Outline Class 09

I. PENN CENTRAL

Breuer Design

Breuer In N.Y. Times

Breuer Cartoon

Grand Central Main Concourse

1. Would the legislation in this case be authorized under the enabling act as interpreted by the *Stoyanoff* court?
2. The court's summary of takings jurisprudence on pp. S519–20. Note particularly the concepts of "investment-backed" expectations and "physical intrusion."
3. What are Penn Central's arguments?
   a. Conceptual severance—*United States v. Causby* (Rhenquist, J., in dissent, buys this argument)
   b. Significant diminution in value—*Euclid*
   c. Reverse spot zoning—what's the answer to this?
   d. Lack of uniformity—*Goldblatt*
   e. Air-rights park—not *Causby*—gov acting in enterprise capacity
4. Does it go too far? The *Mahon* question.
   a. No interference with present use.
   b. We don't know how far they'll limit.
   c. They've got transferable development rights.

II. THE 1987 "TETRALOGY"

1. *Keystone Bituminous Coal Ass'n v. DeBenedictis* (5–4). *Keystone Bituminous Coal Ass'n v. DeBenedictis* (5–4) involved legislation similar to that which had been struck down in *Pennsylvania Coal Co. v. Mahon* (1922). In effect, coal companies in Pennsylvania were required to leave sufficient coal in place, so as not to cause the subsidence of any land over which there were structures, even if they had already purchased from the landowner the right, known in Pennsylvania as the "support estate", to cause such a subsidence. The Court, in an opinion by Stevens, J., held the statute constitutional.
   a. The case rather nicely poses the problem of what we called when we talked about *Penn Central* "conceptual severance." What has been taken here?
   b. The case also introduces the concept of the "nuisance exception."

   The PA statute has been amended since 1987, and there is now a federal statute on the same topic. The complexities of these statutes are beyond the scope of this course.
2. In *Hodel v. Irving*, the Court held unconstitutional the portions of the Indian Land Consolidation Act that provided for the escheat without compensation to the Indian tribe of small fractional shares of land held by deceased members of the tribe that would otherwise pass by devise or descent and become further fractionated. The Court was unanimous in its judgment. The opinion for the Court by O'Connor, J., emphasizes the importance of passage of property at death as one of the "sticks in

the bundle of rights" that the property-owner holds. The particular problem with which the Court dealt here remains with us. As a general matter the case seems inconsistent with *Andrus* v. *Allard* (p. S524) which held that the state could take eagle feathers out of the market in order to conserve the wildlife from which the property came. One or the other case will probably be confined to its facts, but it is by no means clear that it won't be *Irving*.

3. In *First Evangelical Lutheran Church v. County of Los Angeles* (6–3), in an opinion by Rehnquist, C.J. (but the majority included Marshall and Brennan, JJ.), the Court held that where the County had denied all building permits in a flood-plain area after a disastrous flood had occurred, a property owner had stated a cause of action when he sued for damages for a regulatory taking. The principal issue in the case was whether the claim was ripe, granted that the plaintiff had made no application for a building permit. The Court held that it was, granted that the County had said that it would grant no building permits. That turned the case into a question whether a state could make the sole remedy for invalid regulations an action to declare them invalid. The Court held that it could not, because even if the plaintiff succeeded he would have been deprived of the use of his property during the interim period.

   a. Where does the concept of "ripeness" come from? (It is raised in virtually all land-use cases.)

   b. In what way does this raise the stakes for planners? (More recently see Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002).)

4. In *Nollan v. California Coastal Commission* (5–4), the Court, in an opinion by Scalia, J., held that the Commission could not condition the granting of a building permit on beachfront property on the grant by the landowner of a easement of public access across the beach in question. Even though the Commission could have denied the permit outright, it could not condition the granting of the permit on the grant by the landowner of something that was unrelated to the building they were about to build.

5. In 1994, in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the Court per Rehnquist, CJ, held (5–4), that the *Nollan* test not only required that there be a nexus between the required dedication but that there be "rough proportionality" of the burden on the property owner and the benefit that the city gets. The case held that the city's requirement that landowner dedicate portion of her property lying within flood plain for improvement of storm drainage system and property adjacent to flood plain as bicycle/pedestrian pathway, as condition for building permit allowing her to pave the parking lot on her commercial property, did have nexus with legitimate public purposes but that findings relied upon by city to require landowner to dedicate portion of her property in flood plain as public greenway, did not show required reasonable relationship necessary to satisfy requirements of Fifth Amendment. Further, the city failed to meet its burden of demonstrating that additional number of vehicle and bicycle trips generated by proposed commercial development reasonably related to city's requirement of dedication of pedestrian/bicycle pathway easement.

   a. What constitutional doctrine is at stake here?

   b. Possible limits on *Nollan* and *Dolan*?

c. Burden shifting under what circumstances?

d. What planning practices are likely to be affected?

III. LUCAS, PALAZZOLO, MURR

Who won, supported by which justices?

1. Lucas v. South Carolina Coastal Council (1992): (5–1–3) Scalia for the court, Rehnquist, Thomas, O'Connor and White; Kennedy in separate concurrence; Blackmun and Stevens in dissent, Souter with a separate statement.
2. Palazzolo v. Rhode Island (2001): (5–4) Kennedy for the majority, joined by Rhenquist, Thomas, Scalia, O'Connor, concurrences by Scalia and O'Connor, dissents by Stevens [mostly, he agreed on the ripeness issue], Ginsburg, Souter, Breyer, who also noted his agreement with O'Connor on the acquisition-timing question)
3. Murr v. Wisconsin (2017): (5–3) Kennedy for the court with Ginsburg, Breyer, Sotomayor and Kagan. Roberts in dissent with Thomas and Alito. Thomas in a separate dissent. Gorsuch not participating.

IV. LUCAS

For a vew of the area in question in *Lucas* click here.

For what one of Lucas's lots looks like now, click here.

1. *Lucas* (1992): (5–1–3) Scalia for the court, Rehnquist, Thomas, O'Connor and White; Kennedy in separate concurrence; Blackmun and Stevens in dissent, Souter with a separate statement.
   a. Where landowner is totally deprived of value s/he must be compensated unless the regulation deals with a nuisance.
   b. Was this landowner totally deprived of value? If not, can we make sense of the scope of the "nuisance exception"? That's basically Souter's argument.
   c. Where does the idea of "total deprivation of value" come from?
      i. 1789–91?
      ii. 1868?
      iii. 1897? *Chicago, Burlington & Quincy*
      iv. 1922? *Mahon*
   d. Where does the "nuisance exception" come from?
      i. 1789–91?
      ii. 1868?
      iii. 1897? *Chicago, Burlington & Quincy*
      iv. 1922? *Mahon*
   e. The opinion is notable for its frank recognition that the distinction between harm-producing and benefit-conferring is so malleable as to be meaningless. Coase has arrived at the Supreme Court.

f. It is also notable for its frank recognition, at least in a footnote, that total deprivation of value is dependant on the denominator of the fraction, and that the concept therefore must be controversial.

g. Kennedy: Wants to make clear that the nuisance exception extends beyond common-law nuisance.

h. Blackmun: Is furious: "Today the Court launches a missile to kill a mouse." To which Scalia replies: "After accusing us of 'launch[ing] a missile to kill a mouse' … , JUSTICE BLACKMUN expends a good deal of throw-weight of his own upon a noncombatant."

i. Case not ripe

ii. What's so great about common-law nuisance?

iii. Background principles must take into account the colonial and early US experience (Mill Acts)

i. Stevens:

i. Arbitrary nature of the total deprivation rule

ii. Basically same point about nuisance (*Mugler v Kansas* a particularly good case for his position)

j. Souter: We are faced with an unreviewable and highly questionable finding that there has been a total deprivation of value. Since we really do not know that there has been a total deprivation of value, we cannot meaningfully define what the nuisance-exception means.

2. Suppose in *Mugler v. Kansas* the property in question was subject to a private restriction that it could only be used for a brewery. Would Mugler have a claim of total deprivation value?

3. How much practical effect will this have?

4. What happened next? According to Fishel (p. 61), the state settled on remand by purchasing the land. A neighbor offered $315,000 for one of the lots to protect his view, with a promise to keep it unbuilt. The state preferred to sell both lots to a developer for $785,000. (I.e., $392,500 per lot or $77,500 more than the neighbor was willing to pay for it.)

V. CAN WE MAKE ANY SENSE OF THIS FROM A THEORETICAL POINT OF VIEW? DOES HEGEL PROVIDE A CLUE?

1. Hamburger Heaven. A small commercial establishment is operating in an area that is now zoned residential. If the establishment is required to shut down, has there been a taking? The question is not open-and-shut, but as we saw in our discussion of non-conforming uses, there is considerable uneasiness with land-use regulation that requires changes in existing uses. Now let us suppose the same piece of land in the same area, but the commercial establishment has not been built. The zoning regulation is passed. A taking? Certainly not.

2. Two Cadillacs. Suppose that we finally decide that the dangers to the environment and the consumption of fuel caused by automobiles are simply too great. We've got to cut down on driving cars. In the first attempt to do so we pass a statute that says that everyone who owns two cars will turn one of them over to the government. Has there been a taking? Of course, in both the legal and the social senses. Now suppose

that rather than having the second cars turned over to the government we simply impose a very heavy tax on the ownership of a second car, so heavy that the effect of the tax approximates that of requiring that it be turned in to the government. Has there been a taking? Almost certainly not, in both a legal and a social sense. Now suppose that instead of taxing second cars or having them turned in to the government a regulation is passed requiring that second cars be kept in the garage. A taking? Well, maybe. It's certainly not as clear as the other two cases. Perhaps we might want to say that where the owner has been deprived of all reasonable use of his property there has been a taking. But from the point of view of "scientific policy-making" all three situations are virtually the same. The purpose of the regulations is the same; their effects are the same. Whether or not they meet the policy-makers' criteria will not depend, normally, on the fact that appropriation is the mechanism used in the first case, taxation in the second and regulation of use in the third.