



# Private Property Interrupted

## *Protecting Texas Property Owners from Regulatory Takings Abuse*

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### Key Points

- The protection of private property is a foundational principle that underwrites Texas' commitment to constitutional governance.
- Many Texas property owners have no legal recourse when government regulations infringe upon their property rights without compensation.
- The Texas Legislature can improve the protection of property rights by passing legislation that applies the Private Real Property Preservation Act to cities.

*The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account.*

~Justice Potter Stewart

Justice Stevens struck upon a crucial truth when he identified the right to enjoy private property as a personal right, no less important than the other rights that line the U.S. Constitution. Since before our nation's Founding, private property has been recognized as an indispensable pillar in supporting a free and prosperous society. It is what enables individuals to attain self-sufficiency and independence, and it is what prevents the government from misusing its police power to seize the wealth and labor of political minorities. All in all, robust property rights empower us to pursue our own independent dreams and live according to our own personal values.

Nowhere is this better understood than Texas, a state whose pioneers traversed across a continent in order to claim their own piece of Earth. Texas settlers knew intimately the connection between private property and personal liberty, and they took extraordinary risks to experience that promise of property ownership for themselves.

Despite this historical legacy, Texas law contains a large omission in the protection of property rights. Namely, Texas law does not defend all property owners from government regulations that encumber, without compensation, their right to use, develop, and dispose of their property; encumbrances that usually reduce their property's value. Rather, federal and state courts have ruled that constitutional proscrip-

tions on uncompensated takings only apply to those actions where the government physically invades the property or where the regulation proves so burdensome to the owner's enjoyment of the property that it is tantamount to a physical taking. Moreover, legislation aimed at correcting the judiciary's oversight contains several exemptions that sap the legislation of its strength, leaving many Texans vulnerable to the misuse of the police power.

Accordingly, this paper examines the history, case law, and common practices surrounding regulatory takings in the hopes of highlighting those areas in which the law fails to protect Texas property owners as well as identifying key reforms that will help the Texas Legislature bridge the gap between the ideals expressed in the U.S. and Texas Constitutions and the reality Texas property owners face before the courts when confronted by a regulatory taking. It concludes that although court precedents remain unmovable for the time being, the Texas Legislature has the authority and opportunity to reverse many of the shortcomings in the state's regulatory takings jurisprudence simply by eliminating the municipal and *de minimis* exemptions in the Private Real Property Preservation Act.

### Importance of Property Rights

Private property, and its protection under the law, represents a foundational principle both to constitutional governance and to a free market economy.

Since before the American Founding, our inherited legal tradition has recognized the right to private property as the means in which individuals can assert their independence and find refuge from the misrule of government. John

*continued*

## History has shown that private property and personal liberty are fundamentally interdependent and that neither could have meaning without the other. Private property gives individuals a way of transforming their labor into usable wealth.

Locke, in his famous *Two Treatise of Government* identified the preservation of property as “the great and chief end” of the law, the very reason for men “putting themselves under government.”<sup>1</sup> John Adams echoed these sentiments, cautioning that a just and free society could not exist without the energetic preservation of property rights:

“The moment the idea is admitted into society that property is not sacred as the laws of God; and there is not a force of law and public justice to protect it, anarchy and tyranny commence.”<sup>2</sup>

History has shown that private property and personal liberty are fundamentally interdependent and that neither could have meaning without the other. Private property gives individuals a way of transforming their labor into usable wealth; it also gives them a way to find long term security through investment and contract. This combination, in turn, allows property owners to attain a level of self-sufficiency and thereby pursue a life in accordance to their own ambitions and values. In short, private property enables Texans to secure and express their liberty.

Moreover, property rights temper the appetite of government power or, more specifically, the temptation of factions to use the reins of government to poach what they could not or would not obtain through the voluntary market. Democratic governance comes with an ingrained moral hazard that political coalitions will capture the police power of the state in order to unjustly benefit from another’s toil. Robust property rights act as a counterweight to that pull by forcing the government to respect the equal rights of each property owner and compensate them when the fruits of their investment and labor must be seized. Without that check, the government could flex its coercive might and seize and transfer the property of one party to another, at best placing the costs of public benefits onto the shoulders of an isolated few, at worst pilfering someone’s property for another’s gain.

Private property can only fulfill its function as a mitigator of tyranny if a landowner’s rights extend beyond mere ownership. When an individual acquires a piece of property, he does not just obtain title over the physical real estate, but rather assumes a collection of rights that accompany the property and allow for its free use—what the law often describes as a “bundle of sticks.”<sup>3</sup> For example, a landowner possesses the right to exclude others and ward against trespass; he also possesses the right to actively use his property, convey it onto others, and hold it as collateral against other contracts.

Importantly, it is by exerting these accompanying rights that landowners redeem their property’s true value and attain self-sufficiency since land, on its own, has little utility. Any attempt at appropriating or regulating these rights away without adequate compensation no less threatens to unjustly deprive property owners of their dignity, their livelihood, and their ability to realize their personal liberty than if the government had seized the land outright.

### Lack of Legal Protections *United States Constitution*

Recognizing the close relationship between private property and a free and prosperous society, the American Founders engraved the protection of property rights onto the Fifth Amendment of the U.S. Constitution, which plainly reads, “No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”<sup>4</sup> The Constitution’s use of the term “property,” as the U.S. Supreme Court observed in *United States v. General Motors Corp.*, refers to the entire “group of rights inhering in citizen’s [ownership]” and “addresse[s] every sort of interest the citizen may possess.”<sup>5</sup>

Significantly, unlike other constitutional proscriptions, such as the ban on “unreasonable searches and seizures” and “excessive bail,” the Fifth Amendment’s Takings Clause contains no modifiers or qualifications that would confine the breadth of its constitutional protection.<sup>6</sup> Instead, a plain reading of the text reveals the Founders’ intent that the language be given the broadest possible reading, applying to all types of property and to all the various rights that ownership bestows. Once the government takes an individual’s property, the Constitution requires that the government fully compensate the owner. It does not matter whether the action encroached on the physical land or the accompanying “bundle of rights.”

Over the last few decades however, the U.S. Supreme Court has turned away from the Takings Clause’ plain meaning. The Court instead has distinguished between two different types

of takings, each receiving a different level a judicial scrutiny and, therefore, a different degree of protection. The first is a physical taking, also known as a *per se* taking, which occurs when the government physically occupies or takes possession of a property interest. The Court has uniformly found that, in event of such a “permanent physical invasion,” the government must compensate the owner for the land occupied, regardless of whether the action achieved an important public benefit or only imposed a negligible economic cost on the owner.<sup>7</sup>

The Court has not been so reliable when faced with the second type of government takings. This type, known as a regulatory taking, occurs when government regulations interfere with a landowner’s right to use, develop, and dispose of his or her property. The landowner is left with physical possession but the accompanying rights have been unilaterally terminated, often at great expense to the landowner. The law describes this as removing a single strand from the ‘bundle’ of property rights—a physical taking, conversely, would chop a slice off the entire bundle.

In these types of cases, the Court has preferred not to establish a bright line rule for determining when a regulation’s impingement on an individual’s property interests would constitute a taking. Rather, the Court has forwarded an ad hoc collection of vague guidelines that give lower courts little direction and only safeguard property rights in the most extreme of situations—sometimes not even then.<sup>8</sup>

Under this interpretation, state and local governments possess, through the police power, a general license to issue regulations that adversely affect or destroy a property owner’s right to use and develop their land so long as the regulation pursues a legitimate public interest, such as health, safety, morals, and general welfare and that they do not unreasonably interfere with the owner’s distinct investment backed expectations. Believing that the “[g]overnment could hardly go on”<sup>9</sup> if it were forced to pay for every change in the general law that diminished property values, the Court has allowed restrictions to be placed on the use of property almost—but not quite—up to the point where all economically viable use of the property was taken.

A great illustration of this mindset is *Palazzolo v. Rhode Island*,<sup>10</sup> which involved a Rhode Island property owner challenging the state’s wetland regulations after it denied multiple applications to develop his coastline property. In that case, the Court upheld the regulations even though it depleted 94 percent of the property’s value because, in their words, any regulation that preserves \$200,000 in developmental value

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(out of \$3,150,000) “does not leave the property ‘economically idle.’”<sup>11</sup> Palazzo retained some “economically beneficial use” for his property and therefore could not rely on the Constitution for protection.

Put in context, the case stands for the proposition that state and local government can overshoot the constitutional threshold only when they terminate virtually *all* the accompanying rights of ownership. If landowners retain even the slightest hint of redeeming some utility and investment from their property, the Court will deny them all Fifth Amendment recourse with little regard given to their lost future income.

When taken together, the discord in how the Court views physical takings from regulatory taking couldn’t present a sharper contrast. Whereas the Court will vindicate a property owner in the event of a physical incursion no matter how trivial the intrusion or minor the economic impact, the Court has laid down such a high and tangled fence for regulatory takings that even a 94 percent diminishment in value has been upheld.

Not only does this dissonance turn the traditional understanding of property rights on its head, it oddly enough ignores the Court’s own warning about the importance of property rights and the moral hazard incumbent in government takings. The Court has repeatedly averred that the Fifth Amendment’s guarantee 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.”<sup>12</sup> Put simply, the Court has recognized that the purpose of the Takings Clause was to counter the moral hazard incumbent in democratic governments, where influential factions could confer themselves benefits at the expense of an isolated few.

What the Court’s opinion fails to explain is how that hazard suddenly departs when the government elects to pursue public benefits via regulation versus a straightforward an-

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nexation—for good reason, there is no difference. The same danger that drives the Court to jealously safeguard against physical incursions onto private land also boils underneath regulatory confiscations of accompanying property rights.<sup>13</sup> Both enable political majorities to acquire by fiat what they could not acquire through the voluntary market. By abdicating judicial oversight in regards to regulatory takings, the Court has not constructed a principled limit on government power. It has simply left the back gate open to mischief and abuse at the expense of a fundamental right.

### **Texas Constitution**

Based on language alone, the Texas Constitution should offer state property owners greater protection against regulatory takings. The Texas Supreme Court, however, has followed the example of its federal counterpart in granting the government wide deference and latitude when promulgating regulations that adversely affect private property rights, notwithstanding a clear constitutional ban on uncompensated takings.

The Texas Constitution reads, “No person’s property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by consent of such person.”<sup>14</sup> Like the Takings Clause, the Texas Constitution employs no qualifying language limiting the proscription to certain types of takings. Indeed, by expanding on the ways that government actions can put property to public use, especially when it includes property “applied to public use,” the Texas Constitution explicitly contemplates that the government’s responsibility to compensate owners for takings goes beyond the physical annexation or intrusion of private property.

Nevertheless, the Texas Supreme Court has elected to interpret the state’s Constitution very narrowly, to the point where

an individual’s right to use and develop his or her property receives almost no acknowledgement under the law, much less any protection. In *City of University Park v. Benners*, the Court expressly ruled, “Property owners do not acquire a constitutionally protected vested right in property uses.”<sup>15</sup> Thus, Texans can only acquire title to the physical attributes of their real estate, i.e., water, dirt, minerals, etc. Their ability to use those attributes, however, is contingent upon receiving the government’s permission.

This is a clear-cut disavowal of the traditional right to private property—one that even surpasses the federal courts’ abdication of this issue. Federal courts at least acknowledge that landowners possess rights beyond physical ownership; they simply hold that government interests outweigh those rights in most scenarios: “[S]ome values are enjoyed under an implied limitation and must yield to the police power.”<sup>16</sup> The Texas Supreme Court, conversely, rejects the idea that the Texas Constitution applies to the use, development, and disposal of private property.

As a result, the Court has laid out a very unforgiving standard for private property owners when approaching regulatory takings. Under this standard, financial compensation is only deemed proper if 1) a regulation does not substantially advance a legitimate government purpose, 2) the regulation denies the owner all economically viable use of the property, and 3) the regulation unreasonably interferes with the owners’ use and enjoyment of the property.<sup>17</sup> Already, the Court has interpreted a legitimate public interest to include aesthetic, economic, and environmental concerns, giving local governments a wide berth to sit on when it comes to regulatory restrictions on private property. In addition, the Court has validated government regulations even though they reduced the property value by as high as 90 percent.<sup>18</sup> No regard is given to the loss of anticipated gains or future income.<sup>19</sup> Unless addressed by legislation, state courts will not defend private property rights outside of those few extreme situations when a regulatory action is so burdensome that it becomes an annexation in everything but name.

### **Statutory Protections**

Texas legislators attempted to bolster the legal protection of property owners against regulatory takings with the Private Real Property Preservation Act in 1995. The statute, however, included several large exemptions that denied many property owners any legal recourse when confronting a regulatory taking—a decision that has ultimately sapped the legislation of its strength and effectiveness as a deterrent to the improper use of the police power.

Although the Act contains a lengthy itemized list of exemptions, two stand out as being particularly damaging to and, indeed, inconsistent with the Act's purpose.

First and foremost, the Act exempts any "action by a municipality."<sup>20</sup> This means that while state and county authorities have a legal obligation to respect the entirety of an individual's property rights, cities remain free to use regulatory actions on private property as a substitute for publically funded projects. However, as will be touched upon below, municipalities wield significant amount of power in land development and represent a major source of regulations that adversely affect the rights and value of private property. They also face the same moral hazard with regards to uncompensated takings as any other government entity, perhaps more so since their limited geographical boundaries could make it easier for factions to capture both the regulatory and political processes. Therefore, by excluding cities from the Act's purview, Texas legislators inadvertently exposed urban dwelling Texans to the full brunt of takings abuse and handicapped the legislators' own attempt to shelter property rights from overzealous regulatory programs.

Second, the Act excludes any regulatory taking that confiscates less than 25 percent of the property's value.<sup>21</sup> This means that landowners must make a showing in court that the government action reduced the value of their property beyond the statutory threshold before they can pursue compensation. Or, stated differently, state and local governments retain limitless authority to halt, alter, and eliminate the right of individuals to make use of their property but only until that interference imposes a certain economic cost.

The Act's authors included this arbitrary threshold, in part, because they feared that compensation payments would prove too burdensome on local governments if they were forced pay every time a health, safety, or public welfare regulation diminished a landowner's property value—this is a common justification given for avoiding the Fifth Amendment's compensation requirement.

However, not only does the exemption ignore much more liberty friendly solutions to costly regulatory takings, such as a waiver provision, but it also reveals several misconceptions that guided the Legislature's hand. In particular, by focusing on the economic burden that a regulation may have on property owners, Texas legislators mistook the symptom for the disease. The central injury of a regulatory taking is not the loss in property value—albeit that injury is the most visible—but rather the government's decision to limit the

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*right* of property owners to use, develop, and dispose of their land. It's the restriction on an individual's personal liberty and fundamental rights that drives the Takings Clause, and that moral violation occurs whether the lost right was valued at a \$100 or \$1,000,000 or whether it represented 20 percent of the property's economic value or 90 percent.

Moreover, a state committed to limited government cannot permit a *de minimis* exception when it comes to political encroachments on fundamental rights lest that slight tiptoeing across the line turn into great leaps towards the forbidden. Justice Holmes acknowledged this key truth very early in the U.S. Supreme Court's takings jurisprudence:

"When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears."<sup>22</sup>

The temptation of political authorities to take property rights either for a private use or to improperly fund public benefits exists irrespective of how slight that takings is or whether that takings come from a municipality or rural community. Likewise, political authorities will retain the temptation to push and pull at whatever leeway the Texas Legislature gives them until the exceptions overwhelm the presumption that property rights deserve protection, as has happened with the Private Real Property Preservation Act. If Texans truly wish to redeem the promise within the federal and state constitutions, then the Texas Legislature should fill in these gaps in order to prevent local governments from misusing their police power.

## **Recommendations**

Texans do not have enough protection against regulatory encroachments of their property rights under federal and state law. The courts have so misshapen what should have been clear constitutional proscriptions on uncompensated tak-

ings that they have essentially granted the government carte blanche authority to halt, alter, and even eliminate the right of individuals to use and profit from their property. What's more, legislation aimed at correcting this lack of judicial oversight contains several large exemptions, denying many Texans legal recourse when their property rights are trespassed and leaving many of them vulnerable to the mischiefs of factions.

Although court precedents remain, for the time being, unmovable, the Texas Legislature has the authority and opportunity to reverse many of the shortcomings in the state's regulatory takings jurisprudence by codifying additional protections. A fresh round of legislative reform would fill in the current gaps in coverage and help ensure that all political subdivisions respect the rights and equal dignity of Texas property owners. That legislative reform should center on the following three points.

- **Lawmakers should remove the municipal exemption in Sec. 2007.003, Government Code.** The Private Real Property Protection Act of 1995 excluded municipalities from its proscriptions against uncompensated regulatory takings. Not only does this drastically narrow the statute's scope, but by consigning urban Texans to less protection than those that live in rural areas, it also flouts the long-standing principle that all citizens have their rights equally respected. Municipalities wield considerable amount of regulatory power and, as their use of zoning and exactions show, are willing to use that power to limit the use and development of its citizens' property, often for the sake of acquiring an uncompensated benefit. Expanding the law would cut off a major source government takings and would ward off the temptation of local parties to misuse the regulatory process.
- **The numerical threshold of what qualifies as a taking in Sec. 2007.002, Government Code, should be eliminated, or at least significantly reduced.** As it stands now, property owners must show that their property suffered a value loss of 25 percent before a government action can constitute a compensable taking. This arbitrary threshold grants political authorities too much elbowroom in shifting the

costs of public benefits off the books and onto shoulders of isolated populations. More to the point, violations of fundamental rights do not permit any *de minimis* exceptions. A taking is a taking regardless of how much the property was devalued. Anything less would not only defy the equal dignity of Texas property owners but also would tempt political authorities to push at the boundaries in search of unconfined regulatory power.

- **Political subdivisions should have the ability to waive the enforcement of a governmental action, under Sec. 2007.021, as an alternative to financial compensation when a taking is identified.** Takings law should reflect the dual concerns of protecting individual property rights and promoting health and safety. Giving local governments the ability to grant a waiver in event of taking would allow them to tailor their proposed plan so that the only properties covered are those where there is no taking. Importantly, the waiver should specifically mention which property rights are being protected. This way the waiver will "run with the land" and future owners will not find themselves entangled by the same dispute.

## Conclusion

Texas inherits a rich legal tradition that orbits around the energetic defense of property rights. Yet, despite that heritage, current Texas property owners stand before the courts with only a barren quiver and shaky shield to defend themselves against regulatory encroachments on their property. For the most part, this is because of judicial abdication, but it is also a byproduct of too many exemptions within Texas' statutory law that permit state and local subdivisions to pass along the costs of public benefits to private parties by unduly restricting their property rights. The Texas Legislature, however, has both the authority and opportunity to remedy this oversight by passing legislation that eliminates these exemptions and reasserts the primacy of property rights under state law. Private property represents a fundamental right tied to the very promise of personal independence, and it is time for Texas law to see that promise fulfilled. ★

## Endnotes

- <sup>1</sup> John Locke, *Two Treatises of Government* 368-69 (Peter Laslett ed., Cambridge Univ. Press 1967) (1690).
- <sup>2</sup> John Adams, *Defence of the Constitutions of Government of the United States* (Charles Francis Adams ed. Little, Brown & Co., 1850--56) (1787).
- <sup>3</sup> *United States v. Craft*, 535 U.S. 274, 278 (2002).
- <sup>4</sup> U.S. Const. Amend. V.
- <sup>5</sup> *United States v. General Motors Corp.*, 323 U.S. 373, 377-378 (1945).
- <sup>6</sup> Ryan Brannan, *Regulatory Takings: The Next Step in Protecting Property Rights in Texas*, Texas Public Policy Foundation (July 2010) 2.
- <sup>7</sup> *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982).
- <sup>8</sup> *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978).
- <sup>9</sup> *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393, 413 (1922).
- <sup>10</sup> *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).
- <sup>11</sup> *Palazzolo*, 533 U.S. at 616.
- <sup>12</sup> *Armstrong v. United States*, 364 U.S. 40, 49 (1960).
- <sup>13</sup> Richard A. Epstein, Physical and Regulatory Takings: One Distinction Too Many, 64 *Stan L. Rev. Online* 99 (2012).
- <sup>14</sup> Tex. Const. Art. I, Sec. 17.
- <sup>15</sup> *City of University Park v. Benners*, 485 S.W.2d 773, 778 (1972).
- <sup>16</sup> *Pennsylvania Coal*, 260 U.S. at 413.
- <sup>17</sup> *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 933-35 (Tex. 1998).
- <sup>18</sup> *Quick v. City of Austin*, 7 S.W.3d 109 (Tex. 1998).
- <sup>19</sup> *Mayhew*, 964 S.W.2d at 936.
- <sup>20</sup> V.T.C.A., Government Code § 2007.003(b)(1).
- <sup>21</sup> V.T.C.A., Government Code § 2007.002(5)(B)(ii).
- <sup>22</sup> *Pennsylvania Coal*, 260 U.S. at 415.

## About the Author



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