Texas Institute for Property Rights

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The Enemies of Property Rights: Regulatory Takings

Eminent domain is known as a taking—property is taken by the government for "public use." According to the Constitution, "just compensation" is due the owner when such a taking occurs. However, the value of property can be diminished through other government actions, such as regulations, while the owner retains title to the property. This has been a source of great controversy and is known a regulatory taking.

Wikipedia describes a regulatory taking as

> a situation in which a government regulation limits the uses of private property to such a degree that the regulation effectively deprives the property owners of economically reasonable use or value of their property to such an extent that it deprives them of utility or value of that property, even though the regulation does not formally divest them of title to it.[1]

The controversy surrounds the question of when compensation is due the owner. How much value must be destroyed by the regulation before compensation is due?

The issue of regulatory takings has existed for some time. As an example, see in *Mugler v. Kansas (1887)*. But as an explicit doctrine, it first arose in a Supreme Court case titled *Pennsylvania Coal Company v. Mahon (1922)*. Prior to this case, the Court did not regard regulations as a taking.

In 1878, Pennsylvania Coal granted surface rights to a parcel of land to H.J. Mahon and retained mineral rights below the surface. As a part of the deed, Mahon waived all claims for damages resulting from mining. In 1921, Pennsylvania passed a law prohibiting any mining that caused subsidence of any structure used for human habitation. Mahon sued the coal company and the Pennsylvania Supreme Court eventually ruled in Mahon's favor. The case was then appealed to the U.S. Supreme Court.

The Court reversed the Pennsylvania Supreme Court, ruling that the law was a taking. The Court ruled:

> Government hardly could go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation, and must yield to the police power. But obviously the implied limitation 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 the diminution. 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. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power….

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[1] "Regulatory taking," Wikipedia, https://en.wikipedia.org/wiki/Regulatory_taking, accessed June 6, 2018.

> 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.

Ever since, courts have struggled to identify what "too far" means. Rather than provide clear principles by which lower courts can make such judgments, the Court issued a vague and meaningless guideline: The value of property can be diminished by regulations, but it will not be considered a taking unless it goes "too far."

A second landmark case in regulatory takings was *Penn Central Transportation Co. v. New York City* (1978). In the 1960s, Penn Central wanted to construct a fifty-five-story office building on top of Grand Central Station in New York City. The city's Landmarks Preservation Commission denied a permit for the construction, and the case eventually made its way to the United States Supreme Court. In writing for the majority in favor of New York City, Justice William J. Brennan, Jr., declared,

> New York City law does not interfere in any way with the present uses of the Terminal. Its designation as a landmark not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions. So the law does not interfere with what must be regarded as Penn Central's reasonable expectation concerning the use of the parcel. More importantly, on this record, we must regard the New York City law as permitting Penn Central not only to profit from the Terminal but also to obtain a "reasonable return" on its investment….
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> In engaging in these essentially *ad hoc,* factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations…. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, …than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

In *Penn Central*, the Court again rejected principles, declaring that each case must be judged by *ad hoc*, factual inquiries.

More significantly, the Court asserted that since Penn Central could still use its property as it had previously, then New York City was not interfering with the company's "reasonable expectation concerning the use of the parcel." But is this true?

The right to property means the freedom to create, use, keep, trade, and dispose of material values as one chooses. Though Penn Central could continue to use its property as it had in the past, it could not use that property as it chose. And that is the crux of the issue. To the Court, a property owner's desires and choices do not matter.

In Penn Central, the Court introduced a series of factors to consider in deciding whether a regulation goes "too far." Courts must consider the character of the government action, whether the property owner can obtain a "reasonable return" on his investment, and investment-backed expectations. But this offers no meaningful guidance. For example, how much weight is to be given to each factor? What is a "reasonable return"? In further rejecting principles, the Court simply stirred up already muddy waters. The case of Lost Tree Village illustrates this point.

In 2002, the Lost Tree Village Corporation filed for permits with the federal government to fill approximately five acres of wetlands in Florida in preparation for development. Two years later, the Army Corps of Engineers denied the permit, claiming that the company could have pursued less environmentally damaging alternatives. Lost Tree sued the government and claimed that a taking had occurred.

The value of the land with a permit was estimated at more than $4.7 million, but only $30,000 without a permit—a reduction of 99.4 percent. The government argued that other undeveloped land nearby should also be a part of the equation, even though Lost Tree had no plans to develop that land, and it wasn't included in the permit application. Therefore, according to the government, the reduction in value was *only* 58.4 percent. Lost Tree eventually won the case.

One of the most controversial aspects of regulatory takings cases is the extent of the property under consideration. For example, if one acre of a two-acre parcel cannot be developed because of a regulation, the value is diminished by half. However, if that acre is part of a one-thousand-acre parcel, the value is diminished by one-thousandth. The difference is substantial, and the issue is known as the "denominator problem." This was the central issue in *Lost Tree*.

As another example, In *Murr v. Wisconsin* (2017), the litigants disagreed over what constituted the parcel of property being regulated. The Murrs had inherited two separate, but contiguous lots. When they went to sell one of the lots, they learned that a zoning law established minimal lot sizes for development. The individual lots were below the minimum, and so the government prohibited the Murrs from selling one of the lots. Interestingly, the zoning law allowed for development if the lots had been held by different owners, which would have been the case if the Murrs had been allowed to sell the property.

The Murrs sued to be compensated. Wisconsin argued that the two lots should be considered together, rather than separately. And when considered together, the reduction in value allegedly wasn't sufficient to trigger a taking.

The case went to the Supreme Court, where the Court ruled in favor of Wisconsin. Writing for the majority, Justice Anthony Kennedy stated that the denominator question, like the overall takings inquiry, turns on a multi-part analysis. "Like the ultimate question whether a regulation has gone too far," he wrote, "the question of the proper parcel in regulatory takings cases cannot be solved by any simple test." Nearly one hundred years after Pennsylvania Coal, the Court still has no answer to what is going "too far."

As with zoning and eminent domain, regulatory takings routinely sacrifice the well-being and flourishing of individuals for the alleged "public interest." This is the premise that we must reject and challenge if we wish to defend property rights.

The Texas Institute for Property Rights provides analysis, training, and resources for legislators, businesses, organizations, and property owners.

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