

THE FIFTH AMENDMENT TAKINGS CLAUSE

By Richard A. Epstein and Eduardo M. Peñalver¹

The Takings Clause of the Fifth Amendment to the United States Constitution reads as follows: “Nor shall private property be taken for public use, without just compensation.” In understanding the provision, we both agree that it is helpful to keep in mind the reasons behind it. We agree that the Clause is intended to uphold the principle that the government should not single out isolated individuals to bear excessive burdens, even in support of an important public good. When this happens, the payment of “just compensation” provides a means of removing any special burden. The most influential statement of this principle is found in *Armstrong v. United States* (1960), where the Supreme Court wrote: “The Fifth Amendment’s [Takings Clause] . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”

For the Takings Clause to serve this principle effectively, we both agree that the guarantee of just compensation must apply at the very least to cases in which the government engages in the outright confiscation of property. This means more than merely the government taking a privately-owned asset for itself. It also includes situations in which the government permanently deprives a private owner of possession of the asset or gives the asset (or the right to permanently physically occupy the asset) to someone else.

We agree that the compensation requirement must apply not only to land but to all forms of private property. At a minimum this means that the Clause applies to government confiscation of personal property, including interests as diverse as animals and corporate stock. The Clause also applies, not only to the confiscation of all existing interests in any individual piece of property, but to the confiscation of certain lesser interests in property. Under Anglo-American law, these would include recognized interests like easements (such as rights of way), leases, mortgages, life estates, and remainders. The Clause also applies to the confiscation of intangible property, including intellectual property such as patents, copyrights, trademarks and trade secrets. Although the Clause has not been read to apply to taxes, it does apply when the government seizes a specific pool of money, such as a bank account or a bag full of cash, or when it orders an individual to pay a specific amount of money.

We also agree that the Clause prohibits the government from confiscating property (even with just compensation) if it is not doing so for a public use. Although the boundaries of

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this prohibition are controversial, we agree that it encompasses at a minimum situations in which the government takes property from A for the purpose of giving it to B solely for B's private benefit.

We agree that the phrase "just compensation" means that the owner of the property shall receive at a minimum the fair market value of the property in its best alternative use, independent of the government taking. In most instances the compensation required is paid in cash, but in some situations, the government compensation may come in the form of some reciprocal or return benefit given to a party, such as the increase in the value of retained land when the government builds a road over that property.

Finally, we agree that, under the Takings Clause, the government need not compensate private property owners when it requires them to take reasonable steps to avoid pollution or other releases that harm either public or private property in land, air and water. Any time some private party could seek a court order stopping another private party from engaging in harmful activities, the government can impose the same limitations through fines and court orders without a duty to compensate.

With the advent of the modern welfare state (and the complex regulation that came with it), more challenges than ever before are raised under the banner of the Takings Clause. The breadth of state action and the diversity of its interactions with private owners have multiplied the gray areas in which the government burdens some owners more than others. The key areas of dispute about the meaning of the Takings Clause relate to how much the government may burden an individual property owner before triggering its obligation to pay just compensation. These are the areas on which we shall offer our separate and different views.