COMMENT

TOSSING BABY WITH THE BATHWATER: SUBSTANTIVE DUE PROCESS AND THE REGULATORY TAKINGS DOCTRINE APPLIED TO THE COVID-19 PANDEMIC

Josh Bethea

CONTENTS

COMMENT

TOSSING BABY WITH THE BATHWATER: SUBSTANTIVE DUE PROCESS AND THE REGULATORY TAKINGS DOCTRINE APPLIED TO THE COVID-19 PANDEMIC

Josh Bethea[*]

Abstract

This paper explores the issues facing property owners in challenging government regulation in response to COVID-19. Specifically, this paper lays out the relevant law and its development over time, points out the flaws in the current law, and ultimately recommends that courts alter their analysis of these issues. The ideal analysis will avoid strict scrutiny review and give broad deference to state actors during public emergencies. However, it will also grant claimants relief where state actors have readily available, less harmful, and cheaper alternatives to their offending regulation. Such an analysis will protect important property rights against permanent erosion over time—even during pandemics.

By altering their analysis in three main ways, courts may avoid tossing out the baby with the bathwater—or in other words, avoid tossing out important property rights while still rejecting strict scrutiny review of state emergency actions. First, courts ought to deny the legitimate exercise of police power as a threshold inquiry. Second, courts ought to determine the nature of the claimant's loss before engaging in a justification analysis. Third, courts ought to conduct a justification analysis when courts find the nature of the claimant's loss to be substantial enough to invoke a presumption of government liability.

These are the hallmarks of the balanced interests test, which grants state actors broad discretion during emergencies while permitting recovery where readily available, less harmful, and cheaper alternatives to an offending regulation exist. This is a test that keeps the baby but not the bathwater.

[*] J.D. Class of 2022, Sandra Day O'Connor College of Law at Arizona State University. I would like to thank Professor Ilan Wurman for his thoughtful editing and feedback.

INTRODUCTION

COVID-19 has bankrupted hundreds of businesses while taking thousands of lives.[1] In response to this ongoing pandemic crisis, state governments have taken action to fight against COVID-19's severe effects. This action includes calls for wearing facemasks, social distancing, and compliance with the CDC guidelines. Notably, this action also includes shut-down orders of businesses deemed non-essential. While closing businesses has been moderately successful at slowing the spread of COVID-19, the economic impact on affected businesses ranges from hurtful to devastating. Accordingly, there has been much pushback against the states' shutdown orders.

This tension between state action on behalf of public safety and negatively impacted businesses is well illustrated through recent litigation. For example, in Arizona, several hundred bartenders have recently filed an action against Arizona Governor Doug Ducey for his shutdown orders.[2] These plaintiffs own and operate bars under expensive and unique liquor licenses: type 6 and 7.[3] These licenses, costing over $100,000, have two special privileges compared to other liquor licenses: (1) license owners need not serve a minimum amount of food and (2) license owners may sell packaged alcohol for off-premise consumption.[4] However, Governor Ducey's executive orders shut down license 6 and license 7 holders for months while allowing other types of liquor license holders to continue business operations.[5] These orders arguably had the effect of eliminating these special privileges compared to other, cheaper, liquor licenses—thus, the plaintiffs contend that Governor Ducey's executive orders violated their rights and that they are entitled to compensation by the State for their losses.[6]

Given these facts, the question remains: will the plaintiffs obtain the relief they seek? According to some courts, the answer may be as simple as determining

---

[1] *Covid-19 Creating an 'Insolvency Time Bomb' – Latest Updates*, TRTWORLD, https://www.trtworld.com/life/covid-19-creating-an-insolvency-time-bomb-latest-updates-38247 (last visited Sept. 2, 2020) [hereinafter *Insolvency Time Bomb*].

[2] Brett Bavcevic, *Unhappy Hour: Bar Owners Sue, Call Ducey Closure Order Unconstitutional*, CRONKITE NEWS (July 24, 2020), https://cronkitenews.azpbs.org/2020/07/24/unhappy-hour-bar-owners-sue-call-ducey-closure-order-unconstitutional/.

[3] Rogelio Mares, *125 Bars File Lawsuit Against Governor Doug Ducey*, K GUN 9 NEWS (Aug. 23, 2020), Rogelio Mares, 125 Bars File Lawsuit Against Governor Doug Ducey, K GUN 9 NEWS (Aug. 23, 2020), https://www.kgun9.com/news/election-2020/economy/125-bars-file-lawsuit-against-governor-doug-ducey.

[4] *Id. See also*, *2021 Lottery Fees & Due Dates Table*, ARIZONA DEPARTMENT OF LIQUOR (Sept. 9, 2021), https://azliquor.gov/Lottery/2021_Fees.pdf.

[5] *Id.*

[6] *Id.*; Complaint, at 177, *Aguilla, et. al v. Ducey*.

whether Governor Ducey's distinction between liquor license 6 or 7 and other licenses is rationally related to public health and thus a legitimate exercise of police power.[7] In other words, if there is any logically coherent argument that distinguishing between type 6 or 7 licenses and other licenses relates to public health, then Plaintiffs lose. If the court decides to rule on the merits of a regulatory takings claim, Plaintiffs face a steep uphill battle in showing either (1) the order effectively deprived Plaintiffs of all economically viable use of their property or (2) the government's interest in protecting public health does not outweigh individual property interests.[8]

This action is just one of many other similar actions calling for revisiting the arguably overly broad deference courts give to state actors in the name of public safety and health.[9] The outcome of these cases will help clarify the existence of, or lack of, important property and due process rights during pandemics and other public health emergencies. Thus, it is difficult to overstate the significance of how courts today strike the appropriate balance between public health and safety interests and individual property and due process rights.

This paper will explore the issues facing plaintiffs in challenging government regulation in response to COVID-19. Specifically, this paper will lay out the relevant law and its development over time, point out the flaws in the current law, and ultimately recommend courts alter their analysis of these issues. The ideal analysis will avoid strict scrutiny review and give broad deference to state actors during public emergencies. However, it will also grant claimants relief where state actors have readily available, less harmful, and cheaper alternatives to their offending regulation. Such an analysis will protect important property rights against permanent erosion over time—even during pandemics.

By altering their analysis in three main ways, courts may avoid tossing out the baby with the bathwater—or in other words, avoid tossing out important property rights while still rejecting strict scrutiny review of state emergency actions. First, courts ought to deny the legitimate exercise of police power as a threshold inquiry. Second, courts ought to determine the nature of the claimant's loss before engaging in a justification analysis. A justification analysis determines whether the government is justified in withholding compensation. It considers factors that speak to whether the government or the claimant is best suited to bear the regulation's burden. This is distinguished from an analysis examining the

[7] *See* Friends of Danny DeVito v. Wolf, 227 A.3d 872, 894–95 (Pa. 2020).

[8] *See* Lingle v. Chevron U.S.A. Inc, 544 U.S. 528, 540. (2005).

[9] *See* Ilya Somin, *Does the Takings Clause Require Compensation for Coronavirus Shutdowns?*, REASON (March 20, 2020), https://reason.com/volokh/2020/03/20/does-the-takings-clause-require-compensation-for-coronavirus-shutdowns/.

nature of the claimant's loss, whose factors reveal the type and extent of the claimant's loss. Third, courts ought to conduct a justification analysis when courts find the nature of the claimant's loss to be substantial enough to invoke a presumption of government liability.

These are the hallmarks of the balanced interests test, which grants state actors broad discretion during emergencies while permitting recovery where readily available, less harmful, and cheaper alternatives to an offending regulation exist. This is a test that keeps the baby but not the bathwater.

I. BACKGROUND: POLICE POWER AND THE EVOLUTION OF THE REGULATORY TAKINGS DOCTRINE

The substantial impact, economic and otherwise, of government action in response to COVID-19, raises the question: what power allows the government to regulate to this extent? In effort to answer this inquiry, Part I proceeds in two sections: (1) origins of state power to regulate concerning public health and safety and (2) the evolution of the regulatory takings doctrine. This section will emphasize courts' evolving views over time concerning which institution, the courts or the legislature, is best equipped to strike an appropriate balance between public and private interests.

A. Substantive Due Process: Origins of State Power to Regulate Concerning Public Health and Safety

Police power has long been invoked in times of emergency to regulate in a way that mitigates harm to the public.[10] In fact, the basis of states' claim to this power is found in state sovereignty predating the states' formal ratification of the Constitution.[11] In other words, the police power that states invoke to respond to COVID-19 predates the United States of America.

Although the police power doctrine has evolved dramatically since its inception, the traditional view of police power was that the states, by virtue of their sovereignty as states, had power to regulate intrastate concerning the state's public health.[12] The states retained this power even after entering the Union, as confirmed by the Tenth Amendment. *Gibbons v. Ogden*, a Supreme Court case decided in 1824, formally recognizes this power in a way that reflects the traditional view of

[10] *See* Gibbons v. Ogden, 22 U.S. 1, 178 (1824).
[11] *Id.* at 198.
[12] *Id.* at 72.

police power.[13] In determining whether a state had the power to interfere with Congress's power to regulate interstate commerce, the Court established that states carry the police power, which includes the power to "quarantine" and to "regulate concerning public health."[14]

Years later, during a smallpox outbreak in Cambridge, Massachusetts, the 1905 Supreme Court specifically acknowledged the states' power to require vaccinations of citizens.[15] The Court ruled as follows:

> The authority of the state to enact this statute is to be referred to what is commonly called the police power—a power which the state did not surrender when becoming a member of the Union under the Constitution. Although this court has refrained from any attempt to define the limits of that power, yet it has distinctly recognized the authority of a state to enact quarantine laws and "health laws of every description." Indeed, all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other states. According to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.[16]

That same year in 1905, the Court placed some early limits on states' police power when it held that states could not pass legislation placing a cap on the maximum number of hours bakers could work in a week in the famous case *Lochner v. New York*.[17] In doing so, the Court emphasized individual due process rights that guarantee (1) states must take certain procedural steps before depriving individuals of their liberty (shutting down business, etc.) in the name of public health and (2) states must have a sufficiently adequate reason for depriving liberty—specifically, state regulation under the police power must be at least moderately related to public health, safety, or morals, as determined by the Court.[18]

The *Lochner* Court obviously had significant policy concerns with overly broad state police power.[19] The Court, in reaching its conclusion, was not blind to the fundamental justifications of state police power, such as state sovereignty, state

[13] *Id.* at 208.
[14] *Id.* at 20.
[15] *See* Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 35 (1905).
[16] *Id.* at 24-25.
[17] Lochner v. New York, 198 U.S. 45, 59 (1905).
[18] *Id.* at 53, 61-63.
[19] *Id.* at 57.

leaders' elevated perspective transcending individual interests, and how state leaders' regulation of individuals can theoretically produce the optimal amount of public good—including public safety and health.[20] However, the Court recognized that this power has upper limits, and that these limits protect individuals from government actions that would cheaply deprive individual liberty and autonomy without adequate reasons or process.[21] The Court said, "[w]e think there are none which might not come under the power of the legislature to supervise and control the hours of working therein, if the mere fact that the occupation is not absolutely and perfectly healthy is to confer that right upon the legislative department of the government."[22]

That said, the Court's dissenting justices argued that the majority applied too much scrutiny when it invalidated statutory protections for overworked bakers laboring in dangerous workplaces.[23] In addition, Justice Holmes entirely rejected the idea of substantive due process in favor of court deference to "legislative wisdom."[24]

About thirty years later, the 1935 Supreme Court in *West Coast Hotel Co. v. Parish* upheld state legislation establishing a minimum wage for women,[25] thereby departing from the *Lochner* Court's stringent approach to determining legitimate exercises of police power in favor of an approach that grants large deference to state legislatures. Drawing on other decisions, the Court reiterated:

> [I]f such laws have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied; that with the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal; that times without number we have said that the Legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.[26]

[20] *Id.* at 53, 56.
[21] *Id.* at 53.
[22] *Id.* at 59.
[23] Lochner v. New York, 198 U.S. 45, 69-70 (1905) (Harlan, J., dissenting).
[24] *Id.* at 75 (Holmes, J., dissenting).
[25] West Coast Hotel Co. v. Parrish, 300 U.S. 379, 398 (1937).
[26] *Id.*

In essence, the Court emphasized interested parties' participation in the legislative process through representatives and lobbying and ultimately adopted Holmes' *Lochner* dissent's deference to legislative wisdom in assessing whether a regulation sufficiently implicates the public's health, morals, or safety for the regulation to be valid.[27] This approach largely continues today.[28] Absent an impossible or irrational relationship between the challenged legislation and the public's health, morals, or safety, courts will not strike down the legislation as an unconstitutional use of police power.[29] However, there has been some modern pushback to rational-basis deference—for example, the Arizona bar owners and other pandemic takings plaintiffs generally argue for increasing court scrutiny of states exercising their police power.[30]

In summary, while states are theoretically empowered to maximize the good of the public at large through legislation protecting public health, states must exercise their police power in reasonable relation to public health or safety to avoid courts striking down their legislation for violating individual constitutional rights to due process guaranteed by the Fourteenth Amendment.

B. The Evolution of the Regulatory Takings Doctrine

In a similar spirit to *Lochner*, a new doctrine emerged in the 20th century in effort to secure individual property rights from unduly broad state police power action. This doctrine is the regulatory takings doctrine. This check on police power draws heavily from the Constitution's Fifth Amendment, which states in relevant part, "Nor shall private property be taken for public use without just compensation."[31]

The doctrine's essence is best summarized by its foundational roots traced back to the famous case decided by the 1922 Supreme Court: *Pennsylvania Coal Co. v. Mahon*. Here, Pennsylvania Coal Company ("Coal Co."), a mining company, conveyed the surface rights of a piece of land to an individual, Mahon, while reserving the right to continue mining coal without damages liability should

[27] *Id.; see* Lochner, 98 U.S. at 75 (Holmes, J., dissenting).

[28] *See* Daniel O. Conkle, *The Second Death of Substantive Due Process*, 62 IND. L.J. 215, 218-19 (1987); *see generally* 2 PATRICIA E. SALKIN, AMERICAN LAW OF ZONING § 15:2 (5th ed. 2012) ("[t]he essence of a claim that a zoning ordinance or land use regulation violates substantive due process is that it is unreasonable and bears no rational relationship to a legitimate state interest").

[29] *See* 2 SALKIN, *supra* note 28 at § 15:3 ("[u]sing the rational basis test, the federal courts will reject most substantive due process challenges to zoning ordinances and other land use controls").

[30] Bavcevic, *supra* note 2; Mares, *supra* note 3.

[31] U.S. CONST. amend. V.

the company decide to mine under Mahon's home.[32] However, the state legislature passed a statute preventing any mining if it would cause nuisance to the surface owner.[33] Coal Co. filed suit seeking damages from the state, arguing the state constructively "took" the valuable mineral rights that they owned previous to the statute, and the "taking" violated the company's constitutional right to be justly compensated for property taken by the government for public use.[34] Sympathetic to Coal Co.'s complete surprise in losing the valuable mineral rights Coal Co. carefully contracted to keep, the Court granted Coal Co. the relief it sought, acknowledging "[t]he 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."[35]

The regulatory takings doctrine further developed with the emergence of the case-by-case, factual ad hoc analysis in the 1978 Supreme Court's decision in *Penn Cent. Transp. Co. v. City of New York*. Here, Grand Central Station building owners leased the building's airspace rights, worth millions of dollars, as part of a plan to build an additional 50 stories.[36] City legislation granted the Landmarks Preservation Commission the power to prevent the project due to the grand central station's historical landmark designation and how building above the station would obstruct the original view.[37] Ruling that the city regulation did not constitute a "taking," the Court conducted a three-factor analysis: (1) the regulation's economic impact on the affected property (2) the affected owner's reasonable investment-backed expectations and (3) the government action's character.[38] Specifically, the Court held that the city's interest in designating and protecting historical landmarks trumped the affected owner's economic interest and investment expectations, especially considering the city at least partially compensated the owner with valuable airspace rights to neighboring buildings.[39] This ad hoc analysis transformed the doctrine by shifting the emphasis away from the interests of negatively impacted individuals to governmental interests and their broad justifications. Consequently, this decision added great uncertainty regarding potential claims under the already remarkably vague regulatory takings doctrine.

Perhaps as a deliberate attempt to add predictability to the takings doctrine, the Supreme Court eventually acknowledged two scenarios in which courts need not engage in factual ad hoc inquiry in deciding a regulatory takings claim: (1)

[32] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 412 (1922).
[33] *Id.* at 412-13.
[34] *Id.* at 412.
[35] *Id.* at 415.
[36] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 116 (1978).
[37] *Id.* at 117.
[38] *Id.* at 124.
[39] *Id.* at 137-38.

when the state regulation deprives the affected property of all economically beneficial or productive uses and (2) when the state regulation forces a permanent, physical intrusion onto the affected property.[40] In these scenarios, the Court may directly conclude that the questioned regulation is tantamount to a regulatory taking.[41] In re-affirming these takings per-se rules in *Lucas v. S.C. Coastal Council* (1992), Justice Scalia indicated that the Supreme Court had remembered at times Justice Holmes' concern with overly broad police power in Penn. Coal Co., that "[i]f, instead, the uses of private property were subject to unbridled, uncompensated qualification under the police power, 'the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed].'"[42]

Courts' struggle over time to appropriately balance public interests with private property interests is well illustrated by the rise and fall of the substantial government interest stand-alone test set forth in *Agins v. City of Tiburon* (1980) and later overruled in *Lingle v. Chevro*n (2005). Arguably concerned with courts' excessive deference to states exercising police power, the *Agins* Court reasoned any regulation infringing on property rights absent substantial and legitimate governmental interests constitutes a regulatory taking.[43] In other words, a plaintiff could establish a taking by pointing to the questioned regulation's lack of a substantial, legitimate governmental interest.[44] This approach emphasized the individual's property interests by requiring the government to base infringing regulation on substantial and legitimate reasons. In contrast, the *Lingle* Court critiqued the *Agins* Court's reasoning for improperly assessing regulation burden placement, emphasizing that the affected property owner's taking claim cannot be established absent her showing the extent of harm suffered.[45] In other words, the Court held determining whether the public or the individual should bear the regulation's burden is impossible without knowing the burden's weight.[46] This approach emphasizes judicial deference to state governments' own reasoning for regulation infringing on individual property interests.

In short, unless the facts fall neatly into a *Lucas* or *Loretto* per se rule, courts have broad discretion to weigh any amount of public interest over individual

[40] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982).

[41] Lucas, 505 U.S. at 1015.

[42] *Id.* at 1014.

[43] Agins v. City of Tiburon, 447 U.S. 255, 260 (1980), *abrogated by* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005).

[44] *Id.*

[45] Lingle, 544 U.S. at 542 (2005).

[46] *Id.*

interests in determining whether a taking has occurred. It seems courts believe state legislatures are best equipped to weigh public interests against private interests.

II. POLICE POWER AND THE REGULATORY TAKINGS DOCTRINE TODAY

The courts' drastic shift over time from cautious skepticism to great deference to states exercising police power well explains the state of the regulatory takings doctrine today. This section proceeds by exploring the elements of a takings claim, the legitimate exercise of police power as defense to a takings claim, courts' recent rulings on takings claims during the pandemic, and the significant policies informing the courts' rulings. This section will emphasize courts' great reluctance to grant relief to a takings plaintiff, especially during a public health and safety emergency.

A. The Elements of a Takings Claim

In determining whether the regulatory takings doctrine applies to a set of facts, courts distinguish between physical takings and regulatory takings.[47] Regulatory takings involve government action prohibiting private use of property for public benefit, as distinguished from physical takings, where government action acquires private property for public use.[48]

A Fifth Amendment regulatory taking, also known as commandeering and inverse condemnation, fundamentally alleges that a regulation has gone too far and that the plaintiff is thereby entitled to compensation.[49] Put another way, "the determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest."[50]

Once a court has determined the regulatory takings doctrine applies, the court will engage in the ad hoc factual analysis established in *Penn Central*, unless one of the two per-se rules is shown to apply.[51] First, the *Loretto* per se rule applies when the questioned government action has made way for a permanent and physical intrusion on the affected property owner's property.[52] Second, the *Lucas*

[47] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 323–24 (2002).

[48] *Id.*

[49] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[50] Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

[51] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

[52] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982).

per se rule applies when the questioned government action effectively deprives the affected property owner's property of all economically beneficial uses.[53] Impermanent deprivations of all economic value do not fall under the *Lucas* per se rule, but are given weight in the *Penn Central* ad hoc analysis.[54]

The *Penn Central* factual ad hoc analysis weighs three factors, with the third factor potentially outweighing the others: (1) the regulation's economic impact on the affected property, (2) the affected property owner's reasonable investment-backed expectations, and (3) character of the government action.[55]

First, in determining the regulation's economic impact, courts have broad discretion in viewing the affected property narrowly or more broadly. For example, in *Mahon*, the court narrowly viewed the affected property as mineral rights when it determined a taking had occurred.[56] In contrast, in *Penn Central*, the court broadly viewed the affected property as a whole when it determined a taking did not occur where the property owner retained all other property rights to the grand central station land parcel, other than airspace.[57] This discretion, sometimes referred to as the "denominator problem," contributes to the great uncertainty of the regulatory takings doctrine.[58]

Second, in determining the affected property owner's reasonable investment-backed expectations, the court focuses on the owner's purchase intent and the foreseeable risks of purchasing the property.[59]

Third, in determining the government action's character, the factor with the most weight, the court has broad discretion to consider almost any argument that favors the government.[60] Some arguments even appear to be unrelated to the character inquiry, such as reciprocity of advantage and public interest. Simply put, the court may decide here that because a regulation furthers some public interest to some degree, or because the regulation offers the affected property owner some new benefit, the third factor weighs against finding a regulatory taking.[61] Again, the court's broad discretion to entertain facially unrelated arguments deepens the uncertainty facing regulatory takings plaintiffs.

---

[53] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992).

[54] Tahoe–Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 326–27 (2002).

[55] Penn Cent. Transp. Co., 438 U.S. at 124.

[56] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[57] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130 (1978).

[58] *See* AM. BAR ASS'N, TAKING SIDES ON TAKINGS ISSUES: THE IMPACT OF TAHOE-SIERRA, 101-02 (Thomas E. Roberts ed., 2002).

[59] *Id.* at 124.

[60] *Id.*

[61] Murr v. Wisconsin, 198 L. Ed. 2d 497, 507 (2017) (citing Penn Central, 438 U.S. at 124).

In summary, unless a regulatory taking plaintiff's case neatly falls within one of the two per-se rules, she is likely to lose the factual ad hoc analysis due to courts' broad discretion to give tremendous weight to the third factor, which considers the public interest the government's action is intended to further.

B. Legitimate Police Power as a Defense to a Takings Claim

Rather than decide on the merits of a regulatory takings claim, many courts rule on the issue of legitimate exercise of police power as a threshold question. In these instances, courts find a rational relationship between the questioned regulation and the public interest, usually public health or safety, and dismiss the plaintiff's action.

A Westlaw practical article summarizes well the reasoning behind the practice as follows:

> The argument is that the Takings Clause is not implicated when the government exercises its police power to prevent a public harm (as opposed to providing a public benefit), such as enforcing criminal law or abating nuisances . . . [w]ithout this doctrine, the government would likely have to pay compensation for public health regulations that prohibit newly developed drugs, poisons, toxic materials, firearms, and explosives. Deeming all police power regulations as potential takings could even induce property owners to create or maintain dangerous conditions and public nuisances on their properties to attempt to receive compensation from the regulating governmental entity.[62]

While potentially bankrupting the government is a serious concern, this reasoning is arguably imperfect. It dismisses meaningful court distinctions between inherently dangerous activities and other activities. Also, this reasoning arguably ignores the fact that the third factor in the *Penn Central* ad hoc analysis gives significant weight to the government's interest in the challenged legislation, including solvency. These issues will be discussed in greater detail below.

In short, courts are greatly concerned with overexposing the government to liability. This concern closely corresponds with many statutory schemes designed to protect public health and safety. Thus, many courts are willing to dismiss regulatory taking claims on the basis of a legitimate exercise of police power alone.

---

[62] Practical Law Government Practice, *COVID-19: Regulatory Takings Considerations for State and Local Governments*, THOMSON REUTERS (May 8, 2020).

C. Recent Court Rulings During the Pandemic

Recently, courts have found persuasive the reasoning behind viewing the legitimate exercise of police power as a threshold question. For example, a Pennsylvania court recently found "where governmental regulation restricting activity on private property is implemented pursuant to an exercise of police power, rather than through the government's power of eminent domain, no just compensation is due."[63] Another court held similarly:

> There are also practical reasons supporting this finding. Labeling Defendants' Order a taking would require the state to compensate every individual or property owner whose property use was restricted for the purpose of protecting public health. This would severely limit the state's especially broad police power in responding to a health emergency.[64]

These rulings raise important questions that give rise to fair criticism. For example, are the rulings inappropriately assuming that granting relief in a few, distinguishable instances is necessarily tantamount to exposing the government to regulatory takings liability in all instances of states exercising their police power during a pandemic—despite the fact that per se takings have been granted in other instances with successful limitations? More specifically, does the existence of the *Penn Central* ad hoc analysis, as distinguished from a per se rule, belie the possibility of one ad hoc analysis determination weighing dispositively in another regulatory takings case? Does this view leave unanswered other questions essential to the regulatory takings doctrine, such as the true character of the claimant's loss and who ought to bear the burden of the loss relative to that character?

Furthermore, what exactly does public health and safety regulation look like during a pandemic, and how broad is the spectrum? Courts are now beginning to paint a better picture. For example, according to recent rulings, definite, impermanent eviction moratoriums and security deposit provisions do not amount to regulatory takings because the regulations impermanently deprives the affected property owner of only some economic value of his land.[65]

In another recent case, the court denied a temporary restraining order and upheld a government order designed to slow COVID-19 by shutting down bars, but the order limited service restaurants in one area while allowing heavily

[63] Friends of Danny DeVito v. Wolf, 227 A.3d 872, 894 (Pa. 2020).

[64] TJM 64, Inc. v. Harris, 475 F. Supp. 3d 828, 835 (W.D. Tenn. 2020).

[65] Auracle Homes, LLC v. Lamont, 478 F. Supp. 3d 199, 214 (D. Conn. 2020); Elmsford Apartment Assocs., LLC v. Cuomo, 469 F. Supp. 3d 148, 158 (S.D.N.Y. 2020).

trafficked bars in historic district tourist areas to remain open.[66] The plaintiff in this case made two arguments: (1) the regulation was tantamount to an "arbitrary and capricious" exercise of police power in violation of the Fourteenth Amendment and (2) the regulation constituted a regulatory taking.[67]

Addressing the first argument, the court held the order was not "arbitrary and capricious" because the government relied on expert CDC statistics and recommendations in selecting the "50% food sales distinction" for the shutdown rule, as 50% of total sales are alcohol sales as cut-off for opening/shutting down.[68] In its reasoning, the court also cited "reasonable" efficiency concerns with requiring the government to conduct a case-by-case sales analysis of the historical district bars that had long been exempt from normal licensing.[69]

Addressing the second argument, the court held no regulatory taking occurred, reasoning that no categorical takings apply, as there was not a deprivation of all economically beneficial use because the limited-use restaurant could still sell take-out.[70] The court also reasoned that the factual ad hoc analysis weighs against finding a taking and found the third factor to significantly outweigh the first two factors.[71] Specifically, although the court acknowledged the severe economic impact on the restaurant's sales and that the owners had no reason to expect COVID-19 regulation when they invested in the property, it reasoned that requiring compensation for every legitimate exercise of police power to prevent public harm during a public health crisis would significantly shrink essential, broad police powers.

In one final example, a court dismissed a case where a COVID-19 shut-down order prevented non-resident landowners from entering the county where the non-resident plaintiff owned a vacation home. The court reasoned:

> Defendant County's concededly legitimate exercise of its emergency management powers under North Carolina law to protect public health in the unprecedented circumstances presented by the COVID-19 pandemic weighed against loss of use indirectly occasioned by preventing plaintiffs from personally accessing their vacation home for 45 days, [this] does not plausibly amount to a regulatory taking of plaintiffs' property.[72]

[66] TJM 64, Inc., 475 F. Supp. 3d at 832, 835.
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] TJM 64, Inc. v. Harris, 475 F. Supp. 3d 828, 835 (W.D. Tenn. 2020).
[71] *Id.*
[72] Blackburn v. Dare Cnty., 486 F. Supp. 3d 988, 996 (E.D.N.C. 2020).

In conclusion, while courts may recognize the significant negative economic impact suffered by property owners affected by shutdown orders, courts are nevertheless slow to find shutdown orders as violating plaintiffs' constitutional rights. Courts seem deeply concerned with limiting the states' broad emergency police power. This is especially true when the implications of such limitations can be seen, at least at a quick glance, to be tantamount to tying states' hands behind their backs amidst a severe health crisis.

D. What Policies Inform Court Rulings on Pandemic Takings?

Given that courts are already showing a pattern of relying on policy to inform their rulings on regulatory taking claims during the COVID-19 pandemic, a deeper analysis into courts' policy considerations is warranted. Specifically, courts appear to give the most weight to two policy concerns: (1) maintaining the government's ability to act swiftly and decisively during public health and safety emergencies and (2) vindicating and compensating victims of arbitrary government action. A third significant policy concern that courts arguably have largely ignored or overlooked is upholding important autonomy and freedom values to curb the slippery slope spoke of in *Lucas* and *Mahon*.

First, courts seem deeply concerned with limiting state emergency police power related to public health and safety, as requiring compensation for every legitimate exercise of police power to prevent public harm would significantly shrink broad police powers during public health crisis. This would, in turn, deplete valuable resources during a great time of need, or in the very least, redirect limited resources away from fighting the public health crisis. Additionally, due to the additional liability risk imposed on state actors, their decision-making process would be slowed at a time where fast decision-making could be essential to preserving public health and saving lives. From this perspective, property rights necessarily rank lower in importance compared to preserving the government's ability to save lives.

Second, courts acknowledge the need to vindicate and compensate victims of arbitrary government action. While courts will not engage in rigorous review of states' reasons given for their actions intended on behalf of public health and safety, courts will require compensation where state actors are unable to present an argument rationally linking the states' action with public health and safety. In other words, states must articulate a rational connection between their challenged action and the public's health or safety. These arguments are not difficult to create. Accordingly, courts are slow to find failure to meet this very low standard.

Third, courts' recent decisions omit important autonomy and freedom policy concerns from their decisions,[73] suggesting Justice Scalia and Justice Holmes' slippery slope concerns may have been forgotten. American society is built upon traditional notions of freedom, and it is arguably shocking that courts' rulings on regulatory takings claims are silent to the threat imposed on private property rights. Some may argue that these values are implicitly considered, or that silence alone does no harm. However, by denying regulatory takings claims based solely upon a legitimate exercise of police power without addressing the merits, courts contribute to the accelerating expansion of police power. While courts emphasize the nature of state action designed to protect public health and safety during a time of emergency, they have yet to suggest definite boundaries on this power by more closely construing what constitutes an emergency and when an emergency ends. Further expansion of this power may offer additional security to citizens vexed by the dangers of an unprecedented pandemic; however, repeatedly prioritizing the government's interest over private property ownership interests absent clear articulations of the police power's outer limits necessarily undermines future assertions of police power limitations. In common law systems where recency helps determine precedential value and shape cultural norms, it can be argued that personal property and autonomy rights survive as long as they remain a significant part of the debate.

In sum, while courts see the great economic harm suffered by regulatory taking plaintiffs, courts are largely fearful of setting precedent that would slow and otherwise burden state actors in emergency settings. Thus, a pandemic takings plaintiff must not only establish their case on the merits of a takings claim, but they must also show the court that ruling in plaintiff's favor will not set precedent that seriously undermines public policy goals of maintaining the government's ability to act swiftly and decisively during public health and safety emergencies.

III. FUNDAMENTAL FLAWS IN APPLICATION

As suggested in previous sections, the current regulatory takings doctrine is riddled with problems arguably resulting in unpredictable legal application and courts' excessive deference to states exercising police power—even during public health emergencies. This section proceeds by detailing these issues created by (1)

[73] *See* Friends of Danny Devito v. Wolf, 227 A.3d 872, 889 (Pa. 2020), *cert. denied* 208 L. Ed. 2d 17 (2020); *see* TJM 64, Inc. v. Harris, 475 F. Supp. 3d 828, 835 (D. Tenn. 2020); *see* Auracle Homes, LLC v. Lamont, 478 F. Supp. 3d 199, 214 (D. Conn. 2020); *see* Elmsford Apartment Assocs., LLC v. Cuomo, 469 F. Supp. 3d 148, 158 (S.D.N.Y. 2020).

an overly broad police power blanket defense and (2) an imprecise factual ad hoc analysis created by *Penn Central*. This section emphasizes courts' inability to strike an appropriate balance between private and public interests so long as the regulatory takings doctrine remains unchanged, and courts continue to view whether an exercise of police power is legitimate as a threshold inquiry for a takings claim.

A. Overly Broad Police Power Blanket Defense

While a property rights-infringing exercise of police power must certainly be legitimate, a finding of legitimacy does not preclude a regulatory takings analysis on the merits. This is because the blanket defense to a takings claim is duplicative, overly simplistic, and precludes some justifiable recovery. Additionally, courts have set conflicting precedents regarding the blanket defense.[74]

The police power blanket defense is duplicative because the policy justifications for the blanket defense are (1) government overexposure to liability and (2) property owners' incentive to create nuisance for compensation.[75] These concerns are addressed through the current factual ad hoc analysis, which considers character of the government action (the third factor where the government's purpose of preventing harm is considered) and reasonable investment expectations (the second factor where courts will safely conclude it is not reasonable to expect compensation for creating a nuisance).[76] Including a blanket defense is redundant, as it will be considered as part of the ad hoc analysis.

The police power blanket defense is overly simplistic. Case law says that even emergency powers are not without limits,[77] yet courts give complete rational basis deference to government orders without weighing public interest against the destroyed/injured property. "And where the public interest is involved[,] preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property."[78]

---

[74] *See, e.g.*, EARNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 546–54 (1904); Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); William B. Stoebuck, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057 (1980).

[75] *COVID-19: Regulatory Takings Considerations for State and Local Governments*, *supra* note 62.

[76] *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

[77] *See* Home Bldg. & Loan Ass'n v. Blaidwell, 290 U.S. 398, 442 (1934).

[78] Miller v. Schoene, 276 U.S. 272, 279–80 (1928).

The police power blanket defense precludes some justifiable recovery, as arbitrary regulation can arise from excessive court deference to government action justified solely as legitimate exercise of police power. This is because this check seems to be no more than a loose relevance standard. Even during a pandemic, this undermines policy concerns about preserving individual property rights over time, similar to Justice Holmes' slippery slope concerns with police power. "If, instead, the uses of private property were subject to unbridled, uncompensated qualification under the police power, 'the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed].'"[79]

For example, a state could theoretically conclude the states' air quality today is negatively impacting the health of all its residents and, to protect the public's health and safety, order all residents to stay indoors indefinitely until the air clears, which experts suggest will eventually happen as a consequence of the quarantine order. Months pass, and although readily available and equally effective alternatives present themselves, government officials persist in the quarantine order due to an intensely polarized political climate. Because the order is rationally related to public health, courts would uphold the order despite the fact that it eliminates life outside the home and destroys the nation's economy. While elections may serve as a check on this kind of excessive use of police power, considering the extent of the harmful impact this order would have on society, a speedier remedy is warranted, especially if allowing the remedy would not frustrate policy goals favoring large deference to legislatures during emergency public safety and health crisis.

The police power blanket defense has given rise to conflicting rulings, as some courts say the legitimate exercise of police power alone is sufficient to negate takings claim, while others say it is not.[80] For example, in deciding a regulatory takings claim, the court in *Friends of Danny Devito* was forced to synthesize two contradictory rules set by precedent: (1) "where governmental regulation restricting activity on private property is implemented pursuant to an exercise of police power, rather than through the government's power of eminent domain, no just compensation is due"[81] and (2) "[A]ny destruction, restriction or interruption of the common and necessary use and enjoyment of property in a lawful manner may constitute a taking for which compensation must be made to the owner of the

[79] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 (1992) (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)).

[80] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322-23 (2002).

[81] Friends of Danny DeVito v. Wolf, 227 A.3d 872, 894 (Pa. 2020).

property[.]"[82] The courts' synthesis was that the proper exercise of police power is properly weighed as part of a takings analysis and alone is insufficient to negate a takings claim; thus, the court decided to rule on the merits.[83]

In short, while an exercise of police power must certainly be legitimate, its legitimacy alone is insufficient to negate a takings claim because the police power blanket defense is redundant, overly simplistic, precludes some justifiable recovery, and is built on conflicting precedent.

B. Imprecise Factual Ad Hoc Analysis

The *Penn Central* ad hoc analysis of regulatory takings affords courts too much discretion and too little guidance, resulting in imprecise application.[84] This is primarily because of two fundamental flaws: (1) the denominator problem and (2) the conflated justification and property deprivation analysis.

The denominator problem stems from the first factor of the *Penn Central* ad hoc analysis: the regulation's economic impact on the affected property. Here, courts have discretion to view the affected property on a complete spectrum, from incredibly narrow to incredibly broad.[85] For example, the court in *Mahon* viewed the affected property narrowly as mineral rights, although technically the court could have viewed the affected property as the entire parcel comprising of surface rights, usable air space rights, and so on.[86] By viewing the affected property through a narrow lens, the court more easily found that a regulatory taking had occurred.[87] In contrast, the court in *Penn Central* chose not to view the grand central station airspace rights in isolation, but rather viewed the affected parcel as a whole, consisting of surface rights, mineral rights, and so on.[88] By viewing the affected property through a broad lens, the court more easily found that a regulatory taking had not occurred.[89] This discretion to view the affected property broadly or narrowly arguably provides too much wiggle room to ensure uniformity in court analysis and application of the regulatory takings doctrine.[90]

---

[82] *Id.*

[83] *Id.*

[84] *See* Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 COLUM. L. REV. 1697, 1697 (1988).

[85] *See* John E. Fee, *The Denominator of Regulatory Takings*, *in* TAKING SIDES ON TAKINGS ISSUES: PUBLIC AND PRIVATE PERSPECTIVES, 51 (Thomas E. Roberts ed., 2002).

[86] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[87] *Id.*

[88] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 116 (1978).

[89] *Id.*

[90] Fee, *supra* note 85.

Next, the conflated justification and property deprivation analysis stems from the weightiest factor in the ad hoc analysis: character of the government's action. Here, courts have discretion to consider justifications for the property deprivation, as distinguished from determining the true extent of the claimant's loss alone. For example, although the court in *Penn Central* initially declared that it would independently determine (1) whether a taking had occurred and (2) whether just compensation was due,[91] it ultimately blended the two analyses by considering the character of the government's action as part of its property deprivation determination (ruling that no property had been taken).[92] Specifically, the *Penn Central* court found the government action's character in that case to have been to preserve historically significant landmarks for public enjoyment.[93] However, a public interest purpose, no matter how legitimate, does not speak to whether property has been deprived. Thus, the third factor prematurely considers the government action's nature, which is relevant to whether the government should pay, as distinguished from determining the full extent of the claimant's loss.

In summary, the current factual ad hoc analysis set forth in *Penn Central* affords courts too much discretion to view the affected property broadly or narrowly and to blend justifications with takings inquiries. This creates significant imprecision in applying the regulatory takings doctrine.

IV. BALANCED INTERESTS TEST AS A SOLUTION

While many potential solutions might add certainty to the regulatory takings doctrine, the best solution is one that: (1) denies the legitimate exercise of police power as a threshold inquiry, (2) determines the nature and extent of the claimant's loss before engaging in a justification analysis to determine whether the government or the claimant is best suited to bear the regulation's burden, and (3) conducts a justification analysis following a property deprivation analysis only if the claimant's property is determined to have been substantially deprived. A solution encapsulating all three elements is capable of striking an appropriate balance between public and private interests consistently and predictably. This final section proceeds by first exploring possible solutions, and then laying out the balanced interests test. This section will emphasize the balanced interests test's unique potential to fix courts' overly broad deference to state legislatures that is plaguing the regulatory takings doctrine today.

[91] Penn Cent. Transp. Co., 438 U.S. at 122.
[92] *Id.* at 138.
[93] *Id.*

A. Possible Solutions to the Regulatory Takings Doctrine's Problems

As noted in the previous section about the policy informing courts' rulings on regulatory takings claims during pandemics, courts are reluctant to grant relief to plaintiffs out of fear of setting precedent that ties the states' hands during public health emergencies. On the other hand, if courts always deny recovery, then important property rights may erode over time until individual property ownership disappears entirely. These concerns are addressed by each solution explored here: delayed recovery, replacing the ad hoc analysis with categories, and the balanced interests test.

One possible solution is to permit recovery at a later date. Under this theory, courts would be more inclined to grant plaintiffs relief because permitting the state to pay once the public health emergency has ended would avoid slowing crucial state action or diverting precious state resources during public health emergencies. However, this solution would be unlikely to succeed as intended, as the prospect of incurring debt alone is likely enough to deter immediate state action. While this solution offers a different form of liability, it does little else to address the need to maintain the possibility of immediate state action during public health emergencies.

Another solution is to replace the ad hoc analysis with bright-line categories. Under this theory, courts would grant plaintiffs relief where the given facts fall neatly into categories created by policy, such as the deprivation of all economic value per-se takings rule. State actors would be on clear notice of which actions incur liability, and plaintiffs' recovery would be much more certain. However, drawing these bright-line rules would be incredibly difficult, as property is complex and often viewed in multiple ways, as illustrated by the denominator problem. This difficulty would likely result in either complete deference to state actors similar to what we see today or arbitrary distinctions resulting in illogical and impractical limitations on police power.

The last solution offered here is a solution that balances public and private interests rather than giving rational basis deference: the balanced interests test. This approach is in accordance with the traditional spirit that "[t]he determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest."[94] This solution involves a two-step analysis where the given facts do not fall neatly into any per-se takings category. The

[94] Agins v. City of Tiburon, 447 U.S. 255, 260 (1980), *abrogated* by Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005).

analysis steps are two independent determinations: (1) the character and extent of the claimant's loss and (2) whether the government must pay—in other words, whether the public is better equipped to pay compared to the individual. Analyzing regulatory takings claims in this manner precludes the police power blanket defense and allows for clear, focused, and independent analysis of the character and extent of the claimant's loss before examining the government's arguments for avoiding liability. Theoretically, courts will be forced to make all relevant considerations, including threats to individual property rights and not just whether the states' actions were a legitimate exercise of police power. Also, courts will better articulate the actual reasons informing their decision, thus adding certainty and predictability to the takings doctrine. Finally, state actors will not be unduly restrained under this test because there are easy ways of showing that the individual is better suited than the public to bear the regulation's burden, as shown in the next section.

In summary, compared to many other solutions, the balanced interests test shows the greatest potential for adding certainty and legitimacy to the vague regulatory takings doctrine today without slowing state actors during public health emergencies.

B. The Balanced Interests Test Appropriately Weighs Public Interest Against Individual Interest in Determining Whether the Government Owes Compensation

This subsection explains the mechanics of the two-step balanced interests test and then demonstrates how the balanced interests test addresses courts' primary policy concerns in deciding regulatory takings claims.

The balanced interests test's first step is well described as an altered *Penn Central* ad hoc analysis. This is for two reasons. The first is because, like *Penn Central*'s ad hoc analysis, a court's finding that a per-se taking rule applies precludes a balanced interests test analysis. The second is because this step is narrowly designed to answer the question: does the nature and extent of the claimant's loss create a presumption that a taking has occurred? In other words, has the claimant been substantially deprived of property? Here, the following three factors are weighed: (1) the regulation's economic impact on the affected property, (2) the affected property owner's reasonable investment expectations, and (3) new uses, rights, benefits, or value arising from the regulation.

The second step occurs only if a court conducts the first step and finds that the claimant has been substantially deprived of property, as distinguished from a complete deprivation of property (which may suggest a premature taking

determination). If so, this substantial property deprivation invokes a presumption that a taking has occurred. Assuming such, a presumption of the government's liability is born, and the burden of persuasion shifts to the government to show that the individual is best suited to bear the burden of regulation, not society as a whole. Notably, this burden is not particularly difficult to meet in times of emergency, as the government can meet its burden by (1) showing that the government has not had sufficient time to consider how its action would disproportionately affect certain individuals, (2) showing an absence of readily available and effective alternative action amidst an ongoing crisis, (3) showing the deprived property would have been lost even without government action, or (4) otherwise demonstrating through the preponderance of the evidence that the affected individual property owners are better suited than society as a whole to bear the regulation's burden.

This approach addresses courts' primary policy concerns in deciding whether a regulatory taking has occurred. These concerns include maintaining the government's ability to act swiftly and decisively during public health/safety emergencies, upholding important property freedoms, and vindicating and compensating victims of arbitrary government action where: (1) the deprived property would not have been lost anyways, (2) the government has had ample time to consider disproportionately affected individuals or select groups, and (3) the government does not take reasonable alternative action. Reasonable in this context means readily available, less harmful, and using the same amount or less resources compared to the original action.

The balanced interests test maintains the government's ability to act swiftly and decisively during public health emergencies. Even if a court finds that a taking has occurred, the government has many defenses it can assert to avoid liability. For example, states would not likely incur liability for the first shut-down orders in response to COVID-19 because states had little time to understand what they were dealing with. At that time, they knew how quickly the virus was spreading and little else. In the absence of adequate time for states to properly assess whether individuals or groups would be disproportionately affected by an imminent threat to public health and safety, affected individuals are better suited than society as a whole to bear the costs of life-saving regulation. This is because the interest in preserving the states' power to act quickly to save lives outweighs the individual property interests—at least at that particular moment when much is unknown. Although the burden of persuasion shifts to the government to show that the affected individual is better suited than society as a whole to bear the regulation's cost, the government retains its ability to act swiftly and decisively during emergencies because of the many available defenses.

The balanced interests test upholds important property values primarily by shifting the burden of persuasion to the government once a taking has been found. This burden-shifting model forces the government to articulate well-recognized reasons for avoiding liability, as distinguished from forcing plaintiffs to assert how their property rights have been violated. Accordingly, this slows the slippery slope spoken of in *Mahon*.

Lastly, the balanced interests test vindicates victims of unjustified government action. This part of the test captures the idea that while states are endowed with broad police power, this power is not limitless. Under this test, although courts will likely recognize successful takings claims less often than not, courts will compensate victims of arbitrary government action who otherwise would go without compensation for no reason other than the fact that the state said the magic words "police power." Under this test, states will no longer be able to play the "police power" card to escape liability where their actions disproportionately affected individuals without proper justification.

In conclusion, the balanced interests test appropriately weighs public interest against individual interest in determining whether the government owes compensation.

CONCLUSION

State responses to COVID-19 well illustrate the inherent tension between private property rights and government exercises of state police power during pandemics. Many regulatory takings claimants, including some bartenders in Arizona, argue that their property losses are a burden better suited for the public to bear as a whole, as distinguished from them as individuals.

However, their chance for relief may be doomed from the start irrespective of the actual merits of their claims. This is because many courts inappropriately treat whether the offending regulation is a legitimate exercise of the police power as a threshold inquiry. While legitimacy is certainly necessary for any exercise of police power, legitimacy cannot preclude an inquiry into whether property has been taken without just compensation.

Additionally, the current *Penn Central* ad hoc analysis for evaluating regulatory takings claims is a poor tool for weighing public health interests against private property interests during a pandemic. When a per-se rule does not apply, judges have broad discretion to hold the government's interest over even the most compelling of private interests. Furthermore, judges may construe the affected property too narrowly or too broadly, depending on their own view. This results in imprecise, unpredictable outcomes—even where state actors have readily

available, less harmful, and cheaper alternatives to their offending regulation. If left unaltered, the *Penn Central* ad hoc analysis will allow the gradual erosion of important property rights over time, thus affecting persons long after the COVID-19 pandemic ends.

Accordingly, a regulatory takings analysis that properly balances public and private interests will: (1) deny the legitimate exercise of police power as a threshold inquiry, (2) determine the nature and extent of the claimant's loss before engaging in a justification analysis to determine whether the government or the claimant is best suited to bear the regulation's burden, and (3) conduct a justification analysis only when the claimant's property is determined to have been substantially deprived. These are the hallmarks of the balanced interests test, which grants state actors broad discretion during emergencies while permitting recovery where readily available, less harmful, and cheaper alternatives to an offending regulation exist. This is a test that keeps the baby but not the bathwater.