

Takings



The fifth amendment of the U.S. Constitution prohibits the government from taking private property without just compensation. Private property can be taken by physical invasion, i.e. the government occupies the property. However, governmentally imposed regulations can diminish the utility of private property and, thus, its market value. The value of the property is shifted from private use to a public use. When the government declares that you cannot build a home on your property because it is a wetland, it has essentially shifted part of the value of that property in private use, home construction, to a social use, the care of wildlife. If the property is still available for alternative less desirable uses, such as a fishing pond, the land may not have lost all of its value. There will be a partial taking, rather than a total taking of your property. The first time that the Supreme Court stated that physical invasion was not a prerequisite for a governmental taking was in *Pennsylvania Coal v. Mahon* (1922).

The concept of a regulatory taking should be a relatively easy one for an economist to grasp. We recognize that we have experienced a loss whenever the market value of what we own goes down. It does, however, create a conflict between the operation of the government and the U.S. Constitution. Almost every government regulation, even a minor one, will be accompanied by a taking because a regulation by its very nature limits private behavior. If the government had to compensate for every taking it would be swamped in administrative costs. Accordingly, society as a whole may be better off if some takings are not compensated.

Kaldor-Hicks efficiency may be the operational goal. A decision is Kaldor-Hicks efficient if the benefits exceed the cost. Kaldor-Hicks efficiency differs from Pareto efficiency. A decision is Pareto efficient if we can make at least one person better off with out making anyone else worse off. Thus, if a decision imposes benefits on some and costs on others, those who benefit must be about to compensate those who incurred costs and still be left with a net benefit. The Kaldor-Hicks criterion only requires that the benefits exceed the cost, it does not require compensation. Specifically, the decision is Kaldor efficient if the maximum amount the winners are willing to pay exceeds the minimum amount the losers are willing to accept. The decision is Hicks efficient if the maximum amount the losers are willing to pay the winners to forego the change is less than they are willing to accept. Consequently, given either distribution of welfare and rights the benefits exceed the costs.

If the government decides it will not compensate all regulatory takings, then it must have a rule that distinguishes those takings that must be compensated from those that need not be compensated. This is the quandary in courts must confront. *Penn Central Transportation v. NYC* (1978) and the *Tahoe-Sierra Preservation Council, Inc. V. Tahoe Regional Planning Agency* (2002) represent two attempts at resolving this issue.

Penn Central concerns a landmark preservation site. The decision discusses the reciprocal nature of the externalities generated by landmark preservation versus those created by zoning regulations. Rehnquist in the dissent argues that the costs of landmark preservation are largely borne by the owner of the historical site. In addition, reciprocal benefits are minimal. This differs from the zoning regulations that create reciprocal benefits for most members of the community. The decision also discusses the nature of the costs imposed on the landmark owner. The majority emphasizes the fact that the regulatory restraints do not bar Penn Central from earning an adequate return on its investment. Therefore, the prohibition on building an addition that would increase the firm's profitability has little or no impact on determining whether a taking has occurred. Moreover, Penn Central had received some benefits from its landmark status and from the transferable development permits it had been granted. The dissent correctly analyzes the decision in terms of opportunity cost. Lost opportunities represent a real cost. Given the nature of the opportunity denied Penn Central, there is a significant economic cost attached to the regulatory restraint. The dissent also raises a question that has troubled economists. How do you empirically determine an adequate return?

In *Penn Central* the court refuses to propose a bright line test for determining a regulatory taking. A taking exceeding a certain absolute dollar value or a percentage share of the asset's market value are two obvious tests. Implicitly, the court recognizes that each of these tests is subject to manipulation. Both can be influenced by the disaggregation of ownership and property rights. For example, if the air rights above Penn Central are separated from the rest of the entity, then a prohibition on building a tower above the terminal would be a complete taking. We are left with the vague standard that when the current use given the regulatory restraints is economically viable, there has not been an unconstitutional taking and no compensation is necessary.

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency (2002) concerns a temporal taking. Landowners surrounding Lake Tahoe were denied construction permits for a period of six years while the planning agency decided how it would regulate development surrounding the lake. Is this a complete taking that requires compensation? There was a total denial of use, but it was only for a temporary period. Again the court, like in *Penn Central*, declines to apply a per se rule. The majority emphasizes the temporary nature of the moratoria and concludes that this does not require compensation. In support of the majority argument the justices cite the necessity of maintaining temporary moratoria for planning purposes. If governments had to hastily plan in order to avoid paying compensation, they might be forced into making incorrect premature decisions. The dissent agrees that the government need not provide compensation for temporary moratoria needed for planning purposes. These are within a landowner's "reasonable investment-backed expectations." The dissent believes that short-term delays could be distinguished from the type of six-year prohibition on construction that occurred in this case. Furthermore, by labeling the moratoria temporary the government may repeatedly gain a leasehold on private property without compensation.