AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 12: The Contemporary Era – Individual Rights/Property/Takings

**Friends of Danny Devito, et al. v. Wolf, No. 68 (PA 2020)**

*In the spring of 2020, the novel coronavirus, later designated COVID-19, jumped from animals to humans. A global pandemic began in China and quickly swept through much of the rest of the world. COVID-19 had various unusual and significant features, including that humans had no natural immunity to it, many infectious carriers were asymptomatic, and many of those who would become symptomatic were infectious for up to two weeks before their symptoms became apparent. The virus was relatively easy to transmit and was fatal in a relatively high number of cases, particularly among the elderly. There was no immediate vaccine or effective treatment, and tests to detect the virus had to be newly developed, manufactured and distributed. Public health experts recommended that the most effective means of slowing transmission were frequent hand washing, the use of masks that covered the nose and mouth, and maintaining a physical distance of six feet or more between individuals.*

*Governors across the country declared public health emergencies and made use of preexisting statutory authority to slow the spread of infection. Because of prevalence of infectious asymptomatic carriers and limiting testing capacity, the infectious could not be easily identified and quarantined as in traditional epidemics. As a result, many governors took the unprecedented step of issuing wide-ranging “lockdown” orders that imposed generalized restrictions on ordinary life of most of the general public.*

*On March 6, Pennsylvania Governor Tom Wolfe declared a public health emergency. On March 19, he ordered that business that were not “life sustaining” be closed and mandated social distancing practices for those businesses that were allowed to remain open. A number of businesses and individuals filed an emergency application to the state high court challenging the legal validity of the governor’s order. Among the plaintiffs were the campaign committee for a state legislative candidate, a real estate agent, and a golf course. The suit raised a number of legal challenges to the order, including a claim that the governor had exceeded his authority under state statutes, that the order was a form of lawmaking and thus violated the separation of powers, that the business closures were an unconstitutional taking, that the business closures were arbitrary, and that the free speech rights of the political candidate had been violated. The court rejected each argument and upheld the validity of the governor’s order. Three of the seven justices dissented in part, thinking that the case should have been sent to a trial court for fact-finding before concluding that the governor’s mechanism for businesses to apply for waivers from the order provided adequate procedural protections against miscategorizations.*

Justice DONOHUE, delivered the opinion of the Court.

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The broad powers granted to the Governor in the Emergency Code are firmly grounded in the Commonwealth’s police power. This Court has defined the Commonwealth’s police power as the power “to promote the public health, morals or safety and the general well-being of the community.” *Pennsylvania Restaurant & Lodging Association v. City of Pittsburgh* (PA 2019). In *Nat’l Wood Preservers, Inc. v. Dep’t of Envt’l Protection* (PA 1980), we described the police power as the state’s “inherent power of a body politic to enact and enforce laws for the protection of the general welfare,” and thus, it is both one of the “most essential powers of the government” and its “least limitable power.” . . .

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[I]n addition to their challenges based on the statutory language of the Emergency Code, Petitioners argue that Respondents, by ordering closure of all businesses deemed to be non-life-sustaining, have exceeded the permissible scope of their police powers. Petitioners cite the United States Supreme Court’s decision in *Lawton v. Steele* (1894), for the “police powers” test:

To justify the state in thus interposing its authority in behalf of the public, it must appear – First, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

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Under the exigencies created by the spread of the coronavirus and the critical interests of the public, generally, Petitioners cannot prevail in their arguments. As to the predicate requirements that the interests of the public justify the Governor’s assertion of its authority, the nature of this emergency supports it. COVID-19 spreads “exponentially.” Respondents report that in Pennsylvania, from the date they filed their answer to the Emergency Application (March 26, 2020) to the date they filed their brief (April 3, 2020) the number of reported cases increased from 1,687 to 7,016 and the number of deaths increased from 16 to 90. To punctuate the point and as noted previously (supra at 23), as of this writing, 24,199 of Pennsylvania’s citizens have been confirmed to have been infected and 524 have died. The enforcement of social distancing to suppress transmission of the disease is currently the only mitigation tool. . . .

Against this backdrop, Petitioners suggest that the public interest would best be served by keeping businesses open to maintain the free flow of business. Although they cite to none, we are certain that there are some economists and social scientists who support that policy position. But the policy choice in this emergency was for the Governor and the Secretary to make and so long as the means chosen to meet the emergency are reasonably necessary for the purpose of combating the ravages of COVID-19, it is supported by the police power. The choice made by the Respondents was tailored to the nature of the emergency and utilized a recognized tool, business closures, to enforce social distancing to mitigate and suppress the continued spread of COVID-19.

Petitioners’ second argument, namely that there is no significant risk of the spread of COVID-19 in locations where the disease has not been detected (including at their places of business), is similarly unpersuasive. As previously discussed, COVID-19 does not spread because the virus is “at” a particular location. Instead it spreads because of person-to-person contact, as it has an incubation period of up to fourteen days and that one in four carriers of the virus are asymptomatic. . . .

Finally, Petitioners contend that their businesses should be permitted to remain open because of the burden placed on them. We recognize the serious and significant economic impact of the closure of Petitioners’ businesses. However, the question is whether it is *unduly oppressive*, thus negating the utilization of the police power. Faced with protecting the health and lives of 12.8 million Pennsylvania citizens, we find that the impact of the closure of these businesses caused by the exercise of police power is not unduly oppressive. The protection of the lives and health of millions of Pennsylvania residents is the sine qua non of a proper exercise of police power.

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Petitioners claim that because the Executive Order prohibits them from using their property “at all,” it resulted in a taking of private property for public use without the payment of just compensation, in violation of the Fifth Amendment to the United States Constitution and Article I, Section 10 of the Pennsylvania Constitution. . . .

Respondents point out that there is a critical distinction between the exercise of the police power, as here, and takings pursuant to eminent domain. They cite to a long line of Pennsylvania cases holding that the payment of just compensation is not required where the regulation of property involves the exercise of the Commonwealth’s police power. Beginning with *Appeal of White* (PA 1926), this Court made the distinction:

Under eminent domain, compensation is given for property taken, injured, or destroyed, while under the police power no payment is made for a diminution in use, even though it amounts to an actual taking or destruction of property. Under the Fourteenth Amendment, property cannot be taken except by due process of law. *Regulation under a proper exercise of the police power is due process, even though a property in whole or in part is taken or destroyed.*The conditions on which its legitimate exercise is predicated should actually exist or their happening be so likely that restraint is necessary, similar to a court issuing a restraining order for injuries done or threatened to persons or property. Likewise, there should be a reasonable and substantial relation between the thing acted on and the end to be attained[.]

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Petitioners insist that the principle governing their claims is found in the United States Supreme Court’s decision in *Lucas v. South Carolina Coastal Council* (1992). In *Lucas*, petitioner Lucas bought two residential lots on a South Carolina barrier island, intending to build single-family homes such as those on the immediately adjacent parcels. Before construction, however, the state legislature enacted a new law barring the erection of any permanent habitable structures on the parcels he had purchased. Lucas filed suit, arguing that even if the new legislation constituted a lawful exercise of the State's police power, the ban on construction deprived him of all “economically viable use” of his property and therefore effected a “taking” requiring the payment of just compensation. Noting Justice Holmes' prior opinion in *Pennsylvania Coal Co. v. Mahon* (1922), that “if regulation goes too far it will be recognized as a taking,” the Court in *Lucas* held that generally when a regulation deprives an owner of “all economically beneficial uses” of the land, it constitutes a regulatory taking requiring the payment of just compensation.

. . . . Instead, we rely on a subsequent Supreme Court decision, *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency* (2002), for our disposition. In that case, respondent Tahoe Regional Planning Agency (“TRPA”) imposed two moratoria, totaling thirty-two months, on development in the Lake Tahoe Basin while formulating a comprehensive land-use plan for the area. Petitioners, real estate owners affected by the moratoria and an association representing such owners, filed parallel suits, later consolidated, claiming that TRPA's actions had taken all viable economic uses of their property without compensation. Rather than apply its prior decision in *Lucas*, however, the Court recognized that while the regulation in *Lucas* stated that the ban on development “was unconditional and permanent,” the regulations at issue in the case before it were merely temporary measures, which specifically stated that they would terminate. . . . In so holding, the Court stated that “the extreme categorical rule that any deprivation of all economic use, no matter how brief, constitutes a compensable taking surely cannot be sustained,” as it would apply to numerous “normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like, as well as to orders temporarily prohibiting access to crime scenes, businesses that violate health codes, fire-damaged buildings, or other areas that we cannot now foresee . . . which have long been considered permissible exercises of the police power, which do not entitle the individuals affected to compensation.”

The United States Court of Appeals for the Third Circuit relied upon *Tahoe-Sierra* in a case involving an emergency situation bearing similarities to the present disaster crisis. In *Nat'l Amusements Inc. v. Borough of Palmyra* (3d Cir. 2013), the Borough of Palmyra ordered closed for five months an open-air flea market, owned and operated by National Amusements, Inc., due to safety concerns posed by unexploded munitions left behind when the site had been used as a weapons-testing facility for the United States Army. Relying on the holding in *Tahoe-Sierra*, the court of appeals categorically denied that a regulatory taking had occurred requiring the payment of just compensation. . . .

Applying *Tahoe-Sierra* and *Nat'l Amusements Inc.* to the present facts, we conclude that Petitioners have not established that a regulatory taking has occurred. The Executive Order results in only a temporary loss of the use of the Petitioners’ business premises, and the Governor’s reason for imposing said restrictions on the use of their property, namely to protect the lives and health of millions of Pennsylvania citizens, undoubtedly constitutes a classic example of the use of the police power to “protect the lives, health, morals, comfort, and general welfare of the people[.]” *Manigault v. Springs* (1905). We note that the Emergency Code temporarily limits the Executive Order to ninety days unless renewed and provides the General Assembly with the ability to terminate the order at any time. Moreover, the public health rationale for imposing the restrictions in the Executive Order, to suppress the spread of the virus throughout the Commonwealth, is a stop-gap measure and, by definition, temporary. While the duration of COVID-19 as a natural disaster is currently unknown, the development of a vaccine to prevent future outbreaks, the development of an immunity in individuals previously infected and the availability of widespread testing and contact tracing are all viewed as the basis for ending the COVID-19 disaster.

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From the Petitioners’ arguments, we discern three procedural due process issues for our consideration. First, were Petitioners entitled to pre-deprivation notice and an opportunity to be heard prior to the Governor’s entry of the Executive Order containing the list placing them in the non-life-sustaining category requiring the closure of their physical business operations. Second, if Petitioners were not entitled to pre-deprivation due process, were they entitled to post-deprivation due process protections. Finally, if the answer to the second issue is in the affirmative, does the Governor’s waiver process constitute sufficient post-deprivation due process under the circumstances presented here.

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. . . . [In *Bundy v. Wetzel* (PA 2018)] we indicated that while there is a general preference that procedural safeguards apply in the pre-deprivation timeframe, the “controlling inquiry” in this regard is “whether the state is in a position to provide for pre-deprivation process.” . . .

Under the circumstances presented here, namely the onset of the rapid spread of COVID-19 and the urgent need to act quickly to protect the citizens of the Commonwealth from sickness and death, the Governor was not in a position to provide for pre deprivation notice and an opportunity to be heard by Petitioners (and every other business in the state on the non-life-sustaining list). . . .

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While procedural due process is required even in times of emergency, we conclude that the waiver process provides sufficient due process under the circumstances presented here. The Supreme Court has acknowledged that a different level of process may be sufficient in times of emergency. *Bell* *v. Burson* (1971). As the High Court acknowledged in *Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc.* (1981), “[p]rotection of the health and safety of the public is a paramount governmental interest which justifies summary administrative action. Indeed, deprivation of property to protect the public health and safety is ‘[o]ne of the oldest examples’ of permissible summary action.”

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In this regard, we consider the appropriateness of the due process afforded in light of the fact that the loss of Petitioner’ property rights are temporary and find this significant. . . . While the private interest, the closure of the business, is important, the risk of erroneous temporary deprivation does not outweigh the value of additional or substitute safeguards which could not be provided within a realistic timeframe. The government interest in focusing on mitigation and suppression of the disaster outweighs the massive administrative burden of the additional procedural requirements demanded by Petitioners. These procedural requirements would overwhelm an entire department of government otherwise involved with disaster mitigation.

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Chief Justice SAYLOR, with whom Justice DOUGHERTY and MUNDY join, dissenting in part.

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To me, the majority allocates too much weight to temporariness to defeat developed allegations of a lack of due process in the executive branch’s determination of which businesses must close and which must remain closed. Again, there seems to be a factual dynamic that should not be dismissed out of hand. Certainly, the executive branch may engage in proper exercises of police power in a disaster emergency, and a fair amount of deference to its decisions may be in order. At least short of martial law, however – relative to the broad-scale closure of Pennsylvania business for a prolonged period – I don’t believe the executive’s determinations of propriety can go untested in the face of the present allegations of inconsistency and irrationality.

[I]n my considered judgment, the matters raised in the emergency application for extraordinary relief – especially those related to alleged inconsistency and arbitrariness in the waiver process – should be left to the Commonwealth Court, in the first instance, as the court of original jurisdiction invested with fact-finding capabilities.