



COVID-19 Response: Constitutional Protections for Private Property

March 27, 2020

As communities respond to the Coronavirus Disease 2019 (COVID-19) [pandemic](#), the interests of governments and property owners may clash. Governments have an interest in controlling spread of the disease, providing testing and treatment, and helping individuals and businesses cope with widespread disruptions of daily life. State and local governments pursue these interests through their [police powers](#), which give them broad latitude to take measures addressing public health, safety, and the general welfare of those within their jurisdictions. The federal government [lacks](#) “a general federal authority akin to the police power.” But acting under its enumerated authorities, including under the [Commerce Clause](#) and the [General Welfare Clause](#) (as supplemented by the [Necessary and Proper Clause](#)), Congress has ample power to enact legislation to deter the spread of COVID-19, and [indeed several laws enacted](#) long before COVID-19’s outbreak afford the President and executive agencies significant discretion to take measures to curtail the outbreak.

Exercising these broad powers, the federal government has [curtailed](#) international travel. Many state and local governments have [prohibited](#) dining in at restaurants and bars, [halted](#) residential evictions for delinquent rent, and [ordered](#) casinos, gyms, and theaters closed. Several states and municipalities have gone further, [adopting “stay-at-home” measures](#) to limit residents’ travel and the operation of “non-essential” businesses. More such measures may be on the horizon. On March 19, 2020, President Donald J. Trump raised the possibility of [invoking](#) the Defense Production Act (DPA), which [includes](#) authority to “require acceptance and performance” under “contracts or orders” that the President finds “necessary or appropriate to promote the national defense.” A business that is able to fulfill a DPA contract generally must [accept](#) the contract and may need to give it [preference](#) over any non-DPA work. Thus, for example, a distillery required to produce hand sanitizer for a DPA contract may need to scale back its liquor production.

Many of these measures may impair a person’s use of their property, directly or indirectly. For example, the airline with airplanes sitting idle [on account of travel restrictions](#) cannot use a capital investment, while a company [required](#) by the government to manufacture face masks could not prioritize other work. For the most part, property owners have to accept limitations on their private property rights. The Supreme Court has recognized [that](#) “Congress routinely creates burdens for some that directly benefit others,” and [that](#) “a State in the exercise of its police power may adopt reasonable restrictions on private property.” In limited circumstances, though, the Constitution requires federal or state governments to

Congressional Research Service

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LSB10434

provide a property owner “just compensation” where government action leads to a “taking” of “private property.” (State constitutions include [similar](#) requirements.) This Sidebar summarizes federal takings law and analyzes how it may apply to property restrictions in a national public health emergency like the COVID-19 pandemic.

The Takings Clause

As with any government act, COVID-19 response measures must comport with any applicable limitation of the U.S. Constitution. One such limitation, the Takings Clause of the Fifth Amendment, [states](#) that “private property [shall not] be taken for public use, without just compensation.” By its terms, the Takings Clause [applies](#) to the federal government. The Supreme Court has [held](#) that the same limitations extend to state governments under the [Fourteenth Amendment](#). Thus, the Constitution sets a single legal standard on takings that applies to both federal and state governments. That said, states may provide, by state constitution or state statute, [more robust protections](#) for private property than the federal Constitution does.

The Takings Clause “[does not prohibit](#) the taking of private property.” The federal government may, under its enumerated powers, deprive an individual of private property for a public use, and the same is true for a state exercising its police power. For example, the federal and state governments may use their eminent domain authority to seize a privately owned home that sits in the route of a planned public highway. All that the Takings Clause requires is that “just compensation” [accompany](#) the deprivation.

The starting point of any Takings Clause analysis is to decide whether government action affects “private property.” The Constitution [does not create](#) property rights. Other sources of law, such as state statutes or common law, create property rights. Looking to these sources, the Supreme Court has [held](#) that the Takings Clause protects interests in real property (e.g., one’s home or parcel of land) as well as in personal property (e.g., one’s car or other possessions). The Clause [also](#) protects at least some intangible property interests, such as a business’s trade secrets. But the Court has [held](#) that there is no property “right” to a set amount of public-benefit payments, such as food-stamp payments.

Assuming that the object of the government action is “private property,” the next step is to determine whether the government action is a taking. The Court’s cases distinguish between two types of takings, analyzed under different standards.

In *physical takings* cases, the government [assumes](#) a “categorical duty to compensate the former owner” when the government “physically takes” the property. This categorical duty exists even if the seizure is only partial or (in many cases) [temporary](#), and [regardless](#) of the reason for the seizure.

In *regulatory takings* cases, the government does not directly appropriate private property but regulates its use, such as through zoning statutes. The [central question](#) for regulatory takings is whether the regulation is “so burdensome as to become a taking.”

As relevant here, the Supreme Court has developed two regulatory takings tests to answer this question. A regulation may result in a taking under the *categorical test* if it [eliminates](#) “all economically beneficial uses” of property. More often, a regulation will impair use of property or affect its value, without leaving it economically useless. In this situation, under the *ad hoc test* as framed by existing precedent, a court [examines](#) three aspects of a regulation to decide whether the regulation creates a taking requiring just compensation. *First*, a court considers the regulation’s “economic impact,” framed as a [fraction](#) whose numerator is the value taken from the property and whose denominator is the value of the property unburdened by the regulation. In this fraction the denominator is [key](#); courts define it according to the whole of the property interest at issue and not just the portion burdened by the regulation (i.e., the [entire parcel](#) of land on which a person’s home sits and not just the portion of the parcel that a setback ordinance does not allow to be developed). *Second*, a court examines the extent to which a regulation interferes with

reasonable “investment-backed expectations” of how a person may expect to use her property. Thus, [for example](#), a business that submits trade-secret data to a regulatory agency, knowing that the agency may publicly disclose that data, has no reasonable expectation that the data will remain secret. *Third*, a court [scrutinizes](#) the “character” of the regulation. A regulation [that](#) “amounts” to a physical invasion of property is more likely to be a taking than one that burdens property as a result of a legislative scheme that “adjust[s] the benefits and burdens of economic life to promote the common good.” The Supreme Court has repeatedly [stressed](#) that this analysis is tailored to the facts of a given case, and is not amenable to “definitive rules” that distinguish regulations that result in a taking from those that do not.

The Rule of Necessity

The typical Takings Clause case involves common functions of government, such as [land use regulation](#) intended to prevent overdevelopment. And when such functions include physical intrusion on property rights, or a regulation that goes “too far,” just compensation is usually owed. In describing the COVID-19 response, [some](#) have drawn an analogy to war efforts. Tapping deep common-law roots that [predate](#) the Constitution, the Supreme Court has [recognized](#) that exigent circumstances, such as war, can require “strict regulation of nearly all resources” to prevent imminent loss to life or property. Under this “rule of necessity,” for example, if a state [creates](#) a firebreak by destroying a person’s house to save the homes of others, the state need not compensate the party whose property was sacrificed. The Court has [characterized](#) the rule of necessity as a “limitation” that “inheres” in a party’s title to property as part of the “background principles” of property law that inform Takings Clause analysis. Put differently, whatever else title to property may entail, it does not, under this analysis, include a right to be free from certain losses caused by actions necessary to prevent imminent loss of life or property in emergency situations.

As with the Court’s regulatory takings case law, rule-of-necessity cases [lack](#) “rigid rules [that] can be laid down to distinguish compensable losses from noncompensable losses.” In its more recent cases on the subject, both centering on actions taken during World War II, the Court denied compensation for property destroyed or otherwise impaired to meet exigent circumstances. (A [later Supreme Court case](#), involving property damage during riots in the Panama Canal Zone, applied the rule of necessity but in ways inapt to COVID-19 response efforts.) In *United States v. Caltex, Inc.*, the Court refused compensation to oil companies when the U.S. Army destroyed oil terminals in danger of capture by the Imperial Japanese Army. The Court explained that “[t]he destruction or injury of private property in battle . . . had to be borne by the sufferers alone as one of its consequences.” The Court rejected another takings claim in *United States v. Central Eureka Mining, Co.* There, the War Production Board—an entity that [coordinated](#) authorities under the DPA’s [predecessor statutes](#)—had sought to free skilled labor for work in copper mines, considered critical to the war effort, by closing the privately owned gold mines that employed “the only [remaining] reservoir of skilled mining labor.” While noting that regulations of private property could create a taking, the Court explained that “[i]n the context of war, we have been reluctant to find that degree of regulation.” Temporary wartime restrictions “are insignificant when compared to the widespread uncompensated loss of life and freedom of action which war traditionally demands.”

The Court’s cases do not uniformly deny compensation for action deemed essential in emergencies. In *Mitchell v. Harmony*, the Court held that the military could “impress private property into the public service or take it for the public use” where danger is “immediate and impending” but “[u]nquestionably . . . is bound to make full compensation to the owner.” Thus, a trader had a claim when the Army used his wagons and mules during the Mexican-American War. Similarly, in *United States v. Russell*, the Court recognized that “a taking of private property by the government” would “everywhere [be] regarded as justified, if the necessity for the use of the property is imperative and immediate,” but the government still “must make full restitution for the sacrifice.” Thus, the federal government owed a steamboat owner whom the Army ordered to ship freight.

In *Caltex*, the Court distinguished *Mitchell* and *Russell* by explaining that those two cases, which concern the government's use of private property in an emergency, do not address the government's compensation duty when property is destroyed. Thus, the Court's military necessity cases establish two general rules: if the government destroys private property to avoid immediate loss of life or property, no taking occurs and no compensation is due. However, if the government seizes property for use in responding to an emergency, compensation is due.

Property Restrictions and the COVID-19 Response

As the response to COVID-19 unfolds, some property owners may volunteer their property to assist in the response. Other property owners may challenge restrictions on their private property rights, including by arguing that the government action is a taking that requires just compensation. A court would face several questions regarding the proper framework for addressing a COVID-19 takings claim.

The first such question could be whether courts would treat pandemic response measures under the rule of necessity. The Supreme Court does not appear to have considered a takings claim seeking compensation for restrictions on private property arising from a past pandemic response. Although the Court has not applied the rule of necessity outside of military necessity, the Court has recognized the rule as part of the "background principles" of property law and other courts have applied the rule beyond military necessity to somewhat analogous threats such as crop infestation. Assuming the rule of necessity extends beyond the military context, a court likely would apply it only to pandemic response measures marked by "an actual emergency, imminent danger, and . . . actual necessity." Even then, the rule of necessity would likely excuse only the destruction of property and not its appropriation, whether on a temporary or permanent basis, to serve pandemic response efforts.

If a court found the rule of necessity inapplicable, then the usual takings framework would likely apply. Federal or state action that appropriates private property for government use would likely require compensation. Thus, it is doubtful that the government could seize private stocks of medical supplies to serve the pandemic response without paying the property's owner just compensation. Likewise, federal or state action that requires a person to make property available for another's use probably would require compensation, as the Takings Clause extends to any "government authorize[d]" physical invasion of property, whether or not the government, itself, uses the property. If the government requires use of private property for quarantine or COVID-19 testing, it would likely have to pay the owner at some point.

Short of a physical taking, other pandemic response measures would be examined under the Supreme Court's regulatory takings test. It is unlikely that a COVID-19 measure would satisfy the Supreme Court's categorical test by depriving a property owner of "all" economically beneficial uses of property because few regulations meet this high standard—in one case, the Supreme Court suggested that a 95 percent decrease in a property's value was not enough. This may even be true for one of the pandemic response's most ubiquitous features, state and local government orders closing private businesses to facilitate social distancing. A closure order deprives a property owner of the right to operate a business during the period of closure, but the order likely would not render the property valueless because, as the Court has observed in examining moratoriums on the use of property, "the property will recover value as soon as the prohibition is lifted." When a closure order allows a business to continue operating in part (e.g., to sell food on a carryout but not on a dine-in basis), such that the property owner retains use of the property during the temporary closure, a court would be even less likely to find that a regulation eliminates "all" uses of a property.

But simply because a regulation fails the categorical test does not foreclose a takings claim. Rather, the Supreme Court's ad hoc test would most likely apply. Industries that are traditionally subject to extensive health-and-safety regulations, such as a restaurant or dentist's office, may not have a reasonable expectation of continuing to serve clients in the midst of a pandemic. Federal and state governments may

also lessen the sting of mandates that burden private property with cash payments, which would “moderate and mitigate” a regulation’s economic impact. For example, businesses that fill orders under the Defense Production Act must give “priority” rated orders precedence over “unrated” work, which may be more profitable than rated work, but the federal government would pay for the priority rated order. Even if a court does apply the rule of necessity, it may draw on the reasoning of such cases to inform application of the ad hoc test. As in *Eureka Mining*, a court may be “reluctant to find” that a regulation goes too far under the ad hoc test, reasoning that a pandemic response requires “demands which otherwise would be insufferable” and which are “insignificant when compared to” the public health dangers posed by COVID-19. And of course, a court may decide that the unprecedented nature of the COVID-19 response justifies a different articulation or application of existing Takings Clause standards.

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