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NOTES

PROPERTY OWNERSHIP AND THE RIGHT TO VOTE: THE COMPELLING STATE INTEREST TEST

An election in which only property taxpayers could vote was held to approve the issuance of revenue bonds to finance the expansion and improvement of the city-owned utility system. Appellant, who did not own property, sued to enjoin the issuance of the bonds and for a declaratory judgment that limitation of the right to vote to property taxpayers is unconstitutional. A three-judge federal district court found the election constitutional.¹ On direct appeal, the United States Supreme Court *held* that such a denial of the right to vote is a violation of the equal protection clause of the fourteenth amendment. *Cipriano v. City of Houma*, 395 U.S. 701 (1969).²

In a similar case, New York law provided that in the area in question the school board was to be elected at an annual meeting of qualified school district voters. To qualify as such, an otherwise qualified voter had to (1) own or lease taxable real property, (2) be the spouse of one who owns or leases real property, or (3) be the parent or guardian of a child in school. Appellant, a 31-year-old college-educated bachelor who lived with his parents, was denied the right to vote for the school board. He challenged the constitutionality of the voting requirements in a three-judge federal district court which held the requirements valid.³ The United States Supreme Court *held* that the requirements were a denial of equal protection. *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621 (1969).

The right to vote is said to be a fundamental right.⁴ However, it is not usually thought of as a "natural" nor "inalienable" nor "universal" right.⁵ Despite the fact that parts of the original

1. *Cipriano v. City of Houma*, 286 F. Supp. 823 (E.D. La. 1968).

2. The holding was applied only prospectively, but was applied to this case since the suit was brought within the prescriptive period for challenging the election. While the suit was pending, the Louisiana legislature passed Act 33 of the Extra Session of 1968 providing that in the future a local governing body at its discretion could hold revenue bond elections in which only people who own property could vote or an election where all qualified residents could vote.

3. *Kramer v. Union Free School Dist. No. 15*, 259 F. Supp. 164 (E.D. N.Y. 1966).

4. *Cipriano v. City of Houma*, 395 U.S. 701 (1969); *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621 (1969); *Williams v. Rhodes*, 393 U.S. 23 (1968); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); *Carrington v. Rash*, 380 U.S. 89 (1965); *Reynolds v. Sims*, 377 U.S. 533 (1964).

5. See *Pope v. Williams*, 193 U.S. 621, 628, 633 (1904). If by fundamental

Constitution⁶ and five amendments⁷ concern voting, the right to vote in state elections is not expressly guaranteed by the United States Constitution.⁸ When the Constitution was ratified, most of the states required property ownership as a qualification for voting in a general election.⁹ Most of these voting requirements lasted at least until the Jacksonian era.¹⁰ Although the states cannot deny or abridge the right to vote on account of race¹¹ or sex,¹² "the States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised."¹³ In fact, the only thing that seems to require a state to extend the right to vote in state elections to anyone is the guarantee of republican government clause.¹⁴ Whether a particular state government is a republic or not has been held to be a political question which the Court cannot decide.¹⁵ However, Congress would be certain to act if a state set up any government other than a republican government. In effect, the states are politically and historically bound to extend the right to vote to some of their citizens. Once this is done the persons not extended

is meant important, then the right to vote is certainly fundamental since it is necessary to preserve other rights. On the other hand, if by fundamental is meant "natural" or "universal," then the right to vote would not be included since it cannot belong to all people. For example, children—even infants—have such rights as the right to free speech or the right to a fair trial. Our Constitution guarantees such right to all people. However, some agency of the government must decide such things as the age at which a person may vote, *i.e.*, which people may vote and which people may not vote.

6. U.S. CONST. art. I, §§ 2, 4.

7. *Id.* amends. XV, XVII, XIX, XXIII, XXIV.

8. *Pope v. Williams*, 193 U.S. 621, 632 (1904); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 178 (1874). The right to vote in national elections is not strictly a right to vote granted by the state since art. 1, § 2, cl. 1, of the United States Constitution says: "The House of Representatives shall be composed of members chosen . . . by the people . . ." See *Wessberry v. Sanders*, 376 U.S. 1 (1964); *Gray v. Sanders*, 372 U.S. 368 (1963); *United States v. Classic*, 313 U.S. 299 (1941).

9. Only Georgia, New Hampshire, Pennsylvania, and South Carolina did not have property qualifications for voting, but these states had taxpaying qualifications. Vermont, Kentucky, and Indiana entered the Union without property or taxpaying qualifications. However, Tennessee entered with property qualifications; and Ohio, Louisiana and Mississippi entered with taxpaying qualifications. K. PORTER, A HISTORY OF SUFFRAGE IN THE UNITED STATES 110 (1918).

10. *Id.* at 78-79.

11. U.S. CONST. amend. XV, § 2.

12. *Id.* amend. XIX.

13. *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 50 (1959).

14. U.S. CONST. art. IV, § 4.

15. *Plaintiffs in Baker v. Carr*, 369 U.S. 186 (1962), alleged a denial of republican government, but the Court clearly indicated the basis of the decision was the equal protection clause. "But because any reliance on the Guaranty Clause could not have succeeded it does not follow that appellants may not be heard on the equal protection claim which in fact they tender . . ." *Id.* at 227.

the franchise will be able to raise equal protection questions, since the prohibition against denial of equal protection extends to all state action.¹⁶

A strong argument can be made that the equal protection clause was not meant to affect in any way the right of the states to decide the conditions under which a person could vote.¹⁷ This position is based upon statements made on the floor of Congress at the time the fourteenth amendment was debated.¹⁸ Strongest support for this argument comes from the fourteenth amendment itself, since section two of the amendment indicates that states still have an absolute right to decide who can vote, but if they deny or abridge the right to vote to males over twenty-one the number for the basis for representation will be reduced proportionally.¹⁹ The passage of the fifteenth and nineteenth amendments also supports this position. Early cases held that the fourteenth amendment did not change the control that the states had over voting.²⁰ These cases stated that the voting laws of the states could not discriminate in violation of the United States Constitution but it was clear that this referred to the fifteenth amendment rather than the fourteenth amendment.²¹

The Court has never considered itself bound completely by historical argument.²² The framers of the fourteenth amendment, although mainly concerned with discrimination based on race, apparently intended to end other types of class legislation.²³ The early cases which refused to apply the fourteenth amendment to suffrage dealt with the question of whether the right to vote was one of the privileges and immunities of a citizen of the United

16. *Shelly v. Kraemer*, 334 U.S. 1 (1948); U.S. CONST. amend. XIV, § 1.

17. See the dissenting opinion of Mr. Justice Harlan in *Reynolds v. Sims*, 377 U.S. 533, 589 (1964).

18. *Reynolds v. Sims*, 377 U.S. 533, 593 (1964) (Harlan, J., dissenting, citing CONG. GLOBE, 39th Cong., 1st Sess. 2459-3149 (1866)).

19. *Id.*; U.S. CONST. amend. XIV, § 2.

20. *Pope v. Williams*, 193 U.S. 621, 622 (1904); *United States v. Reese*, 92 U.S. 214, 218 (1875); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 178 (1874).

21. *United States v. Reese*, 92 U.S. 214, 218 (1875).

22. *Harper v. Virginia Bd. of Elections*, 333 U.S. 663, 669 (1966): "In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality."

23. The opposite was held with four Justices dissenting in the *Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1872). However, the language of the first section of the fourteenth amendment is general and does not specifically refer to race, whereas the fifteenth amendment does. Some examples of the application of the fourteenth amendment to non-racial discrimination are *Levy v. Louisiana*, 391 U.S. 68 (1968) (illegitimates); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948) (aliens); *Truax v. Raich*, 239 U.S. 33 (1915) (aliens); *Yick Wo. v. Hopkins*, 118 U.S. 356 (1886) (aliens).

States.²⁴ The case most often cited for failure to apply the fourteenth amendment to suffrage cases is *Pope v. Williams*.²⁵ After stating that the reasonableness of state voting requirements was not a federal question, the Court in *Pope* went on to say:

"It is unnecessary in this case to assert that under no conceivable state of facts could a state statute in regard to voting be regarded as an infringement upon or a discrimination against the individual rights of a citizen of the United States removing into a state and excluded from voting therein by state legislation . . . [for example] excluding from that privilege, for instance, a citizen . . . coming from New York or any other state. In such a case an argument might be urged that, under the Fourteenth Amendment of the Federal Constitution, the citizen from Georgia was by the state statute deprived of the equal protection of the laws. Other extreme cases might be suggested."²⁶

The noted cases represent only the third time the equal protection clause has been used to annul state voter qualification requirements.²⁷ However, the main significance of these cases is the way in which the Court determined whether or not the state requirements were a denial of equal protection. The traditional test for the equal protection clause is one of reasonableness: is there a rational basis for the classification that the state has made?²⁸ But because of the fundamental nature of the right to vote²⁹ the court held a different test applied in *Kramer and Cipriano*:

24. *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874). The issue of equal protection was not raised in this case.

25. *Pope v. Williams*, 193 U.S. 621, 633 (1904).

26. *Id.* at 634.

27. *Carrington v. Rash*, 380 U.S. 89, 97 (1965) (Harlan, J., dissenting): "[One] would gather from today's opinion that it is an established constitutional tenet that state laws governing the qualifications of voters are subject to the limitations of the Equal Protection Clause. Yet any dispassionate survey of the past will reveal that the present decision is the first to so hold." The second decision was the Poll Tax Case, *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966). The reapportionment cases and *Williams v. Rhodes*, 393 U.S. 23 (1969), can be distinguished since they are concerned with equal protection of persons already made voters by the states. See Note, 33 U. CIN. L. REV. 483, 495 (1964).

28. *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 636 (1969) (Stewart, J., dissenting); see also *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961); *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 528 (1959); *Kotch v. Board of River Port Pilots Comm'rs*, 330 U.S. 552, 556 (1947).

29. *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 626 (1969) (quoting from *Reynolds v. Sims*, 377 U.S. 533, 562 (1964): "'[S]ince the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.'"

"[I]f a challenged state statute grants the right to vote to some bona fide resident of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest."³⁰

The Court restated this test in *Cipriano* but, as was pointed out in a concurring opinion, the classification made by the city of Houma would have been invalid even under the rational basis test³¹ since the revenue bonds at issue were to be paid for by the profits of the utility company and had nothing to do with property taxes.³² However, the new test was thought necessary to decide *Kramer*. Mr. Justice Stewart (with whom Mr. Justice Black and Mr. Justice Harlan joined) wrote a dissenting opinion urging that the traditional equal protection test should apply.³³ The court felt that the more rigid test should be applied since the right to vote is necessary to preserve other rights:

"The presumption of constitutionality and the approval given rational classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality."³⁴

This type of reasoning would seem to indicate that the "compelling state interest" test would only apply to voting rights cases. However, this test is not completely new with the noted cases, and the Court has applied it in other types of cases involving fundamental rights.³⁵ In fact the "compelling state interest" test evolved out of cases involving racial classifications, and because of the history of the fourteenth amendment,³⁶ it has been applied

30. *Id.* at 627.

31. *Cipriano v. City of Houma*, 395 U.S. 701, 707 (1969) (Black & Stewart, JJ., concurring).

32. *Cipriano v. City of Houma*, 286 F. Supp. 823, 829 (E.D. La. 1968) (Wisdom, J., dissenting).

33. *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 636 (1969).

34. *Id.* at 628.

35. For a good discussion of the Court's application of this test, see Mr. Justice Harlan's dissent in *Shapiro v. Thompson*, 394 U.S. 618, 655 (1969).

36. *Shapiro v. Thompson*, 394 U.S. 618, 659 (1969) (Harlan, J., dissenting): "I think that this branch of the 'compelling interest' doctrine is sound when applied to racial classifications for historically the Equal Protection Clause was largely a product of the desire to eradicate legal distinctions founded upon race."

in many race cases.³⁷ It is hard to see how any racial classification could be valid under any test. If the "rational basis" test is used, in light of the main purpose of the fourteenth amendment, the racial classification is held unreasonable and irrational.³⁸ Likewise, it is hard to see how a racial classification could be necessary for a "compelling state interest."³⁹ Besides voting rights and race cases, the "compelling state interest" test has been applied in cases involving the freedom of association,⁴⁰ freedom of interstate movement,⁴¹ and it may now apply to any case involving a constitutional right.⁴²

The Court's application of the "compelling state interest" test to determine whether or not there has been a denial of equal protection draws into question the constitutionality of many other laws on the right to vote. Since *Cipriano* was limited to its particular facts,⁴³ it did not declare invalid all elections in which only property owners can vote. However, even if the state may in some circumstances limit the franchise to those primarily interested in the subject matter of the election, it does not seem that an election on the sole question of whether or not to raise property taxes in order to collect funds for some government function⁴⁴ could constitutionally be limited to just property owners. In *Kramer*, New York argued that its "compelling state interest" was limitation of the franchise to those primarily interested or directly affected by school decisions,⁴⁵ but the Court found in fact that those excluded were no less interested or affected than those included.⁴⁶ And, in *Cipriano*, the Court found that since everyone uses utility services, persons who do not own property are just as interested in the revenue bonds as property owners. Using the same analysis, everyone who is otherwise

37. *E.g.*, *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964).

38. *Anderson v. Martin*, 375 U.S. 399, 403 (1964).

39. *See* the concurring opinions of Mr. Justice Stewart in *Loving v. Virginia*, 388 U.S. 1, 13 (1967), and *McLaughlin v. Florida*, 379 U.S. 184, 198 (1964).

40. *Williams v. Rhodes*, 393 U.S. 23 (1968).

41. *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

42. *Id.*: "[A]ppellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional."

43. The Court admitted "[A] state might, in some circumstances, constitutionally limit the franchise to qualified voters who are also specially interested in the election." *Cipriano v. City of Houma*, 395 U.S. 701, 704 (1969).

44. *See, e.g.*, LA. CONST. art. XIV, § 14; LA. R.S. 39:702, 781 (1950).

45. *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 631 (1969).

46. *Id.* at 632.

qualified should be able to vote in property tax elections regardless of whether he owns property or not. Most people who do not own property, lease property; and since higher property taxes will more than likely be passed on the lessee as higher rent, the lessees have as much interest in property taxes as property owners. People who neither own nor lease property⁴⁷ have an interest in these elections since higher property taxes might mean higher prices for goods and services.⁴⁸ Moreover, these people would have an interest in seeing that property owners, with a veto on property tax, did not force the government to get its money from increased burdens on other sources such as income or sales. Through our form of representative government, there are many people who have a say in taxes they do not pay.⁴⁹

Other state voting laws which may now be of questionable validity are voter residence laws, literacy requirements, laws that disenfranchise felons and aliens, and laws that require more than a majority vote. They are discussed not because of any relation to the facts of the noted cases but to re-examine their validity under the more rigid test.

One state voting qualification which might not withstand the "compelling state interest" test is state residence requirements. This is so even though there are many cases saying that the state may set reasonable residency requirements.⁵⁰ But with the welfare resident case, *Shapiro v. Thompson*,⁵¹ and the noted cases as precedent, state residence requirements might be successfully challenged in the near future. The state might argue in response to such suits, that only residents should vote and that the waiting period provides an objective test of determining who is a resident. Such an objective test was rejected in *Shapiro*, but it was shown that the states' determination of residency was different from the one-year waiting period.⁵² Since at some point

47. Examples of persons who do not own or lease property include clergy, servicemen, and old people who live in the homes of their children or in rest homes.

48. This was one of appellant's arguments in *Kramer* and the Court seemed to accept it. *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 630 (1969).

49. For example, adults who have no income, such as some college students, or pensioners, vote for a congressman who may vote to raise the federal income tax; persons who do not drive automobiles have as much say, through their legislature, in the rate of gasoline tax as those who do drive.

50. *E.g.*, *Harper v. Virginia Bd. of Elections*, 383 U.S. 633, 666 (1966); *Carrington v. Rash*, 380 U.S. 89, 91 (1965).

51. 394 U.S. 618 (1969).

52. *Id.* at 636.

a waiting period to prove residence for voting would be unreasonable and since there are other ways of determining actual residency, this interest of the state might not be found compelling enough to necessitate a denial of suffrage to bona fide residents.⁵³

Another "compelling state interest" that might make residency requirements necessary is the interest the state has in seeing that voters understand the issues involved in an election. A person who has been a resident of a community only a short period of time may not understand the issues in a local election. This interest obviously does not make residency requirements necessary in presidential elections,⁵⁴ and it might not make such requirements necessary in local elections, since it can be argued that most voters (even long-time residents) are informed of the issues only in the last few weeks of a political campaign.

The "compelling state interest" test also makes doubtful the constitutionality of state literacy requirements, even though such requirements were upheld as late as 1959.⁵⁵ In that case, the traditional test was used. If the question was raised again, the issue would be whether the state's interest in seeing that intelligent and understanding use is made of the ballot is so compelling that it is necessary to exclude illiterates from voting. One could argue that it is not necessary since illiterates could become informed of the campaign issues through means of radio and television. However, the question may never confront the Court again since Congress has abolished most literacy tests by legislation.⁵⁶

The validity of state laws that disenfranchise felons is another issue raised by the "compelling state interest" test. A state's interest in such laws is to prevent corruption of the political process.⁵⁷ A Florida law which denied the right to vote to felons has been upheld by the Court since the noted cases were

53. Intent is the determining factor of bona fide residency. *Carrington v. Rash*, 380 U.S. 89, 93 (1965). The question of unequal treatment of bona fide residents may also be raised in regard to in-state and out-of-state tuition at state universities. It may be unconstitutional for a state university to charge one bona fide resident more than another bona fide resident because the former originally came from another state. It should be remembered that the first sentence of the fourteenth amendment says: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. Const. amend. XIV, § 1.

54. *Carrington v. Rash*, 380 U.S. 89 (1965).

55. *Lassiter v. Northampton Election Bd.*, 360 U.S. 45 (1959).

56. Voting Rights Act of 1965, § 4(b), 42 U.S.C. § 1973(b) (1965); *see also* *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

57. *Green v. Board of Elections*, 380 F.2d 445, 451-52 (2d Cir. 1967).

decided.⁵⁸ Likewise, a state's interest in seeing that the franchise is exercised for the good of the state and nation would probably be held compelling enough to necessitate a denial of the right to vote to noncitizens; aliens might not have the best interest of the country at heart but might vote to help the best interest of their native land. It is also submitted that a state's interest in seeing intelligent use made of the ballot will be found compelling enough to make state age requirements necessary.⁵⁹

One of the most controversial issues raised by the test in the noted cases is the constitutionality of the Louisiana requirement that in order to pass or raise a tax, two-thirds of the legislature must vote for the tax.⁶⁰ This requirement is being challenged in federal district court.⁶¹ Similar cases are pending in California and Idaho.⁶² These cases challenge a requirement that it takes two-thirds vote of the people in certain types of elections, but the Louisiana provision requires a two-thirds vote in the legislature, not the electorate. For this reason, the issue in the Louisiana case may be held to be a political question which the Court will not decide.

An argument against the Louisiana two-third tax law is that it violates equal protection as expressed in the one man, one vote principle.⁶³ More specifically, it gives those who oppose taxes twice the influence of those who favor them. All former applications of the equal protection clause to voting right cases have involved the denial or dilution of the right to vote of part of the electorate, not the legislature.

Assuming that equal protection would be held to apply to the two-thirds legislative vote rule, the state could argue that there is a compelling state interest in obtaining a broad basis of

58. *Beacham v. Braterman*, No. 404 (U.S. Sup. Ct., Oct. 20, 1969), *aff'g* 300 F. Supp. 182 (S.D. Fla. 1969). *But cf.* *Otsuka v. Hite*, 64 Cal. 2d 596, 414 P.2d 412, 51 Cal. Rptr. 284 (1966). In this case it was held that in order for such a law to be constitutional it would have to exclude from voting only those guilty of crimes involving "moral corruption and dishonesty, thereby branding their perpetrator as a threat to the elective process." *Id.* at 599, 414 P.2d at 414, 51 Cal. Rptr. at 286.

59. Although it could be argued that there is no compelling state interest which makes it necessary for a state to exclude persons from the age of 18 to 21 from voting, the state's interest in seeing intelligent exercise of the franchise makes it necessary to set some age requirement. It is doubtful that the Court will try to set the age at which a person may vote.

60. LA. CONST. art. X, § 1(a), added by La. Acts 1955, No. 140, adopted Nov. 6, 1956.

61. *Stafford v. McKeithen*, Civil No. 69-190 (E.D. La.) (filed Sept. 19, 1969). 62. 4 LAW IN ACTION No. 3, at 7 (1969).

63. *Reynolds v. Sims*, 377 U.S. 533, 562-63 (1964).

consent before enacting a tax. A counter-argument to this would be that in seeking such a broad basis of consent the state is diluting the vote of those who favor a tax because of their political views.⁶⁴ It is submitted that if the equal protection clause is found to be applicable to the two-thirds tax law, in light of the noted cases, it is doubtful that the state can prove a compelling state interest.

Since the application of the equal protection clause to voting right cases seems now firmly imbedded in our constitutional law, the states cannot deny the franchise to anyone unless a "compelling state interest" in doing so is demonstrated. For this reason many state laws on voter qualifications are of doubtful constitutionality.

R. Bradley Lewis

EXPROPRIATION—LESSEE'S AWARD

Plaintiff, the State of Louisiana through its Department of Highways, initiated this suit to perfect the expropriation of a certain tract of land, which was encumbered by a lease with sixty months left in its unexpired term. The trial court awarded separate compensation to the lessee in addition to the value of the property in perfect ownership awarded to the lessor-landowner.¹ Plaintiff appealed on the basis that the lessee's award should be paid out of, and not in addition to, the amount found by the court to be the true value of the tract in perfect ownership. Reversing, the supreme court *held* that where the value of the taken tract in perfect ownership is determined by using the actual value of the lease and the cost of reproduction of the premises less an amount for depreciation thereof, and these two determinations are substantially the same, the lessee is to be paid out of and not in addition to this amount. *State, Dep't of Highways v. Holmes*, 253 La. 1099, 221 So.2d 811 (1969).

As a practical matter, the process of expropriation² was relatively unknown in the United States in the earliest stages of

64. *Carrington v. Rash*, 380 U.S. 89, 94 (1965); *Reynolds v. Sims*, 377 U.S. 533, 562-63 (1964).

1. *State, Dep't of Highways v. Holmes*, 209 So.2d 780 (La. App. 2d Cir. 1968).

2. As used in this Note, the term "expropriation" means a taking of private property for public use upon the payment of just compensation therefor.