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## Evaluating Emergency Takings: Flattening the Economic Curve

Robert H. Thomas

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# EVALUATING EMERGENCY TAKINGS: FLATTENING THE ECONOMIC CURVE

Robert H. Thomas\*

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## INTRODUCTION

Desperate times may breed desperate measures, but when do desperate measures undertaken as a response to an emergency trigger the Fifth Amendment’s requirement that the government provides just compensation when it takes private property for public use?<sup>1</sup> The answer to that question has commonly been posed as a choice between the “police power”—a sovereign government’s power to regulate property’s use in order to further the public health, safety, and welfare<sup>2</sup>—and the eminent domain

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<sup>1</sup> See Robert Higgs & Charlotte Twight, *National Emergency and the Erosion of Private Property Rights*, 6 CATO J. 747, 747 (1987) (“Much of the reduction [of private property rights] occurred episodically, as governmental officials took control of economic affairs during national emergencies—mainly wars, depressions, and actual or threatened strikes in critical industries.”).

<sup>2</sup> “Police power” describes everything a sovereign government can do. See *Hous. Auth. v. Midkiff*, 467 U.S. 229, 239–40 (1984). It even might be said to encompass the

power, the authority to seize private property for public use with the corresponding requirement to pay compensation.<sup>3</sup> But that should not be the question. After all, emergencies do not increase government power, nor do they necessarily alter constitutional rights,<sup>4</sup> and an invocation of police power by itself does not solve the compensation question but is merely the predicate issue: all governmental actions must be for the public health, safety, or welfare, in the same way that an exercise of the eminent domain power must be for a public use.

This Article provides a roadmap for analyzing these questions, hoping that it will result in a more consistent approach for resolving claims for compensation that arise out of claims of emergencies. This Article analyzes the potential takings claims stemming from emergency measures, mostly under the current takings doctrine. Which types of claims are likely to succeed or fail? In “normal” times, it is very difficult to win a regulatory takings claim for compensation. In the midst of emergencies—real or perceived—the courts are even more reluctant to provide a remedy, even when they should, and emergencies are a good time to make bad law, especially in takings law. Can a better case be made analytically for compensation?

Part I summarizes the economic “flattening the curve” principle that motivates takings claims for compensation. Part II sets out the prevailing three-factor *Penn Central* standard for how courts evaluate claims that a health, safety, or welfare measure “goes too far” and requires compensation as a taking, examining the character of the governmental action, the impact of the action on the owner, and the extent of the owner’s property rights.<sup>5</sup> Deep criticism of the *Penn Central* standard is beyond the scope of this Article, and here, I accept it as the default takings test.<sup>6</sup> But I argue that the government’s motivation and reason for its actions—generally reviewed under the rational basis standard—should not be a major question in

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eminent domain power. *See id.* at 240 (“The [Fifth Amendment’s] ‘public use’ requirement is thus coterminous with the scope of a sovereign’s police powers.”).

<sup>3</sup> *See* U.S. CONST. amend. V. The Fifth Amendment conditions the federal government’s takings power. *See* *Barron v. Mayor & City Council of Balt.*, 32 U.S. (7 Pet.) 243, 243–44, 250–51 (1833) (noting a wharf owner’s argument that the city’s diversion of water pursuant to its police power could support a Fifth Amendment claim but holding that the Fifth Amendment only limited the actions of the national government). The Fourteenth Amendment extended the just compensation requirement to the states as part of due process of law. *See* *Chi., Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 235, 241 (1897).

<sup>4</sup> *See* Steven M. Silva, *Closed for Business—Open for Litigation?*, NW. U. L. REV.: NULRNOTE (Apr. 29, 2020), <https://blog.northwesternlaw.review/?p=1361> [<https://perma.cc/5LS5-EPY8>] (“First, it must be recognized that the Constitution exists even in an emergency. The Constitution expressly permits some alterations to our ordinary system of rights during times of war—for example, the Third Amendment provides differing provisions for the quartering of soldiers in times of peace versus times of war—but those alterations are baked into the system, the Constitution does not disappear in war. And a pandemic is not even a war.”).

<sup>5</sup> *See* *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124–25 (1978).

<sup>6</sup> The Supreme Court has deemed *Penn Central* the default test for regulatory takings. *See* *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538–39 (2005).

takings claims. Rather, as this Article argues in Part III, the government's emergency justifications should be considered as part of a necessity defense, not subject to the low bar of rational basis, but a more fact and evidence-driven standard of "actual necessity."<sup>7</sup> Part IV attempts to apply these standards and examines the various ways that emergency actions can take property for public use: commandeerings, occupations of property, and restrictions on use. I do not conclude that the approach will result in more (or less) successful claims for compensation, merely a more straightforward method of evaluating emergency takings claims than the current disjointed analytical methods.

In sum, this Article argues there is no blanket immunity from the requirement to provide just compensation when property is taken simply because the government claims to be acting in response to an emergency, even though its actions and reasons may satisfy the rational basis test. Instead, claims that the taking is not compensable because of the exigency of an emergency should only win the day if the government successfully shows that the measure was actually needed to avoid imminent danger posed by the property owner's use and that the restriction on use was narrowly tailored to further that end.

#### I. JUST COMPENSATION: FLATTENING THE ECONOMIC CURVE OF TAKINGS

The Just Compensation Clause democratizes the costs of public uses and benefits. When private property is used or acquired by the public against the will of the owner, the Fifth and Fourteenth Amendments require the government to provide just compensation.<sup>8</sup> The overarching purpose of the takings doctrine is to "flatten the curve"<sup>9</sup> of the economic impact of impressing private property involuntarily into public service: "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."<sup>10</sup> It takes an economic burden that otherwise would be shouldered by a single property owner and spreads the cost to the entire taxpaying public.

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<sup>7</sup> See *TrinCo Inv. Co. v. United States*, 722 F.3d 1375, 1378 (Fed. Cir. 2013).

<sup>8</sup> U.S. CONST. amend. V (stating "nor shall private property be taken for public use, without just compensation"); see *Chi., Burlington & Quincy R.R.*, 166 U.S. at 235, 241 (finding that the just compensation requirement extends to the states through the Fourteenth Amendment).

<sup>9</sup> "Flatten the curve" is the popular description for the theory of spreading out over time the number of coronavirus patients to prevent limited medical services from being overwhelmed. See Brandon Specktor, *Coronavirus: What is 'Flattening the Curve,' and Will it Work?*, LIVE SCI. (Mar. 16, 2020), <https://www.livescience.com/coronavirus-flatten-the-curve.html> [<https://perma.cc/ST86-82JG>] ("In epidemiology, the idea of slowing a virus' spread so that fewer people need to seek treatment at any given time is known as 'flattening the curve.'").

<sup>10</sup> *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

In other words, the takings doctrine is not a direct limitation on the government's power to acquire property or to regulate it for the public good. Rather, the Just Compensation Clause merely forces an evaluation of the actual cost of the government's action by distributing the economic burden to the benefitted public.<sup>11</sup> It forces the government to ask, "Can we afford this?" The principle driving the analysis is whether it is fair to require an owner to shoulder the entire economic burden of publicly worthy regulations that restrict the use of property.<sup>12</sup> As Justice Holmes famously wrote in *Pennsylvania Coal Co. v. Mahon*, "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."<sup>13</sup>

But the compensation imperative is not limited to the paradigmatic governmental action triggering compensation—cases of actual physical invasion or seizure where the government recognizes its obligation to pay compensation.<sup>14</sup> The Supreme Court has acknowledged that there are "nearly infinite variety of ways in which government actions or regulations can affect property interests."<sup>15</sup> Compensation is not limited to those instances in which the government is affirmatively acquiring property. It also includes situations in which the government does not exercise eminent domain, but its actions to regulate for public health, safety, and welfare under the police power affect property's use and value nonetheless.<sup>16</sup> In these types of takings, the government does not acknowledge any obligation to provide compensation.<sup>17</sup> The compensation requirement is triggered when the effect of governmental action is "so onerous that its effect is tantamount to a direct appropriation or ouster."<sup>18</sup> For example, if the government causes private property to flood, it must pay compensation.<sup>19</sup> If a municipal ordinance requires the owners of apartment buildings to

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<sup>11</sup> *See id.*

<sup>12</sup> *See id.*; *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

<sup>13</sup> 260 U.S. at 416.

<sup>14</sup> This is not a new concept. *See, e.g.*, *Gardner v. Vill. of Newburgh*, 2 Johns. Ch. 162, 164 (N.Y. Ch. 1816) (requiring the municipality to compensate riparian property owner before implementing an ordinance rerouting a stream away from the owner's land).

<sup>15</sup> *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 31 (2012).

<sup>16</sup> *See, e.g.*, *United States v. Cress*, 243 U.S. 316, 318–19, 328 (1917) (citing *United States v. Lynah*, 188 U.S. 445, 470 (1903)) (finding that the character of the government's invasion may constitute a taking, even when it does not directly appropriate the title to property).

<sup>17</sup> *See, e.g.*, *Knick v. Township of Scott*, 139 S. Ct. 2162, 2179 (2019); *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 181 (1871) (rejecting the argument that no taking was possible because the defendant had not exercised eminent domain power and was acting pursuant to the state's regulatory power).

<sup>18</sup> *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005).

<sup>19</sup> *See, e.g.*, *Cress*, 243 U.S. at 328 ("Where the government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the Fifth Amendment." (quoting *United States v. Lynah*, 188 U.S. 445, 470 (1903))).

allow the fixture of cable television equipment, compensation is required.<sup>20</sup> If the government requires the owner of a private marina to allow public boating under the government's navigation power, compensation is required.<sup>21</sup> If environmental regulations require an owner to leave their property "economically idle," compensation is required.<sup>22</sup>

This principle—that an exercise of sovereign power *other* than eminent domain may also be a taking—was hardly novel in 1922, because there had been a long tradition of courts recognizing the government's obligation to indemnify owners who suffered an invasion of their private property for the public good. In 1606, for example, Lord Edward Coke famously noted that a homeowner could not stop the King's "saltpeter men"<sup>23</sup> from entering private property and damaging a home or barn when searching for saltpeter, a key ingredient in gunpowder.<sup>24</sup> Gunpowder manufactured from domestic saltpeter was essential for the defense of the realm, and the King's men could enter and remove it, despite the destruction they frequently caused to homes, outhouses, and barns in the process.<sup>25</sup> But the sovereign's prerogative to do so was limited by the principle that agents "are bound to leave the inheritance of the subject in so good plight as they found it."<sup>26</sup> In short, the government's invocation of its sovereign powers does not automatically insulate it from the obligation to provide compensation if that exercise indirectly and unintentionally results in a taking.

## II. *PENN CENTRAL*

To determine whether compensation is required, courts do not treat the power invoked as dispositive, but instead focus on the extent of the impact of the government's actions on the owner's rights.<sup>27</sup> In other words, to prove entitlement to compensation, a property owner need not object to the government's reason for the

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<sup>20</sup> See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 438 n.16, 441 (1982) (finding that even a de minimis permanent physical occupation is a compensable taking).

<sup>21</sup> See, e.g., *Kaiser Aetna v. United States*, 444 U.S. 164, 165–66, 180 (1979).

<sup>22</sup> See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

<sup>23</sup> See generally *What Is a Saltpeter Man?*, FIREARMS HIST., TECH. & DEV. (Feb. 23, 2016), <https://firearmshistory.blogspot.com/2016/02/what-is-saltpeter-man.html> [<https://perma.cc/C4S8-EL3N>] (explaining the history and occupation of "saltpeter men"); Michael Miner, *Early Gunpowder Was Made from the 'Pisse' of Church Ladies, and Other Historical Tidbits* (Jan. 29, 2016, 1:56 PM), CHI. READER, <https://www.chicagoreader.com/Bleader/archives/2016/01/29/early-gunpowder-was-made-from-the-pisse-of-church-ladies-and-other-historical-tidbits> [<https://perma.cc/W5HW-K7GQ>].

<sup>24</sup> See *The Case of the King's Prerogative in Saltpetre* (1606) 77 Eng. Rep. 1294, 1294–95; 12 Co. Rep. 12, 12–13.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 1295–96; 12 Co. Rep. at 12–13 ("They ought to make the places in which they dig, so well and commodious to the owner as they were before.").

<sup>27</sup> See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

action or regulation, but merely the effect. That is why an injunction is not the usual remedy in most of these cases.<sup>28</sup> In some instances, it is easy to conclude that governmental action requires compensation. Outright seizures, for example.<sup>29</sup> By contrast, whether a regulation or other action short of an affirmative seizure triggers compensation has defied simple explication ever since the Supreme Court first expressly recognized regulatory takings claims in *Pennsylvania Coal*.<sup>30</sup> In a 1978 decision, *Penn Central Transportation Co. v. New York City*, the Court first established the three-part, fact-intensive list of factors used to determine whether a governmental action, other than an exercise of eminent domain, requires compensation:

In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The *economic impact of the regulation on the claimant* and, particularly, the *extent to which the regulation has interfered with distinct investment-backed expectations* are, of course, relevant considerations. So, too, is the *character of the governmental action*. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.<sup>31</sup>

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<sup>28</sup> See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536–37 (2005). In that case, the Court attempted to clear up some of the doctrinal confusion in takings, explaining:

As its text makes plain, the Takings Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power." In other words, it "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking."

*Id.* (citations omitted) (quoting *First Eng. Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314–15 (1987)). In certain circumstances, declaratory or injunctive relief may be available. See *E. Enters. v. Apfel*, 524 U.S. 498, 522 (1998) ("Based on the nature of the taking alleged in this case, we conclude that the declaratory judgment and injunction sought by petitioner constitute an appropriate remedy under the circumstances, and that it is within the district courts' power to award such equitable relief."); *Duke Power Co. v. Carolina Env't Study Grp., Inc.*, 438 U.S. 59, 71 n.15 (1978) ("While the Declaratory Judgment Act does not expand our jurisdiction, it expands the scope of available remedies. Here it allows individuals threatened with a taking to seek a declaration of the constitutionality of the disputed governmental action before potentially uncompensable damages are sustained.").

<sup>29</sup> See, e.g., *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 3–6 (1984) (outlining the multiple ways in which the federal government takes property with compensation: straight takings, Declaration of Taking (quick take), by special statute, and by summary physical possession and ouster of the owner).

<sup>30</sup> *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415–16 (1922).

<sup>31</sup> 438 U.S. at 124 (emphasis added) (first citing *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962); and then citing *United States v. Causby*, 328 U.S. 256 (1946)).

*Penn Central* was a regulatory takings case, and the test is universally applied to those cases, and not to direct seizures or physical invasions.<sup>32</sup> But because the Court considers it the default test<sup>33</sup> to determine whether a government action requires compensation (with Justice O'Connor even referring to it as the “polestar”<sup>34</sup>) and because the Takings Clause’s flattening the curve rationale applies to all takings—affirmative condemnations and regulatory takings—in this Article, I will consider every emergency taking situation under the three-part *Penn Central* test, even though the Court provided little guidance as to what the factors mean or how litigants and the lower courts should apply this “storied but cryptic formulation.”<sup>35</sup> This is not to agree that the *Penn Central* framework is the optimal lens by which to analyze every claimed taking (or even a good lens); that is beyond the scope of this Article, and I leave to others those criticisms.<sup>36</sup> The Court apparently continues to believe the *Penn Central* test is the way to evaluate takings, and so here I shall too.<sup>37</sup>

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<sup>32</sup> *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Plan. Agency*, 535 U.S. 302, 323 (2002) (“[The] longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a ‘regulatory taking,’ and vice versa.”).

<sup>33</sup> *See Lingle*, 544 U.S. at 538–39; *supra* note 6.

<sup>34</sup> *See Tahoe-Sierra*, 535 U.S. at 326 n.23 (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O’Connor, J., concurring)) (“[O]ur polestar . . . remains the principles set forth in *Penn Central* itself,” which “provide[] important guideposts that lead to the ultimate determination whether just compensation is required.”).

<sup>35</sup> *Lingle*, 544 U.S. at 537.

<sup>36</sup> For a default test applied in an overwhelming majority of these cases, almost no one staunchly defends it, even those who advocate for a deferential judiciary in takings. *See, e.g.*, John D. Echeverria, *Is the Penn Central Three-Factor Test Ready for History’s Dustbin?*, LAND USE L. & ZONING DIG., Jan. 2000, at 3, 3; Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 232 (2004) (“*Penn Central* hardly serves as a blueprint for a municipality or a court seeking to conform to constitutional doctrine.”). And that is putting it gently; others do not give it such soft treatment, describing it as “inconsistent” and “unprincipled.” *See, e.g.*, Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 93 (1986) (*Penn Central*’s “‘totality of the circumstances’ analysis masks intellectual bankruptcy”); Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective of Penn Central Transportation Co. v. City of New York*, 13 WM. & MARY BILL RTS. J. 679, 680, 734 (2005) (asserting that the Court lacked jurisdiction in *Penn Central* and reached out to create a test that was of “dubious provenance and [was] inconsistent[t] with the Supreme Court’s preexisting taking jurisprudence”); *see also* R.S. Radford & Luke A. Wake, *Deciphering and Extrapolating: Searching for Sense in Penn Central*, 38 ECOLOGY L.Q. 731, 732 n.8 (2011) (cataloguing at least a dozen articles over a five-year period with various scholars attempting to decipher *Penn Central*’s meaning); William W. Wade, *Theory and Misuse of Just Compensation for Income-Producing Property in Federal Courts: A View from Above the Forest*, 46 TEX. ENV’T L.J. 139, 142 n.19 (2016) (“Thousands of words by hundreds of litigators, judges and scholars including the author have sought to explicate the *Penn Central* test.”).

<sup>37</sup> The Court has repeatedly declined to review cases in which the *Penn Central* test is



There is no reason the test cannot be applied to understand why, in cases of affirmative seizures, the government owes compensation—not because it voluntarily provides it, but because *Penn Central*'s application of the Fifth Amendment's negative command compels it: the "character of the governmental action" factor is so oppressive that even seizures of a minimal amount of property require compensation.<sup>38</sup> The compensation requirement is "self-executing" and once there is a taking, the government must provide compensation.<sup>39</sup> Finally, even though some courts do not consider the *Penn Central* factors as true factors to balance, but as a conjunctive "and" test where a property owner must show all three (a "one strike rule," as one commentator has called it),<sup>40</sup> for purposes of this Article, I will treat *Penn Central* as a true "factor" test applied holistically, where more support for one element may offset less of another.<sup>41</sup>

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challenged: the latest example is *Smyth v. Conservation Commission of Falmouth*. See generally 119 N.E.3d 1188 (Mass. App. Ct.), cert. denied, 140 S. Ct. 667 (2019).

<sup>38</sup> See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434–35, 438 n.16 (1982) (invasion by tiny cable box required compensation); see also *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) ("A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government . . .").

<sup>39</sup> *First Eng. Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (quoting *United States v. Clarke*, 445 U.S. 253, 257 (1980)).

<sup>40</sup> See Adam R. Pomeroy, *Penn Central After 35 Years: A Three Part Balancing Test or a One Strike Rule?*, 22 FED. CIR. BAR J. 677, 680–99 (2013) (conducting a survey of cases citing *Penn Central*, which indicated that although most courts do not discuss all three *Penn Central* factors, those that do are more likely to engage in a true balancing test). *Penn Central* is by no means the only way to approach takings questions. Some courts adopt their own categorical rules within the *Penn Central* framework. See, e.g., *Love Terminal Partners, L.P. v. United States*, 889 F.3d 1331, 1343–45 (Fed. Cir. 2018) (a property owner not making a profit cannot prove a taking, notwithstanding their reasonable investment-backed expectations), cert. denied, 139 S. Ct. 2744 (2019); *Diversified Holdings, LLP v. City of Suwanee*, 807 S.E.2d 876, 887 (Ga. 2017) (zoning is not a "fertile ground" for takings claims). Others pay lip service to the *Penn Central* factors but apply them incorrectly. See, e.g., *State v. Basford*, 119 So. 3d 478, 481–82 (Fla. Dist. Ct. App. 2013) (applying *Penn Central* to "take into consideration everything"); *In re New Creek Bluebelt*, Phase 3, 65 N.Y.S.3d 552, 561 (App. Div. 2017) (applying only two of the three *Penn Central* factors). Still other courts—finding the *Penn Central* factors inadequate, confusing, or not compatible with their state constitution's purpose—chart a different course, abandoning entirely the *Penn Central* framework to apply their own standards for state law regulatory takings. See, e.g., *Dep't of Soc. Servs. v. City of New Orleans*, 676 So. 2d 149, 154 (La. Ct. App. 1996) (a taking occurs when a regulation destroys a "major portion" of the property's value); *Am. W. Bank Members, L.C. v. State*, 342 P.3d 224, 235–36 (Utah 2014) (a taking occurs "when there is any substantial interference with private property which destroys or materially lessens its value, or by which the owner's rights to its use and enjoyment is in any substantial degree abridged or destroyed" (quoting *Utah Dep't of Transp. v. Admiral Beverage Corp.*, 275 P.3d 208, 208 (2011))).

<sup>41</sup> For excellent treatment of each of the *Penn Central* factors, see David Crump, *Takings by Regulation: How Should Courts Weigh the Balancing Factors?*, 52 SANTA CLARA L. REV.

*A. Character of the Governmental Action*

The character of the governmental action inquiry examines the nature of the action by assessing its impact on the owner's property rights.<sup>42</sup> The character of the governmental action does not mean the government's reasons.<sup>43</sup> It is not a substitute for a due process or rational basis test.<sup>44</sup> It merely asks the nature of the action: Is it a regulation of property use?<sup>45</sup> Does it result in a transfer of title to private property?<sup>46</sup> Does the owner retain title, but is nevertheless being required to open up their property to others?<sup>47</sup> Does it require the owner to destroy their property for the public good?<sup>48</sup> Are the owner's rights being interfered with temporarily, permanently, or indefinitely?<sup>49</sup> Two words of caution:

First, in evaluating claims for compensation, an inquiry about the character of the governmental action should not be read as inviting a court to make a searching inquiry into the government's motives. Even when a fundamental right is involved or there is some indication that an improper purpose is afoot, that is a different inquiry.<sup>50</sup> Generally, government actions to protect the health, safety, and welfare of the public are presumed valid, and courts are waved off by the rational basis test from any kind of truly meaningful judicial inquiry.<sup>51</sup> A takings analysis mostly admits the public good and seeks compensation. Determining that the government's action has a public character is but the first step in the takings analysis, and to demand compensation the property owner must admit the government action has a

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1, 26–35, 39–42 (2012) (arguing that public purpose should not be a factor, that physical invasion is an “obsolete” factor, that the economic impact is the “most important” factor, and that certain government actions are “minor factors”).

<sup>42</sup> Michael Lewyn, *Character Counts: The “Character of the Government Action” in Regulatory Takings Actions*, 40 SETON HALL L. REV. 597, 598 (2010).

<sup>43</sup> *See id.*

<sup>44</sup> Crump, *supra* note 41, at 8.

<sup>45</sup> *See* Lewyn, *supra* note 42, at 598–99.

<sup>46</sup> *See, e.g., Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 15–16 (1984) (recording of *lis pendens* after the filing of an eminent domain lawsuit was not a taking because it did not restrict other uses of the land).

<sup>47</sup> *See, e.g., Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 828 (1987).

<sup>48</sup> *See, e.g., Miller v. Schoene*, 276 U.S. 272, 273 (1928).

<sup>49</sup> *See, e.g., Nollan*, 483 U.S. at 831; *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427–35 (1982).

<sup>50</sup> *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993).

<sup>51</sup> For a recent example of this unfortunate approach, see *Support Working Animals, Inc. v. DeSantis*, 457 F. Supp. 3d 1193, 1215 (N.D. Fla. 2020) (“The enactment of Amendment 13 represents a valid exercise of Florida’s police power and is therefore not a ‘taking.’ Through Amendment 13, Florida has prohibited Plaintiffs’ property from being used in a particular manner that the State has determined to be contrary to the health, morals, or safety of the community. Whether Amendment 13’s purpose was to protect the health and welfare of racing dogs or to prohibit wagering on dog races, Amendment 13 is a legitimate exercise of Florida’s police power.”).

proper public character.<sup>52</sup> That is why the usual remedy for takings is compensation, not invalidation of the action.<sup>53</sup> A property owner objecting to the exercise of eminent domain may dispute the public use or purpose of the taking and seek to halt it, but such objections are rare and even then are reviewed with a laughably minimal level of judicial scrutiny.<sup>54</sup> Similarly, a property owner may challenge an exercise of regulatory police power, but the government's purpose is reviewed under the same low bar unless the evidence shows that something other than the government's stated reasons is at play.<sup>55</sup> In order to be a taking for which compensation must be provided, all government action must serve a public purpose.<sup>56</sup> If it does not, the action is invalid as a matter of due process of law, and not, in the first instance, compensable as a taking.<sup>57</sup> In short, the character of the governmental action is not the due process test rewritten and imported into the takings equation; the character of the governmental action inquiry focuses elsewhere.

The second caution is related. The character of the governmental action is but the first question in the takings inquiry, not the only one. Unfortunately, however, many courts stop at *Penn Central's* character factor, concluding that because the government is exercising its police power, there is no taking.<sup>58</sup> Relying on past Supreme Court decisions, courts reason that the restrictions on the use of property are not "takings" because the loss is merely the incidental inconvenience of owning property.<sup>59</sup> As Justice Holmes put it in *Pennsylvania Coal*, "Government hardly could go on if to some extent values incident to property could not be diminished

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<sup>52</sup> See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536–37 (2005) (Takings doctrine "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking" (quoting *First Eng. Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314–15 (1987))); *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 802 (Fed. Cir. 1993) ("Thus, claimant must concede the validity of the government action which is the basis of the taking claim to bring suit under the Tucker Act." (first citing 28 U.S.C. § 1491; then citing *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 899 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987); and then citing *Deltona Corp. v. United States*, 657 F.2d 1184 (1981), *cert. denied*, 455 U.S. 1017 (1982))).

<sup>53</sup> *Lingle*, 544 U.S. at 537.

<sup>54</sup> *But see* *Duke Power Co. v. Carolina Env't Study Grp.*, 438 U.S. 59, 71 n.15 (1978) (property owner may challenge uncompensated taking by declaratory judgment); *Kaiser Aetna v. United States*, 444 U.S. 164, 167–69 (1979) (owner challenged taking in federal court).

<sup>55</sup> See *Lingle*, 544 U.S. at 537; *Kelo v. City of New London*, 545 U.S. 469, 477–78, 488 n.20 (2005) (challenges to public use are reviewed for a rational basis unless there is evidence that the stated public use is pretextual).

<sup>56</sup> See *Kelo*, 545 U.S. at 477.

<sup>57</sup> *Lingle*, 544 U.S. at 548–49 (Kennedy, J., concurring).

<sup>58</sup> See J.P. Burleigh, *Just Compensation and the Police Power*, U. CIN. L. REV. (Apr. 8, 2020), <https://uclawreview.org/2020/04/08/just-compensation-and-the-police-power> [<https://perma.cc/3M6N-ZFVQ>]; Pomeroy, *supra* note 40, at 680–99.

<sup>59</sup> See, e.g., *First Eng. Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S., 304, 320 (1986).

without paying for every such change in the general law. As long recognized, some rights are enjoyed under an implied limitation and must yield to the police power.”<sup>60</sup> But that is just one piece of the compensation inquiry.

In *Mugler v. Kansas*, the state outlawed the manufacture of intoxicating liquor by adopting a regulation under the state’s police power, which did not offend due process.<sup>61</sup> In dicta, the Court also noted it was not a taking requiring compensation because the losses in the property’s value by virtue of its restrictions for the public health, safety, or welfare were merely an “incidental inconvenience.”<sup>62</sup> In *Miller v. Schoene*, the character of the governmental action was arguably more compelling (or, more accurately, more immediate), as the government there was seeking to eradicate a fungus that threatened an important part of the state’s economy.<sup>63</sup> The state ordered the destruction of otherwise unthreatened cedar trees without compensation because they served as a “host plant” to a disease harmful to nearby apple trees.<sup>64</sup> The Court concluded that the destruction order was a valid exercise of the police power and held that courts should not question too hard the government’s assertion that the action was needed.<sup>65</sup> Whether an action is a valid exercise of government power to limit liberty or regulate property for the public health, safety, and welfare, however, is a much different inquiry than the character of the governmental action *Penn Central* factor.

But because many courts have conflated the two, they mistakenly transform the takings question into a single factor. For example, in *Kam-Almaz v. United States*, government agents temporarily seized the plaintiff’s laptop at the border “for review” at a border stop because he was a “person of interest,” promising to return it shortly.<sup>66</sup> They did, but while the government possessed it, the hard drive failed.<sup>67</sup> Kam-Almaz sought compensation for a taking because the laptop’s hard drive was where he stored all of his critical business data, and the drive’s failure resulted in his inability to do business.<sup>68</sup> Similarly, in *AmeriSource Corp. v. United States*, the plaintiff was a prescription drug distributor.<sup>69</sup> As part of the government’s criminal investigation of a third party, it seized AmeriSource’s drugs as possible evidence.<sup>70</sup> Eventually, the prosecution went nowhere, and the government returned the drugs to AmeriSource.<sup>71</sup> But by then, the expiration date had lapsed and the drugs were

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<sup>60</sup> Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

<sup>61</sup> 123 U.S. 623, 657 (1887).

<sup>62</sup> *Id.* at 670.

<sup>63</sup> 276 U.S. 272, 277 (1928).

<sup>64</sup> *Id.* at 278.

<sup>65</sup> *See id.* at 280–81.

<sup>66</sup> 682 F.3d 1364, 1366 (Fed. Cir. 2012).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 1367.

<sup>69</sup> 525 F.3d 1149, 1150 (Fed. Cir. 2008), *cert. denied*, 556 U.S. 1126 (2009).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 1151. In a subsequent case, *Innovair Aviation Ltd. v. United States*, 632 F.3d 1336,

useless, and as a consequence, worthless.<sup>72</sup> In both *AmeriSource* and *Kam-Almaz*, the Federal Circuit held that the character of the government action—law enforcement—meant that the seizures simply could not be takings.<sup>73</sup> The court in *AmeriSource* concluded: “Although the precise contours of the principle are difficult to discern, it is clear that the police power encompasses the government’s ability to seize and retain property to be used as evidence in a criminal prosecution.”<sup>74</sup> The court was right on one thing: this rationale does indeed lack “precise contours” because it makes little analytical sense. Concluding that a seizure is not a taking requiring compensation because it is not an exercise of eminent domain power but the police power, gets analytically nowhere because inverse condemnation is, by definition, a regulatory taking that results from an exercise of some power *other than the power of eminent domain*.<sup>75</sup>

The rationale employed by the Federal Circuit in *Kam-Almaz* and *AmeriSource* would lead to some odd results if applied to other more-well-known examples where the Supreme Court concluded that regulation might lead to takings liability. Public boating access cannot be a taking because the Corps of Engineers was protecting navigation.<sup>76</sup> Mandatory cable box installation cannot be a taking because New York City was promoting public access cable television.<sup>77</sup> Protecting endangered species could not be a taking because the government was exercising its commerce power.<sup>78</sup> Rendering useless a state-recognized property interest cannot be a taking because it was an exercise of the police power to prevent sinkholes.<sup>79</sup> In each of these examples, the Court—whatever the ultimate outcome (taking, no taking)—never reasoned that simply because the power being exercised was something other than eminent domain, there could never be a taking. Instead, the outcome in those cases

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1345 (Fed. Cir. 2011), *cert. denied*, 565 U.S. 1147 (2012), the Federal Circuit determined that the Court of Federal Claims lacks subject matter jurisdiction in these kinds of cases because the statute creates a comprehensive administrative system to review *in rem* forfeitures under the statute.

<sup>72</sup> *AmeriSource Corp.*, 525 F.3d at 1151.

<sup>73</sup> *Id.* at 1154; *Kam-Almaz*, 682 F.3d at 1371.

<sup>74</sup> *AmeriSource Corp.*, 525 F.3d at 1153 (citing *Warden v. Hayden*, 387 U.S. 294, 309–10 (1967)).

<sup>75</sup> See T.S. Baumgardner, Comment, “*Takings*” Under the Police Power—the Development of Inverse Condemnation as Method of Challenging Zoning Ordinances, 30 SMU L. REV. 723, 724 (1976).

<sup>76</sup> *Cf. Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979) (holding that the government could not force private landowners to open up waterways to the public without compensation).

<sup>77</sup> *Cf. Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 438 (1982) (finding cable installation to be a taking).

<sup>78</sup> *Cf. Andrus v. Allard*, 444 U.S. 51, 67–68 (1979).

<sup>79</sup> *Cf. Pa. Coal Co. v. Mahon*, 260 U.S. 393, 412–13, 415 (1922) (The Kohler Act enacted pursuant to state’s police power went “too far.”).

turned on other facts, in which the “character of the government action” is but one factor to consider, not the dispositive factor.<sup>80</sup>

Thus, courts evaluating claims for compensation for emergency takings should mostly accept the government’s stated purpose of the seizures (emergency and police powers, for example) and continue on to evaluate the other two *Penn Central* factors: whether the owner had distinct investment-backed expectations and the magnitude of the loss.<sup>81</sup> Ultimately, the question the courts should have resolved was whether it was fair to ask Kam-Almaz and AmeriSource to absorb the entire cost of what were unquestionably public purposes. We want the government to investigate terrorists and drug dealers and respond to emergencies. But is it fair to put the cost of doing so solely on property owners who happen to get in the line of fire? Maybe, and the other two *Penn Central* factors weigh the degree of the individualized burden and the nature of the owner’s property right.

### *B. Economic Impact: Reasonable Return*

Total economic wipeouts are certainly takings.<sup>82</sup> But so may be cases in which the owner’s loss of use or value is substantial, yet less than total.<sup>83</sup> This factor should focus on whether the government action has left the owner the opportunity to make a reasonable return on investment. As Professor Steven Eagle has observed, although “it is unclear what burdens can be considered under the economic impact factor,” this *Penn Central* factor, at minimum, focuses on whether the property owner is “allowed a ‘reasonable return’ on its investment,”<sup>84</sup> even as the *Penn Central* majority left the question of what could constitute a reasonable return to another day.<sup>85</sup> Suffice to say that presently, “[t]he most straightforward application of the economic impact prong

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<sup>80</sup> See, e.g., *Support Working Animals, Inc., v. DeSantis*, 457 F. Supp. 3d 1193, 1215 (N.D. Fla. 2020) (“The enactment of Amendment 13 represents a valid exercise of Florida’s police power and is therefore not a ‘taking.’ Through Amendment 13, Florida has prohibited Plaintiffs’ property from being used in a particular manner that the State has determined to be contrary to the health, morals, or safety of the community. Whether Amendment 13’s purpose was to protect the health and welfare of racing dogs or to prohibit wagering on dog races, Amendment 13 is a legitimate exercise of Florida’s police power.”).

<sup>81</sup> See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

<sup>82</sup> See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

<sup>83</sup> *Lockaway Storage v. County of Alameda*, 156 Cal. Rptr. 3d 607, 623 (Ct. App. 2013) (citing *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001)).

<sup>84</sup> Steven J. Eagle, *The Four-Factor Penn Central Regulatory Takings Test*, 118 PENN. ST. L. REV. 601, 617–18 (2014) (quoting *Penn Cent. Transp. Co.*, 438 U.S. at 129 n.26).

<sup>85</sup> See *Penn Cent. Transp. Co.*, 438 U.S. at 149 n.13 (Rehnquist, J., dissenting) (noting that the Court would eventually need to define what constitutes a “reasonable return” for various types of property and that the Court must further “define the particular property unit that should be examined”).

as it was originally conceived would cut in favor of finding liability when regulation substantially impairs an income property's rate of return."<sup>86</sup>

Unfortunately, instead of factoring the use or value lost as a result of governmental action as a part of the equation, most courts have transformed this factor into an all-or-nothing proposition. If the property's economic use or value is completely impaired—the legendary *Lucas* “wipeout” where a regulation deprives the owner of “all economically beneficial use” of property and the claim is analyzed without examining any of the remaining two *Penn Central* factors—the owner gets compensated.<sup>87</sup> But for anything less than a 100% economic loss, the owner is categorically out of luck.<sup>88</sup> Most courts evaluate this question as part of a preliminary determination of “what property” is being taken and then again as part of an evaluation of the owner's economic loss.<sup>89</sup>

This latter thread has resulted in some courts moving the needle on the economic impact factor so far as to conclude that even a regulation that results in a complete loss of present *use* is not a *Penn Central*–qualifying economic impact, because the property has theoretical *value*.<sup>90</sup> That value? “Investment use.”<sup>91</sup> Someone might be willing to pay something for property that is presently useless because of an existing government regulation, in the hope that the government might change the regulation

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<sup>86</sup> Radford & Wake, *supra* note 36, at 738 (observing that “the decision is virtually silent as to how [the economic impact] prong should be evaluated and weighed”).

<sup>87</sup> *Lucas*, 505 U.S. at 1015, 1019.

<sup>88</sup> For example, in a series of decisions, the U.S. Court of Appeals for the Federal Circuit focused on the “total and immediate” impact of federal statutes that temporarily imposed massive financial liabilities for landowners. See *Cienega Gardens v. United States (Cienega VIII)*, 331 F.3d 1319, 1323, 1344–45 (Fed. Cir. 2003). But four years later a different panel ruled that it was inappropriate to focus the temporary takings analysis on the time frame for which the federal restrictions were imposed—holding that *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency* requires consideration “of the overall value of the property” over the course of its life. See *Cienega Gardens v. United States (Cienega X)*, 503 F.3d 1266, 1281 (Fed. Cir. 2007) (citing 535 U.S. 302, 331 (2002)), *cert. dismissed*, 554 U.S. 938 (2008). The difference between these two approaches is of tremendous practical importance—which may literally make or break a temporary takings claim. See *CCA Assocs. v. United States*, 667 F.3d 1239, 1246 (Fed. Cir. 2011) (“Ultimately, the difference between the *Cienega X* and *Cienega VIII* methodology is the difference between an 18% and 81% economic impact, a substantially different result stemming solely from our change in the economic analysis between the two cases.”). The Federal Circuit stated: “If the net income over the entire remaining life of the mortgage is the denominator there is no way that even a nearly complete deprivation (say 99%) for 8 years would amount to severe economic deprivation when compared to our prior regulatory takings jurisprudence.” *Id.* at 1247.

<sup>89</sup> See Robert H. Thomas, *Restatement (SCOTUS) of Property: What Happened to Use in Murr v. Wisconsin?*, 87 UMKCL. REV. 891, 898 (2019) (noting that the more expansively a plaintiff's “property” is defined, the less likely she will be able to prove a taking); see also Eagle, *supra* note 84, at 631.

<sup>90</sup> See *Leone v. County of Maui*, 404 P.3d 1257, 1277 (Haw. 2017), *cert. denied*, 139 S. Ct. 917 (2019).

<sup>91</sup> See *id.*

and allow some economically beneficial use in the future.<sup>92</sup> But whether there has been a taking is a matter of loss of *use*, while the compensation owed for any taking is more a matter of fair market *value*.<sup>93</sup>

*C. Expectations: Distinct or Reasonable*

The final factor examines the nature of the property rights at stake. *Penn Central* held that “the extent to which the regulation has interfered with distinct investment-backed expectations” is one of the factors to consider.<sup>94</sup> Yet somehow, just a short time after *Penn Central*, the Court was speaking of “reasonable” expectations, without explaining what, if any, difference there might be.<sup>95</sup> Since that time, “reasonable” mostly stuck, and the Court has never revisited it.<sup>96</sup> However, there is a critical difference between “distinct” expectations (which focus on the property owner’s actual actions) and “reasonable” expectations (which focus on an objective view of the government action), and the shift from distinct to reasonable has resulted in courts focusing on whether it is “reasonable” for a property owner to expect to be free of even highly restrictive regulations, not the owner’s actual investment-backed conduct or reliance.<sup>97</sup>

This factor invites an inquiry into the property interest at stake; what “stick” has been allegedly taken? Most courts treat this inquiry separately as a preliminary question, not part of the expectations factor.<sup>98</sup> “The critical terms [in takings cases] are ‘property,’ ‘taken’ and ‘just compensation,’”<sup>99</sup> and most courts approach such cases by tracking the text of the Fifth Amendment.<sup>100</sup> First, by requiring the claimant to plead and prove that she owns “private property,”<sup>101</sup> after which either the finder

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<sup>92</sup> See David L. Callies & Ellen R. Ashford, *Knick in Perspective: Restoring Regulatory Takings Remedy in Hawai‘i*, U. HAW. L. REV., Winter 2019, at 136, 148 (“[T]he [Hawai‘i] Court blithely determined ‘that investment use is a relevant consideration in a takings analysis’ which, if true, is a factor only in partial, not total, regulatory takings cases.” (citing *Leone*, 404 P.3d at 1277)).

<sup>93</sup> See, e.g., *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949) (“For purposes of the compensation due under the Fifth Amendment, of course, only that ‘value’ need be considered which is attached to ‘property,’ but that only approaches by one step the problem of definition.” (footnote omitted)).

<sup>94</sup> *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

<sup>95</sup> See *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

<sup>96</sup> See, e.g., *Love Terminal Partners, L.P. v. United States*, 889 F.3d 1331, 1344 (Fed. Cir. 2018), *cert. denied*, 139 S. Ct. 2744 (2019).

<sup>97</sup> See Wade, *supra* note 36, at 142 n.21 (“This change [from distinct to reasonable] has confounded subsequent courts’ views of reasonable financial expectations with plaintiffs’ reasonable notice of regulatory prohibitions. Conversion of *Penn Central*’s distinct investment-backed expectations to reasonable notice of rules eviscerated the evaluation of severity of economic impact.” (citing *Cienega X*, 503 F.3d 1266, 1289 (Fed. Cir. 2007), *cert. dismissed*, 554 U.S. 938 (2008)).

<sup>98</sup> See, e.g., *Cienega X*, 503 F.3d at 1289.

<sup>99</sup> *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377 (1945).

<sup>100</sup> See, e.g., *id.* at 377–78.

<sup>101</sup> See, e.g., *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1343 (Fed. Cir. 2002)



of fact or the court determines whether the property was “taken.”<sup>102</sup> If it was, the fact finder also determines what compensation is “just.”<sup>103</sup> For example, the Federal Circuit concluded that there is a two-step approach to takings claims, where the first step is for a court to determine “whether the plaintiff possesses a valid interest in the property affected by the governmental action, i.e., whether the plaintiff possessed a ‘stick in the bundle of property rights.’”<sup>104</sup> That approach is understandable, given the obvious syllogism in the Fifth Amendment’s text, but in my view unnecessarily recursive, because the expectations factor is the better place to evaluate Justice Holmes’s *Pennsylvania Coal* admonition that “Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power.”<sup>105</sup> Most courts wrongly frontload the expectations inquiry and turn it into a legal question resolved by a judge, that the restrictions on the use of property are not “takings” because the loss is merely the “incidental inconvenience” of owning property.<sup>106</sup> But expectations, the very fact-specific inquiry about what steps the plaintiff actually took that back up her claim that she expected that her property could not be taken away without compensation, should be left to the fact finder.<sup>107</sup> The regulatory climate may be a part of that inquiry, but it should not be the only part as courts have erroneously concluded. But as a result, the fact-intensive inquiry envisioned by *Penn Central* has in most courts turned into yet another one-strike rule in which the very action being challenged is considered part of the owner’s expectations, or as a “background principle of state law.”<sup>108</sup> For purposes of this Article, I focus on “distinct.”

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(stating that there is a two-step approach to takings claims, where the first step is for a court to examine the plaintiff’s property interest), *cert. denied*, 538 U.S. 906 (2003); *Res. Invs., Inc. v. United States*, 85 Fed. Cl. 447, 478 (2009) (“Before assessing plaintiffs’ categorical takings claim, this court must, as a threshold matter, determine whether plaintiffs possessed a property interest protected by the Fifth Amendment.”), *aff’d*, 785 F.3d 660 (Fed. Cir. 2015), *cert. denied*, 136 S. Ct. 2506 (2016).

<sup>102</sup> See *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 720–21 (1999) (“[W]e hold that the issue whether a landowner has been deprived of all economically viable use of his property is a predominantly factual question . . . [for] the jury.” (citation omitted)).

<sup>103</sup> See *id.* at 721.

<sup>104</sup> *Boise Cascade Corp.*, 296 F.3d at 1343 (quoting *Karuk Tribe of Cal. v. Ammon*, 209 F.3d 1366, 1374 (Fed. Cir. 2000)) (stating that there is a two-step approach to takings claims, with the first step asking whether the plaintiff possesses a property right); *Res. Invs., Inc.*, 85 Fed. Cl. at 478 (“Before assessing plaintiffs’ categorical takings claim, this court must, as a threshold matter, determine whether plaintiffs possessed a property interest protected by the Fifth Amendment.”).

<sup>105</sup> *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

<sup>106</sup> See, e.g., *Mugler v. Kansas*, 123 U.S. 623, 670 (1887).

<sup>107</sup> See *City of Monterey*, 526 U.S. at 720–21 (holding that the deprivation of economic use is generally a question of fact).

<sup>108</sup> See, e.g., *Love Terminal Partners, L.P. v. United States*, 889 F.3d 1331, 1345 (Fed. Cir. 2018) (“The reasonable, investment-backed expectation analysis is designed to account for

#### D. Penn Central Applied

Two state court decisions illustrate how courts consider and apply the *Penn Central* factors. The first is the Minnesota Supreme Court's ruling in *Zeman v. City of Minneapolis*.<sup>109</sup> There, the court reversed the court of appeals' conclusion that the city's revocation of Zeman's rental licenses for his apartment building because his property had been the subject of multiple disorderly use complaints was a taking.<sup>110</sup> Although not an emergency measure, the court applied the three *Penn Central* factors.<sup>111</sup> The court concluded the character of the government action—nuisance abatement to protect the public health and safety—“favors the city.”<sup>112</sup> Although the court found the purpose of the revocation “paramount,” it did not (as some courts do) stop there, but also analyzed the other two *Penn Central* factors.<sup>113</sup> The economic impact of the revocation on the owner was “substantial” and prevented him from making the best use of it (his existing use, an apartment building).<sup>114</sup> It was unlikely he could rezone it to some other use, nor could he likely sell it “given the economically depressed nature of the neighborhood.”<sup>115</sup> The owner's long use as a rental also demonstrated his expectations were not simply inchoate hopes but had been backed up by actual investment of time and money.<sup>116</sup> Thus, the character of the governmental action factor favored the city, but the other two factors “militate[d] towards a decision in Zeman's favor.”<sup>117</sup> The court concluded that “[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.”<sup>118</sup> The

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property owners' expectation that the regulatory regime in existence at the time of their acquisition will remain in place, and that new, more restrictive legislation or regulations will not be adopted.”), *cert. denied*, 139 S. Ct. 2744 (2019); *Rancho de Calistoga v. City of Calistoga*, 800 F.3d 1083, 1090–91 (9th Cir. 2015) (finding that the loss of a “mere” \$4.7 million not a taking because “when buying a piece of property, one cannot reasonably expect that property to be free of government regulation such as zoning, tax assessments, or, as here, rent control”); *Cienega X*, 503 F.3d 1266, 1289 (Fed. Cir. 2007) (“[T]he plaintiffs could not reasonably have expected the change in regulatory approach.”), *cert. dismissed*, 554 U.S. 938 (2008).

<sup>109</sup> See generally 552 N.W.2d 548 (Minn. 1996).

<sup>110</sup> *Id.* at 549–50.

<sup>111</sup> *Id.* at 552.

<sup>112</sup> *Id.* at 554 (first citing *Mugler v. Kansas*, 123 U.S. 623, 661–62 (1887); and then citing *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 488–93 (1987)). As set out above, I think this is the wrong approach to the meaning of “character of the government action.” See *supra* Section II.A.

<sup>113</sup> *Zeman*, 552 N.W.2d at 553–54.

<sup>114</sup> *Id.* at 553.

<sup>115</sup> *Id.*

<sup>116</sup> See *id.*

<sup>117</sup> *Id.* at 554.

<sup>118</sup> *Id.* (citing Bruce W. Burton, *Regulatory Takings and the Shape of Things to Come: Harbingers of a Takings Clause Reconstellation*, 72 OR. L. REV. 603, 618–19 (1993)).

court considered the harm-preventative rationale for zoning regulations as weighing strongly in favor of the government.<sup>119</sup>

Although the California Court of Appeal reached a different result in *Lockaway Storage v. County of Alameda*, it also applied the three *Penn Central* factors in a more correct way than most courts.<sup>120</sup> Lockaway purchased agriculturally zoned land for use as a boat and vehicle storage facility, an alternate conditional use in agriculturally zoned land.<sup>121</sup> For over a decade, the property had been used as such pursuant to a series of Conditional Use Permits (CUPs).<sup>122</sup> In 2000, however, the voters of the county approved an initiative, which prohibited the development of storage facilities unless also approved by public vote.<sup>123</sup> The ordinance contained a provision allowing “minimum development” if the prohibition would deprive an owner of its statutory or constitutional rights.<sup>124</sup> It also contained a provision exempting existing developments and parcels that have received “all necessary discretionary County and other approvals and permits”—in other words, those developments that had “vested.”<sup>125</sup>

When Lockaway applied for a new CUP, the county declined it, because Lockaway had not obtained a building permit and started construction prior to the effective date of the initiative ordinance (it had not vested under California law).<sup>126</sup> After exhausting administrative remedies, Lockaway sued in California state court for a writ of mandate, allowing it to proceed with development, and for inverse condemnation and civil rights violations.<sup>127</sup> The trial court issued the writ, because the development was “squarely under the protections” of the vested rights exemption even though a building permit had not issued, because a building permit is ministerial and not discretionary.<sup>128</sup> Thus, Lockaway was allowed to proceed with development.<sup>129</sup> After a trial applying the *Penn Central* factors to determine whether there had been a temporary taking, the court concluded, “[T]he County’s regulatory action had a ‘substantial, negative economic impact’ on Lockaway’s use of the property, had ‘materially interfered with Plaintiffs’ distinct, investment-backed

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<sup>119</sup> *See id.* (“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.” (citing *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 488–93 (1987))).

<sup>120</sup> *See* 156 Cal. Rptr. 3d 607, 611, 622–26 (Ct. App. 2013).

<sup>121</sup> *Id.* at 611.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 612.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 612, 614.

<sup>126</sup> *See id.* at 613–14.

<sup>127</sup> *Id.* at 614.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

expectations,’ and that its conduct could not be justified as a normal regulatory mistake.”<sup>130</sup> The court of appeal affirmed the entire judgment, including the amount of compensation.<sup>131</sup> The court applied all of *Penn Central*’s three factors and held that although the initiative did not render Lockaway’s property worthless, it did deprive it of a “return on its investment that it ‘reasonably expected from the intended use.’”<sup>132</sup> The court also affirmed the “investment-backed expectation” analysis because “Lockaway purchased the property only after the County expressly confirmed that Lockaway could rely on the 1999 CUP to develop a storage facility.”<sup>133</sup> Finally, the county’s “showstopping U-turn” (first working with Lockaway to further its development plans, and then doing an about-face) satisfied the character of the governmental action factor:

The County did not take any action to shut down the Lockaway project in December 2000 when Measure D went into effect. Instead, it encouraged Lockaway to continue its development efforts for 18 months. Then, in September 2002 the County changed its position and announced that the project had been doomed since December 2000 because Lockaway had not obtained all permits and commenced construction before Measure D’s effective date. In taking this new stand, the County refused to even consider whether Section 22 exempted the Lockaway project.<sup>134</sup>

The court concluded the county’s behavior was “manifestly unreasonable.”<sup>135</sup>

### III. NECESSITY

Determining that the government’s action has a public character is but the first step in the takings analysis,<sup>136</sup> and the character of the governmental action is not a

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<sup>130</sup> *Id.* at 615.

<sup>131</sup> *Id.* at 611.

<sup>132</sup> *Id.* at 624–25.

<sup>133</sup> *Id.* at 625.

<sup>134</sup> *Id.* at 625–26.

<sup>135</sup> *Id.* at 625. As in *Zeman*, I do not agree that the character of the governmental action factor signals an inquiry into the government’s motive, only the way that its actions intrude on the plaintiff’s property. *See Zeman v. City of Minneapolis*, 552 N.W.2d 548, 553–54 (Minn. 1996); *see, e.g., Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (“A ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.” (citing *United States v. Causby*, 328 U.S. 256 (1946))).

<sup>136</sup> *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536–37 (2005) (noting that the takings

substitute for a due process inquiry. It does not invite an evaluation of the relative merits of the government's actions or motives, only the nature of the intrusion into an owner's property rights.<sup>137</sup> That inquiry is simply one part of the calculus. So how to consider an assertion that the action should be afforded extraordinary—indeed dispositive—weight because it is undertaken in reaction to an emergency? Put another way, to what degree must a court defer to the government's claim that what it is doing is “necessary”?

If viewed simply as a recasting of the Due Process and Public Use Clauses' rational basis test or the character of the government action *Penn Central* factor, this principle may be so elastic as to swallow up a compensation rule, especially if—as many courts do—the government justifiably claims the action is very necessary, even compelling. It would be very difficult for a court to conclude that in any public emergency, the government's reaction does not survive the rational basis test.<sup>138</sup> All actions of government to protect the health, safety, and welfare of the public begin with an assumption that the action is valid, and courts are prohibited by the rational basis test from any kind of searching inquiry into the government's motives, unless a fundamental right is involved, or there is some indication that an improper purpose is afoot.<sup>139</sup> Thus, an invocation of “emergency” seems to add little to the public purpose or utility analysis, which is already such a low bar that nearly anything conceivably qualifies. The inquiry seems to lead elsewhere.

But courts consistently misapply the takings test in emergency situations, most often treating it as dispositive, cutting off further inquiry even though an invocation of police power—responding to an emergency or otherwise—is not an exception to the just compensation requirement.<sup>140</sup> Indeed, the entire regulatory takings doctrine is premised on the idea that certain otherwise valid police power actions intrude “too far” into property rights and as a consequence require compensation.<sup>141</sup> The most recent example of this analysis is the Tenth Circuit's decision in *Lech v. Jackson*, in which the court determined that a police action that resulted in massive damage to a private residence was not a compensable taking.<sup>142</sup> There, the police pursued a fleeing shoplifter into the Lech family home.<sup>143</sup> The shoplifter holed up, refusing to surrender.<sup>144</sup> In

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doctrine “is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking” (quoting *First Eng. Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314–15 (1987)).

<sup>137</sup> *See id.* at 538–39.

<sup>138</sup> *See Higgs & Twight, supra* note 1, at 753.

<sup>139</sup> *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (“Facial neutrality is not determinative.”).

<sup>140</sup> *See Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

<sup>141</sup> *Id.* at 415 (The Kohler Act enacted pursuant to state's police power went “too far.”).

<sup>142</sup> 791 F. App'x 711, 712 (10th Cir. 2019), *cert. denied*, 141 S. Ct. 160 (2020).

<sup>143</sup> *Id.* at 713; Burleigh, *supra* note 58.

<sup>144</sup> *Lech*, 791 F. App'x at 713.

the course of dislodging him, the police tactical unit team nearly destroyed the home.<sup>145</sup> The Tenth Circuit concluded that the owner was owed no compensation for a taking, concluding that the local government was exercising the police power, and there is no taking where the government is exercising the police power.<sup>146</sup> This court and the others which approach the takings question the same way have turned what should be an ad hoc analysis based on the facts of each case into a categorical rule of no compensation if the government is exercising its police powers (which it, by definition, must be).<sup>147</sup>

*Miller v. Schoene* is probably mostly responsible for this, as the case is viewed as concluding that police power measures are arguably more compelling (or, more accurately, more immediate) than run-of-the mill regulations, and are therefore not compensable.<sup>148</sup> There, the government was seeking to eradicate a fungus that threatened an important part of the state's economy.<sup>149</sup> While that certainly seems more pressing than, say, a zoning ordinance, under the rational basis test the courts are not supposed to qualitatively weigh the asserted government purpose or the means chosen to advance it.<sup>150</sup> In *Miller*, Virginia ordered the destruction of otherwise unthreatened cedar trees without compensation because they could carry a disease harmful to nearby apple trees.<sup>151</sup> The court concluded the destruction order was a valid exercise of the police power, and courts should not do a searching inquiry into the government's assertion that the action was needed.<sup>152</sup> The important government interest there was the preservation of the apple trees over the cedar trees—a choice the state was entirely free to make, unrestrained by the Due Process Clause.<sup>153</sup> The government's power was not enhanced by virtue of the emergency, and this was a typical exercise of police power.<sup>154</sup> That due process rationale has been extended to the separate compensation question.<sup>155</sup>

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<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 719.

<sup>147</sup> *See id.*

<sup>148</sup> *See* 276 U.S. 272, 277, 279 (1928).

<sup>149</sup> *Id.* at 278–79.

<sup>150</sup> *See* *Kelo v. City of New London*, 545 U.S. 469, 477–78, 488 n.20 (2005).

<sup>151</sup> *Miller*, 276 U.S. at 277–78.

<sup>152</sup> *See id.* at 279–81.

<sup>153</sup> *See id.* at 280 (finding that the power of the government to prefer one interest “over the property interest of [another], to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property”).

<sup>154</sup> *See id.* (“We need not weigh with nicety the question whether the infected cedars constitute a nuisance according to the common law; or whether they may be so declared by statute.”); *see also* *Hadacheck v. Sebastian*, 239 U.S. 394, 409–11, 414 (1915) (finding that prohibiting the operation of existing brickyards in some but not all parts of a city was not a due process violation, and in “the absence of a clear showing” of improper purpose, courts “must accord good faith” to the government’s claim it barred brickyards as a police power measure).

<sup>155</sup> *See Miller*, 276 U.S. at 277.

Not every jurisdiction takes that approach, however. For example, in *Brewer v. Alaska*, the Alaska Supreme Court correctly shifted the focus in these cases from the government's reasons for undertaking the action to whether those actions were justified in light of the flattening the economic curve rationale under the state constitution's takings clause.<sup>156</sup> There, property owners sought compensation after the state set fires on their land to stop or prevent a wildfire.<sup>157</sup> As the wildfire approached their properties, the state set fire to vegetation around the owners' homes to deprive the wildfire of fuel.<sup>158</sup> When the wildfire passed through the area, the homes were not damaged.<sup>159</sup> The homeowners alleged their properties were not actually threatened by the wildfire and that "the State could have 'undertaken . . . the damaging fire suppression activities on bordering State-owned lands' instead."<sup>160</sup> The trial court entered summary judgment for the state, and regarding the claim on which we are focused—the takings claim—held that the state's burning of the vegetation could not be a taking because it was a valid exercise of the police power.<sup>161</sup>

The Alaska Supreme Court reversed, concluding that although the state acted within the lawful exercise of its police powers because its entry onto private land to set the backfires was authorized by state statutes, the benefit of preventing or limiting wildfires "is of benefit to the public as a whole regardless of whether only individual landowners are immediately benefitted."<sup>162</sup> The court, relying on the public use rationale,<sup>163</sup> rejected the state's alternative argument that the backfires were for private benefit only because they were designed to protect the plaintiffs' homes.<sup>164</sup> The court also expressly rejected the "intended beneficiary" test under the Fifth Amendment,<sup>165</sup> set out by the U.S. Supreme Court in *National Board of Young Men's Christian Associations v. United States*, under which the use by the government of private property is not a taking if a "private party is the particular intended beneficiary of the governmental activity."<sup>166</sup> The Alaska court held that the Alaska Constitution's takings clause provided broader protection to landowners, and the court "d[id] not believe that YMCA's 'intended beneficiary' test adequately reflect[ed] the

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<sup>156</sup> 341 P.3d 1107, 1109 (Alaska 2014).

<sup>157</sup> *Id.* at 1110.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* (omission in original).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 1112.

<sup>163</sup> *See* *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 240, 244 (1984) (The police power and the public purpose under the Public Use Clause are "coterminous," and "[i]t is not essential that the entire community, nor even any considerable portion, . . . directly enjoy or participate in any improvement in order [for it] to constitute a public use." (omission and second alteration in original)).

<sup>164</sup> *Brewer*, 341 P.3d at 1112.

<sup>165</sup> *Id.* at 1114 & n.32.

<sup>166</sup> 395 U.S. 85, 92 (1969).

broad protections of Alaska's Takings Clause."<sup>167</sup> The Alaska court undertook what I think is a more defensible approach to the compensation issue, concluding, "[W]e decline to hold that every valid exercise of the police power is justified by the doctrine of necessity and results in a noncompensable taking."<sup>168</sup> In other words, the government's mere invocation of the police power emergency is not a blanket defense to a takings claim, at least under Alaska's constitution. The court correctly viewed the justification for the government's action as simply fulfilling the public use requirement for takings or the rational basis for due process.<sup>169</sup>

Although *Miller* teaches that courts are to give broad latitude to the government's assertion that its action is necessary and tailored to the situation, the Court in that case did not address—much less resolve—the compensation question, which was not presented in the case.<sup>170</sup> For a more compelling approach to the takings issue, the Florida Supreme Court's opinion in *Department of Agriculture & Consumer Services v. Mid-Florida Growers, Inc.* provides a more consistent and satisfying analysis.<sup>171</sup> There, the Department of Agriculture ordered the owners of healthy citrus trees to destroy them in order to eradicate citrus canker that, in the future, might have infested the plants.<sup>172</sup> The tree owners sought compensation for a taking of their healthy trees.<sup>173</sup> The Department asserted it could not be liable for a taking because it was exercising the police power, and "the trees were destroyed in order to prevent a public harm."<sup>174</sup> The court rejected the argument, viewing the destruction as a public benefit, not as preventing a public harm:

We, however, agree with the district court's conclusion that destruction of the healthy trees benefited the entire citrus industry and, in turn, Florida's economy, thereby conferring a public benefit rather than preventing a public harm. Although this factor alone may not be conclusive, we have previously recognized that if a regulation creates a public benefit it is more likely that there is a taking.<sup>175</sup>

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<sup>167</sup> *Brewer*, 341 P.3d at 1114 & n.32.

<sup>168</sup> *Id.* at 1114.

<sup>169</sup> *Id.* at 1112 ("Because the [fires] were set in the exercise of the State's police powers, the damage they caused was for a public use for purposes of the Takings Clause.").

<sup>170</sup> See *Miller v. Schoene*, 276 U.S. 272, 279–80 (1928) ("For where, as here, the choice is unavoidable, we cannot say that its exercise, controlled by considerations of social policy which are not unreasonable, involves any denial of due process.").

<sup>171</sup> See generally 521 So.2d 101 (Fla.), *cert. denied*, 488 U.S. 870 (1988); *Dep't of Agric. & Consumer Servs. v. Bogorff*, 35 So.3d 84 (Fla. Dist. Ct. App. 2010).

<sup>172</sup> *Mid-Fla. Growers, Inc.*, 521 So.2d at 102 (noting that the Department of Agriculture ordered the destruction of the trees, rejecting a quarantine as an alternative).

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 102–03.

<sup>175</sup> *Id.* at 103 (citation omitted) (citing *Dept. of Agric. & Consumer Servs. v. Mid-Florida Growers, Inc.*, 505 So. 2d 592, 595 (Fla. Dist. Ct. App. 1987)).



The court did not expressly apply the *Penn Central* factors (the takings claim was apparently made under the Florida Constitution), but referenced an ad hoc fact-intensive inquiry.<sup>176</sup>

The dissent took issue with that gloss on the state's action, asserting, "The spread of citrus canker is a public harm; the department took steps to prevent the spread and thereby prevent a public harm."<sup>177</sup> But whether the police power glass was half-full, as the majority saw it,<sup>178</sup> or half-empty, as the dissent viewed it,<sup>179</sup> really is not critical, because any valid public purpose that survives rational basis review should be enough to result in compensation without a court weighing the government's intent or the relative wisdom of its actions. Compensation is morally neutral—not, as dissenting Chief Justice McDonald viewed it—dependent on differentiating the government's duty to prevent harm from its power to confer benefit:

The department had the duty to take emergency measures to prevent an immediate harm—the spread of canker. In viewing its actions from an emergency standpoint, those actions were not unreasonable. The trial judge appeared to base his judgment of inverse condemnation solely on the basis that healthy trees were taken. The issue is not whether the plaintiffs' trees were actually healthy, but rather whether the government, acting responsibly, had reasons to conclude that they might not have been and that it was necessary to destroy them to prevent the spread of a deadly disease. Viewed in this light, the evidence fails to support a claim for inverse condemnation.<sup>180</sup>

In other words, necessity.<sup>181</sup>

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<sup>176</sup> See *id.* at 104–05.

<sup>177</sup> *Id.* at 105 (McDonald, C.J., dissenting).

<sup>178</sup> See *id.* at 102–03 (majority opinion). For one legal scholar who has applied the half-full rationale to emergency takings, see F.E. Guerra-Pujol, *The Kelo Case Provides a Strong Legal Argument for Takings Clause Lockdown Compensation*, DISCOURSE (Apr. 24, 2020), <https://www.discoursemagazine.com/politics/2020/04/24/the-ke-lo-case-provides-a-strong-legal-argument-for-takings-clause-lockdown-compensation/> [<https://perma.cc/HLP8-QK6H>].

<sup>179</sup> See *Mid-Fla. Growers, Inc.*, 521 So.2d at 105–06 (McDonald, C.J., dissenting).

<sup>180</sup> *Id.* at 106.

<sup>181</sup> In *Miller v. Schoene*, the Supreme Court noted there was no real difference between the government's power to prefer one interest over another, or even destroy property. 276 U.S. 272, 279–80 (1928). That is "one of the distinguishing characteristics of every exercise of the police power which affects property." *Id.* Highlighting the dissenting Justice's erroneous view in *Mid-Florida* is his assertion that a predicate to a finding there was a taking is a determination that the "department's orders and regulations enacted to combat the spread of the canker, at the time they were made, were unnecessary or arbitrarily and capriciously applied." *Mid-Fla. Growers, Inc.*, 521 So.2d at 106 (McDonald, C.J., dissenting).

But necessity is more of a tort defense than a principle of liability.<sup>182</sup> The necessity doctrine, however, has unfortunately worked its way into the primary takings calculus, as kind of a “super public use” justifying denial of compensation without more.<sup>183</sup> But the character of the governmental action asks about the nature of the action and its effect, not its intent.<sup>184</sup> It does not mean that if the government *really* needed to act, that compensation is thereby cut off. There are no degrees of police power, with some exercises of the power being given more weight than others. Police power is police power. Emergencies are not exceptions to that rule. Everything government does should be for the health, safety, and welfare of the public. That power is not given greater judicial deference in an emergency, nor is it decreased in “normal” times. Otherwise, it is just inviting everything to be deemed an emergency, and because of the related tendencies for regulation to fill all voids, and government taking the path of least resistance, even normal times will breed desperate measures.<sup>185</sup> The proper place to consider such necessity arguments is not in the context

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<sup>182</sup> It should not be terribly surprising that a court finds the line between “tort” and “takings” to be very blurry. Many courts have done so lately. *See, e.g.*, *Long v. South Dakota*, 904 N.W.2d 502, 520 (S.D. 2017) (concluding that a government-caused flood was a taking, not a trespass); *St. Bernard Par. Gov’t v. United States*, 887 F.3d 1354, 1360 (Fed. Cir. 2018) (finding that Hurricane Katrina flooding was a tort, not a taking: “While the theory that the government failed to maintain or modify a government-constructed project may state a tort claim, it does not state a takings claim”), *cert. denied*, 139 S. Ct. 796 (2019); *see also* *Letica Land Co., LLC v. Anaconda-Deer Lodge Cnty.*, 435 P.3d 634, 637–38 (Mont. 2019) (When the government occupied property under its mistaken claim to own it, it was not a physical taking, but a tort; the court applied the same reasoning as the Federal Circuit in *Katzin*); *Katzin v. United States*, 908 F.3d 1350, 1363 (Fed. Cir.) (rejecting takings liability for the government acting like the property’s owner, even though it was not), *cert. denied*, 140 S. Ct. 443 (2018); *Williams v. Moulton Niguel Water Dist.*, 232 Cal. Rptr. 3d 356, 363–66 (Ct. App. 2018) (noting that the allegation of physical invasion damage to copper pipes by the government’s addition of chemicals sounded in tort, not takings); *Ada Cnty. Highway Dist. v. Brooke View, Inc.*, 395 P.3d 357, 359–62 (Idaho 2017) (noting that the construction damage caused by the Highway District to property adjacent to—but not part of—a road project for which it took property by eminent domain was not covered in the condemnation case, but should be addressed as a tort); *In re Willis Ave. Bridge Replacement v. City of New York*, 111 N.Y.S.3d 595, 597–98 (App. Div. 2019) (analyzing a government-caused flood as tort, not a taking); *City of Daphne v. Fannon*, 303 So.3d 114, 116–17, 123, 125 (Ala. 2019) (finding no takings liability for a government-caused flood because it was not reasonably foreseeable).

<sup>183</sup> *See, e.g.*, *Brewer v. State*, 341 P.3d 1107, 1109 (Alaska 2014).

<sup>184</sup> *See Mid-Fla. Growers, Inc.*, 521 So.2d at 103.

<sup>185</sup> For example, New York’s rent control (a temporary measure) is now entering its second century after a post–World War I housing emergency. Note, *The Constitutionality of Rent Control Restrictions on Property Owners’ Dominion Interests*, 100 HARV. L. REV. 1067, 1067–68 (1987) (“The Supreme Court first upheld rent control decades ago as a temporary, emergency response to the housing shortages and rent increases that followed the two world wars.”).

of either due process or the *Penn Central* takings factors. Instead, the necessity of government action should be part of an affirmative defense to these claims, its burden to prove, to a clearer and more stringent standard than rational basis.

For example, in *TrinCo Investment Co. v. United States*, the Federal Circuit held that a property owner plausibly pleaded a takings claim resulting from the Forest Service's intentional burning of private timberland in order to reduce fuel for ongoing wildfires.<sup>186</sup> The Forest Service's fires destroyed thousands of acres of timber, valued at approximately \$6.6 million.<sup>187</sup> The plaintiffs claimed that the wildfire would not have burned their land, but the Court of Federal Claims dismissed the complaint because the doctrine of necessity absolved the Forest Service of takings liability because it asserted it was necessary to fight the wildfire with fire.<sup>188</sup> The Federal Circuit disagreed, instead concluding that although necessity may apply in some circumstances, it was never blanket absolution to takings liability.<sup>189</sup> This "stretches the doctrine too far."<sup>190</sup> The court concluded that necessity may be a defense to a taking, but that it is the government's burden to prove the emergency measure was in reaction to "an actual emergency," and the government's response was "actually necessary."<sup>191</sup>

As addressed above, however, every taking by the Government in the name of fire control does not automatically qualify as a necessity sufficient to satisfy the requirements of the necessity defense. The necessity defense is just what it says it is: a defense. It has always required a showing of imminent danger. The use of the word "necessity" in the title is no accident. The defense requires both an actual emergency and an imminent danger met by a response that is actually necessary. Not every seizure of a private citizen's property will qualify.<sup>192</sup>

Like the necessity doctrine in tort, which if proven, immunizes the tortfeasor from damages, an invocation of necessity in takings is not a part of the plaintiff's burden, but is squarely on the defendant to prove as an excuse to the presumption of compensation if the *Penn Central* factors say "taking."<sup>193</sup> The Federal Circuit held that "certain

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<sup>186</sup> 722 F.3d 1375, 1376–77 (Fed. Cir. 2013).

<sup>187</sup> *Id.* at 1377.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 1378 (citing *Bowditch v. City of Boston*, 101 U.S. 16, 18–19 (1880)).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 1380.

<sup>192</sup> *Id.*

<sup>193</sup> In the famous California Supreme Court decision *Surocco v. Geary*, the court held that Geary, the Alcalde of San Francisco, was not liable in tort for the "blowing up with gunpowder, and destroying [plaintiff's] house and store, with the goods therein" in the course

prerequisites must be met before the doctrine of necessity can be applied to absolve the Government of a duty to compensate a party for lost property.”<sup>194</sup> There must be both “imminent danger and an actual emergency giving rise to the actual necessity.”<sup>195</sup>

#### IV. EVALUATING EMERGENCY TAKINGS

In this Part, I look at various scenarios of emergency takings through the lens of the *Penn Central* factors and the necessity defense to highlight the touchpoints that should be used to evaluate claims for compensation for emergency takings.

##### A. *Commandeerings: Compensation*

First, the easy cases for compensation. Even in emergencies, when private property is affirmatively acquired or occupied for public use, the owner is entitled to compensation.<sup>196</sup> That a seizure of property is done in an emergency does not relieve the government of its compensation obligation.<sup>197</sup> An “[e]mergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved.”<sup>198</sup> After all, “The Constitution was adopted in a period of grave emergency.”<sup>199</sup> The most straightforward situation is where the government temporarily or permanently uses or seizes property during an emergency for the public’s use. A motel to use as a hospital, for example.<sup>200</sup> A hotel to provide shelter for medical

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of fighting “a public conflagration then raging in the city of San Francisco.” 3 Cal. 69, 70, 74 (1853). The court held that the plaintiff’s building was doomed anyway and entered judgment for Geary. *Id.* at 74.

<sup>194</sup> *TrinCo Inv. Co.*, 722 F.3d at 1378.

<sup>195</sup> *Id.* at 1380.

<sup>196</sup> U.S. CONST. amend. V (stating “nor shall private property be taken for public use, without just compensation”). Here, I assume that the government’s action is within its powers, *see Youngstown Sheet & Tube Co. v. Sawyer (The Steel Seizure Case)*, 343 U.S. 579, 588–89 (1952) (deciding that the President’s power to seize steel mills during the Korean War to prevent a strike was limited by the legislature’s authority), and that it passes muster under the very low bar set by the rational basis test for straight takings and police power actions that do not impact a so-called “fundamental” right, *see, e.g., Kelo v. City of New London*, 545 U.S. 469, 490–91 (2005) (Kennedy, J., concurring) (challenges to public use are reviewed for a rational basis, unless there is evidence that the stated public use is pretextual).

<sup>197</sup> *See Kimball Laundry Co. v. United States*, 338 U.S. 1, 16 (1949) (requiring the government to compensate laundry owners for the seizure of their property and equipment for military purposes); *see also Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 127 (1866).

<sup>198</sup> *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 425 (1934).

<sup>199</sup> *Id.*

<sup>200</sup> *See, e.g., Taryn Luna, Newsom Issues Order Allowing California to Take Over Hotels for Coronavirus Patients*, L.A. TIMES (Mar. 12, 2020, 4:43 PM), <https://www.latimes.com/california/story/2020-03-12/california-governor-gavin-newsom-hotels-medical-facilities-patients-meeting-requirements> [<https://perma.cc/X7MY-634L>]; Edmund DeMarche, *Newsom Executive Order Allows California to Commandeer Hotels, Motels to House Coronavirus*

personnel or to house the homeless.<sup>201</sup> Some jurisdictions label such emergency acquisitions as “commandeering” private property, not “takings.”<sup>202</sup> There are no obvious substantive differences between an emergency commandeering and a plain old taking by eminent domain.<sup>203</sup> For example, in *Farmers Insurance Exchange v. California*, the court treated emergency commandeerings and takings interchangeably, even though the court concluded that the state’s fruit fly eradication program was not a taking.<sup>204</sup>

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*Patients*, FOX NEWS (Mar. 12, 2020), <https://www.foxnews.com/politics/newsom-executive-order-allows-california-to-commandeer-hotels-motels-to-house-coronavirus-patients> [<https://perma.cc/CZ8V-UWTU>].

<sup>201</sup> See, e.g., Julie Zauzmer, *D.C. Pays Millions to Place the Homeless in Hotels to Avoid COVID-19. But Many Rooms Are Empty. And Others Need Them.*, WASH. POST (Aug. 7, 2020, 2:45 PM), <https://www.washingtonpost.com/dc-md-va/2020/08/07/dc-pays-millions-place-homeless-hotels-avoid-covid-19-many-rooms-are-empty-others-need-them/> [<https://perma.cc/BZ4B-8SX9>] (noting consensual takeover with rent payment); Ramona Saviss, *Four Seasons New York Offers Rooms to Medical Workers During Coronavirus Crisis*, HOLLYWOOD REP. (Mar. 27, 2020, 3:25 PM), <https://www.hollywoodreporter.com/news/coronavirus-four-seasons-hotel-ny-offers-free-rooms-medical-workers-1287006> [<https://perma.cc/XEV8-ZR5Q>] (detailing a hotel voluntarily offering space to medical personnel after a request from New York Governor Andrew Cuomo).

<sup>202</sup> See, e.g., CAL. GOV’T CODE § 8572 (West 2021) (“In the exercise of the emergency powers hereby vested in him during a state of war emergency or state of emergency, the Governor is authorized to commandeer or utilize any private property or personnel deemed by him necessary in carrying out the responsibilities hereby vested in him as Chief Executive of the state and the state shall pay the reasonable value thereof.”). Certain properties are immune from commandeering. *Id.* (“Notwithstanding the provisions of this section, the Governor is not authorized to commandeer any newspaper, newspaper wire service, or radio or television station, but may, during a state of war emergency or state of emergency, and if no other means of communication are available, utilize any news wire services, and the state shall pay the reasonable value of such use. In so utilizing any such facilities, the Governor shall interfere as little as possible with their use for the transmission of news.”).

<sup>203</sup> Compare *id.* (“[D]uring a state of war emergency or state of emergency, the Governor is authorized to commandeer or utilize any private property or personnel deemed by him necessary in carrying out the responsibilities hereby vested in him as Chief Executive of the state and the state shall pay the reasonable value thereof.”), with CAL. CIV. PROC. CODE § 1240.030 (West 2021) (“The power of eminent domain may be exercised to acquire property for a proposed project only if all of the following are established: (a) The public interest and necessity require the project. . . . (c) The property sought to be acquired is necessary for the project.”), and HAW. REV. STAT. § 101-2 (2021) (“Private property may be taken for public use.”).

<sup>204</sup> 221 Cal. Rptr. 225, 229–30 (Ct. App. 1985) (“Plaintiffs next contend that Government Code sections 8572 and 8652 of the Emergency Services Act provide a statutory basis for their inverse condemnation claim. These sections provide that the State pay the reasonable value of property commandeered or utilized during a state of emergency. The emphasized language describes a ‘taking’ of private property for public use. As discussed above, the medfly eradication program was a valid exercise of the State’s police power to abate a public nuisance. Damage to automobile paint incidental to the exercise of this power does not rise to the level of a ‘taking’ and is thus non-compensable.” (citing *Skinner v. Coy*, 90 P.2d 296 (Cal. 1939))).

The only difference in California's statutory process for compensation for commandeering is procedural: unlike eminent domain takings in which the government provides compensation, commandeering is treated as inverse condemnations and require the property owner to make a claim for compensation.<sup>205</sup> The character of the governmental action in these cases is an outright seizure or use, with the attendant acknowledgment of the obligation to compensate.<sup>206</sup> With the compensation question resolved, the application of the other two *Penn Central* factors is not really helpful, and the big question in a commandeering is the amount of compensation.<sup>207</sup> This presents two major questions.

First, what property is compensable? For example, *Kimball Laundry v. United States* involved the long-term (but ultimately temporary) takeover by the federal government of a going-concern commercial operation for use during World War II as a military laundry.<sup>208</sup> The owners were forced by the commandeering to suspend their private laundry business for the duration.<sup>209</sup> The Army used its facilities and equipment, and the laundry owners could not restart their business elsewhere.<sup>210</sup> The government recognized its obligation to provide compensation, and the issue was the compensation owed.<sup>211</sup> The Court concluded that the compensation requirement only extends to property interests for which there is a market.<sup>212</sup> And when a taking is not permanent—but is of a known duration at the outset—the market usually values such transactions by “the rental that probably could have been obtained.”<sup>213</sup> Moreover, when the government acquires the business itself (as opposed to only the business's property), the Fifth Amendment requires compensation for the “going-concern” or goodwill use lost by the business as a consequence.<sup>214</sup> In short, if the

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<sup>205</sup> GOV'T § 8652 (“Before payment may be made by the state to any person in reimbursement for taking or damaging private property necessarily utilized by the Governor in carrying out his or her responsibilities under this chapter during a state of war emergency or state of emergency, or for services rendered at the instance of the Governor under those conditions, the person shall present a claim to the Department of General Services in accordance with the provisions of the Government Code governing the presentation of claims against the state for the taking or damaging of private property for public use, which provisions shall govern the presentment, allowance, or rejection of the claims and the conditions upon which suit may be brought against the state.”).

<sup>206</sup> See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

<sup>207</sup> See, e.g., *Kimball Laundry Co. v. United States*, 338 U.S. 1, 6 (1949).

<sup>208</sup> *Id.* at 3 (finding that the Army Quartermaster Corps “ran it as a laundry for personnel in the Seventh Service Command” and retained most of Kimball Laundry's employees, including one of the owners).

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 6.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 7.

<sup>214</sup> *Id.* at 11 (“In determining the value of a business as between buyer and seller, the goodwill and earning power due to effective organization are often more important elements than tangible property. Where the public acquires the business, compensation must be made

commandeering affirmatively takes over a business and prevents the operator from moving it elsewhere, compensation is owed for that loss.<sup>215</sup> But otherwise, compensation is only owed for the property itself.<sup>216</sup> The *Kimball* Court wrote:

We think that the situation before us comes within this principle. The Government's temporary taking of the Laundry's premises could no more completely have appropriated the Laundry's opportunity to profit from its trade routes than if it had secured a promise from the Laundry that it would not for the duration of the Government's occupancy of the premises undertake to operate a laundry business anywhere else in the City of Omaha. The taking was from year to year; in the meantime the Laundry's investment remained bound up in the reversion of the property. Even if funds for the inauguration of a new business were obtainable otherwise than by the sale or liquidation of the old one, the Laundry would have been faced with the imminent prospect of finding itself with two laundry plants on its hands, both of which could hardly have been operated at a profit. There was nothing it could do, therefore, but wait.<sup>217</sup>

The second issue is what measure of compensation is the owner of commandeered property entitled to? For example, California's statute obligates the government to pay "reasonable" compensation, but there is nothing suggesting this differs from the constitutional standard of just compensation.<sup>218</sup> To the extent that reasonable compensation falls short of full indemnity for the property taken, the constitutional standard prevails, and the legislature cannot limit the amount of compensation.<sup>219</sup> In *Monongahela Navigation Co. v. United States*, Congress authorized acquisition of a privately owned lock.<sup>220</sup> The owner also possessed the authority to collect tolls from river traffic.<sup>221</sup> Congress appropriated money for compensation but directed

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for these, at least under some circumstances." (quoting *Galveston Elec. Co. v. Galveston*, 258 U.S. 388, 396 (1922))).

<sup>215</sup> *Id.* (In the usual fee taking, the owner is "free to move his business to a new location.").

<sup>216</sup> *Id.* at 12–13 ("The taker has thus in effect assured itself of the freedom from the former owner's competition.").

<sup>217</sup> *Id.* at 14.

<sup>218</sup> CAL. GOV'T CODE § 8572 (West 2021) ("[T]he state shall pay the reasonable value" of property commandeered by the Governor "during a state of war emergency or state of emergency.").

<sup>219</sup> *See Monogahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893) (Although a "legislature may determine what private property is needed for public purposes . . . the question of compensation is judicial.").

<sup>220</sup> *Id.* at 312.

<sup>221</sup> *Id.* at 314.

that whatever amount was paid for the taking, it could not include the value of the tolls.<sup>222</sup> The owner appraised the value of the lock and the value of the right to collect tolls at \$450,000.<sup>223</sup> After trial, the court awarded the owner \$209,000, which in accordance with the statute was the value of the taken lock alone, “not considering or estimating . . . the franchise of this company to collect tolls.”<sup>224</sup>

The Supreme Court rejected that approach, concluding that calculation of just compensation is a judicial function and that a legislature can neither establish the amount to be paid in compensation for a taking nor dictate the method used to calculate it.<sup>225</sup> The Just Compensation Clause requires payment of “a full and perfect equivalent for the property taken.”<sup>226</sup> The Court noted a Mississippi decision which held that permitting the legislature to set or determine the amount of compensation paid would allow it to “constitute itself the judge in its own case.”<sup>227</sup> In short, a statute cannot thwart or limit the self-executing right to the full measure of just compensation.<sup>228</sup> The right to recover just compensation for property taken for public use in an emergency cannot be burdened by state law limitations, particularly legislatively created limitations on providing only “reasonable” compensation.<sup>229</sup>

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<sup>222</sup> *Id.* at 313–14.

<sup>223</sup> *Id.* at 318–19.

<sup>224</sup> *Id.* at 319.

<sup>225</sup> *Id.* at 327 (“By this legislation, Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial and not a legislative question.”).

<sup>226</sup> *Id.* at 326.

<sup>227</sup> *Id.* at 327 (quoting *Isom v. Miss. Cent. R.R.*, 36 Miss. (7 Geo.) 300, 315 (1858)).

<sup>228</sup> *Jacobs v. United States*, 290 U.S. 13, 17 (1933) (“[T]he right to just compensation could not be taken away by statute or be qualified . . .”).

<sup>229</sup> *See People ex rel. Wanless v. City of Chicago*, 38 N.E.2d 743, 746 (Ill. 1941) (A court cannot read a statute to deprive the landowner of compensation for a taking.); *City of San Antonio v. Astoria*, 67 S.W.2d 321, 322 (Tex. Civ. App. 1933) (finding that the legislature may provide the method of securing payment of compensation but may not “prescribe any procedure which would lessen the absolute obligation of the taker to compensate the owner, ‘in money,’ for the property taken”); *see also Tucson Airport Auth. v. Freilich*, 665 P.2d 1007, 1011 (Ariz. Ct. App. 1982) (“The determination of the proper rate of interest, being a part of just compensation, is necessarily a judicial function which the legislature may not usurp.”); *Redevelopment Agency of Burbank v. Gilmore*, 198 Cal. Rptr. 304, 307–08 (Ct. App. 1984) (finding that the interest rate to be allowed could exceed that specified by statute since a constitutional right was involved); *Gov’t of Guam v. 162.40 Square Meters of Land*, 2016 Guam 10 ¶ 19, 29 (finding that the statutory interest rate of six percent on condemnation awards does not limit the right under the Just Compensation Clause of the owner to prove that she is entitled to a greater rate of interest); *Ill. State Toll Highway Auth. v. Am. Nat’l Bank & Trust Co.*, 642 N.E.2d 1249, 1253 (Ill. 1994) (“Although that statute purports to set an interest rate at 6% per year [on compensation awards] . . . the 6% rate is not binding.”); *Booras v. Iowa State Highway Comm’n*, 207 N.W.2d 566, 569–70 (Iowa 1973) (holding that a remittitur not available in eminent domain to reduce jury’s compensation verdict); *State ex rel. Humphrey v. Baillon Co.*, 480 N.W.2d 673, 676 (Minn. Ct. App. 1992) (finding that the calculation of interest on compensation is judicial function, and courts are



*B. Occupations, Seizures, and Destructions Without Proffering Compensation*

Similar to commandeerings, the general rule for emergency seizures and destructions is to provide compensation, even where, unlike commandeerings, the government does not affirmatively acknowledge its obligation to provide it.<sup>230</sup> There may be limited circumstances where compensation need not be provided for the use, seizure, or destruction of private property in extreme emergencies, such as war, but the general rule there still favors compensation.<sup>231</sup> The general approach is best illustrated by *Mitchell v. Harmony*, where the Court noted that the military may take property “to prevent them from falling into the hands of the public enemy; but in order to justify the seizure the danger must be immediate and impending, and not remote or contingent.”<sup>232</sup> This mirrors the necessity analysis which I set out above, in which the government bears the burden of asserting and proving the actual necessity of the taking.<sup>233</sup> The danger must be “pressing” (“immediate and impending, and not remote or contingent”) before private property can be “impress[ed] . . . into the public service.”<sup>234</sup> That case involved the army’s seizure of “wagons, mules

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not bound by statutory interest rates); *Manning v. Mining & Mins. Div. of the Energy, Mins. & Nat. Res. Dep’t*, 144 P.3d 87, 91–92 (N.M. 2006) (rejecting agency’s claim it was not liable for regulatory taking because the agency lacked eminent domain power, the court noted, “legislation cannot insulate the state from providing just compensation for takings . . . When a taking occurs, just compensation is required by the Constitution, regardless of state statute.”), *cert. denied*, 549 U.S. 1051 (2006); *Red Springs City Bd. of Educ. v. McMillan*, 108 S.E.2d 895, 900 (N.C. 1959) (Parker, J., concurring) (“Th[e] constitutional prohibition against taking private property for public use without the payment of just compensation is self-executing, and neither requires any law for its enforcement, nor is susceptible of impairment by legislation.”); *Mitchell v. Village of White Plains*, 16 N.Y.S. 828, 829 (Gen. Term 1891) (“A remedy for compensation contingent upon the realization of funds from taxation for benefit within a limited assessment district does not meet the constitutional requirement.” (quoting *Sage v. City of Brooklyn*, 89 N.Y. 189, 196 (1882))); *Commonwealth v. Lot No. 281-5 R/W*, 2016 MP 17 ¶ 31 (N. Mar. I.) (per curiam) (finding that the Commonwealth of the Northern Mariana Islands was not protected by sovereign immunity when it failed to pay a condemnation judgment; self-executing Just Compensation Clause prohibited legislature from refusing to appropriate money to pay the judgment after it has taken property).

<sup>230</sup> See *Kirby Forest Indus. v. United States*, 467 U.S. 1, 3 (1984); see, e.g., Katie Canales, *San Francisco Could Seize the Headquarters of Tech Giants like Salesforce and Twitter to Use as Emergency Housing for the City’s Homeless and First Responders*, BUS. INSIDER (Apr. 16, 2020, 1:41 PM), <https://www.businessinsider.com/san-francisco-could-seize-private-property-covid-19-crisis-2020-4> [<https://perma.cc/MUY5-GKAP>]; Noam N. Levey, *Hospitals Say Feds Are Seizing Masks and Other Coronavirus Supplies Without a Word*, L.A. TIMES (Apr. 7, 2020, 2:07 PM), <https://www.latimes.com/politics/story/2020-04-07/hospitals-washington-seize-coronavirus-supplies> [<https://perma.cc/ZS3A-D3FZ>].

<sup>231</sup> See *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 133 (1851).

<sup>232</sup> *Id.*

<sup>233</sup> See *supra* text accompanying notes 183–95.

<sup>234</sup> *Mitchell*, 54 U.S. (13 How.) at 133.

and goods” while on campaign in enemy territory during the Mexican-American War.<sup>235</sup> The Court held:

There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy; and also where a military officer, charged with a particular duty, may impress private property into the public service or take it for public use. Unquestionably, in such cases, the government is bound to make full compensation to the owner; but the officer is not a trespasser.<sup>236</sup>

Like *Penn Central*, the Court in *Mitchell* concluded the takings question is circumstance-specific, but also if an emergency “gives the right, . . . the emergency must be shown to exist before the taking can be justified.”<sup>237</sup> Another example of the compensation principle is *Attorney-General v. De Keyser’s Royal Hotel, Ltd.*, in which, in a series of separate opinions, the House of Lords concluded that the Crown could not seize possession of property “in connection with the defence of the realm without paying compensation for their use and occupation.”<sup>238</sup> When the character of the government action is a seizure, occupation, or destruction, it is the most compelling *Penn Central* factor, regardless of the extent of the loss or the owner’s expectation of compensation.<sup>239</sup>

The Supreme Court has treated physical invasions as a distinct species of public use of private property and has long recognized that even temporary occupations are

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<sup>235</sup> *Id.* at 129; see also James E. Pfander, *Dicey’s Nightmare: An Essay on the Rule of Law*, 107 CALIF. L. REV. 737, 763 (2019) (“Rightly viewed as a landmark decision on military accountability for the invasion of property rights, *Mitchell v. Harmony* arose from the loss of property during the Mexican-American War.” (footnote omitted)).

<sup>236</sup> *Mitchell*, 54 U.S. (13 How.) at 134; cf. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 131, 138 (1978) (holding that not all restrictions on property use are takings requiring just compensation when the restrictions are for the general welfare).

<sup>237</sup> *Mitchell*, 54 U.S. (13 How.) at 134.

<sup>238</sup> [1920] AC 508 (HL) at 508 (appeal taken from Eng.).

<sup>239</sup> See *Youngstown Sheet & Tube Co. v. Sawyer (The Steel Seizure Case)*, 343 U.S. 579, 588–89 (1952) (finding that the President acted outside of his powers to seize steel mills); *United States v. Lee*, 106 U.S. 196, 220 (1882) (holding that war is not a blanket exception to the need to provide compensation and “[n]o man in this country is so high that he is above the law”). For an argument that *Lee* remains important because it emphasized the enduring principle that in the United States no man is above the law, including the government itself, see generally ANTHONY J. GAUGHAN, *THE LAST BATTLE OF THE CIVIL WAR: UNITED STATES VERSUS LEE, 1861–1883* (2011). As Professor Gaughan subsequently wrote, “In rejecting the Justice Department’s argument, the Supreme Court reaffirmed the nation’s commitment to the rule of law. . . . The fundamental lesson of *United States v. Lee* was that, in the American legal system, the rule of law constrains the actions of every government officer, including the President.” Anthony J. Gaughan, *The Arlington Cemetery Case: A Court and a Nation Divided*, 37 J. SUP. CT. HIST. 1, 17 (2012).

governed by bright-line rules, not the “few invariable rules” applicable to most takings cases.<sup>240</sup> The brightest of these lines is that an uncompensated physical invasion of private property is mala in se and does not require proof of a resultant loss of use of the property invaded.<sup>241</sup> The compensation owed for a relatively minor invasion may be correspondingly minor, but that is a question of valuation, not of takings liability.<sup>242</sup> In the paradigmatic example of the Court’s categorical rule that all “permanent” physical invasions are takings, *Loretto v. Teleprompter Manhattan CATV Corp.*, the Court was presented with a physical invasion of the most trivial kind: a regulation requiring Loretto and other private property owners to allow installation of a television cable “slightly less than one-half inch in diameter and of approximately 30 feet in length,” “directional taps,” and “two large silver boxes” (about 18” x 12” x 6”) on their apartment buildings.<sup>243</sup> The Court held that this de minimis physical invasion was a taking: “Teleprompter’s cable installation on appellant’s building constitutes a taking under the traditional test. The installation involved a direct physical attachment of plates, boxes, wires, bolts, and screws to the building, completely occupying space immediately above and upon the roof and along the building’s exterior wall.”<sup>244</sup>

The Court agreed that the installation served the public interest, but held that the question of whether it triggered the Fifth Amendment’s requirement for compensation was a separate issue.<sup>245</sup> The majority rejected the dissent’s argument that “a taking of about one-eighth of a cubic foot of space is not of constitutional significance.”<sup>246</sup> Instead, the Court found that the magnitude of the invasion was “not critical: whether the installation is a taking does not depend on whether the volume of space it occupies is bigger than a breadbox.”<sup>247</sup> The Court reaffirmed “[t]he traditional

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<sup>240</sup> Compare *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Plan. Agency*, 535 U.S. 302, 322 (2002) (“When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner.” (citing *United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951))), with *Ark. Game & Fish Comm’n v. United States*, 568 U.S. 23, 31 (2012) (“In view of the nearly infinite variety of ways in which government actions or regulations can affect property interests, the Court has recognized few invariable rules . . .”).

<sup>241</sup> See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982).

<sup>242</sup> *Id.* (Though the occupation was minor, the “physical occupation of an owner’s property authorized by government constitutes a ‘taking’ of property for which just compensation is due.”).

<sup>243</sup> *Id.* at 422, 438 n.16 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 423 N.E.2d 320, 324 (N.Y. 1981)).

<sup>244</sup> *Id.* at 438.

<sup>245</sup> *Id.* at 426 (“We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve. Our constitutional history confirms the rule, recent cases do not question it, and the purposes of the Takings Clause compel its retention.”).

<sup>246</sup> *Id.* at 438 n.16.

<sup>247</sup> *Id.*

rule” that a physical invasion is a taking without regard to the size of the invasion.<sup>248</sup> The Court held that even small permanent (or more accurately, “indefinite”) invasions are “qualitatively more severe than a regulation of the *use* of property” because “the owner may have no control over the timing, extent, or nature of the invasion.”<sup>249</sup>

Notably absent from the analysis was whether the permanent physical occupation resulted in any actual damage or interfered with Loretto’s uses of the five-story building.<sup>250</sup> There was no allegation (or proof) that the installation of the cable equipment resulted in any loss of her use of the roof or her building, and indeed a good argument could have been made that cable television service to Loretto’s tenants actually enhanced her uses and the value of her building.<sup>251</sup> Instead, the Court viewed the invasion itself as the constitutional wrong and presumed that the equipment installation deprived Loretto of her uses to the extent of the invasion, even though she was free to use the rest of her property without interference:

Second, the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property. Although deprivation of the right to use and obtain a profit from property is not, in every case, independently sufficient to establish a taking, it is clearly relevant. Finally, even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property.<sup>252</sup>

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<sup>248</sup> *Id.* at 436.

<sup>249</sup> *Id.*

<sup>250</sup> *See generally id.* The Court more recently rejected a distinction between permanent and temporary physical invasion takings, concluding in *Arkansas Game & Fish Commission v. United States* that the temporary nature of an invasion does not automatically exempt it from compensation. 568 U.S. 23, 38 (2012) (finding that the government-induced flooding, even if temporary in duration, gained no automatic exemption from application of the takings clause).

<sup>251</sup> *See Loretto*, 458 U.S. at 437 n.15 (noting the dissent’s argument that the regulation “likely increase[d] both the building’s resale value and its attractiveness on the rental market”). *Loretto* focused on the “relatively few problems of proof” that the traditional bright line takings rule entails and concluded by noting that evidence about the extent of the invasion (in other words, the loss of the owner’s use resulting from the invasion) was a matter of the just compensation owed, not a question of whether there had been a taking. *Id.* at 437, 441 (“The issue of the amount of compensation that is due, on which we express no opinion, is a matter for the state courts to consider on remand.”); *id.* at 437 (“Once the fact of occupation is shown, of course, a court should consider the *extent* of the occupation as one relevant factor in determining the compensation due.”).

<sup>252</sup> *Id.* at 436 (citation omitted) (citing *Andrus v. Allard*, 444 U.S. 51, 66 (1979)); *see also*

The Court reaffirmed this bright line rule in *Lingle v. Chevron U.S.A. Inc.*, where it concluded, “physical takings require compensation because of the unique burden they impose: A permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner’s right to exclude others from entering and using her property—perhaps the most fundamental of all property interests.”<sup>253</sup> In short, a physical invasion itself triggers an “incontestable” claim for compensation, which the courts have “never den[ie]d.”<sup>254</sup>

Contrast that approach with *United States v. Caltex (Philippines), Inc.*, in which the Court concluded that the army’s destruction of property to prevent it from falling into the hands of the advancing enemy in World War II did not require compensation.<sup>255</sup> Had the army not destroyed the property, the “fortunes of war” would have resulted in the property being used by the enemy.<sup>256</sup> In short, the war took the property, not the government.<sup>257</sup> The Court affirmed the dicta in *United States v. Pacific Railroad*, which noted that it was not a taking for Union forces to blow up a railroad’s bridges during the Civil War as a tactical measure “to prevent the advance of the enemy.”<sup>258</sup> The Court denied that this was a taking and denied

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Nat’l Bd. of Young Men’s Christian Ass’ns v. United States, 395 U.S. 85, 92 (1969) (“Ordinarily, of course, governmental occupation of private property deprives the private owner of his use of the property, and it is this deprivation for which the Constitution requires compensation.”); *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 167, 174 (1871) (After the erection of a dam across a river by a canal company raised the level of a lake, flooding Pumpelly’s property, the Court concluded that where property was invaded by water, the flood effectively destroyed or impaired its usefulness and a taking occurred.); *United States v. Cress*, 243 U.S. 316, 328 (1917) (finding that even when a property was only affected by intermittent floodwaters, a taking may still occur); *United States v. Dickinson*, 331 U.S. 745, 751 (1947) (holding that a taking had occurred, even though the owner was not deprived of all economic uses and had reclaimed most of the land after the initial flood because “no use to which Dickinson could subsequently put the property by his reclamation efforts changed the fact that the land was taken when it was taken and an obligation to pay for it then arose”).

<sup>253</sup> 544 U.S. 528, 539 (2005) (first citing *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); then citing *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 831–32 (1987); then citing *Loretto*, 458 U.S. at 433; and then citing *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).

<sup>254</sup> *Loretto*, 458 U.S. at 427 n.5 (citing Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1184 (1967) (“At one time it was commonly held that, in the absence of explicit expropriation, a compensable ‘taking’ could occur only through physical encroachment and occupation. The modern significance of physical occupation is that courts, while they sometimes do hold nontrespassory injuries compensable, never deny compensation for a physical takeover. The one incontestable case for compensation (short of formal expropriation) seems to occur when the government deliberately brings it about that its agents, or the public at large, ‘regularly’ use, or ‘permanently’ occupy, space or a thing which theretofore was understood to be under private ownership.” (emphasis omitted)).

<sup>255</sup> 344 U.S. 149, 154 (1952).

<sup>256</sup> *Id.* at 155.

<sup>257</sup> *See id.* at 156 (Douglas, J., dissenting).

<sup>258</sup> 120 U.S. 227, 229 (1887).

compensation.<sup>259</sup> The destruction of the railroad bridges was a “military necessity.”<sup>260</sup> As the Court noted, “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.”<sup>261</sup> Nor are military forces obligated to return—or pay compensation for any damage to—contraband or property that an enemy might use to wage war.<sup>262</sup> The same holds true when the property taken or destroyed is enemy property.<sup>263</sup> That principle means that some physical occupations or destructions in emergencies are not compensable events.<sup>264</sup> In *National Board of Young Men’s Christian Associations v. United States*, for example, the Court concluded that the government was not liable for compensation when rioters destroyed a building being occupied by soldiers during the riots.<sup>265</sup> The destruction can be blamed on the rioters, and the Army was trying to defend the property, albeit unsuccessfully.<sup>266</sup> Although the government is ordinarily liable when it occupies property, in the “unusual circumstances” there, it was the riots and the rioters that deprived the owner of the building’s use.<sup>267</sup>

Applying *Loretto’s* view of the *Penn Central* factors, emergency seizures or occupations of private property should be compensable without inquiry into the magnitude of the owner’s loss or her expectations of property and compensation, unless the government can prove it took the property for some extraordinary reason, such as to prevent it from falling into the hands of an enemy or being destroyed inevitably by the emergency.<sup>268</sup> If measures taken in war are alone not sufficient to overcome the compensation principle, it is hard to imagine that a civil emergency

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<sup>259</sup> *Id.* at 240.

<sup>260</sup> *Id.* at 229.

<sup>261</sup> *Id.* at 234.

<sup>262</sup> *See id.*

<sup>263</sup> *See* *Juragua Iron Co. v. United States*, 212 U.S. 297, 305–06 (1909) (finding that the destruction of property owned by U.S. corporation in Cuba to prevent yellow fever spread to army troops was not compensable).

<sup>264</sup> *See id.*

<sup>265</sup> 395 U.S. 85, 93 (1969).

<sup>266</sup> *Id.*

<sup>267</sup> *See id.* at 92–93. The destruction of property is not analyzed differently than a taking. *See* *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945) (“[T]he term ‘taken’ would seem to signify something more than destruction, for it might well be claimed that one does not take what he destroys. But the construction of the phrase has not been so narrow. The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking.”).

<sup>268</sup> The exigencies of the emergency may prevent the government from providing contemporaneous full compensation, but a delay in payment alone does not limit the power to take for public purposes, provided the government has committed to eventually providing it. *See* *Cherokee Nation v. S. Kan. Ry. Co.*, 135 U.S. 641, 659 (1890). It becomes a matter of the amount of compensation owed, not whether compensation is owed at all.

would be. This, as noted above, is a much different inquiry than the rational basis test for whether the court should halt the seizure. It would not be enough to avoid compensation to claim only that the property was destroyed to save another's property.

The utilitarian calculus does not mean that the greater the public good, the lesser the case for compensation, but precisely the opposite: the fact that the plaintiff's property was purposely sacrificed for the public good presents the better case for compensation.<sup>269</sup> The government may be attempting to flatten the curve of an emergency by seizing property, but the Just Compensation Clause stands as a bulwark against doing so on the backs of the individual property owner, unless the owner was going to lose it to the emergency anyway.<sup>270</sup> The government must prove both the presence of an "imminent danger" and "an actual emergency giving rise to actual necessity" of taking property.<sup>271</sup>

### C. Third-Party Occupations

This Section analyzes emergency actions which are not direct government seizures, occupations, or destructions of private property, but where instead—by action or inaction—the government allows third parties to do so. For example, an eviction moratorium,<sup>272</sup> a temporary rent abeyance or rent "strike,"<sup>273</sup> or a rent cancellation.<sup>274</sup> Many of the same *Penn Central* principles animating the analysis of

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<sup>269</sup> See *Armstrong v. United States*, 364 U.S. 40, 48–49 (1960).

<sup>270</sup> See, e.g., *TrinCo Inv. Co. v. United States*, 722 F.3d 1375, 1377 (Fed. Cir. 2013).

<sup>271</sup> *Id.* at 1378.

<sup>272</sup> See, e.g., Jaclyn Diaz, *New York Approves Eviction Moratorium Until May*, NPR (Dec. 29, 2020, 6:41 AM), <https://www.npr.org/sections/coronavirus-live-updates/2020/12/29/951042050/new-york-approves-eviction-moratorium-until-may> [<https://perma.cc/SU98-6YGG>].

<sup>273</sup> See, e.g., Will Parker & Nicole Friedman, *Rent Strike Planned for May 1 as Pain of Coronavirus Deepens*, WALL ST. J., <https://www.wsj.com/articles/rent-strike-planned-for-may-1-as-pain-of-coronavirus-deepens-11587988800> [<https://perma.cc/F46S-GMT8>] (Apr. 27, 2020, 2:07 PM); Jean Tepperman, *What If They Held a Pandemic (and a Rent Strike Broke out Instead?)*, E. BAY EXPRESS (Apr. 29, 2020), <https://www.eastbayexpress.com/oakland/what-if-they-held-a-pandemic-and-a-rent-strike-broke-out-instead/Content?oid=29628380> [<https://perma.cc/32HQ-ZJU3>].

<sup>274</sup> See, e.g., H.R. 6515, 116th Cong. (2020) ("To suspend obligations of residential renters and mortgagors to make payments during the COVID-19 emergency, and for other purposes."); see also Press Release, Rep. Ilhan Omar Introduces Bill to Cancel All Rent and Mortgage Payments During the COVID-19 Pandemic (Apr. 17, 2020), <https://omar.house.gov/media/press-releases/rep-ilhan-omar-introduces-bill-cancel-all-rent-and-mortgage-payments-during> [<https://perma.cc/XY2M-EV7N>]. An Alexandria, Virginia, councilmember has introduced a measure calling for a rent and mortgage moratorium. Press Release, Canek Introduces Resolution Calling for Moratorium on Rent, Mortgages, and Suspension of Negative Credit Reporting (Apr. 14, 2020), <https://www.canekforcouncil.com/news/2020/4/14/aguirre-introduces-resolution-calling-for-moratorium-on-rent-mortgages-and-suspension-of-negative-credit-reporting> [<https://perma.cc/7XB2-LZFS>].

whether a straight commandeering or destruction of property under the emergency power requires compensation also apply to government occupations of property.<sup>275</sup>

First, the character of the governmental action (or inaction). If viewed as a physical occupation, a government invitation to the public to occupy private property should be treated no differently than direct governmental occupations, because the invitation to the public is governmental action.<sup>276</sup> Additionally, the lack of affirmative government conduct—for example, a refusal to enforce eviction or trespass claims—does not avoid the possibility of takings liability.<sup>277</sup> If the government interferes with the operation of trespass or landlord-tenant law, for example, it may be liable for a taking.<sup>278</sup>

Second, whether the character of a refusal to remove nonpaying tenants or oust trespassers is akin to a physical occupation, triggering the *Loretto* rule. The Supreme Court was confronted with a similar situation in *Yee v. City of Escondido*, where it

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<sup>275</sup> See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

<sup>276</sup> See *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979) (finding that a federal government requiring owner of private marina to open it to public would be a taking); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 841–42 (1987) (finding that a property owner has the right to compensation when the state allows public to access beach via private land).

<sup>277</sup> See, e.g., *Litz v. Md. Dep't of the Env't*, 131 A.3d 923, 931 (Md. 2016) (“Upon this review, it seems appropriate (and, in this case, fair and equitable, at least at the pleading stage of litigation) to recognize an inverse condemnation claim based on alleged ‘inaction’ when one or more of the defendants has an affirmative duty to act under the circumstances. Therefore, we hold, as a matter of Maryland law, that an inverse condemnation claim is pleaded adequately where a plaintiff alleges a taking caused by a governmental entity’s or entities’ failure to act, in the face of an affirmative duty to act.”); Christopher Serkin, *Passive Takings: The State’s Affirmative Duty to Protect Property*, 113 MICH. L. REV. 345, 347 (2014) (“While the idea of imposing affirmative constitutional duties on the state is unorthodox as a matter of general constitutional law, it is surprisingly consonant with underlying justifications for the Takings Clause.”).

<sup>278</sup> See, e.g., *Preseault v. Interstate Com. Comm'n*, 494 U.S. 1, 4–5, 8 (1990) (The National Trails System Act, 16 U.S.C. § 1241, was a valid exercise of Commerce Clause authority, but may subject government to takings liability because the Act interfered with the usual operation of state easement law.). In *Preseault v. United States*, the Federal Circuit confirmed that when an abandoned rail easement was converted into a public park, even with an issuance of notice, just compensation still must be paid. 100 F.3d 1525, 1544–49 (Fed. Cir. 1996). Railbanking interferes with the operation of state property law by preventing owners of land subject to abandoned rail easements from exercising their unencumbered rights. *See id.* at 1529–30. Compensation turns on the scope of the easement and the present use. *Id.* at 1555 (Clevenger, J., dissenting); see also *Ladd v. United States*, 630 F.3d 1015, 1019 (Fed. Cir. 2010) (“It is settled law that a Fifth Amendment taking occurs in Rails-to-Trails cases when government action destroys state-defined property rights by converting a railway easement to a recreational trail, if trail use is outside the scope of the original railway easement.”); *Toews v. United States*, 376 F.3d 1371, 1376 (Fed. Cir. 2004) (“It is elementary law that if the Government uses (or authorizes the use of . . .) an existing railroad easement for purposes and in a manner not allowed by the terms of the grant of the easement, the Government has taken the landowner’s property for the new use.”).



concluded that a local rent control ordinance—limiting an owner’s right to charge market rent and stretching out the time it would take an owner to evict a tenant—was not analyzed under *Loretto*.<sup>279</sup> In *Yee*, property owners asserted the ordinance worked a physical taking, because it allowed occupation of their property by third parties (tenants) whom they could otherwise have ousted for not paying market rent.<sup>280</sup> *Yee* was a facial challenge to the rent control ordinance.<sup>281</sup> The Court was not also presented with a *Penn Central* argument.<sup>282</sup>

The Court characterized the argument:

[T]he park owner cannot evict a mobile home owner or easily convert the property to other uses, the argument goes, the mobile home owner is effectively a perpetual tenant of the park, and the increase in the mobile home’s value thus represents the right to occupy a pad at below-market rent indefinitely.<sup>283</sup>

The Yees argued, in effect, that the ordinance had, in practice, transformed their private rentals into public housing.<sup>284</sup> The Court rejected that characterization: this was not a government-*required* occupation, but merely the owners choosing to continue to rent their property, even after the city adopted the confiscatory ordinance.<sup>285</sup> The owners retained the right to evict, “albeit with 6 or 12 months notice.”<sup>286</sup> Thus, the unwanted occupation, although long-term, was not a permanent ouster.<sup>287</sup> The Court noted, however, that a “different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy.”<sup>288</sup> Applying the *Yee* Court’s clever sleight-of-hand, measures like a rent or eviction moratorium, or inaction in the face of a rent strike, would likely lead a court to conclude that the emergency action is not a categorical physical occupation under the *Loretto* codicil to *Penn Central* if the owner had “invited” the tenant onto the property before the emergency

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<sup>279</sup> 503 U.S. 519, 524–25 (1992).

<sup>280</sup> *See id.* at 525.

<sup>281</sup> *Id.* at 528.

<sup>282</sup> *See id.* at 537 (“Whether or not the ordinance effects a regulatory taking is a question *related* to the one petitioners presented, and perhaps *complementary* to the one petitioners presented, but it is not ‘fairly included therein.’ Consideration of whether a regulatory taking occurred would not assist in resolving whether a physical taking occurred as well; neither of the two questions is subsidiary to the other.”).

<sup>283</sup> *Id.* at 526–27.

<sup>284</sup> *Id.* at 526.

<sup>285</sup> *See id.* at 527–28.

<sup>286</sup> *Id.* at 528.

<sup>287</sup> *See id.*

<sup>288</sup> *Id.*

measures were put in place.<sup>289</sup> The lack of government-*required* occupation would not be dispositive, even if it would add more weight on the compensation side of the scale because owners would have both reasonable and distinct investment-backed expectations so they could rely on existing legal processes to recover occupation of their properties if a tenant stopped paying rent or a non-tenant trespassed.<sup>290</sup>

If rent holidays are not physical occupations, are they *Lucas* wipeouts? In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, the Court extended *Yee*'s ad hoc approach to regulatory takings that result in a total loss of economically beneficial uses, if the prohibition is temporary.<sup>291</sup> There, the agency prohibited all development by way of two back-to-back moratoria.<sup>292</sup> The total time these ordinances prevented "virtually all development" was about two years and eight months.<sup>293</sup> The Court rejected the owner's facial takings claim "that the mere enactment of a temporary regulation that, while in effect, denies a property owner all viable economic use of her property gives rise to an unqualified constitutional obligation to compensate her for the value of its use during that period."<sup>294</sup> In other words, compensation is required without examining the owner's expectations or the economic impact of the prohibition.<sup>295</sup> The Court declined to adopt a per se rule, instead concluding that "the circumstances in this case are best analyzed within the *Penn Central* framework."<sup>296</sup> "[T]he answer to the abstract question whether a temporary moratorium effects a taking," the majority concluded, "is neither 'yes, always' nor 'no, never'; the answer depends upon the particular circumstances of the case."<sup>297</sup> Property, the *Tahoe-Sierra* majority concluded, has a "temporal aspect" included as one of the sticks in the bundle, and a government action can never be tested by takings without consideration of the effect of the time the government action clouded use, even if that action resulted in a total prohibition of use.<sup>298</sup>

*Tahoe-Sierra* is built on two assumptions that may not be applicable in cases claiming compensation for rent abeyances.<sup>299</sup> First, the action that is alleged to result in a taking is truly temporary, even if in that case the cloud was years-long.<sup>300</sup> The Court expressly declined to review one of the questions presented by the property

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<sup>289</sup> See *id.*; see also *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 138 (1978).

<sup>290</sup> See *Yee*, 503 U.S. at 528; *Loretto*, 458 U.S. at 441; *Penn Cent. Transp. Co.*, 438 U.S. at 138.

<sup>291</sup> 535 U.S. 302, 342 (2002).

<sup>292</sup> *Id.* at 306.

<sup>293</sup> *Id.* at 306, 314.

<sup>294</sup> *Id.* at 320.

<sup>295</sup> See *id.*

<sup>296</sup> *Id.* at 321.

<sup>297</sup> *Id.*

<sup>298</sup> *Id.* at 331–32.

<sup>299</sup> See *id.*

<sup>300</sup> *Id.* at 333–34.

owner's petition for certiorari, whether a series of temporary prohibitions become, at some point, the functional equivalent of a permanent taking.<sup>301</sup> Thus, it is an open question about how temporary an emergency wipeout of rent or recovery of possession can be before it becomes "permanent."<sup>302</sup> The longer temporary emergency measures are in place, the more likely it is the character of the government action will be recognized as a permanent occupation, making the government liable for the compensation regardless of the magnitude of a property owner's loss.<sup>303</sup> And even as merely a part of the calculus, the temporary inability to collect rent, to make an income from the property, or to recover possession from any non-rent-paying occupant is a factor that, however long the duration of the emergency measure, weighs heavily in favor of a compensation. After all, the term for the compensation for the temporary use of property is "rent."<sup>304</sup>

That ties to the Court's second *Tahoe-Sierra* assumption, that the value of the property would automatically recover once it emerged from beneath the use prohibition's cloud.<sup>305</sup> The majority supported that conclusion with "logical" economics; in other words, an economic theory that had no apparent basis in the record of the case: "Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted."<sup>306</sup>

To that we say, "Says who?" If property naturally recovered any temporary loss of value over time, then even affirmative temporary takings would not require compensation (or, more accurately, the compensation owed would be zero). And the longer the temporary moratorium lasts, the less this recovery theory holds water. Yet in other cases, the Court recognized that temporary regulatory takings require compensation.<sup>307</sup> For example, the government cannot automatically avoid liability

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<sup>301</sup> *Id.*

<sup>302</sup> *See id.* at 337.

<sup>303</sup> *See id.*

<sup>304</sup> *See* *Kimball Laundry Co. v. United States*, 338 U.S. 1, 7 (1949) ("[T]he proper measure of compensation" for a temporary taking "is the rental that probably could have been obtained."); *United States v. Banisadr Bldg. Joint Venture*, 65 F.3d 374, 378 (4th Cir. 1995) ("[W]hen the Government takes property only for a period of years . . . it essentially takes a leasehold in the property. Thus, the value of the taking is what rental the marketplace would have yielded for the property taken."); *City of Charlotte v. Combs*, 719 S.E.2d 59, 62 (N.C. App. 2011) ("The most widely accepted measure of compensation for the taking of a temporary easement appears to be the rental value of the property taken." (quoting 9 NICHOLS ON EMINENT DOMAIN § G32.08[2][a] (rev. 3d ed. 2006))); *Anderson v. Chesapeake Ferry Co.*, 43 S.E.2d 10, 16 (Va. 1947) ("As just compensation for a permanent taking is fair market value, so just compensation for [a] temporary taking can only be a fair rental value.").

<sup>305</sup> *See Tahoe-Sierra*, 535 U.S. at 332.

<sup>306</sup> *Id.*

<sup>307</sup> *First Eng. Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 321 (1987) ("Once a court determines that a taking has occurred, the government [may] . . . amend[] the regulation, [or] withdraw[] . . . the invalidated regulation . . . [But]

for a taking when it invades property simply by asserting that it did not intend for the invasion to be permanent.<sup>308</sup> The measure of compensation for temporary takings is most commonly the rental value of the property,<sup>309</sup> a recognition that even if the long-term market for the property itself may not suffer a consequential effect by virtue of a temporary loss of use, any rent uncollected during that time is gone and can never be recovered as part of the property's market price.<sup>310</sup> And even more fundamentally, the Court's attempt to distinguish permanent occupations (compensated "no matter how small"<sup>311</sup>) from temporary occupations (in which the duration of the cloud is simply factored into the *Penn Central* calculus no matter how long) is an exercise in metaphysical incoherence.<sup>312</sup> To paraphrase John Maynard Keynes's dictum, in the long run, everything is temporary.<sup>313</sup> Any attempt to draw a bright line between permanent and temporary is ultimately fruitless.<sup>314</sup> Temporal metaphysics should be less important than the actual extent of the damage and deprivation of use inflicted by any invasion. Any questions identifying the duration of the occupation should be issues of compensation, not liability.<sup>315</sup> But it does not matter for purposes of this Article, because I am examining emergency actions under the ad hoc *Penn Central* test, not trying to suggest that any per se rules govern.

This relates to *Penn Central*'s economic impact factor.<sup>316</sup> The larger the loss compared to the property's "denominator," whatever that might be,<sup>317</sup> the greater the

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where the government's activities have already worked a taking . . . no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.").

<sup>308</sup> Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 32–33 (2012).

<sup>309</sup> See discussion *supra* note 304.

<sup>310</sup> See Ark. Game & Fish Comm'n, 568 U.S. at 32–33; *Tahoe-Sierra*, 535 U.S. at 322–23.

<sup>311</sup> *Tahoe-Sierra*, 535 U.S. at 322–23.

<sup>312</sup> There may be no better example of this doctrinal incoherence than in *Leone v. County of Maui*, where the Hawaii Supreme Court held that because at some time in the indeterminate future the government may back off of a regulation that deprived the owner of all uses, the market would value such "investment value," and therefore there was no present taking. 404 P.3d 1257, 1265, 1276–77 (Haw. 2017), *cert. denied*, 139 S. Ct. 917 (2019).

<sup>313</sup> See *Tahoe-Sierra*, 535 U.S. at 356 (2002) (Thomas, J., dissenting) ("After all, '[i]n the long run we are all dead.'" (emphasis removed) (quoting JOHN KEYNES, MONETARY REFORM 88 (1924))).

<sup>314</sup> See *id.* at 355–56.

<sup>315</sup> See Alan Romero, *Takings by Floodwaters*, 76 N.D. L. REV. 785, 798 (2000) ("[T]he extent of impairment, like the duration of the intrusion, is not irrelevant. The greater the impairment, the more compensation required. If the owner's use of the property is not impaired at all, then maybe no compensation should be required. But that is not because the land was not taken. It is because justice may not require compensation for a taking that does not impair the owner's use at all."); see also *United States v. Cress*, 243 U.S. 316, 328 (1917) ("[S]o long as the damage is substantial, that determines the question [of] whether it is a taking.").

<sup>316</sup> See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

<sup>317</sup> The denominator in these cases should usually be the rental property in question, not the owner's entire holdings. See *Murr v. Wisconsin*, 137 S. Ct. 1933, 1945–46 (2017) (The

likelihood of a compensable taking. If a property owner goes out of the rental business as a consequence of the eviction moratorium, or, for example, cannot service debt because of the loss of rental income (even temporarily), it would also weigh heavily in favor of a claim for compensation. In *Yee v. City of Escondido*, the Court noted that the invasive character of the government action “may be relevant to a regulatory takings argument, as it may be one factor a reviewing court would wish to consider in determining whether the ordinance unjustly imposes a burden on petitioners that should ‘be compensated by the government, rather than remain[ing] disproportionately concentrated on a few persons.’”<sup>318</sup> One possible counter to even massive losses is another concept borrowed from tort law: causation. Under this approach, a court asks whether it was the emergency itself and its effect on the property’s use—not the government’s reaction—that resulted in the loss.<sup>319</sup> In the rent abeyance situation, a court might examine whether the owner was not likely to collect rent anyway. The Supreme Court endorsed a form of this no-harm-no-foul approach in *National Board of Young Men’s Christian Associations v. United States*, where it concluded the government was not liable for compensation because the destruction of the YMCA could be blamed on rioters, not the soldiers who were trying to defend it, even if unsuccessfully.<sup>320</sup> The “unusual circumstance” of the rioters being the cause of the destruction and depriving the owner of the building’s use meant that they, not the government, were the responsible party.<sup>321</sup>

And what of an owner’s expectations? First, if a tenant is already in arrears on the rent and an emergency measure forced the owner to provide the tenant housing for the duration, the owner certainly had both reasonable and distinct expectations that she would not need to donate her property as public housing simply because an

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denominator constitutes the “property” against which the owner’s claimed loss is measured in takings cases where the owner possesses more than a single parcel, and is determined by a host of factors, including the “treatment of the land” under state law, the “physical characteristics” of the properties (which includes the parcels’ topography and “the surrounding human and ecological environment”), and “the value of the property under the challenged regulation.”)

<sup>318</sup> 503 U.S. 519, 531 (1992) (alteration in original) (quoting *Penn Cent. Transp. Co.*, 438 U.S. at 124).

<sup>319</sup> See Alieza Durana & Matthew Desmond, *A Massive Wave of Evictions Is Coming. Temporary Bans Won’t Help.*, WASH. POST (Apr. 8, 2020, 9:24 AM), <https://www.washingtonpost.com/outlook/2020/04/08/eviction-coronavirus-rent-homelessness/> [<https://perma.cc/VF4J-H9WF>] (“In some cases, states have placed bureaucratic hurdles between renters and the protections that have been passed. . . . [R]equir[ing] tenants to demonstrate they’ve been affected by virus outbreak—either the disease itself or the mandatory business closures—before they are shielded from eviction.”).

<sup>320</sup> 395 U.S. 85, 91–93 (1969).

<sup>321</sup> *Id.* at 93. The lack of market, however, might be more of a question of the owner’s lack of alternatives, an issue that goes to compensation for the government’s seizure and operation of a going-concern business and the business owner’s inability to relocate. See, e.g., *Kimball Laundry Co. v. United States*, 338 U.S. 1, 3, 8–9 (1949).

emergency subsequently arose.<sup>322</sup> Any retroactive reach-back measure may also be independently subject to a due process challenge.<sup>323</sup> Second, a property owner has a reasonable expectation that they will receive a reasonable return on investment, and a rent collection and eviction moratorium would certainly seem to interfere with that expectation.<sup>324</sup> Rent control has survived challenges over the decades, primarily because it does not deprive the owner of a reasonable return, and has always been aimed at “excess” profits.<sup>325</sup> There seems to be a qualitative difference between a measure that keeps rent from going up with a rising market, and a measure that sets rent at zero, even temporarily.

Finally, although the government’s justification for its action is relevant to asking whether a court should halt an emergency measure,<sup>326</sup> it should not play a large role in the takings analysis. Similar to government seizures, denying compensation when the government requires occupation of property by third parties under the *Penn Central* test should only be justified in extraordinary circumstances, such as a particularized and “imminent danger” to the occupied property.<sup>327</sup>

In sum, short delays in collecting rent or on recovering possession present more difficult cases for proving a taking requiring compensation under *Tahoe-Sierra*’s theory of value recovery after a short moratorium.<sup>328</sup> Longer delays—even if not truly “permanent”<sup>329</sup>—present cases more likely to result in compensation, either where the compensation sought is a significant amount of lost rent, or if the property is lost due to a lack of cash flow that the owner reasonably expected to receive.

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<sup>322</sup> See *Preseault v. Interstate Com. Comm’n*, 494 U.S. 1, 23 (1990) (O’Connor, J., concurring) (“[A] sovereign, ‘by *ipse dixit*, may not transform private property into public property without compensation. . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent.” (alterations and omissions in original) (quoting *Webb’s Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 164 (1980))).

<sup>323</sup> See, e.g., *Regina Metro. Co. v. N.Y. State Div. of Hous. & Cmty. Renewal*, 154 N.E.3d 972, 1004–05 (N.Y. 2020) (retroactive application of newly adopted legislative amendments to rent control law held to violate due process).

<sup>324</sup> See Note, *supra* note 185, at 1071–72 (“Courts also found that as long as the measures provided for a reasonable return, they were not confiscatory and therefore did not constitute unconstitutional takings.”).

<sup>325</sup> See, e.g., *id.*; *Apartment & Office Bldg. Ass’n v. Washington*, 381 A.2d 588, 591 (D.C. 1977); see also *Tenoco Oil Co. v. Dep’t of Consumer Affs.*, 876 F.2d 1013, 1020 (1st Cir. 1989) (“[T]he takings clause imposes limits on the proper scope of rent control programs . . . .”); *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 546, 549 (1924) (finding that the order cutting apartment rents was inconsistent with the Fifth Amendment); *Block v. Hirsh*, 256 U.S. 135, 156 (1921) (“For just as there comes a point at which the police power ceases and leaves only that of eminent domain, it may be conceded that regulations of the present sort pressed to a certain height might amount to a taking without due process of law.”).

<sup>326</sup> See *TrinCo Inv. Co. v. United States*, 722 F.3d 1375, 1380 (Fed. Cir. 2013).

<sup>327</sup> *Id.*

<sup>328</sup> See *id.*; *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Plan. Agency*, 535 U.S. 302, 322 (2002).

<sup>329</sup> See *Tahoe-Sierra*, 535 U.S. at 332.

*D. Restrictions on Use*

The most challenging category of emergency measures for which to seek compensation are those that do not outright seize or destroy property—or invite the public to do so—but instead impose what might be characterized as a regulatory negative use easement.<sup>330</sup> These limit the uses that owners may make of their property and may result in some very severe economic consequences, such as a business going under during the pendency or as a result of an emergency shut-down order, but do not directly interfere with the owner’s possession, title, or occupation.<sup>331</sup> The most current examples are the various orders nationwide requiring businesses and activities deemed “nonessential” to close down, or serve their customers remotely if possible, to prevent the spread of the coronavirus.<sup>332</sup>

In these cases, the character of the governmental action is regulation, not direct destruction or occupation. *Penn Central* itself informs us that “[a] ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.”<sup>333</sup> This type of emergency measure falls squarely into the latter category, even if it is not your typical zoning or other day-to-day police power action.<sup>334</sup> Thus,

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<sup>330</sup> See, e.g., Complaint for Declaratory Relief, Injunctive Relief and Damages at 5, 19–20, *Gondola Adventures, Inc. v. Newsom* (No. 2:20-cv-3789), 2020 WL 1974890 (C.D. Cal. Apr. 24, 2020) (asserting a taking for California governor’s emergency order to close “non-essential” businesses); Complaint at 2–3, *Behar v. Murphy* (No. 3:20-cv-05206), 2020 WL 6375707 (D.N.J. Apr. 28, 2020) (challenging the New Jersey governor’s emergency order as a taking of plaintiff’s right to rent residential property, “since he cannot rent it, reach it, nor enter it”); Complaint at 13–14, *Martinko v. Whitmer*, 465 F. Supp. 3d 774 (E.D. Mich. 2020) (No. 2:20-cv-10931) (alleging *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992), and *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978), takings for Michigan governor’s shut down order); Complaint at 12, *Amato v. Elicker*, 460 F. Supp. 3d 202 (D. Conn. 2020) (No. 3:20-cv-00464) (alleging Connecticut governor’s shut down order was a taking); Complaint for Injunctive Relief Pursuant to F.R.C.P. 65 at 6, *Lawrence v. State*, 455 F. Supp. 3d 1063 (D. Colo. 2020) (No. 1:20-cv-00862-DDD-SKC) (alleging Colorado shut down order was a taking); Complaint at 2, *Shulmerich Bells, LLC v. Wolf* (No. 20-01637) (E.D. Pa. Mar. 26, 2020) (alleging Pennsylvania’s shut down order was a taking).

<sup>331</sup> See, e.g., Lauren Cusimano, *Four Peaks Brewing Co. Has Closed Its Scottsdale Grill & Tap*, PHOENIX NEW TIMES (May 7, 2020, 7:00 AM), <https://www.phoenixnewtimes.com/restaurants/four-peaks-brewing-co-has-closed-its-scottsdale-grill-and-tap-11469144> [<https://perma.cc/ZR7G-7DNC>]; Jason Rose (@jasonrosepr), TWITTER (May 2, 2020, 10:50 PM), <https://twitter.com/jasonrosepr/status/1256778011124195329> [<https://perma.cc/C773-EFQL>] (“One of first of too many horrible dominoes to fall: Four Peaks Scottsdale calls it quits after 16 years.”).

<sup>332</sup> See, e.g., *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 876, 892 (Pa.), cert. denied, 141 S. Ct. 239 (2020).

<sup>333</sup> *Penn Cent. Transp. Co.*, 438 U.S. at 124 (citing *United States v. Causby*, 328 U.S. 256 (1946)).

<sup>334</sup> See *id.*

in many cases, this factor weighs against compensation.<sup>335</sup> This factor may be weighed differently, however, if instead of regulation, the government's emergency measure is a direct interference with, or revocation of, an existing entitlement or approval.<sup>336</sup> Again, this is a different inquiry than in a challenge to the action as a violation of due process, where courts review the merits of the government's action, even if only under an impossibly low bar.<sup>337</sup>

The character of the action, of course, does not resolve the takings issue entirely, although it may inform the other factors, particularly the owner's investment-backed expectations. As the Court recognized in *Kaiser Aetna v. United States*:

While the consent of individual officials representing the United States cannot “estop” the United States, it can lead to the fruition of a number of expectancies embodied in the concept of “property”—expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the landowner's property.<sup>338</sup>

In *Kaiser Aetna*, it was the federal government's *not* conditioning the issuance of a Rivers and Harbors Act dredging permit on Kaiser Aetna's agreement to open its private waterway to public navigation.<sup>339</sup> Although the Court focused on the invasive nature of public navigation, the “vested rights” and estoppel conclusion should apply equally to regulatory measures.<sup>340</sup> Also, as in other situations, the greater the economic impact on the property owner, the more likely a court would require compensation, even though nearly every court that has applied this *Penn Central* factor has concluded

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<sup>335</sup> See, e.g., *Zeman v. City of Minneapolis*, 552 N.W.2d 548, 554 (Minn. 1996).

<sup>336</sup> See, e.g., *Lockaway Storage v. County of Alameda*, 156 Cal. Rptr. 3d 607, 611, 613 (Ct. App. 2013) (finding that the county effectively revoked its prior assurances about a conditional use permit).

<sup>337</sup> See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005) (“[T]he Court recognized that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster—and that such ‘regulatory takings’ may be compensable under the Fifth Amendment.”); *First Eng. Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 316 (1987) (“While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings.”); *Andrus v. Allard*, 444 U.S. 51, 64 n.21, 65 (1979) (Federal power to protect endangered species measured against Takings Clause: “There is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate.”); *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 414–15 (1922) (The Kohler Act enacted pursuant to state's police power went “too far.”).

<sup>338</sup> 444 U.S. 164, 179 (1979) (citations omitted) (first citing *Montana v. Kennedy*, 366 U.S. 308, 314–15 (1961); and then citing *Immigr. & Naturalization Serv. v. Hibi*, 414 U.S. 5 (1973)).

<sup>339</sup> *Id.* at 168.

<sup>340</sup> See *id.* at 179; *Lockaway*, 156 Cal. Rptr. 3d at 626.



that absent a 100% diminution in use and value, the regulation is merely “adjusting the benefits and burdens of economic life to promote the common good” that all property owners should expect as part of the social compact and inherent in the ownership of property.<sup>341</sup> Total economic wipeouts are certainly takings meriting compensation.<sup>342</sup> Other less economically devastating governmental actions may also merit compensation, but courts have been very reluctant to do so absent other compelling factors.<sup>343</sup>

Even where an owner is able to establish a taking requiring compensation, the necessity defense can be powerful in insulating emergency measures from compensation.<sup>344</sup> To reemphasize: this should not be a part of the character of the governmental action factor, but the government’s burden to prove an “imminent danger” in an “actual emergency” in which the government’s response was “actual[ly] necess[ary].”<sup>345</sup> Although this is a situation-specific inquiry, the courts have considered claims like this in the due process context and generally afford the government a wide latitude in defining an emergency and tailoring the necessary response.<sup>346</sup> For example, if the government can force vaccinations on people who do not wish to be vaccinated by imposing a fine (forcing them to choose between violating their liberty interest in bodily integrity and a civil penalty), it seems likely that a court will treat less-invasive intrusions into property rights equally deferentially when also done in the name of public health. In *Jacobson v. Massachusetts*, 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 . . . .”<sup>347</sup>

It is then liberty regulated by law.<sup>348</sup> The Court based its reasoning on public “self-defense,” noting that “a community has the right to protect itself against an epidemic

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<sup>341</sup> See also *Lingle*, 544 U.S. at 539.

<sup>342</sup> *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

<sup>343</sup> Cf. *Lockaway*, 156 Cal. Rptr. 3d at 626 (noting the government’s action was “manifestly unreasonable, not just because of its devastating economic impact on Lockaway, but also because it deprived Lockaway of a meaningful opportunity to attempt to protect its property rights”).

<sup>344</sup> See, e.g., *TrinCo Inv. Co. v. United States*, 722 F.3d 1375, 1380 (Fed. Cir. 2013).

<sup>345</sup> See *id.*

<sup>346</sup> See, e.g., *Jacobson v. Massachusetts*, 197 U.S. 11, 26–28 (1905).

<sup>347</sup> *Id.* at 26.

<sup>348</sup> See *id.* at 26–28.

of disease which threatens the safety of its members.”<sup>349</sup> In other words, the principle that Justice Scalia referred to in *Lucas* as a “background principle[] of the State’s law of property and nuisance.”<sup>350</sup> If someone cannot protect their body from being physically invaded except by paying a fine, a court is not likely to conclude that an owner can use her property in a way that is arguably harmful to others.<sup>351</sup> The difference between the usual rational basis police power test for an injunction<sup>352</sup> and the necessity defense to a claim for compensation is that in the latter, the claim of necessity is not just tested for a “conceivable case,” but for actual, factual support in the record.<sup>353</sup>

The Kingdom of Hawaii Supreme Court’s approach in *King v. Tong Lee*<sup>354</sup> is a good example of how modern courts will likely consider arguments about the reach of government power. I cite this example simply because it is the first case, as far as I can tell, in which that court employed the phrase “police power,” and in which it upheld the broad power of government to limit the uses of property, as long as there are some facts to support the assertion that the property’s use was contrary to the public health.<sup>355</sup> The Supreme Court of the Kingdom was governed both by Hawaii’s common law (which was expressly based on English precedent), as well as a constitution modeled in parts after the U.S. Constitution.<sup>356</sup> Thus, decisions from that court should be fairly good representations of how police power was viewed historically by both systems. In *Tong Lee*, the Kingdom’s legislature prohibited any laundry business within a small radius of a particular street intersection in downtown Honolulu, because “the increasing number of laundries and wash-houses within the limits of the City of Honolulu tends to the propagation and dissemination of disease.”<sup>357</sup> It just so happened that this radius encompassed Honolulu’s Chinatown,

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<sup>349</sup> *Id.* at 27.

<sup>350</sup> *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992) (“A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State’s law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.”).

<sup>351</sup> *See id.*; *Jacobson*, 197 U.S. at 27.

<sup>352</sup> *See Jacobson*, 197 U.S. at 28 (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 generally do not seriously question another branch’s conclusions and prohibit them from acting.).

<sup>353</sup> *See id.* at 23–24; *Lucas*, 505 U.S. at 1029.

<sup>354</sup> 4 Haw. 335 (1880) (en banc).

<sup>355</sup> *Id.* at 339–40, 343.

<sup>356</sup> *See* HAW. REV. STAT. § 1-1 (2021) (“The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; provided that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State.”).

<sup>357</sup> *Tong Lee*, 4 Haw. at 335–36.

leading to what was probably a well-founded belief that the prohibition was more of an anti-Chinese measure than an action truly designed to protect the public health.<sup>358</sup> After all, the Kingdom only barred laundering for money (it did not limit large-scale private washing or the dumping of wastewater within the radius), nor did it prohibit commercial laundries elsewhere on the island or the kingdom, both of which a measure truly for the public health would likely have included.<sup>359</sup>

Lee challenged the statute as a violation of the due process clause of the Hawaii Constitution.<sup>360</sup> He asserted his right to use his property (his laundry business and his land), which this statute unreasonably deprived him of without a good reason: if public health was the real reason for this law, it was both too narrow (it did not prohibit all commercial laundries), and was not tailored (there was no showing that Lee's laundry was unsanitary).<sup>361</sup> The Supreme Court easily disposed of this argument:

The authority to enact a law of this character is derived from the inherent power which every sovereign State possesses to protect the life, property and health of its citizens. Says Judge Shaw: "We think it is a well settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations on their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the Legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient."

"This is very different from the right of eminent domain; the right of a Government to take and appropriate private property whenever the public exigency requires it, which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power; the power vested in the Legislature by the Constitution to make, ordain,

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<sup>358</sup> See *id.* at 338 (noting that the prohibition is between Nuuanu and King streets); John C. Derrick, *Honolulu's Chinatown*, GUIDE US OAHU, <https://www.hawaii-guide.com/oahu/sights/chinatown> [<https://perma.cc/6EUH-7RMB>] (noting that modern Honolulu's Chinatown includes Nuuanu and King streets).

<sup>359</sup> *Tong Lee*, 4 Haw. at 335–37.

<sup>360</sup> *Id.* at 342–43.

<sup>361</sup> *Id.* at 341–43.

and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the commonwealth, or the subjects of the same.”<sup>362</sup>

There is a lot about *Tong Lee* that has not necessarily survived the 140 years since it was issued: the racial overtones, for example.<sup>363</sup> But the police power principle is still a very strong thread, and the court’s holding remains the general approach today:

The State, by its Legislature, possesses the right to make such laws as it deems to be wholesome, and the exercise of this power is subject to no review except by the body of society itself, except so far as these laws may be inhibited by the Constitution itself, or be repugnant to its provisions.<sup>364</sup>

If halting the action is the remedy sought, petitioning the government and voting—not suing—is the usual remedy.<sup>365</sup>

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<sup>362</sup> *Id.* at 339–40 (quoting *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 84 (1851)); see also *id.* at 341 (“Chief Justice Shaw also says: ‘Nor does the prohibition of such noxious use of property (a prohibition imposed because such use would be injurious to the public), although it may diminish the profits of the owner, make it an appropriation to a public use, so as to entitle the owner to compensation. . . . But he is restrained, not because the public have occasion to make the like use or make any use of the property, or to take any benefit or profit to themselves from it, but because it would be a noxious use, contrary to the maxim sic utere tuo ut alienum non laedas.’” (quoting *Alger*, 61 Mass. (7 Cush.) at 86)).

<sup>363</sup> See also *id.* at 338; Derrick, *supra* note 358.

<sup>364</sup> *Id.* at 342.

<sup>365</sup> Certainly today, if Lee challenged a similar measure he might have a better chance were he to press an equal protection claim, but he did not, unlike the plaintiffs in two cases that arose later in a similar circumstance. For example, in *Wong Wai v. Williamson*, 103 F. 384 1, 2–3, 10 (N.D. Cal. 1900), and *Jew Ho v. Williamson*, 103 F. 10, 11–12 (N.D. Cal. 1900), the court enjoined enforcement of a San Francisco ordinance that was based on the city officials’ beliefs “that danger does exist to the health of the 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* and the city’s police powers. *Id.* at 17–18. But that case did not serve as a trump card because the plaintiffs alleged and proved that the ordinance was not reasonably designed to protect the public health, but really was targeted 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 been frequently called to the attention of the federal courts where matters of this character have arisen with respect to Chinese.

*Id.* at 23.

Even in “normal” times, if lacking *Loretto* or *Lucas* facts, it is very difficult to win a regulatory takings claim for compensation.<sup>366</sup> In the midst of emergencies, the courts may be even more reluctant to provide a remedy, even where they should. But even if these types of regulatory takings claims are, absent some unusual circumstances, unlikely to succeed (at least under current judicial understandings of the scope of the Just Compensation Clause), they do serve an essential function as a public reminder of the Constitution’s check on the “ratchet” effect of accepting acquiescence to emergency measures.<sup>367</sup>

#### CONCLUSION

Under the current approach, most takings claims in normal times present tough cases for compensation.<sup>368</sup> In emergencies—when courts may be even more deferential to governmental assertions of power—these claims may be even more challenging.<sup>369</sup> But it need not be so, on either ground. In emergencies, a court applying *Penn Central*’s factors should afford no greater deference to the government’s claimed police power rationale than in cases involving the routine exercise of the power.<sup>370</sup> If there is an emergency, property owners should only be forced to suffer more than their proportionate share of the burden if the government can show that the emergency is genuine, the taking responds to the emergency, and the action is as narrow as possible.<sup>371</sup>

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<sup>366</sup> See, e.g., *Support Working Animals, Inc. v. DeSantis*, 457 F. Supp. 3d 1193, 1215 (N.D. Fla. 2020) (“The enactment of Amendment 13 [which bars wagering on dog racing] represents a valid exercise of Florida’s police power and is therefore not a ‘taking.’”).

<sup>367</sup> See Higgs & Twight, *supra* note 1, at 747 (“Derogations from private rights that occurred during national emergencies often remained after the crises had passed. A ‘ratchet’ took hold. People adjusted first their actions, then their thinking, to accommodate themselves to emergency governmental controls. Later, lacking the previous degree of public support, private property rights failed to regain their pre-crisis scope.”).

<sup>368</sup> See *supra* Part I.

<sup>369</sup> See *supra* Part II.

<sup>370</sup> See *supra* Part III.

<sup>371</sup> See *supra* Part IV.