



FEATURE ARTICLE

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A Regulatory Takings Glossary (or How to Translate Property Rights Lawyerspeak)



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One of my law school professors once remarked (hopefully in jest) “if it ain’t Latin, it ain’t the law.” While thankfully we have moved away from the days when Latin and Norman French were the languages of the law, those of us who regularly represent property owners defending their rights sometimes toss about terms that, although they purport to be standard English, often make normal people look at us askance.

We may forget that not everyone might understand what we mean when we say, for example, “The court dismissed the **regulatory takings** claim on **ripeness** grounds under *Williamson County* because the **property** owner had not **exhausted** her administrative remedies. That left for the state court to decide whether the claim was a *per se Lucas* taking, or whether to apply the *ad hoc Penn Central* analysis.”

If you know what that means, congratulations, you don’t need this guide. However, for those of you not yet familiar with the *lingua franca* of **regulatory takings** and **eminent domain** lawyers, here’s a crash course of some of the more common terms.

Ad Hoc Taking

Where a regulation has some impact on the use of **property**, the most common legal test for determining whether the regulation is an invalid **taking**. Also: anything not a *per se* taking. See also *Penn Central*.

Amicus/Amici Curiae Brief(s)

Latin for “friend [or friends] of the court” briefs. In appellate practice, a

brief filed by someone who is not an actual party to the litigation, to assist the court in deciding the case before it. While these are labeled friend of the court briefs, most often these briefs are filed in support of one party or another. Every now and then you might see an amicus brief filed “in support of neither party.” Amicus briefs, when done right, are a very effective way to help a court understand the broader implications of the case before it.

Background Principles

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); the U.S. Supreme Court held that a regulation would be a **taking** if it was a **wipeout** of all economically beneficial use of **property**. The Court made an exception, however, if the regulation was part of “background principles of the state’s property and nuisance law.” In other words, even if a regulation destroys the property’s economic value, it might not be a **taking** if the **property** was always subject to the restriction. See also *Lucas*, **Wipeout**.

Categorical Taking

The plain English way of saying “*per se* taking.” See *Per Se Taking, Lucas*.

Certiorari, Writ of

Also known as “cert.” The process by which the U.S. Supreme Court – and many state supreme courts – decides to review decisions by lower courts. Regular people call this an “appeal.”

Condemnation

Another way of saying **Eminent Domain**.

Due Process

The requirement that government actions affecting **property** be accomplished by fair procedures (procedural due process) and for rational reasons (substantive due process). *See also Lingle*.

Eminent Domain

The sovereign's inherent power to seize private **property** for a **public use** or purpose, upon payment of **just compensation**. Often delegated by statute to municipalities, local governments, and public utilities. In an eminent domain case, the government is the plaintiff and sues the property owner or the property itself. *See also Fifth Amendment, Takings*.

Euclid

The U.S. Supreme Court's decision in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). This is the case that first upheld a zoning ordinance against a due process challenge. *See also Due Process, Police Power*.

Exhaustion

The requirement that a **property** owner avail themselves of all available "administrative" remedies before raising a federal **takings** claim in federal court. *See also Ripeness, Williamson County*.

Fifth Amendment

The Fifth Amendment to the U.S. Constitution. Includes clauses relating to self-incrimination ("taking the Fifth"), **Due Process**, and **Takings**. The relevant provision, known as the "Takings Clause" provides: "nor shall private property be taken for public use, without just compensation." *See also Takings Clause*.

Inverse Condemnation

When some action by the government has resulted in the *de facto* tak-

ing of private **property** for **public use**, but the government has not instituted **condemnation** proceedings or paid **just compensation**. The **property** owner has a claim for inverse condemnation. These **takings** are "inverse" because unlike a **condemnation** lawsuit where the government is the plaintiff, in inverse condemnation, the **property** owner is the plaintiff and must sue the government. A common example is government-caused flooding. Sometimes also used interchangeably with **Regulatory Takings**. Also the name of the web's most widely-read **regulatory takings** and **eminent domain** law blog.

Just Compensation

The **Fifth Amendment** and parallel provisions in most state constitutions require that the government provide "just compensation" for **property** taken by **eminent domain** or **inverse condemnation**. What compensation is "just" in any particular case is a question reserved for juries in many jurisdictions. The general rule is that just compensation is the "fair market value" of the **property** on the date of the **taking**. "*Just Compensation*" is also the title of a monthly loose-leaf report on **eminent domain** law by **condemnation** law maven Professor Gideon Kaner.

Kelo

The U.S. Supreme Court's now-infamous 2005 decision regarding **public use** in **eminent domain**. In *Kelo v. City of New London*, 545 U.S. 469 (2005), the Court held (5-4) that a municipal redevelopment agency could exercise **eminent domain** to take private homes under the "economic development" theory (the government's claim that another private owner would make more economically intense use of **property** is a sufficient justification for a **taking**). The decision provoked widespread outrage and resulted in many state and local laws limiting the use of **eminent domain**, especially for economic development.

Lingle

The U.S. Supreme Court's decision in *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005), where a unanimous Court clarified **regulatory takings** law. The decision held that the government's reason for adopting a regulation is not part of **takings** analysis in most cases, but involves **due process**, instead. The case involved Hawaii's gas station rent control statute as a means of controlling consumer gas prices. *See also Due Process, Nollan/Dolan*.

Lucas

The 1992 U.S. Supreme Court decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). The case held that if a regulation "denies all economically beneficial or productive use of land," it is a **per se taking**. *See also Wipeout, Per Se Takings*.

Nollan/Dolan

Two U.S. Supreme Court cases, most often treated together. *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Together, these decisions require that (1) a development exaction (the government demanding the property owner dedicate a **property** interest in return for a development permit) or a condition in a land use permit is a **taking** unless the government shows some rational "nexus" between the exaction and an important public interest, and (2) that the exaction be "roughly proportional" to the impact of the proposed use.

Penn Central

In 1978, the U.S. Supreme Court issued an opinion in *Penn Central Trans. Co. v. New York City*, 438 U.S. 104 (1978), which stated the most common three-part test to measure whether a regulation has effected a **taking**. A court determines whether a regulation works a **taking** by measuring: (1) the economic impact of the regulation; (2) the **property** owner's reasonable investment-backed expectations; and (3) the character of the government action. The *Penn Central* test has been widely

criticized, but the Supreme Court recently validated it as the standard test for *ad hoc* takings in *Lingle*.

Pennsylvania Coal/Mahon

The U.S. Supreme Court's decision in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), widely viewed as the first "**regulatory takings**" case where the Court held that "[i]n general, while **property** may be regulated to a certain extent, if regulation goes too far, it will be recognized as a **taking**." See also **Regulatory Taking**.

Per Se Taking

Certain regulations are automatically determined to be a **taking**, without resort to the *Penn Central* test. So far, per se takings are limited to situations where a regulation results in a **wipeout** of all beneficial use of property, or interferes with a property owner's right to exclude. Also known as **categorical takings**. See also *Lucas*, **Physical Invasion**.

Physical Invasion

If the government physically invades property, or invites the public to do so (even if the intrusion has little if any impact on the property owner) the courts will find this is a **taking**. Examples include dedication requirements, and public easements. The paradigmatic example is *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), in which the Court held that a municipal ordinance requiring building owners to allow the cable TV operator to install a small cable TV box on the roof was a **taking**. See also **Per Se Takings**.

Police Power

The power of government to regulate for the "health, safety, and welfare" of the public. Zoning and rent control ordinances are classic "police power" regulations. See also *Euclid*.

Property

Not just land (real property), but any interest protected by the **Fifth Amendment** from an uncompensated **taking**,

and by the **Due Process Clause** from deprivation without fair procedures or a rational reason. Often spoken of as a "bundle of rights" with particular interests called "sticks" in the "bundle." The ability to make reasonable use of property by developing it or putting it to some economic use has been determined to be a "stick" in the bundle of property rights. Similarly, the right to exclude others from property is a fundamental "stick." See also **Physical Invasion**, **Per Se Taking**, **Due Process**.

Public Use/Public Use Clause

The first half the **eminent domain** equation (the other being **just compensation**). Under the U.S. Constitution's **Fifth Amendment** and similar provisions in most state constitutions, all **takings** must be "for public use." This means more than the property taken is owned or used by the public, and over the years, the courts have interpreted this to require that the government merely have some public "purpose" in **taking the property**. See also **Takings Clause**.

Regulatory Taking

The situation where it is alleged by a **property owner** that a government regulation has the same impact on the **property** as an affirmative exercise of the **eminent domain** power, but the government has not bothered to institute a **condemnation** proceeding and is not willing to provide **just compensation**. Often used interchangeably with **Inverse Condemnation**.

Ripeness

See *Williamson County*.

Takings

Situations where the government has either (1) seized private **property** for **public use** by **eminent domain** and instituted **condemnation** proceedings and willingly provides just compensation (see **Eminent Domain**); or (2) government has taken some action (zoning regulations, rent control ordinances, for example) that has the *effect* of seizing **property**, but has not instituted **condemnation** proceedings. See

also **Condemnation**, **Eminent Domain**, **Regulatory Taking**.

Takings Clause

The *most important* part of the U.S. Constitution's **Fifth Amendment**, which provides: "nor shall private property be taken for public use, without just compensation." See also **Fifth Amendment**.

Temporary Taking

If the government **takes property** by **eminent domain** or by **inverse condemnation** or by a **regulatory taking**, the **Fifth Amendment** requires it pay **just compensation** even if the **taking** is only temporary. Also known as the "*First English*" rule, after a 1987 U.S. Supreme Court case first establishing the principle in **regulatory takings** cases.

Williamson County

The U.S. Supreme Court's infamous decision in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). That case effectively prohibited the federal courts from considering **regulatory takings** or **Fifth Amendment** claims by holding a federal **takings** lawsuit is not "ripe" until the **property owner** has exhausted her administrative remedies and has sought **just compensation** in state court. Be warned: do not mention the words "*Williamson County*" to a **regulatory takings** lawyer unless you have a lot of time. See also **Ripeness**.

Wipeout

Another name for a **Lucas** taking. See *Lucas*, **Per Se Takings**. ■