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As commercial¹ tobacco endgame strategies start to gain traction in California communities, it may be helpful to think through the potential legal theories that the tobacco industry is likely to employ to derail this movement. Historically, the tobacco industry has weaponized legitimate constitutional protections and other legal processes to frustrate public health efforts. Considering the economic impact that the successful adoption of endgame policies is likely to have on the tobacco industry, the tobacco industry will certainly seek to frustrate those efforts through a wide range of tactics, including litigation.²

One legal argument that the industry is likely to make is that an endgame policy that significantly restricts or bans the sale of tobacco products is an impermissible regulatory taking under the Fifth Amendment of the U.S. Constitution.³ The purpose of this policy brief is to address that argument. Although prohibiting the sale of tobacco products would have some economic impact on tobacco retailers, that law would not be an impermissible taking under the Fifth Amendment because it would not deny retailers economically viable use of their property — the law would still allow retailers to use their premises for other profitable business activities.

The Takings Constitutional Framework

Under the Fifth Amendment's Takings Clause, the U.S. Constitution prohibits the government from taking private property without just compensation.⁴ The central purpose of the Takings Clause is to "prevent the 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."⁵ While the California State Constitution's Takings Clause is broader than the Fifth Amendment's, the California Supreme Court has interpreted both clauses similarly.⁶ Thus, the analysis in this policy brief, which relies heavily on the interpretation of the Fifth Amendment, does not change under California state law.

The government can take property under the Fifth Amendment by way of (1) a possessory taking; or (2) a regulatory taking.⁷ A possessory taking occurs when a governmental body seizes or physically occupies private property.⁸ Eminent domain proceedings are a classic example of a possessory taking. Because public health policies restricting the sale of tobacco products do not typically involve governmental seizure or physical occupation of private property, this form of taking would not be implicated.

A regulatory taking occurs when a regulation imposes such severe constraints on property that the owner is deprived of the property's reasonable economic viability.⁹ The regulatory taking theory rests on the idea that a law that substantially furthers an important public policy may so frustrate the property owner's investment-backed expectations that the regulation becomes a taking.¹⁰ In the endgame context, tobacco retailers may argue that the sale of tobacco products generates a large part of their revenue, and that prohibiting the sale of those products constitutes a regulatory taking.

Determining a Regulatory Taking

The courts have not adopted a specific formula to determine what degree of regulation amounts to a taking.¹¹ Each case is decided on its own merits, using a multifactor balancing test that the U.S. Supreme Court articulated in *Penn Cent. Transp. Co. v. City of New York*.¹² The

Penn Central factors are: (1) the economic impact of the regulation on the property owner; (2) the extent to which the regulation has interfered with the property owner's distinct investment-backed expectations; and (3) the character of the governmental action.¹³ How each of these factors is implicated in the tobacco endgame — prohibiting the sale of all tobacco products — is discussed in more detail below.

Economic Impact of the Regulation

The first *Penn Central* factor analyzes the economic impact of the governmental regulation on the property owner's economic interest. Governmental regulations can affect property



interests in countless ways.¹⁴ Not every regulation that economically impacts private businesses, however, is an impermissible Fifth Amendment taking. If that were the case, governments could hardly operate.¹⁵ For a regulation to be considered a taking under the Fifth Amendment, its impact on property has to be significant. Courts typically “compare the value that has been taken from the property with the value that remains in the property”¹⁶ to determine the significance of the regulation’s economic impact on the property. For that reason, the courts consider the nature and extent to which the regulation interferes with rights in the property *as a whole*.¹⁷ In other words, the focus is not on the regulation’s effect on just one aspect of property ownership—one stick in the bundle of property rights—but on the entirety of property ownership interests.¹⁸

The *Penn Central* case illustrates this point. *Penn Central* involved a challenge to a New York City law designating the Grand Central Terminal as a historical landmark. The terminal owners challenged the law, arguing that the designation was an impermissible taking of property because it prevented them from constructing a high-rise building on top of the terminal. Put another way, they had been denied the use of one of the sticks in the bundle of owning the terminal. The Court, however, rejected the owners’ narrow definition of property and, looking at the terminal as a whole, found that there was no taking because they had not been denied *all* profitable use of the terminal and could still develop and manage the terminal within the regulatory limits.¹⁹ Thus, even though the historical landmark designation decreased the value of the Grand Central Terminal by limiting the available expansion space, the designation was not an impermissible taking because the owner had not been denied *all* use of preexisting property rights and could still economically utilize the terminal in other ways.

Similar to the Court’s reasoning in *Penn Central*, the economic impact of a policy restricting the sale of tobacco products is very unlikely to deny tobacco retailers all profitable use of their property. Just like in *Penn Central* where the denial of the ability to develop the space above the Grand Central Terminal was not sufficient to sustain a takings claim, prohibiting the sale of all tobacco products is very unlikely to be considered a taking because tobacco retailers still have the ability to sell other non-tobacco products.

It is not sufficient that tobacco endgame policies diminish the value of the property by eliminating one stream of income—the ability to sell tobacco products. As the U.S. Court of Appeals for the Federal Circuit stated in *CCA Associates v. U.S.*, the economic impact envisaged under the Takings Clause must be more than a mere diminution.²⁰ That a jurisdiction eliminates tobacco products from the market does not deny tobacco retailers all profitable use of their property because they can sell other merchandise or put their property to some other economically viable use. Although there is no rigid formula to determine regulatory economic impact, it



is generally agreed that such impact must be substantial. In *CCA Associates v. U.S.*, the court noted that it was unaware of any “cases in which a court has found a taking where diminution in value was less than 50 percent.”²¹ In fact, in *Keystone Bituminous Coal Ass’n*, the Court found that a law requiring coal companies to leave 50 percent of the coal in the ground to prevent land subsidence was not a Fifth Amendment taking because the coal mines remained profitable.²²

For the majority of tobacco retailers, prohibiting the sale of all tobacco products is unlikely to result in more than a 50 percent diminution of their property value. Most tobacco retailers, such as grocery stores and convenience stores, sell a wide variety of merchandise, with

tobacco sales accounting for less than half of their income. In 2009, for example, the Center for Economic Vitality at Western Washington University School of Business reviewed the national sales for two types of U.S. convenience stores: (1) stores that included a broad merchandise mix and extended hours of operations; and (2) gas stations with convenience stores.²³ According to the study, cigarette and tobacco product sales accounted for 23 percent and 9 percent of sales respectively for the two types of stores. Thus, although tobacco products typically constitute a significant percentage of retailer revenue, restricting their sale would be unlikely to have a prohibitive economic impact on businesses.

A state or local law prohibiting the sale of tobacco products may economically impact retailers, but it would still allow for other economic activity. Also, the space that was previously used to sell tobacco products does not become unusable; it can be used to sell other, less harmful products. Even stores that sell only tobacco products would be able to diversify their merchandise and sell products other than tobacco. Courts have held that a generally applicable regulation that restricts one of a retailers' streams of income does not amount to a taking. In *Gen. Food Vending Inc. v. Westfield*, for example, the Superior Court of New Jersey upheld an ordinance banning the use of all cigarette vending machines against a takings claim because the owners could put the machines to the next best alternative use.²⁴ In fact, as early as 1887, in *Mugler v. Kansas*, the U.S. Supreme Court ruled that a state law that prohibited breweries from manufacturing alcohol, even though such manufacturing was previously lawful, was not a taking under the Fifth Amendment.²⁵ Also, in *Andrus v. Allard*, after noting that "regulations that bar trade in certain goods ha[d] been upheld against claims of unconstitutional taking," the Court held that federal regulations prohibiting the sale of eagles' parts, even though those parts had been lawfully acquired prior to the promulgation of those regulations, did not offend the Takings.²⁶ The reasoning in the *Mugler* and *Allard* cases would apply to regulations prohibiting the sale of tobacco products.²⁷

Distinct Investment Backed-Expectations

The second *Penn Central* factor — distinct investment-backed expectations — focuses on what the property owner *reasonably* anticipated when they acquired the property.²⁸ Although there is no precise definition of what would constitute a taking under this factor, the *Penn Central* Court noted that people cannot establish a Fifth Amendment taking simply by showing that a regulation prevented them from exploiting a property interest they previously believed was available for development.²⁹ In other words, it is not reasonable for property owners to expect that they will continue to use their property in a particular fashion simply because it was previously devoted to that use.³⁰ As the Court has stated, "the reasonable expectations of an acquirer of land must acknowledge legitimate restrictions affecting [their] subsequent use and dispensation of the property."³¹



Central to the investment-backed expectations factor is the foreseeability of governmental regulation at the time the property was acquired. This inquiry is objective.³² In the endgame context, this entails asking whether a reasonable business operator would have expected the government to adopt a regulation prohibiting the sale of deadly consumer products. A regulation that interferes only with a property owner's unilateral, abstract expectation is not a compensable taking. In *Penn Central*, for example, it was not sufficient that the property owners were prevented from building above the Grand Central Terminal in the way they had anticipated.³³ The Grand Central Terminal owners' unilateral, subjective expectation of developing the space above the terminal was not enough to make the New York City law prohibiting that development an impermissible taking under the Fifth Amendment because there were other ways in which the terminal could be economically utilized.

Business regulations, such as those regulating the sale of tobacco products, are typically not susceptible to takings challenges. Because regulation is part of business life, courts are often reluctant to find that governmental exercise of traditional police powers to protect the health, safety, and welfare of citizens impermissibly interferes with business owners' investment-backed expectations. Indeed, as the Court has stated, "those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end."³⁴ Moreover, in the case of personal property, because of traditional governmental regulation of commerce, property owners ought to be aware that subsequent "regulations might even render their properties economically worthless."³⁵

When determining whether a regulation impermissibly interferes with a property owner's investment-backed expectations, courts have asked these three questions: (1) Is the industry or activity highly regulated? (2) Was the owner aware of the problem that spawned the regulation when they acquired the property? and (3) Could the owner have reasonably anticipated the regulation?³⁶

In the tobacco endgame context, the answer to all these questions is most likely "Yes." First, regulation of tobacco sales falls squarely within state and local police power, and tobacco business are highly regulated.³⁷ Tobacco manufacturers and retailers are subject to various regulatory regimes at the federal, tribal, state, and local levels. These regulations include, among others, marketing restrictions, product manufacturing standards, taxation, licensing, sales restrictions, retail location and density restrictions, pricing, and smoking restrictions. In fact, as early as 1900, the U.S. Supreme Court noted that it was within the province of state power to limit the sale of tobacco products "or to prohibit their sale entirely."³⁸ It cannot be disputed that the sale of tobacco products is, and has historically been, highly regulated.

Second, tobacco manufacturers and retailers are aware that tobacco products are the deadliest consumer goods — they are the leading cause of preventable death in the United States. In fact, the tobacco industry knows more about the dangerousness of its products than the regulators and consumers.³⁹ It stands to reason therefore that tobacco retailers and manufacturers are well aware of the public health problems that result in tobacco regulation when they choose to engage in the tobacco business.

Finally, because tobacco businesses are highly regulated, tobacco manufacturers and retailers cannot claim that they could not have reasonably anticipated regulatory policies aimed at eliminating tobacco-related death and disease. Governments have historically taken various measures to protect the public from the dangers associated with tobacco products, starting more than 50 years ago with the release of the first report of the Surgeon General's Advisory Committee on Smoking and Health in 1964.⁴⁰ The ultimate goal of tobacco regulations has

been to reduce and, ideally, end the devastating health harms caused by the tobacco epidemic. For example, between 1965 to 2018, due to a variety of tobacco control measures, including restrictions on the use and sale of the products, the national smoking rate declined from 52 percent to 13 percent.⁴¹ In 2014, the U.S. Surgeon General emphasized the need to implement tobacco endgame programs and policies, specifically calling for greater tobacco sales restrictions, “including bans on entire categories of tobacco products.”⁴² Since the elimination of tobacco-related disease and death has been the aim of tobacco regulation over the years, tobacco manufacturers and retailers are very unlikely to claim successfully that they could not have anticipated bans on the sale of tobacco products.

As noted above, for most tobacco retailers, the sale of tobacco products accounts for far less than 50 percent of their overall sales, so restricting the sale of tobacco products would not frustrate the entirety of tobacco retailers’ business investments. An endgame policy restricting the sale of all tobacco products would still allow for a substantial volume of other economic activity. Retailers that sell only tobacco products can diversify their stock and sell other products. Retailers may argue that restricting the sale of tobacco “prevent[s] the most profitable use” of their property. Even if true, that fact alone does not constitute an impermissible regulatory taking because “a reduction in the value of property is not necessarily equated with a taking.”⁴³

Character of the Governmental Action

The final factor of the *Penn Central* test requires a review of the character of the governmental action.⁴⁴ A regulation that adjusts the benefits and burdens of economic life to promote the common good is unlikely to be considered a taking under the Fifth Amendment.⁴⁵ Public health measures aimed at ending the tobacco epidemic—an epidemic that is engineered and propagated by purely financial interests—are quintessential adjustments of benefits and burdens of economic life to promote public health. Tobacco is the leading cause of preventable disease, disability, and death in the U.S. Eliminating tobacco-related morbidity and mortality is a public health goal that indisputably falls within governmental police power. When the impact of the elimination of commercial tobacco product sales is viewed in light of the public health character of such laws and the improvement in the health and social costs related to tobacco products, the common good will likely outweigh the economic impact. It seems very likely that a jurisdiction could successfully defend a challenge to an endgame policy restricting the sale of all tobacco products on regulatory takings grounds.



A law prohibiting the sale of commercial tobacco products would most likely not violate the Fifth Amendment.

Conclusion

In sum, a law prohibiting the sale of commercial tobacco products would most likely not violate the Fifth Amendment. While prohibiting the sale of commercial tobacco products may have some economic impact on vendors, such as convenience stores and discount retailers, it would still allow for a substantial volume of other economic activity. Also, the space that was used to sell tobacco products does not become unusable; it can be used to sell other products. When the impact of the elimination of tobacco product sales is reviewed in light of the public health character of the law and the improvement in the health and social costs related to tobacco products—such as admissions to emergency rooms for heart-related events triggered by tobacco smoke, as well as reduced health care costs through the lower incidence of respiratory ailments—the common good would likely outweigh the economic impact. It is likely that a jurisdiction could successfully defend a commercial tobacco sales restriction against a challenge on regulatory takings grounds.

Endnotes

- 1 The Public Health Law Center recognizes that traditional and commercial tobacco are different in the ways they are planted, grown, harvested, and used. Traditional tobacco is and has been used in sacred ways by Indigenous communities and tribes for centuries. Comparatively, commercial tobacco is manufactured with chemical additives for recreational use and profit, resulting in disease and death. For more information, visit <http://www.keepitsacred.itcml.org>. When the word “tobacco” is used throughout this document, a commercial context is implied and intended.
- 2 Patricia A. McDaniel & Ruth Malone, *Tobacco Industry and Public Health Responses to State and Local Efforts to End Tobacco Sales from 1969–2020*, PLOS ONE (May 22, 2020), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0233417> (noting the likelihood of litigation against tobacco sales bans in Beverly Hills and Manhattan Beach, California).
- 3 See James G. Hodge, Jr. & Megan Scanlon, *The Legal Anatomy of Product Bans to Protect the Public’s Health*, 23 ANNALS HEALTH L. 161, 161 (2014) (addressing various legal theories that could be used to challenge laws banning the sale of harmful products). Businesses have unsuccessfully used the Takings Clause to invalidate smoke-free laws, arguing that smoking restrictions denied them economic use of their property. See, e.g., *D.A.B.E., Inc. v. City of Toledo*, 292 F. Supp.2d 968 (N.D. Ohio 2003), *aff’d* 393 F.3d 692 (6th Cir. 2005); *Lexington Fayette Cty. Food & Beverage Ass’n v. Lexington-Fayette Urban Cty. Gov’t*, 131 S.W.3d 745 (Ky. 2004); *City of Tucson v. Grezaffi*, 23 P.3d 675 (Ariz. Ct. App. 2001).
- 4 U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”). This restriction applies to the states under the Due Process Clause of the Fourteenth Amendment. See *Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 234–35 (1897).
- 5 *Murr v. Wisconsin*, 137 S. Ct. 1933, 1943(2017).
- 6 *San Remo Hotel L.P. v. San Francisco*, 41 P.3d 87, 100–01 (Cal. 2002) (noting that the California Supreme Court has construed the Fifth Amendment and the California takings clause congruently).
- 7 See *Yee v. City of Escondido*, 503 U.S. 519, 522–23 (1992).
- 8 *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 247 (1982) (“When faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking.”)
- 9 *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (“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.”).
- 10 *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 127 (1978).
- 11 *Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 224 (1986) (“In all of these cases, we have eschewed the development of any set formula for identifying a ‘taking’ forbidden by the Fifth Amendment, and have relied instead on ad hoc, factual inquiries into the circumstances of each particular case.”).
- 12 *Penn Cent. Transp. Co.*, 438 U.S. at 124.
- 13 *Id.*
- 14 *Arkansas Game & Fish Comm’n v. United States*, 568 U.S. 23, 31(2012).
- 15 *Murr*, 137 S. Ct. at 1943 (“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.”).
- 16 *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 497 (1987).
- 17 *Penn Cent. Transp. Co.*, 438 U.S. at 131; see also *CCA Assocs. v. United States*, 667 F.3d 1239, 1244 (Fed. Cir. 2011) (“[A]ny economic impact must be evaluated with respect to the value of the property as a whole.”).

- 18 *Andrus v. Allard*, 444 U.S. 51, 65–66 (1979).
- 19 *Penn Cent. Transp. Co.*, 438 U.S. at 138.
- 20 *CCA Assocs.*, 667 F.3d at 1246; *Concrete Pipe & Prod. of California, Inc. v. Constr. Laborers Pension Tr. for S. California*, 508 U.S. 602, 645 (1993) (“[O]ur cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking.”).
- 21 *CCA Associates*, F.3d at 1246.
- 22 480 U.S. 470, 501–02 (1987).
- 23 *CTR. FOR ECONOMIC VITALITY, WESTERN WASHINGTON UNIVERSITY COLLEGE OF BUSINESS, Convenience Stores Industry Snapshot*, 2009.
- 24 672 A.2d 760, 765 (N.J. Super. Law Div. 1995).
- 25 *Mugler v. Kansas*, 123 U.S. 623 (1887)
- 26 444 U.S. at 67–68. *See also* *Mitchell Arms, Inc. v. United States*, 7 F.3d 212 (Fed. Cir. 1993) (holding that revocation of a firearms importer’s permit, which frustrated the importer’s collateral interest in the ultimate sale of the firearms, was not a taking under the Fifth Amendment); *Hawkeye Commodity Promotions, Inc. v. Miller*, 432 F. Supp. 2d 822 (N.D. Iowa 2006), *aff’d sub nom.* *Hawkeye Commodity Promotions, Inc. v. Vilsack*, 486 F.3d 430 (8th Cir. 2007) (holding that an Iowa gaming statute that banned gaming operators from using TouchPlay machines was not a regulatory taking under the Fifth Amendment even though that statute would likely result in gaming operators losing their business and declaring bankruptcy).
- 27 *See* *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1068 (1992) (Breyer, J., dissenting) (noting that the reasoning in *Mugler v. Kansas* would be applicable to the manufacture of asbestos, cigarettes, or concealable fire arms).
- 28 John Kenneth Felter, *What Is a “Taking”?* — *Penn Central Factors*, 12 Bus. & Com. Litig. Fed. Cts. § 128:26 (2019).
- 29 *Penn Cent. Transp. Co.*, 438 U.S. at 130.
- 30 *Pace Res., Inc. v. Shrewsbury Twp.*, 808 F.2d 1023, 1032 (3d Cir. 1987) (citing *Goldblatt v. Hempstead*, 369 U.S. 590, (1962) and *Hadacheck v. Sebastian*, 239 U.S. 394, (1915)).
- 31 *Murr*, 137 S. Ct. at 1945.
- 32 *Id.*
- 33 *Penn Cent. Transp. Co.*, 438 U.S. at 130,
- 34 *Concrete Pipe & Prod. v. Constr. Laborers Pension Tr.*, 508 U.S. 602, 645 (1993); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027–28 (1992) (“[Because] of the State’s traditionally high degree of control over commercial dealings, [a property owner] ought to be aware of the possibility that new regulation might even render his property economically worthless.”).
- 35 *Lucas*, 505 U.S. at 1027–28.
- 36 *Taylor v. United States*, 959 F.3d 1081, 1088 (Fed. Cir. 2020); *Appollo Fuels, Inc. v. United States*, 381 F.3d 1338, 1349 (Fed. Cir. 2004); *see also* *Edwards Aquifer Auth. v. Bragg*, 421 S.W.3d 118, 144 (Tex. App. 2013).
- 37 *See* *State ex rel. Cooper v. NV Sumatra Tobacco Trading Co.*, No. M2010-01955-COA-R3CV, 2011 WL 2571851, at *22 (Tenn. Ct. App. June 28, 2011), *rev’d sub nom.* *State v. NV Sumatra Tobacco Trading Co.*, 403 S.W.3d 726 (Tenn. 2013) (“The cigarette industry is highly regulated on both the federal and state level.”).
- 38 *Austin v. Tennessee*, 179 U.S. 343, 348–49 (1900).

39 See The Public Health Law Center, *The Verdict Is In: Findings From United States v. Philip Morris Collection*, <https://www.publichealthlawcenter.org/sites/default/files/resources/tclc-verdict-is-in.pdf>.

40 Patricia A. McDaniel & Ruth Malone, *supra* note 1 (“In the US, the current tobacco control movement began in earnest with the 1964 Surgeon General’s Report.”).

41 U.S. DEP’T OF HEALTH AND HUMAN SERVS., SMOKING CESSATION: A REPORT OF THE SURGEON GENERAL 3 (2020), <https://www.hhs.gov/sites/default/files/2020-cessation-sgr-full-report.pdf>; CTRS. FOR DISEASE CONTROL & PREVENTION, *Current Cigarette Smoking Among Adults in the United States*, https://www.cdc.gov/tobacco/data_statistics/fact_sheets/adult_data/cig_smoking/index.htm (last updated Nov. 18, 2019).

42 U.S. DEP’T OF HEALTH AND HUMAN SERVS., THE HEALTH CONSEQUENCES OF SMOKING: 50 YEARS OF PROGRESS. A REPORT OF THE SURGEON GENERAL 13 (2014), https://www.ncbi.nlm.nih.gov/books/NBK179276/pdf/Bookshelf_NBK179276.pdf.

43 *Andrus*, 444 U.S. at 66.

44 *Penn Cent. Transp. Co.*, 438 U.S. at 124..

45 *Id.*