International Journal of Social Policy and Education
Vol. 6, No. 1; Mach, 2024. pp 20-32
ISSN 2689-4998 (print), 2689-5013 (online)

Published by International Center for Promoting Knowledge

Regulatory Takings, Education, and Due Process: A Tale of Four Plaintiffs

Richard J. Hunter, Jr.
Professor of Legal Studies, Seton Hall University
Adjunct Professor of Business Law, University of Tulsa
United States

John H. Shannon
Professor of Legal Studies, Seton Hall University
United States

ABSTRACT

This article is a discussion of the circumstances under which the government engages in actions which are characterized as "regulatory takings" under the Fifth Amendment to the Constitution and the property owner suffers a diminished value for their property because of a governmental action or policy. In addition, the article considers the import of the requirement of providing due process in the form of notice and hearing before any adverse action can be undertaken.

Keywords: regulatory takings; due process; ripeness; facial challenges; as-applied challenges; notice and hearing

1. The Background

Plaintiffs owned properties that straddled the border that separated two towns in Essex County, in the State of New Jersey. Three of the plaintiffs had school-aged children who were assigned to attend the public schools of Town Number 1. They argued that they were entitled to send their children to the public schools of Town Number 2. Plaintiff Number 4 did not have any school-aged children, but plaintiff Number 4 alleged that the school-assignment policy had decreased the value of his property (see *Wojak v. Borough of Glen Ridge*, 2018). *

Plaintiff Number 4 sued Town Number 1, Town Number 2, and their respective Boards of Education when he discovered that his property's school-district classification had been changed from Town Number 1 to Town Number 2 years earlier—allegedly without his knowledge. All of the plaintiffs claimed that this policy of classification constituted a *regulatory taking.* Plaintiff Number 4 also alleged that the enactment of the policy had resulted in a denial of his due process rights to contest the action of reclassification.

While the original case had been filed in the Superior Court of the County of Essex, it was removed to the Federal District Court on motion of the defendants—a procedure under Section 1466 of the United States Code because "… the Complaint explicitly sets forth a cause of action that arises under the Constitution or laws of the United States…. "(McGivney, Kluger, Clark & Intoccia, 2018).
Miller (2015) observed:

> "An important reason for removing is to take advantage of active case management in federal court. A federal court case will be assigned to a single district judge/magistrate judge team from the beginning of the case through trial. The magistrate judge will take an active role in planning discovery and motion practice and in resolving discovery disputes, which can be critical in complex cases…. The court will also become involved in the settlement process much sooner in federal court than in state court. Another advantage for defendants in federal court is that it is generally easier to have cases dismissed on the pleadings or on summary judgment motions than it would be in state court."

Part I: Regulatory Takings

2. Standards

The *Takings Clause* of the Fifth Amendment to the United States Constitution provides that private property shall not "be taken for public use, without just compensation" (see Hansen, 2023). Although originally applied to the actions of the Federal government (see Treanor, 1995), the Takings Clause was made applicable to the States through the Fourteenth Amendment (see generally Hunter & Lozada, 2010; Campbell, 2022; *Chicago*, *B. & Q.R. Co. v. Chicago,* 1897; *Murr v. Wisconsin,* 2017).

In *Hodel v. Indiana* (1981), the United States Supreme Court stated: "The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation" (*Hodel v. Indiana ,* 1981*,* p. 297 n.40; Hunter & Lozada, 2010; Owens, 2012).Under the Takings Clause, the government must provide compensation when it physically takes or permanently occupies property. Barnes (2023, p. 424) states: "The Takings Clause, as incorporated through the Fourteenth Amendment's Due Process Clause, provides that the government cannot take property from one citizen for the public's benefit without just compensation" (see*Tahoe-Sierra Pres. Council*, *Inc. v. Tahoe Reg'l Planning Agency*, 2002 (*Tahoe-Sierra*); *Loretto v. Teleprompter Manhattan CATV Corp*., 1982).However, the Takings Clause itself "does not address in specific terms the imposition of regulatory burdens on private property" (*Murr*, 2017, p. 1942), as opposed to a full taking under the power of eminent domain (see Kenton, 2022; Moore, 2023).

2.1. Regulatory Takings

In interpreting the meaning of "takings," the United States Supreme Court has held that regulations "can be so burdensome as to become a taking" (*Murr*, 2017, p. 1942). However, the area of regulatory takings may be characterized as "ad hoc, factual inquiries, designed to allow careful examination and weighing of all the relevant circumstances" (*Tahoe-Sierra*, 2002, p. 322), and are not subject to any "per se" analysis. Echeverria (2020, p. 731 argues that "courts should analyze physical taking claims (based on either appropriations or occupations) differently than claims based on use restrictions." Under the approach suggested by Professor Echeverria,

> "courts would evaluate physical taking claims without regard to the economic impact of the government action or the size of the portion of the property affected by the government action. However, courts would evaluate physical taking claims by considering other factors from traditional takings analysis, including the extent of interference with the owner's reasonable expectations and the purposes of the government action."

Professor Richard Frank (2022) noted: "One hundred years ago this month, the U.S. Supreme Court issued a radical constitutional decision that over the last century has proven enormously consequential in a host of environmental, natural resources and publichealth contexts. In the December 1922 decision *Pennsylvania Coal Company v. Mahon(1922)*, a divided Supreme Court created the constitutional doctrine of "regulatory takings.""

Professor Frank (2022) continued:

> "Historians have established that the Takings Clause was the Founders' response to the actions of British troops during the Revolutionary War seizing American colonists' land and personal property to support the Crown's war efforts.
>
> For the first 130 years of the American nation's history, the Takings Clause was widely understood to apply only to government's *physical* seizure of private property. Such seizures could take the form of formal government proceedings to acquire private property for government use such as a city hall, highway, post office or public school– what lawyers refer to as "eminent domain" or "condemnation" actions. And the Takings Clause was also understood from the start to apply to government's occupation of or damage to private property even where formal eminent domain actions had not first been commenced by the government" (see also Treanor, 1998).

The jurisprudence surrounding regulatory takings stresses the obligation of courts to balance two competing objectives (see Rubin, 2008). One objective is "the individual's right to retain the interests and exercise the freedoms at the core of private property ownership" (*Murr v. Wisconsin,* 2017; *Lucas v. S. Carolina Coastal Council*, 1992, p. 1028). A second objective is "the government's well-established power to 'adjus[t] rights for the public good" (*Murr*, 2017, p. 137,citing *Andrus v. Allard*, 1979). As a general principle, the United States Supreme Court has stated that "while property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking" (*Pa. Coal Co. v. Mahon*, 1922). Regulatory takings often take the form of land-use regulations or zoning determinations (see Meltz, 2015; Guimont, 2022).

A publication by the Tulane University Law School (2021) noted: "Land-use regulation is an umbrella term for rules that govern land development. They control the development of private land through use, density, design, and historic preservation requirements. The regulation of land use is common practice in most cities of the world. It includes:

- Zoning, by which land use is restricted
- Lot size regulation, which restricts the size of each housing lot
- Urban growth boundary control, which separates urban development areas from urbanization-control areas
- Floor area ratio regulation, which restricts building sizes."

However, not every land-use regulation or zoning determination that impacts the value of property would be construed as a regulatory taking. As Benshoff (1994, p. 403) warned:

> "Future land use regulations should be drafted conservatively; with care not to stray into one of the "takings"…. At a minimum, all land use regulations should include some variance procedure so that a property owner subject to a "total taking" may be accorded some relief. Otherwise, the jurisdiction may find the entire regulatory scheme thrown out by the courts as did South Carolina. For the first time in generations, property rights advocates have an increased number of theories and precedents on which to base challenges to regulatory taking."

In *Tahoe-Sierra* (2002), the United States Supreme Court stated:"Land-use regulations are ubiquitous and most of them impact property values in some tangential way—often in completely unanticipated ways. Treating them all as *per se* takings would transform government regulation into a luxury few governments could afford" (*Tahoe-Sierra*, 2002, p. 324). As the United States Supreme Court had explained in *Pennsylvania Coal v. Mahon* (1922, p. 413):"Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."

As a result, courts have recognized in a wide variety of contexts that governments may execute laws or regulations that adversely affect the economic values of affected properties (see *Penn*

Cent. Transp. Co. v. City of New York, 1978). For example, in *United States v. Willow River Power Co.* (1945), the government had erected a dam that caused a three-foot increase in a river's water level. The change in water level had decreased the capacity of a power plant. The United States Supreme Court found that this did not constitute a "taking of private property" under the Takings Clause.

3. The Diminution Argument

When, as a result of governmental actions, the diminution in the value of land reaches a "certain magnitude," the United States Supreme Court has held that compensation must be paid (see Brennan & Boyd, 1996; Elliott, 2018). Although it has never attempted to delineate what constitutes a "certain magnitude," the United States Supreme Court has required compensation only in cases in which the value of the property was *reduced drastically*(see Butler, 2019). Professors Holloway and Guy (2010, p. 319 n. 16) noted:

> "One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude. in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power. In addition, Justice Holmes set forth the substantive foundation of regulatory takings theory when he stated: The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

In *Penn Central*(1976), for example, the United States Supreme Court sustained the application of New York City's *Landmarks Preservation Law* (Vecsey, 2015) despite the fact that the legislation denied the claimant's prospective income that would have been generated by the construction of a fifty-five story office building in midtown Manhattan. ["Statutory authority for local municipalities to enact historic preservation laws in New York is found in Section 96-a of the General Municipal Law, entitled "Protection of historical places, buildings and works of art." Section 96-a provides, in part: …any county, city, town or village is empowered to provide by regulations, special conditions and restrictions for the protection, enhancement, perpetuation and use of places, districts, sites, buildings, structures, works of art, and other objects having a special character or special historical or aesthetic interest or value…. (Farrell Fritz,2016)]. The *Penn Central* court also cited with approval cases in which the challenged law had reduced the value of the land by as much as seventy-five and eighty-seven percent, but which courts had denied compensation as "takings"(e.g., *Rogin v. Bensalem Twp*., 1980),

In *Rogin*(1980), the Third Circuit Court of Appeals held that a diminution in value from three million dollars to two million dollars, caused by the application of zoning amendments, did *not* establish a regulatory takings claim. In the seminal case relating to zoning, *Village of Euclid v. Ambler Realty Co.* (1926), the Supreme Court found that a 75% diminution in value did not constitute a taking.

The Supreme Court has also stated that the government "may limit the height of buildings in a city, without compensation.... But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property would prevail over the other public interest, and the police power would fail" (*Hudson Cty. Water Co. v. McCarter,* 1908).

In *Hadacheck v. Sebastian*(1915)*,* the United States Supreme Court found that a 75% diminution in value from $800,000 to $60,000,caused by a prohibition of brickmaking within a designated area, did not constitute a taking. In *Tahoe-Sierra*(2002), a thirty-two-month moratorium on development in the Lake Tahoe area which was ordered by an environmental planning agency to maintain the status quo while studying the impact of any development on the environment was not considered as a taking.

As a result of this discreet line of cases, any claim of a regulatory taking must allege a drastic loss of property value that has reached that "certain magnitude," depriving the owner of the reasonable use of the property.

4. A Framework for Analysis

The framework announced by the United States Supreme Court's in *Penn Central* (1978) has been widely adopted in order to evaluate whether a regulatory burden constitutes a taking.

First, a regulation which denies *all* economically beneficial or productive use of land will require compensation under the Takings Clause. Second, when a regulation *impedes* the use of property *without depriving the owner of all economically beneficial use*(Davis, 2021), a taking still may be found based on a complex of factors, including:

1. the economic impact of the regulation on the claimant;
2. the extent to which the regulation has interfered with distinct and provable investment-backed expectations (see Breemer & Radford, 2005); and
3. the character of governmental action. (see *Murr*, 1922, pp. 1942-43; *Palazzolo v. Rhode Island*, 2001; *Lucas*, 1922; *Penn Cent*., 1978, p. 124).

4.1. When is an Action "Ripe" (or Legally Appropriate) for Adjudication?

A takings claim may be "facial" or "as-applied" (Amar & Caminker, 2003; Bona Law, 2020). A facial takings claim challenges a regulation as constituting a taking by its plain language (see *Suitum v. Tahoe Reg'l Planning Agency*, 1997, p. 736 n.10; *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 1987; Metzger, 2005). A facial challenge may attack an enactment that "denies an owner economically viable use of his land" (*Hodel,* 1981, pp. 295-296).

A claim of a facial taking will succeed if the regulation does not "substantially advance a legitimate state interest" no matter how it is applied (*seeYee v. City of Escondido*, 1992; Metzger, 2005). Facial challenges are immediately *ripe* for adjudication (see Ehrlich, 1990). Sandefur (2015, p. 52) noted that "A plaintiff who argues that a law is facially invalid is claiming that the law is not, and never can be, applied in a way that satisfies constitutional restrictions This is a claim that some fundamental flaw renders the challenged law inherently unconstitutional, regardless of factual circumstances of a particular case."

A more common challenge to a regulation is an "as-applied" takings challenge (see Hudson, 2023). Sandefur (2013, pp, 53) stated:"An as-applied challenge, by contrast, holds that while some circumstances may exist in which the challenged law is within constitutional boundaries, something special about this case has caused it to exceed those bounds." An owner of property bringing such a challenge attacks the decision that applied a regulation to his or her property—not the regulation in general or facially (see*Cty. Concrete Corp. v. Twp. of Roxbury*, 2006).

A takings claim based on the State's having chosen one criterion, rather than some other, would generally fail as an "as-applied challenge."— especially if plaintiffs retain an economically viable use of their property, or if they are able to reside in their homes, use their land,or sell their property.

Similar to the facts outlined in the introduction to this study, under *Winters ex rel. Stassart v. Lakeside Joint Sch. Dist.*(2008), an agreement between Town Number 1 and Town Number 2 changing where a student may attend school would be characterized as an "as-applied" taking.

In the case of an "as-applied regulation,"[A] claim that the application of government regulations effects a taking of a property interest is not ripe unlessthe government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue" and (2) the plaintiffs have sought "compensation through the procedures the State has provided for doing so" (see *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 1985, pp. 186-87, p. 194).

The ripeness doctrine is an important part of adjudicating issues relating to regulatory takings. "The ripeness doctrine serves 'to determine whether a party has brought an action prematurely and counsel's abstention until such time as a dispute is sufficiently concrete to satisfy the constitutional and prudential requirements of the doctrine'" (see *Cty. Concrete Corp.*, 2006; *Khodara Envtl., Inc. v. Blakey*, 2004, quoting *Peachlum v. City of York,* 2003).

The ripeness requirement (Ehrlich, 1990; Stein, 1995; Hof, 2002) stems from the Fifth Amendment's proviso that only takings without "just compensation" infringe on that Amendment. Thus,"if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used that procedure and been denied just compensation" (*Suitum*, 1997, quoting *Williamson*, 1985, p. 195).

In *Hodel*(1981, p. 297), the Supreme Court rejected a claim that the *Surface Mining Control and Reclamation Act* (1978) constituted a taking because there was "no indication in the record that the appellees have availed themselves of the opportunities provided by the Act to obtain administrative relief," such as a waiver of a regulation (see *Corsini v. City of New York*, 2023) or a variance permitting a specific use (generally Infranca & Farr, 2023).

As a general rule, *Killington, LTD. v. State of Vermont and Town of Mendon* (1995)provides a synopsis of the rule to be applied, holding that *a regulatory takings claim will not be considered ripe until claimant has exhausted all administrative remedies* (see Sweeney, 2001, p. 238 n. 146).

5. "Takings" Application to Education: A Unique Application

Recall that Plaintiff Number 4 did not have any children who were attempting to enroll in Public Schools of Town Number 2. In this scenario, the State of New Jersey had in place procedures for challenging a determination that a student was ineligible to attend a particular public school. The applicable regulations provide for such a challenge:

> "An applicant may appeal to the Commissioner [of Education] a school district determination that a student is ineligible to attend its schools. Appeals shall be initiated by petition, which shall be filed in accordance with N.J.S.A. 18A:38-1 and N.J.A.C. 6A:3-8.1 and shall proceed as a contested case pursuant to N.J.A.C. 6A:3."

Thus, in order to make out a successful case of a regulatory taking, plaintiffs would be required to avail themselves of this procedure. In addition, a plaintiff would be required to show that it had pursued state appeals and remedies to either reverse the decision or obtain just compensation for the alleged taking. Reflecting the view found in *Killington, LTD* (1995), unless or until plaintiffs have in hand an adverse decision from the state authorities that is final, their takings claims would not be ripe for adjudication.

Thus, under the application of standards relating both to the "takings" and ripeness, the complaints of the plaintiffs in this study would normally have been dismissed. Was there another vehicle or avenue of attack that might be open to a plaintiff—in this case Plaintiff Number 4 in seeking compensation for the decision of the Board of Education to change his property's school district classification?

Part II: "Takings and Due Process (adapted from Hunter, Shannon, & McCarthy, 2013)

6. Due process and Regulatory Takings

What is "due process" and why is it so important? How might it be applied in this factual circumstance? Due process may be best defined in one word—"fairness." The requirement of due process extends to the substance of an action [*substantive due process*] and also to the procedures employed in guaranteeing individuals their due process rights [*procedural due process*] (Vats, 2022; Redish & Hiltner, 2023).
In the United States, courts look to both federal and state constitutions, statutory law, and judicial precedents found in case law to provide the standards for "fair treatment" of persons or citizens by federal, state, and local governments. These "standards" have become to be known collectively as *due*

process. When a person has been judged to have been treated unfairly by the government, that individual is said to have to have been deprived of or denied due process. Minimally, due process includes the following two elements:

- *Notice* of any potential violation (seer Raba, 2023);
- Conducting a *hearing* to determine the facts and mete out any appropriate judicial or administrative penalty or sanction (see Zoldan, 2023).

As to the notice requirement, Professor Falender (1985, p. 686) noted:

> "The *Mullane* Court defined the notice mandated by the due process clause as "[n]otice reasonably calculated, under all the circumstances, to inform interested parties of the pendency" of the proceeding. The notice must be reasonable "under all the circumstances," with "due" regard for the practicalities and peculiarities of the case." According to the Court "construction of the Due Process Clause which would place impossible or impractical obstacles in the way [of promoting vital interests of the state] could not be justified."
>
> "Two factors must be analyzed to determine what kind of notice will suffice. First, a study of *Mullane* and its progeny reveals the characteristics of notice reasonably calculated to inform under the circumstances. Second, consideration of a statutory scheme that incorporates *Mullane*'s notice philosophy illustrates that enhanced notice is workable in the creditor nonclaim context and that such expanded notice does not interfere with important state interests" (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 1950).

The "hearing" requirement of due process is often the main area of contention between litigants. A hearing is defined broadly as a proceeding wherein an issue of law or fact is adjudicated, and evidence is presented to help determine the facts at issue. In *Cleveland Board of Education v. Loudermill* (1984), the United States Supreme Court stated: "Under the Due Process Clause, an individual must be given an opportunity for a hearing before he is deprived of any significant property interest…."

The hearing requirement may be that of a formal trial,such as occurs in a criminal matter.In other matters, a hearing may resemble a trial in that a hearing may be held publicly and involve the clash of positions of opposing parties. A hearing may also be differentiated from a more formal trial in that a non-judicial hearing may feature more relaxed standards of evidence and procedure andmay take place in a variety of less formal settings or before a broader range of competent authorities.

Under the *Model State Administrative Procedure Act* (1981), hearings fall into three broad categories: judicial, administrative, and legislative (see Kuckes, 2008; Shaver, 2015). Judicial hearings take place within a formal judicial process. Administrative hearings deal with finding of fact, matters of rulemaking, and the adjudication of individual cases based on established rules, regulations, and procedures enacted by a variety of administrative bodies, boards, commissions, or agencies.

Legislative hearings occur at both the federal and state levels and are generally conducted in order to find facts, establish a legislative record (called "legislative history") (Shobe, 2018), seek testimony from competent witnesses, or generally elicit public comment on a wide variety of issues of public concern (see Maloney, 2020).

An important analysis made by the late Judge Henry Friendly (1975) outlines certain procedural safeguards in both content and relative priority relating to due process rights, which may include:

1. An unbiased tribunal;
2. Notice of the proposed action and the grounds asserted for it;
3. Opportunity to present reasons why the proposed action should not be taken;
4. The right to present evidence, including the right to call witnesses;
5. The right to know opposing evidence;

6. The right to cross-examine adverse witnesses;
7. A decision based exclusively on the evidence presented;
8. Opportunity to be represented by counsel;
9. Requirement that the tribunal prepare a record of the evidence presented; and
10. Requirement that the tribunal prepare written findings of fact and reasons ("conclusions of law") for its decision (see, e.g., Katyal & Schultz, 2012).

However, "[W]ithout a constitutionally recognized property or liberty interest, there is no need for further inquiry on the due process question" and there is no potential for relief under the provisions of 42 U.S.C. § 1983" (see *Paul v. Davis,* 1976; *Mnyofu v. Bd. of Educ. of Sch.Dist. 227*, 2004).

Regarding the claims of Plaintiff Number 4, would the Fourteenth Amendment which "entitle[s] Plaintiffs to due process, which would include procedural due process in the event individuals such as Plaintiffs are excluded from a claim to membership in a class of citizens receiving a government sponsored education" be relevant or perhaps dispositive. *Might the application of the New Jersey Constitution provide Plaintiff Number 4 with a basis to go forward in the absence of a regulatory takings clause claim*(see Tractenberg, 1998)?

New Jersey, as all other states, is not obligated by the U.S. Constitution to establish and maintain a public school system (see*Goss v. Lopez*, 1975; Corcoran, 2000; Weishart, 2016).In *San Antonio Independent School District v. Rodriguez* (1973), the United States Supreme Court held that the San Antonio Independent School District's financing system, which was based on local property taxes, was not a violation of the Fourteenth Amendment's equal protection clause.The majority opinion, which reversed the District Court, stated that the appellees did not sufficiently prove a textual basis, within the U.S. Constitution, supporting the principle that education is a fundamental right which should applied to the States, through the Fourteenth Amendment. The Supreme Court found that there was no such fundamental right and that the unequal school financing system was not subject to strict scrutiny.
However, all states do in fact undertake this obligation in some form. For example, New Jersey guarantees a free public education to all children in the State under N.J. Const. art VIII § IV, cl. 1 which states: "The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years."

Thus, the guarantee of a "thorough and efficient education" found in the N.J. Constitution may give rise to a property interest protected by the Due Process Clause of the Fourteenth Amendment (see also *Rogowski v. New Hartford Cent. Sch. Dist.*, 1990; Tractenberg, 1998). However, at the same time, the entitlement to a free public education has never been held to encompass the right to attend a specific public school (*see Mullen v. Thompson,* 2002). The *Mullen Court* noted: "Plaintiffs have no constitutionally cognizable property or liberty interest in attending the individual school of their choice."

However, not every complaint will give rise to a constitutional claim. Some violation of due process must be found.New Jersey, as in many other states, has established rules to determine in which district each child will receive an education, and has established regular procedures to adjudicate disputes under those rules. If an error has been committed, there are procedures for challenging school assignment decisions. Where no procedural flaw has been identified, and where parents have not availed themselves of the available procedures to correct any error, there has been no deprivation without due process of law.

As the United States Supreme Court has provided in *Zinermon v. Burch* (1990):

> "The Due Process Clause also encompasses ... a guarantee of fair procedure. A § 1983 action may be brought for a violation of procedural due process, but here the existence of state remedies is relevant in a special sense. In procedural due process claims, the deprivation by state action of a constitutionally protected interest in "life, liberty, or property" is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law. The constitutional violation actionable under

> § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process."

Thus, there is no procedural due process cause of action under Section 1983 when a *post-deprivation* remedy exists, unless the plaintiff challenges the adequacy or fundamental fairness of the state remedy in the first instance as a violation of due process.

A claim of the deprivation of due process faces significant factual hurdles, as well. Among other things, a plaintiff would have to articulate the *form of notice* required by the due process clause and demonstrate that the authorities failed to provide the required notice (see *Goss v. Lopez*, 1975; Effron, 2018). Damages that may have allegedly resulted from such a deprivation of due process rights must be proven as well.

7. The Issue of Potential Immunity from Suit

Even if a plaintiff's procedural due process rights have been violated, there is also an issue whether such a claim may be asserted against the State as a defendant or whether the due process claim, insofar as it is asserted against the State, is barred by the doctrine of *sovereign immunity*(see Berger, 2006; Longley, 2022).

Sovereign immunity provides broadly that States are not amenable to suits from individuals without their consent (*Seminole Tribe of Florida v. Florida*, 1996). The principle of sovereign immunity is based in the Eleventh Amendment of the U.S. Constitution, which provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

The Eleventh Amendment to the United States Constitution embodies two general principles of immunity:

> "[F]irst, that each State is a sovereign entity in our federal system; and second, that [i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States was not contemplated by the Constitution when establishing the judicial power of the United States" (*Seminole Tribe of Florida v. Florida*, 1996, p. 54).

The underlying purpose of sovereign immunity "is to accord States the dignity that is consistent with their status as sovereign entities" (*Fed. Maritime Comm'n v. S.C. State Ports. Auth.*, 2002).

There are, however, limits to the claim of state sovereign immunity. It can be abrogated by Congress, but "Congress' intent to abrogate ... must be obvious from 'a clear legislative statement'" (*Seminole Tribe*, 1996, p. 55, 2005, citing *Blatchford v. Native Village of Noatak & Circle Village*, 1991; see also Hunter & Shannon, 2022). States can also waive sovereign immunity by action or by law (see*Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 2002). An individual may also sue a state official under *Ex parte Young*(1908) "when that suit seeks only prospective injunctive relief to 'end a continuing violation of federal law'" (*Seminole Tribe*, 1996, p. 73, citing *Green v. Mansour,* 1985*).*

However, pursuant to *Penn-East Pipeline Co. v. New Jersey* (2021), an assertion of sovereign immunity would not apply in the case of a takings action against a town, borough, or municipality because such an assertion would "fly in the face" of the import and purpose of the Takings Clause and the Fifth Amendment of the Constitution, as it had been applied to the States through the Fourteenth Amendment to the Constitution (see Berger, 2006).Professor Seamon (2001) argues that although states are immune from just compensation suits brought in a federal court, due process claims can be adjudicated in state court. Thus, "if a state fails to create an adequate remedy, the Due Process Clause of the Fourteenth Amendment requires state courts to hear just compensation suits notwithstanding state sovereign immunity" (Berger, 2006, citing Seamon, 2001, p. 1069).

8. Conclusions and Observations

Where does this leave the lawsuit filed by the plaintiffs? All four of the lawsuits filed by plaintiffs were dismissed as to the issues of takings on grounds they were not ripe or were moot, or because the plaintiffs had not exhausted all appropriate administrative remedies. As to Plaintiff Number 4, his suit was allowed to go forward solely on the issue whether he had been deprived of his due process rights to notice and hearing under the Fifth Amendment to the Constitution as it was applied to the States under the Fourteenth Amendment.

Meanwhile, as might be expected, a settlement was reached "out of court" between the two towns and Plaintiff Number 4,with the payment of an undisclosed amount of compensation, but without either town admitting that they had in fact violated Plaintiff Number 4's due process rights. The settlement was contingent on "all parties maintaining confidentiality" as to the terms and compensation of the agreement.

* This article/case study is dedicated to the memory of Joseph G. Wojak, a colleague in the Stillman School of Business at Seton Hall University, whose interests were litigated in *Wojak v. Borough of Glen Ridge* (2008).

REFERENCES

Amar, V.D. & Caminker, E. (2003). Constitutional sunsetting? Justice O'Connor's closing comments in Grutter. Hastings Constitutional Law Quarterly 30: 541-555.

Barnes, B.D. (2023). Tort reform and the takings clause. Buffalo Law Review 71: 353-424.

Benshoff, A.M. (1994). Out of focus: The fuzzy line between regulatory "takings" and valid zoning-related "extractions" in North Carolina and federal jurisprudence. Campbell Law Review 16: 333-403.

Berger, E. (2006). The collision of the takings and state sovereign immunity doctrines. Washington & Lee Law Review 63: 493-602.

Bona Law (2020). Differences between facial and as-applied challenges to the constitutionality of a statute. bonalaw.com (May 21, 2020), https://www.bonalaw.com/insights/legal-resources/differences-between-facial-and-as-applied-challenges-to-the-constitutionality-of-a-statute

Breemer, J.D. & Radford, R.S. (2005). The (less?) murky doctrine of investment-backed expectations after Palazzolo, and the lower courts' disturbing insistence on wallowing in the pre-Palazzolo muck. Southwestern (University) Law Review 34: 351-426.

Brennan, T. & Boyd, J. (1996). Pluralism and regulatory failure: When should takings trigger compensation? Resources for the Future (January 1996). Discussion Paper 96-09,

https://www.researchgate.net/publications/24/122996_Pluralism_and_Regulatory_Failure_When_Shoud_Takings_Trigger_Compensation#fullTextFileC…

Butler, L.L. (2019). *Murr v. Wisconsin* and the inherent limits of regulatory takings. Florida State University Law Review 47: 99-142.

Campbell, J. (2023). General citizenship rights. Yale Law Journal 132: 611-701.

Cochran, K.T. (2000). Beyond school financing: Defining the constitutional right to an adequate education. North Carolina Law Review 78: 399-476.

Davis, R. (2021). *State ex rel. AWMS Water Solutions, LLC v. Mertz 2020-Ohio-5482*. Ohio Northern University Law Review 47: 473-488.

Echeverria, J.D. (2020). What is a physical taking? University of California Davis Law Review 54: 731-815.

Effron, R.J. (2018). The lost story of notice and personal jurisdiction. New York University Annotated Survey of American Law 74: 23-104.

Ehrlich, K.A. (1990). Reaping the fruits of a ripe property takings challenge: Eliminating the ripeness problem in facial regulatory takings cases. Santa Clara Law Review 30(3): 685-698.

Elliott, C. (2018). The diminution in value appraisal, explained. elliottco.com (February 8, 2018), https://elliottco.com/publications/columns/the-dimunuation-in-value-appraisal-explained/

Falender, D.A. (1985). Notice to creditors in estate proceedings: What process is due? North Carolina Law Review 63: 659-706.

Farrell Fritz (Attorneys) (2016). Case law and statutes govern landmark designations. FarrellFritz.com (February 3, 2016), https://www.farrellfritz.com/case-law-and-statutes-govern-landmark-designations/

Frank, R. (2022). Reflections on a century of "regulatory takings" law. legal-planet.org (December 29, 2022), https://legal-planet.org/2022/12/29/reflections-on-a-century-of-regulatory-takings-law/

Friendly, H. J. (1975). Some kind of hearing. University of Pennsylvania Law Review 123: 1267-1295.

Guimont, E. (2022). Land use regulations, climate change, and regulatory takings. Environmental Law Review 52: 279-305.

Hansen, R. & Strahlilevitz, L.J. (2023). Toward principled background principles in takings law. Texas A&M Law Review 10: 427-486.

Hof, W.M. (2002). Trying to halt the procedural merry-go-round: The ripeness of regulatory takings claims after Palazzolo v. Rhode Island. Saint Louis Law Journal 46: 833-872.

Holloway, J.E. & Guy, D.C. (2010). Weighing the need to establish regulatory takings doctrine to justify takings standards of review and principles. William & Mary Environmental Law and Policy Review 34: 315-375.

Hudson, D. (2023). As-applied challenges. Free Speech Center (Middle Tennessee State University) (September 19, 2023),https://firstamendment.mtsu.edu/article/as-applied-challenges/

Hunter, R.J. (2011). Judicial review of administrative rule making. Mustang Journal of Law and Legal Studies 2: 31-39.

Hunter, R.J. & Lozada, H.R. (2010). A nomination of a Supreme Court Justice: The incorporation doctrine revisited. Oklahoma City Law Review 35: 365-385.

Hunter, R.J. & Shannon, J.H. (2022). Resolving the jurisdictional issue between theState of Oklahoma and the "Five Civilized Tribes" through a state/sovereign nation compact. International Journal of Business Management and Commerce 7(1): 1-9.

Hunter, R.J., Shannon, J.H, & McCarthy, L. (2013). Fairness, due process and the NCAA: Time to dismiss the fiction of the NCAA as a "private actor." Journal of Politics and Law 6(4) (online): 63-76.

Infranca, J.J. & Farr, R.M. (2023). Variances: A canary in the coal mine for zoning reform? Pepperdine Law Review 50: 443-504.

Katyal, S., & Schultz. J. M. (2012). The unending search for the optimal infringement filter. Columbia Law Review(Side Bar), 112: 83-107.

Kenton, W. (2022). Eminent domain: Meaning and types. Investopedia (February 6, 2022), https://www.investopedia.com/terms/e/eminent-domain.asp

Kuckes, N. (2006). Civil due process, criminal due process. Yale Law and Policy Review 25: 1-61.

Longley, R. (2022). What is sovereign immunity? Definition and examples. Thoughtco.com (June 30, 2022), https://www.thoughtco.com/sovereign-immunity-definition-and-examples-5323933

Maloney, S.P. (2020). The art of the administrative hearing. Thomas Jefferson Law Review 42: 1-5.

McGivney, Kluger, Clark & Intoccia, P.C. (2018). The basics of Federal court removal. mcgivneyandkluger.com (August 23, 2018), https://www.mcgivneyandkluger.com/

Meltz, R. (2011). Takings decisions of the U.S. Supreme Court: A chronology. Congressional Research Service (March 8, 2011), www.crs.gov; https://digital.library.unt.edu/ark:67531/metadc83830/

Metzger, G.E. (2005). Facial challenges and federalism. Columbia Law Review 105: 873-932.

Miller, K. (2015). So you want to remove a case to Federal Court. New Jersey Lawyer (August 2015): 42-45, https://www.NJSBA.com

Moore, E. (2023). What is eminent domain? Consumer Affairs (August 9, 2023), https://www.consumeraffairs.com/finance/what-is-eminent-domain.html

Owens, D.W. (2012). Regulatory takings. UNC School of Government (January, 2012), https://www.sog.unc.edu/resources/legal-summaries/regulatory-takings

Raba, C.J. (2023). The dog that didn't bark: Looking for techo-liberation ideology in a decade of public discourse about big tech regulation. Fordham Urban Law Journal 51: 299-356.

Redish, M.H. & Hiltner, V. (2023). Adversary democratic due process. Florida Law Review 75: 483-547.

Rubin, R.A. (2008). Taking the courts: A brief history of takings jurisprudence and the relationship between state, federal, and the United States Supreme courts: Hastings Constitutional Law Quarterly 35: 897-920.

Sandefur, T. (2015). The timing of facial challenges. Akron Law Review 43(1): 51-77.

Seamon, R.H. (2001). The asymmetry of state sovereign immunity. Washington Law Review 76: 1067-1151.

Shaver, E.A. (2015). Every day counts: Proposals to reform IDEA's due process structure. Case Western Reserve Law Review 66: 143-207.

Shobe, J. (2018). Agency legislative history. Emory Law Journal 68: 283-333.

Stein, G.M. (1995). Regulatory takings and ripeness in the federal courts. Vanderbilt Law Review 48: 1-99.

Sweeney, K. (2001). What's on the horizon? Takings jurisprudence and constitutional challenges to Ridgeline zoning in Vermont. Vermont Law Review 26: 221-261.

Tractenberg, P.L. (1998). The evolution and implementation of educational rights under the New Jersey Constitution of 1947. Rutgers Law Journal 29: 827-946.

Treanor, W.M. (1995). The original understanding of the takings clause and the political process. Columbia Law Review 95: 782-887.

Treanor, W.M. (1998). The original understanding of the takings clause.Georgetown Environmental Law & Policy Institute Papers & Reports,

http://scholarship.law.georgetown.edu/gelpi_papers/2

Tulane University Law School (2021). The basics of land use and zoning law. Tulane University Law School (blog), https://online.law.tulane.edu/blog/land-use-and-zoning-law

Vats, S.A. (2022). Recent developments: *T.O. v. Fort Bend Independent School District*: Fifth Circuit flouts Supreme Court precedent in school discipline cases. Tulane Law Review 96: 787-801.

Vecsey, L. (2015). What is NYC's Landmarks Law? StreetEasy.com (October 20, 2015), https://www.streeteasy.com/blog/what-is-nycs-landmarks-law/

Weishart, J.E. (2016). Reconstituting the right to education. Alabama Law Review 67: 915-978.

Zoldan, E.C. (2023). Due process and the right to an individualized hearing. University of California Irvine Law Review 13: 1399-1458.

STATUTORY AND OTHER MATERIALS

Model State Administrative Procedure Act (1981). Section 4-201.

New Jersey Constitution Art. VIII Section IV, Clause 1.

Surface Mining Control and Reclamation Act of 1978. 91 Stat. 445.

28 U.S. Code Section 1446. Procedure for removal of civil actions.

42 U.S. Code Section 1983. Civil action for deprivation of rights.

CASE CITATIONS

Andrus v. Allard, 444 U.S. 51 (1979). United States Supreme Court.

Blatchford v. Native Village of Noatak & Circle Village, 501 U.S. 775(1991). United States Supreme Court.

Chicago, B. & Q.R. Co. v. Chicago, 166 U.S. 226 (1897). United States Supreme Court.

Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985). United States Supreme Court.

Corsini v. City of New York, 2023 U.S. Dist. LEXIS 118226 (2023). United States District Court for the Eastern District of New York.

Cty. Concrete Corp. v. Twp. of Roxbury, 442 F.3d 159 (2006). Third Circuit Court of Appeals.

Ex parte Young, 209 U.S. 123 (1908). United States Supreme Court.

Fed. Maritime Comm'n v. S.C. State Ports. Auth., 535 U.S. 743 (2002). United States Supreme Court.
Goss v. Lopez, 419 U.S. 565 (1975). United States Supreme Court.
Green v. Mansour, 474 U.S. 64 (1985). United States Supreme Court,
Hadacheck v. Sebastian, 239 U.S. 394 (1915). United States Supreme Court.
Hodel v. Indiana, 431 U.S. 314 (1981). United States Supreme Court.
Houston v. Town of Waitsfield, 648 A.2d 846, 865 (1994). Supreme Court of Vermont.
Hudson Cty. Water Co. v. McCarter, 209 U.S. 349 (1908). United States Supreme Court.
Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470(1987). United States Supreme Court.
Khodara Envtl., Inc. v. Blakey, 376 F.3d 187 (2004). Third Circuit Court of Appeals.
Killington, LTD. v. State of Vermont and Town of Mendon, 668 A.2d 1278 (1995). Supreme Court of Vermont.
Lapides v. Bd. of Regents of Univ. Sys. of Ga., 535 U.S. 613 (2002). United States Supreme Court.
Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). United States Supreme Court.
Lucas v. S. Carolina Coastal Council, 505 U.S. 1003 (1992). United States Supreme Court.
Mnyofu v. Bd. of Educ. of Sch. Dist. 227, 2004 U.S. Dist. LEXIS 269 (2004). United States District Court for the Northern District of Illinois, Eastern District.
Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950). United States Supreme Court.
Mullen v. Thompson, 155 F. Supp. 2d 448 (2001). United States District Court for the Western District of Pennsylvania.
Murr v. Wisconsin, 137 S. Ct. 1933 (2017). United States Supreme Court.
Palazzolo v. Rhode Island, 533 U.S. 606 (2001). United States Supreme Court.
Pa. Coal Co. v. Mahon, 290 U.S. 393 (1922). United States Supreme Court.
Paul v. Davis, 424 U.S. 693 (1976). United States Supreme Court.
Peachlum v. City of York, 333 F.3d 429 (2003). Third Circuit Court of Appeals.
PennEast Pipeline Co. v. New Jersey, 594 U.S. ___ (2021). United States Supreme Court.
Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978). United States Supreme Court.
Rogin v. Bensalem Twp. 616 F.2d 680 (1980). Third Circuit Court of Appeals.
Rogowski v. New Hartford Cent. Sch. Dist., 730 F. Supp. 1202 (1990). United States District Court for the Northern District of New York.
San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973). United States Supreme Court.
Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996). United States Supreme Court.
Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725 (1997). United States Supreme Court.
Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002). United States Supreme Court.
United States v. Willow River Power Co.,324 U.S. 499(1945). United States Supreme Court.
Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). United States Supreme Court.
Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985). United States Supreme Court.
Winters ex rel. Stassart v. Lakeside Joint Sch. Dist. (2008), No. C 08-1511, 2008 WL 4937812 (2008). United States District Court for the Northern District of California.
Wojak v. Borough of Glen Ridge, Civ. No. 2:16-cv-1605-KM-JBC (2018). United States District Court for the District of New Jersey).
Yee v. City of Escondido, 503 U.S. 519 (1992). United States Supreme Court.
Zinermon v. Burch, 494 U.S. 113 (1990). United States Supreme Court.