BUL4310 READINGS FOR INDIVIDUAL ASSIGNMENT #1

THE TAKINGS CLAUSE, EMINENT DOMAIN AND LAKE TAHOE VIRTUAL FIELD TRIP

Table of Contents for this Document

An Example of a Specific Constitutional Provision: The Takings Clause

Certain constitutional clauses, though, may simply call – at least historically – for a broad interpretation of governmental power (not just court power, but legislative or executive authority). An example of that would be the Takings Clause: "nor shall private property be taken for public use without just compensation."

The Takings Clause provides for Eminent Domain (in the 5th Amendment): private property may only be taken for a public use, and the owner must receive just compensation. (Fair Market Value (FMV) is required, the courts have held.) Public use (purpose) is broadly interpreted - Not just buildings, roads, schools, sewers.

Two important eminent domain cases arose in the Hawaiian Islands and on the shores of Lake Tahoe.

Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984)

A Hawaii statute gave lessees of single-family homes the right to invoke the government's power of eminent domain to purchase the property that they leased, even if the landowner objected. (So renters could force a sale; the state would then take the properties of major landowners, and there would be land redistribution – to many small, new landowners.) The state thus condemned the property, paid FMV, and then resold the land to the lessee. The U.S. Supreme Court held: It is the purpose of the taking, not the use of property, that is important. So the purpose of the taking - hence, the condemnation power - is equal in breadth to the police power. The legislature just needs some "reasonable foundation" for its use of eminent domain.[1]4

The Example of Beachfront Access

All states with coastlines have faced eminent domain controversies involving access to the beach. Florida law, as in other states, clearly states that the beach belongs to the public. But just try telling a beachfront property owner.

The law in Florida is that the public has an absolute right to be on the beach. All the sand below the mean high-tide line is state-owned land held in the public trust. But it is also true that rights and actual access are two different matters — all it takes to keep the public off the beach near many condos, resorts and luxury homes is a long walk to an access point from the nearest public parking and restrooms.

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[1] In *Kelo v.City of New London*, decided in June 2005, the Supreme Court ruled on an appeal by seven property owners in a New London, Connecticut neighborhood that the city had designated for economic development. The Connecticut Supreme Court, by a 4:3 vote in the spring of 2003, upheld the city's right to exercise its power of eminent domain to take the parcels (a working-class neighborhood), pay compensation to the owners, and lease the land to a private developer (at one dollar per year for 99 years).

While eminent domain generally has been limited to government projects (e.g., roads or public buildings) or slum clearance, local governments increasingly have tried to use eminent domain to clear land for private development (e.g., shopping malls and hotels) enhancing the tax base. New London's plans for the 90-acre neighborhood of small homes include a waterfront hotel and conference center, office space for high technology research and development, retail space, and 80 new homes. Is such private development a public use (enhanced taxation for a city declining for years and now designated a "distressed municipality") for which eminent domain is constitutionally authorized? That is what the U.S. Supreme Court decided in favor of the City.

The Supreme Court has traditionally been quite deferential toward the government's use of eminent domain, and *Kelo* continued in that tradition. *Kelo* attracted a large number of briefs and has sparked a lively debate over whether New London's economic development proposal is different in kind from the eminent domain "uses" the Court has previously allowed.

Nine states – Arkansas, Florida, Illinois, Kentucky, Maine, Michigan, Montana, South Carolina, and Washington – forbid the use of eminent domain when the economic purpose is not to eliminate blight. And now, in the aftermath of the Court's decision in *Kelo*, numerous other states are considering similar legislation (with the state, in effect, denying unto itself, or its municipalities, the right to carry out the type of eminent domain that took place in *Kelo*.

Florida uses beach renourishment funds to try to goad communities to add and maintain access points. Still, state rules for funding renourishment projects treat hotel properties as publicly accessible beaches, even if they stop nonguests from getting to the beach. While inaccessible beaches rankle, a public beach is just a short drive away for most Floridians. According to the state wetlands and beach administration, 42% of Florida's 825 miles of beaches front publicly owned land.

Increasingly litigation has challenged the rapid privatization of America's shorelines. In 2001, a Connecticut Supreme Court decision marked a growing trend toward defeat for those who try to keep the public off of "privately-held" beach. The Supreme Court declared that outsiders cannot be kept off the beaches because barring them would violate their free speech rights. The ruling was viewed as convoluted even by those who support it. The justices said Greenwich beach qualifies for special constitutional protection as a "public forum": "In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed."

Greenwich protested that the plaintiff, a local lawyer, had provided no evidence that he intended to use the beach to exercise his speech rights (he wanted to jog there). But the Supreme Court brushed this aside and ruled that the town's insiders-only rule threatened free speech in general, even if the plaintiff did not express himself there. But opponents could argue that because towns rarely pick up the trash, clean the streets, or furnish police protection to people who do not live there, why should a town be forced to "provide" beachfront access to nonresidents? On the other hand, is not barring nonresident from using their beaches similar to cities (e.g., New York) trying to bar nonresidents from walking in their parks (e.g., Central Park) - some public resources may not fairly be monopolized.

There is a sanctified American notion of private property. And as homeowners acquire more coastline, with rich landowners paying millions for their own stretch of sand, the public's right to beach access faces drastic diminution. Only the court cases have kept this privatization from taking effect. In the few cases where they have been legally challenged, private landowners have usually lost to the public interest. For example, in late July 2001, the Connecticut Supreme Court ruled that it is unconstitutional for the rich Connecticut town of Greenwich to maintain its exclusive character by keeping non-residents off its beaches. Moreover, in a move that surprised many legal commentators, the court's broadly worded decision may have made it impossible to keep outsiders off any of Connecticut's municipal beaches or parks.

New Jersey also is plagued by beach disputes, and that state's attorney general has threatened to sue some private homeowners for erecting fences to keep out the public. In a move welcomed by activists opposed to private ownership of natural resources, the New Jersey attorney general insists on public access to the first ten feet of dry sand above the mean high water mark in the municipal; that call comes for the town of Point Pleasant Beach, a middle-class community that has seen its local beaches given over to exclusive property developments. This "ten-foot" interpretation of the law will be tested in court; beach law in this state, as in so many others, is unclear. While under the constitution beaches are "public trust" lands, individual states are allowed to define that doctrine.

Most Atlantic Coast states grant no public rights above the mean high water mark, though they do cede the wet sand below. But seven East Coast states allow private ownership down to the low-water mark, depriving the public of all rights above the waterline. Most of those states allow limited public use of the area between high and low tide for activities such as fishing and walking. But sunbathing is seldom allowed, says Kerry Kehoe, general counsel for the Coastal States Organization, which supports public access.

New Jersey is different; a 1984 state supreme court holding ruled that the public has a right to some "reasonable portion" of dry sand above the high tide mark, even if that means traversing private land to reach the beach. But the limits of that ruling have not been tested.

Even though courts rule one way, reality may operate otherwise. Municipalities often find ways to frustrate access, such as by charging fees or abolishing parking for nonresidents. While the judicial trend is clearly towards reasserting the public interest, few invasions of public trust are challenged. Inasmuch as they go unchallenged, the shoreline is, in effect, privatized.

The *Tahoe* case

The Fifth Amendment's Takings Clause prohibits the government from taking private property for public use without just compensation. Many businesses now assert the Takings Clause to fight environmental and land-use regulations as being seizures of property without compensation. At least until a U.S. Supreme Court's decision in 2002, the trend clearly was in favor of landowners. In Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency , 535 U.S. 302 (decided April 23, 2002), the U.S. Supreme Court ruled that a government-imposed moratorium on

property development, even one that lasts for years, does not automatically amount to a "taking" of private property for which taxpayers must compensate the landowners. The 6-to-3 decision was a sharp setback for the property rights movement, which had scored over the past fifteen years many successes in the Supreme Court (e.g., Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), and Dolan v. City of Tigard, 512 U.S. 374 (1994).

In the 2002 Supreme Court case, the defendant was the Tahoe Regional Planning Agency ("the TRPA"), established under an interstate compact between California and Nevada, which share the coastline of Lake Tahoe and its famously deep-blue, crystalline water. The plaintiffs in the Tahoe case originally were about 700 people who had bought undeveloped residential lots, some 400 altogether, in the expectation of building houses on the shore of scenic Lake Tahoe. [These 700 in 1984, when the lawsuit commenced, were down to 449 by 2002 - 55 had died, and the rest had simply withdrawn over the years.]

The plaintiffs sought millions of dollars in compensation for two TRPA regulations that had blocked virtually all land development on those 400 residential lots for 32 months from August 24, 1981 to April 25, 1984. The TRPA used the development moratorium to study the impact of development and then to create a long-term land-use plan for combating lake water degradation traced to run-off from developed areas above the shore. The plaintiffs argued that a restriction that even temporarily deprives property owners of all "economically viable" use of their land is a taking for which the Constitution requires compensation.

Writing for the court, Justice John Paul Stevens said, "A rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decision-making. [Such hasty actions could foster] inefficient and ill-conceived growth. . . . Such an important change in the law should be the product of legislative rule making rather than adjudication." The majority thus rejected an expansive ruling of one of Justice Antonin Scalia's most important opinions, the Lucas v. South Carolina Coastal Council holding. In Lucas, the Court first held that a land-use regulation which, while leaving property in the owner's hands, permanently deprived it of all economic use was a "categorical taking" requiring compensation; therefore, Lucas breached what had been a doctrinal wall between a physical taking (with government actually taking possession of private property), for which compensation has always been required, and a "regulatory taking" (e.g., zoning), in which the government restricts the owner's use of the property. The Tahoe holding was that no categorical taking had occurred. It also restated the key difference between a governmental body actually taking property for a public purpose and simply regulating property in a way that limits its use. When the government acquires property, Justice Stevens wrote, the Constitution "in plain language requires the payment of compensation. [But] the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property."

The Supreme Court reaffirmed a doctrine, disputed by property rights advocates, known as "the parcel as a whole" rule. Under this rule, when a regulation affects only part of a piece of land, typically a wetlands or wildlife habitat, the analysis of that regulation still must take into account the impact on the property as a whole, not just on the regulated portion. Without the protection of the "parcel as a whole" rule, much environmental land use regulation would be considered a taking and would be prohibitively expensive.

Before Lucas, regulatory takings were subject to a case-by-case balancing test that weighed the government's interests against the owner's legitimate expectations. Because Lucas involved a regulatory taking - an environmental ban on coastal development - Lucas raised the prospect that even temporary restrictions might be subject to the "categorical taking" rule. But Tahoe indicates that the distinction between physical and regulatory takings remains vital. The majority opinion relegated Lucas to "the extraordinary case in which a regulation permanently deprives property of all value," a rule with no application to a temporary even if prolonged moratorium. As Justice Stevens explained the reason for treating the two categories of takings differently: "Land-use regulations are ubiquitous and most of them impact property values in some tangential way ø often in completely unanticipated ways. Treating them all as per se takings would transform government regulation into a luxury few governments could afford. By contrast, physical appropriations are relatively rare, easily identified, and usually represent a greater affront to individual property rights."

In dissent were the Court's three most conservative members, Chief Justice William H. Rehnquist and Justices Antonin Scalia and Clarence Thomas. The Chief Justice wrote that "a distinction between `temporary' and `permanent' prohibitions is tenuous" and had been effectively erased by the Lucas decision. He also concluded that the majority's decision "turns entirely on the initial label given a regulation. . . . There is every incentive for government to label any prohibition on development "temporary," or to fix a set number of years."

The Tahoe Court also resolved a property rights issue it had inconclusively decided in Palazzolo v. Rhode Island (decided June 28, 2001). Palazzolo involved coastal wetlands property owned by a Rhode Island man, Anthony

Palazzolo, who claimed that local development restrictions had deprived him of full use and value of 18 acres of wetlands and without compensating him.

Overruling the Rhode Island Supreme Court, the U.S. Supreme Court said that a landowner could bring a takings claim even in cases where government regulations already were in place when the landowner acquired the property. For a 5-4 majority, Justice Anthony Kennedy said that to accept the Rhode Island court's decision "would absolve the state of its obligation to defend any action restricting land use, no matter how extreme or unreasonable." In another part of the case, though, the Justices ruled against Palazzolo, finding that he had failed to establish that he had been deprived of all economic use of his property. Noting that Palazzolo had use of some part of the parcel, Justice Kennedy wrote: "a regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property, "economically idle.'"

Because the Court held that the land-use restrictions might amount to a taking, it sent the case back to the Rhode Island courts to decide whether a taking had actually occurred. But two members of Justice Kennedy's majority in Palazzolo, Justices Sandra Day O'Connor and Antonin Scalia, had battled in separate opinions over what factors the state courts should consider. Justice O'Connor had argued that "all relevant circumstances" should be weighed, cautioning that because the land-use restriction was already in place when the landowner acquired the property, the courts should guard against a "windfall" takings award. Justice Scalia had advocated a flat rule: the pre-existing restriction should have no bearing on the analysis. Ten months later, the Court majority in Tahoe firmly embraced Justice O'Connor's position over Justice Scalia's. Courts should examine "a number of factors rather than a simple mathematically precise formula," Justice Stevens said, quoting from Justice O'Connor's concurring opinion in Palazzolo.

A Recent State Case Against the Exercise of Eminent Domain
On April 4, 2002, the Illinois Supreme Court, in a 5-2 decision, struck down the Southwestern Illinois Development Authority (SWIDA)'s condemnation of a metals-recycling plant owned by National City Environmental LLC. Gateway International Raceway of Madison, Illinois (a unit of Dover Motorsports Inc.) had asked SWIDA to condemn 149 acres adjacent to the race-track for additional parking. The trial court had permitted the taking because it found that the condemnation served a public purpose by easing traffic congestion and eliminating blight. But Illinois' highest court ruled that SWIDA's taking mainly served the race-track's private purpose: "The power of eminent domain is to be exercised with restraint, not abandon. . . . Using the power of government for purely private purposes to allow Gateway to avoid the open real-estate market and expand its facilities in a more cost-efficient manner, thus maximizing corporate profits, is a misuse of the power entrusted by the public." The two dissenting justices opined, "in its attempt to reach a particular result, the majority does great harm to the public-use doctrine and to the interests of the state." The majority opinion said that use of condemnation in economic-development cases should be closely scrutinized as to whether there is a public purpose (i.e., the government cannot simply become an economic czar); but the most serious criticism of the majority's holding is that it left no clear test for when a condemnation might be allowed in an economic-development project.

CHINA AND PROPERTY LAW is in the SELECTED READINGS (Reaction Paper Articles).

Notes on the Video

THE TAKINGS CLAUSE: A VIRTUAL FIELD TRIP TO FAR AWAY!

THE TAHOE CASE

Lake Tahoe is a uniquely beautiful location. It has been characterized as a national treasure, and almost indescribably beautiful. It also became the subject of protracted litigation. In its attempt to impress upon its audience the significance of the litigation surrounding the lake, the District Court in Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 34 F. Supp. 2d 1226 (D. Nev. 1999), quoted Mark Twain’s portrayal of Lake Tahoe as:

> A noble sheet of blue water lifted six thousand three hundred feet above the level of the sea, and walled in by a rim of snow-clad mountain peaks that towered aloft full three thousand feet higher still!...As it lay there with the shadows of the mountains brilliantly photographed upon its still surface I thought it must be the fairest picture the whole earth affords.

34 F. Supp. 2d at 130 (quoting Mark Twain, Roughing It 169 (1872)).
What impressed Twain, and continues to impress others, is the clarity of the lake’s water. This is due to an absence of algae, which is due in turn to an absence of nitrogen and phosphorous. The beauty of the lake attracts both residential

and commercial development. As the area around the lake becomes more developed, these nutrients are released into the water and the clarity eroded. This process of becoming rich in the nutrients that cause growth of algae is known as eutrophication. Should the process become complete, it might take over 700 years for the lake to return to its natural clarity.

At the Southern Shore

Waves, Boats, Ducks, Hot-Air Balloon
Crystal-Clear Water: Beauty Leads to Visitors and Settlement, leads to No More Beauty
Mistaken Date?
A taking of "use" (via regulation)

(a) Lucas case – a (per se) complete taking of use for any economic purpose
(b) Penn Central case – a partial taking of use

Three elements of a Balancing Test:

1. the regulation deprives the owner of his investment expectations
2. there was an economic impact from the regulation
3. the character of the governmental action (its nature and importance)

Laura for a Second!

Up above Emerald Bay

- Pines, a Yapping Baby in the Background, a Very Deep Lake
- Agency's 32-month Ban on Development (extended to about six years altogether)
- Landowners' lawsuits in California and Nevada
- 18 Years of Litigation!
- U.S. Supreme Court: A temporal taking – even a long one – is not a complete taking
- Three dissenters – it is a complete taking for the time period of that taking, and indefinite extensions could take place. (All government takings are, in a sense, merely temporal)
- Poor Lawyering: on appeal, landowners' lawyers did not argue for a partial takings analysis, since they had at that level won on other grounds. That Penn Central argument thus was not saved for review by the U.S. Supreme Court.

On the Western Shore

- Boats, Fishing, Rocks
- Supreme Court's Decision: Pro-Nature! Everyone's right to Beauty!
- A Rude Interruption!
- The Battle Continues: Public Rights versus Private Property