A state law to promote tourism creates an easement across a portion of a private farm for hikers who wish to use a historic trail that crosses the farm. The law allows the farm's owner to charge hikers a fee to cover the costs of this use, but it does not otherwise compensate the owner.

## Is the law constitutional?

- A. No, because the fee provision violates the privileges and immunities clause.
- B. No, because the law takes the owner's property without just compensation.
- C. Yes, because the fee provides the owner with just compensation.
- D. Yes, because the law has the public purpose of promoting tourism.

## Correct

**Collecting Statistics** 

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## **Explanation:**

A physical taking occurs when the government permanently and physically occupies private property. The Fifth Amendment takings clause, which applies to the states through the Fourteenth Amendment due process clause, bars the government from taking private property unless:

the taking is for a **public use**—ie, any use that is rationally related to a legitimate public purpose (eg, promoting tourism) *and* 

the owner receives **just compensation**—ie, the **property's fair market value**.

Here, a physical taking occurred when the state law created an easement that permanently and physically occupied a portion of the owner's farm. The taking is for a public use because it is rationally related to the state's legitimate public purpose in promoting tourism **(Choice D)**. The law does allow the owner to charge hikers a fee to cover the costs of the easement's use. But those fees do *not* provide the owner with just compensation because they do not equal the easement's fair market value **(Choice C)**. Therefore, the law is an unconstitutional taking.

**(Choice A)** There are two privileges and immunities clauses. The Article IV clause (ie, comity clause) prohibits states from discriminating against citizens of other states by denying them a right of state citizenship (not seen here). And the Fourteenth Amendment clause bars states from interfering with the narrowly defined privileges or immunities of national citizenship (also not seen here).

#### **Educational objective:**

A physical taking occurs when the government permanently and physically occupies private property. Such a taking violates the Fifth Amendment takings clause unless the taking was for public use and the owner received just compensation (ie, the property's fair market value).

## References

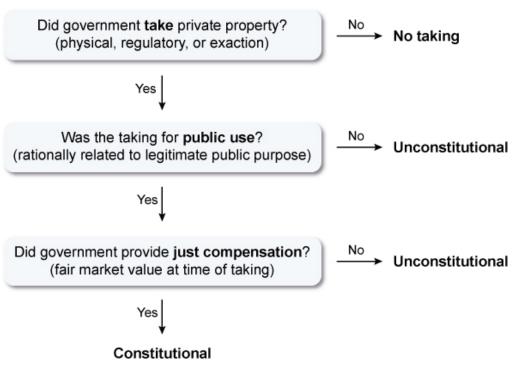
Loretto v. Teleprompter Manhattan Catv Corp., 458 U.S. 419, 434 (1982) (holding that a permanent, physical invasion of private property by the government always constitutes a taking).

26 Am. Jur. 2d Eminent Domain § 112 (2021) (explaining just compensation).

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# Fifth Amendment taking



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