

# **Balancing Rights and Regulations in a Time of Emergency**

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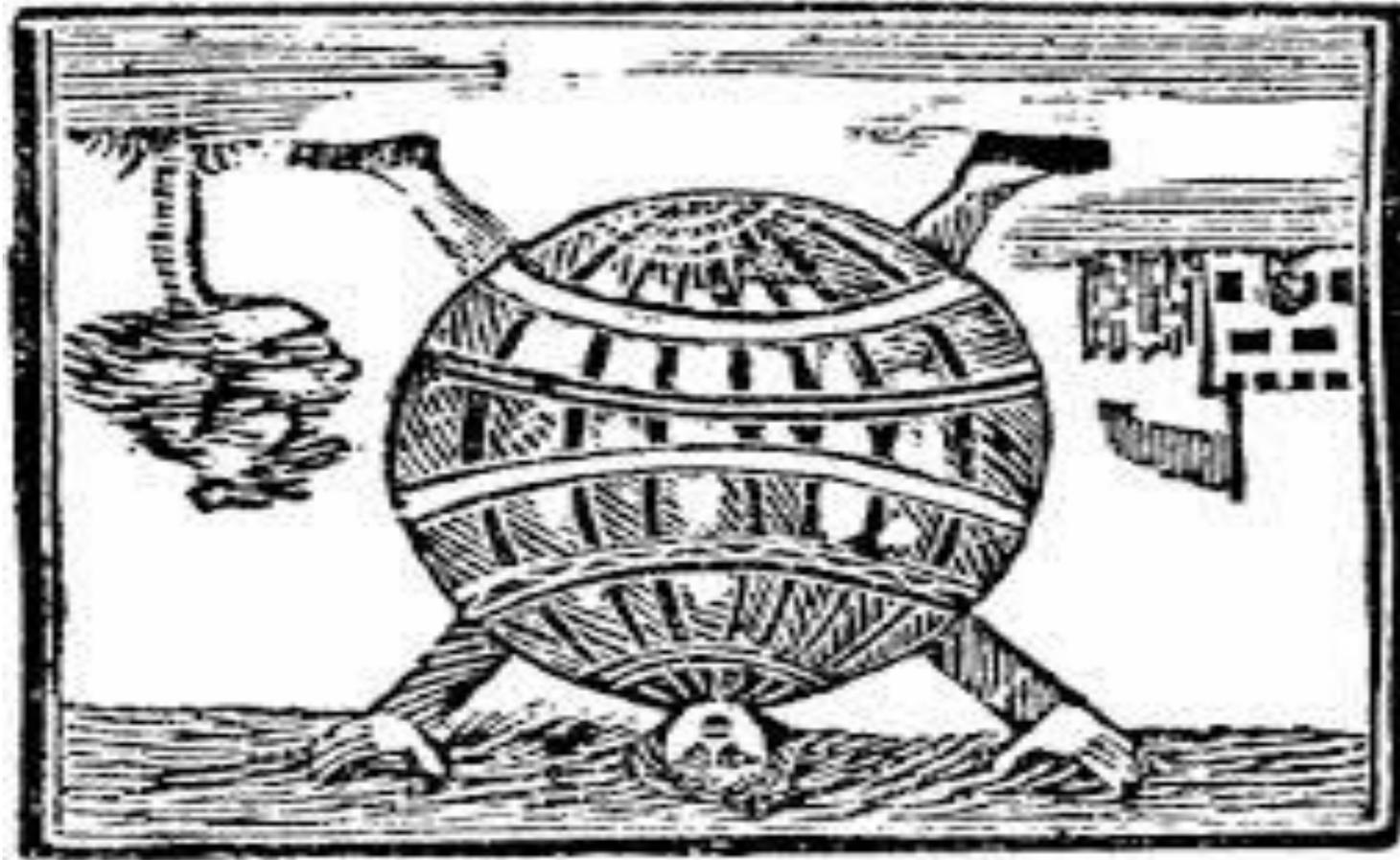
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# New York Case Law Didn't Change Much, but the World Did Turn Upside Down



## New York Case Law: Some Examples (2020)

- ▶ Single lot rezoning is still not spot zoning if done in accordance with...  
Preserve our Brooklyn Neighborhood v. City of NY (1<sup>st</sup> Dept.)
- ▶ Local zoning can still be preempted by state and federal utility laws.  
Empire Pipeline v. Town of Pendleton (WDNY)
- ▶ Standing is not so easy in SEQRA litigation.  
Schmidt v. Buffalo Planning Bd. (4<sup>th</sup> Dept.)
- ▶ Adopting incentive zoning does not require prospective weighing of costs and benefits. State law is not prescriptive. Brighton Grassroots v. Town of Brighton (4<sup>th</sup> Dept.)
- ▶ Hardships are often self-created.  
54 Marion Ave. v. Saratoga Springs (3<sup>rd</sup> Dept.)
- ▶ Denials of variances supported only by conclusory and uncorroborated evidence without empirical data lack a rational basis and are invalid. Simon v Englert, (2<sup>nd</sup> Dept.)

# Dwight Offered me \$150 to do the Pottsdam Porcelain Gardens Case

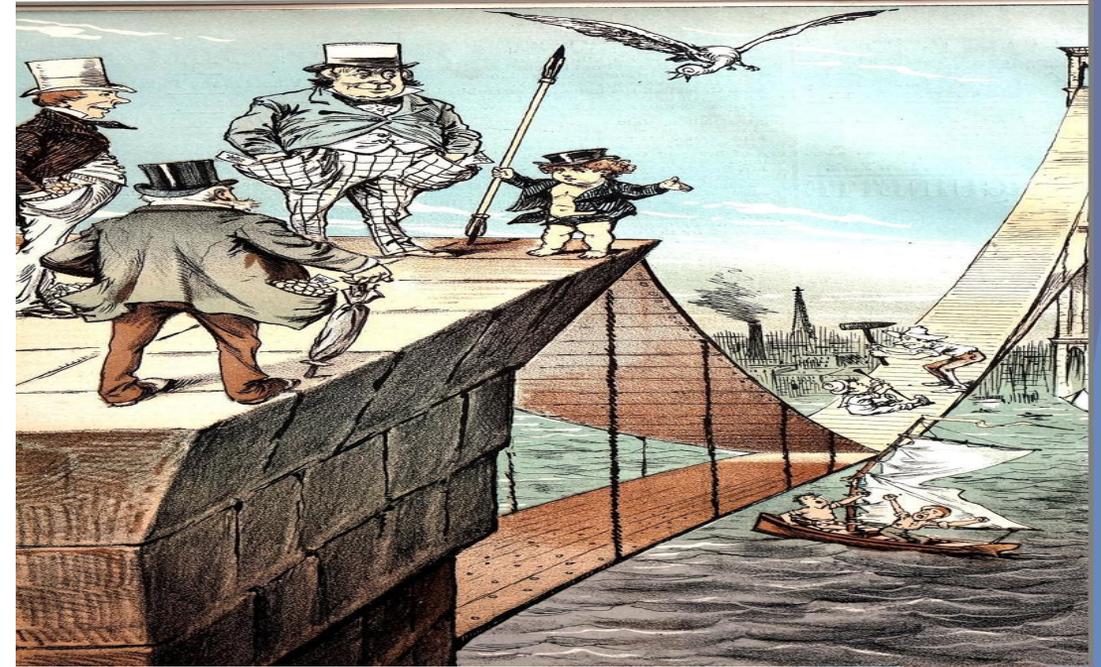


# Meanwhile, the World Turned ... Are these Land Use and Business Regulations Valid?

- ▶ Designation of non-essential businesses?
- ▶ De facto permanent closings?
- ▶ Temporary closings?
- ▶ Partial closings?
- ▶ Rent control?
- ▶ Profit adjusted recovery leases?
- ▶ Eviction moratoria?

# Are They

- ▶ Due Process Violations
- ▶ Regulatory Takings
- ▶ Ultra Vires
- ▶ Violations of Equal Protection
- ▶ Or... A Bridge too far; that is **Valid**
- ▶ What about the Barrett Court?



## Concerns About the First Case in the Justice Barrett Era

- ▶ Roman Catholic Diocese of Brooklyn v. Cuomo 11/25/20 - Temporarily restrained occupancy restrictions in houses of worship.
- ▶ No general holding on the extent of emergency powers except to say that “stemming the spread of COVID-19 is unquestionably a compelling governmental interest.”
- ▶ But the state goofed on the details: not “narrowly tailored.”
- ▶ A large store in Brooklyn could “literally have hundreds of people shopping there on any given day.” Yet a nearby church or synagogue, no matter how large, could have no more than 10 or 25 worshipers inside.
- ▶ It is important to properly tailor the regulations, particularly when restricting the Freedom of Religion where strict scrutiny reigns.

# Jacobson v. Massachusetts

## Deferential Standard Not Overruled

- ▶ 1905 SCOTUS case validated vaccination orders during a smallpox emergency. Defendant guilty.
- ▶ “The liberty secured by the Constitution of the U.S. does not impart an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint.”

# 1915 Hadacheck v. Sebastian

*business closures*

Brick kiln prohibited in a residential zone by local law

“It is to be remembered that we are dealing with one of the most essential powers of government,—one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily.”

# 1915 *Rienman v. Little Rock*

Local law prohibited the operating of an existing livery stable in the commercial district.

*“Granting that the business was not a nuisance per se, it was clearly within the police power of the state to regulate it.”*

*“And the only limitation upon the power [is]... that the power can not be exerted arbitrarily or with unjust discrimination”*

# 1928 Miller v. Schoene

nonessential businesses

Destruction of cedar trees to save apple orchards by state regulation upheld.

*“We need not weigh with nicety the question whether the infected cedars constitute a nuisance....”*

*“For where considerations of social policy are not unreasonable, [there is no] denial of due process.”*

# 1926 Euclid v Ambler Realty

protection of public health

- ▶ Police Power delegated to Village to Zone
- ▶ Due Process Violation Claimed
- ▶ Presumption of Validity
- ▶ Burden of Proof on the Challenger
  - ▶ Must prove that the law is arbitrary, unreasonable, capricious

# 1988 Pennell v. City of San Jose

Profit adjusted recovery commercial leases

The Court held that a rent control ordinance was rationally crafted to protect the financial investments of landlords while simultaneously preventing tenants from becoming victims of burdensome rent increases.

The Ordinance's purpose of preventing unreasonable rent increases caused by the city's housing shortage is a legitimate exercise of its police powers.

# 2002 Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency

moratoria on evictions - temporary closures

- ▶ A 32 month moratorium on all development was not a regulatory taking. The purpose of the moratorium was to give the Agency time to deal with the threat posed by land development
- ▶ Temporal suspension of property rights is not a taking.

# Local Emergency Powers and Limitations on Businesses

San Jose: adopted rent control.

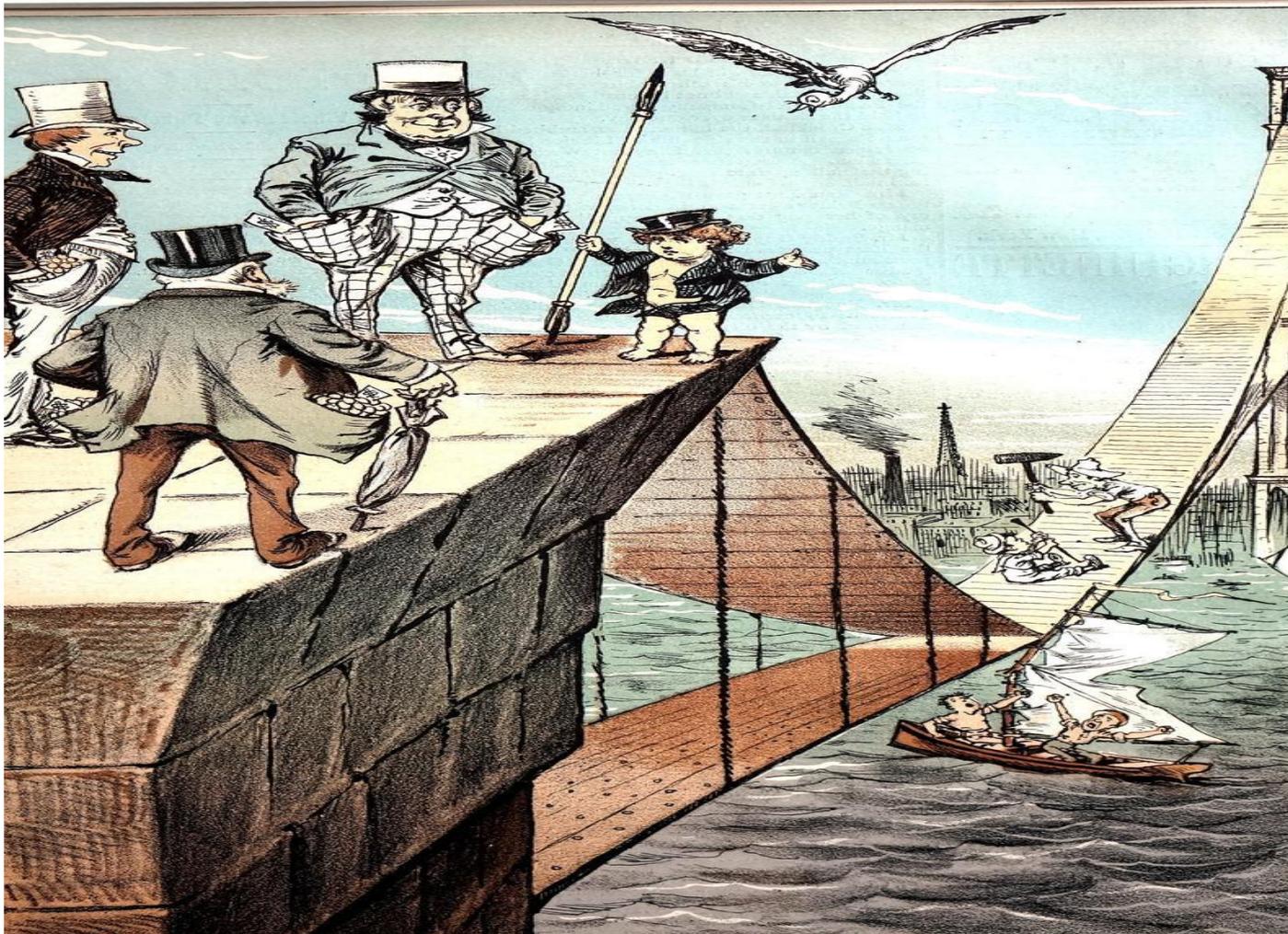
Little Rock: prohibited a livery stable.

Los Angeles: prohibited a brick kiln.

Euclid: controlled land use in part to protect the public health and safety.

Tahoe: moratorium on development ok

# SCOTUS PRECEDENTS -- A BRIDGE TOO FAR!



# Local Power in Public Health and Safety Emergencies

- ▶ Charters
- ▶ Constitutional or Legislated Home Rule
- ▶ General or Special Enabling Acts
- ▶ Dillon's Rule is dead: local governments have broad powers to act.
- ▶ Caveat: state emergency legislation can preempt local regulation.

# How to Create a Uniform System with State and Local Flexibility?

- ▶ Importance of nation-wide standards
- ▶ The police power is reserved to the states under the Tenth Amendment.
- ▶ Clear federal power to create standards and provide incentives or withhold assistance if standards are not followed.
- ▶ Query, source of federal power to override this state power?

# A Note on Nollan/Dolan 1987-1994

- ▶ Imposition of Higher Scrutiny on Land Use Approvals
- ▶ Essential Nexus, Rough Proportionality, Individualized Determination
- ▶ Did the Bridge Collapse?
- ▶ Did the approval process become fairer?
- ▶ Recall challengers burden: unreasonableness
- ▶ Will the Barrett Court expand the definition?

## Chapter Two - 2021

- ▶ What will the Biden Administration do with federal power and resources to create a uniform system?
- ▶ Will state emergency laws preempt local restrictions?
- ▶ How far will local governments be allowed to go under a more uniform and coherent system of law?
- ▶ Stay tuned: see you next year.

# **Thank You!**

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