ARIZONA STATE UNIVERSITY COLLEGE OF LAW

PROPERTY LAW, SPRING 2014

Professor Karjala

FINAL EXAMINATION
Part 1 (Essay Question)

MODEL ANSWER

Monday April 28, 2014

Instructions

This examination consists of two parts. Part 1 is an essay problem that will account for roughly 40% of your final grade in the class. Part 2 is a set of 36 multiple choice questions that will account for roughly 60% of your final grade in the class. Both parts are distributed together, and you have a total of 3-1/2 hours to complete both Parts. You may divide the time you devote to each Part as you choose.

You are permitted to have with you and to use during the examination hard copies of the textbook, any class handouts (including printouts from the Syllabus), your class notes and outlines, and any other materials made by you personally or by your study group (not photocopied from printed materials, except for materials referenced on the Syllabus). You are permitted during the examination to access files stored on your own computer or accessible over the internet via the Syllabus. The materials we have studied and our class discussion constitute the legal authorities that govern the answers to these questions. Do not rely on or cite as authorities cases, statutes, or other materials of which you may be aware but that we have not studied in class.

If answering Part 1 in longhand, please write legibly, double space, and on one side of a bluebook page only.

In answering this essay problem, do not begin with an elaborate discussion of the facts. Indeed, mere repetition of the facts without relevant legal doctrine will not get you any points at all. Neither, for that matter, will abstract discussion of legal doctrine that is not tied to the facts of the problem. Do not recite long policy arguments that you may think I have made in class, except in the very specific context of the facts of this problem. Your analysis should weave relevant legal doctrine, including policy where appropriate, together with the facts to create a response that is directly relevant to what has been asked. If you believe that your resolution of a given issue basically eliminates the need to consider other issues, do not give in to the temptation to point that out and stop writing. Rather, assume (even if apparently beyond common sense or logic) that your earlier resolution is incorrect and analyze the issues that remain when that issue is decided the other way. I do not deliberately place “red herring” facts in my exam problems. Therefore, think about all the facts in the question: If your answer does not make use of a particular fact, it is quite possible that you have missed an issue whose discussion would get you points.

GOOD LUCK!
Problem

P’s grandfather G 50 years ago acquired a painting at a second-hand store. G cleaned up the painting, and it has been in P’s family ever since. P grew up in a house that had the painting on the wall, and it now hangs on a wall in P’s current house. P is now the owner of the painting. Recently P had the painting examined by several experts, all of whom concluded that it was actually an extremely valuable work by an Italian renaissance painter. The painting now has a fair market value of $1 million. Over the years, P has become increasingly obsessed with the painting. Sometimes he stares at it in admiration for hours. P has decided that he cannot bear the thought of leaving the painting to anyone else when P dies. Therefore P has publicly announced that, at some point prior to his death (P is currently 50 years old and in good health), he will ritually burn the painting in a public ceremony.

P lives in State X, and you may assume that practical difficulties make it impossible for P to remove the painting to another state. State X follows the common law on the right to destroy property and has constitutional and statutory provisions identical to Arizona on eminent domain and regulatory takings (specifically including Proposition 207).

The Center for the Preservation of Art (CPA) is alarmed by P’s announcement and wishes to prevent P from destroying the painting. CPA has consulted you concerning several legal paths it is considering. Advise CPA on the following:

(1) Assume that CPA has standing to bring an action against P for an order enjoining P from intentionally destroying the painting. P’s children, who would be P’s heirs if P were to die today, are willing to join in such an action. What would be the likely result of such a lawsuit on the merits?

(2) Assume that CPA has sufficient legislative influence that State X would condemn the painting and take title to it by eminent domain, with the purpose of transferring title to Museum (M), a private nonprofit corporation dedicated to the acquisition and display of art to the public. What arguments would P make to resist this transfer of title by eminent domain, and how would a court likely rule?

(3) If for some reason a formal taking by exercise of the eminent domain power is not feasible (including but not limited to the State’s desire not to pay $1 million as compensation), assume that CPA has sufficient legislative influence that State X would adopt a statute forbidding the destruction of any “work of fine art” whose value exceeds $500,000. Would such a statute constitute a regulatory taking either under state or federal law?

END OF PART 1
A basic rule of property law is that the owner of property may do with it as he chooses, provided such use does not unreasonably interfere with the use by others of their property. There is no suggestion here that P’s destroying the painting would unreasonably interfere with anyone else’s use of his own property. There have not been many judicial decisions on the right to destroy, because people rarely intentionally destroy valuable property. However, in *Eyerman* (text p. 82), the court overturned the denial of an injunction seeking to prevent destruction of a house, as ordered in the will of the decedent owner. The court noted that destruction would result in an unwarranted loss to the estate, the plaintiff neighbors, and the public. The house had, according to the court, “high architectural significance” (p.83) and the value of the estate remaining to the heirs would be depleted by over 95% ($40,000 to $650). The court also noted the increased likelihood that a vacant lot where the destroyed home had stood would be detrimental to the health, safety, and beauty of the neighborhood and that there was a pressing need for housing in the area (p.84). The court concluded that a “senseless destruction serving no apparent good purpose” would be looked upon with disfavor.

Our case differs from *Eyerman* in several respects. First, as pointed out by the dissent, the heirs were not parties in *Eyerman*, while they will be here. Second, if the “architectural significance” of the home in *Eyerman* was important in deciding to preserve it through judicial order against the wishes of the owner, the public interest is even higher in a case like this one. A home of similar style could always have been rebuilt on the site of the demolished home in *Eyerman*, whereas an original Italian renaissance painting is unique and irreplaceable. Destruction of the painting removes an important piece of the cultural heritage of everyone. These facts point in favor of an injunction. However, the court in *Eyerman* expressly distinguished destruction pursuant to order in a will from destruction by a living owner (p.85). Here, P seeks to destroy the painting while he is still alive. Moreover, unconvincing as they were in *Eyerman*, there are here no “health and safety” issues or losses to neighboring landowners that the court can grasp onto in this case at all. Moreover, the interest of the assumed heirs of P are contingent in any event, as P can probably leave the painting in a will to third parties or even sell it in P’s lifetime. Finally, the home in *Eyerman* was viewable by the public from the outside, while P’s painting is not currently publicly accessible nor is there any assurance that it ever will be publicly accessible (absent taking by eminent domain), even if P’s planned destruction of it is enjoined. On the other hand, most valuable works of fine art do end up in museums sooner or later. An injunction against destruction at least allows that possibility, while destruction by P would permanently remove any opportunity for the public to know and appreciate the painting.

Is this a case of “senseless destruction” serving no apparent good purpose? There is no evidence that P is insane or otherwise an irrational person. Many people become enamored of works of great art. While few seek their destruction, the mere fact of wanting such a work destroyed is hardly evidence of insanity or irrationality. Here we know why P wants the painting destroyed, contrary to the situation facing the court in *Eyerman*. P cannot abide the thought of the painting’s being in the hands of someone other than P. This may be selfish, but is it not within the rights of a property owner to be selfish with his property? There is no rule of law that would require P to display the painting in public no matter how strong the public desire to see it, and P would certainly not have to invite anyone into his home just because that person wished, no matter how desperately, to view the painting. So, destruction is not entirely “senseless” and it does serve some public purpose in reaffirming the public’s respect for property rights.
Moreover, because P plans to engage in a ritual public burning of the painting, the act of destruction may fall within Professor Strahilevitz’s notion of furthering an “expressive objective.” Against this, Professor Strahilevitz would balance concerns for wasted resources and negative externalities (p.90). Here, while P’s objective may be expressive, P is not the artist who created the painting, which is the group for whom Professor Strahilevitz seems to have the most concern.

In short, it is far from clear how a court will do the necessary balancing in a case like this one. The purpose, while not senseless, does appear selfish. Destruction causes an irreparable loss not just to those living today but to all future generations. The issue is how these concerns should be balanced by our traditional strong regard for property rights. Different courts will draw the balances in different ways, as indicated by the majority and dissenting opinions in the *Eyerman* case itself.

I would therefore advise CPA that such a lawsuit is worth bringing but that there can be no guarantees or even strong hopes of its succeeding.

(2) Exercise by State X of power of eminent domain

Under both federal and state law, private property may only be taken for a “public use.” Public use under federal law essentially means “public purpose” under the *Kelo* and *Midkiff* decisions. Surely the preservation of artistic heritage is a “public purpose.” Consequently, federal law would constitute no bar to eminent domain action by State X to acquire title to the painting and transfer it to a private, nonprofit Museum whose goal is to preserve the painting.

State X follows the Arizona constitution and Arizona’s Proposition 207 in its provisions for eminent domain. The constitution requires a judicial determination of whether a purported taking is a public use, independent of any legislative finding to that effect. As interpreted in the *Bailey* case, we must consider some seventeen factors, most of which are either neutral or point in the direction of public use here: The property will be used for preservation and public presentation of the painting, title will be held by a nonprofit, albeit private entity, and the property will be used for the public purpose of displaying the painting to the public. This is an important, if not “needed,” public service, although the condemning authority does not (apparently) retain authority over use of the painting. (Perhaps CPA can arrange to allow the State some oversight concerning how Museum displays and, more important, disposes of, the painting.) The anticipated use is viewing by the public, and it is all public funds that will go into the painting’s acquisition. The entire community benefits, not just a few private parties, and indeed no private party stands to gain at all unless Museum is allowed to sell the painting to raise cash for its other purposes. We can probably arrange the acquisition in such a way that insures against transfer of the painting for at least an extended period of time. Private parties may be behind the sought acquisition, but not for profit motive but rather preservation of cultural heritage. While there are no public health or safety concerns nor blight to be removed, the property to be taken is unique and the taking will result in harm to nobody except P’s desire that the painting not be owned by someone other than P. Taking the property is crucial to the purpose of preservation, because P has stated that he intends to destroy it. The public purpose of preservation of a unique work of fine art outweighs the essentially nonexistent private purposes for taking the property. Will the constitutional protection afforded to private property owners have been considered? Yes, the court will consider P’s property rights carefully but is likely to conclude that the public interest in preservation outweighs P’s private interest in destruction of a unique work of art.
Even assuming that a taking of the painting by eminent domain as proposed would comport with the state constitution, we must consider what effect, if any, Proposition 207 has on the issue. As codified, § 1131 permits eminent domain only if authorized by the state, but that should be no problem here because we are envisioning action by the state. § 1136(6) defines “taking” to include transfer of ownership “to any person other than this state or a political subdivision of this state.” Thus, the statute seems to contemplate that a taking can at least sometimes result in transfer of ownership to a private party. § 1136(5)(a) defines “public use” as (1) possession, occupation, and enjoyment of the land by the general public or public agencies, (2) use by utilities, (3) use to prevent a direct threat to public health or safety, and (4) acquisition of abandoned property. No utilities like electric or water companies are involved here, and there is no suggestion of a threat to health or safety, so (2) and (3) are unhelpful. (1) refers specifically to use of land and so would not literally apply to personal property like a painting, but there is nothing to suggest that Proposition 207 would wholly prohibit the taking of personal property by eminent domain. (Indeed, in Lucas Justice Scalia suggested that property owners generally expect more restrictions on their use of personal property than they do of real property.) Here, the painting will be “used” by the general public, in that members of the general public will be able to view it at Museum, and while Museum is not strictly speaking a “public agency,” it is serving an important public purpose in preserving and displaying works deriving from our general cultural heritage. Moreover, while the painting has not been “abandoned” by P within the meaning of any of the cases we have studied, in a sense P does intend to abandon the painting by destroying it. Consequently, the taking may well be a “public use” even within the meaning of Proposition 207. This avenue is therefore one that may usefully be pursued by CPA. Of course, this would require State X to come up with the $1 million necessary to pay just compensation to P. (We put to the side any claim State X might make that the painting has no monetary value to P because he seeks to destroy it. P is entitled to fair market value, not the subjective value he personally places on the property. In any event, P’s subjective value may be even higher than $1 million, in the sense that P would pay more than that for the painting if he is permitted to destroy it as he wishes to do.)

(3) Statute prohibiting destruction of “works of fine art”

Would a statute forbidding destruction of any “work of fine art” having a value exceeding $500,000 constitute a regulatory taking under federal or state law? We simply note at the outset that, however vague the phrase “work of fine art” might be in general, there is little doubt that P’s painting is such a work. Therefore, such a statute would formally remove from P any right he may otherwise have held as owner to destroy the painting.

Under federal law, such a statute would not work a physical invasion of the property, nor would such a statute be justified as health and safety protection, or even nuisance regulation. Moreover, taking away the right to destroy the painting does not work a complete economic wipe-out of value – indeed, it does not reduce the value of the painting at all. Therefore, none of the categorical rules for regulatory takings apply, and we must turn to the Penn Central balancing approach.

Under Penn Central we look to the economic impact of the regulation, especially to its effect on distinct investment backed expectations (DIBEs). We look to the character of the interference with the use of property, such as physical invasion, and we look to whether the action serves a uniquely public function. In this case, the economic impact is nonexistent, given that no one would pay less for the painting just because the buyer would not be permitted to destroy it after acquisition. The DIBEs analysis in the federal courts tends to look, as the Penn Central Court did, at the property owner’s expectations at the time of acquisition. In this case,
upon acquisition grandfather G apparently paid far less than the painting’s FMV, because no one knew who its author was or that it was so valuable. To the extent the painting was purchased for investment, it has paid off handsomely, and the proposed statute furthers, rather than frustrates, such expectations. There is no suggestion that G purchased the painting with an intent eventually to destroy it. We do not even know whether P had an intent to destroy the painting at the time he acquired title, presumably by inheritance. Certainly P has made no “investment” in the painting that can be characterized as having been made for the purpose of destroying it. Moreover, the statute makes no physical invasion of P’s property at all. It simply tells P that he cannot destroy the property. This is no different from the City of New York’s telling the Penn Central company that it cannot destroy the exterior of the historic building that it owned. Finally, while display of works of cultural heritage is a function that is sometimes performed by government (the Smithsonian museums in Washington, D.C., for example), many museums are private. In addition, P has lost only one “arrow” in the quiver of his property rights in the painting. P can still exclude others from viewing the painting, he can display it as he chooses, and he can alienate possession by gift or sale. Although he has lost 100% of his “right to destroy,” he has lost only a minuscule portion of the value of his overall property rights in the painting. The Court did not buy the conceptual severance argument in Penn Central, and a court surely will not buy the argument on these facts. Therefore preserving and displaying works of fine are not a uniquely governmental function. We might also note that the proposed statute applies to all works of fine art having a value exceeding $500,000. No evidence is presented in the fact pattern to suggest that P is unique, and surely there are other works of fine art in State X to which the statute would apply. Those owners, too, would be denied the right to destroy their works of art. Putting everything together, there is no taking under federal law.

Section 1134, adopted by Proposition 207, requires payment of compensation if existing rights to use real property are reduced by a land use law so as to reduce the property’s FMV. Therefore, 1134(A) by its terms seems not to apply to personal property like P’s painting. (Note also that 1134(A) refers to reduction in rights to “use, divide, sell or possess,” which term does not obviously comprise the right to destroy, although that is perhaps encompassed within the right to use.) Section 1134(B)(6) reiterates the limited application of the statute to real property, saying that 1134(A) does not apply to land use laws that do not directly regulate an owner’s land. Moreover, in this case P’s right to destroy the painting is reduced — indeed, eliminated — but that has no effect on the painting’s FMV. Again, just compensation would not seem required under the statute. Finally, the statute is not health and safety regulation or pollution control; the statute does not regulate a common law nuisance; the statute is not required by federal law; the statute does not regulate alcohol, drugs, or topless dancing; and the statute does not establish locations for utilities. Therefore, even if somehow 1134 did apply and even if the painting’s FMV were reduced by the statute, none of the five exceptions appear to apply, but the sixth exception does: the regulation does not directly regulate an owner’s land.

I would therefore advise CPA that its best course would be to try to get State X to adopt a statute prohibiting destruction of works of fine art of value exceeding $500,000. The public objective of preservation could be achieved without payment of the $1 million that would be required if the painting were acquired by eminent domain. Of course, this approach likely leaves the painting outside the public eye for at least P’s lifetime, so if the goal is to have public access now, the only course is for the public to pay for such access by exercising the power of eminent domain and compensating P with its FMV.