"Compulsory Purchase in Administrative and Comparative Public Law".

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The power of eminent domain

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Introduction

- Power of eminent domain is generally defined as the power of the sovereign to take private property for public use without the owner's consent.
- It is an "inherent attribute of sovereignty" (state and federal – **Kohl v. United States**, 91 US 367 (1875)) => 5th Amendment is not a grant of power, but rather a limit on the exercise of that power. Just compensation has to be offered for the exercise of the power of eminent domain to be valid.
- The 5th Amendment limits the power of eminent domain at federal and state levels – **Chicago, Burlington & Quincy RR Co. v. City of Chicago**, 166 US 226 (1897))
- In practice, two main types of takings: a) the so-called "paradigmatic taking" that consists in direct government appropriation or physical invasion of private property, and b) regulatory takings, the existence of which was ascertained by the Supreme Court in **Pennsylvania Coal Co. v. Mahon**, 260 US 393 (1922). "While property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." To each type of taking corresponds a procedure: a) condemnation action or b) inverse condemnation action.
- While the existence and the mechanics of the power of eminent domain have been settled for some time, debates on the scope of the power of eminent domain are still mobilizing scholars, lawmakers and property rights activists. This presentation focuses on current definitional issues.

Part I : A complex definition of "taking"

Beyond the paradigmatic taking case of direct government appropriation or physical invasion of private property, when may a taking occur?

A: What are regulatory takings?

The latest Supreme Court pronouncement on the topic dates back to 2005. In **Lingle v. Chevron USA Corp.**, 544 US 528 (2005), a unanimous Court provides a welcome clarification of its regulatory takings caselaw. It essentially clarifies one point, being the respective scopes of substantive due process analysis and eminent domain analysis. Thanks to this clarification, the Court is able to offer an how-to-do guide to solve regulatory takings claims.

1: Clarification of the respective scopes of substantive due process and eminent domain

- Definition of substantive due process
- Why substantive due process has been used by the courts in takings cases
- Substantive due process is not appropriate to determine whether a taking has occurred

2: Clarification of the regulatory takings jurisprudence

- Categorical/ per se takings

    - Regulations requiring an owner to suffer a permanent physical invasion of her property, however minor. See **Loretto v. Teleprompter Manhattan CATV Corp.**, 458 U.S. 419 (1982) (state law requiring landlords to permit cable companies to install cable facilities in apartment buildings effected a taking).
    - Regulations that completely deprive an owner of "all economically beneficial use" of her property, except to the extent that "background principles of nuisance and property law" independently restrict the owner's intended use of the property. **Lucas v. South Carolina Coastal Council**, 505 US 1003 (1992) (statute that had the direct effect of preventing Mr Lucas from building any permanent habitable structures on the parcels he had bought precisely with the intention of building several houses). Lucas loophole – what are those background principles that may exempt from payment of compensation? “loophole in the Lucas rule large enough to circumvent the rule entirely, provided that state courts are willing to be rather creative in defining background legal principles.” **W. David Saratt, Judicial Takings and the Course Pursued**, 90 Va. L. Rev. 1487 (2004).

- Partial takings

    - Outside these two relatively narrow categories (supra) and with the exception of land-use exactions (infra), regulatory takings challenges are governed by the standards set forth in **Penn Central Transp. Co. v. New York City**, 438 U.S. 104 (1978).
        - Inability to develop any "set formula" for evaluating regulatory takings claims. However, "several factors that have particular significance."
        - "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations."
        - the "character of the governmental action" - for instance whether it amounts to a physical invasion or instead merely affects property interests through "some public program adjusting the benefits and burdens of economic life to promote the common good"
        - Underlying idea is to try and identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.

- Land-use exaction cases (government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit). See **Nollan v. California Coastal Commission**, 483 US 825 (1987) (permit to build a larger residence on beachfront property conditioned on dedication of an easement allowing the public to traverse a strip of the property between the owner's seawall and the mean high-tide line) and **Dolan v. City of Tigard**, 512 US 374 (1994) (permit to expand a store and parking lot conditioned on the dedication of a portion of the relevant property for a "greenway," including a bike/pedestrian path).

    - “Rationally related” and “roughly proportional” tests survive Lingle v. Chevron because the inquiry in this type of cases if of a different nature.
    - Doctrine of “unconstitutional limitations.” Landowners may not be required to relinquish their

right to exclude the public from their property in return for a needed permit without the government providing compensation

B: Do judicial takings exist?

So far, no Supreme Court case has found that a court decision constituted a taking within the meaning of the 5th amendment. However, scholars (and litigants) have been discussing this about this topic. In what circumstances would a court decision constitute a taking and upon what grounds?

1: A tentative definition of judicial takings

- A court decision in an inverse condemnation case holding that because the litigant has no property rights to start with, no taking may have occurred. This is exactly the situation in the Stop the Beach Renourishment case, pending before the Supreme Court. **Stop the Beach Renourishment v. Florida Dept of Environmental Protection**, (2010).
- A court decision in a regular case, that has the effect of substantially modifying property law.

2: A tentative justification for the recognition of judicial takings

- Textual argument
- Very early on, the Supreme Court recognized that the actions of a court judge, or a court judgment could constitute a violation of constitutional provisions.
- The Supreme Court has held that the "government does not have unlimited power to redefine property rights." **Loretto v. Teleprompter Manhattan CATV Corp**., 458 US 419 (1982). In particular, the Court rejected the argument that since property rights are created by the state "by prospective legislation the State can shape and define property rights and reasonable investment-backed expectations," such that subsequent owners acquire a property with lesser rights and have no taking claim. **Palazzolo v. Rhode Island**, 533 US 606 (2001).
- Justice Stewart's concurrence in **Hughes v. Washington**, 389 US 290 (1967).
- A judicial takings doctrine would prevent courts from abusing the Lucas loophole, the dangers of which have been acknowledged by Justice Scalia himself. Dissent in **Stevens v. City of Cannon Beach**, 510 US 1207 (1994).

But

- Impact of the never-ending debate on whether judges make or find the law
- Procedure to be defined
- The Supreme Court cannot encroach upon states' right to amend their property law. Raises the questions of the scope of a judicial takings doctrine.
- Federalism

Part II: A controversial definition of "public use"

It has always been clear that "the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even if A is paid just compensation." In 2005, the Supreme Court's case Kelo made the headlines and caused public outcry because many thought that the Court had authorized a taking for a private use. The Court held in Kelo that a plan of economic development that would primarily benefit a major pharmaceutical company while incidentally benefiting the public in the nature of increased employment opportunities and increased tax revenues, was a "public use." However, this case should not have caused so much anger as it relies on long-established precedents and leaves the states and local governments free to adopt a narrower definition of "public use." **Kelo v. City of New London**, 545 U.S. 469 (2005).

A: Kelo confirms the broad reading of "public use"

1: Kelo confirms precedents

- The majority relies heavily on **Hawaii Housing Authority v. Midkiff**, 467 US 229 (1984) (approved a plan to redistribute private property to achieve a broader base of private ownership of property), which itself relied on **Berman v. Parker**, 348 US 26 (1954) (approved a plan to eliminate blight). These cases stand for several propositions.
    - "the "public use' requirement is thus coterminous with the scope of a sovereign's police powers"
    - judicial deference to legislative determination of "public use"
    - "We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects. "
- At state level, trend toward an expansive reading of "public use"
    - **Poletown Neighborhood Council v. Detroit**, 410 Mich. 616 (Mich. 1981) (approved the condemnation of private property to be conveyed to General Motors Corporation for the construction of new assembly plants).
    - **City of Oakland v. Oakland Raiders**, 32 Cal. 3d 60 (Cal. 1982) (held that the court held that the condemnation of a professional football franchise could be an appropriate municipal function and therefore could constitute a taking for "public use").

2: Kelo confirms past practices and understandings

- Mill Acts in the colonies.
- Conforms to an originalist interpretation of the 5th amendment. **Classical republicanism and the 5th amendment's "public use" requirement**, Nathan Alexander Sales, 49 Duke L. J. 339, 1999.
- As early as the end of the 40's, some scholars announced the "death" of the "actual use" construction of the public use requirement. Among other reasons: impractical test. **The public use limitation on eminent domain: en advance requiem**, 58 Yale L.J. 599 1948-1949.

B: Kelo acknowledges state and local governments' power to ultimately decide what is a permissive "public use"

Lawmakers and activists' (see eg The Institute for Justice and its Castle Coalition, www.castlecoalition.org) immediately responded to the Kelo Supreme Court's invitation to adopt narrower definitions of permissive "public use." Courts have followed suit.

1: Legislative and constitutional responses

- Immediate statutory reforms: by the end of 2006, eminent domain reforms had been enacted in 39 states.
    - Definition of 'public use" (expressly prohibited "public uses," "permissive uses").
        - Elimination of blight is usually permissive but protection of unblighted properties even in a blighted area.
        - Takings for public utilities that provide gas, electricity, water etc. is a permissive use.
    - New procedural rules: compensation in excess of fair market value, payment of cost of relocation and attorney's costs, right of first refusal of landowner whose property has been taken when property transferred to another private party.
- During the 2006 fall elections, voters in 9 states supported state constitutional amendments to limit the use of eminent domain. A further 7 states adopted constitutional reforms in 2007.
    - Restricts definition of public use.
    - Specifically prohibits considering economic development, enhancement of tax revenue, or incidental benefit to the public as public use.

- At federal level, one provision prohibiting the use of funds to support the use of eminent domain for economic developpment that primarily benefits private entities.

2: Courts' responses

- After Kelo, difficult for a court not to find a use to be a public use. However, certain courts have been distinguished Kelo to slow down the expanding reading of "public use."
- Reaction to the expansion of "public use" actually predate Kelo. The Michigan Supreme Court overruled in a retroactive ruling its expansive view of public use by holding that a county's plan to condemn land for the construction of a large business and technology park was not "public use." **County of Wayne v. Hathcock**, 471 Mich. 445 (2004).
- The Supreme Court of Ohio, citing the dissent in Kelo, invalidated the city's use of eminent domain to take homes for a new shopping center. **City of Norwood v. Horney**, 110 Ohio St. 3d 353 (2006).