### Property

### Acquisition

#### Philosophical Ideas

1. **John Locke**
   1. Locke’s 2nd Treatise is a political treatise – convinces property-owners to buy in to Locke’s government theories, which de-legitimizes absolute monarchial rights
      1. The purpose of government is to preserve citizens’ property
         1. Defines property as lives, liberties, and estates, rights which are pre-political
            1. By mixing his labor with land, man acquires property in the land

*Haslem v. Lockwood* (manure heaps) enhances this theory – leaving property for reasonable time after enhancing value does not divest property right

* + - * 1. *Cf.* Jeremy Bentham – Positivist view of property (no right unless explicitly granted by law) - property is an established expectation
      1. In the state of nature, only as much property as can be effectively used may be acquired by a single individual; the rest is held in common
         1. The invention of money destroyed the state of nature

*Cf.* Rousseau – The first declaration of property rights destroyed the state of nature by creating rule of the strong

* + - * 1. Land should be put to use (reflected in U.S. property law)

1. **William Blackstone** 
   1. In the state of nature, property only existed for as long as the land was in use
      1. Gave men an exclusive right to use of property
      2. Modern property ideas were born of necessity, now supported by law (inheritance)
      3. Legislature may strip men of property rights for public good, if compensation is given
2. **Morris & Felix Cohen**
   1. The essence of private property is the right to exclude others
   2. Property’s economic value is dependent on the extent to which property is legally protected
      1. Contradicts fiction that trademark law only protects items with intrinsic value; protection *is* value
         1. Blackstonian argument that the law creates valuable property rights
3. **Charles Reich**
   1. The “new property” is status conferred by large organizations (job title, security, etc.)
      1. The result is a loss of sovereignty, since men are dependent on others to retain property
      2. Status should be Constitutionally protected property, to limit organizations’ control
         1. Similar to rationale behind FDR’s Second Bill of Rights – common law insulated existing wealth distribution
4. Continential v. Anglo-American Property Ideas
   1. U.S. is more distrustful of government, while Continental sees government as part of solution
      1. Rousseau argues each individual submits himself to the State at its formation
         1. Communal rights should trump individual rights in light of that submission
   2. U.S. values liberty more than equality, while Continental values both nearly equally
   3. U.S. views individuals as autonomous and independent, while Continental provides for unique personal value within an important intra-personal relational context
   4. German Basic Law draws from three traditions:
      1. Classical-liberal creation of individual freedoms
      2. Social welfare creation of socialist protections (aka Progressive Property Theory)
         1. See also France’s Declaration of Rights of Man; Combines Lockean principles of inviolable property rights with Rousseau-esque ideas of submission to the State
         2. Usually invoked to justify social welfare policies under complaint of violation of individual freedoms
            1. *Investment Aid* approves coordination and community (Rousseau) over concept of isolated, sovereign individuals (Locke)
            2. *Co-determination* implies some property is entitled to more protection than others; social impact is a major factor in this determination
      3. Christian protection of social morality and education
         1. Compare Swedish property tradition, in which there is no inherent right of exclusion since it is assumed no damage is inflicted upon the landowner
5. Working, modern definition of property: Legally protected relationship between persons with respect to things subject to ownership
   1. Policy goals include: 1) Reward productivity and foster efficiency, 2) Create simple, easily enforceable rules, 3) Create property rules consistent with societal habits and customs and 4) Create fair (consistent with cultural expectations) outcomes

#### Discovery

1. First person to take possession of a thing owns it (*Johnson v. M’Intosh* – Indian vs. Government title)
   1. Native Americans had rights as occupants, but not possessors
   2. Is discovery or labor theory a more satisfying method of determining ownership?
      1. Accession (A’s labor adds value to B’s property) under labor theory?

#### Capture

1. Pursuit of a wild animal doesn’t create a property right (*Pierson v. Post* - fox hunt)
   1. Promotes effective means of capture and is more easily administrable
   2. Dissent notes perverse incentives not to begin a hunt if another may legally interfere – reflects a Locke-ian concern related to labor theory
2. Alternate possible rule in *Ghen v Rich* (whaling) – Property right created if everything possible to establish possession is done
   1. Echoes *Pierson* dissent’s concern with incentives – any other rule destroys whaling incentives
   2. Also follows local custom, which didn’t occur in *Pierson*
3. Malicious interference with livelihood creates a cause of action. Competition doesn’t (*Keeble v. Hickeringill* – duck decoy)

#### Finding

1. Title of a finder is good against anyone except the true owner (*Armory* –found jewel)
   1. Might be limited in instances of dishonest possession (but see *Anderson v. Gouldberg* – trespasser has superior title over subsequent possessor)
   2. If the finder is an employee, the law is unclear (*South Staffordshire Water Co. v. Sharman*)
2. The general U.S. rule is that finders prevail over owners of the premises (*Hannah v. Peel* – found brooch)
   1. Also clarifies that premises owner owns everything attached to or under the land
   2. Introduces the lost-mislaid-abandoned spectrum
      1. Lost property goes to the finder (*Bridges v. Hawkesworth* – bag of notes on shop floor)
      2. Mislaid property goes to premises owner (promotes return of object to true owner) (*McAvoy v. Medina* – wallet mislaid in barbershop)

#### Exclusion

1. Punitive damages may be assessed for intentional trespasses, since nominal damages are an insufficient disincentive (*Jacque v. Steenberg Homes* – mobile home transportation)
   1. Similar to *People v. Likar* (criminal trespass to retrieve envelope) – exclusion is one of the most critical sticks in the bundle of property rights
   2. Property rights exist to serve human values; common sense and policy goals may trump traditional property rights (*State v. Shack* – migrant workers may receive visitors)
   3. Reflects German/Continental perceptions of property as creating social responsibilities
2. Private shopping centers must permit freedom of expression when required to do so under state law, unless such requirements approach constitutional boundaries (*Pruneyard v. Robins*)
   1. States can adopt reasonable restrictions on private property as long as such restrictions don’t implicate due process violations
   2. Marshall’s concurrence argues that states must be allowed to revise common law rights (with the exception of a certain core), or risk returning to the *Lochner* era
      1. May be motivated by an urbanization-esque argument; shopping malls are public fora conducive to ensuring speech is heard by a large number of people
   3. Several cases exhibit tension between right to exclude and other rights:
      1. *Marsh v. Alabama* – Jehovah’s Witnesses in a company-owned town must be permitted
         1. Can *Marsh* extend to university/corporate campuses? Gated communities?
      2. *Logan Valley* – Leaflet distribution protesting a mall tenant’s practices is permitted
      3. *Lloyd v. Tanner* – Political leaflets in a mall are not permitted (no connection to mall)
      4. *Hudgens v. NLRB* – Overruled *Logan Valley*. Private shopping mall is not equivalent to a town, therefore distinguishable from *Marsh v. Alabama*
      5. *Appleby v. U.K.* – Under UK law, freedom of speech is subjugated to property law unless speech is effectively barred

#### Adverse Possession

1. Rationales for adverse possession doctrine include: 1) Desire to reward those who put land to societally productive use (Locke), 2) Desire to reward the diligent trespasser and/or punish negligent owner, 3) Need to provide proof of meritorious title / evidentiary concerns and 4) Fundamental fairness – balance of hardships shifts to trespasser after lapse of time (J.S. Mill)
2. **Actual entry with exclusive possession** –
   1. Personal belongings, junk, and a garden was insufficient to constitute actual possession (*Van Valkenburgh v. Lutz*)
      1. Dissent argues possession was significant, and points out errors in majority’s opinion (weighing evidence, not recognizing implicit title vesting in adverse possessor, etc.)
3. **Open and notorious**
   1. Must be sufficient to put the reasonably attentive owner on notice
4. **Continuous for the statutory period**
   1. Activities consistent with the typical owners’ use of the land are the only ones necessary to establish adverse title (*Ewing v. Burnet* – gravel pit). Similar to *Ghen v. Rich*’s whaling rule
      1. Seasonal ownership, when typical for a plot of land, sufficiently establishes continuous ownership (*Howard v. Kunto* – incorrect beach-house property deeds)
      2. If there is a reasonable connection between successive occupants, tacking to establish continuous possession is permitted
5. **Adverse to true owner’s interest and under a claim of right**
   1. Color of title is a claim founded on an invalid written instrument
      1. Adverse possession is assumed to extend to the entirety of the land described in the invalid document
      2. Absent color of title, adverse possessor’s claim is limited to the land actually possessed
   2. Three state-of-mind options to determine “claim of right”
      1. State of mind is irrelevant (objective) (*Mannillo v. Gorski* – concrete steps overstep boundary). This is the current majority view
         1. Objective view is easiest to administer, reflects statute’s normal silence on possessor’s intent and reflects the reality that the result (possessor acts as an owner) is identical regardless of intent
         2. Exception if true owner does not have actual knowledge of a minor incursion – statutory period does not begin to run until owner has actual knowledge
            1. Related to defense of laches (punishes intentional delay)
      2. Good-faith standard (honest mistake)
      3. Bad-faith standard (aggressive trespasser, Maine doctrine)
6. Boundary disputes can also be resolved through the doctrines of:
   1. Agreed boundaries – An agreement that is respected for a long period of time is enforceable
   2. Acquiescence – Long acquiescence is evidence of an agreement fixing the boundary line
   3. Estoppel – A party that changes position in reliance on another’s representations is protected from the other’s later denial of the validity of his previous actions
7. Adverse possession of chattels
   1. Statute of limitations does not begin to run until true owner knows or should have known of the cause of action (identity of possessor) (*O’Keefe v. Snyder*)
   2. A bona fide purchaser should be able to acquire good title from an individual with voidable title (NOT a thief) against the true owner
      1. Refuted in *Guggenheim v. Lubell*, which puts the onus of verifying purchases on purchasers, rather than victimized owners
      2. Should law protect innocent owner or innocent bona fide purchaser?
         1. Reanimates tension between individual rights and community benefits

### Gratuitous Transfers

#### Gifts

1. Three requirements to make a gift:
   1. Donor must **intend** to make a present transfer of an existing property interest
      1. A gift of a remainder (future) interest in property is OK (*Gruen v. Gruen* – Klimt painting)
      2. A presently existing interest must be transferred; “I give you the painting when I die.” vs. “I give you the painting, reserving possession for my life.”
         1. Evidentiary concerns related to testamentary documents
         2. Gifts *causa mortis* can be made if done in contemplation of immediate approaching death, but is revocable upon recovery
   2. Donor must **deliver** possession to the donee intending to make a gift
      1. Constructive or symbolic delivery may be acceptable in certain circumstances
      2. Delivery must be as perfect as the property and circumstances reasonably allow (*Newman v. Bost* – man leaves house and all property to housekeeper) (*In re Cohn* – husband gives wife note conveying stocks in an NYC bank)
         1. Where articles are present and capable of manual delivery, this must be done
            1. Symbolic delivery of a key creates a gift of items *normally expected* to be contained in item which key unlocks (life insurance policy not expected to be in bureau in *Newman*, so no gift)
         2. No gift if donor retains control over the object of the gift (*In re Cohn*)
   3. Donee must **accept** the gift

#### Will Substitutes

1. Will substitutes allow individuals to avoid the publicity, expense and delay of going through probate
2. A bank account that does not pass title or possession to its intended beneficiary is not an effective gift (*Tygard v. McComb* – Missouri bank account for daughters)
   1. *In re Totten* authorizes the creation of “Totten trusts”, revocable trust accounts with a designated beneficiary
      1. Good example of courts not getting in the way of making the legal system work better
   2. *Malone v. Walsh* adds joint accounts to inter vivos gifts; categorized as a present interest which ripens to complete ownership on death
      1. Crams intent into joint bank accounts, which spawns litigation (Was intention to make an irrevocable gift (of a future *or* present interest) or a revocable survivorship interest?)
      2. Intent of the parties is controlling, especially in cases where party is not dead, so can testify to intent (*Blanchette v. Blanchette* – AT&T stock held jointly, couple divorces)
3. Trusts bifurcate legal and beneficiary ownership – Trustor transfers legal title to the trustee, who manages assets for beneficiaries
   1. Words that indicate with sufficient certainty the intent to create a trust do so (*Smith’s Estate* – uncle leaves bonds for nephew in a box opened after uncle’s death)
      1. Documents indicating uncle’s intent that were obviously left to be found after his death sufficient to satisfy the “delivery” requirement of trusts
   2. Imperfect gifts cannot be transformed into trusts (*Young v. Young* – donor reserving interest until his death indicates intention not to make a complete gift or hold assets in trust for beneficiaries)
   3. Courts can find implied trusts (*Elyachar v. Gerel Corp.* – Colonel tries to revoke stock certificates issued to kids)
      1. Bifurcated gift – Ownership and management of the corporations was reserved to dad for his life; benefits accrue to holders of certificates, which are held in trust

### Co-Ownership

#### Forms

1. **Joint Tenancy**
   1. Each co-tenant has an undivided interest in the whole
   2. Right of survivorship: If B dies, the property is completely owned by A, because nothing passes
   3. Four unities are essential to a joint tenancy: 1) Time, 2) Title, 3) Interest and 4) Possession
   4. Any joint tenant can at any time sever the joint tenancy, voluntarily or involuntarily
      1. Under a lien theory, a mortgage is not a conveyance, therefore no severance (*Harms v. Sprague* – brother’s mortgage does not convey interest after death)
         1. Reflects a tension between fairness in a specific case, and creation of a fair, widely applicable rule
      2. A joint tenant can destroy joint tenancy by conveying property to herself as a tenant-in-common (*Riddle v. Harmon*)
         1. Is it fair that a joint tenant can lose survivorship rights without any notice?
   5. A joint tenant may assign all rights and privileges associated with ownership to a third party, without consent of the other co-tenant, as long as the co-tenant is not prejudiced thereby (*Swartzbaugh v. Sampson* – wife tries to cancel lease executed by husband for boxing arena)
      1. Original joint tenant is liable to co-tenant if third party denies co-tenant entrance or other rights of enjoyment under the original joint tenancy
      2. Co-tenant is not bound by lease agreement
   6. Modern presumption is tenancy-in-common, unless joint tenancy is clearly established
2. **Tenancy in Common**
   1. Each co-tenant has an undivided interest in the whole
      1. There can be no action for ouster unless there is an attempt to enter by one co-tenant and a denial of that right by the other (*Spiller v. Mackereth* – request to vacate insufficient to establish action for ouster)
   2. No survivorship: If B dies, his interest goes to his heir
3. **Tenancy by the Entirety**
   1. Similar to joint tenancy, but can only exist in marriage
   2. Not severable by the unilateral action of either party
   3. Spouse’s interest in an estate by the entirety isn’t subject to individual’s creditors during the spouses’ joint lives (*Sawada v. Endo* – car accident victims attempt to claim interest in marital property to satisfy judgment)
4. Multi-party Bank Accounts
   1. True joint bank accounts entail a present gift of ½ the sum deposited plus survivorship rights
   2. Payable-on-death accounts confer survivorship; usually invalid unless permitted by statute
   3. Convenience accounts transfer no survivorship rights, but simply the ability to pay bills

#### Severance

1. Partition in kind is preferable to partition by sale, unless: 1) Partition is impracticable and 2) Interests of all owners are better promoted by sale (*Delfino v. Vealencis* – Attempt to eject garbage removal business)
   1. Economic value is relevant, but not dispositive to the determination of which partition is preferable, especially when emotional connections to the land exist (*Ark Land Co. v. Harper*)
      1. But see *Johnson v. Hendrickson*, where partition in kind was not granted since it would significantly reduce the value of the land for all involved parties
      2. Presumption towards partition in kind is weakening in modern courts

#### Succession on Death

1. Blackstone argues that traditional laws of property succession are natural and appropriate
   1. Mill argues that succession should be regulated to ensure the greatest amount of societal benefit (Utilitarianism). To that end, there should be a maximum amount children may inherit
2. A critical stick in the bundle of property rights is the right to dispose of property. This right cannot be taken without adequate compensation (*Hodel v. Irving* – Indian land suffering from fractionalization)
   1. Although the state may regulate/adjust inheritance laws, they may not abolish that right
3. This is becoming less important, since inter-generational wealth transfer is more commonly occurring as parents pay for education (and save for longer retirement), not at death

#### Marital Property

1. Educational degrees and professional achievements are not generally considered marital property for purposes of divorce partition (*In re Marriage of Graham*)
   1. Dissent argues that narrow definition of property should be changed to prevent obvious injustice
      1. See *Elkus v. Elkus*, where wife’s opera career was marital property subject to equitable distribution since the husband contributed to her success
   2. *Mahoney v. Mahoney* creates an alternative, where a spouse is reimbursed for all financial contributions made to a spouse’s professional training
   3. Is marriage an equal partnership, or does it imply support?
2. Five factor test to determine if conveyance is fraudulent:
   1. Transfer was made during a contract to marry and in contemplation of marriage
   2. Lack of adequate consideration for the transfer
   3. Lack of prospective spouse’s knowledge of transfer
      1. These elements combine to create a presumption of fraudulent intent
   4. Transferor’s fraudulent intent
   5. Prospective spouse’s reliance on property interest in inducement of marriage (*Strong v. Wood* –elderly husband conveyed farm to sons before marriage)
3. A trust with remainder interests is not invalid simply because the settlor retained power to modify or revoke the trust (*Sullivan v. Burkin* – husband deliberately leaves wife out of will)
   1. Assets of such a trust will be included in the estate, subject to mandatory spousal share
4. Courts are divided on appropriate methods of dividing marital property in the event of divorce
   1. Under *Norris v. Norris*, there is no conveyance unless contributions to marital property value was outside normal familial activities
   2. Under *Rice v. Rice,* the court retains broad discretion to create an equitable and fair settlement
      1. Massachusetts law has dozens of factors to consider, leading to unpredictable results
      2. Policy considerations include: 1) Protect parties’ reasonable expectations (fairness, justice) (Is this informed by background law?), 2) Interest of state in ensuring that divorcees do not become welfare recipients, 3) View of marriage as a partnership, treating contributions as equal, 4) Protecting weaker, more vulnerable parties (i.e., children) (Note that child support cannot be contracted out of), 5) Predictability and efficiency (reducing costs of divorce litigation)
   3. Prenuptial agreements must be fair and reasonable at formation, and conscionable at the time of the divorce to be upheld by a court (*DeMatteo v. DeMatteo* – wealthy husband strong-armed wife into signing a fairly unfavorable prenup)
      1. Necessary elements include full and fair disclosure of each party’s assets, and a waiver of spousal support except those specifically provided in the agreement
5. Domestic Parternships
   1. Even though common law marriage is dead, joint property is subject to equitable division after separation (*Carlson v. Olson* – man tries to get away after years of pretend marriage
   2. Express contracts, even between non-married parties, are entitled to the court’s deference. Even in the absence of an express contract, the court should examine whether an implied contract exists (*Marvin v. Marvin* – Hollywood man tries to get away)

### Real Estate

#### Fair Housing Act

1. FHA goes farther than Civil Rights Act of 1868, because that was limited in application to race
   1. Discrimination through disparate treatment *or* impact, shifting burden to defendant
   2. Prohibits discrimination in negotiations, advertising, renting or selling
      1. Exceptions if property is sold without advertisements or brokers, to religious institutions or private clubs, and for room-sharing
   3. Must allow reasonable accommodations for handicapped individuals
2. Outlaws practices that have a disproportionate effect on minorities, even if intent is to promote racial desegregation (*U.S. v. Starrett City*)
   1. Quotas may be used if there is a history of correctable racial discrimination
      1. Ceiling quotas (maximum number of minorities) are doubtful because they target politically weak to bear the brunt of a neutral program

#### Sale of Land

1. For protection of the public, real estate and mortgage documents should be signed with the supervision of an attorney (*State v. Buyers Service*)
2. “Marketable title” is a title that a reasonable purchaser, exercising the prudence of a business man in an arms-length transaction, would be willing to accept (*Messer-Johnson v. Security Savings*)
   1. Burden of proof to establish adverse possession is on adverse possessor, *and* must show that purchaser will be able to defend the title against any third person
3. Equitable conversion generally puts buyers in possession of real property, and seller in possession of sale proceeds, between signing of purchase contract and closing
4. Where a seller-created condition unlikely to be discoverable by a buyer exercising due care materially impairs real estate’s value, caveat emptor does not apply, and the contract may be rescinded (*Stambovsky v. Ackley* – haunted house)
   1. Has evolved towards a broader exception, where seller must disclose all latent material defects not obvious to a buyer (*Johnson v. Davis* – leaky roof)
   2. Materiality (either objectively or subjectively) is necessary to make a defect actionable
5. Privity of contract is unnecessary for a subsequent buyer of property to sue a builder or contractor for latent defects (*Lempke v. Dagenais* – bad shed)
   1. Implied warranty of workmanlike quality is not a contractual obligation, but one of tort law
   2. Note that caveat emptor cases all focus on residential property – a bifurcation is occurring
6. General warranty deeds protect buyer against *all* defects in title
   1. Special warranty deeds protect against action of seller
   2. Quitclaim deed is a release of all rights and interest that the seller has in the land. If seller has nothing to give, so be it
   3. Deeds are delivered with intent of immediate operation (*Sweeney v. Sweeney* – double deeds)
      1. Manual delivery of a deed creates a rebuttable presumption that the deed is operative

#### Estates in Land

1. Numerus Clausus means that new kinds of property interests cannot be granted, since otherwise property rights would become too fragmented, and sale of property would become much too difficult
2. Fee Simple - Closest thing to unlimited ownership available
   1. Any restraint on land use (such right to divest property rights (*alienability*)) destroys absolute fees simple. Courts don’t interpret wills to create partial intestacy, so may create fees simple, voiding contrary sections of a will (*White v. Brown* – niece gets home to live in and not sell)
      1. Three types of restraints: 1) Disabling restraints restricts the power to transfer interests, 2) Forfeiture restraints strip grantee of property rights if a transfer is attempted and 3) Promissory restraints force grantee to promise not to transfer rights
      2. Any absolute restraints on a fee simple are void
3. Life Estate - If granted for B’s life, A maintains a reversion interest. If A’s, B acquires a remainder interest
   1. *Pur autre vie* if life estate not tied to lifespan of possessor
4. Defeasible Estates
   1. **Determinable** - Fee simple ends automatically when a stated event occurs
   2. **Subject to condition subsequent -** Fee simple may (but not necessarily must) be cut short when a stated condition happens. Called a right of entry or power of termination
   3. **Subject to executory limitation -** Grantee creates a condition subsequent, but creates a future interest in a third party
5. Leasehold Estate
   1. Most leasehold estates are a combination of property law and contract law, with contract law becoming more prevalent (almost becoming consumer law) in residential leases)
   2. **Term of Years** is an estate that lasts for some fixed period of time
   3. **Periodic Tenancy** is an estate that continues for succeeding periods until termination
   4. **Tenancy at Will** is an estate that endures as long as both landlord and tenant desire
      1. Lessor’s intent to give a unilaterally terminable life estate is upheld (*Garner v. Gerrish*)
         1. Doesn’t this violate the numerus clausus principle?
   5. Holdovers are tenants who stay in possession after the term has expired
      1. Under the American rule, the landlord has no duty to delivery possession from holdovers to rightful tenants (*Hannan v. Dusch*)
         1. Landlord cannot contract responsibility for wrongful acts of others
         2. Contrary English rule emphasizes landlord’s better-positioned ability to react to the situation
   6. An assignment gives all of the existing property rights to another; a sublease reserves some rights to the sublessor (*Ernst v. Conditt*)
      1. Two methods to determine whether a contract is an assignment or a sublease: 1) Intent of the parties, or 2) Formalistic determination (See *Ernst* above)
      2. In an assignment, the original tenant remains liable unless the landlord grants a release
      3. In a sublease, only the person directly below you (landlord to original tenant, sublessor to sublesse, etc.) is liable to you
      4. Consent to an assignment of a commercial lease may only be withheld if commercially reasonable (*Kendall v. Ernest* – Airport business assignment)
         1. Note that this is still technically the minority rule
   7. A landlord must wait for a judicial decision before evicting a tenant (*Berg v. Wiley* – restaurant eviction)
      1. Assumes summary proceedings are 1) available, and 2) effective. Is this true?
   8. Landlord must try to mitigate damages from a defaulting/abandoning tenant (*Sommer v. Kridel*)
      1. Duty to mitigate consists of making reasonable efforts to re-let the apartment
      2. Raises problem of accepting tenant’s surrender, extinguishing liability for future rent
   9. Actual eviction occurs when a tenant is deprived of a material part of the leased property; constructive eviction occurs when an interference with possession is so serious that it deprives the lessee of the beneficial enjoyment of the property (*Village Commons v. MCPO* – leaky basement in prosecutor’s office)
      1. Constructive eviction is essentially eliminated by the implied warranty of habitability
         1. A substantial violation of the housing code is prima facie evidence of breach (*Hilder v. St. Peter*)
         2. Landlord is not entitled to a reasonable amount of time to address the issue giving rise to a breach (*Berman v. Jefferson*)

### The Constitutional Law of Property

##### Due Process

1. Debate begins in *Calder v. Bull*. Chase argues for judicial restrictions of laws that violate natural senses of justice and fairness (See Locke, social contract theory). Iredell takes a more positivist view (See Bentham, Blackstone)
2. *Lochner* introduces concept of substantive due process; courts can interfere in legislative pronouncements if there is not a reasonable relationship between permissible ends (exercise of police power) and the means used to get there
   1. Holmes further dissents that the Constitution does not embody a particular economic theory (similar to statements made in Germany’s *Investment Aid*)
   2. *Coppage v. Kansas* acknowledges that there may be limits on freedom to contract, but it is not here. This is the high point of the *Lochner* era
   3. Begins to be pulled back in *Nebbia v. New York* (milk pricing). Individuals cannot exercise property rights that inflict injury on the public
      1. If statute is not arbitrary, discriminatory or demonstrably irrelevant to the policy, it is consistent with Constitutional boundaries
3. Full deference is given in *West Coast Hotel v. Parrish*, recognizing that employees do not have equal bargaining power, so legislature may protect disadvantaged workers
   1. Even if the wisdom of the policy is debatable, the legislature decides (*Ferguson v. Skrupa*)

##### Public Use

1. *Berman v. Parker* articulates a very deferential, rational basis test for “public use”, which has already been watered down to “public purpose”. When the legislature has spoken, the public interest has been decided
2. The public use requirement is coterminous with the scope of police powers (*Hawaii Housing v. Midkiff* – land redistribution)
   1. O’Conner backs off from this statement in *Kelo*
   2. Where the exercise of eminent domain is rationally related to a conceivable public purpose, a public use exists
   3. *Poletown v. Detroit* takes this to the next level, saying the legislature is justified in finding public purposes in reducing unemployment and revitalizing an economic base
      1. Dissent argues that there is now no limit to what can be taken to aid private businesses
      2. Overturned in *County of Wayne v. Hathcock*, where the public use test becomes a three-part inquiry: 1) Public necessity of the most extreme sort (i.e., highways), 2) Property remains subject to public oversight (i.e., pipeline to be used as a public utility), or 3) Property is selected because of facts of independent public significance (i.e., blight)
3. *Kelo v. City of New London* follows *Poletown*, in that the taking’s purpose (not its mechanics, i.e., giving property to another private entity), determine if a public use exists
   1. O’Conner’s dissent argues that an external judicial check is required if the Public Use Clause is to retain any meaning
      1. Makes a distinction between affirmative harm and property not being put to the most economically beneficial use

##### Regulatory Takings

1. There are three per se rules relating to when regulations are grievous enough to become takings
   1. Permanent physical occupation (unless occupation is for the purpose of eliminating a nuisance) (*Loretto*, cable box)
      1. How can this case be squared with other regulations of apartment owners, i.e., smoke detectors, fire extinguishers, etc.?
      2. *First English Evangelical Church* alters this by holding that compensation is required, even if the taking is only temporary
   2. Nuisance control regulations are *never* takings, no matter how large the diminution in value (*Hadacheck*, brickyard condemnation)
      1. There is great difficulty in making distinction between nuisance elimination and doing something for the public good
      2. *Lucas* attempts to deal with this problem by making complete deprivation a per se category unto itself, unless either background property law or nuisance law inherently limits the title
   3. Land-use regulations that denies owners all economically viable use of land is a taking (*Lucas*)
      1. This rule is fenced in by *Tahoe-Sierra*, where the court rejects temporal conceptual severance and finds a limited complete taking is not compensable
         1. How does this square with *First English*? The indefiniteness of the initial taking?
2. When none of the per se rules applies, the diminution in value test is necessary
   1. This test is introduced in *Pennsylvania Coal v. Mahon*, where Holmes argues that if a regulation goes “too far”, it is compensable taking
      1. The benefit that the property owner gains through the regulation (reciprocity of advantage) may play a role in determining if a regulation goes “too far”
   2. *Penn Central* creates a three-part test: 1) Interference with investment-backed expectations, 2) the nature of the government action, and 3) the uniquely public function of the regulation (specifically, the degree to which the regulation stops substantial individualized harm)
      1. *Penn Central* is the correct test, even if the regulation was already in effect when title was acquired. To do otherwise would unfairly limit the ability of subsequent owners to be compensated (*Palazzolo v. Rhode Island*)
3. Exactions must share an “essential nexus” with the policy of a permit’s denial. Otherwise, the regulation works an extortion, not legitimate exercise of police power (*Nollan* – beach easement)
   1. The exaction must share a “rough proportionality” with the negative impact the permit would allow, adding an additional step to *Nollan* (*Dolan*)
   2. Monetary exactions must also follow the “reasonable nexus” and “rough proportionality” requirements of *Nollan* and *Dolan* (*Koontz*)
      1. How can this be a takings case, when the only thing that has been “taken” is a permit that was never actually issued?
      2. What is the distinction between a “taking” of money and a tax?
4. Purely economic regulation can be considered a taking, blurring lines between due process tests and regulatory takings tests (*Eastern Enterprises v. Apfel* – pension funding liabilities)
   1. Which inquiry should proceed first? Due Process, or regulatory taking?