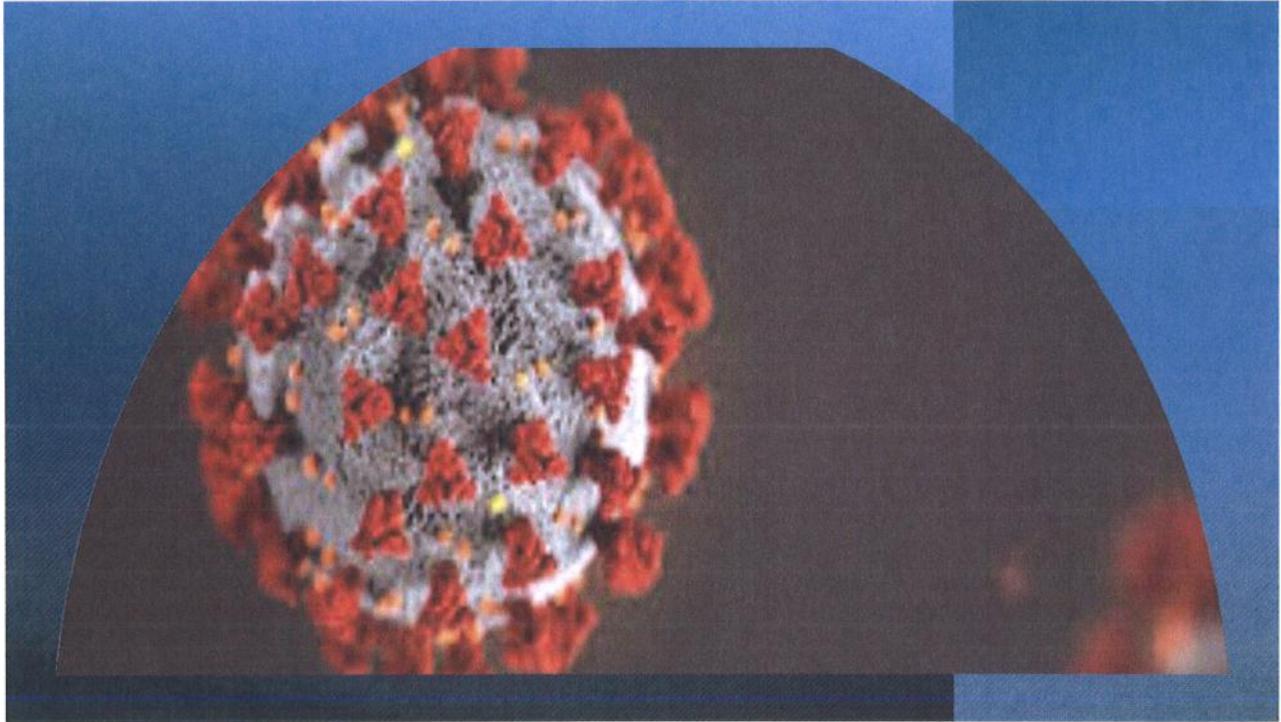


Essential Property Rights for Non-Essential Property Owners: Stay-at-Home Orders and Takings



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As state and local governments have begun reopening their economies, the dark reality is that, as of the date of this article, the pandemic gripping the nation has left over 250,000 dead in its wake and infected over 11,000,000 Americans.¹ Amid the COVID-19 pandemic, virtually every municipal, county, and state government entity implemented unprecedented and extraordinary stay-at-home orders to combat the virus' spread by closing non-essential businesses. Rarely have external events beyond the power of civil authorities to control so disrupted domestic economic life. These measures engender controversy because they implicate legitimate constitutional liberty and property interests. From a property rights perspective, the following question arises: when do these measures trigger constitutional protections against government taking private property without paying compensation under the Fifth Amendment, U. S. Const., or Article X, Section 6(a), Fla. Const?² Plaintiffs in several states have challenged stay-at-home orders on federal and state takings bases.³

In inverse condemnation, an owner's remedy is compensation for what the government took. Takings clauses spread the economic costs of public action across the public as a whole: "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar 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."⁴ Florida courts read the Article X, Section 6(a) takings clause coextensively with the Fifth Amendment.⁵

Takings jurisprudence recognizes several regulatory takings theories. One involves actions that authorize the government to occupy or physically invade property. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982); *Storer Cable T.V. of Florida, Inc., v. Summerwinds Apartments Associates, Ltd.*, 493 So.2d 417 (Fla. 1986). An action compelling the surrender of possession of property is a categorical taking because a fundamental stick in the proverbial bundle of sticks of an owner's interest in property is the right to exclude others from the property.⁶ No matter how slight the invasion, as long as it has a degree of permanence, it is a paradigmatic taking. *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 538-39 (2005). Relatively straightforward inverse cases, therefore, are those falling into the category of commandeering private property during a war or pandemic, even if temporarily.⁷

Another theory involves actions that totally deprive owners of substantial use or value of property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015, 112 S. Ct. 2886, 120 L.Ed.2d 798 (1992); *Keshbro, Inc. v. City of Miami*, 801 So.2d 864, 871 (Fla. 2001). These also are categorical takings, warranting no fact-intensive analysis to determine that a taking has occurred. Government action so onerously burdensome that it totally deprives owners of substantially all use *or* value of their property is a categorical taking because it is tantamount to a physical taking.⁸

Yet not every governmental action is viewed under the lens of *Lucas* because most typically allow for some residual private uses of property. Therefore, another non-categorical takings theory involves police power actions falling short of directly commandeering property or eliminating substantially all use or value. A partial deprivation of use theory requires courts to

engage in an *ad hoc* factual inquiry concerning the governmental action's economic impact on the owner, the extent of its interference with distinct-investment backed expectations, and the character of the government's action. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124, (1978); *Tampa-Hillsborough County Expressway Authority v. A.G.W.S.*, 640 So.2d 54, 59 (Fla. 1994) (Barkett, C.J., concurring).⁹ *Penn Central*'s test applies if the owner loses something less than substantially all economically viable use of property; its test and *Lucas*'s are mutually exclusive.¹⁰

Police power describes largely everything the sovereign can do.¹¹ The issue is whether the police power action goes too far.¹² Governments, defending stay-at-home orders, will contend that their actions do not damage or destroy non-essential businesses on property but only cause a temporary loss of the use of the business' premises. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002). Courts accord governments latitude in regulating their local economies with less than mathematical exactitude. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Governments will defend these cases based on their legitimate interest in public safety, health, and welfare during an international worldwide pandemic, contending that under *Penn Central*, their police powers are broadly entitled to judicial deference. Judicial deference accorded governmental action by *Penn Central* makes these cases more difficult to prosecute than *Loretto* or *Lucas* categorical takings.

There is a risk, however, that governments' characterization of their actions as police power exercises can swallow up the other *Penn Central* factors. Inquiring into the character of the governmental action is not the alpha and omega of the takings analysis, and governments' characterization of their actions as police powers is not a complete defense to a partial takings claim. One cannot conflate a factor with a bright line rule. A plaintiff in a partial regulatory takings

case always concedes the regulation's validity. The corollary to paying too much attention to *Penn Central's* "character prong" is paying too little attention to its other prongs, particularly the economic impact of the action on the owner. Careful practitioners, therefore, should clearly articulate the constitutional theory underpinning their takings claims.

A practical litmus test for application of the character prong of the *Penn Central* theory considers whether governments' actions narrowly target specific property uses or activities that themselves pose a public health threat, much the way courts consider nuisance abatement actions.¹³ Regardless how governments characterize their actions, courts have always mandated compensation when an action goes too far. *Mahon*, 260 U.S. at 415. The characterization of government action as a police power is not the *sine quo non* of the takings analysis since courts read the Fifth Amendment's public use requirement conterminously with the governments' police power limits. *Midkiff*, 467 U.S. at 240.

A limitation on potential inverse condemnation recovery is that Florida law does not consider a business to be property in the constitutional sense. Article X, Section 6(a) only requires compensation for taking constitutionally protected property interests. In a direct condemnation case, a business owner is only entitled to claim business damages if the owner qualifies for business damages under section 73.071(3)(b), *Fla. Stat.* (2019).¹⁴ A property owner needs carefully to distinguish whether a stay-at-home order affects a constitutionally protected property interest rather than a business on the property. Under federal takings law, when the government commandeers an on-going business, as opposed to a business premises, the Fifth Amendment demands compensation for the going concern or goodwill use lost by the business as a result of the taking.¹⁵ Takings claims based on stay-at-home orders are subject to the four (4) year statute

of limitations in section 95.11(3)(p), *Fla. Stat.* (2019). See *Sutten v. Monroe County*, 34 So.3d 22 (Fla. 1st DCA 2013).

Protecting constitutional rights during times of national emergency is critical. Owners of property with non-essential businesses have constitutional rights even in a time of national catastrophe. Governments have no greater constitutional power after an emergency declaration than they did before. As these cases progress through the courts, it will be instructive to see their resolutions. A regulatory taking can either be permanent in duration or temporary. *Infra* at n. 7. If an owner prevails on a permanent regulatory takings claim, the owner is entitled to compensation for the difference in value of the owner's property before and after enactment of the regulation or its application to the property. By contrast, if an owner prevails on a temporary regulatory takings claim, the owner is entitled to compensation for the reduction in value of the property for the duration of the stay-at-home order, the value being estimated by comparing the effect of the taking to a leasehold interest in the property.

There are historical and self-imposed prudential restraints on the judiciary's role which create an inclinational reluctance on the part of courts to reach a takings issue. Consequently, the careful practitioner should consider the feasibility of non-takings challenges like unlawful delegation of authority, *ultra vires* acts, or substantive due process claims. As noted, *infra* at n. 3, Wisconsin's Supreme Court struck down an extension to the state's stay-at-home order, not on takings grounds, but because the court concluded the order exceeded authority delegated to the executive branch by the legislature and constituted the unlawful exercise of rule-making authority in contravention of the state's administrative procedures act. *Wisconsin Legislature v. Palm*, 391 Wis.2d 497, 942 N.W.2d 900 (Wi. 2020).

¹ https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days

² Modern takings jurisprudence recognizes an infinite number of ways governmental actions can implicate takings clauses. *Arkansas Game and Fish Comm'n. v. United States*, 568 U.S. 23 (2012). Consequently, exhaustive discussion of the myriad takings challenges and defenses to stay-at-home orders is beyond this article's scope. This article identifies jurisprudential guardrails to guide litigants and the judiciary. It does not discuss non-takings challenges like unlawful delegation of authority, *ultra vires* acts, or substantive due process claims. Wisconsin's Supreme Court, by split decision, struck down an extension to the state's stay-at-home order, not on takings grounds, but because the court concluded the order exceeded authority delegated to the executive branch by the legislative branch and constituted the exercise of rule-making authority in contravention of the state's administrative procedures act. *Wisconsin Legislature v. Palm*, 391 Wis.2d 497, 942 N.W.2d 900 (Wi. 2020).

³ In the Northern District of Florida, several plaintiffs, including former Arkansas Governor, Michael D. Huckabee, filed a multicount complaint against Walton County alleging, inter alia, a taking of private property under the Fifth Amendment. At issue was a county ordinance which closed all beaches, public and private, and prohibited anyone from being on the beaches, including owners of private beaches. *Dodero, etc., et al., v. Walton County, etc., et al.*, Case No. 3:20-CV-05358-RV-HTC. The plaintiffs argued that the closure amounted to a physical taking of private property. A more complete list of pending litigation in other states is found at <https://www.inversecondemnation.com/inversecondemnation/2020/05/new-article-evaluating-emergency-takings-flattening-the-economic-curve.html>.

⁴ *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

⁵ *St. Johns River Water Management Dist. v. Koontz*, 77 So.3d 1220, 1222 (Fla. 2011), reversed on other grounds, 133 S.Ct. 2586, 2596 (2013).

⁶ In *Nollan v. California Coastal Commission*, 483 U.S. 825, 831 (1987), the Court reiterated its holding that, as to property reserved by its owner for private use, "the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property[.]'" quoting *Loretto*, 428 U.S. at 433. See also, *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

⁷ See also, *Youngstown Sheet and Tube Co., v. Sawyer*, 343 U.S. 579 (1952) (Seizure of steel mills during Korean War); *Kimball Laundry Co. v. United States*, 338 U.S. 1(1949).

⁸ *Lingle*, 544 U.S. at 538-39.

⁹ By contrast, a plaintiff does not need to allege detailed facts regarding the economic impact of physical seizures of property or to allege a cause of action for a physical invasion or a regulation that authorizes physical invasion. *Lingle*, 544 U.S. at 538-39.

¹⁰ An owner's investment backed expectations are irrelevant in a *Lucas* takings case.

¹¹ However, the federal takings clause public use requirement is coterminous with a sovereign's police power. *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 240 (1984).

¹² *Pennsylvania Coal v. Mahon*, 260 U.S.393, 415 (1922).

¹³ By comparison, in a *Lucas* takings case, the government's action was immune from a takings challenge only if it duplicated the "result...achieved in the courts by adjacent landowners...under the State's law of private nuisance, or by the [State's] power to abate...nuisances." *Lucas*, 505 U.S. at 1029.

¹⁴ *Tampa-Hillsborough County Expressway Authority v. K.E. Morris Alignment Services, Inc.*, 444 So.2d 926 (Fla. 1984).

¹⁵ *Kimball Laundry*, 338 U.S. at 11, (Long-term, but temporary, seizure of going-concern private laundry business, including use of facilities and equipment, by the Army during World War II).