The Takings Clause of the Constitution: Overview of Supreme Court Jurisprudence on Key Topics

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SUMMARY

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The Takings Clause of the Constitution and Eminent Domain: An Overview of Supreme Court Jurisprudence on Key Topics

Government seizure of private property for public use without the consent of the property owner, often called "eminent domain," is a traditional power of the state that predates the Constitution. The Fifth Amendment of the U.S. Constitution provides some protections for property owners, guaranteeing that private property will not be taken for public use unless the property owner is given "just compensation." The Supreme Court first recognized the federal government's authority to exercise eminent domain in the late 1800s, and since that time the Court has expanded on notions of what constitutes a "taking," "public use," and "just compensation."

Modern Takings Clause analysis generally divides alleged takings into two categories. In direct condemnation, the federal government initiates the action to take possession of the property interest in question. In inverse condemnation, a private property owner initiates an action against the government, claiming that a property interest has been "taken" without just compensation in violation of the Takings Clause of the Fifth Amendment.

These two types of takings raise distinct legal issues. Direct condemnation will generally involve a physical taking of a property interest, such as title or an easement, and the government (by filing an action) essentially admits that some compensation is due under the Takings Clause. These cases raise questions about the scope of the government's power—for example, whether the taking is for a "public use"—and what just compensation is owned.

Inverse condemnation can also involve a physical taking, but in some cases a property owner will claim that some other consequence of the government's action (such as a diminution in value) constitutes a "regulatory taking." These cases therefore raise questions about whether the Takings Clause requires compensation at all.

This report serves as a primer for Members and their staffs on the Supreme Court jurisprudence regarding key principles of U.S. takings and eminent domain law. The report provides a brief overview of the history of Supreme Court eminent domain jurisprudence, including the Court's rulings on direct and inverse condemnation at the federal and state levels, what constitutes "public use," and factors considered when determining what constitutes "just compensation" in the event of a taking.

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The Fifth Amendment of the United States Constitution provides in part that private property shall not "be taken for public use, without just compensation." This clause, and the principles behind its inclusion in the Bill of Rights, provide the foundation for two important legal concepts related to the protection of property rights.

The first is the exercise of eminent domain, or condemnation, in which the government directly acquires title to real property or some other property right from its owner. The second is the constitutional protection against "inverse condemnation," which occurs by government action that causes a physical property interest that the government has not first acquired through eminent domain or by regulatory restrictions that impact the value of existing property.

This report reviews the application of the Takings Clause to government condemnation of property and to inverse condemnation through the lens of Supreme Court case law and identifies some of the key legal questions raised by the Takings Clause and the government's processes for claiming, and providing just compensation for, private property. Those questions include: What is a "public use" that triggers the requirements of the Fifth Amendment? What kinds of invasions constitute a "taking" without the exercise of eminent domain? And under what circumstances can government regulation of property, with no physical invasion, rise to the level of a taking? Finally, in both direct condemnation and inverse condemnation cases, what principles does a court apply to assess "just compensation"?

Direct Condemnation and the Exercise of Eminent Domain

Eminent domain is a phrase commonly used to denote "[t]he inherent power of a governmental entity to take privately owned property ... and convert it to public use."[1] Under the power of eminent domain, the government may take private property for public use by paying just compensation.[2] Eminent domain can be asserted only alongside a legitimate exercise of government authority that will be served by the property interest in question.[3] Although eminent domain may apply to both real and personal property, the cases discussed in this report generally arise in the context of real property.

The power of eminent domain derives from the Constitution and implicit historical assumptions regarding the scope of government authority, but the exercise of that power is generally pursuant to statute. Some statutes detail a specific process for the exercise of eminent domain authority as well as the public use to be served by taking the property interest. For example, before exercising eminent domain to acquire rights-of-way for the interstate highway system, the Secretary of Transportation must (1) receive a request from the state for acquisition of lands necessary for construction, reconstruction, or improvement of the interstate highway system; (2) determine that the state cannot acquire the needed property interests itself in a timely manner; and (3) obtain agreement from the state that the state will cover a certain percentage of the acquisition costs.[4] Federal statutes also dictate broadly applicable procedural requirements for an exercise of

[1] *Eminent domain,* BLACK'S LAW DICTIONARY (10th ed. 2014).

[2] The Supreme Court has interpreted the eminent domain authority of the federal government to include the authority to take property owned by state and local governments as well as privately owned property. *See, e.g.*, PennEast Pipeline Co. v. New Jersey, 594 U.S. ___, 141 S. Ct. 2244, 2256 (2021) ("State property was not immune from the exercise of delegated eminent domain power."); United States v. 50 Acres of Land, 469 U.S. 24, 31 (1984) ("[I]t is most reasonable to construe the reference to 'private property' in the Takings Clause of the Fifth Amendment as encompassing the property of state and local governments when it is condemned by the United States.").

[3] Courts have evaluated the legitimacy of the exercise of government authority under the "public use" requirement, discussed *infra* at "The "Public Use" Doctrine and Kelo v. City of New London."

[4] 23 U.S.C. § 107(a).

eminent domain, including a requirement to file a "declaration of taking" in addition to a court petition,[5] and requirements that the financial commitment be within the agency's budget limits and include interest.[6] The federal government also has a right to take possession of the necessary property interest upon filing of the declaration of taking.[7]

The Constitutional Basis for Eminent Domain

Unlike many of the federal government's powers, the power of eminent domain is not explicit in the U.S. Constitution. Instead, the power is implicit in the Fifth Amendment's prohibition on the taking of private property without just compensation.[8] The Supreme Court has embraced and validated this implication, recognizing the existence of the eminent domain power since the latter part of the 19th century. The Court's first explicit recognition of the federal power to take private property by the Supreme Court seems to be the 1875 decision in *Kohl v. United States*.[9] In *Kohl*, the Court heard a procedural dispute related to a condemnation proceeding. In addressing this dispute, the Court confirmed the legitimacy of the federal exercise of eminent domain authority. The Court declared that the authority to exercise eminent domain "is essential to [a nation's] independent existence and perpetuity.... The powers vested by the Constitution in the general government demand for their exercise the acquisition of lands in all the States."[10] The Court also noted that the Constitution itself contains an implied recognition of the government's eminent domain authority, pointing out that "[t]he Fifth Amendment contains a provision that private property shall not be taken for public use without just compensation. What is that but an implied assertion, that, on making just compensation, it may be taken?"[11] State governments also have the authority to exercise eminent domain.[12] The Supreme Court has confirmed that the federal constitutional limitations of the Takings Clause apply to the state's exercise of that power through the Due Process Clause of the Fourteenth Amendment.[13]

The "Public Use" Doctrine and *Kelo v. City of New London*

The Takings Clause requires that any taking be for a "public use." Eminent domain often facilitates activities with an obvious connection to "public use," such as transportation or power and water supply.[14] Its use to establish public parks, to preserve places of historic interest, and to

[5] 40 U.S.C. § 3114.

[6] *Id.* § 3115–16.

[7] *Id.* § 3114(b).

[8] *See* PennEast Pipeline v. New Jersey, 594 U.S. ___, 141 S. Ct. 2244, 2255 (2021) ("W]hen the Constitution and Bill of Rights were ratified, they did not include the words 'eminent domain.' The Takings Clause of the Fifth Amendment ... nevertheless recognized the existence of such a power.") Courts have evaluated the legitimacy of the exercise of government authority under the "public use" requirement, discussed in the "Public Use Doctrine" section of this Report.

[9] 91 U.S. (1 Otto) 367 (1875).

[10] *Id*. at 371.

[11] *Id*. at 372–73.

[12] The Supreme Court has held that eminent domain "appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty." Boom Co. v. Patterson, 98 U.S. (8 Otto) 403, 406 (1878). More recent case law has acknowledged eminent domain authority as inherent in state sovereignty. *See, e.g.*, Texas Midstream Gas Servs., LLC v. City of Grand Prairie, 608 F.3d 200, 207 (5th Cir. 2010); Township of W. Orange v. 769 Assoc., LLC, 172 N.J. 564, 571 (N.J. 2002).

[13] Green v. Frazier, 253 U.S. 233, 238 (1920) (noting that "[p]rior to the adoption of the Fourteenth Amendment," the power of eminent domain of state governments "was unrestrained by any federal authority").

[14] *See, e.g.*, Kohl v. United States, 91 U.S. (1 Otto) 367 (1875) (public buildings); New Orleans Gas Co. v. Drainage (continued...)

promote beautification also has substantial precedent.[15] However, these are not considered the only appropriate "public uses' for which eminent domain may be exercised.

The Supreme Court affords a high degree of deference to legislative determinations regarding the scope of eminent domain authority,[16] stating that "[t]he role of the judiciary in determining whether that power is being exercised for a public use is an extremely narrow one."[17] When state action is challenged under the Fourteenth Amendment, the Court also defers to the highest court of the state in resolving such an issue.[18] In a 1908 decision, the Court observed that "[n]o case is recalled where this court has condemned as a violation of the Fourteenth Amendment a taking upheld by the state court as a taking for public uses."[19]

The Supreme Court has also generally approved federal and state governments using the power of eminent domain alongside private companies for facilitation of urban renewal, erection of low-cost housing in place of deteriorated housing, and promotion of aesthetic values as well as economic ones. In its 1954 decision in *Berman v. Parker*, a unanimous Court observed: "The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."[20]

This broad and deferential approach to defining *public use* continued in the decades that followed, as interpretations of what constitutes a compensable taking expanded significantly. In 1946, the Supreme Court cast doubt upon the power of courts even to review the issue of public use, stating "[w]e think that it is the function of Congress to decide what type of taking is for a public use and that the agency authorized to do the taking may do so to the full extent of its statutory authority."[21] No definition of the reach or limits of this power is possible, the Court has said, because such "definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition."[22] In 2003, the Court added as an indicium of "public use" whether the government purpose could be validly achieved by tax or user fee.[23]

Comm'n, 197 U.S. 453 (1905) (city drainage system); Chi. Milwaukee, & St. Paul Ry. v. City of Minneapolis, 232 U.S. 430 (1914) (canal); Long Island Water Supply Co. v. Brooklyn, 166 U.S. 685 (1897) (condemnation of privately owned water supply system formerly furnishing water to municipality under contract); Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 240 U.S. 30 (1916) (land, water, and water rights condemned for production of electric power by public utility); Dohany v. Rogers, 281 U.S. 362 (1930) (land taken for purpose of exchange with a railroad company for a portion of its right-of-way required for widening a highway).

[15] *See, e.g.*, Shoemaker v. United States, 147 U.S. 282 (1893) (establishment of public park in District of Columbia); Rindge Co. v. Los Angeles Cnty., 262 U.S. 700 (1923) (creation of a scenic highway); Roe v. Kansas *ex rel.* Smith, 278 U.S.191 (1929) (protection of a historic site).

[16] Kelo v. City of New London, 545 U.S. 469, 482 (2005). The taking need only be "rationally related to a conceivable public purpose." *Id.* at 490 (Kennedy, J., concurring).

[17] Berman v. Parker, 348 U.S. 26, 32 (1954) (federal eminent domain power in District of Columbia).

[18] Green v. Frazier, 253 U.S. 233, 240 (1920); City of Cincinnati v. Vester, 281 U.S. 439, 446 (1930).

[19] Hairston v. Danville & W. Ry., 208 U.S. 598, 607 (1908).

[20] *Berman*, 348 U.S. at 32–33. *See also* PennEast Pipeline v. New Jersey, 594 U.S. ___, 141 S. Ct. 2244, 2255-66 (2021).

[21] United States *ex rel.* TVA v. Welch, 327 U.S. 546, 551–52 (1946).

[22] *Berman*, 348 U.S. at 32.

[23] Brown v. Legal Found., 538 U.S. 216, 232 (2003).

The Court's expansive interpretation of *public use* in eminent domain cases may have reached its outer limit in 2005 in *Kelo v. City of New London*.[24] There, a five-justice majority upheld as a public use the government acquisition of privately owned land to be transferred to another private party for purposes of economic development under a redevelopment plan adopted by a municipality to invigorate a depressed economy. The Court saw no principled way to distinguish economic development from the economic purposes endorsed as "public uses" of property in previous Supreme Court cases and stressed the importance of judicial deference to legislative judgment as to public needs.[25] At the same time, the Court cautioned that condemnations of individual properties that are transferred to other private parties not as part of an "integrated development plan ... raise a suspicion that a private purpose [is] afoot."[26] Following *Kelo*, many states enacted new legislative protections intended to curb the exercise of eminent domain in service of private interests.[27]

Inverse Condemnation: Identifying Takings

Inverse condemnation generally refers to instances in which a property owner institutes an action claiming that his or her property has been "taken," in contrast with instances in which the government initiates the process of condemnation through an exercise of eminent domain.[28] The Supreme Court has long held that when government permanently occupies property (or authorizes someone else to do so) without an express exercise of eminent domain, the action still constitutes a taking of private property for Fifth Amendment purposes, regardless of the public interests served or the extent of damage to the parcel as a whole.[29]

Early Supreme Court cases considering inverse condemnation claims focused on claims that a government action had caused a physical taking of property without explicitly seeking to exercise its eminent domain authority. At first, the Court limited such claims. In an 1871 decision, the Supreme Court concluded that the Fifth Amendment required just compensation only for "direct appropriation" of property "and not to consequential injuries resulting from the exercise of lawful power."[30] Based on this perspective, the Court found that a number of government actions that diminished the value of the property did not constitute compensable takings during the late 19th and early 20th centuries.[31] However, the scope of compensable property interests expanded during the 20th century to include regulatory takings and other forms of "inverse condemnation."[32]

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[24] 545 U.S. 469 (2005).

[25] *Id.* at 482–83.

[26] *Id*. at 487.

[27] HENRY M. JACOBS & ELLEN M. BASSITT, AFTER "KELO": POLITICAL RHETORIC AND POLICY RESPONSES, LAND LINES (Apr. 2010), https://www.lincolninst.edu/sites/default/files/pubfiles/1773_992_1773_992_4%20Kelo.pdf.

[28] San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 638 n.2 (1981) (Brennan, J., dissenting). *See also* United States v. Clarke, 445 U.S. 253, 257 (1980); Agins v. City of Tiburon, 447 U.S. 255, 258 n.2 (1980).

[29] *See, e.g.*, Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1872); City of St. Louis v. W. Union Tel. Co., 148 U.S. 92 (1893); W. Union Tel. Co. v. Pa. R.R., 195 U.S. 540 (1904).

[30] Legal Tender Cases, 79 U.S. (12 Wall.) 457, 551 (1871).

[31] *See, e.g.*, Meyer v. Richmond, 172 U.S. 82 (1898) (authorization of train siting and operation that damaged abutting property was not a taking); Bothwell v. United States, 254 U.S. 231 (1920) (cattle sale compelled by loss of grazing land due to government flooding was not a taking).

[32] *See infra* at Regulatory Takings. The Court has also heard a case during the current October 2022 term that asks whether seizing cash to satisfy a debt to the government could be considered a taking. Tyler v. Hennepin Cnty., 26 F.4th 789 (8th Cir. 2021), *cert. granted*, 143 S. Ct. 644 (U.S. Jan. 13, 2023) (No. 22-166).

The Constitution does not prohibit takings without formal eminent domain proceedings, but it requires that just compensation be paid. Claims for compensation against the federal government are typically raised under the Tucker Act, which waives sovereign immunity for the federal government for certain monetary claims, including those founded upon constitutional violations.[33] The Tucker Act also confers jurisdiction over such matters upon the United States Court of Federal Claims (or, in matters related to procurement or with smaller amounts in dispute, to the Court of Federal Claims or a U.S. district court).[34] The Court of Federal Claims is authorized only to grant compensation for takings and generally does not grant declaratory or injunctive relief.[35] The United States Court of Appeals for the Federal Circuit has exclusive jurisdiction over appeals from the Court of Federal Claims.[36]

Until recently, a plaintiff who sought to pursue a takings claim against a state entity could not do so in federal court until that plaintiff had (1) received a final decision from the state government regarding the application of the alleged regulation to his or her property and (2) sought compensation through the relevant state-level procedures.[37] However, in 2019 the Supreme Court eliminated this requirement in *Knick v. Township of Scott*.[38]

Inverse Condemnation Claims Based on Physical Takings

Some government actions result in physical occupation of, or require or authorize a third party to occupy, private property without the owner's consent. When the government has not itself instituted eminent domain proceedings to effect such a taking, the property owner may make an inverse condemnation claim. For example, in 1982 the Court heard a challenge to a law requiring landlords to permit a cable television company to install cable facilities on top of rental properties. Although the equipment occupied only about 1½ cubic feet of space on the exterior of each building and had only a de minimis economic impact, a divided Court held that the regulation authorized a permanent physical occupation of the property and thus constituted a taking.[39]

A physical taking may also be temporary. For example, a temporary physical taking may occur when government action causes flood waters to physically intrude upon property.[40] In 2021, the Supreme Court held in *Cedar Point Nursery v. Hassid* that a state law requiring agricultural employers to allow union organizers on their business properties for up to three hours per day, 120 days per year, constituted a per se physical taking requiring just compensation.[41] In *Cedar Point*, the government itself did not physically take a property interest, but it enacted a regulation that allowed a third party to temporarily, physically enter the landowner's property. The Court nonetheless characterized that regulation as causing a "per se" taking due to the element of

[33] 28 U.S.C. § 1346.

[34] *Id.* § 1491.

[35] United States v. King, 395 U.S. 1 (1969).

[36] *Id.* § 1295(a)(3).

[37] Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 195 (1985).

[38] 139 S. Ct. 2162, 2177 (2019).

[39] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982). *See also* Yee v. City of Escondido, 503 U.S. 519, 539 (1992) (no physical occupation caused by regulations in effect preventing mobile home park owners from setting rents or determining whom their tenants would be; owners could still determine whether their land would be used for a trailer park and could evict tenants in order to change the use of their land).

[40] Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 34 (2012).

[41] 141 S. Ct. 2063 (2021).

physical occupation.[42] These cases indicate that a physical occupation or restriction can constitute a taking even if the amount of property taken is relatively small, the occupation is not permanent, or the cause of the occupation is a government regulation.

Inverse Condemnation Claims Based on Economic or Regulatory Takings

For several decades after explicitly recognizing the federal government's eminent domain authority, the Court held firm to the notion that regulation designed to secure the common welfare, especially in the area of health and safety, was not considered a "taking."[43] The Court began to change direction in its 1922 decision *Pennsylvania Coal Co. v. Mahon*.[44] In *Mahon*, the Court heard a challenge brought by holders of subsurface mining rights to a state statute prohibiting subsurface mining for coal in areas where it might trigger subsidence (caving or sinking) of any structure used for human habitation. The Court observed that the statute, by making it "commercially impracticable to mine certain coal," had essentially "the same effect for constitutional purposes as appropriating or destroying" the subsurface estate.[45] The Court concluded that "while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking" and that such a taking had occurred here, where the government action rendered the subsurface property interest largely valueless.[46] In later cases, however, the Court has emphasized a distinction between these regulatory takings and permanent physical occupations, and it has declared it "inappropriate" to view case law from either realm as necessarily controlling precedent in the other.[47]

Land use controls often generate regulatory takings claims, as restrictions on land use can impact property value in many ways. The Court has held that such controls constitute a "per se" regulatory taking if they deny a property owner any "economically viable use of his land."[48] Like a per se physical taking, a per se regulatory taking mandates compensation under the Fifth Amendment regardless of the value of the property taken or the government interest promoted by taking it. This rule, which the Court first articulated in *Agins v. City of Tiburon*[49] and later confirmed in *Lucas v. South Carolina Coastal Council*,[50] dictates that when the landowner "has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."[51] Such land use controls

[42] As the next section will discuss, a regulation that causes a "per se" physical taking is treated differently under takings jurisprudence than a regulation that has only an economic effect. Although either type of taking can be caused by a regulation, only the latter is referred to as a "regulatory taking" (to distinguish it from a physical taking).

[43] Mugler v. Kansas, 123 U.S. 623, 668–69 (1887). *See also* Chi. B. & Q. R.R. v. City of Chi., 166 U.S. 226, 255 (1897); Omnia Com. Co. v. United States, 261 U.S. 502 (1923).

[44] 260 U.S. 393 (1922).

[45] *Id.* at 414–15.

[46] *Id.* at 415–16.

[47] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 323 (2002).

[48] Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

[49] *Id.*

[50] 505 U.S. 1003 (1992). The Court did not refer to "per se" takings in *Lucas*, but it identified a class of regulatory takings that are appropriate for "categorical treatment"–i.e., without any consideration of balancing.

[51] *Id.* at 1019. The *Agins*/*Lucas* total deprivation rule does not create an all-or-nothing situation, because "the landowner whose deprivation is one step short of complete" may still be able to recover through application of the *Penn Central* economic impact and "distinct [or reasonable] investment-backed expectations" criteria. *Id.* at 1019 n.8. *See also* Palazzolo v. Rhode Island, 533 U.S. 606, 632 (2001).

may still not constitute takings if those controls come with the property as title encumbrances or other legally enforceable limitations in place prior to acquisition of the property.[52]

A more common situation is for a regulation to have some economic effect on property value without depriving the property own of all economically viable uses. In that situation, the courts employ a balancing test to determine whether a taking has occurred for purposes of the Takings Clause. A landmark precedent in this area is *Penn Central Transportation Co. v. City of New York*,[53] in which the Supreme Court articulated guidance for determining whether a regulatory taking had resulted from a particular government action. The dispute in *Penn Central* concerned New York City's landmarks preservation law, under which the city denied approval to construct a 53-story office building atop Grand Central Terminal. The Court denied Penn Central's takings claim based, in part, on these considerations:

- "The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations;"[54]
- "[T]he 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;"[55] and
- Whether the challenged government action "[i]nterfere[d] with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes."[56]

Considering the economic impact on Penn Central, the Court noted that the company could still make a "reasonable return" on its investment by continuing to use the facility as a rail terminal with office rentals and concessions, and the city specifically permitted owners of landmark sites to transfer to other sites the right to develop those sites beyond the otherwise permissible zoning restrictions.[57] As for the character of the governmental regulation, the Court found the preservation of historic sites to be valid economic legislation and a policy that served the public interest.[58]

While the Supreme Court also cautioned that regulatory takings cases require "essentially ad hoc, factual inquiries,"[59] the *Penn Central* balancing test continues to guide courts in determining whether a regulatory taking has occurred. In particular, the Court has repeatedly relied on the concept of distinct or reasonable "investment-backed expectations" to analyze whether a taking had occurred. For example, in *Ruckelshaus v. Monsanto Co*.,[60] the Court used this concept to determine whether the government's disclosure of trade secret information submitted with applications for pesticide registrations resulted in a taking. The Court reasoned that the disclosing data was submitted from 1972 to 1978, a period when the statute guaranteed confidentiality and

[52] *Lucas*, 505 U.S. at 1026-27.

[53] 438 U.S. 104 (1978).

[54] *Id.* at 124 (citing Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962)).

[55] *Id.*

[56] *Id.* at 124–25.

[57] *Id*. at 129.

[58] *Id*. at 124–28, 135–38.

[59] *Id.* at 124.

[60] 467 U.S. 986 (1984).

thus "formed the basis of a distinct investment-backed expectation," would have destroyed the property value of the trade secret and thus constituted a taking.[61]

Later Supreme Court decisions clarify that, in applying the economic impact and investment-backed expectations factors of *Penn Central*, courts should compare what the property owner has lost through the challenged government action with what the owner retains. Discharging this mandate requires a court to define the extent of plaintiff's property—the "parcel as a whole"—that sets the scope of analysis.[62] In *Murr v. Wisconsin*, the Court stated, "Like the ultimate question whether a regulation has gone too far, the question of the proper parcel in regulatory takings cases cannot be solved by any simple test. Courts must instead define the parcel in a manner that reflects reasonable expectations about the property," but it noted that those courts must also "take into account a number of factors, including (1) the treatment of the land under relevant state and local law; (2) the physical characteristics of the land; and (3) the prospective value of the land."[63]

Murr provides a useful touchpoint for seeing the Court's progression with respect to regulatory takings over the past century or so. After rejecting the concept entirely in case law in the late 19th and earliest 20th centuries, the Court changed course in 1922.[64] It eventually arrived at a balancing test of sorts for regulatory takings in *Penn Central*[65] and subsequently clarified that this rule should not be considered a rigid test and that courts could consider a number of factors as they deem appropriate.[66] Finally, in *Lucas*, the Court found that no balancing test was necessary to find that a taking has occurred in cases "where regulation denies all economically beneficial or productive use of land."[67]

Exactions

Another example of inverse condemnation is the exaction taking. An "exaction" is a government-imposed requirement that a project developer provide certain public benefits to offset the impacts of the project on the public. Two late-20th-century Supreme Court decisions, *Nollan v. California Coast Commission* and *Dolan v. City of Tigard*, articulated a two-part test to evaluate alleged exaction takings. The first part dictates that in order not to be a taking, an exaction condition must have an "essential nexus" to a legitimate state interest.[68] The second part of the test requires the government to establish that "the required dedication is related both in nature and extent to the impact of the proposed development," a test the Court calls the "rough proportionality" test.[69]

More recent cases about exaction takings continue to apply the principles of *Nollan* and *Dolan*. In *Koontz v. St. Johns River Water Management District*, the Supreme Court heard a challenge to an exaction based on a rejected wetlands mitigation proposal.[70] The petitioner sought permission for

[61] *Id.* at 1011.

[62] The "parcel as a whole" analysis refers to the precept that takings law "does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Penn Cent.*, 438 U.S. at 130.

[63] Murr v. Wisconsin, 137 S. Ct. 1933, 1945–46 (2017).

[64] *See Mugler*, 123 U.S. at 668–69.

[65] 438 U.S. 104.

[66] *See Murr*, 137 S. Ct. at 1945–46.

[67] *Lucas*, 505 U.S. at 1015.

[68] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987).

[69] Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

[70] 570 U.S. 595 (2013).

a construction project on property situated on wetlands in Florida.[71] Florida law requires applicants seeking to build on wetlands to offset the resulting environmental damage, so the petitioner exchanged proposals with the water management district. Ultimately, the petitioner rejected the district's proposals and sued the district under a Florida statute that allows for monetary recovery for a victim of "an unreasonable exercise of the state's police power constituting a taking without just compensation."[72] The matter made its way to the Supreme Court, which held that the "essential nexus" and "rough proportionality" requirements of *Nollan* and *Dolan* also apply in cases where the government *denies* an application due to failure to satisfy the government's proposed conditions under the "doctrine of unconstitutional conditions."[73] The Court noted that this rule allows the government to "enable permitting authorities to insist that applicants bear the full costs of their proposals" while still forbidding the government from engaging in "out-and-out ... extortion that would thwart the Fifth Amendment right to just compensation."[74]

What Constitutes "Just Compensation"?

The Takings Clause also dictates that the compensation for a taking be "just." Both eminent domain and inverse condemnation cases therefore require courts to determine the value of just compensation for a particular taking.

The Supreme Court has declared that just compensation should be determined "by reference to the uses for which the property is suitable, having regard to the existing business and wants of the community, or such as may be reasonably expected in the immediate future" but noted that "mere possible or imaginary uses or the speculative schemes of its proprietor, are to be excluded."[75]

The default standard in case law regarding just compensation is generally "fair market value," i.e., what a willing buyer would pay a willing seller.[76] The Supreme Court has been resistant to alternative standards. For example, it has repudiated reliance on the cost of substitute facilities.[77] In earlier cases, the Court seemed to require that the equivalent be in money, not in kind.[78] However, in its 1974 decision in *Regional Rail Reorganization Act Cases*, the Court indicated that courts should allow for greater flexibility in the form of compensation.[79]

Two Supreme Court cases illustrate some of the particular difficulties in applying the "fair market value" standard of just compensation. In one, the Court held that a company was entitled to compensation for the value of improvements on leased property for the life of the improvements and not simply for the rest of the term of a lease that had no renewal option, because the company occupied the land for nearly 50 years and had every expectancy of continued occupancy under a new lease.[80] The Court noted that just compensation required considering the possibility that the

[71] *Id.*

[72] *Id.* at 602.

[73] *Id.* at 606. For further discussion of the doctrine of unconstitutional conditions, see CRS Report R46827, *Funding Conditions: Constitutional Limits on Congress's Spending Power*, by Victoria L. Killion.

[74] *Id.*

[75] Chicago, B. & Q. R.R. v. City of Chi., 166 U.S. 226, 250 (1897).

[76] United States v. Miller, 317 U.S. 369, 375 (1943).

[77] United States v. 564.54 Acres of Land, 441 U.S. 506 (1979); United States v. 50 Acres of Land, 469 U.S. 24 (1984).

[78] *Miller*, 317 U.S. at 373 (1943).

[79] Reg'l Rail Reorganization Act Cases, 419 U.S. 102, 150–51 (1974) ("No decision of this Court holds that compensation other than money is an inadequate form of compensation under eminent domain statutes.").

[80] Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 478 (1973).

lease would be renewed, because a willing buyer and a willing seller would have placed a value on that possibility.[81] However, when the federal government condemned privately owned grazing land of a rancher who had leased adjacent federally owned grazing land, the Court held that the compensation owed need not include the value of the condemned property attributable to its proximity to the federal land.[82] The result would have been different if the adjacent grazing land had been privately owned, but the general rule is that government need not pay for value that it itself creates.[83]

The Supreme Court has held that the constitutional protection afforded by the Takings Clause does not extend to expenses incurred that are incidental to or a consequence of the government taking:

> Whatever of property the citizen has, the Government may take. When it takes the property—that is, the fee, the lease, whatever he may own—terminating altogether his interest, under the established law, it must pay him for what is taken, not more, and he must stand whatever indirect or remote injuries are properly comprehended within the meaning of "consequential damage" as that conception has been defined in such cases. Even so, the consequences often are harsh. For these, whatever remedy may exist lies with Congress.[84]

Despite this language, the Court has at times carved out some exceptions to this strict rule. For example, in *Kimball Laundry Co. v. United States*,[85] the federal government seized a tenant's laundry plant for the duration of World War II, which turned out to be less than the full duration of the lease, forcing the plant to suspend business during the military occupancy. The Court held that the government must compensate for the loss in value of the business attributable to the destruction of its "trade routes," that is, for the loss of customers, whose patronage the laundry had developed over the years.[86] The Court articulated another exception in *United States v. Miller*, in which it held that if the government takes less than the entire parcel of land and leaves the owner with a portion of what he had before, compensation should include any diminished value of the remaining portion ("severance damages") as well as the value of the taken portion.[87] The Court noted, however, that "if the taking has in fact benefitted the remainder, the benefit may set off against the value of the land taken."[88]

Conclusion

It has been almost 150 years since the Supreme Court first explicitly acknowledged the sovereign right of eminent domain and the Fifth Amendment's guarantee of just compensation for persons whose property is taken for public use.[89] Over that time, federal and state authorities have adopted broader interpretations of *property* to include things other than real property and of *takings* to include government actions other than the physical seizure of property. Courts have generally

[81] *Id.* at 473–74.

[82] United States v. Fuller, 409 U.S. 488, 493–94 (1973).

[83] *Id.*

[84] United States v. Gen. Motors Corp., 323 U.S. 373, 382 (1945).

[85] 338 U.S. 1 (1949).

[86] *Id.* at 16.

[87] United States v. Miller, 317 U.S. 369, 375–76 (1943). See also United States v 40 Acres of Land, 175 F.3d 1133, 1139 (9th Cir. 1999) ("If the value of the remaining land, on a unit basis, diminishes when the condemned parcel is removed from the larger whole, the landowner is entitled to compensation 'both for that which is physically appropriated and for the diminution in value to the non-condemned property.'").

[88] *Id.*

[89] Kohl v. United States, 91 U.S. (1 Otto) 367 (1875).

deferred to legislatures to interpret the "public use" requirement for takings, but a number of stakeholders expressed concern about this following the Court's *Kelo v. City of New London* decision, and some states have taken action to narrow the circumstances in which eminent domain can be exercised by the state.

Concerns related to the Takings Clause arise frequently during the preparation of legislation, as legislators must consider whether proposed legislation will result in a taking of property and, if so, whether and how to compensate the property owners. For example, border security measures calling for the deployment of fencing and other infrastructure along the southwest border may prompt legislators to consider how best to acquire the necessary property interests and compensate owners.[90] Similarly, discussions about infrastructure permitting in the current Congress must likely consider whether and how to accommodate property owners whose interests may be directly or indirectly affected by the facilities and whose cooperation may be necessary to accelerate construction projects.[91] Understanding the evolving jurisprudence regarding the Takings Clause can help legislators avoid pitfalls and ensure compliance with the Constitution.

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[90] *See e.g. Examining the Effect of the Border Wall of Private and Tribal Landowners: Hearing Before the Subcomm. on Border Security, Facilitation and Operations of the Committee on Homeland Security*, 116th Cong (2020).

[91] *See e.g. Committee Business Meeting & Opportunities to Improve Project Reviews for a Cleaner and Stronger Economy: Hearing before S. Comm. on Env't & Pub. Works*, 118th Cong. (2023).