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Smoked Out: Bars, Restaurants, and Restrictive Antismoking Laws as Regulatory Takings

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NOTES

SMOKED OUT: BARS, RESTAURANTS, AND RESTRICTIVE ANTISMOKING LAWS AS REGULATORY TAKINGS

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INTRODUCTION

Walking around New York City on a weekend, you may wonder about the crowds of people standing outside some of the most famed nightspots in the world. Do not be discouraged if it is a bite to eat or a cold beer that you are after—these are not long lines of people waiting to enter. If it is a cigarette to which you are looking forward, however, then you may as well keep on walking. The New York state legislature banned smoking in all public indoor areas in 2003.[1] To protect patrons and employees from the dangers of secondhand smoke, the Smoke-Free Air Act prohibits smoking in bars and restaurants and forces throngs of people outside to have a cigarette.

New York, Connecticut, Maine, Delaware, Massachusetts, and Rhode Island have all followed California's example and passed laws that ban smoking in all restaurants and bars (what this Note calls "restrictive antismoking laws").[2] In addition, more than seventy municipalities throughout the United States have passed similar bans.[3]

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1 N.Y. PUB. HEALTH LAW §§ 1399-n to -x (McKinney 2002 & Supp. 2005).

2 Eli Sanders, *Last Gasp*, STRANGER, July 8–14, 2004, at 20, 20. On March 1, 2005, Rhode Island joined this group and imposed its own restrictive antismoking law. TOBACCO CONTROL PROGRAM, R.I. DEP'T OF HEALTH, PREPARING FOR A SMOKEFREE RHODE ISLAND: A GUIDE FOR RESTAURANTS AND BARS (2004), *available at* http://www.health.state.ri.us/disease/tobacco/sfwpl/SFWPLrestaurant_brochure.pdf.

3 Sanders, *supra* note 2, at 20.

Nonsmoking patrons cheer the clean air that has replaced these once smoke-filled establishments, and reports suggest that employee health has improved for workers in bars and restaurants.[4]

Yet, regardless of how you feel about smoking, its health effects, or a smoke-filled versus smoke-free bar or restaurant, the question remains whether legislatures have the authority to pass these restrictive antismoking laws without compensating property owners for potential loss. On the one hand, a state will argue that it may do so simply as an exercise of its police power in protecting the general welfare of the people. However, these laws must also comply with the strictures of the U.S. Constitution. While restrictive antismoking laws have faced many constitutional challenges in recent years, this Note focuses exclusively on the Fourteenth Amendment issue of regulatory takings.[5]

The Fourteenth Amendment prohibits state governments from taking private property, through actual condemnation or effectively through excessive regulation, without justly compensating the owner.[6] Using New York's 2003 Smoke-Free Air Act[7] as representative of restrictive antismoking laws nationwide, this Note argues that bar and restaurant owners can make out a successful case that these absolute bans effect a regulatory taking of their property. Part I briefly outlines the law of the Fifth and Fourteenth Amendments, eminent domain, and regulatory takings. It focuses on the balancing factors that a potential plaintiff bar or restaurant owner would employ to support his case for a regulatory taking. Part II sets out the case for restrictive antismoking laws as regulatory takings, applying the aforementioned balancing factors and examining both recent statistical data and case

4 New York's one-year review of its Smoke-Free Air Act states that "[l]evels of cotinine, a by-product of tobacco, decreased by 85% in nonsmoking workers in bars and restaurants; and 150,000 fewer New Yorkers are exposed to second-hand smoke on the job" because of the state's restrictive antismoking law. NEW YORK CITY DEP'T OF FIN. ET AL., THE STATE OF SMOKE-FREE NEW YORK CITY: A ONE-YEAR REVIEW 1 (2004) [hereinafter ONE-YEAR REVIEW]. Perhaps ironically, this author includes himself among those nonsmoking patrons who cheer these laws and their positive health effects. My personal preference for a smoke-free bar or restaurant notwithstanding, restrictive anti-smoking laws effectively take privately owned property from owners who are thus legally entitled to just compensation.

5 Restrictive antismoking laws have faced challenges under both the First Amendment (freedom of association and even freedom of speech) and Fourteenth Amendment (equal protection). All such challenges have failed. These bans often survive as an exercise of the state's police power. *See generally* Lexington Fayette County Food & Beverage Ass'n v. Lexington-Fayette Urban County Gov't, 131 S.W.3d 745, 752 (Ky. 2004) ("The fact that an exercise of police power impinges upon private interest does not restrict reasonable regulation.").

6 Chi., Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 233–41 (1897).

7 N.Y. PUB. HEALTH LAW §§ 1399-n to -x (McKinney 2002 & Supp. 2005).

law. Ultimately, this Note concludes that the applicable legal factors and property principles overwhelm the states' health interest and that bar and restaurant owners are consequently entitled to just compensation for their loss.

I. THE LAW OF EMINENT DOMAIN AND REGULATORY TAKINGS

A. The Requirement of Just Compensation

1. Government Takings

Eminent domain is the "power of government to force transfers of property from owners to itself."[8] Certain restrictions apply, however, to this governmental authority.[9] The Fifth Amendment to the U.S. Constitution instructs, "nor shall private property be taken for public use, without just compensation."[10] While this limits federal action, the Fourteenth Amendment holds state governments to the same standard. It enjoins that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law."[11] In addition, several state constitutions require just compensation for takings.[12] As a simple example: if the State of New York condemns a portion of a homeowner's front lawn in order to build a new highway (presumably satisfying the public use requirement), then the State must fairly reimburse the homeowner for the land he has lost (just compensation).

Contrast the above example with the case of a regulatory taking. Here the question is "*whether* a taking has occurred in consequence of some government activity."[13] Rather than physically seize land, the government effectively does so through some action. Assuming the example homeowner above lives instead on an existing roadway, the State of New York may install a road sign on his front lawn (again,

8 JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 1093 (5th ed. 2002).

9 *Id.*

10 U.S. CONST. amend. V. "Virtually all state constitutions have similar language; in any event, the Fifth Amendment applies to the states through the due process clause of the Fourteenth Amendment." DUKEMINIER & KRIER, *supra* note 8, at 1093 n.2; *see also Chi., Burlington & Quincy R.R.*, 166 U.S. at 233–41.

11 U.S. CONST. amend. XIV, § 1.

12 Most relevant for purposes of this Note, every state that currently imposes a restrictive antismoking law on bar and restaurant owners provides such constitutional protection. *See* CAL. CONST. art. I, § 19; CONN. CONST. art. I, § 11; DEL. CONST. art. I, § 8; ME. CONST. art I, § 21; MASS. CONST. pt. I, art. X; N.Y. CONST. art. I, § 7; R.I. CONST. art. I, § 16.

13 DUKEMINIER & KRIER, *supra* note 8, at 1116.

presumably for the public use). The front lawn still belongs to the homeowner, but the state has forced him to allow for this sign on his private property. The Fourteenth Amendment would require the state government to justly compensate the homeowner for this action.[14] While the State has not seized the land, its action constitutes a regulatory taking.[15]

2. Just Compensation Under *Lingle*

In its most recent foray into the law of regulatory takings, the Supreme Court was careful to differentiate a takings challenge from the more general due process challenge. The proper inquiry, the Court states in *Lingle v. Chevron U.S.A. Inc.*,[16] is one into the "challenged regulation's effect on private property . . . [and not its] underlying validity."[17] The Court continues: the "Takings Clause presupposes that the government has acted in pursuit of a valid public purpose. . . . It does not bar government from interfering with property rights, but rather requires compensation 'in the event of *otherwise proper interference* amounting to a taking.'"[18] In short, the Takings Clause "'does not prohibit the taking of private property, but instead places a condition on the exercise of that power.'"[19]

After *Lingle*, bar and restaurant owners would be remiss to argue that restrictive antismoking laws are unconstitutional under the Takings Clause. Any such argument would essentially stand as a due process challenge dressed with inappropriate clothes. Restrictive antismoking laws aim to protect people in public indoor areas, including bar and restaurant employees, from the harms of secondhand smoke. Accordingly, any due process challenge would most likely fail. What the Takings Clause protects instead is an owner's right to just compensation if the government effectively takes his real property.

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14 *Chi., Burlington & Quincy R.R.*, 166 U.S. at 233–41.

15 This is an example of a permanent physical occupation, which "is always a taking, no matter how inconsequential or trivial the invasion." DUKEMINIER & KRIER, *supra* note 8, at 1130; *see also* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421 (1982) (holding that cable installations on the roof and side of a building are takings).

16 125 S. Ct. 2074 (2005).

17 *Id.* at 2084.

18 *Id.* (quoting First English Evangelical Lutheran Church of Glendale v. County of L.A., 482 U.S. 304, 315 (1987)). "Conversely, if a government action is found to be impermissible—for instance because it fails to meet the 'public use' requirement or is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action." *Id.*

19 *Id.* at 2080 (quoting *First English*, 482 U.S. at 314).

While restrictive antismoking laws thus appear to be constitutional, owners who suffer a regulatory taking on account of these laws are nevertheless entitled to just compensation.

B. Regulatory Takings and Penn Central

After the Supreme Court decision in *Lingle*, government regulation may result in a taking through only three paradigms.[20] First, where the government compels an owner to suffer a permanent physical occupation on his land, as discussed in the example above of the New York homeowner.[21] Second, where an "owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."[22]

Clearly, restrictive antismoking laws do not effect a permanent physical invasion of bar and restaurant owners' property. Just as clearly, restrictive antismoking laws do not deprive bar and restaurant owners of all economically beneficial uses of their property—nonsmoking customers, as well as smokers who abstain from smoking while in a bar or restaurant, continue to frequent bars and restaurants for drinks and food. Thus, the case for restrictive antismoking laws as regulatory takings must rely upon the third paradigm.

The landmark Supreme Court case of *Penn Central Transportation Co. v. New York City*[23] governs a regulatory taking challenge under this third paradigm. The test that the Supreme Court has outlined consists of several factors. Primary among these factors are the "'extent to which the regulation has interfered with distinct investment-backed expectations'" and the "'economic impact of the regulation on the claimant.'"[24] Additionally, the "'character of the governmental action' . . . may be relevant in discerning whether a taking has oc-

20 This leaves aside the "special context of land-use exactions." *Id.* at 2081. *See generally* Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

21 *See supra* Part I.A.1. Another is the rule that "if a government action in question is depicted as a nuisance-control measure, then there is no taking notwithstanding the loss worked by the regulation." DUKEMINIER & KRIER, *supra* note 8, at 1138; *see also* Hadacheck v. Sebastian, 239 U.S. 394, 414 (1915). In *Hadacheck* the Court upheld against a takings claim a Los Angeles ordinance making it unlawful to establish or operate a brick yard, brick kiln, or any place for the manufacture or burning of brick within city limits. *Id.* at 404. No court has ruled that antismoking laws fall under nuisance control in the context of regulatory takings.

22 *Lucas*, 505 U.S. at 1019.

23 438 U.S. 104 (1978).

24 *Lingle*, 125 S. Ct. at 2081–82 (quoting *Penn Central*, 438 U.S. at 124).

curred."[25] This Note now details these factors (and one related factor) before then holding up restrictive antismoking laws to the *Penn Central* standards.

1. Distinct Investment-Backed Expectations

The first factor, sometimes seen as an element within the economic impact question,[26] focuses on the owner rather than the property alone. The court analyzes an owner's expectations as to the use of his land and the extent to which government regulation has interfered with these plans. As the Supreme Court says, "a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking.'"[27] Property owners invest in land and development with certain expectations in mind, and laws affect these expectations. Nevertheless, the court may find a regulatory taking in cases where "'distinct investment-backed expectations' are defeated by government regulatory action that sharply reverses a prior governmental stance upon which the aggrieved owner specifically and justifiably relied by investing in the particular advantage that the questioned regulation would remove or destroy."[28]

An owner can argue that the government has effectively taken his land when subsequent government regulation goes beyond that in effect when the owner had originally invested in the land. The owner relied upon these laws when investing in the land and planning for its expected uses. Regulation that interferes with these expectations may constitute a regulatory taking. Moreover, the value of these expectations as property interests may trump "important public policies"[29] that the state offers to justify its actions. Government regulation that interferes with distinct investment-backed expectations strongly supports a potential plaintiff's case for a regulatory taking.

2. Economic Impact, Diminution in Value

The second factor looks at the economic effect that regulation has on property. Stated simply, the court may find a taking if govern-

25 *Id.* at 2082 (quoting *Penn Central*, 438 U.S. at 124).

26 DUKEMINIER & KRIER, *supra* note 8, at 1167–68 ("Is the test . . . different from the diminution-in-value test?"); *see infra* Part I.B.2.

27 *Penn Central*, 438 U.S. at 127 (discussing Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922)).

28 Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1604 n.21 (1987).

29 For example, a state's interest in protecting the health interests of nonsmokers.

ment regulations "deny an owner economically viable use of his land."[30] Apart from a complete economic taking, discussed above,[31] a "less intrusive regulation" may allow a property owner "some but not all economic use of his land (sometimes called a partial or non-categorical taking)."[32]

In the landmark case *Pennsylvania Coal Co. v. Mahon*,[33] the Supreme Court relied on this diminution-in-value test in finding a regulatory taking. The Kohler Act, a Pennsylvania statute, prohibited the mining of anthracite coal that threatened surface habitations with potential subsidence.[34] However, Pennsylvania had previously recognized the right to mine coal as a valuable estate in land,[35] one upon which this regulation drastically impinged. Justice Holmes states that "[w]hat makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it."[36]

Owners derived value from this subterranean land in mining its coal. The Kohler Act prohibited this land use and consequently diminished the value of the land. The government had effectively taken this land in regulating the right to use it. Thus, regulation that diminishes the economic value of property may constitute a regulatory taking.

3. Character of the Governmental Action

Also relevant to the *Penn Central* analysis is the nature of the governmental regulation that arguably effects a taking; for example, "whether it amounts to a physical invasion or instead merely affects property interests through 'some public program adjusting the benefits and burdens of economic life to promote the common good.'"[37] Courts are more willing to rule that governmental action constitutes a

30 D.A.B.E., Inc. v. City of Toledo, 292 F. Supp. 2d 968, 971 (N.D. Ohio 2003) (citing Agins v. City of Tiburon, 447 U.S. 255 (1980)), *aff'd*, 393 F.3d 692 (6th Cir. 2005).

31 *See supra* text accompanying note 22.

32 *D.A.B.E.*, 292 F. Supp. 2d at 971 (citing Anderson v. Charter Twp. of Ypsilanti, 266 F.3d 487, 493 (6th Cir. 2001)).

33 260 U.S. 393 (1922).

34 *Id.* at 412–13.

35 *Id.* at 414 (citing Commonwealth *ex rel.* Keator v. Clearview Coal Co., 100 A. 820, 820 (Pa. 1917)).

36 *Id.*

37 Lingle v. Chevron U.S.A. Inc., 125 S. Ct. 2074, 2082 (2005) (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)).

taking when the government physically invades an owner's property. It is more difficult for a potential plaintiff to argue that government regulation leading to economic, nonphysical interference with an owner's property effects a taking. Essentially, takings law "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."[38]

4. Conceptual Severance

A related factor separates out the different property interests that an owner holds in his land and asks whether regulation has effectively taken any single interest, perhaps without upsetting the others. This idea is known as "conceptual severance."[39] Proving a regulatory taking with this factor "consists of delineating a property interest consisting of just what the government action has removed from the owner, and then asserting that that particular whole thing has been permanently taken."[40] Consider the Kohler Act, discussed above,[41] as permanently taking the whole right to mine coal on an owner's land.

Accordingly, the idea of conceptual severance would enforce the finding of a regulatory taking in *Pennsylvania Coal*,[42] as government regulation effectively seized a single property interest. While regulation may not interfere with the whole of an owner's property interests, if the owner can prove that the government has effectively taken one such interest then the owner may make a case for a regulatory taking.

5. An Ad Hoc Determination

However, the Supreme Court "quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."[43] Courts consequently analyze the

38 *Id.* at 2082.

39 Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1676 (1988) ("Thus, this strategy hypothetically or conceptually 'severs' from the whole bundle of rights just those strands that are interfered with by the regulation, and then hypothetically or conceptually construes those strands in the aggregate as a separate whole thing.").

40 *Id.*

41 *See supra* text accompanying notes 33–36.

42 Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922).

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

particular circumstances and make an ad hoc determination as to whether government action has wrought a regulatory taking.[44]

The Supreme Court in *Penn Central* explicitly stated, however, that interference with distinct investment-backed expectations and diminution in value are among the factors that have "particular significance" in making this determination.[45] One cannot definitively predict how the court would decide every case in which plaintiffs argue for restrictive antismoking laws as regulatory takings; the determination is too fact specific. This Note nevertheless sets out the best case that potential plaintiffs could urge upon the court.

II. RESTRICTIVE ANTISMOKING LAWS AS REGULATORY TAKINGS

Applying the above factors,[46] this Note argues that in certain factual scenarios restrictive antismoking laws constitute regulatory takings. These laws ban smoking in all public indoor areas and effectively take bar and restaurant owners' land. Subsequently, this government action requires just compensation to injured property owners.

A. Land-Use Regulation

Before analyzing the specifics of restrictive antismoking laws as takings, this Note must clear an initial hurdle. Any discussion of regulatory takings presumes that the government action in question affects the use of land.[47] Consequently, the court must find restrictive antismoking laws to be land-use regulations before ruling that such laws constitute takings.

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44 *Id.*

45 *Id.*

46 *See supra* Part I.B.

47 A survey of cases dealing with restrictive antismoking laws reveals that courts choose to sidestep this issue. *See, e.g.*, D.A.B.E., Inc. v. City of Toledo, 292 F. Supp. 2d 968, 972 n.2 (N.D. Ohio 2003) ("A survey of takings law reveals that nearly every takings case deals with a land-use regulation. I will assume without deciding that the [restrictive antismoking] ordinance at issue here, while not technically a land-use regulation, is sufficiently analogous to such regulations that the same legal principles apply."), *aff'd*, 393 F.3d 692 (6th Cir. 2005); City of Tucson v. Grezaffi, 23 P.3d 675, 684 (Ariz. Ct. App. 2001) (assuming that the restrictive antismoking "ordinance somehow constitutes a land use regulation rather than a health provision that merely regulates conduct" before analyzing the takings claim); Found. for Indep. Living, Inc. v. Cabell-Huntington Bd. of Health, 591 S.E.2d 744, 754 (W. Va. 2003) (limiting implicitly "application of this constitutional provision [West Virginia's equivalent to the Fifth Amendment] to various situations involving land-use regulation").

Justice John William Graves, sitting on the Supreme Court of Kentucky, offers perhaps the best explanation for why the court should treat restrictive antismoking laws as land-use regulations.[48] Justice Graves argues that the Lexington-Fayette County ordinance banning smoking in all public indoor areas requires just compensation to property owners.[49] Justice Graves states that the "ordinance is oppressive because it operates as a regulatory partial taking of private property without just compensation."[50] It warrants mentioning that this restrictive antismoking law struck Justice Graves so forcefully as constituting a regulatory taking that he raised the issue sua sponte in penning the lone dissent to an opinion that upheld the restrictive antismoking law.[51]

In support of the notion that the restrictive antismoking law represents land-use regulation, Justice Graves writes:

> Use is an essential attribute of ownership. . . .
>
> . . . .
>
> The actions of the Lexington-Fayette Urban County Government are comparable to those in centrally-planned economies where property tends to be managed by the state and government officials decide how to use those resources. The system of private property ownership works best when the individual holds the right to manage his property. . . .

48 *See* Lexington Fayette County Food & Beverage Ass'n v. Lexington-Fayette Urban County Gov't, 131 S.W.3d 745, 757 (Ky. 2004) (Graves, J., dissenting) (arguing that the restrictive antismoking law in question is unconstitutional).

49 *Id.* The ordinance allowed for limited exceptions "such as dwellings and government buildings." *Id.* at 749 (majority opinion). Justice Graves "would strike down the ordinance as being arbitrary and oppressive." *Id.* at 757 (Graves, J., dissenting).

50 *Id.* at 757 (Graves, J., dissenting).

51 The Food and Beverage Association had argued that the ordinance was unconstitutional as an intrusive extension of the state's police power and that it was void-for-vagueness. *Id.* at 752–53 (majority opinion). Property rights figured only in the association's claim that the ordinance "infringe[d] on the right of business owners to conduct their business without impermissible interference from government." *Id.* at 752. While this argument may have suggested elements of a regulatory taking, the association never framed it as such. The court ultimately found the ordinance to be a valid exercise of the state's police power. *Id.* at 752; *see infra* Part II.B. Had the association argued more succinctly for the restrictive antismoking law as a regulatory taking, the court would have moved into an ad hoc determination in examining the above factors. *See supra* Part I.B. One can only speculate as to how this determination would have resulted, but perhaps Justice Graves' opinion would have enjoyed a louder voice in the decision.

> . . . [W]hen a businessman is forced to effect an unwanted smoking policy on his own property, the government is taking part of his property by regulation.[52]

Justice Graves binds use to ownership of property. The government is essentially aiming to manage privately owned property. Subsequently, interference with an owner's free use of his property is a taking.

That the restrictive antismoking law may "promote the health, safety, morals or general welfare of the people"[53] does not alter the fact that it interferes with a bar or restaurant owner's use of his privately owned property. Furthermore, to call such a restrictive antismoking law a "health provision that merely regulates conduct"[54] forgets that the law specifically restricts the use of such proprietors' land. Thus, Justice Graves' reasoning compels the finding that restrictive antismoking laws function as land-use regulations.

B. State Police Power

State governments have the power to regulate the health, safety, and morals of the people.[55] To promote this general welfare, the government often passes laws that infringe upon the rights of individuals for the benefit of the greater good. Government takings offer a clear example. Returning to the example of the homeowner on whose front lawn the state installed a road sign,[56] note that the homeowner suffers a permanent physical occupation on his lawn but that countless drivers benefit from the road sign's information.

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52 *Lexington*, 131 S.W.3d at 757–58 (Graves, J., dissenting). Justice Graves also relies on the lessons of history. Borrowing from an eighteenth century case, he writes:

> Property rights have crucially contributed to our freedom and prosperity. . . . [T]he United States Supreme Court noted that the "right of acquiring and possessing property, and having it protected, is one of the natural, inherent and inalienable rights of men . . . . The preservation of property then is a primary object of the social compact."

Id. at 758 (quoting Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 310 (1795)). Borrowing next from the twentieth century, Graves writes that "the Supreme Court stated, 'Property does not have rights. People have rights. . . . In fact, fundamental interdependence exists between the personal right to liberty, and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.'" *Id.* (quoting Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972)).

53 *Id.* at 749 (majority opinion).

54 Found. for Indep. Living, Inc. v. Cabell-Huntington Bd. of Health, 591 S.E.2d 744, 754 (W. Va. 2003).

55 *Lexington*, 131 S.W.3d at 749.

56 *See supra* Part I.A.1.

This ability to regulate, however, may require the government to compensate the individual, as it would the example homeowner. Stated simply, just because the government can do something does not mean that the government can do it for free. While opponents will admit the above as true, they will argue simply that some regulations, as valid exercises of the state's police power, do not require compensation. The police power is "[t]he inherent and plenary power of a sovereign to make all laws necessary and proper to preserve the public security, order, health, morality, and justice."[57] The Supreme Court, in *Hadacheck v. Sebastian*,[58] has suggested that, under the police power, a law protecting society from a public nuisance does not qualify as a regulatory taking notwithstanding any loss that the law may occasion.[59]

In *Hadacheck*, the City of Los Angeles passed an ordinance making it unlawful to operate a brick yard within described city limits.[60] The city was expanding its residential areas.[61] Plaintiff, however, had purchased land that was, at the time, outside existing city limits and distant from any dwellings; plaintiff neither believed nor expected that the property would eventually be annexed as part of the city.[62]

Though the Supreme Court denied plaintiff any recovery, the Court states that the "police power of a state cannot be arbitrarily exercised."[63] The government need not pay property owners for losses that result from regulations proper under the police power. But when regulation reaches beyond the police power, the government must compensate injured property owners.

Restrictive antismoking laws differ greatly from the type of measure that the Supreme Court upheld in *Hadacheck*. The ordinance in question declared brick yards to be a nuisance in "'particular circumstances and in *particular localities*.'"[64] To make way for an expanding residential area, the City of Los Angeles by necessity banned this heavy industry. Restrictive antismoking laws, however, ban smoking in bars and restaurants irrespective of both their particular circumstances and localities. These laws affect bars and restaurants everywhere and, unlike *Hadacheck*, are blind to the surrounding areas. Instead, these laws

57 BLACK'S LAW DICTIONARY 1196 (8th ed. 2004).

58 239 U.S. 394 (1915).

59 *Id.* at 410–12; *see supra* note 21.

60 *Id.* at 404.

61 *Id.* at 409.

62 *Id.* at 405.

63 *Id.* at 410.

64 *Id.* at 411 (quoting Reinman v. Little Rock, 237 U.S. 171, 176 (1915)) (emphasis added).

reach into bar and restaurant owners' property and regulate the land use therein.[65]

While a brick yard may have posed a public nuisance in a residential neighborhood, smoking within a bar or restaurant does not pose a public nuisance in any neighborhood—for the most part, one would have to enter a bar or restaurant before even realizing that people within were smoking.[66] Ironically, restrictive antismoking laws may result in a public nuisance in forcing smokers outside and onto streets and sidewalks surrounding affected bars and restaurants. Those in the surrounding area must deal with the noise and blocked causeways that such a group of, often inebriated, people is likely to cause. Thus, restrictive antismoking laws represent arbitrary exercises of the state's police power and are vulnerable to scrutiny as regulatory takings.

C. Penn Central *Analysis*

The finding that restrictive antismoking laws function as land-use regulations beyond the purview of the state government's police power invites a regulatory taking analysis. Under the Supreme Court's holding in *Penn Central*, a potential plaintiff must employ the balancing factors discussed above[67] to convince the court that a restrictive antismoking law effects a regulatory taking of his property; the court will subsequently weigh the evidence in an ad hoc determination on the facts. Admittedly, these laws aim to protect people in public indoor areas, including bar and restaurant employees, from the harms of secondhand smoke. Not surprisingly, the *One-Year Review* of New York's restrictive antismoking law found that air quality had improved in bars and restaurants.[68]

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65 *See supra* Part II.A.

66 Neither the operation of a brick yard nor smoking would seem to be a nuisance per se.

67 *See supra* Part I.B.

68 ONE-YEAR REVIEW, *supra* note 4, at 1 ("Air quality in bars and restaurants has improved dramatically . . . ."). Furthermore, the report states that

> [t]he Health Department conducted an air quality survey of various indoor and outdoor locations throughout the City in August 2002, prior to the implementation of the Smoke-Free Air Act. The Department found that the average air pollution levels in bars that permitted smoking were as much as 50 times higher than at the entrance to the Holland Tunnel at rush hour.
>
> The Department returned to the same locations in May 2003, after the Smoke-Free Air Act went into effect, and documented substantial improvements in air quality.

Id. at 5. On worker protection, the report finds that "within a short period after the implementation of the Smoke-Free Air Act, 150,000 fewer adult New Yorkers reported being exposed to second-hand smoke at work." *Id.* at 6.

However, restrictive antismoking laws deny owners full economic use of their land, notwithstanding the evidence that these laws improve air quality. Restrictive antismoking laws direct an owner as to how he may use his land, often contrary to the owner's expectations regarding the property. Moreover, these laws diminish business from smoking customers and have a deleterious economic impact to the owner. Applying the balancing factors outlined above demonstrates that in certain factual scenarios restrictive antismoking laws result in a regulatory taking and thus require just compensation.

1. Interference with Distinct Investment-Backed Expectations

Regulation that interferes with a property owner's expectations as to use of his land may constitute a regulatory taking and thus require just compensation.[69] Two related expectations seem appropriate in the case of restrictive antismoking laws: one, that an establishment will benefit from customers coming specifically to smoke; the other, that no one will deny a bar or restaurant the right to open its doors to smokers and to allow smoking on the premises. Restrictive antismoking laws may interfere with both of these expectations.

Using New York's smoking ban as the model, the legislature seems to have consciously avoided interference with the first expectation. The statute provides exemptions for retail tobacco businesses, cigar bars, and enclosed rooms that are being used exclusively to promote and sample tobacco products.[70] This exemption forgets, however, that owners may have designed a club that offers the ability to not only make purchases from a cigar bar, but also smoke throughout the club. Restrictive antismoking laws may deter customers that now have to smoke such newly purchased cigars either in an enclosed room or not at all.

Furthermore, the law severely interferes with the second expectation. It completely prohibits a bar or restaurant from allowing smoking. A bar or restaurant owner may thus argue that restrictive antismoking laws interfere with a distinct investment-backed expectation.

To prove this interference, a claimant must overcome the issue of notice. Because of the long history of smoking regulation,

> [b]usinesses dependent in whole or part on patronage by smokers, and those who invest in such businesses and seek to make

69 *See supra* Part I.B.1.

70 N.Y. PUB. HEALTH LAW § 1399-q (McKinney 2002 & Supp. 2005). The statute is also inapplicable to private areas, such as homes, hotel rooms, membership associations, and outdoor dining areas (subject to further restrictions). *Id.*

> their livelihoods from them, have thus long been on notice that the value of their investments, and implicitly, the ability to profit from such businesses, may be affected adversely by continuing governmental efforts to reduce exposure to second-hand smoke.[71]

By this reasoning, New York's bar and restaurant owners should have tempered their expectations of a profitable investment with those of impending government regulation. Subsequently, turning to the legislative history that preceded New York's restrictive antismoking law, one can examine what notice the state legislature had given such owners. In the findings of a 1989 antismoking statute, the legislature states that "it is in the best interests of the people of this state to protect nonsmokers from involuntary exposure to secondhand tobacco smoke in indoor areas open to the public, food service establishments, and places of employment."[72] This would presumably function as notifying potential bar and restaurant owners that theirs was a "regulated field" and that "subsequent amendments" would perhaps follow.

What then was a potential investor to make of the legislature's next finding that "*a balance must be struck* between safeguarding citizens from such involuntary exposure to secondhand tobacco smoke and *the need to minimize governmental intrusion into the affairs of its citizens*"?[73] This would seem to indicate that the government would not unnecessarily intrude upon an owner's free use of his property. It suggests balancing between restricting secondhand smoke in public indoor areas and upholding free property rights. Thus, a potential investor should have anticipated some antismoking regulation but not an absolute ban.

Owners who had previously invested in separate rooms for smoking can make out a particularly strong case for a regulatory taking under this factor. Consider the example of Antonio Avanzato, the coowner of Stella Luna, a restaurant in Oneonta, New York. He spent $45,000 in 2000 on "a separate smoking lounge off the bar, a 20-by-40-foot room with comfortable furniture and humidors. His employees d[id]n't serve in the room, which ha[d] its own ventilation system."[74]

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71 D.A.B.E., Inc. v. City of Toledo, 292 F. Supp. 2d 968, 972 (N.D. Ohio 2003) (citing *In re* Blue Diamond Coal Co., 79 F.3d 516, 525–26 (6th Cir. 1996)), *aff'd*, 393 F.3d 692 (6th Cir. 2005). "'Those who do business in [a] regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end.'" *Id.* at 972–73 (quoting FHA v. Darlington, Inc., 358 U.S. 84, 91 (1958)).

72 Act of July 5, 1989, ch. 244, § 1, 1989 N.Y. Laws 2328.

73 *Id.* (emphasis added).

74 Michael Virtanen, *Smoking Waivers a Hard Sell*, ALBANY TIMES UNION, Mar. 21, 2004, at D8.

Clearly, Avanzato expected smoking regulation and constructed his bar accordingly, making the necessary investment to protect his employees and accommodate his smoking customers. Just as clear is the fact that Avanzato never expected the absolute smoking ban that came in 2003. Avanzato relied on the state of the law at the time of his investment only to then suffer economic loss as further government regulation moved far beyond what he could have reasonably expected. As he said, "'July 24th [2003] we had to put up the no-smoking sign. Basically my $45,000 room turned into a coat room for the winter. . . .'"[75] New York's restrictive antismoking law does not represent the balancing that an investor should have rightly expected; it is a "subsequent amendment" that goes too far.[76]

By contrast, note that the United States District Court for the Northern District of Ohio upheld a law that prohibited smoking in public indoor areas "except in a 'separate smoking lounge' designated for the exclusive purpose of smoking."[77] While both the State of Ohio and City of Toledo had restricted smoking in public indoor areas over twenty-five and fifteen year periods, respectively, the "subsequent amendment" in question aligned with what a potential investor should have expected—further regulation.

Restrictive antismoking laws ban rather than regulate smoking in public. Consequently, the legislature never notified potential investors that such extreme interference may have been forthcoming. Just compensation is necessary to account for blocking distinct investment-backed expectations.

2. Diminished Economic Value

Regulation that diminishes the economic value of privately owned property may require just compensation for the owner.[78] Again using New York's Smoke-Free Air Act as an example, the debate over diminution in value becomes clear. Property owners argue that their businesses have suffered as the result of this law. In New York City, "76 percent of bars and nightclubs experienced a 30 percent de-

75 *Id.* While denying the applications of thirteen other bar, restaurant, and business owners, the New York State Health Department granted Avanzato's restaurant, Stella Luna, a waiver from the restrictive antismoking law in 2004. *Id.*; *see infra* Part II.D.1.

76 *See infra* Part II.D.

77 D.A.B.E., Inc. v. City of Toledo, 292 F. Supp. 2d 968, 969 (N.D. Ohio 2003), *aff'd*, 393 F.3d 692 (6th Cir. 2005).

78 *See supra* Part I.B.2.

cline in business" because of the Smoke-Free Air Act.[79] Smoking customers choose to stay at home or, at least, outside.[80] To some, especially smokers, this may seem to be the logical effect of the law.

New York State, on the other hand, has proposed that the restrictive antismoking law may actually have improved business.[81] In support of this tenet, the state offers several pieces of data.[82] Between April 1, 2003, and January 31, 2004, bar and restaurant business tax receipts, for example, "were up 8.7% from the same period in 2002–2003."[83] Furthermore, the Department of Labor finds that the number of bars and restaurants remained "essentially unchanged" between the third quarter of 2002 and that of 2003—"an improvement compared with the same period in 2002, during which 280 more bars and restaurants closed than opened."[84]

These data seem to take an overly optimistic view of the law's effects, however. Serious issues exist as to causation. First, the test periods only loosely correspond to the passage of the state's restrictive antismoking law. It is consequently difficult to fit the law's influence on the numbers into the analysis. Second, the state's conclusions forget that a number of other factors may have contributed to the improved business figures for New York City's bars and restaurants in 2003–2004.

A more perceptive look at the *One-Year Review* reveals that the state itself may not stand wholly behind its own assertions. The report mentions repeatedly, and yet almost parenthetically, "New York City's improved financial climate" since the passage of the Smoke-Free Air Act.[85] The report cannot mean to suggest that the restrictive antismoking law caused this upturn, and so we read the generalization that

79 Adrienne T. Washington, *Smoking Bans Could Snuff out Small Bars, Eateries*, WASH. TIMES, Mar. 23, 2004, at B2 ("[L]egislators are considering amendments to the smoking ban.").

80 *Id.* ("After a visit in the summer to New York City to watch her then-boyfriend's band, Ms. Mitchell [public advocate who went on to start the website www.bantheban.org] said she noticed many people standing on the streets outside restaurants. Few went in to watch the performance.").

81 ONE-YEAR REVIEW, *supra* note 4, at 1 ("One year later, the data are clear. The City's bar and restaurant industry is thriving . . . .").

82 *Id.* at 2 ("Data from the New York City Department of Finance show that the amount of money spent in New York City's bars and restaurants has increased over the past year.").

83 *Id.* The reader should initially note that the law was not effective until July 24, 2003. *See* Act of Mar. 26, 2003, ch. 13, § 16, 2003 N.Y. Laws 117.

84 ONE-YEAR REVIEW, *supra* note 4, at 3. The reader should again note that the law was not effective until almost the end of this test period.

85 *Id.* at 2.

"after a difficult 2001 and 2002, more people are spending more money in New York's bars and restaurants."[86] While financial factors tend to show that bars and restaurants can thrive despite New York's restrictive antismoking law, an improved economy does not absolve the state for interfering with owners' property and decreasing business from smoking customers. The report concludes:

> As New York City, home of the world's finest restaurants and most celebrated nightlife, emerges from the difficult economic times of 2001 and 2002, so has its bar and restaurant industry. Economic data confirm that New Yorkers love their bars and restaurants, and so do the millions of tourists that come here every year to enjoy all that the City has to offer. Thanks to the Smoke-Free Air Act, the City's bar and restaurant experience is a safer and healthier one for everyone.[87]

Thus, the *One-Year Review* seems ultimately to back off its position that the restrictive antismoking law improved the bar and restaurant business in New York City and instead extols its health benefits, perhaps only coincidental with the improving city economy.

Having debunked the myth of the law's economically beneficial effects on the bar and restaurant business, the analysis must continue to prove that the law has actually diminished the value of the owners' property. In addition to the statistic offered above in support of economic injury in New York,[88] this Note now expands its analysis to include a survey of other states and municipalities that have passed restrictive antismoking laws.

In California, the first state to pass such a law, "[t]here was talk of California bars being 'raped,' of a sales decline of 26 percent, of 'definitive evidence' and 'conclusive proof' that the smoking ban was an economic nightmare."[89] In Maine, business has declined by thirty percent at some bars, especially those close to the New Hampshire border;[90] New Hampshire has no such

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86 *Id.* at 4.

87 *Id.* at 6. This Note does not attempt to explain the causes for the "difficult economic times of 2001 and 2002" or the subsequent recovery, but the effects of September 11, 2001 should be prominent in the reader's mind.

88 *See supra* text accompanying note 79.

89 Sanders, *supra* note 2, at 20. A different study found no such effect. *Id.* However, "California's ban has not been as devastating . . . because it has numerous exemptions and good weather permits owners to operate outdoor smoking sections." Washington, *supra* note 79.

90 Chris Churchill, *Bar Smoking Ban: Air Cleaner, Business Down*, KENNEBEC J. (Me.), June 3, 2004, at B5 ("'Business is off big-time,' Dick Grotton [president of the Maine Restaurant Association] said. 'The law continues to be a source of extreme irritation.'").

ban.[91] Montgomery County, Maryland, just outside Washington, D.C., has seen "total sales decline an average of 30 percent during the week and 50 percent during the weekend" in smaller establishments.[92] Moreover, "[o]fficials in Austin, Texas . . . revoked a ban after its devastating effects on the local economy."[93]

The economic effect of restrictive antismoking laws is clearly a hot topic of debate. The statistics offered above would seem to prove that smoking bans diminish the value of bars and restaurants in restricting their client bases and thus harming the overall business. New York State, meanwhile, has failed in its whitewashing attempt to show that the law has improved business in New York City's bars and restaurants; it can hope, at most, that the law has had no economic effect.

Admitting this controversy over statistical interpretation, small and "border" establishments can make out the best case for a regulatory taking under the diminution-in-value test. At the very least, it is hard even for proponents of restrictive antismoking laws to argue that such bans do not have a devastating economic effect on small bar and restaurant owners. Some may have a regularly smoking clientele;[94] others may simply not be able to survive the loss of a significant class of customers. These establishments cannot afford to lose a large source of their business. It also seems reasonable to conclude that restrictive antismoking laws diminish the economic value of small bars more so than that of small restaurants, if only because smoking is traditionally more prevalent within bars.[95] Similarly, as is the case for some Maine and Washington, D.C., establishments discussed above,[96] bars and restaurants close to state borders will lose customers who

91 *Id.* As Washington, D.C., considered a restrictive antismoking law, the same dilemma emerged because "smokers [will] opt to cross the Potomac River to the tobacco-friendly state of Virginia." Washington, *supra* note 79. This Note does not attempt to examine the question of whether the need for national uniformity in smoking laws requires federal intervention.

92 Washington, *supra* note 79.

93 *Id.*

94 *Id.* ("Alvin and Adrienne Carter, owners of the popular Hitching Post on Upshur Street NW [Washington, D.C.], face a similar fate [to bars and restaurants whose businesses have suffered as the result of restrictive antismoking laws]. Their small soul-food restaurant and bar will not survive if they lose their regular clientele—the majority of whom are smokers.").

95 *Id.* ("Proponents of smoking bans argue that these bans do not cause economic hardship for restaurant owners. But many of the studies do not include places such as bowling alleys, bingo parlors, pool halls or bars where food is not sold. . . . [M]ost of those studies refer to big restaurant chains, not to family-owned operations.").

96 *See supra* notes 90–92 and accompanying text.

take their business to the bars and restaurants of neighboring states and municipalities that continue to allow smoking therein.

Thus, restrictive antismoking laws diminish the value of affected bars and restaurants, especially small establishments that cannot afford to lose smoking customers and those that will lose customers who choose to avoid the law by crossing state borders. The diminution-in-value test supports a finding that restrictive antismoking laws work a regulatory taking and consequently require just compensation for injured owners.

3. Analogue to Physical Interference

It is imperative to again note that the Supreme Court in *Penn Central* states that the "economic impact of the regulation on the claimant and, *particularly*, the extent to which the regulation has interfered with distinct investment-backed expectations are . . . relevant considerations" in determining whether government regulation effects a taking.[97] The Court mentions the character of governmental action factor in what seems to be a tertiary manner.[98] Thus, while this factor appears to be the greatest possible impediment that a potential plaintiff would face in arguing for a restrictive antismoking law as a regulatory taking, the court would give primary importance to the law's interference with distinct investment-backed expectations—the factor that most strongly supports the argument for restrictive antismoking laws as regulatory takings, as discussed above.[99]

The character of governmental action factor directs the court to find a taking when government regulation approximates physical seizure or invasion of an owner's land. Though restrictive antismoking laws do not involve an actual physical interference with an owner's land, these laws quickly lend themselves to the legal analogy for which the court would look in its takings analysis. The clearest example is again that of an owner such as Antonio Avanzato who has previously invested in a separate room for smoking. A restrictive antismoking law essentially ousts the owner from this room through direct interference with his property use. Stated differently, the government essentially appropriates an owner's separate room and directs the owner to use the room for purposes other than smoking—contrary to the owner's business discretion.

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97 Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (emphasis added).

98 *Id.* (stating as a relevant factor, after distinct investment-backed expectations and economic impact, "[s]o, too, is the character of the governmental action").

99 *See supra* Part I.B.1.

Similar reasoning, though under an admittedly weaker analogy, applies to "border" establishments.[100] Restrictive antismoking laws effectively remove an owner's property used previously for smoking and relocates the space across the border to a state that permits smoking therein. A potential plaintiff must analogize the restrictive antismoking law to an actual appropriation of his property as best he can on the facts emphasizing not only that every regulatory taking case requires an ad hoc determination, but also that the character of the government action factor receives only tertiary attention under *Penn Central.*

4. Denial of Specific Property Interest

Government regulation that essentially denies an owner a single estate in his property may constitute a regulatory taking.[101] Scholars have long recognized property rights as a "bundle of sticks."[102] Each stick symbolizes a different entitlement in the land. Conceptual severance would support the finding of a taking anytime the government seizes an individual stick or property right.[103] In a regulatory taking, government action effectively denies an owner a single land-use stick.

Restrictive antismoking laws prevent bar and restaurant owners from the free use of their property. Sticks within the bundle include the different rights to use one's land as one chooses.[104] These bans preclude smoking, a land use from which such owners had previously benefited. Recognizing the admittedly minor right to allow smoking as a property right, or single stick, it is evident that restrictive antismoking laws remove this stick from an owner's bundle. While conceptual severance has met with some skepticism,[105] the Supreme

100 *See supra* Part II.C.1.

101 *See supra* Part II.C.2.

102 *See, e.g.*, Radin, *supra* note 39, at 1678 ("[E]very regulation of any portion of an owner's 'bundle of sticks,' is a taking of the whole of that particular portion considered separately.").

103 *Id.*

104 *Id.* (noting that "[e]very curtailment of any of the liberal indicia of property" may constitute government seizure of a property right stick from out of an owner's bundle).

105 *See generally* Keystone Bituminous Coal Ass'n v. DeBenedictus, 480 U.S. 470, 497–501 (1987) (describing Supreme Court precedent that views property rights as a whole rather than in discrete segments and declining to treat "coal in place" and "support estate" as separate property segments of petitioners' coal reserves); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130–31 (1978) ("'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular government action has effected a taking, this Court

Court has more recently favored this test as part of the takings analysis.[106]

An injured property owner may use conceptual severance to buttress his case for interference with distinct investment-backed expectations and diminution in value. The government has effectively outlawed what was once a legal use of property[107] and consequently seized a specific right from out of the owner's bundle of sticks. Accordingly, just compensation is due.

D. Restrictive Antismoking Laws Go "Too Far"

Restrictive antismoking laws result in negative economic effects and interference with free property use. The problem is "'that the regulation has in substance "taken" . . . [bar and restaurant owners'] property—that is, the regulation "goes too far."'"[108] The government interest in protecting people from the dangers of secondhand smoke is clear. Restrictive antismoking laws, however, take this objective too far without compensation, forgetting the necessary balance with property rights.[109]

1. Partial Regulatory Takings and the New York Waiver Provision

Restrictive antismoking laws result in partial, or noncategorical, takings of restaurant and bar owners' property.[110] The bans do not deny owners all economic use of their land, but the "level of intrusion" completely outweighs the "government interest at stake."[111] A survey of recent case law that has examined antismoking laws as regulatory takings suggests that restrictive antismoking laws, such as New York's 2003 ban, may invite such a finding. The courts have refused to find that laws confining smoking to a designated section within public

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focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole . . . .").

106 Radin, *supra* note 39, at 1678 ("[L]ooking back on the Court's recent takings jurisprudence, a trend toward conceptual severance is already in progress.").

107 *See* Lexington Fayette County Food & Beverage Ass'n v. Lexington-Fayette Urban County Gov't, 131 S.W.3d 745, 757 (Ky. 2004) (Graves, J., dissenting) ("[T]obacco is a legal product and smoking a legal activity . . . .").

108 D.A.B.E., Inc. v. City of Toledo, 292 F. Supp. 2d 968, 971 (N.D. Ohio 2003) (quoting MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 348 (1986) (citing Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922))), *aff'd*, 393 F.3d 692 (6th Cir. 2005).

109 *See supra* text accompanying note 73.

110 *See supra* text accompanying note 32.

111 *D.A.B.E.*, 292 F. Supp. 2d at 971.

indoor areas function as regulatory takings.[112] The New York law, however, allows for no similar exception; the law effectively bans smoking in all bars and restaurants.[113] As for restrictive antismoking laws comparable to that in New York: one sparked a vigorous dissent raising the issue of regulatory takings sua sponte;[114] and another seemingly forgot the possibility of finding a partial regulatory taking in an overly narrow approach to the issue.[115]

Moreover, again looking at New York's restrictive antismoking law as the model, the legislature has seemingly anticipated this argument—perhaps even conceded its validity. The New York statute allows for waiver of the ban if: "(a) compliance with a specific provision of this article *would cause undue financial hardship*; or (b) other factors exist which *would render compliance unreasonable*."[116] Any business that can prove that it lost at least fifteen percent of its profits as a result of the law can apply for a waiver.[117] If the restrictive antismoking law has an adverse economic effect or poses an unreasonable burden on the bar or restaurant owner's property, both factors indicative of a regulatory taking, then he may apply for a waiver. Rather than pay such an owner his deserved just compensation, the government chooses to lift the ban on an individual basis. This would seem to remedy the problem in New York if the government were to give the provision any teeth.

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112 *See, e.g., id.* at 969 (upholding an ordinance that prohibited smoking in enclosed public places, "except in a 'separate smoking lounge' designated for the exclusive purpose of smoking"); City of Tucson v. Grezaffi, 23 P.3d 675, 678 (Ariz. Ct. App. 2001) (upholding against regulatory taking challenge a law that "prohibits restaurant owners from allowing persons to smoke in restaurants except in a designated smoking area").

113 Limited exceptions apply, though these refer to individual places rather than separate areas therein. *See supra* note 70 and accompanying text. Nor does the outdoor exception alleviate the problem in the often harsh climate of the Empire State when compared to its effect in the Sunshine State, California. *See supra* note 89.

114 Lexington Fayette County Food & Beverage Ass'n v. Lexington-Fayette Urban County Gov't, 131 S.W.3d 745, 757–58 (Ky. 2004) (Graves, J., dissenting).

115 Found. for Indep. Living, Inc. v. Cabell-Huntington Bd. of Health, 591 S.E.2d 744, 754 (W. Va. 2003) ("[W]e find no constitutional violation because . . . *all economic use of the property is not destroyed as a result of the regulation*." (emphasis added)). Nowhere has this Note suggested that restrictive antismoking laws deny a restaurant or bar owner all economic use of his property. The position is untenable. The court's narrow finding here forgets not only to apply the balancing factors discussed above, *see supra* Part I.B, but also that a partial regulatory taking may exist under lesser intrusions.

116 N.Y. PUB. HEALTH LAW § 1399-u (McKinney 2002 & Supp. 2005) (emphasis added).

117 Virtanen, *supra* note 74.

However, as of March 21, 2004, the New York State Health Department had granted only a single waiver, while rejecting the applications of thirteen other bar, restaurant, and business owners.[118] At this time Scott Wexler, executive director of the Empire State Restaurant and Tavern Association, said that there were around one hundred waiver applications pending from business owners who could prove the necessary financial hardship.[119] The government thus seems reluctant to grant waivers that could alleviate the problem and make lawsuits unnecessary. Instead, owners denied waiver must argue that the restrictive antismoking law effects a regulatory taking of their property and seek compensation from the courts.

That the state has quantified the necessary economic loss may further affect the takings analysis. For instance, does a fifteen-percent loss of profits constitute a partial taking again that the government chooses to avoid, on only a case-by-case basis, in allowing for waiver? Is the related argument then that a loss of less than fifteen percent does not sufficiently diminish the property's economic value as to require waiver or just compensation? Most importantly, perhaps, a bar or restaurant owner whose business has suffered a fifteen percent loss in profits but whose waiver application failed can make out a case for a partial regulatory taking by pointing to the government's own standard of undue financial hardship.

2. Government Paternalism

A more general reason that restrictive antismoking laws go too far is "the need to minimize governmental intrusion into the affairs of its citizens,"[120] recognized by the New York legislature in 1989. Restrictive antismoking laws prohibit some business owners from using their property as they otherwise would and forget that individual owners could make the same determination on their own. A Maryland legislator, in considering a proposed restrictive antismoking law, called such a measure "'[g]overnment nannyism.'"[121] Owners should be free to make their own decisions, within reason, as to the use of their property.

For many, the controversy is about choice. In Washington, D.C., where legislators recently approved a restrictive antismoking law for

118 *Id.*

119 *Id.* Wexler called it "'astounding' that in almost a year the state ha[d] granted only one waiver" and mentioned also that "the guidance to applicants [wa]s vague." *Id.*

120 Act of July 5, 1989, ch. 244, § 1, 1989 N.Y. Laws 2328.

121 Washington, *supra* note 79.

the nation's capital,[122] an opponent had argued that the city "already 'has lots of options,' with more than 200 smoke-free bars and restaurants . . . [and another that] allows smoking only after 11 p.m."[123] Nonsmokers can choose to frequent such smoke-free establishments and thus enjoy the benefits of clean air. Similarly, prospective employees worried about the effects of secondhand smoke can limit their job searches to these smoke-free establishments. In cities already under a restrictive antismoking law, smokers do not have the same right to choose. To deny this choice again goes too far.[124]

However, these laws threaten the property rights of owners not those of patrons; the owners too have lost the right to choose. Justice Graves points out that both patrons and owners should share in this choice.[125] Owners, he argues, are better suited than the government to deal effectively with their clientele as the "American economic system works best when individuals are able to put resources to their most highly valued use."[126] An owner who chooses to allow smoking and suffers because others do not "will soon adjust, or go out of business."[127] Absent restrictive antismoking laws, some owners will decide on their own to limit smoking. Remember the example of Antonio Avanzato and his smoking lounge.[128] Or, consider the owner of a Maine off-track-betting parlor who, despite a seven percent loss in his business, said that he would not bring back smoking if voters or the legislature overturned the restrictive antismoking law because he "'enjoy[s] coming home not smelling like smoke.'"[129] These are choices

122 In January, 2006, the D.C. Council approved the bill, and Mayor Anthony A. Williams declined to veto. Eric M. Weiss, *Williams Lets City Smoking Ban Move on to Congress for Review*, WASH. POST, Jan. 31, 2006, at B4. The act then moved on to Congress, whose only response was to exempt itself from the citywide ban that consequently took effect in March, 2006. Anne E. Kornblut, *All (Puff) in Favor (Puff) Say Aye (Wheeze)*, N.Y. TIMES, Feb. 12, 2006, at WK3.

123 Washington, *supra* note 79.

124 *Id.* ("Taking away the options of smokers is too restrictive—maybe even fatally so—for the small establishments that want and need the business.").

125 Lexington Fayette County Food & Beverage Ass'n v. Lexington-Fayette Urban County Gov't, 131 S.W.3d 745, 757 (Ky. 2004) (Graves, J., dissenting). He states:

> Since tobacco is a legal product and smoking a legal activity, the private business owner should have the choice to either prohibit smoking in his or her establishment, or be permitted and required to warn patrons that smoking is allowed and that second-hand smoke presents a health hazard. Thus, both the business owner and the customer have freedom of choice.

Id.

126 *Id.*

127 *Id.*

128 *See supra* text accompanying notes 74–75.

129 Churchill, *supra* note 90.

that property owners are free to make absent restrictive antismoking laws. Under these absolute bans, however, there is no freedom to make the opposite choice.

3. Market Theory

Market theory would similarly support the argument that restrictive antismoking laws go "too far." Under this theory, the government should let the market determine whether smoking is economically desirable or not.[130] In the absence of restrictive antismoking laws, no one forces nonsmokers to go to bars or restaurants, yet these establishments continue to allow smoking and nonsmokers continue to visit them; potential employees too are never compelled to work at a smoke-filled bar or restaurant, but these establishments remain fully staffed. Normal market operation would reveal that allowing smoking in bars and restaurants is both economically desirable and profitable.

Government intervention is thus unnecessary and unwanted from the standpoints of both property owners and customers speaking through the free market. Restrictive antismoking laws interfere with the free function of the market and disturb this economic benefit to owners. Accordingly, restrictive antismoking laws go too far in restricting the use of property, and the government must justly compensate injured proprietors.

CONCLUSION

In the case of eminent domain a state government condemns an owner's land and the Fourteenth Amendment requires the state government to compensate the owner for his loss. The question of a regulatory taking is far more uncertain. The law offers very few categorical rules, and instead litigants and courts are left to argue over and decide upon the net effect of various balancing factors. Yet, in applying these factors to restrictive antismoking laws that continue to grow more prevalent throughout the nation, it seems clear that business owners can make a strong case that this government regulation has effectively taken their property.

Restrictive antismoking laws interfere with owners' expected use of their property. Bars and restaurants lose smoking customers and thus suffer decreased profits. The government action is analogous to

130 *See* Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 683 (1973) ("[O]ptimally efficient patterns of city development would evolve naturally if urban land markets were to operate free of imperfections; city planning or public land use controls would only make matters worse from an efficiency standpoint.").

physical interference with property and denies these owners a specific land use. Moreover, these laws go too far. The possibility that New York's waiver provision represents the state legislature's attempt to foreclose any regulatory taking challenge would seem to counsel in favor of such a judicial finding. What would a New York court say of an economically damaged bar or restaurant whose waiver application failed? What about states with restrictive antismoking laws that do not allow for such waivers?

Restrictive antismoking laws admittedly promote a legitimate state interest, but only through a significant intrusion into privately owned property. The bans erase a business owner's right to determine how he will use his own land. Just as an exercise of eminent domain or rezoning (in the absence of a public nuisance) requires the government to justly compensate property owners, so too must the government pay bar and restaurant owners whose land these restrictive antismoking laws partially take.

Increasing numbers of aggrieved business owners will continue to come forward as they are forced to shut their now smoke-free and less profitable establishments to the public, though no court has yet found a restrictive antismoking law to violate the Fourteenth Amendment. Thus, until a court follows in the footsteps of Justice Graves' dissent[131] and requires the government to justly compensate injured property owners, people will enjoy the clean air of bars and restaurants as well as the empty space smokers leave as they exit to have a cigarette. Anyone walking around New York City on a weekend can attest to that.

131 *Lexington*, 131 S.W.3d at 757–58.