CHAPTER 12

Economic Liberty and the Pursuit of Public Health

We think it is a settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth, as well that in the interior as that bordering on tide waters, is derived directly or indirectly from the government, and held subject to those general regulations, which are necessary to the common good and general welfare.

Chief Justice Lemuel Shaw (1851)

The sovereign power in a community may and ought to prescribe the manner of exercising individual rights over property. . . . The powers rest on the implied rights and duty of the supreme power to protect all by statutory regulations, so that, on the whole, the benefit of all is promoted. . . . Such a power is incident to every well regulated society.

John Woodworth (1827)

I have discussed a series of conflicts between public interests in health and well-being and private interests in freedom from governmental interference. Thus far, the private interests examined involve personal freedoms: autonomy, privacy, bodily integrity, and liberty. A great deal of the history and regulatory content of public health, however, involves

private economic interests: freedom to enter legally binding agreements, own and use property, and engage in businesses and professions without undue government interference.

Commercial regulation creates a tension between individual and collective goods. In a well-regulated society, public health officials set clear, enforceable rules to protect the health and safety of workers, consumers, and the population at large. Yet regulation impedes economic freedoms and business interests. It is not surprising, therefore, that public health regulation of commercial activity, like the regulation of personal behavior, is highly contested terrain.

Industry and commerce are widely and legitimately thought to be essential to social progress and economic prosperity. Business and trade create greater productivity, more employment, and higher living standards. These benefits are highly relevant to healthy populations because of the positive correlation between health and socioeconomic status (see chapter 1). Community well-being is determined to a large extent by improved standards of living and increased general wealth.

Important and influential economic theories (e.g., laissez-faire and, more recently, a market economy or free enterprise) support private enterprise as a means of economic growth. These theories favor free markets and open competition; regulation that hampers private initiative is often seen as detrimental to social progress.[1] Commercial regulation, if it is desirable at all, should redress market failures (e.g., monopolistic and other anticompetitive practices) rather than restrain free enterprise. Modern proponents of market economy stress the importance to economic growth of the profit incentive and the undeterred entrepreneur.[2]

Public health advocates are opposed to unfettered private enterprise and suspicious of free-market solutions to social problems.[3] They are concerned more with the manifest harms to the community posed by an industrial economy and the resulting urbanization. It is not difficult to identify the public health risks of unbridled commercialism. Manufacturers can pose significant risks to the health and safety of employees, who may be exposed to toxic substances or unsafe work environments. Businesses may produce noxious by-products, such as waste or pollution, or sell contaminated foods, beverages, drugs, or cosmetics. Property owners may create public nuisances, such as unsafe buildings, accumulations of garbage, or dangerous animals. Persons engaged in trades, occupations, or professions may pose harms to consumers due to lack of qualifications or expertise. At the same time, migration to the cities for jobs brings

the manifest health risks of overcrowding, substandard housing, rodents, infestations, and squalor.

This chapter explores the complex trade-offs between the benefits of regulation to advance the common good and the resulting retardation of economic growth. It first examines the law relating to three of the most common forms of commercial regulation: licenses, inspections, and nuisance abatements. These regulatory techniques protect the public's health and safety but undoubtedly interfere with economic liberty. Next, the chapter reviews the major claims of economic liberty: economic due process, freedom of contract, limits on eminent domain, and compensation for regulatory takings. Throughout this chapter, the key normative issue concerns the appropriate weight to be afforded to economic freedom. How important are contract and property rights compared with political and civil liberties? When government acts for the public's health, how concerned should we be about impeding commercial opportunities?

THE REGULATORY TOOLS OF PUBLIC HEALTH AGENCIES

Chapter 5 examined the structure, functions, and powers of public health agencies. It is important also to consider the specific methods of regulation. Public health officials possess a number of regulatory tools: licensing trades, professions, and institutions; inspecting for violations of health and safety standards; and abating public nuisances (figure 35).

[FIGURE] [insert Figure 35 here]

Licenses and Permits

Licenses and permits are an integral part of civil society[4] and a staple of public health practice.[5] (A related but different requirement is registration, which involves recording data such as names, dates, and events for identification and informational purposes.)[6] A license is authoritative permission to hold a certain status or to perform certain activities that would otherwise be unlawful (e.g., practice a trade or profession, keep a dog, or carry a firearm).[7] Consequently, legislative language is phrased in terms of a prohibition and then permission: "No person shall engage in the [specified] activities unless she has obtained a license from the [specified] agency."[8]

Licenses are administered principally by state public health agencies or by a body authorized by the legislature or agency.[9] (Because licenses are historically state functions, they pose especially complex problems

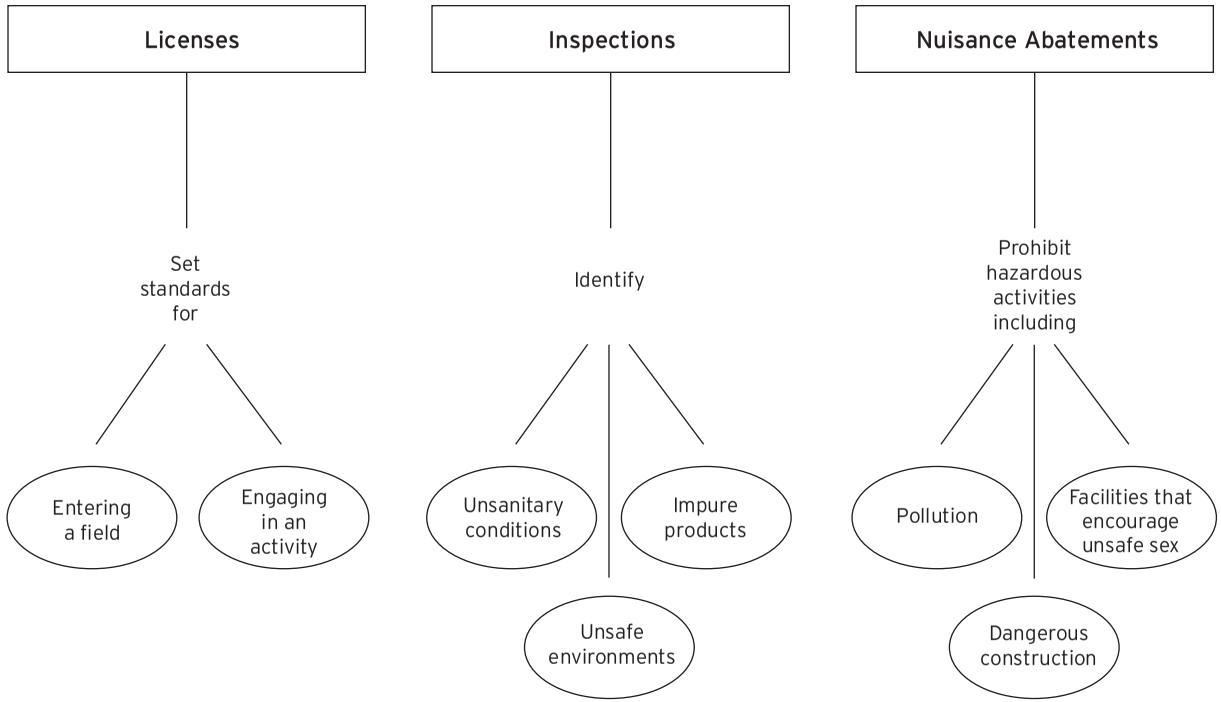

Figure 35. Regulatory tools of public health agencies.

BOX 38

MULTISTATE PRACTICE: TELEMEDICINE AND DISASTER RELIEF

Health care and emergency response professionals historically are regulated by states, but professional practice increasingly has multijurisdictional dimensions. Telemedicine and cybermedicine, for example, entail rapid access to shared and remote medical expertise by means of telecommunications, the Internet, and other information technologies, no matter where the patient or relevant information is located. Health care professionals may view medical records and images, correspond with patients, and make clinical judgments (e.g., diagnosis, prognosis, treatment) in multiple states. Complex questions arise about the right of individuals to practice in states where they are not licensed. Professionals also fear legal liability for their actions if patients are harmed by the negligent exercise of clinical judgment.

Legal issues related to licensure similarly arise during natural disasters or other public health emergencies, such as the Gulf Coast hurricanes Katrina and Rita in 2005. During times of crisis, volunteers typically travel to affected states to render assistance.[1] In these and other contexts, it is important to ensure that individuals have a valid license or permission to practice, at least temporarily, in the state. Absent such permission, the professional may be liable under state statute or tort law. To address this problem, the National Conference of Commissioners on Uniform State Laws has approved a Uniform Emergency Volunteer Healthcare Practitioners Act. If adopted by the states, the act will standardize states' licensure practices for out-of-state professionals during emergencies and make clear the legality of volunteers working outside their jurisdiction. However, the conference deferred adopting portions of the act applying to workers' compensation coverage and civil liability of volunteers until 2007.[2] Federal intervention may be required to reduce liability risks—for instance, by setting a national standard or facilitating cooperative arrangements among the states. The Emergency Management Assistance Compact (EMAC), for example, is a congressionally ratified organization for interstate mutual aid. Through EMAC, a state impacted by disaster can request and receive assistance from other member states, resolving upfront liability concerns.[3] Forty-seven states—all but Alaska, California, and Wyoming—have joined this compact through enactments of their legislatures.

[1] Center for Law and the Public's Health, "Hurricanes Katrina and Rita—Legal Issues concerning Volunteer Health Personnel," *Center for Law and the Public's Health at Georgetown and Johns Hopkins Universities,* http://www.publichealthlaw.net/Research/Katrina.htm ("In response to Hurricanes in the Gulf Coast region, volunteer medical personnel have been utilized to provide medical assistance to a large number of impacted persons . . . . Utilizing these volunteers in times of an emergency, however, presents challenges for hospital, public health, and emergency authorities, and raises a host of legal issues").

[2] *Uniform Emergency Volunteer Healthcare Practitioners Act* §§ 4–6 (2006).

[3] James G. Hodge, Jr., Lance A. Gable, and Stephanie H. Calves, "The Legal Framework for Meeting Surge Capacity through the Use of Volunteer Health Professionals during Public Health Emergencies and Other Disasters," *Journal of Contemporary Health Law and Policy,* 22 (2005): 32–39.

when professionals practice in multiple jurisdictions, particularly during a public health emergency such as a natural disaster—see box 38). Licensing authorities may include the health department, a board of regents, a special licensing agency, or a professional or occupational board. Members of licensing boards, of course, should not have a direct or pecuniary

[BOX] [insert Box 38 here]

interest in the license.[10] The courts readily allow public health officials to administer licensing systems, provided the legislature has adequately stated the facts, conditions, or qualifications for issuing the license.[11]

Licenses are part of a regulatory system that sets standards for entering a field or engaging in an activity. Agencies can set any licensing conditions reasonably necessary to protect the public's health, safety, morality, or general welfare.[12] Agencies license a broad range of professions, trades, and occupations in such areas as health care (e.g., physicians, nurses, pharmacists, and dentists)[13] and public safety (e.g., barbers, plumbers, and electricians).[14] (Note that many private professional or occupational specialties, such as medical specialties, nursing specialties, and dietitians, also operate credentialing systems designed to obtain recognition for their members' special qualifications.)[15] Licensing authorities set standards relating to qualifications, experience, and safe practice. In addition, agencies license public health institutions (e.g., hospitals, nursing homes, and laboratories).[16] Here, they can set standards relating to the security and health of patients or residents. Finally, agencies license businesses (e.g., alcohol beverage retailers, food services, and tattoo parlors).[17] The agency can set standards relating to the safety of workers, the purity of goods, or protection of consumers from fraud, deception, or unreasonable risks.

A licensing system does not merely sift out the unqualified or unsafe; it also offers continuous supervision by inspecting, monitoring, and punishing violators (e.g., withdrawal of licenses, as well as civil or criminal penalties). Consequently, licensing systems regulate both prospectively, by limiting entry into the field and imposing operational requirements, and retrospectively, by punishing transgression of standards.

State and local governments have the power to impose reasonable license fees.[18] However, fees must be proportionate to the government's regulatory costs.[19] Thus, if the license has a revenue-raising purpose (the fee is considerably higher than the administrative and policing costs), it may be invalidated as an impermissible tax.[20]

Social and economic fairness. Although licensing is important for health, safety, and prevention of fraud, it raises questions of social and economic justice. Licensing can be unfair because it parcels out a privilege based upon officials' discretion, which can be exercised in a discriminatory fashion against racial[21] or religious[22] minorities, women,[23] or other disenfranchised groups.[24] For example, in striking down a licensing system that was hostile to Chinese Americans, the Supreme Court said, "Though

the law be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and unequal hand . . . [it is] a denial of equal justice."[25] Similarly, licenses can operate to exclude disadvantaged individuals because they cannot meet educational and qualification standards that may be set artificially high.[26] For example, the American Medical Association forced the closure of many existing black medical schools when it co-opted medical licensing in the early twentieth century, resulting in marked declines in the number of African American physicians.[27]

Members of the regulated profession may dominate or influence licensing authorities, creating the appearance or reality of exclusionary practices.[28] Licensing grants monopoly power to the profession or occupation,[29] which can enable private actors to exclude people for anticompetitive reasons.[30] Seen in this way, a licensing system, even if it originated in the public interest, can be used by the regulated group to limit new entrants, thus ensuring those already in the field higher incomes and professional status.[31]

Procedural fairness. A license can be a valuable property interest that triggers a constitutional right to procedural due process (see chapter 4).[32] Licensing authorities may proceed informally, but they must comport with fundamental fairness when determining whether to grant or deny applications. Citizens who face official denial or revocation of a professional license may be entitled to legal representation, an adequate opportunity to present their case and cross-examine witnesses, a reasonable record of the proceedings, and reasons for the decision.[33]

Constitutionally troublesome conditions. Regulations requiring a license for the exercise of a right or freedom raise important constitutional concerns. For example, licenses may burden the free exercise of religion (e.g., religious processions),[34] expression (e.g., adult cinemas),[35] or assembly (e.g., bathhouses).[36] Courts will not necessarily overturn licensing decisions that burden the exercise of constitutional interests, but they will require neutral health and safety standards as well as the absence of unbridled discretion and arbitrary decision making.[37]

Inspections (Administrative Searches)

An inspection, or administrative search, of public or commercial premises is perhaps the most important and commonplace method of moni-

toring and enforcing compliance with health and safety standards. It also is among the oldest state powers, mentioned expressly in the Constitution.[38] An inspection is an official investigation or oversight—a formal and careful examination of a product, business, or premises to ascertain its authenticity (e.g., possession of a valid license), quality (e.g., purity and fitness for use), or condition (e.g., safe and sanitary). Inspection laws authorize and direct public health officials to conduct administrative searches to ensure private conformance with health and safety regulations. Inspection systems operate in many different public health contexts, ensuring the safe construction and maintenance of buildings or residences,[39] purity of food and drugs,[40] sanitary condition of farms[41] or restaurants,[42] safe workplace environments,[43] and control of pesticides[44] and toxic emissions.[45]

Search and Seizure under the Fourth Amendment. Although administrative searches are conducted in the public interest, they invade a sphere of privacy protected explicitly in the Constitution.[46] The Fourth Amendment guarantees the "right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." For most of the nation's history, public health inspections were rarely challenged and presumed to be constitutional.[47] However, in 1967, in the companion cases *Camara v. Municipal Court*[48] and *See v. City of Seattle*,[49] the Supreme Court held that public health inspections are governed by the Fourth Amendment and are presumptively unreasonable if conducted without a warrant.[50]

Administrative search warrants, therefore, are generally required for health or safety inspections of both residential[51] and private commercial property.[52] However, the judiciary permits searches without a warrant in at least three circumstances. First, a legally valid consent justifies an administrative search,[53] and in practice, most health and safety inspections are conducted with the permission of an authorized person (e.g., the owner or occupier of the property).[54] Second, public health officials may inspect premises in an emergency to avert an immediate threat to health or safety.[55] Third, under the so-called open-fields doctrine, inspectors may search a public place[56] (e.g., an eating area of a restaurant)[57] or test pollutants emitted into the open air.[58]

Generally speaking, courts issue warrants in criminal investigations only on evidence of probable cause to believe that a person has committed an offense.[59] However, courts issue warrants for health and safety inspections on grounds that are far less stringent than in criminal inves-

tigations.[60] To obtain a warrant for an administrative search, public health agencies need only demonstrate specific evidence of an existing violation of a health and safety standard,[61] or a reasonable plan supported by a valid public interest.[62]

Public health officials may not use an inspection to investigate a crime.[63] If the primary purpose is to discover evidence of criminal activity, they must obtain a search warrant based on probable cause.[64] Agencies often have both a public health and criminal investigative purpose, of course; after all, violation of health and safety standards can itself result in criminal penalties. Provided that the public health purpose is dominant, courts will not invalidate an otherwise lawful inspection that combines criminal law and administrative objectives.[65] Similarly, public health officials may seize criminal evidence if it is discovered during a lawful inspection.[66]

The courts have carved out a major exception to the general rule that agencies must obtain a warrant for inspection. Courts permit reasonable inspections of pervasively regulated businesses without a warrant.[67] In *New York v. Burger* (1987), the Supreme Court held that an inspection without a warrant of a pervasively regulated industry is reasonable if (1) there is a substantial public interest for the regulatory scheme, (2) the search is necessary to achieve the objective, and (3) the enabling statute gives notice to owners and limits the discretion of inspectors.[68] The courts permit inspections without warrants for a wide range of heavily regulated (and often hazardous) businesses, such as mining,[69] firearms,[70] alcoholic beverages,[71] propane,[72] and transport.[73] They also permit inspections without warrants for licensed businesses with substantial public health significance, such as nursing homes[74] and health care facilities.[75] Finally, the courts allow health inspectors to conduct routine audits of data (e.g., medical or pharmacy records) that, by statute, they have a legal right to search.[76] The judiciary permits administrative searches of pervasively regulated businesses without a warrant because of the importance of routine inspections in enforcing health and safety standards (warrants may afford owners time to conceal hazards)[77] and the reduced expectation of privacy in highly regulated commercial activities.[78]

The courts place certain limits on the time, place, and scope of searches without a warrant.[79] Further, if public health officials violate the Fourth Amendment (e.g., by not obtaining a warrant when it is required or exceeding the proper scope of the search), the exclusionary rule may apply (i.e., health officials are prohibited from using illegally collected ev-

idence).[80] However, the judiciary often does not apply the exclusionary rule to administrative proceedings if the regulatory subject is facing civil penalties or minimal burdens.[81]

Nuisance Abatement

> [A public nuisance encompasses] that class of wrongs that arise from the unreasonable, unwarrantable or unlawful use by a person of his own property, real or personal, or from his own improper, indecent or unlawful personal conduct, working an obstruction of, or injury to, a right of another or of the public. . . . It is a part of the great social compact to which every person is a party, a fundamental and essential principle in every civilized community, that every person yields a portion of his right of absolute dominion.
>
> H. Wood (1893)

> Many wrongs are indifferently termed nuisance or something else, at the convenience or whim of the writer. Thus, injuries to ways, to private lands, various injuries through negligence, wrongs harmful to the physical health, disturbances of the peace . . . are commonly spoken of as nuisances.
>
> Joel Bishop (1889)

In law, a nuisance is a condition or situation (e.g., a loud noise, foul odor, or environmental contamination) that is harmful or offensive to the public or to a member of it, for which there is a legal remedy—an unlawful interference in the enjoyment of a person's or community's legally protected interests. The linguistic origins of the term illustrate its basic character: a hurt, injury, or annoyance.[82]

Private and public nuisances have common origins[83] but are distinct doctrines. A private nuisance, discussed in chapter 6, is an unreasonable interference with the possessor's use and enjoyment of property (e.g., flooding or contaminating adjoining land). Private nuisances principally are part of the common law and are redressed through the tort system.

A public nuisance, also known as a common nuisance, is an unreasonable interference with the community's use and enjoyment of a public place or harm to common interests in health, safety, and welfare.[84]

Public nuisances need not involve interference with interests in property but include all activities that harm common pool resources, such as silence, clean air and water, or species diversity.[85] The interest claimed must be common to the public as a class, and not applicable merely to one person or even a small group.[86] Public nuisances were originally part of the common law but are now principally legislative and enforced by public health agencies.

Public nuisance suits can be brought either by government (e.g., cities, counties, and states) or by private citizens. In private actions for public nuisance, however, individuals must show that they suffer an interference with their enjoyment of property distinct from the general public interest.[87] That is, private plaintiffs must demonstrate injury different in kind from the harm suffered by the public in general. Contemporary firearms litigation illustrates the role of public versus private actions for common nuisance. Municipalities have brought suit against the firearm industry under various tort theories, including public nuisance for conduct that poses a threat to the public's health and safety.[88] At the same time, private actions for public nuisance have been brought by civic organizations suing on behalf of harmed members and by victims, or their descendants, who have been personally harmed by gun violence.[89] Most courts, however, have not been sympathetic to public or private actions for common nuisance related to firearm violence, believing it is an unreasonable expansion of the theory of a "public right."[90] In fact, in 2005, Congress precluded most public nuisance suits against gun manufacturers or sellers[91] (see chapter 6).

A public nuisance is exceptionally difficult to define[92]—a point (as we will see) of significance, since the Supreme Court resurrected the doctrine in a famous "regulatory takings" case in 1992. In common law, a public nuisance is an act or omission "which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all."[93] Early American illustrations of public nuisances included explosives,[94] garbage and offal,[95] decaying animals,[96] improper sewage,[97] and hogs kept in a filthy condition.[98]

Today, public nuisances are usually defined by the legislature. Alternatively, the legislature delegates to state and local public health agencies the power and duty "to define, prevent, and abate nuisances."[99] The legislative or administrative definition is often broad and virtually coterminous with the police power (e.g., "anything which is injurious to health, or indecent or offensive to the senses, or to an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or

property").[100] Legislatures or agencies also specify as public nuisances particular conditions such as "a breeding place for flies, rodents, mosquitoes,"[101] a place that is conducive to "high risk sexual activity,"[102] or keeping pigeons in a residential area.[103]

As mentioned above pertaining to federal firearms legislation, legislatures sometimes act to immunize certain industries from nuisance actions, believing that their activities are necessary to the economy or another public interest. Granting immunity, however, can interfere with private economic interests. For example, in *Gacke v. Pork Xtra, L.L.C* (2004), the Supreme Court of Iowa held that Iowa law granting nuisance immunity to animal feeding operations violated the state constitution because it deprived property owners of a remedy for the "taking" of their property resulting from the noxious odors that emanated from animal feeding.[104]

Legislative or administrative definitions of nuisances are presumed constitutional, but courts reserve the right to determine the presence of a nuisance. The standard for judicial review (unless the regulatory action affects a constitutionally protected interest, such as free expression)[105] is whether the nuisance abatement is reasonably necessary to avert a health threat,[106] even if it represents "a derogation of pre-existing private rights of property."[107] Consequently, the courts have sustained a wide spectrum of traditional nuisance abatements, including noxious odors,[108] diseased crops,[109] hazardous waste,[110] pollution,[111] unsanitary or dangerous buildings,[112] fire hazards,[113] and lead paint in homes.[114]

Courts have also sustained nuisance abatements in response to public health problems of more recent origin, such as unsafe health care practitioners,[115] public meeting places that increase risks of STIs (e.g., adult entertainment),[116] and violence by abortion protesters.[117] For example, in several cities public health agencies have successfully used nuisance laws to close down bathhouses in response to the HIV epidemic, believing that they create opportunities for anonymous sex.[118]

Courts possess broad equitable powers to alleviate nuisances. These powers include issuing injunctions to abate nuisances (e.g., ordering cleanup, repair, discontinuance of hazardous activity, or closure), awarding damages to the injured parties, or destruction of property. If abatement is the remedy, public policy suggests that, where there is no emergency, the person should be given reasonable time and opportunity to rectify the hazardous condition.[119] If the public health agency has to intervene, it should avoid unnecessary property damage.[120]

In summary, public health agencies have ample methods to regulate

commercial activities, including licenses, inspections, and nuisance abatements. At the same time, these regulatory techniques, if applied in an arbitrary or discriminatory manner, can be unjust and may trample the constitutional protection of liberty and property interests. One question that has long troubled scholars is the relative importance of economic freedoms. I now turn to the discussion of economic rights, which have taken on increased importance in contemporary political discourse.

ECONOMIC LIBERTY: CONTRACTS, PROPERTY USES, AND "TAKINGS"

The regulatory techniques used by public health officials safeguard the public's health and safety but interfere with economic liberties. The Framers intended to defend economic freedoms, as evidenced by several constitutional provisions. Notably, the Constitution prevents the state from depriving persons of property (or life or liberty) without due process of law (economic due process),[121] from impairing the obligations of contracts (freedom of contract),[122] and from taking private property for public use without just compensation ("takings") (see figure 36).[123] Here, I examine the normative and constitutional justifications for economic liberties.

[FIGURE] [insert Figure 36 here]

Economic Due Process

Conservative scholars argue that economic liberties are important in the constitutional design and deserve protection from commercial regulation.[124] Their claim is that individuals have a right to possess, use, and transfer private property, engage in a business, or pursue the profession of their choosing.[125]

In support of their claim, these scholars cite the Fifth and Fourteenth Amendments of the Constitution, which prohibit the federal government and the states from depriving any "person" (including corporations)[126] of "life, liberty, or property, without due process of law." Known as economic substantive due process, this constitutional theory holds that government must act fairly and nonarbitrarily. Courts applying this theory typically use a means-ends analysis to inquire into the extent to which the regulation furthers a reasonable or important public interest. Substantive due process theory would allow the courts to invalidate public health regulation if it unreasonably infringed on personal economic freedoms.

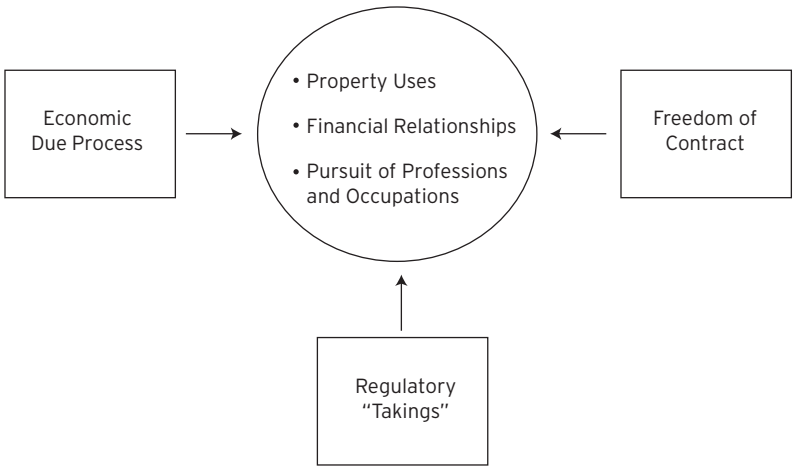

Figure 36. Economic liberties protected under the U.S. Constitution.

Despite the claim for constitutional protection of economic rights, the Supreme Court has rarely overturned state regulation, seeing public health as a sufficient justification for government infringement of economic liberty. Not long after the Constitution was ratified, the Supreme Court explored the idea that private property deserved protection as part of the natural law.[127] However, none of these early cases involved public health regulation. Indeed, when the Supreme Court examined a challenge to sanitary regulation of slaughterhouses in 1873, it said that government had the undoubted power to restrict occupational freedoms for the common good.[128]

During the nineteenth century, the Supreme Court began to find that business regulation could violate due process but still affirmed the state's power when it came to public health.[129] The Court ushered in a new era in constitutional protection of economic rights in *Lochner v. New York* (1905), when it struck down a state law regulating the hours that bakers could work. (In the same term, Justice Harlan wrote the Court's famous opinion in *Jacobson v. Massachusetts,* upholding state compulsory vaccination laws.)[130] Justice Holmes wrote a prescient dissent in *Lochner,* arguing that economic due process would erode government's ability to protect the public's health and safety:

> The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well- known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution. . . . But a constitution is

> not intended to embody a particular economic theory, whether paternalism and the organic relation of the citizen to the State or of *laissez faire.*[131]

The *Lochner* era, from 1905 to 1937, was a time when the Court most prized economic freedoms and aggressively invalidated numerous attempts at social and economic regulation. The Court struck down a great deal of legislation designed to protect the public's health and security, such as the minimum wage, consumer protection, and licensing. In 1937, the Supreme Court repudiated the *Lochner* doctrine, and scholars almost universally condemned it. The major flaw of economic due process was that it permitted courts to substitute their view for that of the legislature as to what is in the best interests of society and the economy. Since Franklin Delano Roosevelt's New Deal, the Court has granted police power regulation a strong presumption of validity, even if it interferes with economic and commercial life (see chapter 3).

Modern conservative scholars have sought to resurrect the *Lochner* doctrine.[132] As Judge Richard Posner remarked, "There is a movement afoot (among scholars, not as yet among judges) to make the majority opinion in *Lochner* the centerpiece of a new activist jurisprudence."[133] This "movement" empathizes with the promarket, antiregulation philosophy underlying *Lochner,* and it has regained influence in political and academic circles.[134] The judiciary, however, has not endorsed the political theory or constitutional interpretation of *Lochner,* and for good reason. It is for democratically elected assemblies to strike a balance between a well-ordered, safe society and the property rights of individuals.

Freedom of Contract

Conservative commentators have urged stronger protection of a number of interrelated economic rights against health regulation. Perhaps the most important of these is freedom of contract. The right of contract is often favored because it epitomizes free economic relationships and the ability to plan and conduct business in a predictable, orderly fashion. Unlike economic due process, which must be inferred from the Due Process Clause, the Constitution expressly provides for the right of contract: No state shall pass any "Law impairing the Obligation of Contracts."[135]

Despite the express constitutional language, the Contract Clause has become a relatively unimportant limitation on public health powers. The clause applies only to the states; most challenges to federal restrictions

on contractual freedom must be brought under the Due Process Clause of the Fifth Amendment, which, as we have just seen, is quite limited.[136] More importantly, the clause applies only to existing contracts; states are free to limit the terms of future contracts.[137] Most public health regulation, of course, is intended to govern future economic relationships. In rare cases, however, public health regulation affects existing contracts. In such cases, the Supreme Court has emphasized that the police power "is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals."[138] Consequently, public health regulation, even if it interferes with existing economic relationships, is presumed to be constitutionally legitimate.

The modern Court uses a three-part test to assess government regulation that interferes with private contracts:[139] (1) Is there a substantial impairment of a contractual relationship? (2) If so, does it serve a significant and legitimate public purpose? (3) Is it reasonably related to achieving the goal?[140] Like substantive due process, this is a highly permissive standard that generally affirms governmental power to regulate contractual relationships reasonably in the public interest. Public health regulation ordinarily meets this deferential test because it usually prescribes health and safety practices that have incidental effects on commercial transactions; it is intended for important public purposes; and if it is based on science or established practice, it is reasonably likely to achieve a public health objective. For example, in *RUI v. One Corp. v. City of Berkeley* (2004), the Ninth Circuit Court of Appeals upheld a living wage law designed to alleviate poverty. The Court found no infringement of contracts, noting that "the power to regulate wages and employment conditions lies clearly within a state's or municipality's police power," and that legislative bodies are given broad authority to exercise such power.[141]

Aggressive use of the Contract Clause is another means by which some conservative activists try to block health and safety regulation. Adopting a philosophy of natural rights or libertarianism, these scholars sometimes propose revolutionary changes to judicial interpretation of the Contract Clause. Richard Epstein, for example, asserts that the freedom of contract should apply to both public and private contracts; to both rights and duties of contracts, so that government could not relieve existing contractual obligations or impose new ones; and to prospective, as well as retroactive, modification of contracts. This position threatens forward-looking health and safety regulation. Of particular concern is the claim

that the Contract Clause could restrain the police power: "Even health or safety measures may be attacked, notwithstanding the soundness of their ends."[142]

It may be that individuals in a state of nature would seek freedom to do what they wish with their wealth and property. But individuals are not in a state of nature; they are embedded in a society where their interactions may be regulated for the sake of the collective. Limits on sound regulation sometimes benefit the economic interests of discrete individuals, but society as a whole would suffer from deteriorated health and safety standards. Contract rights, therefore, should give way when they come in conflict with the public interest, and decisions about when a public purpose justifies impairment of economic relationships should be a policy determination.[143]

Eminent Domain: "Taking" Property for Public Use with Just Compensation

The federal government and the states have the power of eminent domain, which is the authority to confiscate private property for government purposes. However, the Fifth Amendment imposes a significant constraint on this power: ". . . nor shall private property be taken for public use, without just compensation."[144] Thus, government may take property only (1) for a "public use" and (2) with "just compensation."[145]

Theories supporting the Takings Clause relate to basic fairness and justice. The "public use" constraint is intended to reserve government's power to confiscate private property only for legitimate public purposes. Under this theory, government may not use the power of eminent domain to confer a private benefit, taking one person's property solely to enrich another private party.[146] The "just compensation" constraint is intended to ensure that individuals do not have to bear public burdens, which should be borne by the community as a whole. Consequently, the Takings Clause is about government spreading loss when pursuing the public interest.[147]

No one would quarrel with the idea of justice in the ownership and allocation of private property, but this seemingly innocuous constitutional provision has been intensely divisive. It has created deep fault lines between those who view the state as a vehicle for the common good and others who see protection of private property as the natural right of citizens. Modern controversy has swirled around two defining questions in the law of eminent domain: What is a "taking" and what is a "public

use"? Both of these constitutional questions have important public health dimensions, because they help determine when and how the state can interfere with economic rights to promote the common good. Powers of eminent domain can be exercised for many public health purposes—e.g., to renovate unsanitary or unsafe buildings,[148] to convert private animal shelters to serve the public need of controlling dangerous animals,[149] and to confiscate hospitals for care or even quarantine during a public health emergency.[150]

WHAT IS A "TAKING"? COMPENSATION FOR REGULATORY TAKINGS

> Attorney General Meese . . . had a specific, aggressive, and it seemed to me, quite radical project in mind: to use the takings clause of the Fifth Amendment as a severe brake on federal and state regulation of business and property.
>
> Charles Fried (1991)

> Many of the changes in takings law . . . correspond quite closely to a blueprint for the takings doctrine proposed by Professor Richard Epstein. . . . This observation [is] both remarkable and troubling. After all, Epstein's work was almost universally criticized . . . [and its] proposed end result—the overturning of a century's worth of health, safety, and economic regulation—would sink this country in a constitutional crisis. . . . What we have found is a large and increasingly successful campaign by conservatives and libertarians to use the federal judiciary to achieve an anti-regulatory, anti-environmental agenda.
>
> Douglas T. Kendall and Charles P. Lord (1998)

Government confiscation or physical occupation of property is a "possessory" taking that certainly requires compensation. But does government regulation that only diminishes the value of private property also require just compensation? An expansive interpretation of takings would shackle public health agencies by requiring them to provide compensation whenever regulation significantly reduced the value of private property. Since public health regulation, by definition, restricts commercial uses of property, it has become a focal point for a sustained conservative critique of social action itself.[151] As Justice Holmes warned as early

as 1922, "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."[152] The law of regulatory takings is complex and muddled and, therefore, beyond the scope of a book on public health law. (See box 39 for a brief explanation).

[BOX] [insert Box 39 here]

During the early twentieth century, the Supreme Court held that government regulation that "reaches a certain magnitude" also is a taking requiring compensation.[153] The question, of course, is when does a regulation go so far that it becomes a taking? Initially, this idea of "regulatory" takings was not highly problematic for public health agencies because the Court indicated that government need not compensate property owners when regulating within the police power.[154] However, regulatory takings took on public health significance in the 1992 case of *Lucas v. South Carolina Coastal Council.*[155] In *Lucas,* Justice Antonin Scalia, the most intellectually powerful conservative voice on the Court, said that a person suffers a per se, or categorical, taking if regulation denies all economically beneficial or productive use of real property[156] and there were no similar restrictions "that background principles of the State's law of property and nuisance already place upon land ownership."[157] (Temporary restrictions on land use do not rise to the level of a per se taking).[158] Justice Scalia suggested that common law nuisance was the key to resolving the question of when regulation amounted to an uncompensated taking; an owner who lost the value of her land would suffer a taking if the public health regulation was not considered a nuisance under the common law.[159]

Lucas focused on the reasonable expectations of the buyer at the time the property was purchased. In that case, the buyer knew there were government restrictions on the use of the property at the time of the purchase, so she couldn't then complain that there had been a taking. However, the Court now appears to draw a distinction between common law rules that existed prior to purchase and other regulations. In *Palazzolo v. Rhode Island* (2005), the Court held that a property owner could bring a takings claim for statutes and regulations (as opposed to common law nuisance) that were in place at the time the property was acquired.[160]

The Court's reasoning in *Lucas* is problematic because it forces public health agencies to define and abate public hazards according to vague and outdated common law understandings of nuisance. Even the most astute legal scholars perceive common law nuisance as confusing and indecipherable.[161] The complexity was compounded in *Palazzolo,* which drew an even more unfathomable distinction: challenges to common law

BOX 39

REGULATORY TAKINGS DOCTRINE: HARDLY A MODEL OF CLARITY

The Supreme Court's regulatory takings jurisprudence is "hardly a model of clarity."[1] Regulatory takings cases are commonly divided between "per se" takings, where there are categorical rules, and other regulatory takings, where there is a balancing test.[2] The Court has established two categories of regulatory action that are deemed per se takings, which give rise to an unqualified constitutional obligation to compensate the property owner. First, if the regulation results in a permanent physical invasion of the owner's property, however minor, the state must provide just compensation.[3] This per se regulatory takings rule makes sense because a permanent physical invasion is a serious incursion on property rights similar to the government taking ownership.

A second categorical rule applies to all regulations that completely deprive an owner of "all economically beneficial use" of property.[4] Under *Lucas v. South Carolina Coastal Council* (1992), the government must pay just compensation for such "total regulatory takings," except to the extent that "background principles of nuisance and property law" independently restrict the owner's intended use of the property.[5]

Two subsequent Supreme Court cases explain further the *Lucas* doctrine. In *Palazzolo v. Rhode Island* (2005), the Court held that a property owner could bring a per se takings claim for statutes and regulations (as opposed to common law nuisance) that were in place at the time the property was acquired.[6] Palazzolo was repeatedly denied planning permission for development of his coastal property. Even though he knew about the restrictive rules prior to buying the land, the Court permitted a regulatory takings claim for the loss of all economic value in his property. Property rights advocates hailed the decision in *Palazzolo,*[7] although on remand he lost his regulatory takings claim.[8] In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* (2002), the Supreme Court made clear that when government enacts *temporary* regulation denying a property owner of all viable economic use of property, there is no per se taking. Rather, temporary moratoria on land use are to be decided by applying the balancing factors discussed below.[9]

Outside of these two relatively narrow categories of per se takings—physical invasion of property and total loss of economic value—regulatory takings are governed by a balancing test established in *Penn Central Transportation Co. v. New York City* (1978) that takes into account: (1) the economic impact of the regulation on the property

[1] "Leading Cases," *Harvard Law Review,* 119 (2005): 169–414, 297.

[2] It is important to emphasize that zoning laws are not considered regulatory takings. The Supreme Court considers land use restrictions to be within the states' broad police powers. *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926) (upholding a zoning regulation even though it reduced the value of land because the regulation bore a rational relationship to public health and safety).

[3] *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982) (holding that a state law requiring landlords to permit cable companies to install cable facilities in apartment buildings effected a taking).

[4] *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1029 (1992).

[5] Under *Lucas,* "background principles" can bar any type of per se claim, whether based on physical occupation or denial of all economic value.

[6] *Palazzolo v. Rhode Island,* 121 S. Ct. 2448 (2001). The Court, however, determined there was no per se taking because the land still had economically valuable use. The Court remanded for a balancing analysis under *Penn Central.*

[7] Harold Johnson, "Supreme Court Strikes a Blow for Property Rights," *Wall Street Journal,* July 3, 2001.

[8] *Palazzolo v. Rhode Island,* 2005 WL 1645974, *14 (holding that "Palazzolo could have had little or no reasonable expectation to develop the parcel as he has now proposed. Constitutional law does not require the state to guarantee a bad investment").

[9] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 535 U.S. 302 (2002).

owner; (2) the extent to which the regulation has interfered with investment-backed expectations; and (3) the character of the governmental action.[10]

The Court has noted that these three inquiries—permanent physical invasion, loss of all economically beneficial use, and the *Penn Central* balancing test—share a common touchstone: "Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain."[11] Accordingly, each criterion focuses directly on the severity of the burden imposed by the government upon private property rights.

In *Agins v. City of Tiburon* (1980), a case involving municipal zoning, the Supreme Court said that there is a taking if the ordinance does not "substantially advance legitimate state interests."[12] This test was highly solicitous of property rights, as it finds a taking even in cases where the intrusion on the owner is slight. But in *Lingle v. Chevron U.S.A.* (2005), the Supreme Court ruled unanimously that *Agins* is not a valid method of identifying compensable regulatory takings. It prescribes an inquiry in the nature of a due process test, which has no proper place in the Court's takings jurisprudence.[13]

Lingle represents a victory for public health regulation. It abandons the "heightened scrutiny" of the "directly advances" formula, which would have given judges the power to interfere with a multitude of government actions on land use, zoning, rent control, and the environment. The Court indicated that regulatory takings could be found only in those situations that are so dire as to be "functionally equivalent to the classic [physical] taking." The case appropriately limits the potential use of the Takings Clause and may return the Court to a path of restraint in the creation of economic rights.[14] However, much still depends on the Roberts Court, which could resurrect the regulatory takings doctrine by using either *Lucas* or a *Penn Central* balancing test with a bite.

[10] *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 124 (1978).
[11] *Lingle v. Chevron USA, Inc.,* 544 U.S. 528, 539 (2005).
[12] *Agins v. City of Tiburon,* 447 U.S. 255, 260 (1980).
[13] *Lingle,* 544 U.S. at 545.
[14] "Judicial Takings and Givings," *Washington Post,* May 29, 2005.

rules, which cannot be brought if they were in place at the time of purchase, and challenges to statutes and regulations, which can be made even if they were in place at the time of purchase. Consequently, when democratically elected government, according to modern standards, regulates to avert a public harm or promote a public good, it cannot be certain whether it will be compelled to compensate property owners. This narrowing of what may be considered a nuisance and expansion of property interests effectively constrains police power regulation. The Court, in effect, has simultaneously frozen the understanding of public health that existed in earlier times, while allowing the normative value of property to expand to meet modern libertarian expectations.

Lucas poses a threat to public health regulation because it adopts a rule imposing a categorical duty to compensate property owners. As the Supreme Court itself recognized, "Land-use regulations are ubiquitous and most of them impact property values in some tangential way—often

in completely unanticipated ways. Treating them all as *per se* takings would transform government regulation into a luxury few governments could afford."[162] Public health regulation, however, rarely obliterates the value of property, and the future of *Lucas,* therefore, is uncertain. Although lower courts have been highly reluctant to apply this rule and find a per se taking,[163] the conservative wing of the Supreme Court and property rights advocates outside the Court still have ambitions to revitalize a categorical rule of regulatory takings.[164] For example, the Supreme Court of Ohio found a per se taking when state regulations designed to protect public drinking water prevented coal mining operations.[165] And strong property rights protections have been enacted by the states to constrain environmental regulation.[166]

Most regulatory takings cases do not involve a complete loss of property value. These cases are governed by a balancing formula established in *Penn Central Transportation Co. v. New York City* (1978) that takes into account:[167] (1) the economic impact of the regulation on the property owner; (2) the extent to which the regulation has interfered with investment-backed expectations; and (3) the character of the governmental action.[168] Balancing tests of this kind often suggest a permissive standard of review, but this does not mean that the Supreme Court will not use *Penn Central* as a strong vehicle for protection of property rights in the future. For example, federal courts have ruled that steps taken to protect the public's food supply[169] or even to protect trade secrets (e.g., compelled disclosure of the ingredients in cigarettes)[170] can constitute a taking under the more flexible *Penn Central* test.

If Charles Fried in the epigraph was correct in describing a conservative plan to use the Takings Clause as a severe constraint on public health regulation, then the outcome remains uncertain. Much depends on the direction of the Supreme Court, which, at present, has several members apparently committed to expansion of the regulatory takings doctrine.[171] This split among the Justices is likely to be manifested in many property rights cases to come. It is too soon to tell whether the Roberts Court will elevate economic justice to a new level in our constitutional democracy.

WHAT IS A "PUBLIC USE"? *KELO V. NEW LONDON*

> The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious

> as well as clean, well-balanced as well as carefully patrolled . . . . If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.
>
> Justice William O. Douglas (1954)

> That alone is a just government, which impartially secures to every man, whatever is his own.
>
> James Madison (1792)

The Fifth Amendment authorizes the state to take private property only for a justifying "public use." If the government took property to confer a private benefit, the taking would be unconstitutional, even if the owner were fully compensated.[172] Classically, the state may not take the property of one person for the sole purpose of transferring it to another private person.[173] It would obviously be unjust to use the power of eminent domain purely to transfer wealth from one private party to another. However, what if the state's purpose were to advance the public interest in health, welfare, prosperity, or another public good, but nevertheless conferred an economic advantage on private parties?

The term *public use* is susceptible to a narrow or broad interpretation. In its narrow sense, public use literally is "use by the public," where the government takes ownership (e.g., a public utility) or grants access to the public (e.g., a park, road, or railway). In its broader sense, public use is when the taking benefits the public. The Supreme Court historically has preferred an expansive understanding of public use, defining it more as a "public purpose." Court decisions have conceived of public use as virtually coterminous with the police powers.[174] Like the "rational basis" test discussed in chapter 4, the Court has upheld the power of eminent domain provided it is "rationally related to a conceivable public purpose."[175] The Court has afforded elected bodies due deference, moreover, in deciding what forms of development benefit the public. The Supreme Court, for example, was highly permissive in upholding the District of Columbia's use of eminent domain to acquire slum properties and transfer them to private developers to remove blight in the city, as expressed in Justice Douglas's epigraph.[176]

The Supreme Court's expansive understanding of public use was affirmed in a bitterly contested 5–4 decision in *Kelo v. New London* (2005), where the Court ruled that government could use its eminent do-

main power to take property for the purpose of spurring private economic development. In *Kelo,* homeowners in an economically distressed city challenged the condemnation of their property under a comprehensive urban renewal plan designed to increase jobs and augment tax revenue. The Court found that economic development is a "long accepted function of government," and refused to limit the use of eminent domain to properties that are "blighted" or to require government to show a "reasonable certainty" that the expected public benefits actually would ensue.[177]

The decision was widely criticized within the Court and by American politicians, and was commonly seen as benefiting large corporations at the expense of homeowners and small businesses. Four dissenting Justices fervently appealed to the Founders' vision of the "security," "sanctity," and "inviolability" of private property and the "natural rights" of property owners, declaring, "The specter of condemnation hangs over all property."[178] And Justice Thomas said, "Losses will fall disproportionately on poor communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful."[179] Public opinion polls showed overwhelming disapproval of the ruling;[180] the House passed the Private Property Protection Act by a vote of 376 to 38, denying federal funds to cities and states that use eminent domain for private commercial development;[181] and states rushed to proscribe such uses of eminent domain.[182] Local town boards in New Hampshire even threatened to seize the property of Justices Breyer and Souter for joining the majority in *Kelo*.[183]

—Kelo.
[FIGURE]
[insert Photo 26 here]

Was the almost universal denunciation of *Kelo* justified, or was it part of an overly romantic American ideal of the private home and the small business owner fighting big government?[184] Certainly private owners can endure hardship when their property is taken by eminent domain: they may have a sentimental attachment, the compensation may not be enough to make them feel "whole," and private developers may gain economic windfalls.[185] Undoubtedly, eminent domain is used more often in poor, minority neighborhoods than in well-heeled communities.[186]

Despite the hardship for the few, eminent domain can bring significant benefit to the many. The exercise of police powers entails trade-offs, almost by definition, so that individual interests are diminished while collective interests are enhanced. And eminent domain, even for economic development, *does* confer substantial benefits for the public's health, safety, and welfare. Land-use policy goes to the heart of local government planning for healthy and prosperous societies, which would be

thwarted without the power of eminent domain.[187] For example, improving run-down urban areas can diminish some of the more intractable problems of slum living: alcohol and drug abuse, firearm and other violence, lead exposure in children, contamination of drinking water, asthma from cockroaches or mold, exposure to pests and toxins, and a dearth of facilities for nutritious food, recreation, and exercise that can increase risks of obesity and chronic diseases.

When desperately poor urban communities are revitalized through a comprehensive plan of improvement, the vast majority of people in those neighborhoods benefit: the area is more beautiful and livable, jobs are more plentiful, and problems of the inner city discussed above are curtailed. In *Kelo,* the city of New London was suffering from deep economic and social disadvantage and had been designated as a "distressed municipality"—showing steep economic decline, high unemployment, and fewer residents in 2005 than in 1920. The city council's comprehensive development plan promised parks, a river walk, jobs, an environmental cleanup, and a "small urban village" with restaurants and shopping.

When Justice Thomas and other economic conservatives contend that the poor and vulnerable are exploited, what do they mean? In New London, and in most comparable cities, the overwhelming majority of residents voluntarily sell their homes, and the whole community benefits from the improvements. Poor people usually do not choose to live in derelict neighborhoods with no prospect of hope or change, and most want the government to pursue well-designed plans for social and economic improvement. It is too easy to champion the few "holdouts" who, by refusing to sell their property, can spoil plans to rejuvenate public spaces and improve the well-being of residents.

It is well to consider that the most vocal critics of *Kelo* were not the people of New London or their elected representatives, but rather those who routinely defend private entrepreneurs and free markets.[188] The conservative wing of the Supreme Court has long sought to limit government control over private property.[189] And the Institute of Justice, which brought *Kelo* and has since waged a tenacious public campaign against eminent domain, describes itself as an activist libertarian organization for individual economic liberty.[190] Libertarian groups make emotive claims regarding state exploitation of the downtrodden and the vulnerability of "a family's home or church."[191] Yet, in other important ways, *Kelo* was a highly conservative decision, upholding a federalist vision of local democratic decision making, judicial restraint, and due deference to elected officials.[192] Granting city leaders latitude to seek innovative solutions for struggling urban communities is better than having federal judges sit in judgment of whether land-use plans are sufficiently "public."[193]

Government must make hard choices when faced with desperately poor and dilapidated inner cities. It is not possible to act boldly for the common good while privileging a small handful of property owners. Nor is it possible to revitalize communities without conferring some economic advantage on private developers. The essence of public health is that it seeks to benefit most of the population while acting deliberatively, transparently, and fairly.

The constitutional interpretation of the Takings Clause for which I have advocated—both for regulatory takings and urban redevelopment—is not intended to show disrespect for private property. Instead, as articulated by the Georgetown University Environmental Law and Policy Institute, it suggests that individual property rights must be defined in relation to the rights and needs of all other citizens to health, safety, and environmental protection. And it reflects the conclusion that resolution of the conflict between private rights and public goods is primarily for demo-

cratically elected representatives of the people rather than the judiciary. Philosophical opponents of state regulation drive the property rights movement in the United States. If the public had to pay every time government regulated, it would chill state action for the common good. And if cities could not exercise powers of eminent domain, it would seriously impede rejuvenation of long-neglected communities. At the same time, other property owners and other citizens would suffer harm to their health, well-being, and the environment in which they live.[194]

Certainly, the courts should curtail powers of eminent domain intended to provide special favors for private developers. But government should be empowered to exercise these powers to clean up environmental hazards, ameliorate unsanitary or unsafe conditions, and reinvigorate communities stricken by violence, drug abuse, or other detriments to the public's health.

THE NORMATIVE VALUE OF ECONOMIC LIBERTY

When health is absent
Wisdom cannot reveal itself,
Art cannot become manifest
Strength cannot fight,
Wealth becomes useless
And intelligence cannot be applied.

Herophilus (325 B.C.)

As we have seen throughout this book, government regulation for the public's health inevitably interferes with personal or economic liberties. The Supreme Court usually grants the legislature deference in the exercise of police powers. A permissive approach to government regulation is justified, in part, by democratic values; citizens elect representatives to make complex policy choices.[195] A legislative choice to prefer collective health and well-being over individual interests deserves respect and insulation from aggressive judicial scrutiny. This is broadly the judicial approach to public health regulation that affects personal autonomy. Heightened scrutiny is reserved for those rare instances where public health interventions intrude on fundamental rights and interests, such as total deprivation of liberty.

The normative issue is whether there is something in the nature of economic liberty that warrants a departure from the normal deference to public health regulation. Put another way, how important is unbridled

freedom in property uses, financial relationships, and the pursuit of occupations? I see no reason why the diminution of economic liberties should be taken more seriously than the many deprivations of personal autonomy and privacy that routinely occur with public health regulation (e.g., vaccination, reporting, and contact tracing). Courts generally understand that some loss of individual freedom is necessary for the common welfare. Regulation that interferes with civil liberties does not cause conservative thinkers undue concern; nor is there any discussion of compensation to those who must forgo liberty for the collective good.

The same logic ought to apply to economic regulation for the common welfare. The reason for the governmental intervention usually is to prevent owners from using their private property in ways that are harmful to the public interest. Thus, the state's aim is not to deny economic opportunity per se, but only to foreclose commercial activities that are detrimental to the public's health and safety. The creation of private wealth, moreover, hardly can be regarded as a fundamental interest akin to loss of personal freedom, for private wealth creation is not essential to the achievement of a healthy and fulfilling life. Rarely does economic regulation affect an individual's basic ability to obtain the necessities of life, such as food, shelter, and medical care. Indeed, the purpose of such regulation is to meet the needs of the many.

The conservative claim, of course, is not only that economic liberties have intrinsic value, but that they have instrumental value as well. They claim that preserving economic liberty will help create wealth for the community at large. Even assuming that economic freedom reliably leads to greater overall prosperity, it is still reasonable for a legislature to make a social choice that favors immediate health and safety benefits over future wealth creation. A community cannot benefit from increased prosperity if it experiences excess morbidity and mortality from hazardous commercial activity.

Government, to be sure, ought not carelessly or gratuitously interfere with economic freedoms. If government has a reason, however, based on averting a risk to the public's health, then there is nothing in the nature of economic liberty that should prevent the state from intervening, nor is there any reason why the state should provide compensation for regulating private commercial activities deemed detrimental to the communal good.