated owner. Like animal cases, did you do everything you should have done?
    - D had been paying taxes on land, using it for sand/gravel. Leased use out. Excluded others (actions against trespassers). NOT living on it.
    - P argument: just a vacant lot! Neighborhood sand and gravel sight. P could have prevented if initiated confrontation (disrupt continuous possession). Lawsuit will interrupt. Get someone else to interrupt (tenants on land; sell rights, etc.) 🡪 helps absentee landowner (largest is U.S. government). Mass allows AP against state.
  + SoL says 20 years after accrued… 🡪 does NOT say accrued to certain person. **Keeps running** even when ownership is passed from one person to another. Issue: when can you tack one person’s possession to another?
  + What starts SoL running? Need two things: Entry w/ “claim of right” (vs. color of title) – acting as an owner would.
* [Required To Cultivate The Whole] *Van Valkenburgh v. Lutz* (Plaintiffs [VV’s] purchased a bunch of lots [1947] and were suing to compel the “removal of certain encroachments” and for delivery of possession and incidental relief by Lutz who had been occupying the lots in question. Lutz bought property in 1912 and had begun using easements through adjoining property in 1920, tending a garden etc. Court rules that Lutz adversely acquired title to a lot)
  + Statute bottom p. 153-54. Sec. 39: what is meant by “premises” (whole thing or just piece). Sec. 40 🡪 “usually cultivated or improved.”
    - First point of adverse possession: 1912 when Lutz built road across tract. Right to go back and forth = easement (not exclusive, but right of passage).
    - AP of whole lot begins? 1920 – partial clearing for brother’s “shack.” Could ripen into AP (1935). What referee found.
    - 1928 – Lutz loses job and spends all time working around house; plants “garden” (maj.) or “farm” (min.). (AP in 1943).
    - 1937 VV buy property. Lutz asserts right of way, but should have argued AP.
  + Majority: Cultivation utilized did NOT constitute **whole of premises**. Proof fails to show that premises were **cultivated/improved**. Court requires “clear and positive” proof. No claim of title (Lutz admitted to not owning it).
    - **Problem:** statute didn’t say he needed to occupy whole. Also, “clear and positive” proof not in the statute. Claim of title required is a minority position. And if you have claim of title, then you wouldn’t need AP? You can only AP that is already yours?
    - Charlie’s house: no claim of right b/c he was “tenant.”
  + Minority: court is ***trying fact***. Court’s jurisdiction limited to review **questions of law**. On the merits, Lutz’ cultivation is adequate. No requirement in statute to cultivate “the whole” or every foot of property. Statute reads “***usually*** cultivated and improved” 🡪 used to the way owners of similar land uses it.
* Claim Of Title – three approaches (but really only two)
  + Majority rule: “objective standard.” State of mind is ***irrelevant***.
    - P. Helmholz: courts usually find a way to rule for “good faith” and not for “bad faith.” Other prof disagrees. Cases are **extremely fact sensitive** 🡪 won or lost at trial.
  + “Good faith” rule (sometimes pops up in American law): appears in some statutes/common law.
    - Real argument is between objective and good faith. Objective: easier to administer; avoids litigation; nothing in statute that says **anything about intent**.
  + Discredited “aggressive trespasser rule”: Only prevail as adverse possessor if you ***knew you were*** possessing someone else’s land. Misunderstanding of “adverse and hostile” language. “Hostile” erroneously interpreted as intentionally against owner.
* Color Of Title And Constructive Adverse Possession
  + **Color of title**: you have a piece of paper (deed) to substantiate claim (could be invalid). Puts you in position as adverse possessor. Relevant to many statutes.
  + **Constructive adverse possession**: person **with deed** (color of title), possession of ***part*** of land 🡪 gets ***whole*** land. “Constructive” means extending boundaries to whole of property. Not a hard a fast rule. Courts use, but there are exceptions. Relevant to “how much” you get.
    - **Reasonable proportion exception:** can’t get whole land if you’re only possessing a fraction
    - **Another possessor exception:** doesn’t help you if someone else is ALSO possessing the land.
    - **Two deeds exception:** possessing part of land does not gain you title to adjacent lot, even if you have title to adjacent lot. Adjacent owner never had cause of action against possessor of other lot.
* [Mistaken Belief Of Possession] *Manillo v. Gorski* (14 year old builds stairs that encroaches 14 inches onto neighbors property).
  + **Problem:** neighbor had no reason to know the stairs were encroaching on property. How to apply “open and notorious” when encroachment is only found with expensive survey. Statute of limitations doesn’t starting running until neighbor has ***actual knowledge*** of the encroachment or clearly should have.
    - Remanded for a determination of whether P had actual knowledge of the encroachment.
  + What happens if person who gets land through AP but gives up right. New owner comes and claims title. Who owns land? Once title has been gained 🡪 must be transferred by ***title or deed***. Apologizing/verbal is NOT sufficient.
* [Interrupted Use As Continuous] *Howard v. Kunto* (everyone occupied the owner’s land of summer residence adjacent to them; owner argued Kunto had not occupied continuously [summer use])
  + Issues 1 (**problem of continuity**): only occupied during summer. Continuous? Still counts as **uninterrupted**. Back to ***relative test***. Way ppl use this kind of property.
    - What if granola camper only camped and left no trace? Hard case for “open and notorious.”
  + Issue 2 (**tacking**): owner has only been there for short period of time. To tack, you need ***privity*** (some kind of connection between owners). **Problem:** deed has NOTHING to do with the land; no overlap. Court: privity in this case doesn’t require precise question between deed and land in question, but the ***relationship*** between individuals. Some “reasonable connection.”
    - No tacking if A throws B off land, or if they never communicate.
    - A leaves b/c he is threatened but comes back 6 months later? Interruption of continuity? Some jurisdictions yes. Some jurisdictions no.
    - #2 p. 176: did anyone have cause of action?
    - #3 p. 176: C has no rights to respect to land until B dies. A never AP C’s land. A can acquire life tenants interest. So unless statute says otherwise, C owns the land.
* [Adverse Possession Of Chattels] *O’Keefe v. Snyder* (painting bought that was stolen out of gallery)
  + Both prior rules fail b/c there is an **issue of material fact** (problem with story that it was stolen vs. given away). [FOURTH APPROACH] NJ approach (maybe got from medical malpractice?): SoL starts running when owner ***discovers or reasonably should have discovered*** stolen work or person who stole it. BoP is on owner. Needs to show “due diligence.”
    - If she would have shown due diligence, not clear that she would have found it. Both parties uncertain 🡪 settle.
    - Three approaches all rejected
      * Trial approach: 6 years from date of loss/theft and that’s it. Lose cause of action. Policy considerations: literal reading of statute. Clear-cut rule. Protects bona-fide future purchasers (market).
      * Appellate: SJ for O’Keefe. Any one of the possessors must fulfill all the elements of AP. Problematic element in this case to show **open and notorious** of a chattel. Not like land where you can check up on.
        + New York approach (governs most jurisdiction for stolen art): SoL doesn’t run until O’Keefe finds painting and makes demand. Policy considerations: discourage art theft. Maximum protection to original owner. Maximum pressure on purchasers in investigating works of art

1. **GRATUITOUS TRANSFERS**
   * Probate: proving a will. Must be approved by court. Executor of will must (1) pay all the just debts of the decedent; (2) collects assets, (3) distribute estate according to will.
     + Administering/distributing estate is person dies without a will (intestate succession)
       - Expense, delay, publicity
       - Administrator appointed by court (will charge fees, act as executor)
       - Estate distributed according to laws of intestate succession: the will the state makes for you if you don’t make a will
   * Why would ppl want to avoid probate? Expensive and time consuming (can take 8-9 months).
   * How to avoid? (getting property out of your estate)
     + Work-related pension funds
     + Life insurance policy
     + Set up a joint and survivorship bank account
     + Trusts
     + Transfer on deaths
     + Joint tenancy of real estate
     + Joint tenancy of personal property: bank accounts (*Malone*); stock (*Blanchett*)
       - Lots of flexibility 🡪 most importantly, revocable.
     + Informal trusts (*Smith*, *Elyachar*)
     + NB: Chief litigation-breeders are joint tenancies of personal property and informal trusts, due to issues demonstrating intent and delivery
   * Policy concerns for wills – all elements add up to a sort of ceremony (written documents; no space between text & signatures; two-three witnesses) 🡪 aim is to prevent bad claims. Ensure testator had capacity. Avoid undue influence. Avoid forgery. Avoid duress

* Intestate Succession – given to closest relative, but not what most ppl want. Ex. divide up between spouse and surviving kids equally, but survey says **most ppl want all to go to their spouse** (except in the cases where children of an earlier marriage would be in competition with a subsequent spouse).
  + Also, if you die w/o will, who will be executor? 🡪 appointment by the court.
    - Always will be something left over, so will is always necessary. Now “catch all” to other extra-will methods.
    - Need will to appoint guardianship
  + MAG: Since intestate succession law is the will of the State makes for ppl who do not leave wills, it would be desirable to bring it into closer conformity with the needs and wishes of the people who are most affected.

**#Gifts**

* A GIFT is a voluntary transfer of property for no consideration. To accomplish a gift of personal property the donor must ***intend to make a present transfer*** of an existing interest in the property, ***deliver possession***, and it must be ***accepted***.
* Gifts are commonly divided into
  + (1) **Intervivos** (during life made with no knowledge or threat of impending death) and
  + (2) **Gifts causa mortis** (in imminent contemplation of death)
    - Exception to the law of wills → idea is that you can’t get to a lawyer
    - Not allowed in every state
* Gifts are ***irrevocable***.
  + However, gifts causa mortis are revocable if you recover from the threat of death that motivated the gift.
    - Courts view causa mortis gifts with great skepticism since the donor is dead and the contemplated gift is a substitute for a will (which is much preferred form of transfer of private property).
* Elements Of Gift:
  + (1) **Intent:** For a gift to occur, the donor must intend to make a ***present transfer*** of an existing interest in the property. Merely intending to transfer possession is not enough.
  + (2) **Delivery:** must ***deliver*** possession. Must hand over with manifested intention to make a gift. Law wants actor to feel wrenching loss. Feels irrevocable. Makes vivid to both parties and witnesses. Gives receiver evidence.
    - a. The best form of delivery is actual physical possession, but this is not always required.
    - b. When physical delivery is impractical or impossible, symbolic or constructive delivery would suffice.
      * i. Delivery makes the abstraction of making a gift a reality to the donor and is objective evidence of intent, it also is objective evidence of acceptance.
      * ii. Delivery must be as perfect as the nature of the property and the circumstances surrounding the parties reasonable permit (*Gruen*)
      * iii. Container Cases: When keys are delivered to a container, ***goods expected*** to be found within the furniture are also presumed to be gifted.
        + 1. Ex: *Newman* -- life insurance policy is NOT expected to be in a bureau (which is for linens, china, etc.)
  + (3) **Acceptance:** A gift is not complete until it has been accepted by the donee. Delivery triggers a ***presumption of a completed gift***, which presumption can be rebutted by the donee’s rejection of the gift.
    - a. The presumption of acceptance is strongest when the gift benefits the donee and virtually non-existent when the gift is (rarely) of no benefit.
    - b. A donee’s delay in rejecting known unwanted gifts also endangers the donee’s ability to claim that there was no acceptance.
* [Delivery As Perfect As Possible] *In re Cohn* (gift to wife of 500 shares for birthday with delivered, signed document; didn’t actually give shares b/c they were in the name of company, in some safe in NYC and promised to deliver them when they were available; over the next week, continued to exercised dominion over shares)
  + The delivery necessary to consummate a gift must be as ***perfect as the nature*** of the property and the ***circumstances and surroundings*** of the parties will ***reasonably permit***. RELATIVE TEST (like possession of wild animal; adverse possession). Presently/irrevocably transferred all interest in stock; the letter was itself a symbol of the present gift. Still could reserve right to vote (*Gruen v. Gruen*).
    - Helmholz like analysis: would the outcome be same if gift was to secretary? Doesn’t work as well if person would not be naturally included in will. Tend to fact-sensitive. Won/lost on trial. **Delivery/intent requirements relaxed if court sees person as natural inheritor**.
    - Not a causa mortis gift (in anticipation of death). Problems: defective intent (future gift when deal was signed? Was planning a few days later to vote that stock) and no actual delivery.
* [Issue Of Delivery] *Gruen v. Gruen* (father gave son at Harvard famous painting; father reserved right to possess it until his death)
  + **Letter constituted a valid gift with a remainder interest**—a property right that would automatically become possessory upon the father’s death. Present right to a future interest. Father retained life interest. You can make a gift of ***fewer than all the bundle of rights***.
    - The letter was sufficient to constitute delivery because it would be “illogical to require the donor to part with possession of the painting when that is what he intends to retain.” Acceptance was evident by the younger Gruen talking about it with his friends, and retaining the symbolic letter for 17 years until his father’s death.
    - What if father sold painting? Power to give title to bonafide purchaser, but donee has cause of action against them
    - Stepmother argument: gift was meant to be given at death 🡪 need a will! And no delivery.
* [Donatio Causa Mortis] *Newman v. Bost* (guy points and gives furniture in room/house; life insurance policy in drawer)
  + Got bureau b/c it was hard to move and received key. ***Constructive delivery***. For **donatio causa mortis** (given in anticipation of imminent death; ***emergency will***), two things indispensably necessary: (1) ***intention*** to make the gift; and (2) ***delivery*** of the thing given. CAN REVOKE and if guy gets better, AUTO REVOKE.
    - B/c so much risk, need “clear and convincing evidence” of intent. Only personal property, not real property. Dying can change mind and revoked if recovers. Only some states have it. Some states also do holographic will.
  + Engagement ring? Four theories:
    - Rights to ring. Possession now, ownership upon marriage.
    - Irrevocable gift.
    - Fault engagement 🡪 depends who broke it off.
    - No fault.

**Will Substitutes and the Non-probate Revolution**

* Ppl starting using joint bank accounts as cheap way to have will. **Problems:** courts didn’t know what to do with them. Ran into conflict w/ law of wills 🡪 lacked formality. Conflicts w/ inter vivos gifts b/c you reserve revocability. Conflict w/ contract b/c there is no bargain/consideration. Conflict wit joint tenancy of real estate. Conflict with law of trusts (can’t use money for own purposes and mingle own money)
* [Problem With Intent] *Tygard v. McComb* (father transferred the entire balance of his bank account to the credit of his minor daughters; but he frequently made withdrawals from the funds and told friends he only transferred the funds for his own convenience)
  + Did not ***intend*** to make a present gift of anything. Only works when donor has ***absolute and unequivocal intention*** to pass title to donee. Using account as his own. Hoping to go to the daughters when he died. No problem w/ delivery b/c they were so young (delivery requirements relaxed in the case of family).
    - Complicating factor (another reason to have accounts): can’t disinherit your spouse. Big problem with will substitutes. Maybe if no spouse the court would have let the kids have account?
* [Bank Account As Revocable Will Substitute] *In re Totten* (lady deposited money in passbook savings account with her own name as trustee for E.R. Lattam, her nephew. The nephew was unaware of the account and the aunt retained complete control over the funds. Nephew already gets what was in the “trust” when aunt died; sues for the money that was withdrawn from the account by the aunt after it was established)
  + Trust is a **revocable will substitute**.Calls it a trust, but did not mean for it as such. No trust relationship established—could withdraw funds at any time and “beneficiary” gets what is left when depositor/trustee dies.
    - Court **establishes a presumption** based on perceived intent of ppl who use accounts. Unless presumption is rebutted, goes to person named.
    - A deposit by one person of his own money, in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a ***tentative trust*** merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as **delivery of the pass book** or **notice to the beneficiary**. If dies 🡪 absolute trust was created.
    - Leading case in field b/c commercial law conforms to general practices and b/c opens up whole field of revocable trust.
  + Easy case. Just like will. Harder w/ joint bank accounts 🡪 not clear what majority of ppl had in mind. All kinds of reasons. Depends on ***intent***. But intent of whom? Difficult.
* [Cramming Joint Accounts Into Inter Vivos Gifts] *Malone v. Walsh* (Irish lady; falls out with sister & husband, tried to give to brother; didn’t want husband to get it so didn’t write a will; brother got the money, but it was revocable)
  + The court categorized this as a creation of a present interest in Patrick as joint tenant that would ripen into complete ownership if she died before he did. Says trial court finds fact, but court free to disagree with ***inferences*** trial court made. Says accounts are ***revocable*** and NOT ***presently given***. Forced case into inter vivos category, didn’t really fit. Covert judicial discretion. Retroactively finds present intent.
* [Assumption Of Immediate Gift] *Blanchette v. Blanchette* (tries to overcome disaster of *Malone*; living guy says he didn’t mean “Joint Tenant” for company stocks; court held they were technically joint tenants, but he intended shares as death benefits only)
  + Wife did NOT acquire any irrevocable property rights. Guy in placing stock in joint tenancy did so ONLY as a will substitute with ***no intent*** to make a present gift 🡪 **can revoke**. Could have said “clear there was no intent to a present gift.” But went on to avoid uncertainty. Take **form at face value** UNLESS there is ***some evidence*** to rebut form. Present gift of a future interest, subject to a reserved life estate in the husband and to his power to **revoke** his wife’s interest. ***Guy only intended a will substitute 🡪 free to revoke***.
    - **Default rule** is that joint tenancy is an immediate gift unless intent can be proven by clear and convincing evidence to be something otherwise. Court makes a strong opinion in order to stop the flood of will-substitute intent cases. Joint bank accounts go to surviving parties.
    - Form is NOT conclusive. Burden of proof on person who wants to rebut

Summary

* Disposition of Property on Death
  + Policy
    - (1) Implementing the intent of property owners w/in the limits of public policy (not very many limitations).
    - (2) Minimize the expense and delay of transmission of property from one generation to the next.
      * Non-probate means
      * Statutory: for small estates, can be wound up in expedited procedures.
    - (3) Minimize occasions for fraud duress.
  + Will
    - Nothing happens until person dies. Fully revocable
    - Exception to formal requirements – emergency and holographic wills. Strict proof requirements.
  + Will-Substitutes
    - Two major: life insurance and pension benefits (work-related benefits).
  + Non probate revolution
    - People of means go to estate planner 🡪 trusts (gives specific powers and duties)
  + Chief litigation breeders
    - Joint bank accounts – hard to tell for what purposes ppl are using them for. Start with bank form, then person who contests otherwise has burden of proof.
    - Informal trusts

**Will Substitutes and #Trusts**

* Trusts – tool to separate management from ownership. **Settlor:** person who creates trust. **Trustee**: person who manages trust, takes ***legal title*** to the trust property, which allows the trustee to deal with third parties as owner. Beneficiaries have ***equitable title*** to the trust property, which allows them to hold trustee accountable for breach of fiduciary duties. Trusts may be **testamentary**—created by will and arising in probate. Or that may be **inter vivos**—created during settlor’s lifetime by declaration of trust or by deed of trust (often as will substitute to avoid probate). Trustee’s duties spelled out in trust instrument. If not spelled out, background trust law.
  + Types
    - Formal trusts
    - Informal trusts
    - Constructive or Implied Trusts – court gives life to a trust.
  + Duties of Trustee
    - **Duty of loyalty** – trustee must administer solely in the interest of the beneficiaries; self-dealing is sharply limited and often prohibited altogether.
    - **Duty of prudence** – objective standard of care and must administer the trust according to purpose of trust/need of beneficiaries. Different than how you can manage your own stuff. Prudent investor rule. Real costs if you don’t manage trust property carefully.
    - **Don’t mingle with own property**
    - **Don’t manage for own benefit**
      * Often will exempt trustee from liability if don’t want them subject to such strict requirements.
  + Bifurcation of Ownership
    - **Legal Owner/Title** – belongs to trustee.
    - **Equitable Owner/Title** – if trustee can overstep bounds, EO can go to court and get an accounting of trust.
  + Trust can be irrevocable or revocable
    - You can determine. But if nothing is said, **presumption** was long held as ***irrevocable***. But can’t be what most ppl want. So restatement ppl are pushing for presumed revocability.
  + Courts are very reluctant to find trust when there is NOT a **trust instrument**.
* [Indicating Sufficient Certainty] *Smith’s Estate* ($13,000 in bonds goes to deceased’s nephew. Bonds found in a safe deposit box with a note “held for” nephew. Nephew wins)
  + Words that indicate with ***sufficient certainty*** a purpose to create a trust will be effective in doing so. In most cases, such clear and convincing evidence will NOT be present.
    - Word “trust” never appears, so hard case. But managing separately and not co-mingling with other property. And wrote note with intention that it be found and executed. Convincing case when it comes all together, but right on the borderline. Outlier case. More typical approach in case where clear intent but no delivery 🡪 very reluctant to save an imperfect gift by calling it a trust. Most courts will require a **very high degree of evidence**.
* [Implied/Constructive Trust] *Elyachar v. Gerel* (The plaintiffs brought an action against their 85-yr old father to compel him to surrender certain stock certificates he gave them in his real estate corporation. They claimed that their father had made them a gift of the interests represented by these certificates despite the fact that he retained physical possession of the certificates themselves)
  + Court found an ***implied trust***. (“**Constructive trust**” = equitable remedy.)
    - Sounds like inter vivos gift. Filed a federal gift tax return. Had dividends paid to children. *In re Cohn* relative test: delivery is not a problem given the nature of the stock (b/c it was powers reserved to manage). Judge does not call it gift, but ***implied trust***. Does not trust guy to manage trust of beneficiaries. Colonel retains ability to wheel and deal as prudent investor, and kids get what was given with assurance.
* King Case
  + Best arg. for getting papers back: retained legal ownership. “Custody” language suggests bailee/bailor.
    - Charitable pledge exception? Promise to make a gift is enforceable

1. **CO-OWNERSHIP AND THE EFFECTS OF FAMILY RELATIONS ON OWNERSHIP**

**#Co-Ownership**

* **Presumption is that they are *tenants in common***. Need presumption of ownership b/c many instruments are ambiguous (unsophisticated parties not really knowing what they are dong).
  + Tenants in Common: separate but ***undivided ownership*** of the whole (each person owns the whole w/ the other), but with no survivorship.
    - Can go to a partition in kind—physically separate the property; if one person gets more, other compensates.
    - Or partition in sale—sell it and divide the proceeds.

|  |  |  |
| --- | --- | --- |
| **#Tenants In Common** | **#Joint Tenants** | **Tenants By The Entirety** |
| Undivided Interest in Whole | Undivided Interest in Whole | Undivided Interest in Whole as ***one person*** |
| -**No survivorship**.On death: heir (next of kin) or devisee (legatee). A&B. B dies 🡪 A & B’s heir.  -Partition: split property.  -Conveyance of real property to 2+ persons who are not married is ***presumed*** to be TiC.  -Presumed that shares of tenants in common are ***equal***, but not necessary. | -**Right of survivorship.** On death: doesn’t pass to anyone, just vanishes. A&B. B dies 🡪 A only.  -**Severance:** destroys survivorship feature and defaults to tenancy in common. Occurs by “conveyance” (sale, lease, contract for sale, or mortgage [though maybe not if most ppl won’t expect]). Involuntary conveyance: court order.  Can do indestructible survivorship via trust.   * Mortgage?   + Lien theory: not conveyance, didn’t sever (*Harms*)   + Title theory: conveys title, destroys unity of interest and therefore destroys JT * Lease?   + Modern view is no, but may depend on length. If long, may be analogous to life estate and treated as a severing event. * Involuntary conveyance: creditor levies on property, execution sale. * Conveyance to self (*Riddle*)   **Need “four unities”**  Must take their interests:  -At the **same time**  -By the **same instrument** (see *Riddle*). JT can ***never*** arise by intestate succession or other act of law.  -With **identical interests**   * *Equal share (increasingly ignored by courts, DK p. 324)* * Same durational estate   -With an **equal right to possess** the whole property  Creation of Joint Tenancy:  -Must overcome presumption of tenancy in common  -“To A and B as joint tenants with right of survivorship” is OK (except in MI/KY) | Exact same as joint tenancy except:  -ONLY SPOUSES. Between husband and wife and civil unions. Only usable in less than half of the states. AND  no partitions by 1 party (need agreement) AND  no survivorship by 1 (need agreement) AND  divorce automatically turns into TiC.  -Four Unities required  -**Survivorship rights**  -No severance by one acting alone (protection for wife)  Many states use TbtE b/c you get a ***limited amount of creditor immunity***. Big deal.  Some states allow in real property, but NOT in personal property. |

* + EX. *A* and *B* are planning to be married. Two weeks before ceremony, they buy a house and take title “in A and B as tenants by the entirety.” Several years after the marriage, *A* moves out of the house and conveys his interest in the house to his brother *C. C* brings action to partition the property. What result? TiC. Partition is ok.
* **Big difference between joint tenancy in real estate and joint tenancy bank account:** JT in real estate is making an ***immediate grant*** in one-half real estate. Significant in terms of creditor’s rights.
  + EX. P.360 #1 – presumption easily rebutted by evidence (first question). Probably not enough, intent is not that (second question). Bank agreement is NOT dispositive.
  + #2 – presumption can be rebutted by **clear evidence**.
  + #3 – who funded, how much, and with want intent?
* [Unilateral Severance] *Riddle v. Harmon* (Riddle’s wife, the decedent, owned certain real property in joint tenancy with Riddle. When she was planning her estate, she did not want her interest in the parcel to pass Riddle. Her attorney advised her to terminate the joint tenancy by granting herself an undivided one-half interest in the property, making her a tenant in common. A grant deed was drawn up to that effect, and a will devising her tenancy in common to herself was executed.)
  + Can destroy joint tenancy ***unilaterally*** w/o straw man. Joint tenant has a right to destroy survivorship.
    - **Issue:** did she have to go through third party for severance? Traditionally, needed straw man, AND 12-yr old precedent that said you needed straw man
    - “An indisputable right of each joint tenant is the power to convey his/her separate estate by way of gift or otherwise w/o the knowledge or consent of other tenant.”
* [Mortgage As Severance] *Harms v. Sprague* (William and John Harms owned property in joint tenancy. John executed a mortgage favoring Simmons, who later assigned his interest to Sprague. After John died, William contended that the mortgage had died with John and brought an action to quiet title)
  + Issue 1: is joint tenancy severed when less than all of the joint tenants mortgage their interest in the property? No. Mortgage is NOT a severance. **Just a lien**. Most states follow this rule.
    - Odd in that giver of mortgage did not require both joint tenants to sign contract.
  + Issue 2: does mortgage survive death of mortgagor as lien on property? No. Surviving tenant is **sole inheritor** of property. Mortgage vanishes. Very hard on lenders.
* [#Partition In Kind Over Partition Sales] *Delfino v. Vealencis* (Delfino owned an undivided 99/144 interest in land, in which Vealencis owned an undivided 45/144 interest. The property was held as a tenancy in common. Delfino wanted to develop residential housing on the tract and sought a partition sale. Vealencis, who lived on the land, was using her property as a rubbish disposal business and wanted a partition in kind.)
  + Partition in kind. Favor partition in kind over partition sales UNLESS:
    - (1) **Split is impossible**, AND
    - (2) **Best interests of party**.
  + MAG: in modern practice this presumption is weakening.
    - Although partition in kind is preferred, the modern practice is to decree sales in partition actions in a **great majority** of cases, either b/c the parties all wish it or b/c the courts are convinced that sale is the fairest method of resolving the conflict.
  + PARTITION IN KIND = physical partition into separate tracts; each party owns his tract alone in fee simple.
    - If the separate tracts are not equal, than the tenant with the smaller amount gets a cash payment (**owelty**) to equalize the values
  + PARTITION IN SALE = Property is sold and the sale proceeds are divided equally
    - Frequent: houses, apt buildings can’t really be physically partitioned
    - Presumption of equal shares rebuttable by evidence that co-tenants intended unequal shares (e.g., they paid unequal amounts at purchase)
* [Co-Tenant Rent And #Ousters] *Spiller v. Mackereth* (Spiller and Mackereth were tenants in common of a warehouse. When their tenant vacated, Spiller began using the entire warehouse as a storage facility. Mackereth demanded that he either vacate half the premises or pay rent. He ignored the demand. Mackereth sued for rent)
  + Absent an owner physically barring a cotenant from entry upon the owned premises 🡪 NOT liable to the co-tenant for rent. A co-tenant has the **full right to use the premises** and CANNOT be liable to the co-tenants for rent. **Only exceptions:** (1) Previous rental agreement, or (2) Ouster: a co-tenant must physically bar the other cotenant from entry (or deny claim to title). **Two kinds:** 
    - (1) Refuse to let in (bars physical access), or
    - (2) Occupying co-tenant begins timer for adverse possession by denying co-tenant’s claim to title. Pretty heavy burden to convert co-tenancy under AP. Need to unequivocally repudiate relationship.
  + For taxes/improvements, costs will be split by occupying and absent co-tenant if they are ***necessary*** for the land.
* [Right Of Joint Tenant To Convey/Mortgage His Interest] *Swartzbaugh v. Sampson* (husband leases part of property for boxing ring; wife doesn’t like it, refused to participate and did not receive any rent; sued to cancel the lease)
  + Joint tenant has right to convey or mortgage his interest in the property, even if the ***other joint tenant objects***. A lease for all of the property by one joint tenant is not null but is valid to the extent of his interest in the joint property. **Co-tenant cannot cancel the lease**. Short-term lease is NOT a severing event.
    - She could have tried to get the leasee to bar entry 🡪 ***ouster*** and she could get fair-market value of rental of her share. If moved for partition 🡪 would lose survivorship.
    - She could acquiesce in the lease and demand and receive half the rents received by John from Sam.
    - If leasing co-tenant dies 🡪 lease disappears.
    - She might have had an injunctment to stop cutting walnut trees or damages (depends on state & case).

**Property Allocation on Death**

* John Stuart Mill – writing against complete freedom of testation in England. What rights inherent in property right to direct estate after death? Should recognize responsibilities to illegitimate children, and should be a maximum amount that can be left to children (in U.S., estate tax law encourages decedents to leave some to family—heavily in favor of surviving spouse, favor children up to a point)
* American Law – organization principle is ***freedom of disposition***. Property owners have nearly unrestricted right to dispose of their property as they please. Restrictions:
  + Spousal restrictions (chief exception to above principle in U.S.)
  + Creditor rights
  + Dispositions that are against strong public policies – e.g. racial restrictions.
  + Dispositions that promote the “control of the dead head” – tie up property for too long a time.
  + Estate Tax (way which we address Mill’s concerns). Least amount of taxes for nearest and dearest (either preventing state-reliance or closest to normal intent).
* Langbein – inheritance on death is no longer main way property is passed. Modern forms of wealth are “new property.” Now, inter-life transfer 🡪 ***education***. The rest is sapped by retirement (longer life expectancy).
  + MAG: Demographic + economic effect of aging population, declining birth rate 🡪 active labor force too small to support Medicare and Social Security
* [Takings Clause And Small Amount Of Property] *Hodel v. Irving* (disaster of tenancy in common structure for native-american lands—fractional interests in property; made gov. trustee to prevent land speculation; solution to problem: land below a certain size or $ amount, act took away right to dispose by will or pass by succession an children. Land would go back into tribe ownership)
  + A government regulation that abolishes the ability to pass land by descent or devise is a taking under the Fifth Amendment. Ability to pass interest in property is one of the most ***essential sticks in bundle of rights***. Right to dispose of property on death. Congress DOES have property to **regulate**, but not to abolish. E.g., abolish law of succession 🡪 if no wills, then escheat.
    - P’s have standing b/c trustee (gov) had conflict of interest.
    - Court questions how small/insignificant this property is.
    - ALMOST abolished power to dispose on death. Could still use will-substitute.

**#Marital Property**

* Blackstone – Husband and Wife
  + By marriage, the husband and wife are one person in law; that is the very being or legal existence of the women is suspended during the marriage, or at least is incorporated and consolidated into that of the husband.
  + Thus, a man ***cannot*** grant any thing to his wife, or enter into covenant with her, for the grant would be to suppose her separate existence. To covenant with her would only be to covenant with himself. M
* Mass. General Laws On Marital Property
  + §1: Separate property is separate, even when taken in marriage; both are entitled to income from property held as tenants by the entirety.
  + §2: Married Women can contract
  + §3: Transfers between husband and wife is as if sole
  + §4: Labor of married women are for their own account
  + §5: Married women can be executrix
  + §6: Married women can be sued and sue
  + §7: Married women not liable for husband’s debts, nor her property liable on execution against him
  + §8: Husband not liable for wife’s debt
  + §9: Husband not liable for contracts made by wife on her separate property
* [Engagement Affecting Property Interest] *Strong v. Wood* (lady got married to old guy who owned farm; just prior to marriage [late December] and because of anticipated changes in tax law, conveyed property to children while maintaining a life interest on farm; January they married, and two years later he died; wife sued claiming conveyance was fraudulent as it deprived her of her marital interest)
  + Fraudulent intent alone is ***insufficient*** to establish claimant’s rights in the transferred property; it is the fraudulent effect of the transferor’s actions which we must consider. If no reliance is shown, then a complaining spouse cannot claim such an effect. **Five elements** to determine if the dead spouse fraudulently conveyed property in contemplation of marriage:
    - Has to be in **contemplation of the marriage**. Transfer made during contract to marry or proximity to marriage would indicate this (testimony said it was about some new tax law; but timeline suggested it was b/c of impending marriage)
    - **Inadequate consideration** for the transfer. (got $1 plus “other consideration”)
    - **Transfer unknown to the prospective spouse**.
    - **Reliance** on property as inducement to marriage. (What P lacked in this case; didn’t know anything about farm prior to marriage)
    - **Fraudulent intent** (court said if other factors are shown, court will assume fraudulent intent).
      * ***Presumption of fraudulent intent*** is created if first three elements are satisfied.
* [During Marriage]
  + Predators and creditors are interested during marriage. Potential purchasers will want to know who owns the object. Need to look at state and relevant statutes. Before statutes, all the wife’s personal property automatically became husband’s property, and he gained right to sell/manage in wife’s real estate.
    - **Separate Property (40 states)**
      * Starting point: His and Hers. Woman’s property rights ***same as before marriage***. **Defects:** (1) doesn’t help much b/c woman who were inside the home weren’t acquiring much property; not much property could be called hers; and (2) goes ***asset by asset***. Hard to figure out who owns what.
      * His and Hers **modified by two things:** (1) voluntary co-ownership of various sorts (JT, TC, TE, gifts), and (2) presumptions – unclear who owns it 🡪 jointly owned. And when put in joint ownership 🡪 presumption it was a gift and co-owned.
    - **Communal Property (8 states + 2)** (theory that marriage is partnership. Work inside home contributes into property).
      * NOT a community of everything – Not gifts. Not inheritance. Not pre-marital property. What ***is*** community 🡪 “community of acquests.” Acquests = all property acquired by the gainful activity of the spouses.
      * BIG presumption: ***anything where title is unclear*** 🡪 swept into communal property.
      * Each spouse owns ½ community property and other stuff not included 🡪 available for testation.
  + 20 states – tenancy by entirety (joint tenancy as modified by family law). **Limited immunity from creditors**.
  + [Insulation From Creditors] *Sawada v. Endo* (uninsured motorist gets in accident, quickly deeds property to son for no consideration; continued to live on property)
    - **Creditors cannot get property** b/c even if they had done nothing, still insulated from separate debts of one spouse as long as they both live. Based on stare decisis and public policy to not disrupt property of families. Since Sawadas could not have reached that property when the conveyance was made (because it was a tenancy by the entirety), the conveyance was not fraudulent
      * Case of first impression. Hawaii had choice. Thought it was important to protect the basis of family’s economic security.
      * **Alternatives:** (1) creditor can get whatever the debtor owned. Could try to enter, if stopped, then could force rent. Or get access to full thing if husband survived wife; or (2) at least the contingent right of survivorship given to the creditor.
      * Hawaii did not go with (2) b/c it would make very difficult to sell property. Court wanted maximum creditor immunity. BUT creates ***legal haven from creditors*** 🡪 ppl can take all property and move it into tenancy by entirety. Mass limits it to principle residence.
  + When ppl die:
    - Intestate succession: look at state statute.
    - Will – affected by forced share (for spouse, and in some cases, for children).
  + [Forced Share] *Sullivan v. Burkin* (Husband trying to disinherit wife, made an inter vivos trust that he solely controlled and transferred his real estate to the trust. Upon his death, the successor trustee was directly to pay the principal and income of the trust to Burkin and a few others. In his will, he said he intentionally left Mary and his grandson Mark out of the will. Mary claimed that this method of shielding the assets was an invalid testamentary disposition, and the assets should be considered part of the estate of Ernest open to probate)
    - Held against wife, but changed rule moving forward. Aware of all ppl who arranged affairs in reliance on *Kerwin v. Donaghy* (declined to apply in present case because of precedent).
    - NEW RULE: a **revocable inter-vivos trust *is*** part of the estate. The assets will be considered part of the estate of the deceased when the deceased is the only person with control over the trust (meaning the ability to revoke the trust, as well as accepting all of the income from the trust). **Will-substitutes can be subject to forced share**. Which ones? Inter-vivos trusts. Don’t know about life insurance. Doesn’t include money obtained via trust set up by third party.
    - Only Oregon takes into account long periods of separation between spouses.
      * **Can get around** *Sullivan* by: (1) creating a joint T with children, (2) irrevocable trust, (3) inter vivos gift, or (4) irrevocable trust with life estate for self.
    - MAG: student should recognize (a) *Sullivan* responds to a widely recognized need to harmonize will-substitute law with the law of wills by permitting surviving spouses to claim a forced share against a will substitute, but (b) that Mass was unique in do so by judicial decision, and (c) that the Mass. Decision left open a number of questions that should be handled in a systematic way by the legislation. A good memo will show awareness of unresolved questions and suggest a general approach to them. An excellent answer will recognize the need to protect an estate plan that provides generously for the surviving spouse from abusive exercise of the forced share. One might also consider whether a forced share should be available as a matter of right to a long-separated by undivorced spouse.

**Property Allocation on Divorce**

* Two Systems: (1) **equitable (DISCRETIONARY) distribution**; (2) **community property** (50/50 – only three states)
  + (1) Special section addressing family home w/ minor children.
    - Look at conduct.
    - Separate alimony and property
    - All property or just acquests?
    - Presumption of equal division or no presumption?
  + (2) Each spouse gets 50% of communal property. Resulting in a lot of couples being forced to sell the family home (greatest asset, often not paid off).
* [Separate Property System—Revised By *Rice*] *Norris v. Norris* (Norma and John got divorced. The trial judge gave her what she owned before getting married, her clothes and effects, and her car which she personally bought, and nothing else. He got the 264-acre farm which he had inherited prior to marriage, and all machinery, livestock, improvements, etc. For the first ten years of marriage, she worked at home, raised the kids, and helped out on the farm. When she got a job outside the house, she still did those tasks and contributed her money to the family’s food and clothing. She wanted interest in the property)
  + Spouse A, seeking a part or all of the property in the name of Spouse B upon divorce, must show that Spouse A 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**.
* [Pre-Marital Property And Judicial Discretion] *Rice v. Rice* (Nancy and John get divorced. Had been married for 27 years, and John was making bank from business, inheritances, cash gifts from his dad, and a lot of interest he owned before marriage. Nancy had no skills and earned no money, and she got an allowance from her husband.)
  + ***All property is available for discretionary distribution***. Gives judge huge discretion. Lumps property and alimony all together. Established that a **judge make finding under each category** (effort to cabin discretion a little bit).
  + Factors considered: length of marriage; conduct of the parties during the marriage; the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. Also the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates.
    - MAG: This kind of “equitable” (discretionary) distribution involves so many factors that it just becomes the judge’s discretion 🡪 unpredictable, comes down to the luck of the judicial draw.
  + Policies behind Equitable Distribution statutes:
    - Protect parties’ reasonable expectations
      * But reasonable expectations in property are informed by the background law
    - Interest of state in protecting the public purse
      * Don’t want divorcees forced on to welfare
    - Marriage as a partnership, treating contributions as equal
    - Protecting weaker and more vulnerable parties (e.g., children)
      * Although children tend to be marginalized (dealt with after property division), they cannot be left out 🡪 can’t contract out of child support
    - Predictability (problem)
    - Individual justice
    - Reducing the costs of divorce litigation
  + MAG: this affords ***maximum discretion*** to the judge (pro: individual tailoring; con: loss of predictability, risk of arbitrariness). A good memo should discuss the pros/cons of the main alternatives to wide-ranging judicial discretion, e.g.
    - **Community property or a presumption of equal division** (easier and cheaper to apply, but risk of unfairness and problems in cases where the main asset of a coupe with children is the family home [equal division requires sale of home and division of proceeds])
    - **Exclusion of pre-marital, inherited and gift property**
    - **Exclusion of fault as a factor** (consistent with the idea behind no-fault divorce that courts aren’t well suited to determining who is at fault, *but risk of unfairness* in the most egregious cases and in cases where the marital property has been diminished by economic misconduct, e.g., gambling or lavish gifts to non-family members)
    - A good memo might also suggest that the Senator consider replacing the present system with a system that differentiates among commonly recurring cases: a bright-line rule (his-and-hers or equal division) for short, childless marriages; a children; a more discretionary system for divorces of couple with minor children, etc.
* [Education As Property] *Graham* (husband gets MBA; wife puts him through school and seeks half value after divorce)
  + Degree is NOT marital property subject to division upon divorce. Not encompassed in the concept. Can be ***included*** in earning capacity when calculating alimony.
  + **Three approaches:**
    - *Graham* (majority approach): degree is NOT property; can be considered as a factor in determining division of marital property or alimony.
    - New Jersey: reimbursement for degree. Spouse is reimbursed for the financial contributions made to the other spouse’s successful professional training. **Problem:** reimbursement doesn’t cover lost opportunity costs (chance for her to go to school, etc.)
    - New York: Degree ***is*** marital property.
* [Enhanced Skills As Property] *Elkus v. Elkus* (Frederica was a major opera star with the NY Metro Opera. She married her voice coach in 1973, who gave up his career to coach her (and be her photographer) and was the primary child-rearer. In 1989, they divorced. Mr. Elkus wanted the court to incorporate her celebrity and career as marital assets in their property division award)
  + **Enhanced earning capacity** (degree/license/reputation) ***is*** property. Mr. Elkus made sacrifices to help Frederica become a celebrity; common notions of fairness require that because he actively helped her career, he is entitled to some of the value of it.
    - MAG: compare the vision of marriage here (“economic partnership”) to that in *Graham* (marriage implies giving support).

#### Marital Property Chart

|  |  |  |
| --- | --- | --- |
|  | **Separate Property System** (muddy, but tailored) | **Community Property System** (more predictable) |
| During Marriage: | * Married Women’s Property Acts give married woman control over her own property * Each spouse is to be regarded as though they were single and independent. (“His” and “hers.”)   + But, overwhelmingly, married couples introduce voluntary co-ownership. This reduces the gap from a community system. (All the examples of joint tenancy.) * Presumptions:   + 1) That everything is jointly used (presumed gift of ½), and   + 2) Jointly owned (presumed gift of ½) * Questions of ownership are ones of fact | Everything 50/50, *except*:   * Gifts or inherited property. * Anything acquired premarital   But presumption of Community of Property |
| Death: | * Estate is his and hers. * Testate succession gives a **forced share** of decedent’s estate to the spouse who seeks to claim it if the other spouse leaves them out. (Size of share varies state to state, depends on circumstances.) * Intestate succession: share of surviving spouse has increased over time (although when polled, most people want spouse to get all) | Estate of single individual consists of ½ acquests (property acquired during marriage by gainful activity of spouses) + premarital property and inheritance |
| Divorce: | * Enormous change in the law between the Norris v. Norris and the Rice v. Rice cases. Norris shows that the disadvantage of the his and hers system was that it was very hard for a spouse who had not worked outside the home to have support here. Also very hard for the spouse who works outside the home but whose income is used for consumables and groceries. Disproportionately a problem for women. * “**Equitable distribution**”: This is better characterized as a “discretionary distribution” system. How property is distributed on divorce is based on the decision maker, the judge usually. * Discretionary Distribution Statutes (variants)   + All property subject to distribution (MA) v. Acquests (property acquired during marriage by gainful activity of spouses) only (CO)   + No presumptions on extent of division (MA) v. Presumption favoring equal division   + Conduct a factor (MA) vs. “No fault” (CO) | Upon divorce, each party is entitled to half of the community property and their separate property |

**Marriage Contracts**

* US outlier in this area. All civil law countries (continental Europe) have alternative marital property system. Other countries not that unusual to have a marriage contract. In US, marriage contracts not all that common. More lawyering involved. Question about whether contract will be enforceable.
  + Mass is about as certain as it gets. At other end of spectrum, prenup is just ***a*** factor the court can consider. In the middle, court gives a much harder second look at contract.
  + **To ensure prenup is enforceable 🡪** (1) Full financial disclosure or get spouse to sign waiver; (2) Independent counsel; (3) Fair and Reasonable (*DeMatteo*)
* Things to consider:
  + Party wanting contract: aware of divorce rate; concerned about kids from previous marriage and wants to protect their interest in estate (in either death or divorce); want to keep property in the family.
  + Lawyer representing the above: totally divulge all assets to prospective spouse; video tape proceedings to document faculties (prevents charges of **duress**); hire independent counsel; ensure ***real negotiation***; make it “fair and reasonable” (*Dematteo*) (client has to give ***something***); if party doesn’t want other person to know net worth 🡪 need to get them to sign **a waiver** (either disclose or sign waiver).
  + Party being asked to sign contract: what am I giving up (in case of death/divorce)?; given that it is an unusual request in our society 🡪 awkward, dampening;
  + Lawyer for above: opportunity cost for person who lives workforce?
* [Fair And Reasonable] *Dematteo v. Dematteo* (real estate mogul worth over $100m married poor woman; signed agreement w/lawyers and video, negotiated 🡪 marital home and annual payment of $35k; lost in trial court, reversed in upper court)
  + “Fair and reasonable” does NOT need to approximate alimony and property division that court would make w/o agreement, but rather, the agreement can not essentially strip contesting party of substantially all marital interests. ***Can be one-sided***.
    - Change in circumstances has to **be really dramatic** so as to make divorcee public charge. **Two-part test:**
      * (1) a judge must determine whether an antenuptial agreement is valid;
      * (2) the agreement must be ***fair and reasonable at the time of entry*** of the judgment nisi. Also, “second look” to see if agreement was “fair and reasonable” at the time of the divorce trial. Court said test at the time of enforceability (second look) is ***“conscionability”***.
    - Trial court used test for separation agreement to invalidate contract; also argument about changed circumstance w/ birth of two children.
  + MAG: student should recognize that what is controversial about *DeMatteo* is mainly the strictness of its approach to the question of fairness at time of enforcement. A good memo should discuss pros/cons of permitting a “second look” at an otherwise valid pre-nup at the time of enforcement: it can avoid hardship to one spouse owing to changed circumstances; but it undercuts the basic purpose of the pre-nup from the point of view of the other spouse who has relied on the contract. Arguably, *DeMatteo* strikes a reasonable balance by keeping the second look within narrow bounds, but it risks breeding litigation.
* [Co-Habitation]
  + Traditionally dealt with by contract and property law. Only 10 states left with common-law marriage (holding themselves out as married 🡪 married). Originated to help surviving spouses who in the early days didn’t have good access to courthouses. Most states now have phased out.
  + [Inferring Marriage Due To Equity] *Carlson v. Olson* (couple lived together for 21 years—raised a son, never married, held themselves out as married; took joint title to property as Mr. and Mrs. Olson; she sues to partition, he counter-sues for rent and ejectment)
    - Court agrees with wife. Court invokes his ***equity powers*** in apartition. Evidence indicates that **intentions** of parties were to divide property on an equal basis. Didn’t rebut presumption of irrevocable gift. Gets 50/50 division.
      * Probably took into account services of wife in the home.
      * Did not destroy survivorship b/c there was no transfer.
    - Her theory: he paid for it, but when he put in both names 🡪 irrevocable gift.
    - His theory: did not irrevocable gift, but revocable will substitute.
  + [Implied In Fact Contract] *Marvin v. Marvin* (actor lives with girlfriend)
    - Contract for property division or support can be ***implied*** from the **conduct** of the parties. Court declines to apply communal property by analogy. But there are a number of contractual avenues available. People can have express contract and ***implied in fact*** contract (novel idea). She can go back to trial and try to prove implied in fact contract. Also, can get ***quantum meruit*** (get reasonable value of their services) or equitable remedies such as constructive or resulting trusts are good too when warranted by the facts.
      * Other jurisdictions have declined to go implied-in-fact route b/c it starts to look like fault-divorce. Messy inquire.
    - MAG: **most controversial part** of *Marvin* is holding that a cohabitant may attempt to prove a contract implied-in-fact from the **conduct of the parties**. A good answer should discuss: the pros/cons of contract implied-in-fact in cohabitation cases, and the pros/cons of alternative approaches such as: leaving property relations between cohabitants to be regulated by express agreements and the common law of property; or adopting civil union or domestic partnership legislation giving most of the legal incidents of marriage to couples who register.
  + What should be background law be for co-habitation? ALI in book. Sweden 🡪 couple w/ no children, then state is not interested in how they arrange affairs. If have children, then community property law.

1. **PURCHASE AND RENTAL OF HOUSING**

* Intro: takeaway from executive summary, two points – (1) current rate of home ownership is 65.1% (declining for past several years), but is higher than in 80’s and 90’s. More than Germany/France. Overall still pretty good. Unfortunately far from peak of ’04 69%; (2) there is a serious affordability problem. Affordability = proportion of income. “Cost burdened” 🡪 30% of income on housing. “Severely cost burdened” 🡪 spending more than 50% of net income on housing.
* Two federal statutes
  + 1866 Civil Rights Act – focused on racial discrimination. “All citizens of the United States shall have the same right, in every State and Territory as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”
    - No mention of advertising or accommodations. No exemptions. Not just residential.
    - Requires ***proof of intent***.
  + 1968 Fair Housing Act (p.453-54)
    - First and second section (not included in book) – 1st) Fair housing ***within*** constitutional limitations. Property rights come up against other important rights. 2nd) Definitions of terms. Look broader than they really are.
    - 3rd Article – Exemptions. Not all are covered:
      * Religious organizations and private clubs under certain circumstances. Trying to avoid conflict with freedom of association?
      * Sales or rental of single family home under certain circumstances
      * Owner-occupied dwellings
    - 4th Article – no discriminatory advertising; need to make reasonable accommodations, etc.
  + Differences: 1866 need to prove ***intentional or purposeful discrimination***. For FHA, can prove violation in two ways:
    - (1) ***Disparate treatment***. Done with testimony or written records showing that landlord/seller/real estate agent/gov agency intended to discriminate. Also can show disparate treatment by setting forth a prima facie case of discrimination by circumstantial evidence. Need to show member of protected class, that she qualified, that she was rejected, and that housing remained available after rejection and/or given to someone else not in protected class. D needs to give reason for denial. Can will if show reason is pretextual.
    - (2) ***Disparate impact***. Challenge to a facially non-discriminatory practice that has **effect** of burdening protected class. Once effect is shown, burden shifts to D to prove there is a legitimate reason for action and that “no alternative course of action could be adopted that would enable that interest to be served with less impact.”
  + Problem 3 p. 456 – probably exempted under FHA, but violation of the CRA if can prove intent. Standard way to show intent is test double. And maybe advertisements violated FHA. Can you sue newspaper as well? “To make print or publish” 🡪 yes. Can sue newspaper. What if placed in craigslist? “On-line services” exempted.
    - What if said, “only speakers of language X”? “…***indicates a preference***” based on natural origin. Test that is used is “ordinary reader test.”
    - What if said, “no lawyers?” In Mass and most places 🡪 OK. In NY, no (no discrimination based on profession”).
    - Unmarried or same-sex couple? Can discriminate unless barred by specific statute. Familial status only refers to having children.
    - Looking for female roommate? Ok b/c of privacy interest.
* [Quotas Disallowed] *U.S. v. Starrett City Associates* (massive housing project set up w/ funding; had racial integration quotas to promote racial balance and prevent white flight; prior suit had settled to adjust quotas)
  + Quotas are NOT ok. ***Literal interpretation*** does not allow.
    - Challenged based on racial quotas and disparate treatment and impact.
    - Look at analogous statutes that allow race-conscious plans 🡪 distinguish based on 3 things: (1) timelessness of quotas and (2) floor v. ceiling quotas and (3) no prior history of discrimination. One-shot quota is OK.
  + Dissent: ***purpose*** is NOT to prevent racial integration. Racial quotas to prevent white flight is NOT included w/in statutes. And, the majority’s distinction is made up.
    - Problem: statute has two purposes 🡪 no discrimination AND racial integration.
    - Dissent: The Act was designed only to bar perpetuation of segregation. Defendant is not promoting segregated housing. In fact, he is promoting integrated housing. A law enacted to enhance the opportunity for people of all races to live next to each other should not be interpreted to prevent a landlord from maintaining one of the most successful integrated housing projects in the country
* Lawyer-Made Law
  + Legal forms represent accumulated experience of a lot of lawyers over long time. If made validly, the documents become “the law” for the parties to them 🡪 contracts, estate planning, trusts.

**Purchase and Sale of Residential Property**

* Land Transaction – p. 543 (not typically everywhere; different states have different approaches)
  + Broker 🡪 Contract (negotiate contingencies – physical condition of property; good title) 🡪 (executory period 60-90 days) 🡪 Closing 🡪 Recording
    - Hard to find lawyer for small deal. Problem.
    - Most important clause in contract: ***good title***. Make sure seller owns house. “Good and merchantable/marketable title.” **Concerns:** title insurance might not cover all incidents (get what you pay for) and what do you get if seller doesn’t own all/part of property. If defect in title 🡪 better to walk away than rely on insurance. Also, bank’s lawyer is worried about different things than purchaser.
    - **Equitable conversion** (p 581): change in ownership once contract is signed. Conveyance.
      * Land has always been considered and specifically enforceable by buyer/seller. Land is unique. **$$ damages are insufficient**.
      * Specifically enforceable once contract is signed.
      * Buyer considered to be equitable owner; Seller retains bare legal title as kind of trustee for buyer.
      * Who bears risk of loss during 60-90 day period? Look at jurisdiction. Very often it is the buyer (should get insurance for the interim).
    - Section 28: Performance (p. 553) – “Time is of the essence…” Scary provision. Means if you miss a deadline 🡪 loss the rights for whatever the deadline involves. E.g., late 15 min to a meeting and sold property to someone else. “Time of the essence” enforced.
  + Problems 558
    - If married, homestead laws might apply. Need release of spousal rights.
    - Is “good and merchantable” satisfied by adverse possession? NOT that you can’t, but there are some conditions.
    - And what does “good” mean?
* [Good And Merchantable Title] *Messer-Johnson v. Security Savings* (Homebuyer sues seller to recover deposit after title found to have defects. Seller claims he holds title by adverse possession)
  + Defective title not “marketable” even with adverse possession until adverse possession proven. **Burden of proof is on vendor** not only to show adverse possession but to make it clear that the purchaser will have the means at hand at all times to establish his title, if it should be attacked by a third person.
    - Hard to have perfect title. **What does “marketable” mean?** 🡪 title “which a **reasonable purchaser**, well informed as to the facts and legal bearings, **willing and anxious to perform his contract**, would, in the exercise of that **prudence which business men** ordinarily bring to bear…be **willing to accept** and ought to accept.” ***Free from reasonable doubt***.
  + If partly based on adverse possession, buyer will need evidence to prevent claims (means to establish title). **Burden of proof is on vendor**. Buyer gets out of the deal in this case.
    - What can seller do next time? Lower price ($). Resolve claims of other interests; get releases ($). Bring quiet title action ($$$).
  + Mass. – when defect is purely formal, and no one has challenged in 10 years, then defect won’t prevent good and merchantable.
    - Key question to start adverse possession: did anyone have a ***cause of action***?
* [Unauthorized Practice Of Law] *State of South Carolina v. Buyers Service Company* (company that comes in after contract, provides title check, filling out forms, handling closings, recording legal documents at the courthouse [what paralegals do for lawyers all the time])
  + What’s wrong with company investigating title? **No supervising attorney**. What’s wrong with filling in forms? Paralegals aren’t trust to explain difference between three pre-printed forms. What’s wrong with non-lawyers handling closings? Need lawyer there to furnish legal advice if problem pops up. **Not practical** to assume closing with stop and lawyer will be found when something comes up. Why not recording? Falls under the definition of the practice of law as formulated by prior decision.
  + ABA, in response, proposed broad rule of practicing law. Shut down by dep. of justice.

**#Duty to Disclose Defects**

* Every Contract Has An Implied Warranty On Title. For physical condition, historical starting point is **caveat emptor** (buyer beware), but has largely been abandoned today.
  + **Caveat emptor** (background rule). Two ideas:
    - 1) ***No implied warranties, except warranty of fitness to first buyer***.
    - 2) ***No duty to disclose defects to the buyer***.
      * Has since been riddled with exceptions. What’s left? In purchase/sales of residential real estate, much less is left as compared to commercial real estate.
    - Exceptions:
      * **Fraud**. (1) Affirmative misrepresentation of material fact. NOT just someone being quiet. (2) Reliance by buyer on that misrepresentation.
      * Do have to disclose defects if there is ***confidential relationship*** between buyer/seller. Generally means fiduciary/guardian and ward/trustee relationship.
      * Seller has ***actively concealed*** a defect that buy would not discover with **reasonable exception**. E.g., painting over water stains.
      * Traditional exception of builder’s warranty to ***first buyer***.
    - **Current state of Caveat emptor in residential:** sellers obligation to disclose defects is pretty much universal. As duty extends, so is pressure to accept “as is” clauses, which generally relieve the seller of disclosure obligations that are reasonably discoverable, as long as there is no fraud.
      * In commercial cases: more states are hanging on to caveat emptor. “As is” clauses much more likely to be regularly used and regularly upheld.
  + Section 10 “Professional Inspections and Inspection Notices.” Most negotiated. Alternative 🡪 Section 40 “As Is” Condition.
    - Most states also have statutes requiring the seller to deliver to prospective buyers a written statement disclosing facts about the property.
  + **New areas of debate re: duty to disclose**
    - Is knowledge of the seller ***objective*** or ***subjective***? What does the seller know, or what he ***should*** know?
    - What diligence is reasonable to expect from buyer?
    - For “materially affecting the value/desirability” of the property, is this ***objective*** or ***subjective***? Material to this buyer, or to a reasonable buyer?
    - Only the facts about the house, or adjacent areas?
    - To what extent can you contract out of this requirement as a seller via “as is” clause?
* [Seller Created Impairment] *Stambovsky v. Ackley* (house haunted by poltergeist; contract says “as is”)
  + Where condition which has been **created by seller** ***materially impairs*** the value of the contract and is peculiarly w/in the knowledge of the seller or unlikely to be discovered by a prudent purchaser exercising due care, nondisclosure constitutes a basis for recession.
    - Court says this is narrow exception. NY still has caveat emptor.
    - What about subsequent sellers of house? (1) Didn’t create impairment; and (2) NY has stigma statutes (info that doesn’t go to title 🡪 murder, aids death, etc.)
    - Many states have subsequently **required disclosure forms** filled out by sellers.
  + **Dissent:** bad way to get rid of caveat emptor. If court forces a disclosure of ghosts, isn’t it much more likely that seller will be forced to disclose leaky roof, etc.?
* [Majority View] *Johnson v. Davis* (told buyers the roof did not leak; outright lie; roof needed to be replaced and Davis sued for recession; court went beyond traditional exception of affirmative misrepresentation)
  + When seller knows of facts ***materially affecting the value*** of the property that are NOT **readily observable** and are NOT **known to the buyer** 🡪 seller is under a ***duty to disclose***.
    - **Problems:** What is readily observable? What is material? Objective test or subjective test? It is known OR should have known? Can seller contract out? Statute of limitations?
  + Another case: guy thought he fixed leak. Objective or subjective test? **Test:** ***foreseeably relevant*** to the buyer.
  + What about chemical cleanup where EPA says it’s clean? Objective test. No psychological stigma. Buyer, however, probably would have prevailed in Florida.
* [Extended Builder’s Warranty] *Lempke v. Dagenais* (Lempke’s predecessor contracted with Dagenais for Dagenais to build a garage, which he did, but after Lempke purchased the house, structural problems appeared with Lempke claimed were due to substandard work by Dagenais. Lempke sued for the cost of repair and/or replacement. Trial court dismissed, saying there was no privity between Lempke and Dagenais)
  + Builder’s warranty ***extends beyond*** first buyer. A subsequent purchaser of property may recover from one performing defective contractor services for the prior owner if the **work contained latent defects NOT apparent at the time of purchase**.
    - How long after? “Reasonable time.” When does SoL start running? Can you contract out?
    - Whether privity is required is determined by reference to policy. **Numerous reasons for not imposing a privity requirement exist:** society is increasingly mobile, and a builder should not be surprised by a change in ownership; experience also tells us latent defects will not show up for years afterward, so a sale to an unsuspecting purchaser is not unlikely; a builder is in a better position to control the quality of the work than a subsequent buyer; a contractor is already under obligation to perform in a workmanlike manner, so the nature of his obligation is not changed by privity; and to impose privity would encourage sham first sales. The measure of repair is the cost of repair or replacement.
  + **Souter Dissent:** starre decisis. Not enough to overrule prior ruling.
  + Mass made the warranty **non-waivable** that lasts reasonable time. NOT five years.
* [#Deeds]
  + **Merger of deed:** once executor period is over, everything is merged into deed. Except collateral promises. BUT “marketable title” is now gone. Remedies will now depend on deed.
  + Types of deed:
    - (1) **General warranty deed:** warrants title against ***all defects*** in title, whether they arose before OR after the grantor took title. E.g., don’t end up owning backyard 🡪 get proportion of price back or price back (not land), and depends upon solvency of seller. ***Rare***.
      * Better to walk away from deal than rely on title insurance.
    - (2) **Special warranty deed:** warranties only against the ***grantors own acts*** but not the acts of others.
      * More common than general warranty deeds.
    - (3) **Quitclaim deed:** contains no warranties of any kind. Release of all right, title, and interest that seller has in the land.
  + Can effectively transfer title w/o physically handing over deed. Can unequivocally express intent, and that’s good enough. Unlike gifts of smaller property.
  + *Sweeney v. Sweeney* (deeds his farm to brother, and brother deeds back; wanted to brother to have farm, but wanted to keep farm if brother died first)
    - Court valued formal structures over intent. Whole exercise between guy and brother was meaningless. Conditional delivery can ONLY be made by placing dead in hands of **third party**.
      * Justification for the rule (states split on whether a deed can be directly given to grantee)? You ***cannot see*** the condition. Worry is that third party wouldn’t be able to see the condition. Solution by other states: condition invalid once bonafide purchaser enters picture.
      * Brother’s deed back to guy had to be presently effective or else it wouldn’t have been able to work in the future.

**#Estates in Land**

* Major presumptions in conveyance:
  + Presumption in *favor of fee simple*.
  + Presumption in *favor of free marketability* (free alienation).
  + Policy *against automatic forfeiture*.
  + If no will or inheritors 🡪 escheats to the state.

### *Bullet-point Notes on Estates*

1. **#Fee simple** 
   1. Characteristics: Potential of infinite duration
   2. Types:
      1. **Fee simple absolute**: No future interest. Maximum number of rights. No limitations on heritability, cannot be divested, nor will it end on the happening of any event.
         1. Creation: “to A and his heirs” “to A”
      2. **Fee simple defeasible**: Defeasible (comes to an end) on the happening of some event. Big restraint on alienation. Many states have passed statutes that say conditional reverters automatically void unless re-recorded 30 days after. Prevents conditions from lasting forever. Wipes rights off the deed.
         1. Fee simple determinable
            1. Estate **automatically ends when some specified event happens**. When the event occurs, fee simple automatically reverts to O (“possibility of a reverter”, and this need not be expressly retained)
            2. Language must show **durational aspect**, and NOT just purposive aspect: “while used for...” and “so long as P is used for...” work; “I give P to O for X purpose” does NOT work, and the transfer would give O a fee simple absolute.
         2. Fee simple subject to condition subsequent
            1. Estate ***may be*** terminated at the grantor’s discretion when a stated condition happens. NOT automatically ended, but when transferor elects to end. Creates “right of entry” or “power of termination.” To X “but if…then grantors and heirs shall have right of entry.”
            2. Creation: “to A, but if X happens…” “to A, upon condition that if X happens…” “to A, provided, however, that if X happens… then O retains a right of entry”
         3. Fee simple executory limitation
            1. Estate that, on the happening of a stated event, is automatically divested in favor of **a third person**. Subject to condition subsequent and in the same instrument creates a future interest (called “executor interest”) in a third party rather than in himself.
            2. To X “but if…then to Y.”
   3. NB: Construction presumption is *against* automatic forfeitures and *for* free alienability of land
      1. Presumption in favor of fee estate (*White*)
2. **Fee tail**
   1. Characteristics: Lasts as long as the ***grantee or any of his descendants survives***, and is inheritable ONLY by the grantee’s descendants. Purpose was to keep property in same bloodline.
      1. O has a reversion in fee simple to become possessory upon expiration of the fee tail (no more A and all A’s descendants are dead)
      2. Can also vest a remainder interest, such that B gets it if A and all A’s descendants are dead
         1. “to A and the heirs of his body, and if A dies without issue, to B and his heirs”
   2. Creation: “to A and the heirs of his body”
3. **Life estate**
   1. Characteristics: Potential duration of one or more human lives. Measured by tenant or life of another person. Can be imposed by law. Condition that if occurs, reverts to heirs.
      1. Can also be a life estate in trust: property is held by X in trust for A for life
      2. Legal life estates are **very rarely used**. Anything you’d want to do with a life estate would now be used with a trust.
   2. Types:
      1. For the life of the grantee (“to A for life”)
      2. Pur autre vie
         1. Measured by the life of someone other than the owner of the life estate
         2. “B for the life of A”
      3. Defeasible life estates
         1. Determinable: “to A for life so long as X”
         2. Subject to condition subsequent: “To A for life, but if X “
         3. Executory limitation: “To A for life, but if X, then to B”
   3. If alienated (transferred, leased, etc.), transferee gets no more than what A has: estate ends at the end of the relevant life
4. **Interest in real estate that are less than estates**
   1. ***Easements*** – right of way.
   2. ***Profits –*** e.g. right to mine, extract gas, etc. Often combined with easements.
   3. ***Covenants*** – most commonly seen deed is conveyed with promise to use part of property for X (e.g. conservation).
   4. ***Licenses*** – different from leases in the sense that don’t really have the right to exclude. License governed by terms. Or, like mall – stores are leased, but carts in the middle of aisle are licensees.

* [Life Estate v. Free Will] *White v. Brown* (holographic will [in handwriting of testator]; “wish X to have my home to live in and not to be sold; Lady’s niece, Brown, claims the will created a life estate and she obtained a remainder interest. White sued to quiet title, contending the will created a fee estate)
  + Unless the words and context of a will **clearly evidence** an intention to convey ONLY a life estate, it will be ***interpreted as conveying a fee estate***. Not enough evidence to show clear intent to pass only a life estate as is sufficient to overcome the law’s ***strong presumption that fee simple interest was conveyed***.
    - If something can be construed as fee simple absolute, it will be.
    - If not absolute possible, then on condition subsequent is preferred to prevent forfeiture.
    - This case illustrates two common rules of construction: intent of testator is derived from the entire document, and extrinsic evidence is admissible only under limited circumstances.
  + “To Harvard for education purposes” 🡪 construed as merely a wish and a fee simple absolute.

**Leasehold Estates / Landlord Tenant Law**

* A #lease is simultaneously a conveyance of an estate and a package of bilateral promises. Tenant owns an ***estate in land***. Landlord has ***reversionary interest***. Means tenant is ***owner*** of an estate in land, which means common law treats you like owner.
  + Residential leases tend to be viewed in a more contractual nature than commercial leases
    - Both have common law of property at bottom
    - Both also have common law of contract at bottom
    - They also have “lawyer-made law”
    - The differences?
      * Commercial law governs interpretation of commercial leases “UCC”
      * Residential leases have a large degree of statutory regulation
  + Statute of Frauds requires that leases over one year be in writing
  + **A lessee has all the rights of possession that the fee owner has**. Leaseholders own a present possessory interest (in which the owner retains the reversionary interest).
    - Lease agreement does away with some of rights:
      * Usually cannot sell leasehold (because of contract)
      * Most redecorating rights are contracted away (as are some rights to exclude)
* Types Of Leases (first three are main types)
  + **Term of Years:** A lease for a single, fixed term of *any* length. (Must be computable if not explicitly specified.) Must end at or before a computable day.
    - May be made defeasible on the occurrence of some uncertain future event (e.g., landlord response in event of failure to pay)
  + **Periodic Tenancy:** A lease for a recurring period of time. It continues for succeeding periods until either the landlord or tenant gives notice of termination.
    - Most statutes require a notice period of one month (though Common Law required much longer).
    - Periodic tenancies may be created by agreement or by operation of law (constructively created b/c of practice). When created by operation of law, there is often difficulty deciding what the period is, but the issue is often resolved by observing how frequently the rent is paid and using that as the recurring period.
    - Tenancy at will can be converted to a periodic tenancy by giving/receiving of regular rent (implied-in-law lease)
  + **Tenancy at Will:** A leasehold for no fixed time or period that lasts only as long as both parties desire. It may be terminated at any time by either party. Most statutes require one month’s notice.
    - A tenancy for a defined period – either periodic or for a term of years – that is terminable whenever one party wishes is a determinable periodic tenancy or term, not a tenancy at will
    - A tenancy at will must be mutually terminable. A unilaterally terminable leasehold, in which only one party has the right to terminate, cannot be a tenancy at will. It is a determinable tenancy (lease-hold life estate). (*Garner v. Gerrish*)
  + **Holdovers – Tenancy at Sufferance:** trespasser with legal entry.
    - **Two options:** (1) evict and recover damages for lost possession; or (2) to bind holdover tenant over to new term 🡪 periodic tenancy. Terms of the lease will be the same. **Problems:** landlord has often gotten a new tenant. And tenant might accidently be bound for new term.
    - Commercial leases more contract than conveyance (property law).
    - Case with posting signs on door and windows: landlord did NOT have rights for door and windows. Injunction to remove signs intruded on tenant’s property rights.
    - Every lease has a ***dual character*** – conveyance AND a contract. MAG: each lease has a triple character 🡪 common law and property, dual nature of conveyance and contract, and third layer of statutory regulation.
    - In commercial leases, predominant engine in leases is lawyer-made law (contract). In residential, its statutory law.
    - A tenant who stays on in possession after the term has expired is no longer a lawful tenant. He occupies a status of legal limbo between tenant and lawful trespasser until landlord decides how to treat him.
* [Ability To Terminate As Life Estate] *Garner v. Gerrish* (Donovan [lessor] leased a house to Gerrish [lessee]. The lease contained a clause granting Gerrish the ability to terminate the lease at the date of his choice. No such right was reserved for the lessor. Upon Donovan’s death, the administrator attempted to evict Gerrish, claiming the lease had been a tenancy at will)
  + Court construed it as a **special kind of life estate** 🡪 life estate that could come to an end before the death of life tenant = defeasible life estate. Doesn’t really put into normal lease box. Looking at ***intent***. Shift towards contract law?
    - PP: tenancy at will ought to be terminable by BOTH parties. And if tenancy at will, comes to end when one of the parties dies.
* [Holdover And Rights Of New Tenant] *Hannan v. Dusch* (Hannan, the lessee, alleged that Dusch, the lessor, failed to deliver possession of rented property by allowing a former tenant to remain in possession)
  + Landlord has **NO duty to deliver possession** (American rule), ***only to place in legal possession***. A landlord does not impliedly covenant against the wrongful acts of others, and is not responsible for tortious acts of third parties unless he expressly contracts to such an effect.
    - American rule: gives ***right*** to possession
    - English rule: landlord obligation to ***deliver*** possession
  + Walking way from lease:
    - Penalties?
    - Sub-let.
* [#Assignment v. Sublet] *Ernst v. Conditt* (Ernst leased property to Rodgers, who assigned his lease to Conditt. Ernst sought damages from Conditt for past rent due and removal of improvements. The trial court held that the document constituted an assignment, rather than a sublease, and held Conditt (rather than Rogers) liable for monies owed)
  + If an instrument purports to transfer the lessee’s interest for the ***entire remainder*** of the lease term, an **assignment** has occurred. However, if the instrument purports to transfer the lessee’s interest for ***any length of time less*** than the remainder of the lease term (or reserves such rights as re-entry in the event of a breach), a **subleas**e has been established. The **intention of parties governs** – NOT the terms they use in their agreement.
    - **Right of Re-entry:** An interest in property reserved in the conveyance of a fee that gives the holder the right to resume possession of property upon the happening of a condition subsequent
* [No Arbitrary Objections To Lease Assignments] *Kendall v. Ernest Pestana, Inc.* (landlord arbitrarily refuses to approve a sublet on a hanger space at a municipal airport unless the rent is increased)
  + Landlord needs to have a ***commercially reasonable*** objection to the assignment. Absent contractual language to the contrary, a lessor may not arbitrarily withhold consent to an assignment.
    - **Two rationales:** *policy against restraints on alienation* pertains to leases in their nature as conveyances (doubts should be resolved in favor of alienability). *Implied duty of good faith* in leases nature as contracts. Bifurcated rule between residential and commercial.
      * This case ***applies only to commercial leases.*** Also, it reserves to lessor the right to **include within the contract the right to arbitrarily veto a sublease**.
    - Commercially reasonable? Easy case: bad credit.
  + **Assignment:** transfers ***entire unexpired term*** to assignee. Original tenant retains like-assured to the original landlord.
  + **Sublease:** tenant grants an interest ***less that full duration*** and ***retains a reversionary interest*.** 
    - Prefer to sublet so as to return to apartment or take advantage of rising rents in future date.
    - Prefer assignment to avoid being a landlord. Get rid as much hassle as you can.
  + ***Original tenant, whether he sublets or assigns, retains obligation to landlord***. Only way to get rid of obligation is to get a release.

**Landlord’s Remedies**

* Lease-Created Remedies
  + Rent acceleration: A rent-acceleration clause makes the entire remaining rent for the term of lease *due immediately upon a default by tenant*.
  + Security deposits: The landlord may demand a deposit from the tenant at the inception of the lease as security for the tenant’s performance of the lease obligations.
    - Statutes strictly govern landlords’ use of such deposits, especially in residential leases
  + Liquidated damages: A lease may provide for liquidated damages. Such clauses are valid if the amount of liquidated damages is **reasonably related** to the probable damage, but the **actual damages cannot be easily determined** (i.e.: not just penalty).
* Statutory And Common-Law Remedies
  + Eviction: By statute, a landlord is permitted to terminate the lease and evict the tenant for *non-payment of rent and occasionally for breach of other lease covenants*
    - Handled in summary proceedings where the only issue is entitlement to possession
    - Distinct from common law ejectment in that summary proceedings are available and case cannot raise issues that go beyond possession
  + Tenant Abandonment: Tenant abandonment is an offer to surrender the lease. The landlord may:
    - Accept and terminate the lease
      * Tenant liable for unpaid rent up until termination (plus damages caused by abandonment)
    - Reject and leave the premises untouched
      * Tenant *remains liable for rent*
      * Many jurisdictions require that the landlord retake possession and re-let to mitigate damages if he rejects surrender (See, e.g., *Sommer*)
    - Reject but retake possession and re-let the premises on behalf of the tenant
* #Self-help: Some states absolutely forbid self-help. (See, e.g., *Berg*) Others require that the landlord **act peaceably.**
* [No Self Help] *Berg v. Wiley*  (tenant’s restaurant violates health code, closed restaurant; landlord tried to retake possession)
  + ***No self-help to remove a tenant in breach***.A landlord may NOT remove a breaching or defaulting tenant’s possessions or bar such tenant’s access to the leasehold without resorting to judicial remedies
    - **Court announces new rule:** “peaceable” is term of art. Not no conflict, but self-help. So new rule does not surprise parties.
    - Common law permitted self-help procedures by landlords if removal was accomplished peaceably. In response to a long-applied policy to discourage landlords from taking the law into their own lands, the modern trend has been to bar self-help to dispossess a breaching tenant. This case suggests that the right to quiet possession and the obligation to pay rent are not entirely interdependent.
* [Mitigate Damages If Abandons Premises] *Sommer v. Kridel* (tenant vacated the apartment that he leased from L after one month. L did not re-let the apartment for over a year [despite the availability of an interested tenant] and sued to recover unpaid rent for full two years of lease)
  + Landlord has ***duty to make reasonable efforts*** to mitigate damages.
    - Typically not economically viable to leave apartments vacant. But large landlord might leave vacant as a deterrent for other tenants to abandon lease.
    - The **burden of proof is on the landlord** to establish that he used ***reasonable diligence*** in attempting to re-let the premises. Among the factors to be considered are whether the landlord offered or showed the apartment to any prospective tenants, advertisement of the unit, etc. In this case, despite the availability of a prospective tenant, Sommer allowed the apartment to lie empty in order to increase the amount of damages.
  + **Many jurisdictions have declined to follow this rule**. Pennsylvania rejects duty to mitigate for five reasons: (1) leases have been drafted and bargained on reliance on no duty to mitigate; (2) simplicity. Mitigation has unlimited potential for litigation; (3) Penn legislature didn’t change rule; (4) fundamental unfairness to force un-breaching landlord to mitigate for breaching tenant; (5) tenant is in position to mitigate himself
  + Remedies to landlord for material breach of lease:
    - **Evict**
    - **Remove out of security deposit.**
    - Landlord can only sue for rent as it **comes due**
      * EXCEPT if there is a rent acceleration clause. If penalty 🡪 court will hold void.
    - And anticipatory breach

**#Tenant’s Remedies**

* Landlord’s Obligations For Physical Conditions Of Premise and Tenant’s Remedies
  + Tenants enjoyed very few under common law of property. Leases were treated like deeds (like a conveyance or sale of estate in land). Common law background: caveat lease; independent covenants; T’s duty under law of waste.
    - Landlord had no duty to deliver premises in any physical condition (just had to deliver the right to possession under American rule)
      * Once in possession, landlord had duty to protect tenant’s quiet enjoyment
  + At common law, tenant had a limited duty to repair
    - His responsibility with respect to lease was governed by **law of waste**
    - Tenant was required to make such repairs as were ***necessary to prevent waste and decay*** (but not major repairs)
  + **Exceptions** (can’t forget common law background – still there to some extent. Exercise is to find out what is left of it):
    - L’s duty to **disclose latent defects** of which the T **couldn’t have discovered upon *reasonable inspection*** that L knew/should have known. Doesn’t mean he has to do anything about it, just disclose.
    - L’s duty to maintain areas **under L’s control** – pipes, wiring, etc.
    - **Fraud**
    - [Most Important] Expansion of the covenant of **quiet enjoyment** (L’s duty to refrain from wrongful actual or constructive eviction of tenant). Interpreted to include **protection against disturbance of T’s beneficial use**. Obligation comes from clause in the lease, clause in statute, etc. Remedy is constructive eviction (getting broader and broader). In order to assert it, T must vacate the premises
      * Actual total eviction: Tenant who is wrongfully physically ousted from the entire premises **may terminate lease with no further liability**
      * Actual partial eviction: Traditional rule is that wrongful eviction from any part of premises entitles tenant to abate rent entirely until restored to full possession. **Modern view is partial rent abatement at reasonable value for loss**
      * Constructive eviction: If a landlord (and not someone else) wrongly interferes with the tenant’s use and enjoyment of the premises so substantially that the ***intended purpose of the tenant’s occupation is frustrated***, constructive eviction has occurred
        + *Tenant may move out and terminate lease with no further liability*
        + Before vacating, tenant must **notify landlord** and **give reasonable chance to fix problem**
        + If tenant vacates and court does not find constructive eviction, he will *be held to have abandoned*
  + At present (70’s onward) – divergence of commercial and residential leases, both with common law background and statutes.
    - Commercial Leases:
      * “Lawyer-made law.” Usually come out of memory banks of law firm. Pro continuing relationship. Framework that both parties hope will be profitable and avoiding disputes.
      * Commercial law
    - Residential leases:
      * Housing codes (began in Boston/New York trying to address dangerous/unsanitary housing; led to Federal Housing Act – provided funding contingent on passing housing/sanitary codes). No renting property that are not in fit/safe/sanitary/habitable conditions. L has duty AND maintains these conditions. People realized that codes were in conflict with common law 🡪 lead to #**implied warranty of habitability**.
      * **Implied warranty of habitability (judge-made law)** – Contract remedies & Administrative enforcement.
    - **Warranty of habitability**
      * Traditional view is that the landlord makes no warranty that the premises are fully suitable for the tenant’s purposes.
      * Modern trend is to imply into every residential lease a warranty that premises are habitable. Tenant may not waive warranty (which is often codified in statute). (*Hilder*)
  + ***Tenant Remedies*** for landlord breach of **implied warranty of habitability**
    - Terminate and leave (and perhaps recover damages)
    - Stay and withhold rent (often must deposit rent into an escrow pending repair of defects)
    - Stay and repair (may use reasonable portion of rent to make repairs)
    - Stay and recover damages (in the form of rent abatement or deductions). Measure of damages is either:
      * Difference between warranted value and value as is
      * Difference between stated rent and value as is
      * Reduction in stated rent equal to the proportion by which warranted value has been reduced
    - Stay and defend: tenant can stay and, if he can prove an inhabitable condition, use it as a complete defense to an eviction for failure to pay rent
    - Punitive damages (in especially egregious cases involving willful, wanton, or fraudulent conduct)
  + **Retaliatory Eviction:** Landlord cannot seek eviction ***in retaliation*** for tenant’s assertion of habitability warranty. Tenant must prove retaliatory motive and the remedy is available only to a tenant who is not in default.
    - After retaliatory motive has been found, landlord can only evict if he can prove an independent good business reason
    - Landlord may not evict through indirect methods (i.e.: drastic cut in services)
* [Commercial Case – Constructive Eviction] *Village Commons v. Marion County Prosecutor* (obstacle to tenant remedies was “exclusive remedies” provision – “tenant cannot terminate lease”; court said ***landlord*** evicted tenant and thus terminated lease, not terminated by tenant and constructive eviction was failure of landlord to remedy problem)
  + **Elements of showing constructive eviction** – (1) Problem has to be ***prolonged***.Time element. (2) Problem has to be ***serious***.
    - CE has its limits. Risky for tenants b/c if you guess wrong 🡪 stuck on the lease. Useful for commercial tenants in many cases; more difficult for low-income residential tenant. Not that helpful (often have no where to go).
    - If landlord evicts you from ***part*** of premises, tenant can treat it as ***eviction of the whole***.
  + **Problems:** 
    - Horrible noise from the neighbors, serious and repeated? Question: were the noise-makers tenants of the landlord; does he have the power? If not, what can he do about it? Court will need to interpret circumstances. If outside third parties, starting point is landlord NOT liable, but if criminal activity, landlord has duty to provide safe common areas. Or required to provide security. But in principle, not liable for third parties.
* [Implied Warranty Of Habitability] *Hilder v. Peter* (poor tenant paying rent in horrible circumstances; test case and unusual that tenant still paying rent [made case better; rebuts court presumption that tenant just doesn’t want to pay rent])
  + An ***implied warranty of habitability*** exists in residential leases.For residential tenants, ***constructive eviction is gone***. Replaced. Who’s covered? **Everybody** (“any tenant…”). Not every state agrees here. Some exclude single-family home landlord, especially if long term lease (looks more like a sale and tenant is more like a homeowner).
    - This case illustrates the problems of scope and limits when law changes in dramatic way (caveat lease 🡪 implied warranty of H).
    - In Vermont, CANNOT contract out of implied warranty of habitability. Some states disagree, but require evidence of real bargaining. Other states say it is outside contract and is a matter of public policy.
  + What are terms of IWH in Vermont? Start with housing codes, but don’t end there (not that many cities of 50k people in Vermont). Look at impact on heath and safety.
  + How do we know if breach is serious enough to start withholding? Some risks for tenant. Main thrust is health and safety concerns. Must be serious.
    - Landlord must be **notified** (chance to fix it) and given **reasonable time to correct**.
  + **Remedies in place of constructive eviction:** 
    - Ordinary contract remedies. Damages (lots of different methods varying from state to state). Rescission (p. 520). Also :
      * Repair and deduct (tenant fixes problem and deducts from rent). Judge-made remedy, led to lots of legislation. Worried about tenant upgrades and taking advantage. How often? Reasonable amount? Heavily regulated remedy.
      * Withhold rent (or portion of rent) and stay on premises.
  + Problem 4(a) (p. 525) – landlord’s argument: no control over city employees! And not signing agreement strikers. Court didn’t buy it. Landlord could do it himself. Suppose it was power failure of city (landlord had nothing to do with it), then landlord probably off the hook. BUT footnote 11 of *Berman*. Landlord usually only charged when he is ***responsible*** – common law, statutory, or because of contract.
* [When Does Rent Abate] *Berman v. Jefferson* (T went w/o hot water and heat from time to time; withheld part of her rent; L sued; Issue: after notice or after notice and a reasonable time to repair?)
  + Once landlord **receives notice** 🡪 tenant can abate ***immediately***. Landlord’s argument based in contract. But court said NOT about fault, but about public policy. Tenants cannot say that they took reasonable efforts to pay rent; why should landlords enjoy the same protection?
    - Not every state would follow this.
  + MAG: Is this really a warranty? Lasts the life of a lease and non-waivable. Doesn’t sound like contract. Taken out of the realm of private agreements; more in the realm of regulatory/consumer law.

1. **THE #CONSTITUTIONAL LAW OF PROPERTY**

**Property and #Due Process** [fairly stable line]

* Constitution say and doesn’t say? Does NOT say there is a right to property. Maybe b/c it’s a pre-political right recognized, but not given by government? There are **protections of property**. Prohibitions against states having own bankruptcy laws or currency (protecting credit). Bill of rights – protections in the home. 14th Amendment: No deprivation w/o due process of law and just compensation.
* [Ex Post Facto And Property Rights] *Calder v. Bull* (no 14th amendment; comes up under ex post facto clause; P arguing that will should be set aside and won in state court, but legislature passed law to set decision aside)
  + All agree: Ex post facto ONLY applies to ***criminal penalties***. And **property is *not* an absolute right** 🡪 distinction between criminal rights and “private rights.” Acceptance that property has to be regulated in the public interest, and sometimes that regulation has retro-active effect. Also seem to agree upon judicial review.
    - **Disagreement between Chase and Iredell:** about constitutional interpretation and relationship between court and legislation. **Iredell** 🡪 court is limited to the ***text*** of the constitution. Yes, there are great principles that underlie constitution, but principles not limited there. You can’t talk about natural rights or natural law b/c nobody agrees on what that is. We ***agreed*** on constitution. Limits the framework we draw on. **Problem:** you have to amend constitution or regulated to political process. **Chase** 🡪 in addition to constitution, court can look at ***principles that underlie*** constitution. Those that are found/implied in the social compact. NOT saying look at any principles of natural justice. Ex. taking property from A and giving it to B.
    - What’s wrong with the will? Formal defects? Undue influence/duress/lack of capacity? Many states forbid “special legislation” 🡪 legislation aimed at specific case.
    - *Marbury v. Madison* was decided shortly thereafter, but only sparingly used in next 50 years. Picked up in 80’s.
* [Liberty Trumps Everything But Public Health] *Lochner v. New York* (baker that worked more than 60 hours/week)
  + A law that affects freedom of contract is unconstitutional if it is ***not reasonably related*** to a legitimate purpose of protecting public health. There is ***no reasonable ground*** for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. Court doesn’t buy that law has legitimate end in protecting health/safety. Act must have a ***direct relation***. NOT a health law, but a ***labor law*** 🡪an illegal interference with rights of individuals to make contract. ***Liberty interest; freedom of contract***.
    - Why labor laws? Hour restrictions leads to more laws? Health/safety? Avoid jobs being taken by illegal immigrants?
    - *Lochner* took hard look at both means AND ends of legislation.
  + **Harlan Dissent:** brings in social science to argue bakers could be at health risk. Liberty to contract is subject to reasonable police regulations. Statutes falling within the States’ police powers should be reviewed under a rational basis test, with a presumption that the state is acting properly, and with the burden on the challenger to rebut that presumption by showing the law is not rationally related to state police powers.
  + **Holmes Dissent:** not the role of the court to strike down legislature when it passes law that ***reasonable men disagree over***. Majority is importing into constitution their own economic theory. Legitimate sources to consider when striking a law down 🡪 clear text of the constitution; traditions of our people and the law (?). Not a complete textualist opinion.
    - The word ‘liberty’ in the fourteenth amendment does NOT invalidate a statute UNLESS it reasonably can be said that the statute infringes fundamental principles of our people and our law. This law is clearly related to public health and ought to be upheld. The Constitution was not intended to embody a particular economic view and is not a document about economic philosophy.
* [Height Of Lochner Era] *Coppage v. State of Kansas* (D was charged with requiring “yellow dog contracts” [condition of employment you have to renounce union membership] in violation of Kansas law)
  + Legitimate exercises of the **state police power** could restrict freedom of contract, but there was ***no relationship*** here between the statute's purpose and the state's police-power goal. **Constitutional right to make contracts for the acquisition of property**.
    - Employment relations are the same as a contractual arrangement.
    - Both contracting parties have the right to terminate the employment ‘at-will’ for any reason. At the onset, the employee has the choice to refuse employment if union membership is more valued than the position offered.
  + Series of decisions that struck down regulatory laws upon **principle of freedom of contract**. But did uphold rent control (emergency after WWII) and zoning law.
* [Tides Begin To Turn] *Nebbia v. New York* (sold milk at lower price than state minimum price [law set to combat effects of Great Depression])
  + Property/contract rights are NOT absolute in nature and may be subject to limitations. Due process only requires that law shall not be ***unreasonable, arbitrary or capricious***, and the means selected shall have a ***real and substantial relation*** to the object sought to be attained. State is free to adopt whatever economic policy may ***reasonably be deemed*** to promote public welfare, and to enforce that policy by legislation adapted to its purpose.
    - *Shifting away from freedom of contract*. Says no such thing as constitutional freedom of contract. Due process makes no mention of sales or of prices any more than it speaks of business of contracts or buildings or other incidents of property.
    - Consistent with *Lochner*: maintains need for reasonable connection between police power and public interest
    - Break from *Lochner*: Shift in tone, does not second-guess wisdom of legislation
    - Break from *Coppage*:Admits that property/contract rights are not absolute
* [Reasonable Relation And Interests Of Community] *West Coast Hotel Co v. Parrish* (minimum wage for women and children)
  + Constitution does NOT mean freedom of contract. Does speak of liberty broadly and prohibits the deprivation of liberty without due process of law. **No absolute and uncontrollable liberty**, but liberty safeguarded in a social organization that requires the protection of law against the evils that menace the health, safety, morals and welfare of the people. Liberty is thus ***restrained by due process***, and regulation that is ***reasonable*** in relation to its subject and is adopted in the interests of the community is due process.
    - Sometimes text gives general direction. How much content can court pack into general statements? Not much.
    - Language (different than *Lochner*) about unequal bargaining power, protecting women as a class, considerations of the likely effects of a decision one way or another.
  + Would this statute be constitutional today? Doubtful. Based on gender. Equal protection clause.
    - *Coppage* was soon after struck down. Upholds statue that gives definite boost to labor movement.
* [Culmination of the Movement] *Ferguson v. Skrupa* (Kansas statute forbade anyone to engage in “debt adjusting” except lawyers. Skrupa was in business as a "Credit Advisor" and engaged in this practice. A lower court held that the Kansas statute was an "unreasonable regulation of a lawful business" and struck it down)
  + It is up to the legislatures, NOT the courts, to decide the wisdom and utility of the legislation. Legislature was **free to decide for itself that legislation was needed** to deal with the business of debt adjusting. Refuse to sit as a “super-legislature to weigh the wisdom of legislation.” Refuse to go back to the time when courts used the DP clause “to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.” **Almost complete deference to the legislature. Lowers bar to arbitrariness.**
    - ***Highly deferential***. Returned to original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies that are elected to pass laws. **“We are not concerned with the wisdom, need, or appropriateness of legislation.”**
  + [Middle Ground] **Harlan concurrence:** Statute only has to bear a ***rational relationship to a constitutionally permissible objective***.
* Since 1963 (Fergusen vs. Skrupa), this line is fairly stable.

**Property and #Public Use** [much more active line of cases]

* *Kelo* left latitude for the states, so activity tends to be in state courts and state legislature.
* The Power Of Eminent Domain
  + 5th amendment does NOT grant ED power, but it just sort of assumes that it there (says it must be exercised in certain way). Where does government get power? Inherent in the power of the sovereign. **Always been treated as an attribute of sovereignty, something that the government needs to have.** SCOTUS: 5th amendment is “a tacit recognition of pre-existing power.” Greater sense of urgency b/c of public-use works—roads, railroads, etc. **Avoid problem of hold-outs, and gov is using tax dollars**.
    - Rationales come after the fact. Gov’s have tended to pay compensation, even when it has not been required or specified.
    - Questions come up about favoritism and what constitutes compensation.
  + **Conditions for ED in U.S. law:** must be for ***public use***, and ***just compensation*** must be paid.
    - Not clear from 5th amendment what “public use” means. Use by everyone? Use by gov that is open to public? Use by gov but not open to public? Preventing harm—diseased trees/cattle? Promoting some general good—health, education, and welfare? Something as broad as “if legislature says so”?
    - The property owner is entitled to the fair market value of the property taken. When only a portion is taken, the owner is entitled to **severance damages** – the difference between the value of the entire parcel before the taking and the value of the parcel the owner is left with after the taking.
    - By *Berman*, three things seems to be clearly settled: (1) public use does NOT mean “anything that legislature says so,”; (2) purpose of ***preventing threat to public health/safety*** was clearly approved as PU; (3) public use, if it means anything, does NOT mean take away from private person A and give to private person B.
* [Opens Up Urban Redevelopment] *Berman v. Parker* (1954)(post WWII; FDR pushed legislature to pursue urban redevelopment; lots of specific finds of legislature that facilitated decision—area was problematic, project was “public use,” private parties were preferred over public for development, etc.; owners of commercial property challenged project, argued that their property didn’t fit within purpose)
  + PP: (1) statute is addressed to removing blight, and commercial place is perfectly good store. And (2) statute takes from private owner A and gives to private owner B.
  + Court: To (1), congress is NOT restricted to **consider building by building**. Can consider need of area ***as a whole***. Comprehensive plan can set its own boundaries. To (2), points to finding of congress that private ownership will be more efficient/better for public. And then goes a step further (why case is landmark): ***public benefits, including aesthetics*, is part of public use** 🡪 opens door to historic preservation laws.
    - **Scope of review:** once legislature has decided it is “public use,” not for court to second-guess. ***Extremely narrow judicial role***. ***Well-nigh conclusive***.
    - To loser: Douglas says its fair b/c of **just compensation**.
* *Berman* And *Parker*
  + MAG: hard to fault the court. All displaced were in adequate housing afterward. And were acting on legislation. Eventually, urban renewal discontinued by legislation. States stop using ED less and less to eradicate social ills, but instead used for ***economic development*** (increase the tax base; provide jobs).
  + Two lines of cases, DP and PU, look fairly stable, but PU became unstable b/c (1) using ED in novel ways to **solve economic problems**, and (2) state courts/legislatures pushing back on ED.
* [Rational Relation To Any Conceivable Public Purpose] *Hawaii Housing v. Midkiff* (centuries old oligopoly that dominated Hawaiian property rights, remnant of tribal chief system; Hawaii passed legislation that allowed renters to buy their property—break up ownership; aimed at making housing more affordable)
  + Public Use is ***coterminous with the police power***. If valid use of police power 🡪 valid public use. Standard of review: if legislature gave ***rational relation to any conceivable public purpose*** 🡪 ok. O’Connor regretted this language. Court **very reluctant** to second-guess legislature, even in the light that the public purpose won’t be actualized. ONLY that legislature could have **reasonably believed** that public goal would be actualized. Court is NOT in place to do empirical studies.
    - How is this not a transfer from private A to know B (not like undetermined developer of *Berman*)?
    - Very much in the style of where DP cases ended up. Practically no scrutiny of legislature decision.
    - Police power: not mentioned in constitution, but seen as implied. Power to regulate for health and safety.
  + Aftermath: did NOT meet its public purpose. Property prices doubled in six years.
* [ED For Private Use And Economic Development] *Poletown v. City of Detroit* (1981)(land taken for a GM plant; area terrified that GM would move [unemployment would increase and city would lose millions of dollars in real estate and income tax revenues], so city used ED to condemn land to increase jobs/tax base)
  + Public purpose is **primary benefit**, and benefit to private interest is ***merely incidental***.Determination of what constitutes a public purpose a legislative function, subject to review, and should not be reversed except in instances where such determination is ***palpable and manifestly arbitrary and incorrect***. Standard seems to be **minimal scrutiny**. Court does mention that when private parties are benefited 🡪 “court inspects with heightened scrutiny claim that public interest is the predominant interest. Such benefit must be clear and significant.”
    - Sub-holding: hard to squeeze social damage into “natural resources” clause of EPA.
  + **Fitzgerald dissent:** ***no limit*** to use of condemnation to aid private businesses. The concept “public use” cannot evolve to the extent the majority claims it has. If increased employment, tax revenue, and general economic stimulation qualify as “public use” virtually all takings to benefit private businesses would be permitted.
  + **Ryan dissent:** the proper vehicle for change of this dimension is a constitutional amendment.
* [Overruled *Poletown* In Michigan] *Wayne v. Hathcock* (2004)(Wayne County wants to use eminent domain to condemn D’s properties for construction of business and technology park to improve economies in SE Michigan. MI Constitution requires that takings be for “public use”)
  + Takings are NOT Constitutional per MI constitution because the property was to be transferred to private parties, **not within the common understanding of “public use” in 1963 when constitution was ratified**. Also, *Poletown* ***“generalized economic benefit”*** justification for transferring property to a private entity is **overruled**. REVERSED and remanded.
    - Have to show **one of three things** to satisfy “public use” requirement in Michigan: (1) involve public necessity of the ***extreme sort otherwise impracticable***—highways, railroads, canals, and other instrumentalities of commerce; (2) private entity ***remains accountable*** to the public in its use of that property (public oversight); ( 3) when ***selection of the land*** to be condemned is itself based on public concern—**underlying purpose** for resorting to condemnation, rather than the subsequent use of the condemned land, must satisfy public use requirement.
  + Case shows state level very active in addressing ED.
* **Mississippi case:** publicity changed the whole complexion of the case. Publication strategy + litigation strategy.
* [Private Property And Public Interest] *Kelo v. City of New London* (2005)(eminent domain use to seize private property for development project; P challenged under “public use” per fifth amendment; SCOTUS approved all takings)
  + ***Economic development***qualifies as “public use” (“private property taking for public use w/o just compensation”). NOT ok to use ED for the ***purpose*** of conferring a private benefit on a particular private party, but no evidence of that here (pursuing public purpose often benefits private parties).
    - Should be very **deferential to reasoning of legislature** as to what “public purpose” meant. **Minimal rational standard**. Court is NOT in position to micro-manage urban planning. *Kelo* unique in that it was NOT a wholly blighted neighborhood. Economic development that was not necessarily tied to current condition of property.
    - **Problem:** maybe powerful local interests make unfair legislative process?
    - Permanent tension between a strong commitment to individual rights and the limits of those rights b/c we’re members of a community.
  + **Kennedy concurring:** ***primary purpose*** needs to be public benefit, NOT just incidental to benefit to a particular private party. Stricter standard of review might be appropriate.
  + **O’Connor dissent:** economic development rule is authorizing **any transfer** of private property under banner of economic development. Burden will fall onto persons who have the **least clout** in the political process. Economic development, on its own, does NOT pass constitutional muster. Bright line rule.
  + **Thomas dissent:** needs to be something that the **public uses**, NOT just general benefit to the public. If framers wanted public use to equal general welfare, they would have said it! “General welfare” is used elsewhere in the constitution. Use by the government or public, NOT some vague general public benefit.
    - **Cracks:** not a unanimous decision. O’Conner wrote opinion in *Hawaii Housing*, and now says “errant language.” Police power is NOT coterminous with ED. **Thomas:** think again about original meaning on public use and standard of review. **Kennedy:** maybe room for heightened SoR in appropriate case 🡪 where ED is for private property.

**Property and #Regulatory Takings**

* [Overview] Recall *Calder* and Blackstone. Property rights are not absolute. Police power—does not require compensation—and ED—does require just compensation—are two separate powers. Gov needs to regulate. Issues didn’t come up b/c not that much regulation of land use early in the republic. Following line of cases overlaps with due process line in the sense that they’re challenging regulation on multiple grounds.
  + Developed **two hard-edged categorical rules** by time of *Hadacheck*:
    - (1) If regulation involved ***physical occupation***, no matter how small (pipe under property) 🡪 compensation required.
    - (2) ***Nuisance regulation*** (exercise of police power), no matter how much it devalues/interferes 🡪 NOT a taking, and no compensation is required. [Though gov will also often provide compensation]
      * *Pennsylvania Coal* adds a vauge, open-ended “too far” test.
  + Third *per se* test added by *Lucas*:
    - (3) Taking when land-use regulation **“denies an owner all economically viable use of land”**
      * **Exception:** Where regulation does no more than could have been achieved in courts under State's background law of property and nuisance (then there is no taking). E.g., owner of lakebed not entitled to compensation when he is denied requisite permit to engage in landfilling operation that would flood others’ land.
  + Balancing Tests (when one of the *per se* tests are satisfied)
    - **Diminution in value test:** when governmental regulation of a use (that is not a nuisance) works too great a burden on property owners, it cannot go forth w/o compensation (*PA Coal* – Holmes) -- Becomes a taking when it ***goes too far*** (whatever that means).
      * ***Denominator problem*** (What is the denominator for determining the total value of the property?)—Brandeis in *PA Coal* dissent argued that diminution in value should be considered in relation to the entire property, as opposed to **conceptual severance** (meaning the interest in the property can be divided) (this is rejected in *Keystone Bitumious*)
      * Problem resurfaced in *Penn Central* where air building rights are not considered independently of whole property.
    - Fleshed out into 3 part test in *Penn Central*:
      * (1) the ***economic impact*** of regulation (diminution of value) and ***extent*** to which regulation has interfered with ***distinct investment-backed expectations*** are relevant
      * (2) the ***character or “nature” of government action***, e.g., physical invasion more likely to be relevant (demotion from per se rule)
        + In *Penn Central* Brennan makes “physical occupation” only a strong factor, NOT a per se taking requiring compensation. *Loretto* later rejects this.
      * (3) ***average reciprocity of advantage*** – determining “too far” involves looking at “reciprocity of benefits” - does the property owner get something from the regulation as well (*Penn Central* and *PA Coal*)
        + The court also notes that “government actions that permit/facilitate ***uniquely public functions*** have often been held to constitute “takings.”
    - Investment-backed expectations – (*Penn Central*) adds the IBE test in regulatory takings cases but meaning is unclear:
      * Some courts have held that expectations are frustrated only when regulation denies **all viable use** of land (effectively eliminating importance of IBE test).
      * Other courts have found IBE only when regulations interfere with investments that have been made prior to the regulation
        + *Palazzolo* seems to conflict with this view slightly in its holding that takings claims are not precluded in property acquired after regulations already exist – takings clause exists to protect both current and future holders against unreasonable state taking.
  + **Exactions**: Conditions for land-use permits (e.g., “We will give you this permit if you do X”)
    - Conditions placed on the issuance of land-use permits that would themselves be a taking are invalid UNLESS they share an ***“essential nexus”*** with the **purpose of denying the permit**. (*Nollan*) Not a taking if it is “substantially related” to “government’s valid regulatory objective.”
    - Even where they share a “nexus” the nature of the condition must be ***“roughly proportional”*** to the **negative impact of the use**. (*Dolan*)
* [Regulating Nuisance, No Compensation] *Hadacheck v. Sebastian*  (guy who owns brick yard in LA; extended city borders and city ordinance forbid brick-making factory)
  + **Enjoining a nuisance is never a taking.** Only limitation upon the police power to regulate nuisance is that it cannot be exerted ***arbitrarily*** or with ***unjust discrimination***. No prohibition on guy removing the bricks; only a prohibition w/in designated locality of its manufacture. Nuisance per se regulation is established power of state. Not a taking.
    - Why not ex post facto rule? B/c he continued to operate. But still feels unfair.
    - Court did not consider this to be a complete deprivation of Plaintiff’s ability to use his property because he would still be able to remove the clay from the property and operate the brickyard elsewhere (it is unclear whether the court would hold it a taking if it were a complete deprivation *à la Lucas*).
  + **Main criticism of nuisance per se rule: *impossible to distinguish*** abating nuisance vs. promoting some public good. They often do both!
* [Rule Based On Measuring And Balance] *Pennsylvania Coal v. Mahon* (company owned mineral rights under property where homeowners owned surface rights; mining caused subsidence)
  + Need to consider the ***extent*** of the diminution. When it reaches a **certain magnitude**, in most if not all cases there must be an exercise of ED and compensation to sustain the act. In this case 🡪 act CANNOT be sustained as exercise of police power. **General rule:** while property may be regulated to a certain extent, if regulation goes ***too far*** it will be recognized as a taking. It is a ***question of degree***, and cannot be disposed of general propositions.
    - Holmes concedes nuisance idea 🡪 can regulate to some degree w/o compensation.
    - Homeowners bought ***surface rights***. It’s what they bought, so it’s a matter of bargaining. Gave up rights to the support, and they have notice of mining.
    - MAG: don’t get a lot of guidance as to what “too far” means. Unclear what constitutes “taking.” This opinion adds to the two hard-edge rules a vague, open-ended “too far” test.
  + [Against Conceptual Severance] **Brandeis dissent:** need to look at regulation as a **whole**. Holmes is only looking at support rights, and should look at all of the parcel. Kohler act designed to prevent public harm. Clearly falls within nuisance rule.
* [Ad Hoc Factual Inquiry If Taking] *Penn Central Transportation Co. v. City of New York* (city historic preservation ordinance prevented company from building above penn station; taking of air space property?; not challenging ordinance, but wanted compensation and tried to analogize with *Mahon*)
  + **Balancing Test:** Ad hoc factual inquiry as to whether it is taking—three factors: (1) ***economic impact*** of regulation (diminution of value) and ***extent*** to which regulation has interfered with ***distinct investment-backed expectations*** are relevant; (2) ***character of government action***, e.g., physical invasion more likely to be relevant (demotion from per se rule); (3) ***reciprocal advantage***—person regulated is benefited as much as anyone else.
    - NOT a taking. Restrictions imposed are substantially related to the promotion of the general welfare, permit reasonable beneficial use and also afford transfer rights.
    - Brennan trying to re-conceptualize idea of what constitutes taking.
* [Permanent Physical Occupation = Taking] *Loretto v. Teleprompter Manhattan CATV* (ordinance required cable to be attached to house; owner sued for compensation)
  + ***Permanent physical occupation*** authorized by government is a **taking *per se***, without regard to public interests it may serve and no matter how small, that requires compensation. ***Character*** of government action is **determinative**. Especially serious b/c it destroys all rights in bundle of rights 🡪 (1) right to possess occupied space and has no power to exclude; (2) denies the owner any power to control the use of property; (3) permanent occupation of that space by a **stranger** will empty the right of any value, since purchaser will not be able to make any use of that part of property.
    - P paid $1 for compensation…
    - MAG: did NOT apply *Penn Central*. Return to traditional rule and small exception to *Penn Central*.
  + **Blackman Dissent:** ***anachronistic decision***. Why are you bringing about old rules? Far from “permanent.” If we can’t do this, how can we justify extensive regulation of landlord-tenant law?
  + Question hanging in the air: what is left of *Penn Central*?

**The Battle over Regulatory Takings**

* Three Lines Review
  + **Due Process:** *Lochner* 🡪 *Ferguson v. Skrupa* (Very low level of scrutiny).
  + **Takings, Public Use:** Began as restrictive, then 🡪 *Berman*, *Hawaii Housing, Kelo* (very low level of scrutiny).
  + **Takings, Regulatory:** Holmes “too far” 🡪 *Penn Central* (balancing test; very little scrutiny)
    - Brennan, ambitiously, says every case is ad hoc factual inquiry balancing a bunch of factors.
    - [Conceptual Severance] *Keystone*: very much like *Penn Coal*, but went different way. Said statute was “health and safety” oriented. And we don’t allow ppl to sign away their rights when health and safety is involved. Conceptual severance is rejected (following the Brandeis dissent in *PA Coal* and the majority in *Penn Central*) ignoring *Penn Coal*’s three distinct estates in land.
      * Four dissenters: almost a physical occupation, support segment 100% wiped out and clearly a taking.
* [Temporary Taking And Compensation] *First English Evangelical Lutheran Church of Glendale v. Los Angeles* (prevented rebuilding on summer camp site after flooding destroyed; six years w/o being able to build is taking and requires compensation; other side argue nuisance, health and safety, etc., and they weren’t wholly deprived of their land—slam dunk as police power?)
  + ***If*** this were to be concluded as a taking by lower court, LA would have to compensate for the past six years. **Compensation required** even if it is only a ***temporary taking***. Where the government’s activities have worked a taking, no subsequent withdrawal of the regulation can relieve the government of the duty to pay for the period during which the taking was effective.
    - Warning to over-zealous regulators? Bad idea b/c it puts too much restraint on local planners?
    - Appellate Court had said that compensation was not owed until ***after*** the act is ruled a taking (Supreme Court says that compensation becomes due once the taking has effectively begun).
    - On remand, this was held not to be a taking.
  + **Dissent:** Majority decision ***distorts our precedent***. What precedent? Not a physical segment of property, but segment of time. Stevens does not want any conceptual severance. Now we have temporal severance.
    - MAG: first hint that conceptual severance will extend beyond just physical severance.
* [Exactions—Confuses Settled System Of *Penn Central*] *Nollan v. California Coastal Comm.* (beachfront property and applied for permit to rebuild; local gov made permit contingent upon property owners allowing public to cross their beach [easement])
  + **For exactions**, there must be some ***relation—“essential nexus”—***between condition of permit and purpose of permit. Here, condition had **nothing to do** with stated purpose of permit.
    - Ok to have conditions on permits (legitimate use of police power), and could do it under ED b/c there is legitimate governmental end.
    - **Exactions:** local government measures that require developers to provide goods and services or pay money as a condition to getting project approval. Used to be small potatoes, but gov start using as common substitute means of funding public improvements (like printing money for local governments).
  + **Big reason for dissent (and why it was thought to transform whole body of regulatory takings):** court is going ***beyond minimal scrutiny***. Look at rational relation, not just minimal scrutiny. Disrupts the settled point of *Penn Central*.
    - **Dissent:** majority as returned to “long discredited standard.” (*Lochner* era).
* [Takings Clause And Small Amount Of Property] *Hodel v. Irving* (disaster of tenancy in common structure for Native-American lands—fractional interests in property; made gov. trustee to prevent land speculation; solution to problem: land below a certain size or $ amount, act took away right to dispose by will or pass by succession an children. Land would go back into tribe ownership)
  + A government regulation that abolishes the ability to pass land by descent or devise ***is*** a taking under the Fifth Amendment. Although there may be no loss of investment-backed expectations, the ability to pass interest in property is one of the ***most essential sticks in bundle of rights***. Right to dispose of property on death. Congress DOES have property to **regulate**, but NOT to abolish. E.g., abolish law of succession 🡪 if no wills, then escheat.
    - Framework for analysis is *Penn Central*. Nine justices agreeing that clearly approves of conceptual severance approach!! What was destroyed was “***one stick of bundle of rights***”.
    - MAG: extraordinary case. What about whole bundle? Bit of a puzzle.
* [Rent Control Is Not Taking] *Pennell v. San Jose* (end of 87-88 term) (San Jose rent control ordinance allowed a hearing officer to consider “hardship to a tenant” [in addition to other factors] when determining whether to approve a rent increase proposed by the landlord)
  + Valid to deny rent increase based on consideration of hardship to tenant. The Takings Clause is not implicated here. This is a question of Due Process. Considering hardship to tenant legitimately advances the policy of affordable housing and satisfies the **Due Process** deference standard of “**arbitrary, discriminatory, or demonstrably irrelevant to the policy**.”
    - MAG: takeaway is footnote 5 🡪 there ***are*** circumstances were takings clause might be triggered. E.g. eviction restrictions + hardship tenants
  + **Scalia dissent:** DOES trigger the takings clause.

**Whither the Takings Cases? Scalia v. Stevens**

* [All Economic Value With Exception] #*Lucas v South Carolina Costal Comm.* (Lucas prohibited from building single family home on beach from property; trial court ruled regulation rendered property valueless [neighbor could buy for quite a lot?])
  + **New categorical rule:** When regulation denies ***ALL economic value*** of land 🡪 ***per se* taking**, UNLESS state law could have **alerted** him of the fact that regulation would occur. Forces buyer to check (beyond title and physical condition) zoning regulations and land use regulation. MAG: does this inquiry satisfy investment-backed expectations? Not always when nothing on the books. If there is ***reason to expect***, e.g., HLS knowing Gropius dorms will be earmarked if tried to destroy. Remanded to see if ***background principles*** of state law notified buyer of land.
    - What is new about *Lucas*? **Nuisance and public benefit** are ***two sides of same coin***. Radical new direction from old categorical nuisance rule (*Hadacheck).* Challenges the *per se* nuisance rule.Re-categorizes the nuisance cases as ***primitive way of taking about police power***. These cases are now within the framework of *Penn Central*. **Question is:** do they go ***too far*** in reducing value. Re-reads *Mahon* as including categorical rule about **total take-out *per se* rule** 🡪 like physical taking.
    - *Lucas* and **conceptual severance 🡪** ?? (didn’t get this point) MAG: footnote makes clear where he stands.
    - **Purposes for building regulation:** erosion primary concern; harm against public; beauty of the beach; fostering tourism. MAG: shows difficulty old per se categorical nuisance rule. Has both nuisance measures and public benefit measures. Lucas argues *Loretto* and *Mahon* (“too far”) and *Penn Central* (diminution of value factored in).
  + **Scalia dicta:** Limits of state in re-defining property? State can’t pass legislature that avoids this decision. Citizens understand that property can be regulated, but taking away ***all economic value*** is contrary to historical compact in takings clause, ***recorded in the constitution*** (we don’t know what this means). If 95% economic diminution 🡪 NOT per se taking, but probably could get there under *Penn Central*.
  + **Dissent Blackmun:** used missile to kill a mouse. VERY RARE that regulation will take ***ALL*** economic value. Majority opinion built on fiction. This is a regular nuisance case. MAG: fighting to save the categorical nuisance rule.
  + **Dissent Stevens:** new rule is ***wholly arbitrary***. What if value is diminished by 95%? Gets nothing why property that is diminished 100% gets full value back? Cites *First English* as case where it is ok that a law rendered property valueless and was not a taking.
* [Rough Proportionality, Addition To Nexus] *Dolan v. City of Tigard* (problem: city didn’t show that condition would appropriate address problem created by development; there ***is*** a nexus; D conditioned permit approval on P dedicating part of property to improving drainage system and creating a bicycle path)
  + Need a ***nexus AND “rough proportionality.”* Negative externality needs to match condition required.** Need to look at ***degree*** of interference of ownership. Majority worried about “right to exclude.” Dolan wins b/c bike path was not roughly proportional to the negative impact created by issuing permit.
    - MAG: inevitable that SCOTUS asked to look again at “nexus” b/c local government papering regulations (or passing more) to ensure “nexus” between permit and condition in response to *Nollan*. Also, look at thread of “right to exclude.”
    - Most commentators thought *Nollan* and *Dolan* would apply to payment requirement conditions.
* [Purely Economic Regulation As Taking] *Eastern Enterprises v. Apfel* (big national problem with coal miners’ pension plans; costs were spiraling; P in this case had left coal industry and law required them to continue to pay in pension)
  + Statute is ***unconstitutional***, but not enough justices to agree on one reasoning.
    - **O’Conner and 3 others:** applies *Penn Central* economic impact factor (regulatory taking). Cites ***disproportionate nature*** of liability. Interferes with investment-backed expectations and the character of the gov action was “severely retroactive.” Company never contracted; when they were in industry, benefits a lot lower, etc. Do not have ***sufficient connection***, patently unfair. Worrisome concept 🡪 retroactivity.
      * Response to DP argument: court should avoid DP question. But it is an issue, and would come out different under *Skrupa*.
    - **Kennedy:** regulation that is so unfair and arbitrary that it is unconditional under **due process clause**. Not taking, just obligation to pay money (no property). First time addressing issue since *Skrupa*—against whole line of regulatory due process cases. Like Harlan concurrence 🡪 need to provide ***some scrutiny***. Highlights ***retro-activity***.
      * Fear that all gov action could be subject to *Penn Central* taking analysis.
    - **Thomas:** just an ex-post facto issue. Like *Calder*.
  + **Breyer dissent:** NOT takings case. Just a requirement of payments. Should analyze ***under due process***. But *Skrupa* says minimal scrutiny 🡪 nothing wrong with this case. Sticks with DP line of cases

**And the Winner is???**

* [Notice Does Not Preclude Taking And Compensation] *Palazzolo v. Rhode Island* (thought he had good case under *Lucas…*P’s corporation purchased wetlands in 1959. Subsequently, Rhode Island passed a law protecting coastal wetlands by limiting their development. A small part of the property was not restricted by the wetland regulation. Twenty years later, the corporation dissolved and title to the property was transferred to P. P sued to receive compensation for the taking. RI Supreme Court held that there was no taking because the regulation was in place when title was acquired [“**notice rule**”] and does not affect his investment-backed expectations [*Penn Central*]. Also, *Lucas* doesn’t apply because P was still able to develop part of the property)
  + There is NO ***per se “notice rule.”*** *Penn Central* is correct test for determining a taking, whether or not the regulation was in effect when title was acquired. Remand to apply.
    - There ***are*** limits to states re-defining property rights. Can’t put Hobbesian stick (no pre political right to property) into Lockean bundle. Haven’t lost all economic value, so not a total taking. Lucas responds: they’re taking whole segment! Kennedy response: you brought it up at the last minute. We won’t decide, but this a “difficult and persisting question.” Remand for *Penn Central* analysis.
    - MAG: court assumed that when corp dissolved, and he became owner, the regulation was in place and was subject to *Lucas* exception.
  + It would be unfair to limit compensation for a regulatory taking to pre-enactment owners. Oftentimes such claims take years to ripen and can only be made after title has already changed hands. The court relied on *Nollan*, in which the (*Nollan*) dissent argued that post-enactment owners were on notice of the regulation and therefore do not suffer a loss of their investment-backed expectations. The majority in *Nollan* rejected this argument, reasoning that if the previous owners had a compensation right they transferred that right along with the property to the new owner.
    - Pre-existing regulations are NOT always considered “background principles” under *Lucas*.
* [Reject Conceptual Severance In Time] *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency* (owners claim per se taking under *Lucas*)
  + *Per se* taking if prevents ALL economically viable use for ***temporary period***? **NO**. *Lucus* was talking about complete and permanent destruction. Absolutely reject idea to look at **segment of time** for *per se* taking. As a practical matter, court disliked idea of compensation for temporary taking b/c these regulations are super common and would open floodgates of litigation. Don’t want to hamper governmental processes. Moratoria are a good thing (most of the time) aimed at fostering intelligent land use. Re-reads *First English* as saying ***IF*** 🡪 **only dicta**. All it did was send court back for finding. Didn’t address the issue of compensation itself.
    - **Test** in *Tahoe* as to whether temporary regulation can be a taking 🡪 *Penn Central.* There CAN be a case.
* [Monetary Exactions] *Koontz v. St. John’s River Water Mgmt.* (filling in wetlands; local gov wanted $$ to conserve elsewhere or decrease development by a bunch)
  + ***“Monetary exactions”*** **must satisfy** the nexus and rough proportionality requirements of *Nollan* and *Dolan*. Distinguishes *Eastern Enterprises* (may impose financial obligations w/o triggering Takings clause) by noting that in this case the demand for money did “operate upon an identified property interest.” ***Direct link*** between monetary obligation and specific parcel of land. Like a lien.
  + **Kagan dissent:** muddies waters between monetary conditions and taxations. As a practical matter, the effect would be to stultify back and forth (negotiations) between parties that leads to good outcome (win/win situation).
* Where Do Things Stand After *Koontz*?
  + Three things with confidence:
    - (1) Basic framework ***remains*** *Penn Central* balancing test with two per se tests:
      * Permanent physical occupation. *Loretto*.
      * Total economic wipeout. *Lucas.*
    - (2) Same deferential approach to regulation, with exceptions of exactions that get closer look (more worried about abuses).
    - (3) On conceptual severance, this area is still ***unsettled***. *Tahoe* majority seems to favor looking at big picture, BUT *Hodell* (“taking away ***one stick*** of bundle of rights”) and *Palazzolo* (“difficult and persisting question”)
      * And conceptual severance in time, recent case said that ***in some cases***, compensation can be required.
  + Issues to watch for:
    - (1) Footnotes in *Lucas*. What if diminution in value is ***less*** than total wipeout? *Lucas* situation super rare. And regulation “went too far”?
    - (2) What is the relevant property interest—conceptual severance issue. Segment/stick vs. whole parcel. MAG: what is the “whole parcel” anyway? Cases are not consistent. “total holdings of owner” v. “parcel described in tax deed”, etc.
    - (3) Are we going to learn any more about ***extent of states power*** to define/re-define property rights? When does it run up against takings clause? *State v. Shack*
    - (4) What is the status of the noxious use/public harm cases? Will it stick to *Lucas*, tested under *Penn Central*? Or will it go back to *Keystone* and per se no compensation rule?
    - (5) Keep an eye on retro-activity. Seems to be growing in important. Majority in *Eastern Enterprises* considered that it was decisive.
    - (6) Watch developments in state courts/legislatures

**COURSE REVIEW**

* BEST WAY TO PREPARE FOR THE EXAM
  + Only review what is in the course. Ignore unknown content in old exams.
  + Go over old exams.
  + There is “rough proportionally” to content covered. Constitutional issues will be 1/3+.
  + Exam: mix of types of questions. Three parts – essay, short answers, issue spotter.
    - In essay type question, often asked to assume a role.
  + Good answer?
    - Really good grasp of relevant doctrine. A lot of questions ***do*** have answers.
    - More interesting questions though are splits of authority and unknown areas, e.g., regulatory.
    - Demonstrate known doctrine, and then explain where the law should/will go. Much more interested in analysis as opposed to solution. State BOTH strengths and weaknesses of position.
    - READ QUESTION CAREFULLY. And directly answer it.
    - Making assumptions? Don’t assume that professor knows any doctrine. Don’t assume additional facts if it turns the question into something else. If do assume something, explain why its necessary. Or explain alternative. Be careful in reading into question.
    - Ability to express clearly and concisely. Word space is precious.
* CONSTITUTIONAL LAW – past exam exercise
  + Alexander: perception of gov involved dictates outcome? Doctrine has its role, but more important is the images the judges have in their mind. E.g., *Hawaii Housing* – anti-trust argument that portrayed situation as un-american.
    - MAG: leave out narratives of power, someone like Holmes, who consistently upheld legislation he thought was bad. Sometimes, if you see doctrinal confusion, you can line them up based on result (whether actor is viewed to be powerful or weak). But you don’t want to discount doctrine too much.
  + Tideman: slowly moving toward a direction where court is recognizing gov stewardship over shared heritage.
    - MAG: a lot of property being allowed to be taken w/o triggering constitutional protection. Wrong to think that pre-Kagan there was strong environmental concern on court.
  + Michelman: predicts *Lucas*. But goes to far with “or the regulation is categorically not a taking.”
  + Rose-Ackerman (replies to Michelman): moving more and more to ad hoc balancing test. She wants more formalization, but she doesn’t get it.
  + Epstein: impossible to say where this is going.
    - MAG: he does say that there is more going on here than just doctrine.
* PART I
  + Trying to introduce ideas that have ***dominant***. Give some ideas that you can trace through every section of the course. Think of them as group of threads. Sometimes prominent, sometimes sub-terraneal. Four things (themes):
    - Looking at how property law is affecting by, and adapts to, changing social and political and economic conditions.
    - Eternal problem of predictability against the need to have flexibility to adapt the changing conditions.
    - Alexander talked about: very much a difference between what courts say what they’re doing, and what they’re actually thinking. Ideas, images, and feelings operating in the deep structure of the system. Legal realism.
    - Pay attention to law reform and what institutions (courts/legislatures/agencies) would be best to adapt law to new situation.
  + Basic Concepts
    - Possession – distinguished between ownership and possession. Looked at AP. Relativity of title—not who owns, but who has ***better right***. Standard definition of property: legally protected relationship between persons with respect to something that can be a subject of ownership. Idea of bundle of rights—property is aggregate of rights.
* PART II – Gratuitous Transfers
  + MAG: Success stories of the law. Law was gradually able to validate the use of all these will substitutes that allowed ppl of modest means to transfer property to love ones on death. The only problem is that the major will substitutes—accounts, revocable trusts, etc.—what about attempted transfers that are not so standard? No writing, no witnesses.
  + Crucially important property concept: you ***can*** make a present, irrevocable gift of a future interest. E.g., giving Klimf.
  + How far will courts go in subjecting will substitutes to family-protection laws?
  + **Worried about three things:** intent, unreliability of testimony, and litigation breeding when formalities are done away with.
* PART III – Family Property and Concurrent Ownership
  + Three things:
    - Know characteristics JT, TiC, and TbtE.
    - Desirability of fixed rules vs. far-ranging discretion with individualized justice. Especially acute in matrimonial property area. Mass (maximum discretion in reallocating by judge based on legion factors) v. 3 communal property states (50/50 division upon divorce) 🡪 problem with the house? Force a sale of marital home? Probably not.
    - How should the law treat property relations when a non-marriage relationship come to an end? Choices: use property law and say his/hers; use contract law as in *Marvin v. Marvin*; or use divorce law (nobody has done this yet).
  + Currrent law on conveyance: lease is a conveyance, but probably won’t sever JT.
* PART IV – Purchase and Sell of Residential Real Estate
  + Look at review memo.
  + Two main points:
    - Really pay attention to contract for sale of land. Key moment when you most benefit in having a lawyer is when you negotiate contract of purchase/sale. Many things change after contract is signed and between closing.
    - You should have idea as buyer of residential real estate as how to protect yourself against defect in title and problem with physical condition of property.
  + Landlord/Tenant law – settled down into fairly predictable patterns w/o a lot of variation from state to state.
    - One pattern for commercial rentals and another for residential.
      * Commercial – contract law and engine of development. Well-negotiated leases from bank of forms. Like a little constitution for relationship. Most disputes involve lawyer made law and interpretation of contracts.
      * Residential – consumer law (special branch of contract law) and regulatory law. Not much real bargaining and contract. Consumer law you may not be able to waive certain rights—implied warranty of habitability (in most states).
  + Tension in remedies with low-income landlord and tenant in rent withholding cases. Tenant remedies:
    - Rent withholding
    - Repair and deduct
    - Normal contract remedies