



The Constitutional Law of Property Rights “Takings”: An Introduction

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Summary

This report introduces the Takings Clause of the Fifth Amendment: “[N]or shall private property be taken for public use, without just compensation.” The Clause, extensively explicated by the courts in recent decades, seeks to strike a balance between societal goals and the burdens imposed on property owners to achieve those goals. In filing a “taking action” in court, the property owner first must surmount threshold hurdles such as ripeness and the statute of limitations. If successful, the court then will address whether a taking occurred, the criteria depending on whether the claim is of the regulatory taking, physical taking, or exaction taking variety. If a taking is found, the constitutionally required remedy is usually compensation of the property owner, rather than invalidation of the government action. Takings actions against the United States, as opposed to state and local governments, have some special procedural and substantive-law features.

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The Fifth Amendment of the U.S. Constitution closes with twelve simple words: “[N]or shall private property be taken for public use, without just compensation.” Long a constitutional sleeper, this “Takings Clause” has been thrust into the limelight in recent decades by increased government land use controls combined with a more conservative Supreme Court interested in securing protections for property owners.

This report covers but the high points in the court-made law construing the Takings Clause; full coverage would require volumes. Regrettably, too, this case law is not a model of clarity. Nonetheless, some broad principles have emerged, so that in a few situations one may predict how a court will rule on a “taking action” with some reasonable chance of proving right.

Basics of the Takings Clause

The Takings Clause is a balancing act. It seeks to strike an accommodation between the goals of the public (as represented by government) and the burdens imposed on private property owners to achieve those goals. When the private burden is sufficiently severe or of a certain kind, the courts say that a “taking” has occurred, and that “just compensation” must be paid to the property owner. In determining what is and is not a taking, the courts have developed a host of rules, factors, defenses, and policy considerations. Some of these takings indicators are amorphous balancing factors. Others are *per se* rules—rules that brand certain government actions as automatic takings without much site-specific inquiry.

This report focuses on the Takings Clause in the U.S. Constitution, which applies both to the federal government and, through the Fourteenth Amendment Due Process Clause, to states and localities. Takings clauses in state constitutions are generally, though not always, construed the same as their federal counterpart.

Threshold Hurdles

Before a court will address a property owner’s taking claim, several threshold hurdles must be surmounted, among them—

Is the property owner in the right court? While takings suits against states and localities are filed in state or federal courts of general jurisdiction, takings suits against the United States usually must be filed in a single, specialized court: the U.S. Court of Federal Claims (CFC). Exceptions from the CFC’s exclusive jurisdiction exist only for takings suits seeking \$10,000 or less or those filed under certain program statutes, which may/must be filed in federal district court. The CFC is headquartered in Washington, D.C., but has nationwide jurisdiction and routinely holds trials around the country.

Has the statute of limitations expired? Takings actions must be filed within the requisite number of years after the date of the alleged taking. For takings actions against the United States, the limitations period is six years. In a few circumstances, a court may be willing to “toll” (stop the running of) the limitations period—e.g., when the facts giving rise to the alleged taking were not known to plaintiff until after the period, due to the government’s failure to disclose.

Is the taking claim ripe? While statutes of limitations seek to ensure that lawsuits are not filed too late, ripeness doctrine seeks to ensure they are not filed too early. The Supreme Court has developed two ripeness criteria for takings claims.

First, the property owner must have obtained a “final decision” from the land-use regulating authority as to the nature and extent of development permitted on the property. “Final decision” is a legal term of art. To get a final decision, it may be necessary for the property owner, after his/her initial development proposal is rejected, to reapply with scaled-down or reconfigured proposals. The rationale: reapplication may reveal some type of development, sufficient to avert a taking, that the regulating authority *will* accept. For the same reason, opportunities for variances or other exceptions from generally applicable restrictions must be exhausted.

The property owner need not pursue reapplications or exceptions when doing so would be futile. Successful invocation of this futility exception to the final decision ripeness criterion demands that the owner show more than long odds of getting the development approved, or onerous procedural requirements.

An agency’s mere designation of a parcel as within its permitting jurisdiction cannot by itself be a taking, since it leaves open the possibility that the permit, if applied for, will be granted.

The second takings/ripeness criterion applies only to takings actions against states and localities. For such a claim to be ripe in federal court, it must initially be brought in state court—as long as the state’s courts make a compensation remedy available for takings. Many plaintiffs who go to state court, however, find themselves barred from refile in federal court, owing to legal doctrines precluding the relitigation of claims and the Federal Full Faith and Credit Act.¹

“Property” and Related Considerations

Even if the economic impact of government action is severe, the Takings Clause is not implicated unless that impact falls upon “property,” as that term is used in the Takings Clause. Almost all common interests in land—fee simple absolutes, leases, easements, water rights, etc.—are indisputably property, plus many intangible interests such as patents, trademarks, copyrights, most contract rights, and trade secrets.

Even when “property” is adversely affected by government conduct, takings law offers a remedy only if the effect is direct. Thus, the denial of a permit to fill a wetland may effect a taking of that wetland. However, it cannot work a taking of a nearby commercially zoned parcel whose value is reduced by the fact that no residential subdivision, hence no potential customers, will come to the wetland property. The value loss in the commercial parcel is termed “consequential damages,” which takings law holds noncompensable.

The Three Types of Takings Claims, and the Tests Used for Each

There are three fairly distinct types of takings actions that property owners may bring. Each is evaluated under a different Supreme Court-created test.

The regulatory taking claim asserts that a government action has taken one’s property merely by restricting its use. Regulatory takings claims break down into two subcategories, involving government restrictions that cause (1) a *complete* elimination of a land parcel’s economic use or

¹ 28 U.S.C. § 1738.

value (called a “total taking” claim), or (2) a *less-than-complete* elimination of such use or value (called a “partial taking” claim).

Complete elimination of use or value by the government is held to be a *per se* taking, with a big exception. If the government restriction prompting for the taking claim is implicit in “background principles of the State’s law of property and nuisance” existing when the property was acquired, no taking occurs—total loss of use/value notwithstanding. The rationale for this exception is that the government has not taken any right that the property owner ever had. Definition of precisely what constitutes a background principle is an ongoing issue in takings law.

Complete elimination of use or value also is not a *per se* taking when imposed through a regulatory measure known *at the outset* to be temporary—for example, a moratorium on new building permits while a land-use study is being done. The anticipated resumption of use and value after the measure is lifted leads courts to view this situation as not involving a complete loss (see temporal parcel as a whole rule, page 5). Thus, prospectively temporary restrictions generally are assessed under the balancing test for less-than-total takings, as follows.

Less-than-total eliminations of a property’s use or economic value are evaluated quite differently than total takings. Here, the courts apply the *Penn Central* balancing test, under which the government action is assessed for its economic impact, the degree to which it interferes with reasonable investment-backed expectations, and its “character.”² These three vague factors have been explicated only rarely by the Supreme Court, leading many commentators to complain that this test is muddled. It certainly does not make for predictable court rulings, beyond the fact that in the large majority of cases, the required degree of economic impact is very substantial and the government action is held not to be a taking. Typically, takings plaintiffs first seek to convince the court they have suffered a total taking resulting in *per se* compensability, then argue as a backup that if the court discerns only a less-than-total elimination of use/value, there is still a taking under *Penn Central*.

An important issue in regulatory takings law is the role played in the takings determination by laws existing when the property was acquired, even when such laws do not amount to background principles. The Supreme Court instructs that the pre-acquisition existence of the regulatory scheme at issue in a takings case is not a *per se* bar against maintaining a taking claim, but is to be given some weight. Lower courts continue to give great weight to pre-acquisition schemes, arguing that they undercut the property owner’s reasonable expectations of development in the *Penn Central* analysis. Note, too, that the background principles concept, first stated in a “total taking” case, has been held to apply as well to partial regulatory takings claims. Thus, if the pre-acquisition scheme constitutes a background principle, it also presents an absolute bar to the partial regulatory taking claim.

Under either subcategory—total or partial regulatory takings—a court must define the physical extent of the property it will evaluate. This is known as the “parcel as a whole” or “relevant parcel” issue. Its pertinence stems from the fact that takings law looks at the economic impact and interference with investment-backed expectations factors in a relative, rather than absolute, sense. For example, a person who suffers a \$100,000 drop in property value due to government action may have a strong taking claim when the “relevant parcel” retains little value, but only a weak

² *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

claim if the relevant parcel is still worth \$200,000. The property owner's loss is evaluated relative to what he/she still has.

The Supreme Court says that the relevant parcel cannot be limited to the portion of the parcel subject to the challenged use restriction, at least not solely on that basis. Thus, when one is denied a permit to fill in a wetland on a tract, the fact that a significant portion of the tract is buildable nonwetland generally will defeat the taking claim. Beyond this, however, the many issues that arise in defining the relevant parcel have been left to the lower courts. For example, should a court include in its takings analysis acreage owned by the plaintiff that is noncontiguous with the regulated tract or subdivided as different lots? In most cases, contiguous acreage in common ownership is deemed the parcel as a whole. One principle is that a developer's intentions are key; where it regarded a project as a single unit for purposes of planning, financing, and development, a court likely will reject efforts to segment the project acreage in the regulatory taking analysis. Further relevant-parcel issues arise with land sold off before the development approval was denied, or before the regulatory scheme in question was enacted.

The relevant parcel issue also has a functional dimension, under which the court must assess the loss of one right in a property relative to the bundle of remaining rights. Finally, the relevant parcel doctrine has a temporal dimension, under which a court must look not only at the period during which the restriction is in effect, but less restricted periods of the plaintiff's ownership before and after.

The physical taking claim asserts that the government has taken property by causing, or authorizing, a physical encroachment upon that property. Flooding caused by government dams and overflights by government airplanes are the archetypal federal examples. Physical takings claims break down into two subcategories, involving (1) permanent physical occupations, and (2) temporary physical invasions. Permanent physical occupations are almost invariably held to be takings, because they are seen to egregiously violate one of the most sacred of property rights: the right to exclude others. Thus, in assessing physical occupation claims the courts will not inquire into the extent of the occupation, the magnitude of the economic impact on the property owner, or the importance of the underlying public purpose. Nor does the relevant parcel rule apply to permanent physical occupations. The existence of a permanent physical occupation caused by government, without more, establishes a taking.

Temporary physical invasions are regarded quite differently. They are tested under the *Penn Central* balancing test and generally are held nontakings.

The exaction taking claim may be brought when a property owner objects to an exaction demanded by a land regulatory agency as a condition of its approving a proposed development. Such exactions are used routinely by local agencies to get developers to pay for the fire protection, police, school, sewage disposal, and other costs created by development. They typically take two forms: physical dedications (setting aside land within the project area for roads, schools, etc.) or impact fees paid in lieu of physical dedications.

In order not to be a taking, the exaction condition must meet two criteria. First, there must be an "essential nexus" between the condition and an underlying purpose of the permit or other approval to which it is attached. Second, the burden imposed on the property owner by the exaction must be no greater than "roughly proportional" to the impact that the owner's proposed development would have on the community. Moreover, the burden of proving rough proportionality is on the government.

One can readily see that the exactions takings standard places more demands on the government-defendant than that for regulatory takings. Thus, it is referred to as “heightened scrutiny.” The Supreme Court has now clarified that the exactions takings test does not apply outside the exactions context—e.g., to non-exaction conditions on permits—and has suggested that it does not apply either to monetary assessments imposed in lieu of physical dedications.

Constitutional Remedy for a Taking

The constitutional remedy for a taking is generally monetary compensation, usually in the amount of the fair market value of the property taken. With limited exceptions, it does *not* satisfy the Constitution for the court to invalidate the offending government action, or for the agency simply to back off. The reason is that by that time, the taking, if any, has already occurred. Invalidation or rescission merely converts a permanent taking into a temporary one.

Invalidation remains the constitutional remedy in a few instances. These include takings based on government appropriation of a specific fund of money, or on government actions interfering with the right to pass on property.

Special Characteristics of Takings Claims Against the United States

At the state and local level, the large majority of takings cases arise in the context of land use restrictions—zoning and subdivision cases are the staples. In contrast, takings claims against the United States involve land less than half the time, because the federal government regulates land use only in selected contexts. Such claims span the wide spectrum of federal activities—such as the bailout of the savings and loan industry, restrictions on the location of cigarette vending machines, quarantines to prevent the spread of animal disease, imposition of liability on employers for employee pension plans or retiree health benefits, resolution of claims by U.S. citizens against foreign governments, retroactive taxes, assessments to fund cleanup of government nuclear enrichment plants, etc.

As noted above, takings claims against the United States must be brought in almost all circumstances in the U.S. Court of Federal Claims, a court established in 1855 under Congress’ Article I legislative powers. The CFC is a highly specialized court, hearing only money claims against the United States. Appeals from the CFC are to the U.S. Court of Appeals for the Federal Circuit.

The takings jurisprudence of the CFC and Federal Circuit does not always parallel that of other courts. For example, the CFC and Federal Circuit assert that no taking claim may be brought based on an “unauthorized act” of the government, a restriction not recognized by many other courts.

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