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The Obstacle Course of the Takings Clause

by Timothy Sandefur

The Fifth Amendment holds that government may not take "private property . . . for public use without just compensation." The Framers knew that seizing a person's property always violates his rights, but providing for government payment would at least protect citizens from the worst sorts of abuses. To the uninitiated, therefore, it might seem that the Fifth Amendment protects Americans' liberty. But the reality is a bit darker. The power of eminent domain has been expanded far beyond its original meaning, and is now hedged with so many procedural pitfalls, that the Takings Clause is now mentioned far more often in the breach than the observance.

The most infamous Supreme Court takings decision is probably *Hawaii Housing v. Midkiff*, a 1984 case in which the Court essentially eradicated one of the two constitutional limitations on eminent domain. Originally, that power could only be exercised to take property "for public use"—to build bridges or make roads; things the public at large uses. It was not intended to let government transfer property from one private party to another whenever it becomes politically expedient. In the 1798 case of *Calder v. Bull*, the Supreme Court held that "a law that takes *property* from A. and gives it to B" is "against all reason and justice" because "[t]he *genius*, the *nature*, and the *spirit*, of our State Governments, amount to a prohibition of *such acts of legislation*; and *the general principles of law and reason* forbid them."

More emphatic was a 1795 case, *Vanhorne's Lessee v. Dorrance*, in which Circuit Justice Patterson wrote that

> The despotic power, as it is aptly called by some writers, of taking private property, when state necessity requires, exists in every government. . . . The presumption is, that [government] will not call it into exercise except in urgent cases, or cases of the first necessity. . . . It is, however, difficult to form a case, in which the necessity of a state can be of such a nature, as to authorise or excuse the seizing of landed property belonging to one citizen, and giving it to another citizen. It is immaterial to the state, in which of its citizens the land is vested; but it is of primary importance, that, when vested, it should be secured, and the proprietor protected in the enjoyment of it. . . . Where is the security, where the inviolability of property, if the legislature, by a private act, affecting particular persons only, can take land from one citizen, who acquired it legally, and vest it in another?. . . It is infinitely wiser and safer to risk some possible mischiefs, than to vest in the legislature so unnecessary, dangerous, and enormous a power.

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In *Midkiff,* the legislature of Hawaii decided that property was owned by too few people, and it passed a law essentially turning all property leases into options to buy at depreciated rates. The landowners sued, saying that this was an unconstitutional transfer of property for *private* use. The Supreme Court upheld the law, holding that "the 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers." In other words, anything government can legitimately do, it can seize property to do.

Since 1937 the Supreme Court has taken an almost "anything goes" approach to government regulation of the economy.[1] Therefore, if the government can do nearly anything to regulate the economy, it can take nearly any property to do so. This view is most notoriously symbolized in a case announced some years before *Midkiff,* called *Poletown Neighborhood Council v. Detroit* (1981). The city of Detroit seized an entire neighborhood and gave it to General Motors, arguing that this would improve the economy and "create jobs." Since improving the economy falls within the state's police power, the Michigan Supreme Court held that this was constitutional. Since then, the "public use" requirement has been reduced to a practical nullity, as courts have permitted legislatures to seize property for shopping malls, sports arenas, and any number of undeniably private uses.

Much more insidious in eminent-domain law are the number of procedural mechanisms by which government avoids compensating property owners. Consider, for instance, the "*Williamson County* trap." According to *Williamson County Regional Planning Comm'n v. Hamilton Bank* (1985), takings cases against states must first be brought in the courts of that state before they're brought in federal court. At first this seems reasonable, but once a property owner loses in state court, a federal court will employ the doctrine of absention, meaning that federal courts will not change state court decisions. By the time a property owner gets into federal court, it's too late.

"Ripeness" Requirement

A similar trap is the so-called "ripeness" requirement. Notorious in takings law, ripeness is a legal doctrine that requires a property owner to have a "final administrative determination" on how a law affects a piece of property—for instance, the owner must be explicitly denied a building permit. Until then the owner may not sue—and this provides an incentive for administrative agencies to delay, sometimes for decades, before deciding whether a property owner may use his land. The ripeness requirement can easily become a black hole from which a lawsuit never emerges. In fact, some courts have gone so far as to require a property owner to submit a second permit request, and a third—because although the first permit was denied, it's "possible" that the administrative agency would grant a less ambitious permit. Thus courts play an owner like a yo-yo and never give him his day in court.

There are problems with the ways courts decide takings claims as well. Government takes property in essentially two ways: first, it can actually occupy the land. In these cases, government must always pay the landowner.[2] The other way is by passing a law prohibiting the landowner from using his property as he wants—thus making the property worthless without actually taking it. These "regulatory takings" cases are more complex. Although the Court has held that regulations depriving an owner of *all* value must be paid for,[3] it's often hard to say when a regulation really does that. All the Court has been able to say is that "if a regulation goes too far it will be recognized as a taking."[4] But what is "too far"? To decide this, the Court weighs a number of "factors," known as the *Penn Central* test. These factors include the "the economic impact of the regulation," the "extent to which the regulation has interfered with distinct investment-backed expectations," and "the character of the governmental action."[5]

In reality, the *Penn Central* test is meaningless, as even the Court acknowledges. (The Court admitted in that case that it engages in "essentially ad hoc, factual

inquiries.") And the *Penn Central* test has proven not only a false hope to property owners, but a convenient mechanism by which government avoids paying just compensation. Consider *Suitum v. Tahoe Regional Planning Agency* (1997), in which a regulation prohibited a property owner from developing her land. The law gave the property owner TDRs ("transferable development rights"—credits that waive some zoning restrictions), which the owner could sell to neighbors. The case was decided on purely procedural grounds, but the Court did suggest that the TDRs could be taken into account—not when determining whether the owner had been granted just compensation—but instead when considering "the economic impact of the regulation" under the *Penn Central* test. Justice Scalia, in a separate opinion, decried this scheme:

> Whereas once there is a taking, the Constitution requires just (*i.e.,* full) compensation . . . a regulatory taking generally does not occur so long as the land retains substantial (albeit not its full) value. . . . If money that the government-regulator gives to the landowner can be counted on the question of whether there is a taking . . . rather than on the question of whether the compensation for the taking is adequate, the government can get away with paying much less. That is all that is going on here.

An even nastier procedural trap, until recently, was the so-called "notice rule." If a property owner purchased land knowing that a regulation existed prohibiting development, he could not later sue to have that regulation thrown out—after all, he was "on notice" when he purchased the land. But a closer examination reveals that the "notice rule" served as a "one-way ratchet" to gradually eliminate *all* land-use rights. If a landowner did not challenge a regulation immediately, no subsequent purchaser (or heir) could do so, *no matter how unconstitutional* the law.

Law professor Richard Epstein uses an analogy to make the unfairness clear: "[T]he plaintiff who stands on his own front steps may be on notice of the dangers created by motorists using the public highway. He has a set of choices which would enable him to avoid the risk at some cost if he so chose. Yet this does not establish assumption of risk. The central point is that the individual plaintiff has *both* the right to use his own land and the right to his own physical integrity."[6] Courts would never hold that a pedestrian's "notice" of traffic would bar a lawsuit against a driver who jumps the curb and runs him down; but those same courts held that a person buying property aware of *unconstitutional* regulations could not sue to get those regulations thrown out.[7]

The asserted justification for the "notice rule" was that it was needed to prevent "speculators" from purchasing regulated property at low prices, then suing to get the regulations withdrawn and realizing "windfall" profits. Considering the extreme amount of time and money that regulatory takings cases consume, it's highly unlikely that any speculators actually did this. But even assuming that some did, it's hard to see what was wrong with it.

Many civil-rights statutes provide for awarding attorney's fees; this creates an incentive for private parties to sue for discrimination, essentially making citizens into freelance enforcers of the law. But the same people who support such mechanisms are horrified by the possibility that similar incentives could protect property owners from unconstitutional land-use regulations. In any case, land regulations accrue a benefit to "the public" only by depriving the landowner of his rights. If he managed to get the regulation thrown out, he recovered nothing more than what was taken from him to begin with.

The notice rule went to even worse extremes. In some cases, courts held that property owners could not recover if they purchased property while aware of a regulatory "atmosphere" or of a likelihood that a land-use regulation would *eventually* be passed. In other words, the notice rule required that property owners foresaw future unconstitutional acts.

The rule essentially eliminated the Takings Clause. As Epstein says, "If notice of possible government action is sufficient to deny compensation for a partial taking of private property, say, development rights, then it is sufficient to deny it for a complete taking of property. All that is necessary is that purchasers be aware that the government may act to take over their land in entirety."[8] In fact, some courts went almost that far.[9]

Rule Ended . . . Maybe

Fortunately, last June the United States Supreme Court ended the "notice rule." In *Palazzolo v. Rhode Island* (2001), a 5-4 Court held that the rule attempted "to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land." Justice Anthony Kennedy, writing for the majority, was particularly explicit in explaining the notice rule's flaws:

> The theory underlying the argument that post-enactment purchasers cannot challenge a regulation under the Takings Clause seems to run on these lines: Property rights are created by the State. . . . So, the argument goes, by prospective legislation the State can shape and define property rights and reasonable investment-backed expectations, and subsequent owners cannot claim any injury from lost value. After all, they purchased or took title with notice of the limitation. The State may not put so potent a Hobbesian stick into the Lockean bundle.

While property owners can breathe a little easier now, it may be too early to celebrate the death of the "notice rule." Federal circuit courts have repeatedly attempted to circumvent Supreme Court decisions that don't comport with the overwhelmingly anti-property leanings of the legal elite. And they may have an opportunity to do so thanks to Justice Sandra Day O'Connor's concurring opinion. Characteristically, O'Connor attempted to divert the actual holding of the case. (Because only the "narrowest holding" of a Supreme Court decision is considered to be binding precedent, if a Justice concurs with an opinion on different grounds than the majority, *that* opinion, and not the opinion of the court, can sometimes be the more important ruling. Justice O'Connor has done this in a number of cases, particularly cases involving the Establishment Clause.)

In *Palazzolo* she wrote that "Today's holding does not mean that the timing of the regulation's enactment relative to the acquisition of title is immaterial. . . . [I]nterference with investment-backed expectations is one of a number of factors that a court must examine. Further, the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations." In other words, the notice a buyer had is not decisive, but should still be considered. The problem is, if a court does consider this factor, it will inevitably become the dominant factor—as it has all along. If a land-use regulation cannot become *more* constitutional merely by passage of time—if states may not "put an expiration date on the Takings Clause"—then it is *not* proper to consider the timing of that regulation at all.

But it is likely that circuit courts, and state courts, reluctant to allow plaintiffs to recover just compensation, will use Justice O'Connor's opinion to escape the compensation requirement. One catches a hint of this already in Justice Stephen Breyer's dissent:

> [M]uch depends upon whether, or how, the timing and circumstances of a change of ownership affect whatever reasonable investment-backed expectations might otherwise exist. Ordinarily, such expectations will diminish in force and significance—rapidly and dramatically—as property continues to change hands over time. I believe that such factors can adequately be taken into account within the *Penn Central* framework. . . . [Some] have warned that to allow complete regulatory takings claims . . . to survive changes in land ownership could allow property owners to manufacture such claims by

> strategically transferring property until only a nonusable portion remains. . . . But I do not see how a constitutional provision concerned with "fairness and justice" . . . could reward any such strategic behavior.

One can see where this is leading: if the timing of a regulation is considered in evaluating a takings claim's "fairness," then the amount of protection the Fifth Amendment provides to property owners will indeed diminish rapidly and dramatically whenever courts are still dominated by proponents of government regulation.

In fact, in an opinion issued on November 5, 2001, the Federal Circuit Court of Appeals did precisely this. In *Rith Energy v. United States*, the court rejected a coal mining firm's argument that under Palazzolo, "the mere fact that an owner bought after a regulatory scheme was passed cannot defeat a partial takings claim." Relying on Justice O'Connor's opinion, the court held that the coal company should have "expect[ed] the regulatory regime to impose some restraints on its right to mine coal under a coal lease," and therefore it could not have been disappointed in its "reasonable investment-backed expectations." Yet this is precisely the same rule rejected in Palazzolo: that just because a property owner is "on notice" that the government may act, or may have acted, unconstitutionally, should not prevent him from demanding just compensation. If there should not be an "expiration date on the Takings Clause," there should also not be a "five-minute warning" limit on the Takings Clause, either.

Property rights are indeed in jeopardy. Rehabilitating the Takings Clause would be a first step toward making property safe again. □

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1. This approach is known in the law as "rational relationship scrutiny," meaning that a law is constitutional if the legislature could possibly have thought the law was related in any way to any legitimate government interest. The test originated in cases like *United States v. Carolene Products Co.* (1938). Needless to say, hardly any law ever fails this test.
2. *Loretto v. Teleprompter Manhattan CATV Corp.* (1982).
3. *Lucas v. South Carolina Coastal Council* (1992).
4. *Pennsylvania Coal Co. v. Mahon* (1922).
5. *Penn Central Transp. Co. v. New York City* (1978).
6. Richard Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, Mass.: Harvard University Press 1985), pp. 153–54.
7. *Gazza v. New York State Dep't of Envtl. Conservation* (1997).
8. Epstein, p. 155.
9. See the New York case *Kim v. City of New York* (1997).

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