

REGULATORY TAKINGS

Private property rights are the foundation of economic freedom. According to the Fifth Amendment of the U.S. Constitution, “No person shall be...deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.” Landowners have long been protected from physical takings by the federal government (commonly known as the power of eminent domain). If the government wants to build a highway through someone’s land, for example, they cannot take that land outright unless they fairly compensate the owner for her loss.

But what about when government doesn’t take property outright, but rather imposes regulations that are so stringent that they severely diminish a property’s value? Since 1922, the Supreme Court has recognized this as a special kind of takings under the Fifth Amendment called a “regulatory taking,” and it likewise requires just compensation for the property owner.

The pivotal case, *Pennsylvania Coal Co. v. Mahon*, involved a Pennsylvania regulation requiring coal companies to leave in place all of the coal under houses built above deep mines. The coal company argued that this completely diminished the value of their property (the right to the mine subsurface coal). The Supreme Court agreed. Justice Oliver Wendell Holmes, Jr., speaking for the court, wrote the following passage that became the basis for regulatory takings law:

[Government regulation] must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of diminution [in land value]. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act... The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking (3).

However, subsequent regulatory takings cases before the Supreme Court have limited regulatory takings protections for property owners. In the 1978 case *Penn Central Transportation Co. v. City of New York*, the Court ruled that a partial taking – where the property’s value is only partially diminished by government regulation – does not require compensation.⁴ In several other cases, involving things like federal wetlands protections and other land use restrictions, the Court has ruled that government regulations must “invade” a property or completely diminish its value before regulators owe compensation under the Fifth Amendment (5).

Conservative legal scholars often argue that the Court’s narrow interpretation defies common sense (6). Consider the following hypothetical example. Melvin owns a 100-acre farm. If the government wants to build a highway through 10 acres of Melvin’s land (a physical taking under the power of eminent domain), they have to purchase those 10 acres from Melvin at a fair price. However, if the government wants to impose stringent farm dust regulations on Melvin’s farm that will diminish its value by 10 percent, the Supreme Court would likely rule that since Melvin still keeps 90 percent of his property’s value, it is not a true regulatory taking and no compensation is required from the government. In both cases the government is destroying 10 percent of Melvin’s property for some public purpose (building a highway or controlling air pollution), yet in one case he gets compensation and in the other he gets nothing.

QUICK FACTS

- Regulations can significantly damage property values. In 1998, the Congressional Budget Office estimated that one federal regulation alone, the stringent wetlands protection rule, stripped as much as \$1.85 billion in value from Americans’ property every year (1).

NOTABLE & QUOTABLE

“Most regulations do not reduce the value of a person’s property to zero or near zero. Rather, they reduce the value by 25 percent, 50 percent, or some other fraction of the whole. In those circumstances ... the owner gets nothing. Only if he is ‘lucky’ enough to be completely wiped out by a regulation does he get compensation. Surely that is not what the Framers meant to happen when they wrote the Takings Clause.”

- **Roger Pilon**, Cato Institute (2)

WHY IS IT IMPORTANT TO PROTECT AGAINST REGULATORY TAKINGS?

If a regulation is truly worth its claimed public benefits, regulators will come up with the funds to compensate property owners.

Regulatory takings claims force government to recognize and bear the costs of the regulations they impose, changing their calculations about which ones are truly necessary. Some regulations have widespread public benefits (e.g. controlling pollution), but often those same regulations impose big costs on a narrow group of people (e.g. landowners). Instead of being allowed to regulate at will with no regard for the costs their rules impose on the economy, regulators must compensate those who bear the costs. If a regulation is truly worth its public benefits, regulators will come up with the funds, and private property owners are protected from the resulting losses.

In addition, when regulators destroy private property values without paying for the losses, this can create backwards incentives for landowners that undermine regulators' goals. Species conservation efforts under the Endangered Species Act (ESA) serve as a strong example. The law was enacted to protect endangered species and the habitats they need to survive, but in practice it actually discourages landowner from starting their own conservation efforts (7).

A real life case can illustrate. Wildlife enthusiast Ben Cone had devoted substantial efforts to forest management and species habitat improvements on 7,200 acres of land he owned in North Carolina. His efforts proved successful and the populations of many species increased on his land. Among those that benefitted was the red-cockaded woodpecker, and endangered species protected under the ESA. In response, the U.S. Fish and Wildlife Service (FWS) declared over 1,500 acres of his land off limits to logging to further protect the woodpecker population that had settled there. This dramatically reduced the property's value and cost Cone over \$2 million – all without compensation. Afraid that the FWS would expand the ban to cover more of his property and cost him more money, Mr. Cone promptly reversed course and cleared portions of the rest of his land to discourage woodpecker nesting (8).

Endnotes:

1. CONGRESSIONAL BUDGET OFFICE, Regulatory Takings and Proposals for Change, at 73-74 (December 1998) (online at <http://www.cbo.gov/ftpdoc1051/takings.pdf>).
2. Roger Pilon, Congressional Testimony: Protecting Private Property Rights from Regulatory Takings, THE CATO INSTITUTE (February 1995) (online at <http://www.cato.org/testimony/ct-pi210.html>).
3. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).
4. Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978).
5. Joel R. Burcat and Julia M. Glencer, The Law of Regulatory Takings: Part I, Development of the Law, KIRKPATRICK & LOCKHART LLP (February 2002) (online at http://www.klgates.com/files/tbl_s48News/PDFUpload307/7642/burcatwhpaper.pdf).
6. Richard A. Epstein, The Spurious Constitutional Distinction Between Takings and Regulation, ENGAGE, Volume 11, No. 3 (December 2010) (online at <http://www.fed-soc.org/publications/detail/the-spurious-constitutional-distinction-between-takings-and-regulation>).
7. Jonathan H. Adler, Money or Nothing: The Adverse Environmental Consequences of Uncompensated Land Use Controls, BOSTON COLLEGE LAW REVIEW, Vol. 49, No. 2 (March 2008) (online at http://www.bc.edu/content/dam/files/schools/law/bclawreview/pdf/49_2/01_adler.pdf).
8. Richard L. Stoup, The Endangered Species Act: Making Innocent Species the Enemy, PROPERTY & ENVIRONMENT RESEARCH COUNCIL, Policy Series (April 1995) (online at <http://www.perc.org/articles/article648.php>).

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