ARBITRARY PROPERTY INTERFERENCE DURING A GLOBAL PANDEMIC AND BEYOND

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ABSTRACT

To stymie COVID-19's spread, state and local governments imposed sweeping and burdensome lockdown measures that crushed American businesses and interfered with private property. Despite interfering with many Americans' property rights, state and local governments have consistently prevailed on pandemic-related regulatory takings claims in federal court. By forcing governments to pay for deprivations, the Takings Clause can thwart arbitrary interference with private property. However, the dispensation of regulatory takings claims arising out of pandemic-related regulations suggests that the Takings Clause may presently fail to adequately thwart arbitrary property interference in the partial regulatory takings context when the government claims that it is acting in the name of public health or safety.

This Note expands on existing literature and details how substantive due process may presently only protect property from extremely arbitrary or despotic interference. This Note then argues that when substantive due process fails to thwart arbitrary interference, the regulatory takings doctrine will also fail to shield property when interference is substantial but is made pursuant to states' police powers. Because both doctrines may simultaneously fail to stymie arbitrariness, this Note contends that our Republic may constitutionally tolerate arbitrary property interference, a phenomenon highly detrimental to the rule of law. To incentivize legitimate and principled decision-making, and to protect private property from arbitrary interference, this Note urges states to pass laws that resemble the Texas Private Real Property Rights Preservation Act. These laws should,

at a minimum: (1) require governments to compensate property owners for regulatory diminutions in property value that exceed a legislatively calibrated threshold; (2) excuse compensation when governments can satisfy a form of heightened scrutiny; and (3) permit governments to seek immunity from a law's requirements in exigent circumstances.

INTRODUCTION

"Where an excess of power prevails,
property of no sort is duly respected."[1]

Governments interfered with private property[2] and crushed

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1. JAMES MADISON, *Property* (1792), *reprinted in* SELECTED WRITINGS OF JAMES MADISON 222, 223 (Ralph Ketcham ed., 2006).

2. *See* Ilya Somin, *Does the Takings Clause Require Compensation for Coronavirus Shutdowns?*, REASON: VOLOKH CONSPIRACY (Mar. 20, 2020), https://reason.com/volokh/2020/03/20/does-the-takings-clause-require-compensation-for-coronavirus-shutdowns/ [https://perma.cc/6LLM-SW59] ("[A] shutdown obviously imposes severe—sometimes even ruinous—limitations on the owner's use of their property."); Emilio R. Longoria, *The Case for the Rodeo: An Analysis of the Houston Livestock Show and Rodeo's Inverse Condemnation Case Against the City of Houston*, 52 ST. MARY'S L.J. 125, 138 (2021) (explaining how Houston "interfere[d] with the Rodeo's use and enjoyment of its property"); F.E. Guerra-Pujol, *Why COVID-19 Lockdown Orders Require Just Compensation*, DISCOURSE (Apr. 21, 2020), https://www.discoursemagazine.com/politics/2020/04/21/why-covid-19-lockdown-orders-require-just-compensation/ [https://perma.cc/48U2-NFRV]. For other examples of government interference, see Timothy M. Harris, *The Coronavirus Pandemic Shutdown and Distributive Justice: Why Courts Should Refocus the Fifth Amendment Takings Analysis*, 54 LOY. L.A. L. REV. 455, 458–61 (2021); Zach Weissmueller, *What Disney Can Teach Us About Covid-19: Lockdowns Fail*, REASON (Feb. 4, 2021), https://reason.com/video/2021/02/04/what-can-mickey-mouse-can-teach-us-about-covid-19-lockdowns-fail [https://perma.cc/GMJ6-UZDC]; Jim Epstein, *The Victims of the Eviction Moratorium*, REASON (Feb. 23, 2021), https://reason.com/video/2021/02/23/the-victims-of-the-eviction-moratorium/ [https://perma.cc/G4ZN-E985].

American businesses[3] to stymie COVID-19's spread. Despite interfering with many Americans' property rights, states and localities have consistently prevailed on Fifth Amendment takings claims arising out of pandemic-related public health orders.[4] In fact, *no* property owner appears to have prevailed on the merits of a pandemic-related regulatory takings claim in federal court through

3. *See* Christian Britschgi, *Another Wave of Business Closures Devastates the Suffering Restaurant Industry*, REASON (Nov. 17, 2020), https://reason.com/2020/11/17/another-wave-of-business-closures-devastates-the-suffering-restaurant-industry/ [https://perma.cc/LYE8-5TSP]; Emily Flitter, *'I Can't Keep Doing This:' Small-Business Owners Are Giving Up*, N.Y. TIMES (July 13, 2020), https://www.nytimes.com/2020/07/13/business/small-businesses-coronavirus.html [https://perma.cc/TF5B-SQYX]; Rachel Ramirez, *3 Small-business Owners on Life After Shutting Down*, VOX (Oct. 29, 2020), https://www.vox.com/first-person/21538961/coronavirus-covid-19-economy-small-businesses [https://perma.cc/G5Z7-EWPQ]; Ruth Simon, *For These Companies, Stimulus Was No Solution; 'We Decided to Cut Our Losses'*, WALL ST. J. (Apr. 15, 2020), https://www.wsj.com/articles/we-decided-to-cut-our-losses-why-some-small-firms-are-shutting-down-11586943002 [https://perma.cc/VXK9-9ST7]; Kelly McCarthy, *Nearly 16,000 Restaurants Have Closed Permanently Due to the Pandemic, Yelp Data Shows*, ABC NEWS (July 24, 2020), https://abcnews.go.com/Business/16000-restaurants-closed-permanently-due-pandemic-yelp-data/story?id=71943970 [https://perma.cc/6FU2-SVQT]; Marisa Kendall et al., *Shutting Down Again: New COVID Orders Pose a Major Threat to Bay Area Businesses*, TIMES-HERALD (Dec. 4, 2020), https://www.timesheraldonline.com/2020/12/04/shutting-down-again-new-covid-orders-pose-a-major-threat-to-bay-area-businesses [https://perma.cc/PA5E-RJJD]; Pamela N. Danziger, *Half of Small Retailers May Be Forced Out of Business with More Restrictions Threatening*, FORBES (Dec. 7, 2020), https://www.forbes.com/sites/pamdanziger/2020/12/07/half-of-small-retailers-may-be-forced-out-of-business-with-new-closures-threatening/?sh=5a097f01762a [https://perma.cc/6AS5-Y2PG]; Matthew Haag, *One-Third of New York's Small Businesses May Be Gone Forever*, N.Y. TIMES (Aug. 3, 2020), https://www.nytimes.com/2020/08/03/nyregion/nyc-small-businesses-closing-coronavirus.html [https://perma.cc/4YV2-V9MS]; Nellie Bowles, *Hurt by Lockdowns, California's Small Businesses Push to Recall Governor*, N.Y. TIMES (Feb. 19, 2021), https://www.nytimes.com/2021/02/19/business/newsom-coronavirus-california.html [https://perma.cc/2WZQ-RR29].

4. *See, e.g.*, Metroflex Oceanside LLC v. Newsom, No. 20-CV-2110-CAB-AGS, 2021 WL 1251225, at *3 (S.D. Cal. Apr. 5, 2021); Northland Baptist Church of St. Paul v. Walz, No. 20-CV-1100 (WMW/BRT), 2021 WL 1195821, at *15–16 (D. Minn. Mar. 30, 2021); Daugherty Speedway, Inc. v. Freeland, 520 F. Supp. 3d 1070, 1078 (N.D. Ind. 2021); Culinary Studios, Inc. v. Newsom, 517 F. Supp. 3d 1042, 1066 (E.D. Cal. 2021).

2021,[5] well over a year since California enacted the "first statewide

5. *See, e.g.*, Pro. Beauty Fed'n of California v. Newsom, No. 2:20-CV-04275-RGK-AS, 2020 WL 3056126, at *8 (C.D. Cal. June 8, 2020); McCarthy v. Cuomo, No. 20-CV-2124 (ARR), 2020 WL 3286530, at *5 (E.D.N.Y. June 18, 2020); PCG-SP Venture I LLC v. Newsom, No. EDCV201138JGBKKX, 2020 WL 4344631, at *10 (C.D. Cal. June 23, 2020); Elmsford Apartment Ass'ns, LLC v. Cuomo, 469 F. Supp. 3d 148, 168 (S.D.N.Y. 2020); TJM 64, Inc. v. Harris, 475 F. Supp. 3d 828, 840 (W.D. Tenn. 2020); Xponential Fitness v. Arizona, No. CV-20-01310-PHX-DJH, 2020 WL 3971908, at *9 (D. Ariz. July 14, 2020); Savage v. Mills, 478 F. Supp. 3d 16, 32 (D. Me. 2020); HAPCO v. City of Philadelphia, 482 F. Supp. 3d 337, 358 (E.D. Pa. 2020); Lebanon Valley Auto Racing Corp. v. Cuomo, 478 F. Supp. 3d 389, 402 (N.D.N.Y. 2020); Luke's Catering Serv., LLC v. Cuomo, 485 F. Supp. 3d 369, 387 (W.D.N.Y. 2020); Blackburn v. Dare Cnty., 486 F. Supp. 3d 988, 1001 (E.D.N.C. 2020); Alsop v. DeSantis, No. 8:20-CV-1052-T-23SPF, 2020 WL 9071427, at *3 (M.D. Fla. Nov. 5, 2020); Heights Apartments, LLC v. Walz, 510 F. Supp. 3d 789, 812–15 (D. Minn. 2020); Peinhopf v. Guerrero, No. CV 20-00029, 2021 WL 218721, at *8 (D. Guam Jan. 21, 2021); Nowlin v. Pritzker, No. 1:20-CV-1229, 2021 WL 669333, at *7 (C.D. Ill. Feb. 17, 2021); Excel Fitness Fair Oaks, LLC v. Newsom, No. 220CV02153JAMCKD, 2021 WL 795670, at *5 (E.D. Cal. Mar. 2, 2021); Our Wicked Lady LLC v. Cuomo, No. 21CV0165 (DLC), 2021 WL 915033, at *6 (S.D.N.Y. Mar. 9, 2021); 1600 Walnut Corp. v. Cole Haan Co. Store, No. CV 20-4223, 2021 WL 1193100, at *3 (E.D. Pa. Mar. 30, 2021); Northland Baptist Church of St. Paul v. Walz, No. 20-CV-1100 (WMW/BRT), 2021 WL 1195821, at *16 (D. Minn. Mar. 30, 2021); Amato v. Elicker, No. 3:20CV464 (MPS), 2021 WL 1430918, at *11 (D. Conn. Apr. 15, 2021); Mission Fitness Ctr. v. Newsom, No. 220CV09824CASKSX, 2021 WL 1856552, at *3 (C.D. Cal. May 10, 2021); Underwood v. Cty. of Starkville, No. 120CV00085GHDDAS, 2021 WL 1894900, at *8 (N.D. Miss. May 11, 2021); Case v. Ivey, No. 2:20-CV-777-WKW, 2021 WL 2210589, at *23–24 (M.D. Ala. June 1, 2021); S. California Rental Hous. Ass'n v. Cty. of San Diego, No. 3:21CV912-L-DEB, 2021 WL 3171919, at *9 (S.D. Cal. July 26, 2021); Abshire v. Newsom, No. 221CV00198JAMKJN, 2021 WL 3418678, at *7 (E.D. Cal. Aug. 5, 2021); Skatemore, Inc. v. Whitmer, No. 1:21-CV-66, 2021 WL 3930808, at *5 (W.D. Mich. Sept. 2, 2021); El Papel LLC v. Durkan, No. 220CV01323RAJJRC, 2021 WL 4272323, at *17 (W.D. Wash. Sept. 15, 2021); Jevons v. Inslee, No. 1:20-CV-3182-SAB, 2021 WL 4443084, at *15 (E.D. Wash. Sept. 21, 2021); Willowbrook Apartment Assocs., LLC v. Mayor & City Council of Baltimore, No. 20-CV-01818-SAG, 2021 WL 4441192, at *7 (D. Md. Sept. 27, 2021); KI Fla. Properties, Inc. v. Walton Cty., No. 3:20CV5358-RH-HTC, 2021 WL 5456668, at *6 (N.D. Fla. Oct. 15, 2021); Heidel v. Hochul, No. 20-CV-10462 (PKC), 2021 WL 4942823, at *11 (S.D.N.Y. Oct. 21, 2021); Bojicic v. DeWine, No. 3:21-CV-00630-JGC, 2021 WL 4977018, at *13 (N.D. Ohio Oct. 27, 2021); Golden Glow Tanning Salon, Inc. v. City of Columbus, Mississippi, No. 1:20-CV-103-GHD-DAS, 2021 WL 5225617, at *4 (N.D. Miss. Nov. 9, 2021); Helbachs Cafe, LLC v. City of Madison, No. 20-CV-758-WMC, 2021 WL 5327946, at *11 (W.D. Wis. Nov. 16, 2021); Madsen v. City of Lincoln, No. 4:21CV3075, 2021 WL 6201232, at *10 (D. Neb. Dec. 8, 2021). In *Bols v. Newsom*, the district court found that the plaintiffs had stated cognizable regulatory takings claims in connection with pandemic-related orders. *See* Bols v. Newsom, 515 F. Supp. 3d 1120, 1131–33 (S.D. Cal. 2021). However, the plaintiffs have not yet prevailed on the merits in court. *See Bols v.*

mandatory" closure order.[6]

Lower courts' treatment of pandemic-related takings claims disquietingly suggests that the Takings Clause may presently fail to adequately thwart *arbitrary* property interference in the partial regulatory takings context when the government claims that it is acting in the name of public health or safety.[7] Although courts and scholars have long considered due process a chief safeguard "against arbitrary [state] action[,]"[8] this Note expands on existing literature and details how due process may, in some cases and in conjunction with the regulatory takings doctrine, fail to prevent the government from arbitrarily interfering with private property.[9] Because the

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Newsom (3:20-cv-00873), COURT LISTENER, https://www.courtlistener.com/docket/17146362/bols-v-newsom/ [https://perma.cc/D7ZS-VAZ2] (last updated Dec. 13, 2021).

6. *See California Becomes First State to Order Lockdown*, KSLA NEWS 12 (Mar. 20, 2020), https://www.ksla.com/2020/03/20/california-becomes-first-state-order-lockdown/.

7. This argument flows from the well-argued proposition that mandated compensation for deprivations may guard against governmental arbitrariness. *See* Joseph Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 64 (1964); Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 420 (1977); Daniel R. Cahoy, *Treating the Legal Side Effects of Cipro(r): A Reevaluation of Compensation Rules for Government Takings of Patent Rights*, 40 AM. BUS. L.J. 125, 142 (2002); *State Approaches to Protecting Private Property Rights: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 129 (1999) (statement of Nancie G. Marzulla, Pres. & Chief Legal Couns., Defs. of Prop. Rts.); Susan Eisenberg, Note, *Intangible Takings*, 60 VAND. L. REV. 667, 673 (2007); *cf.* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 860 (1995) (explaining that the Takings Clause "was . . . designed[, in part,] to teach the people that governmental actions that arbitrarily affected property interests (including the value of property) were illegitimate"); *see generally* Steven J. Eagle, *The Four-Factor* Penn Central *Regulatory Takings Test*, 118 PENN ST. L. REV. 601, 613–14 (2014).

8. *See* Wolff v. McDonnell, 418 U.S 539, 558 (1974); Albright v. Oliver, 510 U.S. 266, 272 (1994); E. Enters. v. Apfel, 524 U.S. 498, 556–57 (1998) (Breyer, J., dissenting); Randy E. Barnett & Evan D. Bernick, *No Arbitrary Power: An Originalist Theory of Due Process of Law*, 60 WM. & MARY L. REV. 1599, 1643–45 (2019); Craig W. Hillwig, *Giving Property All the Process That's Due: A "Fundamental" Misunderstanding About Due Process*, 41 CATH. U. L. REV. 703, 710 (1992).

9. *See* Erica Chee, Comment, *Property Rights: Substantive Due Process and the "Shocks the Conscience" Standard*, 31 U. HAW. L. REV. 577, 577, 590–92 (2009). Erica Chee first provided the idea that "[c]ombined with the difficulty of overcoming the ripeness barrier in a Fifth Amendment takings claim, . . . [present, heightened due process standards] ha[ve] . . . effectively preclude[ed] judicial review of unconstitutional takings of

Court has assumed that arbitrary interference is non-compensable,[10] it has not crafted a robust regulatory takings doctrine that might stymie arbitrary interference in situations in which a due process inquiry may not do so on its own;[11] namely, when the government claims that it is acting in the name of public health or safety. Finally, this Note contends that the aforementioned phenomenon is highly detrimental to "individual liberty" and "the rule of law."[12]

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private property." *See id.* at 577. However, Chee's emphasis on ripeness may no longer be as persuasive in light of the Court's recent decision in *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), which affirmed that "a property owner has a claim for a violation of the Takings Clause as soon as a government takes his property for public use without paying for it." *Knick*, 139 S. Ct. at 2170; *see also* Robert H. Thomas, *After More than 30 Years, the Supreme Court Reopens the Door to Federal Takings Claims*, FEDERALIST SOC'Y BLOG (Aug. 13, 2019), https://fedsoc.org/commentary/fedsoc-blog/after-more-than-30-years-the-supreme-court-reopens-the-door-to-federal-takings-claims [https://perma.cc/MP6K-6HSG]. This Note expands on Chee's due process analysis by parsing out how, in addition to heightened standards, a deferential doctrine *and* application potentially contribute to arbitrary regulations surviving rational basis review. *See* Chee, *supra* note 9, at 577, 598–600. Importantly, this Note breathes life into Chee's broad statement that "[i]t is ultimately difficult to bring a takings case in federal court[,]" *see id.* at 580, by: (1) considering and crystallizing the Takings Clause's vital position as a powerful secondary deterrent against arbitrary property deprivations; (2) emphasizing how doctrinal flaws have evolved around a series of faulty assumptions; and (3) arguing that, at least within the regulatory takings context, the Clause's anti-arbitrariness mechanism is unavailable when it is needed most—namely, when courts analyze the permissibility of police power exercises. Finally, this Note distinguishes itself from Chee's Comment by offering a takings-type solution to the arbitrariness problem that is specifically designed with the COVID-19 pandemic and separation of powers principles in mind.

10. *See* Lingle v. Chevron, 544 U.S. 528, 543 (2005).

11. *See generally* AmeriSource Corp. v. United States, 525 F.3d 1149, 1154 (Fed. Cir. 2008) ("As expansive as the police power may be, it is not without limit. The limits, however, are largely imposed by the Due Process Clause."), *cited in* Lech v. Jackson, 791 F. App'x 711, 719 (10th Cir. 2019).

12. *See* PAUL STARR, FREEDOM'S POWER: THE TRUE FORCE OF LIBERALISM 15–16, 21 (2007); *see also* James S. Burling, Senior Counsel, Pacific Legal Found., Speech from Proceedings of the Third Annual New York Conference on Private Property Rights: Democracy, Property, and Land Use Regulation (1998); *cf.* Jeremy Waldron, *The Rule of Law*, STANFORD ENCYCLOPEDIA PHIL. (June 22, 2016), https://plato.stanford.edu/entries/rule-of-law/ [https://perma.cc/U9WK-9R7P] ("[T]he Rule of Law also comprises certain substantive ideals like a presumption of liberty and respect for private property rights."); *see generally* James Hankins, *Prudence Demands We Resist Arbitrary Government*,

To promote principled lawmaking, this Note urges state legislatures to adopt laws that resemble the Texas Private Real Property Rights Preservation Act ("the Texas Act").[13] Like the Texas Act, laws should:[14] (1) mandate compensation when a regulation produces a diminution in value that meets or exceeds a legislatively calibrated threshold;[15] and (2) excuse compensation for police power deprivations only when the government's actions satisfy a statutorily imposed form of heightened scrutiny.[16] To anticipatorily address concerns that the law may stifle government action in situations in which inaction may be catastrophic, this Note also proposes that laws should include provisions permitting the government to seek immunity from the law's stringent requirements if a

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L. & LIBERTY (Feb. 10, 2021), https://lawliberty.org/prudence-demands-we-resist-arbitrary-government/ [https://perma.cc/HX3F-SKF6]; Timothy Sandefur, *In Defense of Substantive Due Process, or the Promise of Lawful Rule*, 35 HARV. J. L. PUB. POL'Y 283, 344–45 (2012); Michael J. Teter, *Letting Congress Vote: Judicial Review of Arbitrary Legislative Inaction*, 87 S. CAL. L. REV. 1435, 1442–43 (2014); Michael J. Teter, *Gridlock, Legislative Supremacy, and the Problem of Arbitrary Inaction*, 88 NOTRE DAME L. REV. 2217, 2227–29 (2013); Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259, 281–84 (2009); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 498–501 (2003); Andrew Grossman, *Protecting Property Rights to Preserve Freedom and Prosperity: A Memo to President-elect Obama*, HERITAGE FOUND. (Jan. 6, 2009), https://www.heritage.org/economic-and-property-rights/report/protecting-property-rights-preserve-freedom-and-prosperity-memo [https://perma.cc/KHM3-PJNL] (explaining, in part, that "property rights . . . protect us from unjust government action").

13. TEX. GOV'T CODE ANN. §§ 2007.001–2007.045 (West 2021).

14. The reader should note that the proposed provisions detailed in this Note are a suggested baseline.

15. This suggestion was derived from and inspired by the Texas Act and other works commenting on the mechanics of diminution in value laws. *See* TEX. GOV'T CODE ANN. § 2007.002(B)(ii) (Westlaw current through the 2021 Reg. and Second Called Sess.); *State Approaches to Protecting Private Property Rights: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 106–08 (1999) (statement of Harvey M. Jacobs, Professor, Univ. of Wisc. at Madison and Chair of the Dep't of Urb. and Reg'l Plan.) ("Compensation laws require that private property owners be compensated when governmental laws impose a burden on their property (reduce their property value) by a predetermined percentage."); Lynda J. Oswald, *Property Rights Legislation and the Police Power*, 37 AM. BUS. L.J. 527, 540, 544–47 (2000).

16. *See* TEX. GOV'T CODE ANN. § 2007.003(b)(13) (Westlaw current through the 2021 Reg. and Second Called Sess.).

government can demonstrate: (1) exigent circumstances; (2) that necessitate government action to avoid catastrophe; and (3) that the government possesses such limited information that would prevent it from carrying out its duty to the public without incurring potentially ruinous takings liability. By awarding compensation for deprivations, this solution may adequately incentivize principled lawmaking and thwart potentially arbitrary action.[17]

In Part I, this Note discusses the Founders' view of property rights and regulatory takings' doctrinal evolution. In Part II, this Note explains how the substantive due process and takings doctrines weakly thwart arbitrary governmental interference. In Part III, this Note recommends that states adopt laws that resemble the Texas Act.

I. THE PURPOSE AND FUNCTION OF THE TAKINGS CLAUSE

A. Property & Democracy

To John Locke, people inherited property rights from God,[18] meaning that when people voluntarily submitted to a sovereign, their property remained secure.[19] Many Founders felt similarly and

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17. Some have contended that, if properly calibrated, "[t]he Act should guard against the ability of local governments to arbitrarily devalue a citizen's private property." *See* Ryan Brennan et al., *Regulatory Takings: The Next Step in Protecting Property Rights in Texas*, POLICYPERSPECTIVE, July 2010, at 6. Another author has similarly noted that the Act "is intended to ensure that government entities take a 'hard look' at their actions that may affect the value of private real property." *See* George E. Grimes, Jr., *Texas Private Real Property Rights Preservation Act: A Political Solution to the Regulatory Takings Problem*, 27 ST. MARY'S L.J. 557, 597 (1996); *see also State Approaches to Protecting Private Property Rights: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 129 (1999) (statement of Nancie G. Marzulla, Pres. & Chief Legal Couns., Defs. of Prop. Rts.); Cahoy, *supra* note 7, at 142; Sax, *supra* note 7, at 64; *cf.* WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 96–97 (1995) (noting that "enhanced compensation would deter governments from undertaking projects").

18. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT (1689), *reprinted in* 5 THE WORKS OF JOHN LOCKE 116–17 (1823); RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 10 (1985); David Schultz, *Political Theory and Legal History: Conflicting Depictions of Property in the American Political Founding*, 37 AM. J. LEGAL HIST. 464, 472 (1993).

19. *See* LOCKE, *supra* note 18, at 165–66; *see also* EPSTEIN, *supra* note 18, at 10–11, 14–15; Christian Brooks, Comment, *Political Bluff and Bluster: Six Years Later, a Comment on the Texas Private Real Property Rights Preservation Act*, 33 TEX. TECH L. REV. 59, 63 (2001)

believed that "civil society" depended on private property's preservation.[20] For example, Justice James Wilson held that "property ought to be inviolable" because "no one would toil to accumulate what he could not possess in security."[21] Like Locke, Wilson viewed property as "highly important to the existence . . . of civilized life."[22] John Adams shared Wilson's sentiment, and once remarked that "[p]roperty [wa]s surely a right of mankind as . . . liberty."[23] To Adams and Hamilton, like Wilson, property secured "republican government[.]"[24] James Madison felt similarly and boldly argued that "protect[ing] property" was "the end of government[.]"[25] He believed, like others, that property was "necessary" for "free government."[26]

If government failed to adequately protect or preserve property rights, some Founders postulated that "tyranny" and despotism would result and society would collapse.[27] John Adams once remarked that "[t]he moment the idea is admitted into society, that

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("Locke advocated that the purpose of organized society, by definition, is the protection of private property rights."); Jeffrey M. Gaba, *John Locke and the Meaning of the Takings Clause*, 72 MO. L. REV. 525, 533 (2007).

20. *See* PAUL J. LARKIN, JR., THE FRAMERS' UNDERSTANDING OF "PROPERTY" 3–6 (2020) (Heritage Found., Legal Memorandum No. 263, 2020) ("The Founders' generation saw the protection of property as vital to civil society."); Schultz, *supra* note 18, at 471–73, 475–76.

21. *See* JAMES WILSON, *Of Man, as a Member of Society.* (1791), *in* 1 THE WORKS OF THE HONOURABLE JAMES WILSON 283, 294 (1804).

22. *See* JAMES WILSON, *On the History of Property.*, *in* 2 THE WORKS OF JAMES WILSON 480, 494 (1896).

23. *See* JOHN ADAMS, A DEFENCE OF THE CONSTITUTION OF GOVERNMENT IN THE UNITED STATES OF AMERICA (1787), *reprinted in* THE POLITICAL WRITINGS OF JOHN ADAMS: REPRESENTATIVE SELECTIONS 148 (Leonard W. Levy & Alfred E. Young eds., 2003 ed.), *quoted in* LARKIN, *supra* note 20, at 5 n.38.

24. *See* Schultz, *supra* note 18, at 475–76.

25. *See* MADISON, *supra* note 1, at 223, *quoted in* LARKIN, *supra* note 20, at 6 n.40.

26. *See* Schultz, *supra* note 18, at 475–76; *see also* THE FEDERALIST NO. 10 (James Madison); THE FEDERALIST NO. 54 (Alexander Hamilton or James Madison) (charging that "[g]overnment [wa]s instituted no less for protection of the property, than of . . . individuals."), *cited in* LARKIN, *supra* note 20, at 6, 6 n.39.

27. *See* ADAMS, *supra* note 23, at 148; Letter from Thomas Jefferson to James Maury (Apr. 25, 1812); LARKIN, *supra* note 20, at 5; *see also* JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 68 (1990) (suggesting that

property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence."[28] Madison appeared to share Adams' view and cautioned in *Federalist 10* that democratic governments that failed to respect or preserve property were "as short in their lives as they have been violent in their deaths."[29]

B. Arbitrarily Interfering with Private Property

Despite their steadfast positions concerning private property's position in a blossoming republic, the Founders declined to install a sweeping Constitutional guarantee that would place private property beyond a sovereign's reach. Indeed, the Fourth Amendment and Fifth Amendment Takings and Due Process clauses impliedly permit governments to deprive citizens of their property as long as the government meets certain procedural and substantive requirements. For example, the Takings Clause requires that deprivations be for "public use" and that the government "just[ly] compensat[e]" owners for losses.[30] Relatedly, the Fourth Amendment only proscribes "*unreasonable* . . . [property] seizures," not *all* deprivations.[31]

Although the government can interfere with private property, some Founders, Founding influencers, like Locke and Blackstone, and other "early writers[,]" like Samuel Pufendorf and Hugo Grotius, appeared to find *arbitrary* interference impermissible.[32] For example, Locke believed that people "would not quit the freedom of

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Gouverneur Morris subscribed to the idea that "[i]t was only for the sake of property that men gave up the greater freedom of the state of nature").

28. *See* ADAMS, *supra* note 23, at 148, *quoted in* LARKIN, *supra* note 20, at 5 n.38.

29. *See* THE FEDERALIST NO. 10 (James Madison).

30. *See* U.S. CONST. amend. V.

31. *See* U.S. CONST. amend. IV (emphasis added); *see also Fourth Amendment*, LEGAL INFO. INST. (last visited Feb. 15, 2022), https://www.law.cornell.edu/constitution/fourth_amendment [https://perma.cc/ZV9R-V8LU].

32. *See* Sax, *supra* note 7, at 54, 56–58; LARKIN, *supra* note 20, at 4; *cf.* Letter from Thomas Jefferson to Joseph Milligan (Apr. 16, 1816) ("To take from one, because it is thought that his own industry and that of his fathers has acquired too much, in order to spare to others, who, or whose fathers have not exercised equal industry and skill, is to violate arbitrarily the first principle of association[.]"); *see generally* RICHARD EPSTEIN,

. . . Nature" if they knew they would be subjected to "[a]bsolute arbitrary power" that left ambiguous "rules of right and property[.]"[33] James Madison also appeared to detest arbitrary deprivations, cautioning in an essay that "property [is in]secure . . . where the property which a man has in his personal safety and personal liberty, is violated by arbitrary seizures of one class of citizens for the service of the rest."[34] Madison also warned that:

> property [is in]secure . . . where *arbitrary* restrictions . . . deny to part of its citizens that free use of their faculties, and free choice of their occupations, which not only constitute their property in the general sense of the word; but are the means of acquiring property strictly so called.[35]

Consistent with the concerns voiced by those above, some have suggested that the Takings Clause operates as a prophylactic against arbitrary state action.[36] William Blackstone recognized this principle, and argued that governments could only meddle with private property if they paid owners for losses.[37] Indeed, Blackstone reasoned that "full indemnification" was owed to avoid "[s]tripping the [s]ubject of his property in an arbitrary manner[.]"[38]

Blackstone's anti-arbitrariness theory is functionally identical to late Professor Joseph Sax's argument concerning compensation.

SUPREME NEGLECT: HOW TO REVIVE CONSTITUTIONAL PROTECTION FOR PRIVATE PROPERTY 6 (2008) ("[T]he key writers who set the intellectual framework for our Constitution . . . all treated private property as a bulwark of the individual against the arbitrary power of the state.").

33. *See* LOCKE, *supra* note 18, at 164; *see also id.* at 163, 165–66; *see generally* EPSTEIN, *supra* note 18, at 12.

34. *See* MADISON, *supra* note 1, at 224, *quoted in* LARKIN, *supra* note 20, at 4.

35. *See* MADISON, *supra* note 1, at 224 (emphasis added), *quoted in* LARKIN, *supra* note 20, at 4.

36. *See* Sax, *supra* note 7, at 64; Cahoy, *supra* note 7, at 142; Ellickson, *supra* note 7, at 420; Eisenberg, *supra* note 7, at 673; Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980) ("Th[e] [Takings] Clause stands as a shield against the arbitrary use of governmental power."); *see also* Treanor, *supra* note 7, at 860, 880; *cf.* Eagle, *supra* note 7, at 614; Nestor M. Davidson, *The Problem of Equality in Takings*, 102 NW. U. L. REV. 1, 18–19 (2008).

37. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *139.

38. *See id.*

Professor Sax argued that "compensation . . . can satisfactorily serve . . . [the Takings Clause's anti-arbitrariness] function to the extent that it immunizes existing values against . . . risks by requiring the payment of compensation whenever loss is occasioned by exercise of the enterprise capacity."[39] Put differently, compensation guards against arbitrary deprivations by requiring the government to make property owners whole.[40] By requiring the government to indemnify owners, the government may only interfere with private property when "property . . . is worth more to the government [or the public] than . . . in the marketplace[.]"[41] Compensation thus provides the government with "[dis]incentive[s] to arbitrarily take the property of the populace by putting a price tag on it."[42]

Although compensation can shield property against arbitrary state action,[43] this Note argues below how the regulatory takings doctrine presently excuses the government's compensation obligations where compensation is needed most. This Note now turns to recount the doctrine's origins and gradual impairment.

C. Regulatory Takings, the Police Power, and Arbitrariness

The Takings Clause requires the government to compensate property owners when it deprives them of property "for public use[.]"[44] When the government "physical[ly]" seizes property, it

39. *See* Sax, *supra* note 7, at 64.

40. *See id.*; *see generally* EPSTEIN, *supra* note 18, at 15 ("There is . . . only a network of forced exchanges designed to leave everyone better off than before.").

41. *See* Eagle, *supra* note 7, at 613–14; *see also* Eisenberg, *supra* note 7, at 673; Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 62 (1988); *see generally* Grossman, *supra* note 12 (suggesting that a failure to compensate may provide the government with "perverse incentives").

42. *See* Cahoy, *supra* note 7, at 142; *see generally State Approaches to Protecting Private Property Rights: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 129 (1999) (statement of Nancie G. Marzulla, Pres. & Chief Legal Couns., Defs. of Prop. Rts.).

43. *See supra* notes 37–42 and accompanying text.

44. *See* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

cannot excuse its indemnification duties—no matter how compelling its interests might be.[45] However, the government's compensation obligations are more ambiguous in the regulatory takings context.[46] Where a regulation "denies [an owner of] all economically beneficial or productive use of land[,]" the government must compensate the owner for his loss.[47] Likewise, the government is usually on the hook when it "permanently occupies physical property[.]"[48]

Regulatory property interference that fails to trigger either of the aforementioned *per se* rules are often governed by a multi-factor test articulated in *Penn Central Transportation Co. v. New York City*,[49] which is notoriously deferential to government action.[50] As illustrated in this section, the inapposite logic that courts employ under *Penn Central* to excuse compensation transcends regulatory takings jurisprudence.

i. Early Regulatory Takings Jurisprudence

Inexplicitly arising out of the Tenth Amendment,[51] the police power vests states with "authority to protect the health, safety, and welfare of the public."[52] Courts and scholars have both narrowly

45. *See* SEAN M. STIFF, CONG. RSCH. SERV., LSB10434, COVID-19 RESPONSE: CONSTITUTIONAL PROTECTIONS FOR PRIVATE PROPERTY 2 (2020).

46. *Cf.* Mark Fenster, *The Stubborn Incoherence of Regulatory Takings*, 28 STAN. ENV'T L.J. 525, 528 (2009) (describing "doctrinal indeterminacy").

47. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992); Lynn E. Blais, *The Total Takings Myth*, 86 FORDHAM L. REV. 47, 56–57 (2017).

48. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982); *see also* Horne v. Dep't of Agric., 576 U.S. 350, 360 (2015); Blais, *supra* note 47, at 55–56.

49. *See* 438 U.S. 104, 124 (1978).

50. *See* Ilya Shapiro et al., *Destroying Property Value by Regulation Is Just as Bad as Using Eminent Domain*, CATO: CATO AT LIBERTY (July 25, 2018), https://www.cato.org/blog/destroying-property-value-regulation-just-bad-using-eminent-domain [https://perma.cc/QZK6-NJEG] ("[P]roperty owners almost always lose under *Penn Central*."); Blais, *supra* note 47, at 50 ("Landowners rarely prevail in takings claims evaluated under the *Penn Central* three-factor test.").

51. *See Police Powers*, LEGAL INFO. INST. (last visited Mar. 15, 2021), https://www.law.cornell.edu/wex/police_powers [https://perma.cc/SCH7-3A3T].

52. *See* Robin Kundis Craig, *Of Sea Level Rise and Superstorms: The Public Health Police Power as a Means of Defending Against "Takings" Challenges to Coastal Regulation*, 22

and broadly defined the police power's scope. One scholar has narrowly characterized the police power as the "power to regulate property."[53] Others, by contrast, have broadly defined the police power. For example, in *Thurlow v. Massachusetts*,[54] the Supreme Court explained that states' police powers "[we]re nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions."[55] In *Stone v. Mississippi*,[56] the Supreme Court explained that the police power's scope "extend[ed] to all matters affecting the public health or the public morals."[57] Many have broadly defined the police power like the *Stone* court.[58]

Courts have spent over one hundred years defining the relationship between property and the police power and examining whether property deprivations made pursuant to states' police powers amount to compensable takings.[59] *Mugler v. Kansas*,[60] a prominent decision concerning a police power property deprivation,[61] involved a challenge to a Kansas law that proscribed liquor production.[62] Reasoning, in part, that the Fourteenth Amendment's[63] ratifiers could not have "intended . . . to impose restraints

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N.Y.U. ENV'T L.J. 84, 106–07 (2014); *see also* Gonzales v. Raich, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting).

53. *See* Jan G. Laitos, *The Public Use Paradox and the Takings Clause*, 13 J. ENERGY, NAT. RESOURCES, & ENV'T L. 9, 19 (1993).

54. 46 U.S. 504 (1847).

55. *See id.* at 583.

56. 101 U.S. 814 (1879).

57. *See id.* at 818.

58. *See, e.g.*, Craig, *supra* note 52, at 106–07; Buchanan v. Warley, 245 U.S. 60, 74 (1917); Engelage v. City of Warrenton, 378 S.W.3d 410, 414 (Mo. Ct. App. 2012); Massingill v. Dep't of Food & Agric., 102 Cal. App. 4th 498, 504 (2002); Stephen R. Miller, *Community Rights and the Municipal Police Power*, 55 SANTA CLARA L. REV. 675, 676, 702 (2015).

59. *See* William B. Stoebuck, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057, 1059–69 (1980).

60. 123 U.S. 623 (1887).

61. *Cf.* Stoebuck, *supra* note 59, at 1060.

62. *See Mugler*, 123 U.S. at 661–62.

63. The Fourteenth Amendment Due Process Clause extended the Fifth Amendment's takings mandates to "the states." *See* Dennis J. Coyle, *Takings Clause: Fifth Amendment*, CTR. FOR THE STUDY OF FEDERALISM, https://encyclopedia.federalism.org/index.php/Takings_Clause:_Fifth_Amendment [https://perma.cc/Z8L2-M9L8] (last updated 2006).

upon the exercise of their powers for the protection of the safety, health, or morals of the community"[64] and that a law preventing public harm "does not disturb the owner in the control or use of his property for lawful purposes,"[65] the Court squarely rejected the challenger's takings argument.[66] Although the Court recognized that the Fourteenth Amendment did not protect government actions that were intended "to deprive the owner of his liberty and property, without due process of law[,]"[67] the Court also appeared to find the state's deprivation non-arbitrary because the government had used its police power to protect the public.[68]

In his *Mugler* dissent, Justice Field appeared to suggest that Kansas had chosen arbitrary means to enforce its law.[69] Prior to the Kansas law's enactment, the challenger lawfully operated his brewery.[70] Seemingly overnight, however, the challenger's brewery became "a common nuisance[,]"[71] permitting officials to destroy the challenger's property "merely because the legislature ha[d] so commanded." [72] Destroying property to enforce a manufacturing law appeared to Justice Field as excessive and unnecessary relative to the government's abatement objective, especially since the government was excused from making the owner whole.[73] Thus, Justice Field suggested that the Kansas law had violated "due process" and the Takings Clause's compensation requirement.[74]

Nearly thirty years after *Mugler*, the Court held in *Hadacheck v. Sebastian*[75] that a Los Angeles city ordinance proscribing brick manufacturing facilities was a lawful police power exercise.[76] The

64. *See Mugler*, 123 U.S. at 664.
65. *See id.* at 668–69.
66. *See id*.
67. *See id.* at 669.
68. *See id* at 662–63, 669.
69. *See id.* at 678 (Field, J., dissenting).
70. *See id.* at 677.
71. *See id.*
72. *See id*.
73. *See id.* at 678.
74. *See id.*
75. 239 U.S. 394 (1915).
76. *See id.* at 404–08.

Hadacheck challenger acquired land "for the purpose of manufacturing brick" and contended that the city ordinance would substantially diminish his property's value, effectively requiring him "to entirely abandon his business[.]"[77] Affirming the lower court's finding that the city's ordinance was a "good faith" police power exercise[78] and reasoning that the challenger, like other property owners, "must yield to the good of the community[,]"[79] the Court declined to entertain the challenger's due process and takings arguments.[80] The Court recognized that the "police power . . . cannot be arbitrarily exercised."[81] However, the Court found the ordinance a lawful, non-compensable police power exercise, even where "s[imilar] conditions [plausibly] exist[ed] [but] [we]re not regulated" or where "some other exercise would have [potentially] been better or less harsh."[82]

Pennsylvania Coal Co. v. Mahon[83] marked a doctrinal shift away from positions taken in *Mugler* and *Hadacheck*. Writing for the majority, Justice Holmes recognized that "[g]overnment 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."[84] However, Justice Holmes also noted that if the police power perpetually immunized government action, then the "contract and due process clauses" would be rendered meaningless.[85] Thus, Justice Holmes held that regulations that deprive owners of property may amount to compensable takings if they "go[] too far[.]"[86]

Since *Mahon*, the Court has attempted to define when the police power "goes too far[.]"[87] Justice Holmes offered some guidance in

77. *See id.* at 405.
78. *See id.* at 409–10, 414.
79. *See id.* at 410.
80. *See id.* at 408–10.
81. *See id.* at 410.
82. *See id.* at 413–14.
83. 260 U.S. 393 (1922).
84. *See id.* at 413.
85. *See id.*
86. *See id.* at 415.
87. *See id.*

Mahon. For example, he opined that "[o]ne fact for consideration in determining such limits is the extent of the diminution" caused by the regulation.[88] When a regulation causes a significant diminution, "compensation . . . [must] sustain the act."[89] Finally, Justice Holmes advised that courts owed deference to "the legislature[,]"[90] but cautioned that uncompensated police power deprivations would obliterate property rights.[91]

Following *Mahon*, the Court decided two cases that resembled *Mugler* and *Hadachek*. In *Village of Euclid, Ohio v. Ambler Realty Co.*,[92] the Court held that a local zoning law was a lawful police power exercise and did not violate due process principles.[93] Although the zoning law was overinclusive because it captured "innocent" businesses that "[we]re neither offensive nor dangerous[,]" the Court reasoned that legislative imprecision was insufficient to invalidate the law.[94] The Court stipulated that "clearly arbitrary and unreasonable" laws that "ha[d] no substantial relation to the public health, safety, morals, or general welfare"[95] may violate the Due Process Clause.[96] However, the Court objected to any kind of close examination or "sentence by sentence" scrutiny[97] and ultimately found the imprecise local measure a lawful and non-arbitrary police power exercise.[98]

In *Miller v. Schoene*,[99] the Court declined to entertain Virginia tree owners' due process claim on the grounds that the state's order to destroy healthy trees to prevent a tree disease from spreading was

88. *See id.* at 413.
89. *See id.*
90. *See id.*
91. *See id.* at 415 ("When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears.").
92. 272 U.S. 365 (1926).
93. *See id.* at 396–97.
94. *See id.* at 388–89.
95. *See id.* at 395.
96. *See id.*
97. *See id.*
98. *See id.* at 395–97.
99. 276 U.S. 272 (1928).

a lawful police power exercise.[100] The Court articulated that the state was capable of "deciding upon the destruction of one class of property in order to save another[,]"[101] and found that Virginia's actions were lawful,[102] in part, because the state's "determination [wa]s subject[ed] to judicial review" and because "[t]he property . . . in error [wa]s not subjected to the possibly arbitrary and irresponsible action of a group of private citizens."[103]

ii. The Modern Doctrine

Partial Regulatory Takings. In 1978, the Court revisited Holmes's "too far"[104] test. In *Penn Central*, a New York City "landmark law"[105] interfered with Grand Central Terminal's owners' ability to add to the terminal structure.[106] To determine whether the regulatory deprivation amounted to a compensable taking, the Court "identified several factors[,]" which included the: (1) "economic impact of the regulation on the claimant[;]" (2) "extent to which the regulation has interfered with [the challenger's] distinct investment-backed expectations[;]" and (3) "character of the governmental action."[107] The Court also made clear that a "physical invasion" may point toward a compensable taking,[108] whereas "interference aris[ing] from some public program adjusting the benefits and burdens of economic life to promote the common good" may weigh against a finding for compensation.[109]

Applying these principles to *Penn Central*'s facts, the Court held that New York's deprivation was a lawful police power exercise that did not amount to a compensable taking.[110] Importantly, Justice Brennan's majority opinion squarely rejected the owners' argument

100. *See id.* at 277–78, 280–81.
101. *See id.* at 279–80.
102. *See id.*
103. *See id.* at 281.
104. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).
105. *See* Penn Cent. Transp. Co. v. New York, 438 U.S. 104, 129 (1978).
106. *See id.* at 115–18.
107. *See id.* at 124.
108. *See id.*
109. *See id.*
110. *See id.* at 129, 138.

that New York had "singl[ed their property] out . . . for disparate and unfair treatment[,]"[111] in part because the owners were entitled "to judicial review" and that judges were capable of snuffing out governmental arbitrariness if necessary.[112]

In his dissent, then-Justice Rehnquist expressed discomfort with Justice Brennan's new test, noting that New York City's law would deprive the owners of a substantial portion of their property[113] and that *only* the owners would bear the brunt of complying with the City's regulation.[114] Justice Rehnquist recognized that "some may believe that the costs of landmark preservation will be more easily borne by corporations such as Penn Central than the overburdened individual taxpayers[.]"[115] Echoing *Mahon*, however, Justice Rehnquist countered that such "concerns do not allow us to ignore past precedents construing the Eminent Domain Clause to the end that the desire to improve the public condition is, indeed, achieved by a shorter cut than the constitutional way of paying for the change."[116]

Physical Occupations. *Loretto v. Teleprompter Manhattan CATV Corp*.[117] held that a "permanent physical occupation of property [wa]s a taking."[118] In dicta, the Court reasoned that although "the Court has often upheld substantial regulation of an owner's use of his own property where deemed necessary to promote the public interest[,]" the Court has "long considered a physical intrusion by government to be a property restriction of an unusually serious

111. *See id.* at 132.

112. *See id.* at 132–33. Importantly, the Court recognized that the police power strongly justified non-compensation. *See id.* at 125 ("[I]n instances in which a state tribunal reasonably concluded that the health, safety, morals, or general welfare would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests.") (quoting Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928)) (internal quotation marks omitted).

113. *See Penn Central Transp. Co.*, 438 U.S. at 146 (Rehnquist, J., dissenting).

114. *See id.* at 147.

115. *See id.* at 152.

116. *See id.* at 153.

117. 458 U.S. 419 (1982).

118. *See id.* at 441.

character for purposes of the Takings Clause."[119] In other words, the righteousness of the government's motives cannot excuse compensation when it "permanent[ly] physical[ly] occup[ies] . . . real property[.]"[120]

Complete Deprivations. In *Lucas v. South Carolina Coastal Council*,[121] the Court held that regulations that "deprive[] . . . landowner[s] of all economically beneficial uses" amount to compensable takings.[122] Writing for the majority, Justice Scalia reasoned that "it is less realistic to indulge our usual assumption that the legislature is simply 'adjusting the benefits and burdens of economic life,'"[123] when a law "deprives land of all economically beneficial use[.]"[124] Justice Scalia also noted the risk involved in failing to compensate owners who have suffered complete losses, remarking that regulations that affect complete losses "carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm."[125]

Temporary Regulatory Takings. In *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*,[126] the Court held that a temporary deprivation may amount to a compensable taking.[127] To protect residents, Los Angeles County prohibited further building in a flooded area occupied by the First English Evangelical Lutheran Church.[128] Because the County "denied [the church] . . . all use of its property for a considerable period of years[,]" the Court found the County's ordinance unconstitutional to the extent that it did not compensate the church or other owners for losses.[129]

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119. *See id.* at 426.
120. *See id.* at 426–27.
121. 505 U.S. 1003 (1992).
122. *See id.* at 1018–19.
123. *See id.* at 1017 (quoting *Penn Central*, 438 U.S. at 124).
124. *See id.* at 1027.
125. *See id.* at 1018.
126. 482 U.S. 304 (1987).
127. *See id.* at 321.
128. *See id.* at 307–08.
129. *See id.* at 321–22.

In dicta, Chief Justice Rehnquist advised that a deprivation's temporary nature could not excuse the government's duty to compensate.[130] Indeed, he contended that "[i]nvalidation of the ordinance . . . converting the taking into a 'temporary' one . . . is not a sufficient remedy to meet the demands of the Just Compensation Clause."[131] Finally, the Chief Justice commented that the Court's holding would proscribe state power; he noted, however, that "many of the provisions of the Constitution are designed to limit the . . . freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them."[132] In other words, limiting government power indicates that the compensation requirement is properly functioning.[133]

Fifteen years after *First English*, the Court decided *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[134] which involved a challenge to two government "moratoria" that halted "virtually all development on a substantial portion of the [challenger's] property" for over two and half years.[135] The Court reasoned that extending liability for the deprivation "would transform government regulation into a luxury few governments could afford[,]"[136] and ultimately found the deprivation non-compensable.[137]

In his dissent, Chief Justice Rehnquist argued that "it has long been understood that moratoria on development exceeding . . . short time periods are not . . . legitimate planning device[s,]"[138] suggesting that the government's means were potentially arbitrary.[139] Although the Chief Justice believed that the government's "efforts at preventing further degradation of the lake were made in good

130. *See id.* at 319.
131. *See id.*
132. *See id.* at 321.
133. *See id.*
134. 535 U.S. 302 (2002).
135. *See id.* at 306.
136. *See id.* at 324.
137. *See id.* at 341–42.
138. *Id.* at 354 (Rehnquist, J., dissenting).
139. *See id.*

faith[,]" he suggested, as he had in *Penn Central*, that indemnification was owed to prevent the government from advancing "the public interest . . . [through] a few targeted citizens."[140]

iii. Disentangling the Doctrine

Prior to *Lingle v. Chevron U.S.A. Inc.*,[141] and separate from the doctrine detailed above, the Court employed a different takings test. In *Agins v. City of Tiburon*,[142] the Court held that government action "effects a taking if . . . [it] does not substantially advance legitimate state interests[.]"[143] Nearly twenty-five years later, however, the Court rejected *Agins* in *Lingle*.[144] Writing for the *Lingle* majority, Justice O'Connor articulated that *Agins* "prescribe[d] an inquiry in the nature of a due process, not a takings, test" and was improper "in our takings jurisprudence."[145] Justice O'Connor opined that the "Takings Clause presupposes that the government has acted in pursuit of a valid public purpose."[146] In concluding, Justice O'Connor clarified that if a deprivation was "so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action."[147] In other words, the court will only reach the compensation question if the deprivation is permissible under the Due Process Clause.[148]

II. PERMISSIBLY ARBITRARY PROPERTY DEPRIVATIONS

Lingle brought to light a flawed assumption underlying modern regulatory takings jurisprudence. Indeed, the Court has repeatedly suggested that arbitrary property deprivations are constitutionally

140. *See id.*
141. 544 U.S. 528 (2005).
142. 447 U.S. 255 (1980).
143. *See id.* at 260.
144. *See Lingle*, 544 U.S. at 548.
145. *See id.* at 540.
146. *See id.* at 543.
147. *See id.*
148. *See id.*

impermissible,[149] and that arbitrary deprivations are non-compensable because they "violate due process[.]"[150] Thus, by the time courts reach the compensation question, the regulatory takings doctrine assumes that "what the government intends to do is otherwise constitutional[.]"[151] Below, this Note explains how this premise fails to recognize a modern jurisprudential phenomenon: namely, that constitutionally permissible deprivations may also be *arbitrary* because modern due process protections insufficiently capture arbitrary action.[152] Because the Court has assumed that arbitrary deprivations are non-compensable,[153] it has failed to craft a robust regulatory takings doctrine that might stymie arbitrary interference in cases in which a due process inquiry may not do so on its own; namely, when the government claims that it is acting in the name of public health or safety.

A. Arbitrariness: Defined and Underscored

What does it mean when the government acts *arbitrarily*? Arbi-

149. *See, e.g.*, Barbier v. Connolly, 113 U.S. 27, 31 (1884) (noting that the "[t]he fourteenth amendment" prohibited the "arbitrary spoliation of property"), *cited in* Mugler v. Kansas, 123 U.S. 623, 663 (1887); Hagar v. Reclamation Dist. No. 108, 111 U.S. 701, 707 (1884); Dobbins v. City of Los Angeles, 195 U.S. 223, 236 (1904); Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915); Miller v. Schoene, 276 U.S. 272, 281 (1928) ("The property of plaintiffs in error is not subjected to the possibly arbitrary and irresponsible action of a group of private citizens."); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 417 (1922) (Brandeis, J., dissenting); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 133 (1978); *Lingle*, 544 U.S. at 543.

150. *See Lingle*, 544 U.S. at 543.

151. *See* E. Enterprises v. Apfel, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring); *see id.* at 554, 556–57 (Breyer, J., dissenting); *Lingle*, 544 U.S. at 543; Stephen Durden, *Unprincipled Principles: The Takings Clause Exemplar*, 3 ALA. C.R. & C.L.L. REV. 25, 68 n.232 (2013); Steven J. Eagle, *Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 ALA. L. REV. 977, 980 (2000) ("The Takings Clause is predicated, after all, on the requirement that the sovereign pay for that which it has *lawfully* acquired for its own use.") (emphasis in original); *cf.* Vizio, Inc. v. Klee, No. 3:15-CV-00929 (VAB), 2016 WL 1305116, at *18 (D. Conn. Mar. 31, 2016); Support Working Animals, Inc. v. DeSantis, 457 F. Supp. 3d 1193, 1224 (N.D. Fla. 2020).

152. *See* Chee, *supra* note 9, at 577, 580, 592.

153. *See Lingle*, 544 U.S. at 543.

trary laws are those "that ha[ve] no connection to a legitimate purpose or goal[.]"[154] Arbitrary enactments "may lack reasons to explain . . . [them], or . . . [are] supported by illegitimate reasons, or reasons that would, with equal plausibility, justify the opposite act."[155] Professor Michael Teter has "distill[ed] a working definition of arbitrariness" by drawing on case law and other scholarly work.[156] This Note adopts Professor Teter's definition of "arbitrary," which he describes as "a decision or action that is based on improper motivations, lacks a rational connection to a legitimate end, or is untethered to any controlling standards."[157]

So what if the government acts arbitrarily? Arbitrary law-making is antithetical to "the rule of law[,]"[158] impairs institutional "legitimacy[,]" and subverts the population's "liberty interests[.]"[159] By "appl[ying laws] consistently and with standards that are known and followed[,]"[160] the government "encourages confidence that the law will be fair and thereby increases the state's ability to secure cooperation without the imposition of force."[161]

The principles detailed above apply to arbitrary property deprivations. Put best by Justice Holmes in *International Postal Supply Co. v. Bruce*, the

> arbitrary destruction of the property rights of the citizen might be expected to occur under a despotic government, but it ought not to be tolerated under a

154. TIMOTHY SANDEFUR, THE CONSCIENCE OF THE CONSTITUTION: THE DECLARATION OF INDEPENDENCE AND THE RIGHT TO LIBERTY 73 (2013).

155. *See id.* at 73; *see generally* Barnett & Bernick, *supra* note 8, at 1643–66.

156. *See* Teter, *Letting Congress Vote*, *supra* note 12, at 1440–41.

157. *Id.* at 1441.

158. *See* STARR, *supra* note 12, at 16–17; Teter, *Letting Congress Vote*, *supra* note 12, at 1443; Waldron, *supra* note 12; *see generally* Martin Krygier, *The Rule of Law: Pasts, Presents, and Two Possible Futures*, 12 ANN. REV. L. & SOC. SCI. 199, 203 (2016).

159. *See* Teter, *Letting Congress Vote*, *supra* note 12, at 1443; *see also* Todd J. Zywicki, *The Rule of Law, Freedom, and Prosperity*, 10 SUP. CT. ECON. REV. 1, 4 (2003); James McClellan, *Rule of Law & U.S. Constitutionalism*, OLL (2000), https://oll.libertyfund.org/page/rule-of-law-us-constitutionalism [https://perma.cc/TSP6-AJRX]; STARR, *supra* note 12, at 15–17.

160. *See* Teter, *Letting Congress Vote*, *supra* note 12, at 1443.

161. *See* STARR, *supra* note 12, at 16.

> government whose fundamental law forbids all deprivation of property without due process of law, or the taking of private property for public use without compensation.[162]

As explained below, however, the Due Process and Takings Clauses may insufficiently stymie arbitrary interference.[163]

B. Substantive Due Process as an Ineffective Anti-Arbitrariness Mechanism

In early due process cases, the Court made clear that arbitrary actions or deprivations presumptively violated the Due Process Clause.[164] For example, in *Hagar v. Reclamation District No. 108*, the Court concluded that due process "is intended as additional security against . . . the arbitrary spoliation of property."[165] Similarly, in *Dobbins v. City of Los Angeles*, the Court held that courts must "determin[e] whether . . . under the guise of enforcing police regulations, there has been . . . arbitrary interference with the constitutional rights to . . . use and enjoy property."[166] More recently, in *Wolff v. McDonnell*, Justice White opined that "[t]he touchstone of due process is protection of the individual against arbitrary action of government[.]"[167] To the extent that regulations impact private property, however, this section demonstrates that due process may fail, in some cases, to thwart arbitrary action.[168]

a. Constitutionally Arbitrary Actions Are *Extremely* Arbitrary: *Lewis* & Progeny

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162. Int'l Postal Supply Co. v. Bruce, 194 U.S. 601, 613 (1904).

163. *See* Chee, *supra* note 9, at 577.

164. *See, e.g.*, Phillip Wagner, Inc. v. Leser, 239 U.S. 207, 215–16 (1915); Helvering v. City Bank Farmers Tr. Co., 296 U.S. 85, 89–90 (1935); Chicago, M. & St. P. Ry. Co. v. State of Minn. ex rel. R.R. & Warehouse Comm'n, 134 U.S. 418, 457 (1890); Gundling v. City of Chicago, 177 U.S. 183, 188 (1900); Goss v. Lopez, 419 U.S. 565, 574 (1975); Wolff v. McDonnell, 418 U.S. 539, 558 (1974) (citing Dent v. West Virginia, 129 U.S. 114, 123 (1889)); Griswold v. Connecticut, 381 U.S. 479, 502 (1965) (White, J., concurring).

165. Hagar v. Reclamation Dist. No. 108, 111 U.S. 701, 707 (1884).

166. Dobbins v. City of Los Angeles, 195 U.S. 223, 236 (1904).

167. *See Wolff*, 418 U.S. at 558.

168. *See* Chee, *supra* note 9, at 577.

The Court has made clear that *constitutionally* arbitrary actions involve brazen conduct,[169] suggesting that less arbitrary actions may survive judicial review.[170] Indeed, the Court has acknowledged that, in the executive action context, "only the most egregious official conduct can be said to be arbitrary in the constitutional sense[.]"[171] In *Lingle*, Justice O'Connor also recognized that substantive due process would only screen for government actions that were "*so arbitrary or irrational* that . . . [they would] [r]un afoul of the Due Process Clause[,]"[172] which might suggest that substantive due process may generally capture some but not all arbitrary actions.

Furthermore, due process protections may egregiously fail to capture arbitrary action in cases involving property deprivations.[173] Some circuits will only find a due process violation when a deprivation occurred under extraordinarily arbitrary auspices.[174] For example, the Tenth Circuit has "acknowledged that arbitrary deprivation of a property right may violate substantive due process if the arbitrariness is extreme[.]"[175] Several other circuits, including the Tenth Circuit, have followed *Lewis* and have applied a "shocks the

169. *See* County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998).

170. *See* Chee, *supra* note 9, at 577.

171. *See Lewis*, 523 U.S. at 846 (quoting Collins v. Harker Heights, 503 U.S. 115, 129 (1992)) (internal quotation marks omitted).

172. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 542 (2005) (emphasis added).

173. *See* Chee, *supra* note 9, at 577, 590–601.

174. *See* Brian W. Blaesser, *Substantive Due Process Protection at the Outer Margins of Municipal Behavior*, 3 WASH. U. J.L. & POL'Y 583, 594–95 (2000) ("Accordingly, for these circuits, only arbitrary action that is extreme in some form merits consideration under substantive due process."); Chee, *supra* note 9, at 577, 590; *see, e.g.*, George Washington Univ. v. District of Columbia, 318 F.3d 203, 209 (D.C. Cir. 2003) ("Once a property interest is found, however, the doctrine of substantive due process constrains only egregious government misconduct."), *cited in* Chee, *supra* note 9, at 596 n.180; Clayland Farm Enterprises, LLC v. Talbot County, 987 F.3d 346, 357 (4th Cir. 2021) (noting a highly stringent substantive due process threshold).

175. *See* Onyx Properties LLC v. Bd. of Cnty. Comm'rs of Elbert Cnty., 838 F.3d 1039, 1049 (10th Cir. 2016); *see generally* Chee, *supra* note 9, at 594–96.

conscience" test that captures "only the most egregious official conduct"[176] in cases involving property interests.[177] To illustrate the relationship between arbitrariness and stringent standards of review, consider due process claims concerning two states' COVID-19 public health orders.

In *World Gym, Inc. v. Baker*,[178] the U.S. District Court for the District of Massachusetts found that the Massachusetts' Governor's mandate that non-essential businesses shutter,[179] and subsequent orders that kept the challenger's business shuttered, did not "amount[] [to] conscience-shocking action."[180] In contrast, the U.S. District Court for the Western District of Pennsylvania (employing rational basis review,[181] a different standard detailed in greater depth below[182]) found in *County of Butler v. Wolf* that the state's "Order closing all 'non-life-sustaining' businesses was so arbitrary in its creation, scope and administration as to fail constitutional scrutiny."[183] In *Wolf*, the government appeared to lack "any controlling standard[]"[184] or principle that may have guided its decisions to

176. *See Lewis*, 523 U.S. at 846.

177. *See* Blaesser, *supra* note 174, at 594–95; Chee, *supra* note 9, at 577, 584–89, 596; *see, e.g.*, Najas Realty, LLC v. Seekonk Water Dist., 821 F.3d 134, 145 (1st Cir. 2016); GEFT Outdoors, LLC v. City of Westfield, 922 F.3d 357, 368 (7th Cir. 2019); Azam v. City of Columbia Heights, 865 F.3d 980, 986 (8th Cir. 2017); Knox v. Town of Se., 599 F. App'x 411, 413 (2d Cir. 2015); Thorpe v. Upper Makefield Twp., 758 F. App'x 258, 261–62 (3d Cir. 2018) (applying a mix of rational basis and a *Lewis*-type standard); Abdi v. Wray, 942 F.3d 1019, 1027–28 (10th Cir. 2019) (explaining that the circuit analyzes executive conduct under a *Lewis*-type standard); Siefert v. Hamilton Cnty., 951 F.3d 753, 766 (6th Cir. 2020); Siena Corp. v. Mayor & City Council of Rockville Maryland, 873 F.3d 456, 464 (4th Cir. 2017).

178. 474 F. Supp. 3d 426 (D. Mass. 2020).

179. *See id.* at 429; *see also* Massachusetts Covid-19 Order No. 13 (Mar. 23, 2020), https://www.mass.gov/doc/march-23-2020-essential-services-and-revised-gatherings-order/download [https://perma.cc/B2DQ-77DZ].

180. *Baker,* 474 F. Supp. 3d at 434.

181. *See* County of Butler v. Wolf, 486 F. Supp. 3d 883, 922 (W.D. Pa. 2020).

182. *See infra* notes 191–241 and accompanying text.

183. *Wolf*, 486 F. Supp. 3d at 922 (quoting Order of the Governor of the Commonwealth of Pennsylvania Regarding the Closure of All Businesses That Are Not Life Sustaining (Mar. 19, 2020)).

184. *See* Teter, *Letting Congress Vote*, *supra* note 12, at 1441.

close some businesses and not others.[185] If we assume that Massachusetts authorities made similar closure determinations without relying on a "controlling standard[][,]"[186] which is plausible considering how some regulations appeared randomly and haphazardly constructed,[187] the Massachusetts law presented in *Baker* that distinguished between "essential" and "non-essential" businesses[188] was likely no less arbitrary than the Pennsylvania law in *Wolf* that drew a similar distinction. However, because the "shocks the conscience" test only captures the most *outrageously* arbitrary actions,[189] actions

185. *See Wolf*, 486 F. Supp. 3d at 922–25.

186. *See* Teter, *Letting Congress* Vote, *supra* note 12, at 1441.

187. *See* Hummy Song et al., *The Impact of the Non-Essential Business Closure Policy on COVID-19 Infection Rates*, 21 INT'L J. OF HEALTH ECON. & MANAGEMENT 387, 389 (2021), https://link.springer.com/content/pdf/10.1007/s10754-021-09302-9.pdf [https://perma.cc/95V3-ZLJF] ("The criteria for classifying businesses and their employees into essential and non-essential categories were somewhat arbitrary."); AMS. FOR PROSPERITY FOUND. KAN., KANSAS SHUT DOWN BUSINESSES THAT WERE WILLING AND ABLE TO COMPLY WITH SAFETY GUIDELINES 1, https://mk0xituxemauaaa56cm7.kinstacdn.com/wp-content/uploads/2020/07/2020_AFPF_ShutDownReport.pdf [https://perma.cc/3X69-M43U] ("There appears to be no rhyme or reason to Kansas's designations of essential businesses in this process. This arbitrary and capricious process serves only to pick winners and losers."); Elizabeth Wolstein, *We Now Know New York's Shut Down of "Non-Essential" Businesses Is Unconstitutional*, SCHLAM STONE & DOLAN: BLOG (Oct. 14, 2020), https://www.schlamstone.com/we-now-know-new-yorks-shut-down-of-non-essential-businesses-is-unconstitutional/ [https://perma.cc/M26M-DAQM]; Jeff Jacoby, *Courts Find Pandemic Orders Unlawful in Michigan and Pennsylvania. Will the SJC Do the Same?*, BOSTON GLOBE (Oct. 11, 2020), https://www.bostonglobe.com/2020/10/11/opinion/courts-find-pandemic-orders-unlawful-michigan-pennsylvania-will-sjc-do-same/ [https://perma.cc/9UFC-JRVC]; Andrew Keshner, *Closing Our Business to Stop the Coronavirus Violated Our Employees Rights, Lawsuit Claims*, MARKETWATCH (Mar. 30, 2020), https://www.marketwatch.com/story/closing-our-business-to-stop-the-coronavirus-violated-our-employees-rights-lawsuit-claims-2020-03-30 **[**https://perma.cc/W3NB-G9SB**];** Jacob Sullum, *Americans Are Sick of Arbitrary COVID-19 Restrictions*, REASON (Dec. 23, 2020), https://reason.com/2020/12/23/americans-are-sick-of-arbitrary-covid-19-restrictions/ [https://perma.cc/8D9P-JYSD].

188. *See* Massachusetts Covid-19 Order No. 13 (Mar. 23, 2020), https://www.mass.gov/doc/march-23-2020-essential-services-and-revised-gatherings-order/download [https://perma.cc/8VQR-SDX7].

189. *See Lewis*, 523 U.S. at 846.

that are arbitrary, but are insufficiently arbitrary to violate due process, may survive review.[190]

b. Constitutionally Arbitrary Actions Are *Extremely* Arbitrary: Rational Basis

Arbitrary interference with property may also survive rational basis review,[191] which is a preferred standard in other circuits.[192] Rational basis review only requires courts to "determine whether the challenged legislation has a legitimate purpose" and "whether the

190. *See* Chee, *supra* note 9, at 577; *see generally* Entergy Ark., Inc. v. Nebraska, 241 F.3d 979, 991 (8th Cir. 2001) ("To assert a substantive due process violation . . . [the challenger] must establish a constitutionally protected property interest and that state officials used their power in *such an arbitrary and oppressive way*[.]" (emphasis added)). Other jurisdictions have upheld similar classifications and orders shuttering some businesses and not others. *See, e.g.*, Tandon v. Newsom, 517 F. Supp. 3d 922, 949–52 (N.D. Cal. 2021); Slidewaters LLC v. Wash. Dep't of Lab. & Indus., No. 2:20-CV-0210-TOR, 2020 WL 3130295, at *4 (E.D. Wash. June 12, 2020); Best Supplement Guide, LLC v. Newsom, No. 2:20-CV-00965-JAM-CKD, 2020 WL 2615022, at *6 (E.D. Cal. May 22, 2020); Six v. Newsom, 462 F. Supp. 3d 1060, 1069–1070 (C.D. Cal. 2020); Open Our Oregon v. Brown, No. 6:20-CV-773-MC, 2020 WL 2542861, at *2 (D. Or. May 19, 2020).

191. One scholar has remarked that "[t]he rational basis test as applied by the Supreme Court is such a permissive level of review that it is effectively not judicial review at all. It permits the most irrational of legislation to become the law of the land, no matter how needless, wasteful, unwise, or improvident it might be." James M. McGoldrick, Jr., *The Rational Basis Test and Why It Is So Irrational: An Eighty-Year Retrospective*, 55 SAN DIEGO L. REV. 751, 752–54 (2018). Others have also alluded to the permissiveness of rational basis. *See* Aaron Belzer, *Putting the "Review" Back in Rational Basis Review,* 41 W. ST. U. L. REV. 339, 355 (2014); *see generally* Chee, *supra* note 9, at 598–600; Joel Alicea & John D. Ohlendorf, *Against the Tiers of Const. Scrutiny*, NAT'L AFFS. (2019), https://www.nationalaffairs.com/publications/detail/against-the-tiers-of-constitutional-scrutiny [https://perma.cc/54YS-VT86] ("[E]ach step of the scrutiny process is marked by indeterminacy and manipulability.").

192. *See* Slidewaters LLC v. Washington State Dep't of Lab. & Indus., 4 F.4th 747, 758 (9th Cir. 2021) (citing Jackson Water Works, Inc. v. Pub. Utilities Comm'n of State of Cal., 793 F.2d 1090, 1093–94 (9th Cir. 1986)); Hackbelt 27 Partners, L.P. v. City of Coppell, 661 F. App'x 843, 846 (5th Cir. 2016); PBT Real Est., LLC v. Town of Palm Beach, 988 F.3d 1274, 1284 (11th Cir. 2021) (applying rational basis only in suits challenging legislative action); Abdi v. Wray, 942 F.3d 1019, 1027–28 (10th Cir. 2019) (explaining that rational basis is appropriate for analyzing non-executive, legislative action); *see also* Thorpe v. Upper Makefield Twp., 758 F. App'x 258, 261–62 (3d Cir. 2018); *cf.* League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer, 814 F. App'x 125, 126–127 (6th Cir. 2020) (applying rational basis in connection with a public health regulation); *see generally* Chee, *supra* note 9, at 598.

challenged . . . [law] promotes that purpose."[193] Rational basis may fail to capture arbitrary action for two interrelated reasons.[194]

i. A Deferential Test

First, rational basis review doctrinally favors the government by forgiving pretext.[195] The government may offer "any valid reason for . . . [its] action[.]"[196] Because the government's claimed objective does not need to be its original or honest[197] objective,[198] government actors may further potentially illegitimate ends that *could* be justified or rationalized *ex post*.[199] Further exacerbating this shortcoming is the impossible evidentiary burden thrust on challengers who seek to invalidate the government's actions.[200] Indeed, "challenger[s] must negative every conceivable justification for . . . [a] challenged law or policy"[201] to demonstrate that the law is arbitrary and violates the Due Process Clause. These structural barriers "ha[ve] essentially made the rational basis test the equivalent to no test at all."[202]

Although local and state governments have acted in good faith when regulating to curb COVID-19's spread and protect the public, "governments" located around the world "have exploited [the]

193. *See Jackson Water Works, Inc.*, 793 F.2d at 1094.

194. *See generally* Jeffrey D. Jackson, *Putting Rationality Back into the Rational Basis Test: Saving Substantive Due Process and Redeeming the Promise of the Ninth Amendment*, 45 U. RICH. L. REV. 491, 492 (2011).

195. *See* Steven Menashi & Douglas H. Ginsburg, *Rational Basis with Economic Bite*, 8 N.Y.U. J.L. & LIBERTY 1055, 1059–60 (2014).

196. *See* Nicholas Walter, *The Utility of Rational Basis Review*, 63 VILL. L. REV. 79, 79 (2018); *see also* Randy E. Barnett, *Judicial Engagement Through the Lens of* Lee Optical, 19 GEO. MASON L. REV. 845, 856 (2012); Brendan Beery, *Rational Basis Loses its Bite: Justice Kennedy's Retirement Removes the Most Lethal Quill from LGBT Advocates' Equal Protection Quiver*, 69 SYR. L. REV. 69, 78–79 (2019); *cf.* Belzer, *supra* note 191, at 355–56.

197. *See* Jackson, *supra* note 194, at 493.

198. *See* Barnett, *supra* note 196, at 856.

199. *See* Menashi & Ginsburg, *supra* note 195, at 1059–60.

200. *See* Beery, *supra* note 196, at 79.

201. *Id.* at 78; *see also* F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 313–15 (1993).

202. *See* Jackson, *supra* note 194, at 493.

COVID-19"[203] pandemic to preserve and amass power and authority.[204] Indeed, governments have frequently abused their emergency powers and, in some cases, have enacted arbitrary "lockdown measures [that] have been applied in an openly discriminatory manner to specific segments of the population."[205] Because property interference is one way that self-interested government actors have attempted to preserve and consolidate authority during crises,[206] it is conceivable that a small contingent of government officials may interfere with property to advance ends that

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203. *See* David S. D'Amato, *The Real Threat Posed by COVID-19 Lockdowns*, HILL (Dec. 5, 2020), https://thehill.com/opinion/civil-rights/528892-the-real-threat-posed-by-covid-19-lockdowns [https://perma.cc/PT72-XZAH].

204. *See* Kenneth Roth, *How Authoritarians Are Exploiting the COVID-19 Crisis to Grab Power*, HUM. RTS. WATCH (Apr. 3, 2020), https://www.hrw.org/news/2020/04/03/how-authoritarians-are-exploiting-covid-19-crisis-grab-power [https://perma.cc/2GVT-2JBM]; Eric Boehm, *Rand Paul, Ron Wyden Want to End Endless National Emergencies*, REASON (Feb. 26, 2021), https://reason.com/2021/02/26/rand-paul-ron-wyden-want-to-end-endless-national-emergencies/ [https://perma.cc/JU2P-NXL2]; Selam Gebrekidan, *For Autocrats, and Others, Coronavirus Is a Chance to Grab Even More Power*, N.Y. TIMES (Mar. 30, 2020), https://www.nytimes.com/2020/03/30/world/europe/coronavirus-governments-power.html [https://perma.cc/8MA4-EEVP]; Steven Erlanger, *Poland and Hungary Use Coronavirus to Punish Opposition*, N.Y. TIMES (Apr. 22, 2020), https://www.nytimes.com/2020/04/22/world/europe/poland-hungary-coronavirus.html [https://perma.cc/MR55-333J]; Roger Valdez, *Socialist Grabs for Power and Property in Virus Crisis*, FORBES (Mar. 12, 2020), https://www.forbes.com/sites/rogervaldez/2020/03/12/socialist-grabs-for-power-and-property-in-virus-crisis/?sh=38a100f24df3 [https://perma.cc/6VGQ-MJBW]; *cf.* Emma Green, *The Liberals Who Can't Quit Lockdown*, ATLANTIC (May 4, 2021), https://www.theatlantic.com/politics/archive/2021/05/liberals-covid-19-science-denial-lockdown/618780/ [https://perma.cc/5W95-SHRM] (suggesting that, "[f]or many progressives, extreme vigilance was in part about opposing Donald Trump.").

205. *See* SARAH REPUCCI & AMY SLIPOWITZ, DEMOCRACY UNDER LOCKDOWN 1, 3, 5 (2020), https://freedomhouse.org/sites/default/files/2020-10/COVID-19_Special_Report_Final_.pdf [https://perma.cc/ZE58-BKVT].

206. *See* Robert Henneke, *Government Power Grab Thwarted by 'Unconstitutional' Eviction Moratorium*, TEX. PUB. POL'Y FOUND. (Mar. 23, 2021), https://www.texaspolicy.com/government-power-grab-thwarted-by-unconstitutional-eviction-moratorium/ [https://perma.cc/M35B-QQ6A]; Ethan Yang, *The Constitutional Reckoning of State Lockdown Orders*, AM. INST. ECON. RSCH. (Oct. 7, 2020), https://www.aier.org/article/the-constitutional-reckoning-of-state-lockdown-orders/ [https://perma.cc/A2BF-Y6XW]; MICHAEL A. WEBER ET AL., CONG. RSCH. SERV., GLOBAL DEMOCRACY AND HUMAN RIGHTS IMPACTS OF COVID-19: IN BRIEF 5, 2020; *see generally Abuses of Power Amid Coronavirus*

are entirely impermissible or unrelated to "public health."[207] Rational basis is principally flawed because it permits the government to claim that it is acting in pursuit of valid and compelling public health ends, even if those objectives or ends are pretextual.[208]

When a deferential test is paired with a deferential review, a phenomenon explained in further depth below, an arbitrary regulation—one enacted in furtherance of some "improper" aim or goal or "untethered to any controlling standard[]"[209]—may plausibly survive.

ii. A Deferential Review

If rational basis is rigorously applied, it could conceivably thwart arbitrary action. For example, a court might scrutinize the government's objectives or require the government to "show its work," forcing the government to demonstrate how its means will materially advance its stated purpose. In practice, however, courts may apply rational basis in a highly deferential manner,[210] making it

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Pandemic, PROTECT DEM. (last visited Mar. 27, 2021), https://protectdemocracy.org/project/abuses-of-power-amid-coronavirus/ [https://perma.cc/F862-LDGE]; Ramya Vijaya et al., *Coronavirus Versus Democracy: 5 Countries Where Emergency Powers Risk Abuse*, CONVERSATION (Apr. 6, 2020), https://theconversation.com/coronavirus-versus-democracy-5-countries-where-emergency-powers-risk-abuse-135278 [https://perma.cc/CY8C-TVAL].

207. *See* Peter Suderman, *'Public Health' Has Become a Catchall Excuse for Bad Ideas*, REASON (Feb. 1, 2022), https://reason.com/2022/02/01/public-health-has-become-a-catchall-excuse-for-bad-ideas/ [https://perma.cc/24K2-UXF4]; Jacob Sullum, *Why Didn't COVID-19 Kill the Constitution*, REASON (Sept. 2021), https://reason.com/2021/07/03/why-didnt-covid-19-kill-the-constitution/ [https://perma.cc/LXB7-J5UL] (discussing the extension of eviction moratoria for reasons unrelated to stymying COVID); *see generally* REPUCCI & SLIPOWITZ, *supra* note 205, at 1; Kevin Penton, *NY Firm Sues Cuomo over COVID-19 Closure Orders*, LAW360 (May 14, 2020), https://www.law360.com/newyork/articles/1273623/ny-firm-sues-cuomo-over-covid-19-closure-orders?nl_pk=70bd2684-ae93-4b0e-98b3-b85850047d61 [https://perma.cc/6B6Z-4LTJ]; *Articles of Impeachment Officially Filed Against Ohio Gov. Mike DeWine, Claiming Abuse of Power During Pandemic*, 19 NEWS (Nov. 30, 2020), https://www.cleveland19.com/2020/11/30/articles-impeachment-officially-filed-against-ohio-gov-mike-dewine-claiming-abuse-power-during-pandemic/ [https://perma.cc/BP83-BZT4].

208. *See generally* Jackson, *supra* note 194, at 493; Beery, *supra* note 196, at 78–79.

209. *See* Teter, *Letting Congress Vote*, *supra* note 12, at 1441.

210. *See* Belzer, *supra* note 191, at 354–56; Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through* Romer v. Evans, 32 IND. L. REV.

even more likely that an arbitrary law might survive review.[211] In *FCC v. Beach Communications, Inc.*,[212] the Court stated that rational basis "review is a paradigm of judicial restraint[,]"[213] and made clear that "legislative choice is not subject to courtroom fact-finding and may be based on *rational speculation unsupported by evidence or empirical data*."[214] Even if the government struggles to find reasons for its actions, "court[s] will happily speculate as to what any of . . . [the government's] justifications *might* have been."[215] In other words, "if the state . . . is incapable of making its case, judges must help it do so."[216]

When coupled with an extremely deferential standard, deferential application may permit arbitrary regulations to survive judicial review. Take, for example, two cases arising out of COVID-19 public health orders. In *Bill & Ted's Riviera, Inc. v. Cuomo*, New York wedding venues sought to enjoin New York from enforcing the state's closure order on Equal Protection grounds.[217] New York law permitted restaurants to serve over 170 guests, but specified that wedding venues could only serve fifty or fewer.[218] The U.S. District Court for the Northern District of New York found the governor's classifications non-arbitrary,[219] reasoning, in part, that "New York

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357, 357 (1999); Robert H. Thomas, *Emergencies, Police Power, Commandeering, and Compensation: Essential Readings*, INVERSE CONDEMNATION (Mar. 18, 2020), https://www.inversecondemnation.com/inversecondemnation/2020/03/emergencies-police-power-commandeering-and-compensation-essential-readings.html [https://perma.cc/MB3L-KJXF]; Chee, *supra* note 9, at 598.

211. *See generally* Jackson, *supra* note 194, at 493.

212. 508 U.S. 307 (1993).

213. *Id.* at 314.

214. *Id.* at 315 (emphasis added); *see also* S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613–14 (2020) (Roberts, C.J., concurring); Williamson v. Lee Optical of Oklahoma Inc., 348 U.S. 483, 487 (1955) ("The Oklahoma law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement.").

215. Beery, *supra* note 196, at 78–79 (emphasis in original).

216. Andrew Ward, Note, *The Rational-Basis Test Violates Due Process*, 8 N.Y.U. J. L. & LIBERTY 714, 724 (2014).

217. Bill & Ted's Riviera, Inc. v. Cuomo, 494 F. Supp. 3d 238, 242–43 (N.D.N.Y. 2020).

218. *See id.* at 243.

219. *Id.* at 248.

is not required to respond to COVID-19 in any particular way and scientific experts may differ about how best to prevent the transmission of the virus."[220] In a footnote, the court further detailed how:

> New York might react differently and impose different restrictions on social gatherings or on particular industries than other states for various reasons, including that the incidence of the virus may differ from state to state as may the density of population or other circumstances that are particular to some states and not others.[221]

Indeed, the court ironically emphasized that public health officials should be afforded deference during a public health crisis and that their "decisions, unless arbitrary and irrational[,] should not be subject to second guessing by unelected judges who are not accountable to the people and do not have the background, competence, and expertise to assess public health."[222] Finding the challengers unable to demonstrate how the regulation did not satisfy rational basis review, the court declined to award relief.[223]

In *TJM 64, Inc. v. Harris*,[224] the challengers, a cohort of restaurant owners, claimed that a Tennessee county's public health orders mandating that bars and "Limited Service Restaurants" close "for forty-five days" violated their due process rights and effected a *Penn Central* taking.[225] Citing testimony "that limited service restaurants pose[d] a greater risk for the spread of the COVID-19 virus than other restaurants" and "given the deferential review applicable to public health orders[,]" the court declined to entertain the

220. *Id.* at 247 (footnote omitted).

221. *Id.* at 247 n.2.

222. *Id.* at 248.

223. *Id.*

224. 475 F. Supp. 3d 828 (W.D. Tenn. 2020).

225. *See id.* at 832, 834, 837; Shelby County Health Order and Directive No. 8 (July 7, 2020), https://www.shelbytnhealth.com/DocumentCenter/View/1761/Health-Directive-No-8-7-7-20 [https://perma.cc/C6T9-F8YS].

challengers' substantive due process claim.[226] The court also rejected the challengers' allegations that "no scientific studies or data backed Defendants' decisions[,]" explaining that "the Fourteenth Amendment's arbitrary and capricious standard does not require such data-driven, scientifically rigorous decision-making from local officials."[227] Conversely, "rational speculation" was sufficient to pass muster under the Fourteenth Amendment.[228]

Neither the *Riviera* nor *Harris* courts meaningfully evaluated the government's objectives or means. Instead, both courts made clear that they were deferring to governments' public health regimes.[229] Failing to meaningfully inquire into governments' ends or means greatly impaired the courts' ability to snuff out "improper motivations" or determine whether the challenged laws were methodically or deliberately designed.[230] If courts are unwilling to peek behind the curtain, question the governments' motivations, and prod at governments' means, then carelessly and haphazardly crafted regulations and laws may plausibly survive review. Escape devices like "rational speculation"[231] further exacerbate this problem by permitting courts to abstractly explain away potentially arbitrary actions that are, in practice, random or "unsupported[,]"[232] or which do not materially advance the government's stated ends.[233] Thus, both *Harris* and *Riviera* demonstrate how an arbitrary law might plausibly survive rational basis review.[234]

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226. *Harris*, 475 F. Supp. 3d at 835.

227. *Id.* at 836.

228. *Id.*

229. *See id.* at 835–36; Bill & Ted's Riviera, Inc. v. Cuomo, 494 F. Supp. 3d 238, 243–48 (N.D.N.Y. 2020).

230. *See* Teter, *Letting Congress Vote, supra* note 12, at 1441.

231. FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993).

232. *Id*.

233. *See* Teter, *Letting Congress Vote, supra* note 12, at 1441.

234. Whether the underlying regulations in the cases detailed above were, in fact, arbitrary is irrelevant to this analysis. The cases simply demonstrate that courts *cannot* snuff out arbitrariness when they exercise extreme deference. This proposition is further supported by cases in which courts within the same district have treated similar lockdown orders differently, possibly suggesting that varying levels of deference may yield different results. As in *Bill & Ted's Riviera*, *DiMartile v. Cuomo* involved an Equal Protection challenge against state-imposed gathering limitations. *See* DiMartile v.

Friction between trial and appellate courts on similar facts further supports the idea that varying levels of deference may influence courts' ability to effectively snuff out arbitrariness. For example, in *League of Independent Fitness Facilities & Trainers, Inc. v. Whitmer*,[235] a district judge found Michigan's gym closure order arbitrary, reasoning that "when asked what data, science, or even rationale supports the continued closure of indoor gyms, . . . [the government] presented *nothing* beyond 'trust us, they're still dangerous.'"[236] On appeal, however, the Sixth Circuit reversed, positing that "[t]he idea that heavy breathing and sweating in an enclosed space containing many shared surfaces creates conditions likely to spread the virus is a paradigmatic example of 'rational speculation' that fairly supports the Governor's treatment of indoor fitness facilities[,]" and that imprecision would not prevent the government from satisfying rational basis review.[237] Similar to *Whitmer*, a California

Cuomo, 478 F. Supp. 3d 372, 386–87 (N.D.N.Y. 2020), *order vacated, appeal dismissed*, 834 F. App'x 677 (2d Cir. 2021). Reasoning that New York had "failed to adequately rebut Plaintiffs' argument that a 50-person limit on a social gathering is not consistent with Defendants' allowance of exemptions to the 50-person gathering restriction for activities such as dining at restaurants and participating in graduation ceremonies[,]" the Northern District of New York found the New York law arbitrary. *Id.* at 386–89. Put differently, New York's regulation was arbitrary because it failed to justify how exempting some entities from "gathering restriction[s]" and not others meaningfully advanced its public health goal. *See id.* New York's classification distinguishing wedding venues from restaurants in *Bill & Ted's Riviera* appears no less unwieldy and misguided than New York's gathering limitations highlighted in *DiMartile*. *Compare Bill & Ted's Riviera*, 494 F. Supp. 3d at 243–45 (N.D.N.Y. 2020), *with DiMartile*, 478 F. Supp. 3d at 386–87. Both cases appeared to lack "controlling" principles that might have guided the state's distinctions, yet two courts within the same district found differently as to whether the regulations were arbitrary. *See* Teter, *Letting Congress Vote, supra* note 12, at 1441.

235. 468 F. Supp. 3d 940 (W.D. Mich. 2020), *appeal dismissed*, 843 F. App'x. 707 (6th Cir. 2021).

236. *See id*. at 951.

237. *See* League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer, 814 F. App'x 125, 129 (6th Cir. 2020) (quoting *Beach Commc'ns*, 508 U.S. at 315).

Court of Appeal reversed a lower court's finding[238] of arbitrariness,[239] and reasoned, in part, that it was inappropriate "to second-guess public health officials' actions in an 'area[] fraught with medical and scientific uncertainties.'"[240]

In both cases, the appellate courts reversed findings of arbitrariness, in part, on the grounds that governments should be afforded deference.[241] Too much deference, however, might lead courts to look beyond haphazardly constructed laws that crush individual rights and confer no social or public benefit. Because the lower courts in both cases above employed a less deferential review,[242] both cases might suggest that higher levels of judicial deference may stymie findings of arbitrariness.

c. Returning to *Lingle*'s Dangerous Assumption

Due process may plausibly fail, in some instances, to adequately protect against arbitrary interference.[243] This proposition gives context to the jurisprudential assumption that compensable regulatory takings flow from legally permissible regulations.[244] As demonstrated above, a subset of permissible actions may be arbitrary,[245] which not only appears to conflict with the Court's early conceptions of due process, but also elevates just compensation's role in

238. *See* California Restaurant Ass'n, Inc. v. California of Los Angeles Dept. of Pub. Health, No. 20STCP03881, 2020 WL 7356717, at *1 (Cal. Super. Ct. Dec. 08, 2020).

239. *See* Cnty. of Los Angeles Dep't of Pub. Health v. Superior Ct. of Los Angeles Cnty., 275 Cal. Rptr. 3d 752, 765 (Cal. App. 4th 2021).

240. *See id.* (quoting S. Bay Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring)). Notably, the Court of Appeal rejected the trial court's order that Los Angeles County perform a "risk-benefit" analysis. *See id.* at 764–65.

241. *See id.*; League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer, 814 F. App'x 125, 129 (6th Cir. 2020).

242. *See California Restaurant Ass'n*, 2020 WL 7356717, at *1 (Cal. Super. Ct. Dec. 08, 2020); League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer, 468 F. Supp. 3d 940, 949–50 (W.D. Mich. 2020).

243. *See* Chee, *supra* note 9, at 577, 590–601.

244. *See* Lingle v. Chevron, 544 U.S. 528, 543 (2005); E. Enterprises v. Apfel, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring); *id.* at 556–57 (Breyer, J., dissenting); Durden, *supra* note 151, at 68 n.232; Eagle, *supra* note 151, at 980.

245. *Cf.* Chee, *supra* note 9, at 577.

thwarting arbitrary action.[246] However, for reasons described below, the regulatory takings doctrine may excuse compensation for regulatory interference where compensation's protections are needed—when the government claims that it is acting in the name of public health or safety.

C. Arbitrariness & Exceptions to the Compensation Requirement

In the eminent domain context, the government *cannot* excuse itself from compensating owners when it deprives them of property to advance some *affirmative* public health or safety end.[247] Likewise, compensation is usually owed, regardless of motive, when government action effects a *per se* regulatory taking.[248] Because the government is required to compensate owners for physical or *per se* regulatory deprivations, the government must determine whether a deprivation is worth the public expense, which, for reasons articulated in Part I, might guard against unwieldy, inefficient, and arbitrary action.[249] *Lucas*'s facts support this proposition. After the *Lucas* decision rendered South Carolina's deprivation a taking, the governing body "passed a special variance allowing development on [Lucas's land], and they sold it, because, the state concluded it couldn't stand to pay that kind of money for the property."[250] In other words, had South Carolina understood *ex ante* that it was obligated to compensate David Lucas, it (1) might not have deprived Lucas of his property or (2) may have conceived of more precise means to achieve its police power end.[251]

If arbitrary regulations survive due process review, the Takings

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246. *See* Sax, *supra* note 7, at 57–60, 64; Cahoy, *supra* note 7, at 142; *cf.* Ellickson, *supra* note 7, at 420; Eagle, *supra* note 7, at 614.

247. *See* STIFF, *supra* note 45, at 2.

248. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016–18, 1029 (1992); Horne v. Dep't of Agric., 576 U.S. 350, 360–61 (2015).

249. *See* Cahoy, *supra* note 7, at 142; Eisenberg, *supra* note 7, at 673; Sax, *supra* note 7, at 64; Ellickson, *supra* note 7, at 420.

250. *See State Approaches to Protecting Private Property Rights: Hearing Before the Subcommittee on the Constitution of the Committee on the Judiciary*, 105th Cong. 33 (1999) (statement of Chip Campsen).

251. *See generally id.*

Clause may also fail to thwart arbitrary interference in the partial regulatory takings context when the government claims that it has acted pursuant to its police powers.[252] This Note now turns to analyze this proposition.

a. The Police Power Justification & Arbitrariness

As a general principle, the state may physically deprive someone of their property without compensating them when it abates a nuisance.[253] Courts have long upheld nuisance abatement as a valid police power exercise.[254] However, "modern [regulatory takings] jurisprudence authorizes [and excuses compensation for] police power land use regulations that preserve or protect the public health, safety, morals, or welfare[.]"[255] Courts have, both explicitly and inexplicitly, consistently invoked this justification to outright excuse compensation in regulatory takings actions arising out of COVID-19 public health orders or to further justify findings that

252. As articulated above, this argument is derivative of scholars' arguments detailing how compensation can deter arbitrary deprivations. If compensation is excused, then the clause cannot serve out its anti-arbitrariness functionality. *See generally* Cahoy, *supra* note 7, at 142; Eisenberg, *supra* note 7, at 673–74; Sax, *supra* note 7, at 64; Ellickson, *supra* note 7, at 420; Eagle, *supra* note 7, at 613–14.

253. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992).

254. *See* Todd D. Brody, *Examining the Nuisance Exception to the Takings Clause: Is There Life for Environmental Regulations After Lucas*, 4 FORDHAM ENV'T L. REV. 287, 287–88, 294–97 (1993); Charles H. Clarke, *Harmful Use and the Takings Clause in the Eye of the Beholder:* Lucas v. South Carolina Coastal Council, 41 CLEV. ST. L. REV. 31, 40–44 (1993); David A. Thomas, *Finding More Pieces for the Takings Puzzle: How Correcting History Can Clarify Doctrine*, 75 U. COLO. L. REV. 497, 543–45 (2004).

255. *Id.* at 544–45; *see* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 125 (1978); *see also* Lech v. Jackson, 791 F. App'x 711, 719 (10th Cir. 2019); Am. Sav. & Loan Ass'n v. Marin Cty., 653 F.2d 364, 368 (9th Cir. 1981); Naegele Outdoor Advert., Inc. v. City of Durham, 803 F. Supp. 1068, 1080 (M.D.N.C. 1992); Pharm. Care Mgmt. Ass'n v. Rowe, No. CIV. 03-153-B-H, 2005 WL 757608, at *18 (D. Me. Feb. 2, 2005); Britton v. Keller, No. 119CV01113KWRJHR, 2020 WL 1889017, at *3 (D.N.M. Apr. 16, 2020); Tirolerland, Inc. v. Lake Placid 1980 Olympic Games, Inc., 592 F. Supp. 304, 316 (N.D.N.Y. 1984); Holliday Amusement Co. of Charleston, Inc. v. South Carolina, No. 2:01 CV 210 CWH, 2006 WL 1285105, at *3 (D.S.C. May 5, 2006).

interference is not compensable.[256] If substantive due process fails to adequately protect owners from arbitrary action, then excusing compensation may fail to prevent the government from arbitrarily interfering with property.[257]

i. Arbitrary Ends & Means

Excusing compensation for police power exercises provides the

256. *See, e.g.*, Case v. Ivey, No. 2:20-CV-777-WKW, 2021 WL 2210589, at *23 (M.D. Ala. June 1, 2021) ("Ervin's and Farr's takings claim fails for another independent reason—the March 27 order represents a valid exercise of Alabama's police power."); Bojicic v. DeWine, No. 3:21-CV-00630-JGC, 2021 WL 4977018, at *13 (N.D. Ohio Oct. 27, 2021) ("Plaintiffs' takings claim fails on th[e police power] basis alone."); KI Fla. Properties, Inc. v. Walton Cty., No. 3:20CV5358-RH-HTC, 2021 WL 5456668, at *5 (N.D. Fla. Oct. 15, 2021) ("[T]he government was acting pursuant to its police power in a public-health emergency."); Dixon v. De Blasio, No. 21-CV-5090 (BMC), 2021 WL 4750187, at *12 (E.D.N.Y. Oct. 12, 2021); Abshire v. Newsom, No. 221CV00198JAMKJN, 2021 WL 3418678, at *7 (E.D. Cal. Aug. 5, 2021) ("[T]hat the government forbade certain property uses it determined to be injurious to public health does not constitute a taking."); Bimber's Delwood, Inc. v. James, 496 F. Supp. 3d 760, 784 (W.D.N.Y. 2020) ("[T]he character of the government action here is a temporary exercise of the police power to protect the health and safety of the community, which weighs against a taking."); Golden Glow Tanning Salon, Inc. v. City of Columbus, Mississippi, No. 1:20-CV-103-GHD-DAS, 2021 WL 5225617, at *4 (N.D. Miss. Nov. 9, 2021); Willowbrook Apartment Assocs., LLC v. Mayor & City Council of Baltimore, No. 20-CV-01818-SAG, 2021 WL 4441192, at *7 (D. Md. Sept. 27, 2021) ("The Supreme Court's precedents require substantial deference to government actions taken to protect the public."); Michael Amato v. Elicker, 534 F. Supp. 3d 196, 214 (D. Conn. 2021); Skatemore, Inc. v. Whitmer, No. 1:21-CV-66, 2021 WL 3930808, at *4 (W.D. Mich. Sept. 2, 2021); Luke's Catering Serv., LLC v. Cuomo, 485 F. Supp. 3d 369, 386 (W.D.N.Y. 2020); TJM 64, Inc. v. Harris, 475 F. Supp. 3d 828, 839 (W.D. Tenn. 2020); Blackburn v. Dare Cnty., 486 F. Supp. 3d 988, 999 (E.D.N.C. 2020) ("Courts have long recognized that regulations that protect public health or prevent the spread of disease are not of such a character as to work a taking."); PCG-SP Venture I LLC v. Newsom, No. EDCV201138JGBKKX, 2020 WL 4344631, at *10 (C.D. Cal. June 23, 2020); Flint v. Cty. of Kauai, No. CV 19-00521 JMS-WRP, 2021 WL 640903, at *8 (D. Haw. Feb. 18, 2021); Our Wicked Lady LLC v. Cuomo, No. 21CV0165 (DLC), 2021 WL 915033, at *6 (S.D.N.Y. Mar. 9, 2021); Northland Baptist Church of St. Paul, Minnesota v. Walz, No. 20-CV-1100 (WMW/BRT), 2021 WL 1195821, at *16 (D. Minn. Mar. 30, 2021); Oregon Rest. & Lodging Ass'n v. Brown, No. 3:20-CV-02017-YY, 2020 WL 6905319, at *6 (D. Or. Nov. 24, 2020).

257. Again, this idea draws from the presupposition that compensation may deter arbitrary action. *See generally* Sax, *supra* note 7, at 64; Ellickson, *supra* note 7, at 270.

government little incentive to craft regulations that address its desired ends without arbitrarily interfering with private property.[258] Consider two cases arising out of pandemic-related regulations.

Turning back to *TJM 64, Inc. v. Harris*, the U.S. District Court for the Western District of Tennessee held that *Penn Central*'s third prong — "the character of the governmental action"[259] — weighed heavily against a finding that the government's closure order amounted to a taking because the state had acted under its police power,[260] notwithstanding the order's potentially "significant, detrimental impact on the Plaintiffs' businesses . . . . [that] jeopardiz[ed] the[ir] short-term and long-term survival[.]"[261]

If the government is excused from compensating owners for substantial police-power deprivations, a government acting under arbitrary auspices may illegitimately interfere with property because its actions are costless.[262] Couched in a deterrence framework, if the government operates in a random, haphazard, or "unbridled"[263] fashion, "untethered to any controlling standards[,]"[264] the police power justification may underdeter future "unbridled"[265] action by eviscerating an important barrier (i.e. compensation) that may have otherwise incentivized deliberate and methodical behavior.[266] As demonstrated above, substantive due process protections woefully lack any meaningful review of the government's ends, especially in cases involving property interests.[267] Thus, if the government is ex-

258. *See generally* Eagle, *supra* note 7, at 614; Sax, *supra* note 7, at 64; Ellickson, *supra* note 7, at 420.

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

260. *See* TJM 64, Inc. v. Harris, 475 F. Supp. 3d 828, 839 (W.D. Tenn. 2020).

261. *Id*. at 838.

262. *See generally* Cahoy, *supra* note 7, at 142; Sax, *supra* note 7, at 64; Ellickson, *supra* note 7, at 420.

263. Teter, *Letting Congress Vote*, *supra* note 12, at 1479.

264. *Id.* at 1441.

265. *Id.* at 1479.

266. *See* Cahoy, *supra* note 7, at 142; Eisenberg, *supra* note 7, at 673; Eagle, *supra* note 7, at 613; Grossman, *supra* note 12; Sax, *supra* note 7, at 57–60; Ellickson, *supra* note 7, at 420.

267. *See* Chee, *supra* note 9, at 580–82, 590–601.

cused from compensating owners for regulatory property deprivations, *Harris* illustrates how the doctrine may permit the government to significantly interfere with property without worrying whether its actions *actually* advance its ends. In other words, the government is inadequately incentivized to *not* indiscriminately or haphazardly interfere with private property.

A different illustration is useful. In *PCG-SP Venture I LLC v. Newsom*,[268] the challenger, a hotel owner, contested multiple California public health orders that "forced [the owner] to close its Hotel, cease operations, and terminate a majority of its employees[.]"[269] The district court found the public health orders constitutionally compliant, in part, because they advanced the government's public health ends by "requir[ing] residents of California to stay home and businesses to shutter to limit the public's movement and slow transmission of COVID-19."[270] In evaluating the challenger's *Penn Central* claim, the Court articulated that "[t]o the extent Plaintiff could provide evidence of lost profits or interference with investment-backed expectations, the character of the government action at issue would likely outweigh either factor."[271] Reasoning that the "[s]tate [wa]s entitled to prioritize the health of the public over the property rights of the individual[,]" the court held, among other grounds, that the challenger lacked a viable claim for compensation.[272]

Notably, the court explained that the regulations "[we]re strategically designed to progressively reopen low-risk businesses and reallow low-risk activities — businesses and activities that, through increased sanitization measures and limited human contact, can resume without overwhelming the State's healthcare system."[273] The closest the court came to explaining how the governments' sweeping measures—which included shuttering the hotel, closing "certain areas of . . . [the] Hotel[,]" and limiting the hotel's capacity—

268. No. EDCV201138JGBKKX, 2020 WL 4344631 (C.D. Cal. June 23, 2020).
269. *Id.* at *3.
270. *Id.* at *5.
271. *Id.* at *10.
272. *Id.*
273. *Id.* at *5.

were more than theoretically connected to the governments' public health ends, even several months after California had passed its first order affecting the hotel, was a passage speaking generally about the public health risks inherent in operating a hotel.[274] Were the regulations haphazardly created and "untethered to . . . controlling standards[,]"[275] or were they carefully constructed? This Note acknowledges that it is entirely plausible that the regulations *were* carefully crafted; however, if a careful ends-means inquiry is not performed, and the government is not required to compensate owners, it need not worry about *how* it makes decisions. Indeed, the government can shield haphazard actions by claiming that those decisions were made in the name of public health or safety. As suggested by Locke, arbitrary interference with private property rights may subvert a vital reason why people agree to be governed—to seek out stronger property protection.[276] Thus, when government actions impact private property, *how* governments make decisions is tremendously important.

Relatedly, both *Harris* and *PCG-SP Venture I LLC* raise the question: does the government pursue the most or least restrictive option if it cannot know whether either will materially advance its stated health or safety end? The regulatory takings and substantive due process doctrines both weakly incentivize principled decision-making. When the government is presented with the most or least extreme options but cannot know whether either will advance its objective, then its decision to pursue one and not the other is an unprincipled guess.[277] In the context of property deprivations, neither the regulatory takings nor substantive due process doctrines incentivize *inaction* or principled *action* in situations in which the government is poised to make an arbitrary decision with potentially great cost to society and no tangible benefit. Because the po-

274. *See id.* at *2–4, *5, *7.

275. *See* Teter, *Letting Congress Vote*, *supra* note 12, at 1441.

276. *See* LOCKE, *supra* note 18, at 164–66.

277. *See generally* 4 WILLIAM BLACKSTONE, COMMENTARIES *350 (remarking that "all arbitrary powers, well executed, are the most *convenient*[.]") (emphasis in original).

lice power may excuse the government from paying for its interference and, thus, internalizing the costs associated with its actions, the government need not consider alternatives and, instead, can wield its regulatory power haphazardly, carelessly, maliciously, and for no good reason at all.

ii. Reciprocity of Advantage & Public Benefit Analyses: Doctrinal Shields?

Courts have employed various forms of "reciprocity of advantage" to determine the validity of police power deprivations.[278] Namely, reciprocity of advantage has been employed to help courts "mak[e] the critical distinction between exercises of the eminent domain power and exercises of the police power."[279] In *Penn Central*, Justice Brennan invoked notions of reciprocity when contending that "interference aris[ing] from some public program adjusting the benefits and burdens of economic life to promote the common good" is unlikely compensable under the Takings Clause.[280]

Concepts of reciprocity might lead some to conclude that property is adequately protected from arbitrary interference because reciprocity ensures that the public, including the owner, benefits from the deprivation and that the government has not arbitrarily disadvantaged any group of owners to advance *some* interest.[281] However, this standard, like rational basis review, is extraordinarily permissive and deferential, which might permit courts to excuse otherwise arbitrary actions.[282] Indeed, the modern "rule" articulated in *Penn Central* "validate[s] automatically *any alleged* police power action which confers a substantial benefit upon society at

278. *See* Lynda J. Oswald, *The Role of the "Harm/Benefit" and "Average Reciprocity of Advantage" Rules in a Comprehensive Takings Analysis*, 50 VAND. L. REV. 1447, 1489, 1511–12, 1520–21 (1997).

279. *See id.* at 1521.

280. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978). Applying reciprocity principles, Justice Brennan ultimately rejected the challenger's argument that the benefits and burdens imposed on them were discriminatory and lopsided. *See id.* at 133–35.

281. *See* Oswald, *supra* note 278, at 1521–23.

282. *Cf. id.* at 1489, 1512, 1522.

large[,]" and allows "the state to achieve through a back-door exercise of the police power what it could not accomplish directly[.]"[283] Thus, when courts have invoked concepts of reciprocity to justify burdensome public health orders,[284] the test has not provided any greater protection against arbitrary deprivations than rational basis review, which, as demonstrated above, provides little protection.

For example, in *Daugherty Speedway v. Freeland*,[285] the district court explained in a sweeping manner that the Indiana governor's executive order forcing the challenger to shutter his speedway "benefitted the general public, who would be at greater risk of contracting COVID-19 if congregating together in close proximity."[286] The court further reasoned that the Indiana Governor's

> directives were intended to slow the spread of this deadly disease and protect citizens. Benton County followed state guidelines and attempted to shift the *benefits and burdens of economic life* in an effort to keep citizens safe. Given the gravity of the COVID-19 crisis, the Governor's response to it was both measured and entirely appropriate.[287]

The court declined to indicate how the government's actions were precisely measured or supported by data or science.[288] Furthermore, the court failed to explain, just as Justice Rehnquist had explained in his *Penn Central* dissent,[289] how *all* property owners were subjected to similar restrictions and how the racetrack owner was

283. *Id.* at 1522–23 (emphasis added).

284. *See, e.g.*, Michael Amato v. Elicker, No. 3:20CV464 (MPS), 2021 WL 1430918, at *11 (D. Conn. Apr. 15, 2021); Our Wicked Lady LLC v. Cuomo, No. 21CV0165 (DLC), 2021 WL 915033, at *6 (S.D.N.Y. Mar. 9, 2021); TJM 64, Inc. v. Shelby Cty. Mayor, No. 220CV02498JPMTMP, 2021 WL 863202, at *5 (W.D. Tenn. Mar. 8, 2021); Bimber's Delwood, Inc. v. James, No. 20-CV-1043S, 2020 WL 6158612, at *17 (W.D.N.Y. Oct. 21, 2020); Lebanon Valley Auto Racing Corp. v. Cuomo, 478 F. Supp. 3d 389, 402 (N.D.N.Y. 2020); Blackburn v. Dare Cty., 486 F. Supp. 3d 988, 999 (E.D.N.C. 2020); Northland Baptist Church of St. Paul, Minnesota v. Walz, No. 20-CV-1100 (WMW/BRT), 2021 WL 1195821, at *16 (D. Minn. Mar. 30, 2021).

285. No. 4:20-CV-36-PPS, 2021 WL 633106 (N.D. Ind. Feb. 17, 2021).

286. *Id.* at *5.

287. *See id.* at *4 (emphasis added).

288. *Id.* at *2–4.

289. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 147 (1978) (Rehnquist, J., dissenting).

not individually disadvantaged to advance the government's public health goal.[290] It was enough for the court to inexplicitly speculate that the government's regulation could theoretically benefit society,[291] which is no less deferential than the "rational speculation"[292] standard employed in the rational basis context.[293] As stated above, if the government and courts can rationalize away actions and do not meaningfully review the government's means or ends, "improper[ly] motivat[ed]" and "untethered"[294] actions will survive review, thus permitting the government to gratuitously interfere with property at little cost. Despite this standard's shortcomings, courts have found in the government's favor when employing forms of reciprocity in the context of COVID-19 public health orders.[295] Because reciprocity is as flawed as rational basis review, reciprocity may not fully protect property from arbitrary interference.[296]

Tying these points together, consider *Heights Apartments, LLC v. Walz*.[297] *Heights Apartments* involved a challenge by Minnesota landlords against the state for ordering eviction moratoria that stripped landlords of "only one stick in the[ir] . . . bundle of property rights—the ability to enforce their rights under the lease through lease termination or eviction."[298] In declining the challengers' *Penn Central* takings claim, the district court reasoned, in part, that because moratoria "[we]re precisely the kind of public program benefitting the common good that is not a compensable taking[,]" *Penn Central*'s third prong weighed against compensation.[299]

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290. *Daugherty Speedway*, 2021 WL 633106, at *4.

291. *See id.*

292. FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993).

293. *See supra* notes 191–242 and accompanying text.

294. Teter, *Letting Congress Vote, supra* note 12, at 1441.

295. *See, e.g.*, Lebanon Valley Auto Racing Corp. v. Cuomo, 478 F. Supp. 3d 389, 402 (N.D.N.Y. 2020); Heights Apartments, LLC v. Walz, No. 20-CV-2051 (NEB/BRT), 2020 WL 7828818, at *16 (D. Minn. Dec. 31, 2020); Blackburn v. Dare Cty., No. 2:20-CV-27-FL, 2020 WL 5535530, at *7 (E.D.N.C. Sept. 15, 2020).

296. *See also* Oswald, *supra* note 278, at 1452.

297. No. 20-CV-2051 (NEB/BRT), 2020 WL 7828818 (D. Minn. Dec. 31, 2020).

298. *Id.* at *16.

299. *Id.*

However, the court failed to make explicit: (1) how the benefits landlords may have received from moratoria were, in fact, reciprocal; and (2) why moratoria did not lopsidedly impose burdens on landlords.[300] The court's analysis illustrates that the reciprocity standard leaves much to be desired as a doctrinal shield. How much should society theoretically benefit for genuine reciprocity? At what point are costs and benefits at equipoise? How can courts possibly quantify or operationalize a benefit to society?

The reality is that the reciprocity standard offers no greater protection than does rational basis review. Thus, the reciprocity standard will inadequately screen for arbitrary action because the standard permits courts to rationalize away what might otherwise be illegitimate actions, and excuses deprivations as long as the government appears to be acting in pursuit of valid public health ends.[301] In other words, if an arbitrary law survives a substantive due process challenge, regulatory takings jurisprudence may fail to screen for arbitrariness by permitting courts to employ deferential devices that, as demonstrated in above, may ineffectively screen for arbitrary actions.

iii. Partial Deprivations & Arbitrariness

During the COVID-19 pandemic, courts have frequently suggested that some interference is too minor to warrant compensation.[302] However, the doctrine permits the government to *significantly* interfere with property without compensating owners.[303] For

300. *See id.* at *15–16.

301. *See* Oswald, *supra* note 278, at 1452, 1521–22.

302. *See, e.g.*, Northland Baptist Church of St. Paul, Minnesota v. Walz, No. 20-CV-1100 (WMW/BRT), 2021 WL 1195821, at *15 (D. Minn. Mar. 30, 2021); Heights Apartments, LLC v. Walz, No. 20-CV-2051 (NEB/BRT), 2020 WL 7828818, at *16 (D. Minn. Dec. 31, 2020); Flint v. Cty. of Kauai, No. CV 19-00521 JMS-WRP, 2021 WL 640903, at *6 (D. Haw. Feb. 18, 2021); Baptiste v. Kennealy, 490 F. Supp. 3d 353, 388 (D. Mass. 2020); Peinhopf v. Guerrero, No. CV 20-00029, 2021 WL 218721, at *7 (D. Guam Jan. 21, 2021); Michael Amato v. Elicker, No. 3:20CV464 (MPS), 2021 WL 1430918, at *10 (D. Conn. Apr. 15, 2021); Excel Fitness Fair Oaks, LLC v. Newsom, No. 220CV02153JAMCKD, 2021 WL 795670, at *5 (E.D. Cal. Mar. 2, 2021); *see generally* Daugherty Speedway, Inc. v. Freeland, No. 4:20-CV-36-PPS, 2021 WL 633106, at *3 (N.D. Ind. Feb. 17, 2021).

303. *See* 335-7 LLC v. City of New York, No. 20 CIV. 1053 (ER), 2021 WL 860153, at *12 (S.D.N.Y. Mar. 8, 2021).

example, the Federal Circuit has declined to find a taking when regulations halve property values.[304] The Ninth Circuit has applied a more stringent standard, noting in *Colony Cove Properties, LLC v. City of Carson*[305] that "a diminution in property value . . . ranging from 75% to 92.5% does not constitute a taking."[306] The government can also deprive an owner of "a property's most beneficial use"[307] or destroy at least "one 'strand' of the [ownership] bundle" without compensating owners.[308] Finally, the government can temporarily strip an owner of a portion of his property rights without compensating him, as long as the property "retains [*some*] value."[309]

Excusing the government from compensating owners has similar implications as those explained above. If deprivations are considered *de minimis* and non-compensable, the government has little reason to carefully craft its means to not needlessly or arbitrarily interfere with property. Consider *Heights Apartments*[310] and *Peinhopf v. Guerrero*.[311] In *Heights Apartments*, the District of Minnesota declined the challengers' regulatory takings claim, in part because the challengers retained other rights in their ownership "bundles[.]"[312] Similarly, in *Guerrero*, the District of Guam found that "[t]he economic impact of the government's action [taken to reduce the spread of COVID-19] appear[ed] to have only prevented the Plaintiff from operating his bar or tavern," and thus "only interfere[d] with a 'single strand' of the property rights he possess in his leasehold interest."[313] If arbitrary regulations survive due process challenges, *Heights Apartments* and *Guerrero* demonstrate that existing doctrine may fail, in some circumstances, to secondarily deter

304. *See* CCA Assocs. v. United States, 667 F.3d 1239, 1246 (Fed. Cir. 2011).

305. 888 F.3d 445 (9th Cir. 2018).

306. *Id.* at 451.

307. Maritrans Inc. v. United States, 342 F.3d 1344, 1354 (Fed. Cir. 2003).

308. Andrus v. Allard, 444 U.S. 51, 66 (1979), *quoted in Maritrans Inc.*, 342 F.3d at 1354.

309. Daniel L. Siegel, *The Impact of* Tahoe-Sierra *on Temporary Takings Law*, 23 UCLA J. ENV'T L. & POL'Y 273, 286 (2005).

310. No. 20-CV-2051 (NEB/BRT), 2020 WL 7828818 (D. Minn. Dec. 31, 2020)

311. No. CV 20-00029, 2021 WL 218721 (D. Guam Jan. 21, 2021).

312. *Heights Apartments*, 2020 WL 7828818, at *16.

313. *See Guerrero*, 2021 WL 218721, at *7.

unwieldy or arbitrary interference principally because a partial deprivation may be non-compensable, weakly incentivizing non-interference.

D. Permissibly Arbitrary Property Deprivations

This section began by proposing that due process protections may fail to thwart arbitrary action, especially in cases involving property rights.[314] If due process fails to pinpoint arbitrariness, regulatory takings may also fail to deter arbitrary laws when the doctrine excuses compensation.[315] Because both safeguards may simultaneously fail to protect property from arbitrary governmental interference, this Note suggests that courts and our Republic may constitutionally tolerate arbitrary property deprivations.[316]

This phenomenon is highly problematic for two interrelated reasons. First, if private property is essential for a liberal and free society as suggested by some Founders,[317] then failing to protect it may inhibit self-governance and democracy in the manner envisioned by some Founders.[318] Second, arbitrary and ad-hoc rulemaking is inherently subversive to the rule of law.[319] Thus, arbitrary laws that interfere with property may subvert liberal democracy.

III. DETERRING ARBITRARY PROPERTY INTERFERENCE

To incentivize lawful behavior, this Note suggests that states pass laws that resemble the Texas Private Real Property Rights Preservation Act, which mandates compensation, in part, for regulatory deprivations that produce a value diminution exceeding twenty-

314. *See* Chee, *supra* note 9, at 577, 590.

315. *See generally* Cahoy, *supra* note 7, at 142; Sax, *supra* note 7, at 64; Ellickson, *supra* note 7, at 420.

316. *Cf.* Chee, *supra* note 9, at 577.

317. *See* LARKIN, *supra* note 20, at 3–6; Brooks, *supra* note 19, at 64–65; *see generally* Eagle, *supra* note 7, at 613–14; Grossman, *supra* note 12.

318. *See* ADAMS, *supra* note 23; LARKIN, *supra* note 20, at 5; THE FEDERALIST NO. 54 (Alexander Hamilton or James Madison); *see generally State Approaches to Protecting Private Property Rights: Hearing Before the Subcommittee on the Constitution of the Committee on the Judiciary*, 105th Cong. 119 (1999) (statement of Nancie G. Marzulla).

319. *See* STARR, *supra* note 12, at 15–17, 21; *see also* Waldron, *supra* note 12; Teter, *Letting Congress* Vote, *supra* note 12, at 1442–43.

five percent.[320] Making the government liable for deprivations that exceed a pre-set threshold will generate deterrence incentives that may coerce lawful behavior.[321] This solution addresses concerns that increased takings liability may stifle action[322] by providing a narrow exception to the compensation requirement for government actions that are necessary to affirmatively address public health and safety issues[323] and by permitting the government to seek a limited period of immunity from the law's requirements under exigent circumstances. By adopting laws similar to the Texas Act, this Note contends that legislatures may guard against arbitrary deprivations.

A. Coercing Lawful Behavior

Tortious, constitutional harms may be actionable and compensable under 42 U.S.C. § 1983.[324] Section 1983's deterrence functionality[325] is simple. When courts make the government pay for its violations, the government internalizes costs associated with its unlawful actions "and modif[ies] . . . [its] behavior accordingly."[326] The Takings Clause's deterrence functionality is perhaps even sim-

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320. *See* TEX. GOV'T CODE ANN. § 2007.002 (B)(ii) (Westlaw current through the 2021 Reg. and Second Called Sess.). If compensation drives the Takings Clause's anti-arbitrariness functionality, then any remedy must provide compensation for deprivations. This idea was inspired by authors who have commented on the Takings Clause's anti-arbitrariness functionality. *See generally* Cahoy, *supra* note 7, at 142; Sax, *supra* note 7, at 64; Ellickson, *supra* note 7, at 420.

321. *See generally* Michael L. Wells, *Some Objections to Strict Liability for Constitutional Torts*, 55 GA. L. REV. 1277, 1289–91 (2021).

322. *Cf.* Grimes, *supra* note 17, at 598–99.

323. *See* TEX. GOV'T CODE ANN. § 2007.003(b)(13) (Westlaw current through the 2021 Reg. and Second Called Sess.).

324. *See* Nader James Khorassani, *Must Substantive Due Process Land Use Claims Be So "Exhaust"ing?*, 81 FORDHAM L. REV. 409, 415 (2013); Thadd J. Llaurado, *The Actionability Under Section 1983 of a Negligent Deprivation of a Liberty Interest in Light of Daniels and Davidson*, 69 MARQ. L. REV. 599, 623 (1986); Mitchell J. Edlund, *In the Heat of the Chase: Determining Substantive Due Process Violations Within the Framework of Police Pursuits When an Innocent Bystander Is Injured*, 30 VAL. U. L. REV. 161, 169 n.38 (1995).

325. *See* Gary S. Gildin, *Redressing Deprivations of Rights Secured by State Constitutions Outside the Shadow of the Supreme Court's Constitutional Remedies Jurisprudence*, 115 PENN ST. L. REV. 877, 917–18 (2011).

326. *See generally* Wells, *supra* note 321, at 1290.

pler than that of Section 1983 liability. The Takings Clause essentially makes the government *strictly* liable for its deprivations.[327] If the government deprives, it usually pays, no matter how inconsequential or egregious the deprivation.[328] Because strict liability increases costs and incentivizes inaction,[329] mandated compensation for *all* deprivations may guard against unwieldy, inefficient, and arbitrary ones by making interference expensive, forcing the government to be decisive about when to interfere with property.[330] By forcing the government to determine if its ends are important enough to justify its costly means, this model may incentivize legitimate interference.[331]

B. A Texas Model

Some states have adopted proactive property rights legislation that restores the Takings Clause's strict liability functionality in the regulatory takings context.[332] Some laws require the government to compensate property owners when a regulation causes a diminution in property value that meets or exceeds a legislatively calibrated threshold.[333] This Note urges states to follow Texas' approach because it reconciles and balances governmental need with a liberal democratic interest in keeping arbitrary interference at bay.

Regulatory Strict Liability. First, governments should implement laws that make the government pay for their deprivations if their regulations produce property value losses that meet or exceed a

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327. *See* John Martinez, *A Proposal for Establishing Specialized Federal and State "Takings Courts"*, 61 ME. L. REV. 467, 473 (2009).

328. *See id.*

329. Wells, *supra* note 321, at 1303.

330. *See* Eisenberg, *supra* note 7, at 673; Sax, *supra* note 7, at 64; Cahoy, *supra* note 7, at 142.

331. *See* Alex Potapov, *Making Regulatory Takings Reform Work: The Lessons of Oregon's Measure 37*, 39 ENV'T. L. INST. 10516, 10523–24 (2009); Grossman, *supra* note 12; Ellickson, *supra* note 7, at 420.

332. *See* Martinez, *supra* note 327, at 473.

333. *See* Oswald, *supra* note 15, at 540; *State Approaches to Protecting Private Property Rights: Hearing Before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 105th Cong. 106 (1999) (statement of Harvey M. Jacobs).

legislatively calibrated threshold.[334] The Texas Act defines a "Taking[,]" in relevant part, as "a governmental action that" results in "a reduction of at least *25 percent in the market value* of the affected private real property[.]"[335] Texas' low takings threshold is designed to "deter[] . . . local government regulations that would damage the value of someone's property[,]"[336] and may, if properly calibrated, "guard against the ability of local governments to arbitrarily devalue a citizen's private property."[337] In other words, by assuming the validity of the economic theory underlying strict liability, the Texas Act and like diminution-in-value laws may deter arbitrary deprivations by forcing the government to carefully consider costs, thus incentivizing precision.[338]

Limited Police Power Exception. Governments enacting a Texas-style takings law should include a narrow police power exception.[339] The Act preemptively addresses potential concerns that mandated compensation may impede legitimate public health and safety efforts.[340] For example, the Act excuses compensation, in part, when property is deprived through "lawful forfeiture[s] or seizure[s]"[341] or nuisance abatement,[342] or when property is taken to

334. *See* TEX. GOV'T CODE ANN. § 2007.002(B)(ii) (Westlaw current through the 2021 Reg. and Second Called Sess.).

335. *Id.*

336. TEX. PUB. POL'Y FOUND., 2017-18 LEGISLATURE'S GUIDE TO THE ISSUES 21 (2017-2018), https://www.texaspolicy.com/wp-content/uploads/2018/08/2017-Special-Session-Lege-Guide-2-1.pdf [https://perma.cc/4HDH-GUVP].

337. Brennan et al., *supra* note 17, at 6.

338. *See* Grimes, *supra* note 17, at 597; *State Approaches to Protecting Private Property Rights: Hearing Before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 105th Cong. 129 (1999) (statement of Nancie G. Marzulla); FISCHEL, *supra* note 17, at 96–97; *State Approaches to Protecting Private Property Rights: Hearing Before the Subcommittee on the Constitution of the Committee on the Judiciary*, 105th Cong. 22 (1999) (statement of Dean Saunders); *cf.* Potapov, *supra* note 331, at 10523.

339. *See* TEX. GOV'T CODE ANN. § 2007.003(b)(13) (Westlaw current through the 2021 Reg. and Second Called Sess.).

340. *See generally* Oswald, *supra* note 15, at 547.

341. TEX. GOV'T CODE ANN. § 2007.003(b)(2) (Westlaw current through the 2021 Reg. and Second Called Sess.).

342. TEX. GOV'T CODE ANN. § 2007.003(b)(6) (Westlaw current through the 2021 Reg. and Second Called Sess.).

"prevent a grave and immediate threat to life or property[.]"[343] Furthermore, the government can avoid compensation liability for non-nuisance deprivations that are:

> (A) "taken in response to . . . real and substantial threat[s] to public health and safety;"
>
> (B) "designed to significantly advance . . . health and safety . . . and"
>
> (C) "do[] not impose a greater burden than is necessary to achieve the health and safety purpose[.]"[344]

By requiring the government to demonstrate that it is acting in furtherance of an important police power objective, this solution patches a major doctrinal loophole;[345] namely, as argued in Part II, that the government need only show that its regulation is *theoretically* connected to its ends or objectives.[346] Thus, the Texas Act raises the bar and requires the government to proffer additional evidence that its regulation will advance its public health or safety goal, thereby patching the rational basis loophole.

Furthermore, by allowing the government to avoid takings liability under limited circumstances, this solution proactively addresses overdeterrence concerns. The Texas Act permits the government to regulate and interfere with property, as long as the government can demonstrate that it is acting in furtherance of a legitimate public or safety goal.[347] Thus, instead of imposing an absolute strict liability regime, which may incentivize less interference in situations in which regulation may be beneficial, the solution detailed above simply requires more from the government before excusing it from

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343. TEX. GOV'T CODE ANN. § 2007.003(b)(7) (Westlaw current through the 2021 Reg. and Second Called Sess.).

344. TEX. GOV'T CODE ANN. § 2007.003(b)(13)(A)–(C) (Westlaw current through the 2021 Reg. and Second Called Sess.).

345. *See generally* Chee, *supra* note 9, at 604 (recommending a due process analysis with greater scrutiny).

346. *See* FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 314–15 (1993).

347. *See* TEX. GOV'T CODE ANN. § 2007.003(b)(13)(A)–(C) (Westlaw current through the 2021 Reg. and Second Called Sess.).

liability. Therefore, the solution may permit the government to address important public health or safety ends without fearing that it will face onerous liability for regulatory deprivations.

Immunity. To anticipatorily address concerns that the law may stifle government action in situations in which inaction may be catastrophic, this Note also proposes that a takings law include a provision permitting governments to seek immunity from the law's stringent requirements for a fixed period of time, which would allow governments to collect enough information to meet the statute's requirements. To seek immunity from the statute, the law would require government actors to demonstrate: (1) that exigent circumstances exist; (2) that such circumstances necessitate government action to avoid catastrophe; and (3) that the government actor possesses such limited information that would prevent it from carrying out its duty to the public without incurring potentially ruinous takings liability.

Under what circumstances might the government satisfy the immunity exception detailed above? Although the test is inherently fact-specific, a global pandemic would clearly satisfy all three prongs. In a short period of time, governments at all levels were tasked with determining how best to stymie COVID-19's spread.[348] Absent government intervention, models projected tens of millions of deaths and billions of cases worldwide.[349] Therefore, exigent circumstances existed that necessitated government action to avoid catastrophe. Governments also initially possessed limited information about the virus' transmission and potential health effects,[350]

348. *See* Nick Schwellenbach, *The First 100 Days of the Government's COVID-19 Response*, POGO (May 6, 2020), https://www.pogo.org/analysis/2020/05/the-first-100-days-of-the-u-s-governments-covid-19-response/ [https://perma.cc/YV2K-FHVW].

349. *See* Isaac Scher, *Without Any Interventions Like Social Distancing, One Model Predicts the Coronavirus Could Have Killed 40 Million People This Year*, BUS. INSIDER (Mar. 27, 2020), https://www.businessinsider.com/covid19-model-predicts-40-million-people-could-die-without-interventions-2020-3 [https://perma.cc/P4SJ-Y2G4].

350. *See* Anne Schuchat, *Public Health Response to the Initiation and Spread of Pandemic COVID-19 in the United States*, CDC (May 8, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6918e2.htm [https://perma.cc/N4NW-3ULW].

which may have interfered with their ability to craft laws and regulations that were adequately tailored to their undoubtedly compelling public health and safety objectives. Thus, officials would have likely been able to demonstrate that they would have incurred potentially ruinous liability under the statute.

Incentives. By guaranteeing compensation, and providing only a few, narrow exceptions to the compensation requirement, this solution may incentivize legitimate and precise lawmaking.[351] By forcing the government to internalize the costs associated with its actions, this solution may incentivize interference with property only when "property . . . is worth more to the government [or the public] than . . . in the marketplace[.]"[352] Therefore, this solution provides the government with "[dis]incentive[s] to arbitrarily take the property of the populace by putting a price tag on it[.]"[353]

Hindering the Police Power. Will the solution detailed above overdeter beneficial regulation despite its attached exceptions? Justice Holmes raised this objection in *Mahon*, opining 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."[354] In connection to the COVID-19 pandemic, the *Harris* court specifically claimed that compensation "would severely limit the state's especially broad police power in responding to . . . health emergenc[ies]."[355]

These concerns are likely overstated but are unlikely misplaced. Oregon's Measure 37 compensation law spurred "thousands of claims for billions of dollars" arising out of alleged regulatory property deprivations.[356] However, Oregon appears anomalous among states that have implemented compensation regimes. One scholar has explained that, shortly after their passage, Florida's and Texas' compensation laws "had no substantial impact on State finances

351. *See* Brennan et al., *supra* note 17, at 6.
352. Eagle, *supra* note 7, at 613–14; *see generally* Sax, *supra* note 7, at 57–60, 64.
353. Cahoy, *supra* note 7, at 142.
354. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413, 415 (1922).
355. TJM 64, Inc. v. Harris, 475 F. Supp. 3d 828, 839 (W.D. Tenn. 2020).
356. *See* Potapov, *supra* note 331, at 10524.

and ha[d] not interfered with State regulatory programs."[357] Thus, compensation laws may not overdeter beneficial regulation. This proposition is further supported by the logic underlying the limited police power exceptions detailed above. As long as the government has carefully contemplated its actions, it should avoid compensation under this regime, allowing the state to address critical public health and safety issues without incurring potentially ruinous liability.

But what if the government *still* cannot craft laws that comport with the requirements set forth above *after* an immunity period has ended? Opponents may again contend that the law will create potentially ruinous liability that will overdeter beneficial government action in periods of true exigency. This proposition brings the Note and reader full circle. This solution does not preclude the government from passing regulations to address serious public health or safety issues. Rather, it demands that the government compensate owners for its deprivations, just as in the physical takings context. Thus, if the government believes that "property . . . is worth more to the government [or the public] than . . . in the marketplace[,]"[358] it will choose just compensation over inaction.[359] If the government cannot possibly regulate without incurring onerous takings liability, then temporary inaction—until refinement is possible—may suggest a more prudent course. In other words, after the government has enjoyed its period of immunity, it must make a difficult choice in situations that fail to meet the limited police power exception described above: incur liability or stagnate. However, this choice is necessary to curb potentially poor and arbitrary actions that needlessly interfere with property at no demonstrable benefit to society.

CONCLUSION

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357. *State Approaches to Protecting Private Property Rights: Hearing Before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 105th Cong. 120 (1999) (statement of Nancie G. Marzulla); *see* Nancie Marzulla, *State Private Property Rights Initiatives as a Response to "Environmental Takings"*, 46 S.C. L. REV. 613, 636 (1995).

358. Eagle, *supra* note 7, at 613–14; *see also* Eisenberg, *supra* note 7, at 673.

359. *See generally* Eagle, *supra* note 7, at 613–14.

Governments are vested with certain coercive powers to avert imminent catastrophe and to solve real and substantial problems that threaten society. However, praying for benevolence where malice can motivate and where recklessly crafted laws, however motivated, can effectuate greater harm than benefit will insufficiently protect the rule of law and liberty that sustain our Republic. We can and must cauterize practically boundless governmental authority to protect private property and to preserve the rule of law.

Some envisioned that "[g]overnment [wa]s instituted no less for protection of the property, than of the persons, of individuals[.]"[360] The regulatory takings doctrine may presently fail to thwart arbitrary interference with private property by excusing the government from compensating owners for deprivations. To breathe life into the vision detailed above, thwart arbitrary deprivations, and preserve liberty and the rule of law, this Note urges states to adopt statutes that require the government to compensate owners for deprivations, which may incentivize lawful, non-arbitrary action.

360. THE FEDERALIST NO. 54 (Alexander Hamilton or James Madison).