

PROPERTY RIGHTS IN TIMES OF CRISIS



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Robert once again was selected by his peers to the 2020 Best Lawyers in America list in the fields of Eminent Domain & Condemnation Law, Land Use & Zoning Law, Litigation-Land Use & Zoning, and Real Estate Law. He was Best Lawyers' Lawyer of the Year 2019 for Litigation – Land Use & Zoning, 2018 and 2014 Lawyer of the Year for Eminent Domain & Condemnation Law, and 2017 Lawyer of the Year in Land Use & Zoning Law. Robert is also listed in Super Lawyers in Appellate Law, Land Use/Zoning, and Government/Cities/Municipalities. Robert also taught law at the University of Santa Clara School of Law, and was an exam grader and screener for the California Committee of Bar Examiners.

He is also a frequent speaker on land use and eminent domain issues in Hawaii and nationwide. Robert regularly publishes scholarly and practical articles in his area of practice. His blog on land use, property, and takings law, [inversecondemnation.com](https://www.inversecondemnation.com), is one of the most widely-read blogs on those subjects.

"REAL LIBERTY," VACCINATION, PLAGUE, POLICE POWER, AND TAKINGS

Spurred by the headlines that have been swirling around all of us, I decided to re-read cases about the role of the courts when government curtails liberty or property rights under its police or emergency powers. We've now seen lawsuits claiming that an order to shut down businesses is a due process violation and is a regulatory taking requiring compensation, and we're hearing about official quarantines, citations for people violating stay-home orders, and the like.

We started with the vaccination cases. These got us to thinking that if the government can for the most part force people who don't want vaccinations to get vaccinations (violating their bodily integrity),

then how will a court treat seemingly less-invasive intrusions into liberty or property in the name of public health?

In *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), <https://www.inversecondemnation.com/files/jacobson-v-mass-197-us-11.pdf>, the Court distinguished "an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint," with what it labeled "[r]eal liberty":

Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others. This court has more than once recognized

it as a fundamental principle that “persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State;

...

It is then liberty regulated by law.

Id. at 26, 27 (footnote omitted). The Court based its reasoning on public “self-defense,” noting that “a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.” Id. at 27.

In other words, that old principle that Justice Scalia referred to in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), as a “background principle[] of the state’s property and nuisance” law. If you can’t protect your body from being physically invaded, a court isn’t likely to conclude that you can use your property in a way that is harmful to others. And although the government’s powers cannot be exercised in “an arbitrary, unreasonable manner,” or “go so far beyond what was reasonably required for the safety of the public,” the courts won’t seriously question another branch’s conclusions. *Jacobsen*, 197 U.S. at 28.

That conclusion about who gets to determine that your use of property is, in fact, harmful to others remains valid today. As we’ve seen, the courts are going to be even more deferential to the authorities’ assertions that “X measure is necessary to preserving the public health” than they are in the usual circumstances. On a good day, courts are already super deferential, and we can’t imagine that the courts would be less deferential in the current situation. (Joe Hadacheck was not available for comment. <https://www.inversecondemnation.com/inversecondemnation/2016/03/takings-pilgrimage-la-edition-police-power-the-zoning-game-and-nuisances.html>)

But what about those cases where the courts have struck down measures that were done seemingly to protect the public health, such as a quarantine to battle the bubonic plague? In *Wong Wai v. Williamson*,

103 F. 384 (N.D. Cal. 1900), <https://case-law.vlex.com/vid/103-f-384-n-595184566>, and *Jew Ho v. Williamson*, 103 F. 10 (N.D. Cal. 1900), <https://case-law.vlex.com/vid/103-f-10-n-595184430>, for example, the court enjoined enforcement of a San Francisco ordinance that was based on city officials’ belief “that danger does exist to the health and citizens of the city and county of San Francisco by reason of the existence of germs of the [plague] remaining in the district hereafter mentioned [Chinatown].” *Jew Ho*, 103 F. at 12. San Francisco supported the ordinance by referring to *Mugler v. Kansas*, 123 U.S. 623 (1887), <https://www.inversecondemnation.com/files/123us623.pdf>, and the city’s police powers. Why wasn’t that the trump card?

The plaintiffs in those cases alleged the ordinance wasn’t reasonably designed to protect the public health, but really was aimed at Chinese people. We saw this same vibe in an earlier Hawaii decision, *The King v. Tong Lee* (1880), <https://www.inversecondemnation.com/inversecondemnation/2020/03/police-power-hawaii-style-the-king-v-tong-lee-1880-.html>, which upheld a restriction on commercial laundries in Honolulu’s Chinatown, although the racial bias argument was apparently not developed in that case. The California federal court, by contrast, considered the plaintiffs’ arguments that what looked like a public health ordinance was, in reality, racial discrimination:

The evidence here is clear that this is made to operate against the Chinese population only, and the reason given for it is that the Chinese may communicate the disease from one to the other. That explanation, in the judgment of the court, is not sufficient. It is, in effect, a discrimination, and it is the discrimination that has frequently been called to the attention of the federal courts where matter of this character have arisen with respect to Chinese.

Jew Ho, 103 F. at 23 (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), <https://www.law.cornell.edu/supremecourt/text/118/356>).

Ah, but you say, a takings claim does not seek to enjoin the government action because it is unreasonable or discriminatory, but instead asks only for compensation as a cost-spreading measure for an otherwise valid exercise of governmental power ... what about that?

A good exemplar of how courts will likely react to these type of arguments is the Minnesota Supreme Court's ruling in *Zeman v. City of Minneapolis*, 552 N.W.2d 549 (Minn. 1996), <https://mn.gov/law-library-stat/archive/supct/9608/cx95429.htm>, (thanks to a learned Minneapolis colleague for sending this one our way). There, the court reversed the court of appeals' conclusion that the city's revocation of Zeman's rental licenses because his property had been the subject of multiple disorderly use complaints was a Penn Central taking.

The court's analysis is worth quoting at length:

The city argues that the ordinance at issue here is a valid exercise of municipal power to ameliorate a nuisance, namely criminal activity in a residential neighborhood. Zeman does not challenge this characterization, but points to the fact that the city erroneously employed its own ordinance. This seems to us to be irrelevant: if the ordinance indeed is a proper effort to protect the health, morals, or safety of the community which has the effect of prohibiting a particular use of a property, then there will be no taking. See *Mugler*, 123 U.S. at 661-62.

The first two of the Penn Central factors involve the economic impact of the regulation on the person suffering the loss and the extent to which the regulation interferes with distinct investment backed expectations. Penn Central, 438 U.S. at 124-25. Certainly, as Zeman's witness testified, the economic impact on Zeman has been substantial; the best use for his property is as an apartment building, and without a rental dwelling license he cannot operate it as such. Moreover, rezoning of the property for another use is unlikely and, given the economically depressed nature of the neighborhood, so too would be locating a buyer. Also, as Zeman

has operated this property as a rental dwelling since acquiring it in 1975, it would appear that he has some investment-backed expectations in its use as such. Thus, the first two Penn Central factors militate towards a decision in Zeman's favor.

Consideration of the third factor, the character of the government action, however, favors the city. Under this factor, we must examine the regulation at issue, with emphasis on its purpose and the possibility of achieving that purpose with this regulation. While this is always an important consideration in a takings analysis, in cases involving a regulation aimed at the protection of the public health and safety, it becomes paramount. If the state regulation appears genuinely designed to prevent harm to the public and is likely to achieve that goal and the harm suffered by the property owner does not appear to be one that should be borne by the entire community, we will not find a taking. See, e.g., *Mugler*, 123 U.S. at 661-62; *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 488-93 (1987).

Mugler held that a state could prohibit a use of a property that it determined to be injurious to community health, morals, or safety and, therefore, although enforcement of a statute prohibiting the manufacture of alcohol against *Mugler*, a beer maker, would substantially depreciate the value of his property, no taking occurred. *Mugler*, 123 U.S. at 656-57, 668-69. Since *Mugler*, the Court has upheld as valid state regulatory efforts—denying compensation for alleged takings—the destruction of infected trees jeopardizing local orchards, *Miller v. Schoene*, 276 U.S. 272, 279-80 (1928), the banning of brickyard plant operations in urban areas, *Hadacheck v. Sebastian*, 239 U.S. 394, 410-11 (1915), and strict limitations on coal mining activities, *Keystone*, 480 U.S. at 485.

A harm-prevention regulation, if not a ruse for a state purpose other than protecting the public from noxious harm or illegal activity, is a powerful rationale militating against finding a

taking. See Bruce W. Burton, *Regulatory Takings and the Shape of Things to Come: Harbingers of a Takings Clause Reconstellation*, 72 Ore. L. Rev. 603, 618-19 (1993). A reviewing court must look to the nature of the regulation with an eye on its purpose and the probability of achieving that purpose with this regulation. If the regulation is drawn to prevent harm to the public, broadly defined, and seems able to achieve this goal, then a taking has not occurred. See, e.g., *Keystone*, 480 U.S. at 488-93.

Zeman, 552 N.W.2d at 553-54.

We're thinking that if the government were to physically occupy or appropriate property during a health emergency, if its measures are beyond the government's power, or if there's proof that the public health isn't the real reason but is a pretext, that these situations would likely be subject to a much different analysis. See, e.g., *De Keyser's Royal Hotel, Kimball Laundry and Youngstown Sheet and Tube*, for example. But your typical regulatory takings situation is going to be an uphill climb.

SOME READINGS ON EMERGENCY TAKINGS, COMPENSATION FOR COMMANDEERED PROPERTY

It's tough with all that's swirling around all of us to keep focused on non-virus related things. But because we think that's one way to keep calm and carry on, we shall continue to endeavor to do so. But come on, being takings and dirt lawyers we also can't help viewing current events through that lens, no? Consequently, we shall also continue from time-to-time to address issues that have cropped up in practice that are related to the thing that is on everyone's mind these days.

In that vein, here are some things worth reading:

- "History: Fire and Blood(worth)" - Steve Silva, *Taking Nevada* blog ("Many argue, with great merit, that when a person's property is sacrificed to preserve the public health, that the person is entitled to compensation. But the law has not yet reached that conclusion, ... [and] there is no legal mandate that the sovereign

must so compensate."). <https://takingnevada.com/2020/03/26/history-fire-and-bloodworth/>

- "Does the Takings Clause Require Compensation for Coronavirus Shutdowns?" - Ilya Somin, *The Volokh Conspiracy* ("Under current Supreme Court precedent, the answer is almost always going to be "no." But some compensation may be morally imperative, even if not legally required."). <https://reason.com/2020/03/20/does-the-takings-clause-require-compensation-for-coronavirus-shutdowns/>
- Eugene Kontorovich, "Liability Rules for Constitutional Rights: The Case of Mass Detentions," 55 *Stanford L. Rev.* 755 (2004) ("Another objection to liability rules for constitutional rights is that forced takings of constitutional entitlements may have particularly high "resentment costs." This term refers to the psychological or dignitary cost of having an entitlement forcibly taken."). <https://reason.com/2020/03/20/does-the-takings-clause-require-compensation-for-coronavirus-shutdowns/>

We also got to thinking about compensation issues also. So we dusted off what we think is one of the more important decisions in the oeuvre, *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1948), <https://www.inversecondemnation.com/files/338us1.pdf> . That case, as you recall, involved the wartime long-term but temporary taking by the feds of a going-concern commercial laundry, for use as a military laundry.

The case has often been used to support arguments that business losses that result from an affirmative taking (or commandeering) of property for public use should be compensable. Most jurisdictions, as you know, do not include such losses in "just compensation." In *Kimball Laundry*, however, the Supreme Court held:

But when the Government has taken the temporary use of such property, it would be unfair to deny compensation for a demonstrable loss of going-concern value upon the assumption that an even more remote possibility— the

temporary transfer of going-concern value— might have been realized.

Id. at 15. There's an ongoing debate about whether business losses should be part of just compensation when the government takes property, but does not necessarily take over the business. Is the loss of business just a "consequential" damage, and therefore not compensable? Or should, as others have argued, these losses be part of compensation because the measure of compensation is supposed to be what the owner lost, and not what the taker gained?

We're certainly not going to resolve that debate in this modest blog post. We only put the case here to add to your reading list because we think that if the government acknowledges that compensation is required for emergency takings or commandeering, the question of just what is compensable is going to take center stage. And on that question, you better know Kimball Laundry.

HOW MUCH POWER?

The headlines from the last several weeks—and a couple of inquiries from colleagues and clients—got us to thinking about government power in times of crisis and the tension between that power and property and other individual rights.

On one hand, court decisions going back over the centuries have told us that courts are reluctant to interfere with government power that the government asserts further the public "health, safety, and welfare" (what we in the U.S. call the "police power"). But at what point do such exercises of government power require compensation to a property owner who as a consequence of the limitation on their rights suffers a loss?

So I dusted off our law books and assembled a primer of what I thought were some of the more interesting and important decisions over the centuries on the question. This is not a comprehensive list, of course, and if you think there should be others, please send them our way, and I'll add them.

- The Case of the King's Prerogative in Salt-peter, 12 Coke R. 13 (1606). The King's "saltpetre men" may enter private property to obtain saltpeter to use as an ingredient in gunpowder to be used in the national defence, but they do so with limitations about how and when they do it, and "are bound to leave the Inheritance of the Subject in so good Plight as they found it[.]"<https://www.inversecondemnation.com/files/salt-peter-12-coke-r-13.pdf>
- Gardner v. Village of Newburgh, 2 Johns. Ch. 162 (N.Y. Chancery 1816). When a municipality diverted a stream and deprived a riparian owner of his rights, the payment of compensation "is a necessary qualification accompanying the exercise of legislature power in taking private property for public uses." <https://www.inversecondemnation.com/files/gardner-v-village-of-newburgh-2-johnsons-chancery-reports-ny-1816.pdf>
- "Contraband" property and the seizure of enemy property during time of war or insurrection. <https://www.inversecondemnation.com/inversecondemnation/2020/03/and-although-they-may-be-poor-not-a-man-shall-be-a-slave-a-brief-visit-to-the-birthplace-of-a-more-p.html>
- United States v. Pac. R.R., 120 U.S. 227 (1887). During the "late civil war," the Union Army blew up railroad bridges "to prevent the advance of the enemy." No compensation because the destruction of the bridges was a "military necessity." "The destruction or injury of private property in battle, or in the bombardment of cities and towns, and in many other ways in the war, had to be borne by the sufferers alone as one of its consequences." <https://www.inversecondemnation.com/files/120us227.pdf>
- Mugler v. Kansas, 123 U.S. 623 (1887). A law criminalizing the manufacture of liquor, adopted under the state's police power, did not offend due process. It also wasn't a taking requiring compensation because losses in property's value by virtue of its restrictions for the public health, safety, or welfare is merely an "incidental

inconvenience[.]”<https://www.inversecondemnation.com/files/123us623.pdf>

- *Hadacheck v. Sebastian*, 239 U.S. 394 (1915). Prohibiting the operation of existing brickyards in some but not all parts of a city is not a due process violation. In “the absence of a clear showing” of improper purpose, the courts “must accord good faith” to the government’s claim it barred brickyards as a police power measure. <https://www.inversecondemnation.com/files/hadacheckvsebastianchiefo.pdf>
- *Attorney-General v. De Keyser’s Royal Hotel, Ltd.* [1920] AC 508. In series of separate opinions the House of Lords concluded that the Crown may not seize possession of property “in connection with the defense of the realm” (there, a hotel to house RAF officers) without paying compensation for their use and occupation. <https://www.inversecondemnation.com/files/de-keyser-royal-hotel-all-opinions.pdf>
- *Miller v. Schoene*, 276 U.S. 272 (1929). The state ordering the destruction without compensation of otherwise un-threatened cedar trees because they served as a “host plant” to a disease harmful to nearby apple trees is a valid exercise of the government’s police power. Courts should not question too hard the government’s assertion that the action was needed. <https://www.inversecondemnation.com/files/milleretalvschoene276us27.pdf>
- *The Steel Seizure Case (Youngstown Sheet and Tube Co. v. Sawyer)*, 343 U.S. 579 (1952)). The President’s order to seize steel mills during the Korean War to prevent a strike is limited by the Constitution. The executive’s power even during emergencies is limited by the legislature’s authority. <https://www.inversecondemnation.com/files/343us579.pdf>
- *Armstrong v. United States*, 364 U.S. 40 (1960). The case that gave rise to the famous quote about the cost-distribution purpose of the Just Compensation Clause: “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.” The feds had rendered invalid state law materielmen’s liens on boats being built for the federal government. Held: compensation required. <https://www.inversecondemnation.com/files/armstrongetalvunitedstate.pdf>

- *National Bd. of YMCA v. United States*, 395 U.S. 85 (1969). The government doesn’t need to pay compensation when rioters destroyed a building being occupied by soldiers during the riots. The destruction can be blamed on the rioters, and the Army was trying to defend the property, albeit unsuccessfully. Although the government is “ordinarily” liable when it occupies property, in the “unusual circumstances” here, it was the riots and the rioters that deprived the owner of the building’s use. <https://www.inversecondemnation.com/files/nationalboardofyoungmensc-1.pdf>

The overall “vibe” we take away from all of this:

1. Under “rational basis” review, modern courts are reluctant—even in the absence of crisis—to second-guess the government’s assertion that even a total restriction on someone’s property rights can be halted.
2. When faced with an assertion that there are “unusual circumstances” afoot, the courts become even more reluctant.
3. Whether compensation (and not an injunction) should be provided for an exercise of the police power is a separate question, and in the absence of an emergency or a claim that someone’s use of their property is harmful to others, the courts may enforce the requirement to pay (see *Lucas*, *Penn Central*, and *Mahon*).
4. But when there’s a claim of an emergency, crisis, that you are using your property in a way harmful to others (a conclusion the courts will generally defer to government’s judgment about), or what we might call an extreme need for the police power, courts will not require compensation.

The bottom line as we view it is that the search for principles often goes out the window in times of calamity. Not just in takings law, but generally. Denial of compensation and the rejection of the Armstrong principle might not be theoretically sound if someone is being forced to suffer for the good of the public. But much of the time it simply is.

And here's what our fellow property lawyers have been thinking about this topic:

- Anthony Della Pelle, "The COVID-19 Pandemic Allow the Government To Seize My Private Property?" https://www.mrod.law/2020/03/18/can-the-covid-19-pandemic-allow-the-government-to-seize-my-private-property/?fbclid=IwAR3rN7w1gj31OTHv2EOLsL88M-VLzvPdf88VlcWII2cuRWzTuw_ZPSWMggk
- Katrina Wu, "Governor's Use of Emergency Power to Commandeer Property Requires Payment of 'Reasonable Value.'" https://www.californiaeminentdomainreport.com/governors-use-of-emergency-power-to-commandeer-property?utm_source=divr.it&utm_medium=linkedin&fbclid=IwAR0t7HiA-HUDzo4ewpZT7cLqSOud6h1wR9os7eIMtncl8irYh5WmydjSN5Lc
- Steve Silva "O Fortuna - A casualty event is not a taking of private property for public use." <https://takingnevada.com/2019/10/31/o-fortuna/>
- Lawprof Elizabeth Joh, "Yes, States and Local Government Can Close Private Businesses and Restrict Your Movement." <https://www.politico.com/news/magazine/2020/03/18/states-police-power-coronavirus-135826>

Stay tuned. A lot more is going to develop in this area in the coming weeks and months. 🌱



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