

Takings litigation is a bit of a puzzle. You would expect the amount of litigation to go up and down depending on the situation in the real estate market. If there's a lot of new construction, there are more opportunities for conflict between developers and regulators.

And if prices are high, so are the economic stakes, which should make litigation more appealing for developers. But the housing bubble seems to have done only a bit to increase litigation, and the collapse of the housing market and its partial recovery are barely discernible in litigation rates.

It would be really hard to find out the actual filings of takings claims in all the trial courts cross the country. What I did instead was count citations to the *Penn Central* case in published opinions as a rough gauge of takings litigation. It's a case that one side or the other (probably the government) seems likely to cite in almost any takings case, thus very likely to end up being cited by the court. Of course, appellate opinions are only a sample of all litigation, but there's no particular reason to think the propensity to appeal cases changes markedly from year to year. If anything, you would expect the propensity to appeal to be pro-cyclical, since parties have more money in good times to pay for appeals. That would accentuate the trends that you would expect in the appellate citations for takings cases.

Here are the number of Penn Central citations in cases in the even-numbered years for the past two decades, plus 2015:

Year Citations

1996 64

1998 59

2000 52

2002 63

2004 74

2006 77

2008 85

2010 77

2012 73

2014 64

2015 72

If you figure a two or three lag between permit denials and appellate court opinion, the peak years roughly track the real estate bubble (although it's possible that even that isn't statistically significant). But the peak in takings cases was nowhere as big as the peak in the housing market. And takings litigation only went down by a little after the bubble collapsed and never returned to pre-bubble levels. The number of permits is still only half as much as the peak, so there should be far fewer opportunities for disputes between developers and regulators. And the likelihood of a dispute in any given case should have gone down after the housing crash. After the bubble burst, you might have expected a municipality to be very generous in encouraging developments to try to help restore its tax base and to boost employment. So you'd expect even fewer development rejections that could give rise to litigation.

Think of it this way. Suppose there was a huge surge in the number of people in hospitals and in the amount of damages you could get in a malpractice cases. Wouldn't you expect the number of malpractice cases to shoot *way* up? And then if the number of people in hospitals dropped by half and the damages also went down, wouldn't you expect *a lot* fewer suits? Or if there were suddenly half as many arrests and they were for less serious offenses, wouldn't you expect citations of *Miranda* to drop proportionately? The puzzle is why that hasn't happened here.