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## The Coronavirus Pandemic Shutdown and Distributive Justice: Why Courts Should Refocus The Fifth Amendment Takings Analysis

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# THE CORONAVIRUS PANDEMIC SHUTDOWN AND DISTRIBUTIVE JUSTICE: WHY COURTS SHOULD REFOCUS THE FIFTH AMENDMENT TAKINGS ANALYSIS

*Timothy M. Harris\**

*The 2020 Coronavirus Pandemic and the ensuing shutdown of private businesses—to promote the public’s health and safety—demonstrated the wide reach of state and local governments’ police power. Many businesses closed and many went bankrupt as various government programs failed to keep their enterprises afloat.*

*These businesses were shut down to further the national interest in stemming a global pandemic. This is an archetypal example of regulating for the public health—preventing a direct threat that sickened hundreds of thousands of Americans. But some businesses were disproportionately hit while others flourished. Many who bore the brunt of these regulations sued, alleging their property was taken by the government without just compensation. These unfortunate businesses and individuals are unlikely to be successful, absent arbitrary action by the government, a physical invasion, or other egregious circumstances.*

*The Takings Clause is therefore woefully inadequate to provide what Aristotle called “distributive justice”—the equal distribution of benefits and burdens throughout society. Courts should therefore refocus the takings analysis to ensure fairness and justice by considering whether a regulation has a disproportionate, catastrophic, and sudden impact.*

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## I. INTRODUCTION

The 2020 Coronavirus/Covid-19 pandemic shutdown—in which state and local governments closed thriving businesses to stem the spread of disease—disproportionately affected those business owners whose livelihoods depend on human contact. Hair salons, restaurants, bars, and movie theaters were shuttered,<sup>1</sup> while grocery stores, home office suppliers, and technology companies flourished.<sup>2</sup> Those human contact businesses carried a lopsided societal burden through no fault of their own.

Many affected businesses sued under the Fifth Amendment’s Takings Clause: “nor shall private property be taken for public use, without just compensation.”<sup>3</sup> Although the plain language of the Takings Clause would seem to create a viable cause of action, court-created exceptions for health and safety regulations—coupled with the temporary nature of the pandemic shutdown—left these businesses without judicial relief.

The lack of viable takings claims for these disproportionately affected businesses highlight the inequities of the Fifth Amendment takings analysis. According to the U.S. Supreme Court, the Takings Clause was designed to prevent individuals from bearing burdens, “which, in all fairness and justice, should be borne by the public as a whole.”<sup>4</sup> But the cases and judicially-created balancing tests do not reflect that outcome. Courts should, therefore, refocus and widen the applicability of takings claims to include relief for entities that have been suddenly and catastrophically hit by unexpected regulations.

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1. See, e.g., Michael McGough, *Coronavirus Updates: In California’s New Reopening Plan, When Can Bars, Theaters Reopen?*, SACRAMENTO BEE (Sept. 2, 2020, 9:01 AM), <https://www.sacbee.com/news/coronavirus/article245433100.html> (discussing the closing and reopening of bars, restaurants, hair salons and card rooms).

2. See, e.g., David J. Lynch, *In a Bleak Economy, These Companies Are Flourishing*, WASH. POST (Aug. 11, 2020, 10:40 AM), <https://www.washingtonpost.com/business/2020/08/10/recession-on-coronavirus-pandemic-winners/>; Mike Duff, *Home Office Lifestyle Trends Accelerated as Pandemic Spread*, HOMEWORLD BUS. (Sept. 16, 2020), <https://www.homeworldbusiness.com/home-office-lifestyle-trends-accelerated-as-pandemic-spread-2/> [<https://web.archive.org/web/20201214181237/https://www.homeworldbusiness.com/home-office-lifestyle-trends-accelerated-as-pandemic-spread-2/>] (“The home and small office furniture segment is going through a metamorphosis of sorts, one that has been accelerated by the coronavirus pandemic in the U.S. . . .”).

3. U.S. CONST. amend V.

4. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123–24 (1978) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

## II. BACKGROUND

In December of 2019, a novel coronavirus began infecting humans and quickly spread in Wuhan, China.<sup>5</sup> The World Health Organization (WHO) declared a global pandemic on March 11, 2020, after the virus spread to 114 countries and had killed more than 4,000 people.<sup>6</sup> The first confirmed case in the United States was on January 21, 2020.<sup>7</sup> The virus subsequently spread across several regions of the United States,<sup>8</sup> and on January 30, the WHO declared a global health emergency.<sup>9</sup> The United States reported its first coronavirus death on February 29, 2020, and on March 13, President Trump declared a National Emergency.<sup>10</sup> By March 26, 2020, the United States led the world in coronavirus cases.<sup>11</sup> The pandemic continued through the summer. At the end of September 2020, more than two hundred thousand died of coronavirus-related illness in the United States, and the total number of cases approached seven million.<sup>12</sup>

In March of 2020, governors of forty-five states implemented a “patchwork of policies,” including full or partial closure of bars, restaurants, and other non-essential services in response to the global coronavirus pandemic.<sup>13</sup> The government’s closure of otherwise profitable enterprises created catastrophic losses for many business owners and their employees.<sup>14</sup> These closures continued for several

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5. Derrick Bryson Taylor, *A Timeline of the Coronavirus Pandemic*, N.Y. TIMES (Aug. 6, 2020), <https://www.nytimes.com/article/coronavirus-timeline.html>.

6. Tedros Adhanom, WHO Dir.-Gen., Opening Remarks at the Media Briefing on COVID-19 (Mar. 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020/>.

7. Taylor, *supra* note 5.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. Jeffrey Kluger, *Tragic Math: The U.S. Exceeds 200,000 COVID-19 Deaths*, TIME (Sept. 22, 2020, 11:42 AM), <https://time.com/5891101/us-coronavirus-deaths-200000/>; Chris Kidd, *US Death Rate Tops 200,000 as Cases Approach 7 Million*, EURO WEEKLY NEWS (Sept. 19, 2020, 6:23 PM), <https://www.euroweeklynews.com/2020/09/19/us-death-rate-tops-200000-as-cases-approach-7-million/>.

13. Suzanne Rowan Kelleher, *45 U.S. States Shut Down and Counting: State-by-State Travel Restrictions*, FORBES (Mar. 28, 2020), <https://www.forbes.com/sites/suzannerowankelleher/2020/03/28/23-states-shut-down-and-counting-state-by-state-travel-restrictions/#54a6d5a358f4>.

14. See, e.g., Helen Freund, *How 6 Months of Pandemic Have Profoundly Changed Florida’s Restaurants*, TAMPA BAY TIMES (Sept. 20, 2020), <https://www.tampabay.com/life-culture/food/2020/09/20/six-months-of-pandemic-have-profoundly-changed-floridas-restaurants/> (stating that “[a]cross the country about 100,000 restaurants have either closed permanently or long-term” and

months, with phased re-openings in the late summer and early autumn of 2020, with mixed success.<sup>15</sup>

Several businesses and individuals impacted by this government shutdown sued under the Takings Clause of the Fifth Amendment. In Connecticut, a lounge owner alleged that Governor Lamont's order preventing large gatherings and closing restaurants deprived the owner of all economically viable use of his property and demanded just compensation under the Fifth and Fourteenth Amendments.<sup>16</sup> In Florida, beachfront property owners alleged that beach patrols by code compliance officers constituted a physical invasion because they occupy private property and prevent residents from entering their own backyards.<sup>17</sup> The Florida class-action plaintiffs also argued a Fourteenth Amendment due process violation, alleging the beach patrol order was arbitrary and capricious.<sup>18</sup>

In Colorado, a pro se petitioner, who is a restaurant cook, sued because his work ended due to Governor Polis's coronavirus pandemic shutdown, and his free exercise of religion has been impaired because gatherings of more than ten people were prohibited.<sup>19</sup> The petitioner also alleged there is no valid coronavirus

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“[c]lose to 3 million employees in the restaurant sector remain out of work”); Josh Mitchell, *State Shutdowns Have Taken at Least a Quarter of U.S. Economy Offline*, WALL ST. J. (Apr. 5, 2020), <https://www.wsj.com/articles/state-coronavirus-shutdowns-have-taken-29-of-u-s-economy-offline-11586079001> (“At least one-quarter of the U.S. economy has suddenly gone idle amid the coronavirus pandemic, an analysis conducted for The Wall Street Journal shows, an unprecedented shutdown of commerce that economists say has never occurred on such a wide scale.”); Bethany Jean Clement, *James Beard Survey Suggests 4 out of 5 Restaurants May Not Survive a Prolonged Coronavirus Shutdown—Our Critic on What We Stand to Lose*, SEATTLE TIMES (May 1, 2020, 6:00 AM), <https://www.seattletimes.com/life/food-drink/4-out-of-5-restaurants-may-not-reopen-our-restaurant-critic-on-what-we-stand-to-lose/> (“[Restaurant] [o]wners report having laid off 91% of hourly workers and nearly 70% of salaried ones.”).

15. See, e.g., Chris Woodyard, *‘Makes No Sense’: California Faces Backlash Over Its New Tiered System for Reopening Businesses Amid COVID-19*, USA TODAY (Sept. 1, 2020, 10:29 AM), <https://www.usatoday.com/story/news/nation/2020/09/01/coronavirus-california-faces-backlash-over-new-tiered-reopening-plan/3449500001/>.

16. Paul Bass, *Suit Seeks to Quash Emergency Orders*, NEW HAVEN INDEP. (Apr. 7, 2020, 4:08 PM), [https://www.newhavenindependent.org/index.php/archives/entry/covid\\_lawsuit/](https://www.newhavenindependent.org/index.php/archives/entry/covid_lawsuit/).

17. See Complaint at 12, *Dodero v. Walton Cnty.*, No. 3:20-cv-05358-RV-HTC, 2020 WL 1868995 (N.D. Fla. Apr. 6, 2020) [hereinafter *Dodero Complaint*] (“The County and Sheriff’s physical appropriation of Plaintiffs’ beachfront properties violates the Plaintiffs’ rights under the Fifth and Fourteenth Amendments to the U.S. Constitution and 42 U.S.C. § 1983.”); see also *Dodero v. Walton Cnty.*, No. 3:20cv5358-RV/HTC, 2020 WL 5879130, at \*1 (N.D. Fla. Apr. 17, 2020).

18. *Dodero Complaint*, *supra* note 17, at 15.

19. *Lawrence v. Colorado*, 455 F. Supp. 3d 1063, 1065–69 (D. Colo. 2020); see also *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2604–05 (2020) (denying injunctive relief to a

emergency and sought an injunction to end the state's shutdown order.<sup>20</sup> A federal judge denied the injunctive request due to, *inter alia*, the emergency nature of the orders.<sup>21</sup>

In California, attorney Mark Geragos<sup>22</sup> sued Governor Gavin Newsom for a Fifth Amendment taking, representing, *inter alia*, a Mexican restaurant, a special effects lighting company, a pet groomer, and a gondola service.<sup>23</sup> Mark Geragos alleged that Governor Newsom's Shelter-in-Place Order violated the constitutionally protected rights to travel, due process, and equal protection as well as Fifth Amendment takings.<sup>24</sup>

In Maryland, housing providers sought an injunction against laws that prevented landlords from increasing rents during the pandemic.<sup>25</sup> The petitioners alleged that these laws constituted a regulatory taking under both the Federal and Maryland Constitutions.<sup>26</sup> The federal court denied the request for an injunction because "the appropriate remedy for these claims is not equitable in nature."<sup>27</sup> Because money damages were adequate, an injunction was inappropriate.<sup>28</sup>

In Tennessee, the owners of several restaurants filed for a temporary restraining order to prevent Shelby County from enforcing a COVID-19 closure order, which required the closure of the plaintiffs' establishments.<sup>29</sup> The court denied the motion for injunctive

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church that argued it was entitled to meet under the Free Exercise Clause, despite the governor of Nevada's order to the contrary). *But see* Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (granting injunctive relief to religious entities against Governor Cuomo's capacity limits on in-person services).

20. *Lawrence*, 455 F. Supp. 3d at 1066, 1073.

21. *Id.* at 1067.

22. Geragos is a celebrity attorney who has represented Michael Jackson, Michael Avenatti, Susan McDougal, and several other famous and controversial figures. Richard Winton & James Quealley, *Caught Up in Avenatti Scandal, Mark Geragos Finds Himself on the Other Side of the Law*, L.A. TIMES (Mar. 27, 2019, 9:20 AM), <https://www.latimes.com/local/lanow/la-me-mark-geragos-profile-20190327-story.html>.

23. Complaint at 6–8, 19, *Gondola Adventures, Inc. v. Newsom*, No. 2:20-cv-03789 (C.D. Cal. Apr. 24, 2020).

24. *Id.* at 6, 19, 21, 22.

25. *Willowbrook Apt. Assocs., v. Baltimore*, No. SAG-20-1818, 2020 WL 3639991, at \*1 (D. Md. July 6, 2020).

26. *Id.* at \*3.

27. *Id.* at \*4; *see also* *Xponential Fitness v. Arizona*, No. CV-20-01310-PHX-DJH, 2020 WL 3971908, at \*9 (D. Ariz. July 14, 2020) ("[E]ven if the [Governor's Executive Order] did violate Plaintiffs' Fifth Amendment rights, Plaintiffs would not be entitled to injunctive relief because damages are the proper remedy for a taking." (citing *Bridge Aina Le'a, LLC v. Hawaii Land Use Comm'n*, 125 F. Supp. 3d 1051, 1066 (D. Haw. 2015))).

28. *Willowbrook*, 2020 WL 3639991, at \*4.

29. *TJM 64, Inc. v. Harris*, 475 F. Supp. 3d 828, 832 (W.D. Tenn. 2020).

relief because “Plaintiffs are unlikely to succeed on the merits of their constitutional claims and given the potential public health consequences of allowing Plaintiffs to continue to operate their businesses.”<sup>30</sup>

In Massachusetts (and several other states), local authorities enacted moratoria on evictions.<sup>31</sup> Landlords sued seeking to enjoin the moratorium but were ultimately unsuccessful.<sup>32</sup> In Massachusetts, the superior court first rejected the argument that the prohibition on ejecting tenants constituted a “physical invasion” by the government.<sup>33</sup> The court also found that the moratorium did not interfere with the plaintiffs’ reasonable investment-backed expectations<sup>34</sup> and did not, therefore, constitute a taking.

The Pennsylvania Supreme Court—in the first published appellate case to consider the issue—denied the claims of a congressional candidate, a real estate agent, a golf course, and a restaurant.<sup>35</sup> The parties’ constitutional challenges included a taking without compensation under the Fifth Amendment.<sup>36</sup> According to the court, “the payment of just compensation is not required where the regulation of property involves the exercise of the Commonwealth’s police power.”<sup>37</sup> The outcome was no surprise.

Under the current state of takings law, arguments in favor of a Fifth Amendment Taking by such plaintiffs are unlikely to be successful.<sup>38</sup> The state-mandated closures are temporary, and were put in place to promote the health, safety, and welfare of society, a core police power<sup>39</sup> and an established background principle of property

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30. *Id.* at 841.

31. Memorandum of Decision and Order on Plaintiffs’ Motion for Preliminary Injunction at 3–5, *Matorin v. Massachusetts*, No. 2084CV01334 (Aug. 26, 2020).

32. *Id.* at 34.

33. *Id.* at 20.

34. *Id.* at 26.

35. *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 876–77 (Pa. 2020).

36. *Id.* at 893.

37. *Id.*

38. See Bernadette Meyler, *Shelter-in-Place Orders Are Perfectly Legal*, N.Y. TIMES (Apr. 29, 2020), <https://www.nytimes.com/2020/04/29/opinion/shelter-in-place-constitution.html>.

39. See *Gibbons v. Ogden*, 22 U.S. 1, 203 (1824) (stating that police power is “that immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government”).



law. Those regulations also likely kept the early 2020 coronavirus pandemic from becoming worse.<sup>40</sup>

These health and safety exceptions to otherwise colorable takings claims are arguably at odds with the plain language of the Fifth Amendment itself and the Supreme Court's oft-cited admonition that the impetus for the Takings Clause is to protect individuals from shouldering the burdens that society should bear.<sup>41</sup> Unfortunately, the coronavirus pandemic shutdown illustrates the inadequacy of takings law in distributing burdens among individuals particularly impacted by sweeping government shutdowns.

### III. FIFTH AMENDMENT TAKINGS LAW

The Fifth Amendment to the U.S. Constitution provides in part: “[N]or shall private property be taken for public use, without just compensation.”<sup>42</sup> Each clause in this sentence has been heavily litigated. The focus of this Article is whether private property has been “taken” such that just compensation is due under the Fifth Amendment.<sup>43</sup> “The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”<sup>44</sup> This is a maddeningly vague standard for litigants.

Many property and business owners allege that social distancing restrictions and the concomitant shutdowns imposed by the coronavirus pandemic resulted in their property being “taken” by the government such that just compensation is due.<sup>45</sup> The bar, however, is

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40. See, e.g., Joel Achenbach, *As Social Distancing Shows Signs of Working, What's Next? Crush the Curve, Experts Say*, WASH. POST (Apr. 8, 2020, 2:11 PM), [https://www.washingtonpost.com/national/health-science/as-social-distancing-shows-signs-of-working-whats-next-crush-the-curve-experts-say/2020/04/08/3c720e06-7923-11ea-b6ff-597f170df8f8\\_story.html](https://www.washingtonpost.com/national/health-science/as-social-distancing-shows-signs-of-working-whats-next-crush-the-curve-experts-say/2020/04/08/3c720e06-7923-11ea-b6ff-597f170df8f8_story.html).

41. See *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

42. U.S. CONST. amend. V. The Fifth Amendment applies to the states under the Due Process Clause of the Fourteenth Amendment. *Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 239 (1897).

43. This Article involves government imposing restrictions (shutdown order) on the operations of private entities to restrict gatherings and close personal contact that may further the spread of the coronavirus. The property is therefore “private” and the purpose (restricting the spread of the disease) is “public.” The amount of “just compensation” is discussed in footnote 45. The question addressed by this Article, is whether there is a regulatory “taking” at all.

44. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

45. Just compensation is “fair market value.” *United States v. Miller*, 317 U.S. 369, 374 (1943); see also *Backus v. Fort St. Union Depot Co.*, 169 U.S. 557, 573, 575 (1898) (“[W]hen [the] power [of eminent domain] is exercised it can only be done by giving the party whose property is

necessarily high for a property owner to prove that “just compensation” is due when a regulation restricts use, particularly when the justification for the restriction is a public health and safety concern. Unfortunately, the test for determining whether a taking has occurred is a “muddle,”<sup>46</sup> and pandemic-related regulations are likely to further the confusion.

#### A. Penn Central’s *Ad Hoc* Three-Part Balancing Test

The Fifth Amendment takings analysis begins with the seminal taking case, *Penn Central Transportation Co. v. New York*.<sup>47</sup> In *Penn Central*, the owners of Grand Central Station (“Station”) in New York City sought to partner with UGP Properties (“UGP”) to build a multi-story office building in the airspace above the Station.<sup>48</sup> The proposed project complied with all zoning and building requirements,<sup>49</sup> but because the station had been designated as a landmark under the City’s Landmark Preservation Law, UGP and Penn Central were required to apply to New York’s Landmark Preservation Committee (“Committee”) for the requisite “certificate of ‘appropriateness.’”<sup>50</sup> The Committee denied permission of the plan to cantilever a fifty-five-story office building over the Station.<sup>51</sup>

Penn Central and UGP challenged the Committee’s decision by bringing a Fifth Amendment takings claim.<sup>52</sup> The U.S. Supreme Court

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taken or whose use and enjoyment of such property is interfered with, full and adequate compensation, not excessive or exorbitant, but just compensation.”).

46. See Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings “Muddle”*, 90 MINN. L. REV. 826, 827 (2006) (“Despite a series of high-profile decisions over the last three decades, the Supreme Court has failed to solve the riddle it posed for itself in the seminal case of the modern regulatory takings era, *Penn Central Transportation Co. v. City of New York*: When does a regulation burdening property rise to the level of a compensable ‘taking?’”).

47. 438 U.S. 104 (1978).

48. *Id.* at 116.

49. *Id.*

50. *Id.* at 115–17. A certificate of appropriateness will be granted “if the Commission concludes—focusing upon aesthetic, historical, and architectural values—that the proposed construction won the landmark site would not unduly hinder the protection, enhancement, perpetuation, and use of the landmark.” *Id.* at 112.

51. *Id.* at 116–17. The Commission also rejected a fifty-three-story proposal that involved removal of a portion of the Station’s façade. The Commission stated: “To protect a Landmark, one does not tear it down. To perpetuate its architectural features, one does not strip them off.” *Id.* at 117.

52. *Id.* at 122 (“[T]he issues presented . . . are (1) whether the restrictions imposed by New York City’s law upon appellants’ exploitation of the Terminal site effect a ‘taking’ of appellants’ property for a public use within the meaning of the Fifth Amendment . . .”).

denied the claim, and in doing so articulated a three-part test to determine whether a taking has occurred. Accordingly:

when a regulation impedes the use of property without depriving the owner of all economically beneficial use, a taking still may be found based on a “complex of factors,” including: (1) the economic impact on the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct<sup>53</sup> investment-backed expectations; and (3) the character of the governmental action<sup>54</sup>

(the “*Penn Central Test*”). The *Penn Central Test* is an “ad hoc factual inquir[y], designed to allow careful examination and weighing of all the relevant circumstances.”<sup>55</sup>

In formulating the *Penn Central Test*, the Court was guided by the principle set forth in *Armstrong v. United States*<sup>56</sup>: the “Fifth Amendment guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole”<sup>57</sup> (the “*Armstrong Principle*”). The *Penn Central* Court acknowledged there has been considerable difficulty in identifying a taking under the Fifth Amendment, and articulated the *Penn Central Test* to set a formula for situations where “‘*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.”<sup>58</sup>

The Court rejected *Penn Central* and UGP’s argument that they were solely burdened and unbenefited by New York’s Landmark Preservation Law.<sup>59</sup> According to the Court, this argument “overlooks

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53. The Supreme Court later changed the word “distinct” to “reasonable” investment backed expectations. *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

54. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1943 (2017); see *Penn Cent. Transp.*, 438 U.S. at 124; see also Steven J. Eagle, *The Four-Factor Penn Central Regulatory Takings Test*, 118 PENN ST. L. REV. 601, 601 (2014) (arguing that there is a fourth factor—related to the “relevant parcel”—in the *Penn Central Test*); Gary Lawson, et. al., “*Oh Lord, Please Don’t Let Me Be Misunderstood!*”: *Rediscovering the Matthews v. Eldridge and Penn Central Frameworks*, 81 NOTRE DAME L. REV. 1, 32 (2005) (arguing there are two factors rather than three).

55. *Murr*, 137 S. Ct. at 1942 (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 322 (2002)).

56. 364 U.S. 40 (1960).

57. *Penn Cent. Transp.*, 438 U.S. at 123–24 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)); see also *Murr*, 137 S. Ct. at 1943 (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 617–18 (2001)).

58. *Penn Cent. Transp.*, 438 U.S. at 124 (emphasis added).

59. *Id.* at 134–36.

the fact that the New York City law applies to vast numbers of structures in the City in addition to the Terminal.”<sup>60</sup> The fact that a particular property owner may be more burdened than benefited in a particular case does not rise to the level of a taking.<sup>61</sup> “[I]n instances in which a state tribunal reasonably concluded that ‘the health, safety, morals, or general welfare’ would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests.”<sup>62</sup>

Under *Penn Central*, the three-part ad hoc balancing test is a means to determine whether justice and fairness dictate that a taking has occurred, in harmony with the *Armstrong* Principle. Absent one of the exceptions below, a court will apply the *Penn Central* Test in all Fifth Amendment takings cases. Most pandemic shutdown litigants will have to show their situation meets the *Penn Central* Test, which is already notoriously difficult.<sup>63</sup>

### B. Lucas’s Total Deprivation Test

The *Penn Central* Test specifically applies to situations in which a regulation did *not* deprive the property owner of *all* economically viable use of the property.<sup>64</sup> That situation was later addressed in *Lucas v. South Carolina Coastal Council*.<sup>65</sup>

In *Lucas*, a property owner purchased two waterfront lots in 1986 for \$975,000.<sup>66</sup> The two lots were surrounded by single-family homes, and Lucas’s were the last two vacant lots on the Isle of Palms, in Charleston County, South Carolina.<sup>67</sup> Two years after Lucas

60. *Id.* at 134.

61. *Id.* at 133–35; *see, e.g.*, *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (the property owner was more burdened than benefited by the applicable regulation without the court finding a Fifth Amendment taking); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (same); *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (same); *cf. Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (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.”).

62. *Penn Cent. Transp.*, 438 U.S. at 125.

63. A recent study found that less than 10 percent of takings cases are successful under a *Penn Central* analysis. James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 35, 59–60 (2016).

64. *Penn Cent. Transp.*, 438 U.S. at 138 n.36 (“The city conceded at oral argument that if appellants can demonstrate at some point in the future that circumstances have so changed that the Terminal ceases to be ‘economically viable,’ appellants may obtain relief.”).

65. 505 U.S. 1003 (1992).

66. *Id.* at 1006.

67. *Id.* at 1009, 1038.

purchased the parcels, the state of South Carolina passed the Beachfront Management Act that effectively prohibited Lucas from building on either of his lots.<sup>68</sup> Lucas sued, alleging a taking of his property under the Fifth Amendment.<sup>69</sup> The Court found a taking and articulated a new test, which constituted a per se exception to the three-part *Penn Central* Test.<sup>70</sup>

Under *Lucas*, a regulation that “denies all economically beneficial or productive use of land” will require compensation under the Takings Clause—unless the regulation is consistent with “background principles of nuisance and property law.”<sup>71</sup> In other words, if a regulation eliminates a property’s economic viability, it will automatically constitute a taking, unless that regulation is consistent with “background principles” of property law.<sup>72</sup> This is the first per se exception to the three-part *Penn Central* Test.<sup>73</sup>

In *Lucas*, the U.S. Supreme Court overturned the South Carolina Supreme Court, which “ruled that when a regulation respecting the use of property is designed ‘to prevent serious public harm,’ no compensation is owing under the Takings Clause regardless of the regulation’s effect on the property’s value,”<sup>74</sup> citing to *Mugler v. Kansas*.<sup>75</sup> In fact, Lucas did not challenge the assertion that the beachfront management act protected a valuable resource or that new construction contributed to the erosion of this public resource.<sup>76</sup> According to the *Lucas* court, however, the Beachfront Management Act denied a previously permissible productive use, and did not therefore constitute a background principle of property or nuisance law that would have exempted the state from providing just compensation.<sup>77</sup>

Since *Lucas*, however, courts have been progressively reluctant to find a total deprivation of economically viable use. For example, in

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68. *Id.* at 1007.

69. *Id.* at 1009.

70. *Id.* at 1016.

71. *Id.* at 1016, 1031; *see also* *Horne v. Dep’t of Agric.*, 576 U.S. 350, 361–62 (2015) (extending the *Lucas* “total deprivation” test to a government appropriation of physical property such as raisins).

72. *Lucas*, 505 U.S. at 1031.

73. *Id.* at 1031–32.

74. *Id.* at 1010.

75. 123 U.S. 623 (1887).

76. *Lucas*, 505 U.S. at 1020.

77. *Id.* at 1031.

*Leone v. County of Maui*,<sup>78</sup> the Hawaii Supreme Court held that regulations that leave land in its natural state do not always constitute a taking,<sup>79</sup> clarifying that the *Lucas* rule is not absolute—and the scope of “background principles” is expanding.<sup>80</sup>

Many litigants affected by the coronavirus government shutdowns may allege that their property (or business) has suffered a *Lucas*-style total deprivation of all economically viable use, but: (1) the pandemic government shutdowns are temporary (unlike *Lucas*) and (2) the public health impetus for the pandemic regulations is likely more compelling than even the Beachfront Management Act in *Lucas*—as a background principle of property law. Such claims are therefore unlikely to be successful under *Lucas*.

Mr. Lucas also has a stronger “fairness and justice” argument than do the coronavirus litigants. Lucas had two empty lots in a large neighborhood of single-family homes and was singled out to bear the burden of the Beachfront Management Act, while the coronavirus litigants represent wide sectors of business interests.<sup>81</sup> Similarly, the petitioners in *Armstrong* itself were a group of government contractors whose mechanic’s liens were invalidated by the federal government when a shipbuilder went bankrupt.<sup>82</sup> Upon the shipbuilder’s bankruptcy, title to the ship went to the government under the applicable contract, and since liens are prohibited for public work, the government had “inchoate title” to the ships.<sup>83</sup> The Supreme Court held that the liens constituted a property interest that was unlawfully “taken” under the Fifth Amendment’s Takings Clause.<sup>84</sup>

### C. Loretto’s Physical Invasion Test

Another per se exception to the *Penn Central* Test is when the government physically occupies property. In *Loretto v. Teleprompter*

78. 404 P.3d 1257 (Haw. 2017).

79. *Id.* at 1274.

80. See Krier & Sterk, *supra* note 63, at 59–60 tbls. 2–3 (showing a 25.8 percent success rate for “total wipeout” cases under *Lucas*); see also Michael C. Blumm & Lucus Ritchie, *Lucas’s Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENV’T L. REV. 321, 368 (2005) (“[J]udicial use of background principles seem likely to expand, as government defendants continue to present various categories of *Lucas* defenses to state and federal courts.”).

81. *Lucas*, 505 U.S. at 1006–07.

82. See *Armstrong v. United States*, 364 U.S. 40, 41–42 (1960).

83. *Id.* at 42.

84. *Id.* at 43–44.

*Manhattan CATV Corp.*,<sup>85</sup> a property owner sued over a city regulation that allowed cable companies to install cable equipment on buildings.<sup>86</sup>

Although the offending cable boxes were only two by four inches, along with half-inch wide connecting cable, the Court found that a permanent physical invasion authorized by government regulation is always a taking. The Court considered a physical invasion of property to be a restriction of “an unusually serious character” because it “effectively destroys” the right to possess, use, and dispose of the property.<sup>87</sup> When there is a permanent physical occupation of real property, “there is a taking to the extent of the occupation, *without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.*”<sup>88</sup>

After *Loretto*, many litigants tried to shoehorn their takings claims into physical invasions. For instance, in *Yee v. City of Escondido*,<sup>89</sup> a mobile home park owner unsuccessfully claimed that a rent control ordinance effected a physical taking.<sup>90</sup> More recently, in *Cedar Point Nursery v. Shiroma*,<sup>91</sup> the Ninth Circuit Court of Appeals failed to find a valid taking claim under a *Loretto* physical invasion theory for a regulation that required business owners to open up their land to union organizers.<sup>92</sup>

Although a coronavirus litigant is unlikely to be able to show a true physical invasion, if they could, they would probably have a successful takings claim because physical invasions are of an “unusually serious character,” and even temporary physical invasions are actionable.<sup>93</sup>

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85. 458 U.S. 419 (1982).

86. *Id.* at 421–22.

87. *Id.* at 426, 435.

88. *Id.* at 434–35 (emphasis added).

89. 503 U.S. 519 (1992).

90. *Id.* at 539.

91. 923 F.3d 524 (9th Cir. 2019).

92. *Id.* at 532–33 (citing *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 (1980)) (finding that requiring a shopping center to be a public forum for speech did not constitute a Fifth Amendment taking). On November 13, 2020, the U.S. Supreme Court granted certiorari in *Cedar Point*. See *Cedar Point Nursery v. Hassid*, No. 20-107, 2020 WL 6686019 (2020) (mem.).

93. *Loretto*, 458 U.S. at 426, 427, 435 fn.12 (“When faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking.”). At least one coronavirus shutdown petitioner has alleged a physical taking—due to beach patrols that cut off access to private property. See *supra* note 17 and accompanying text.

### *D. Temporary Takings*

A regulation need not be permanent to constitute a taking, which is critical to the analysis of whether coronavirus related government shutdown restrictions constitute either a regulatory or physical taking under the Fifth Amendment.

In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,<sup>94</sup> a retreat and recreational center for handicapped children in Mill Canyon was destroyed after a fire, and subsequent flooding swept the property.<sup>95</sup> In response to the flooding in the canyon, the County of Los Angeles adopted an ordinance which prohibited construction in the interim flood protection area in Mill Canyon.<sup>96</sup> The church alleged a temporary taking, and the Supreme Court stated that “‘temporary’ takings which, as here, deny a landowner all use of his property, are not different from permanent takings, for which the Constitution clearly requires compensation.”<sup>97</sup> The Court remanded for further proceedings to determine if a taking had occurred.<sup>98</sup>

On remand, the California court found that there was no Fifth Amendment taking and therefore the church was not entitled to compensation.<sup>99</sup> The court—relying on *Mugler*—first said that the ordinance was justified by health and safety concerns; and second, that the church was allowed to use any buildings that were not destroyed by flood and it could use the property for any purpose other than reconstructing demolished buildings or erecting new ones.<sup>100</sup> There was therefore no temporary taking for the church under either *Lucas* or *Penn Central*.<sup>101</sup>

The temporary takings analysis, however, should also be analyzed in light of *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,<sup>102</sup> which considered whether a thirty-two-month moratorium on development constituted a Fifth Amendment

94. 482 U.S. 304 (1987).

95. *Id.* at 307.

96. *Id.*

97. *Id.* at 318.

98. *Id.* at 322.

99. *First Eng. Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 258 Cal. Rptr. 893, 905–06 (Ct. App. 1989).

100. *Id.* at 899.

101. *Id.* at 906.

102. 535 U.S. 302 (2002).



taking.<sup>103</sup> The plaintiffs in *Tahoe-Sierra* alleged a *Lucas*-style per se taking due to a prohibition on all development in the lake Tahoe region that was subject to the Planning Agency's jurisdiction.<sup>104</sup> The Court held that there was no per se taking based on the denominator or "parcel as a whole" concept.<sup>105</sup> According to the Court, the ability to develop a parcel for thirty-two months was only part of a landowner's rights because:

Both dimensions must be considered if the interest is to be viewed in its entirety. Hence, a permanent deprivation of the owner's use of the entire area is a taking of "the parcel as a whole," whereas a temporary restriction that merely causes a diminution in value is not. Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted.<sup>106</sup>

Therefore, under *Tahoe-Sierra*, a temporary taking can never be tantamount to a "total deprivation" under *Lucas*. However, the Court left open the possibility of a temporary taking under *Penn Central*'s three-part test<sup>107</sup>—although meeting that test will be nearly impossible.<sup>108</sup>

Lower courts have attempted to reconcile *Tahoe-Sierra* and *First English* by identifying the parameters of myriad temporary takings. According to the United States Court of Appeals for the Federal Circuit, in *Seiber v. United States*<sup>109</sup>:

Supreme Court cases, as well as decisions from our own court, recognize that a temporary taking may arise in one of two ways. First, "a temporary taking occurs when what would otherwise be a permanent taking is temporally cut short." Temporary takings of this category may result when

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103. *Id.* at 306.

104. *Id.*

105. *Id.* at 331 ("To sever a 32-month segment from the remainder of each fee simple estate and then ask whether that segment has been taken in its entirety would ignore *Penn Central*'s admonition to focus on 'the parcel as a whole.'" (quoting *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130–31 (1978))).

106. *Id.* at 332.

107. *Id.* at 334 ("[T]he ultimate constitutional question is whether the concepts of 'fairness and justice' that underlie the Takings Clause will be better served by one of these categorical rules or by a *Penn Central* inquiry into all of the relevant circumstances in particular cases.").

108. *Id.*

109. 364 F.3d 1356 (Fed. Cir. 2004).

“a court invalidates a regulation” that had previously effected a taking, “when the government elects to discontinue regulations after a taking has occurred,” or when “the government denies a permit . . . [and] at some [later] point reconsiders the earlier denial and grants a permit (or revokes the permitting requirement).” The “essential element” of this type of temporary taking “is a finite start and end to the taking.” In the case of a rescinded permit denial, therefore, “the initial denial of a permit is still a necessary trigger” for the temporary taking.

Alternatively, a temporary “taking may occur by reason of extraordinary delay in [the] governmental decision making” process. In such a case, a property owner may be entitled to compensation for property loss incurred while the government was in the process of deciding whether to allow the contested activity. This type of temporary takings claim may be asserted “notwithstanding the failure [of the government] to deny a permit” or affirmatively prohibit a certain use of the property. Nonetheless, “mere fluctuations in value during the process of governmental decision making, absent extraordinary delay” do not give rise to a compensable temporary taking under this second category because such losses are considered “incidents of ownership.”<sup>110</sup>

In other words, to constitute a temporary taking in the coronavirus regulation context, the enactment of a “stay in place” regulation may constitute a “triggering event,” and if the stay in place regulation were stricken down (for example) because it was arbitrary and capricious and a violation of the Fourteenth Amendment’s Due Process Clause, or the Equal Protection Clause, there may be a valid takings claim for the period that the invalid “stay in place” regulation was in effect—if the landowner was able to prove a taking under *Penn Central*’s three-part test.<sup>111</sup> There may also be a valid temporary takings claim if there

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110. *Id.* at 1364–65 (alterations in original) (first quoting *Wyatt v. United States*, 271 F.3d 1090, 1097 n.6 (Fed. Cir. 2001); then *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1347 (Fed. Cir. 2002) (analyzing a Fifth Amendment takings claim over the denial of a permit to harvest timber due to the listing of the Spotted Owl under the Endangered Species Act); and then citing *Cooley v. United States*, 324 F.3d 1297, 1306 (Fed. Cir. 2003)).

111. *Tahoe-Sierra*, 535 U.S. at 330.

is an unreasonable delay or when a government elects to discontinue a regulation after a taking has occurred.<sup>112</sup> A *Lucas*-style “total deprivation” claim for a temporary taking in the coronavirus government shutdown context is precluded by *Tahoe Sierra*.

It is also possible to have a temporary taking in the case of a *Loretto* physical invasion of property. In *Arkansas Game and Fish Commission v. United States*,<sup>113</sup> the U.S. Supreme Court held that a temporary taking was possible for government-induced seasonal flooding over the commission’s property.<sup>114</sup> The only issue before the Court was whether such a claim (a temporary physical invasion) was categorically exempt from a Fifth Amendment taking claim, and the Court held that it was not.<sup>115</sup> However, any such claim would still have to meet the three-part *Penn Central* Test.<sup>116</sup>

### *E. The Public Health and Safety Exception to Takings Claims*

Both *Penn Central* and *Lucas* contemplate some sort of exception to the takings analysis for regulations that concern the general health, safety and welfare;<sup>117</sup> particularly when such concerns produce a widespread public benefit and are applicable to “all similarly situated

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112. *Seiber*, 364 F.3d at 1364.

113. 568 U.S. 23 (2012).

114. *Id.* at 27 (arguing there was a permanent taking due to the destruction of trees on the flooded property); see Brian T. Hodges, *Will Arkansas Game & Fish Commission v. United States Provide a Permanent Fix for Temporary Takings?*, 41 B.C. ENV’T AFFS. L. REV. 365, 365 (2014) (stating that there are no categorical exemptions to liability for government actions that are temporary in nature).

115. *Ark. Game & Fish Comm’n*, 568 U.S. at 38 (“We rule today, simply and only, that government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection.”).

116. *Id.* at 39 (noting that under *Arkansas Game and Fish*, the owner’s reasonable investment-backed expectations are part of the analysis in determining whether a temporary physical taking is compensable). For another viewpoint, see Hodges, *supra* note 114, at 388–92 (arguing that the test is the same for both temporary and permanent physical takings). See *Bridge Aina Le’a, LLC v. Land Use Comm’n*, 950 F.3d 610, 631–33 (9th Cir. 2020) (applying the valuation prong of the *Penn Central* Test to a temporary taking and concluding that the valuation evidence weighs strongly against a taking).

117. See, e.g., *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 125 (1978) (“More importantly for the present case, in instances in which a state tribunal reasonably concluded that ‘the health, safety, morals, or general welfare’ would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests.”); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1023 (1992) (finding that *Hadacheck*, *Miller*, and *Goldblatt* “are better understood as resting not on any supposed ‘noxious’ quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy—not unlike historic preservation—expected to produce a widespread public benefit and applicable to all similarly situated property” (quoting *Penn Cent. Transp.*, 438 U.S. at 133–34 n.30)).

property [owners].”<sup>118</sup> Courts have traditionally been deferential toward local jurisdictions’ authority to regulate for health and safety under the applicable police power.<sup>119</sup> Therefore, if the government has enacted a valid regulation for the protection of safety, health, and welfare, courts will not find a Fifth Amendment taking.

An analysis of the extent of a state’s authority to regulate health and safety without compensation begins with *Mugler v. Kansas*,<sup>120</sup> cited by both *Penn Central*<sup>121</sup> and *Lucas*.<sup>122</sup> *Mugler* involved a challenge to a Kansas constitutional amendment that prohibited the sale and manufacture of liquor.<sup>123</sup> When the Kansas constitutional amendment passed, all liquor sales and manufacturing were declared a common nuisance.<sup>124</sup> After *Mugler*’s brewery was declared a nuisance, he claimed “most earnestly and confidently, that his right to operate his brewery as vested in him by the laws of Kansas, cannot be taken away by the State without just compensation.”<sup>125</sup> According to the *Mugler* Court:

[T]he present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without

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118. *Lucas*, 505 U.S. at 1023 (1992) (quoting *Penn Cent. Transp.*, 438 U.S. at 133–34 n.30).

119. See *Mugler v. Kansas*, 123 U.S. 623, 661 (1887) (stating that the police powers of a state “determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety,” subject to constitutional limits); *Cal. Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306, 306 (1905) (holding that an ordinance limiting garbage burning to certain areas was not a compensable taking under the city’s authority to regulate public health); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 592 (1962) (“If this ordinance is otherwise a valid exercise of the town’s police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional.”); see also *id.* at 596 (“Our past cases leave no doubt that [challengers to police power] had the burden on ‘reasonableness.’” (citing *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 529 (1959) (arguing that the exercise of police power is presumed to be constitutionally valid))); *Salsburg v. Maryland*, 346 U.S. 545, 553 (1954) (“The presumption of reasonableness is with the State.”); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 154 (1938) (stating that the exercise of police power will be upheld if “any state of facts either known or which could reasonably be assumed affords support for it”).

120. *Mugler*, 123 U.S. at 623.

121. *Penn Cent. Transp.*, 438 U.S. at 126 (citing *Mugler*, 123 U.S. at 623) (upholding law that prohibited liquor business).

122. *Lucas*, 505 U.S. at 1010, 1022–23, 1033 (Kennedy, J., concurring). The South Carolina Supreme Court had rejected *Lucas*’s takings claim based on a *Mugler* analysis. See *id.* at 1010 (“[The South Carolina Supreme Court] ruled that when a regulation respecting the use of property is designed to ‘prevent serious public harm,’ . . . no compensation is owing under the Takings Clause regardless of the regulation’s effect on the property’s value.”).

123. *Mugler*, 123 U.S. at 624.

124. *Id.*

125. *Id.* at 637.

compensation. *A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit.* Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. . . . The power which the States have of prohibiting such use by individuals of their property, as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.<sup>126</sup>

The U.S. Supreme Court therefore rejected *Mugler's* argument. In doing so, the Court extended tremendous deference to legislative authorities in the supervision of public health.<sup>127</sup>

Following *Mugler*, in *Miller v. Schoene*,<sup>128</sup> the U.S. Supreme Court denied compensation for a property owner who was forced to cut down ornamental red cedar trees by the state entomologist because there was a danger of spreading plant disease to a nearby orchard.<sup>129</sup> *Miller* challenged the state's decision under a Fourteenth Amendment substantive due process theory.<sup>130</sup> According to the Court, "the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public."<sup>131</sup> This determination is at the core of every exercise of police power that affects real property.<sup>132</sup>

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126. *Id.* at 668–69 (emphasis added).

127. *Id.* at 669 (citing *Stone v. Mississippi*, 101 U.S. 814 (1879)).

128. 276 U.S. 272 (1928).

129. *Id.* at 277.

130. *Id.*

131. *Id.* at 279.

132. *Id.* at 279–80; *see also* *Hadacheck v. Sebastian*, 239 U.S. 394, 414 (1915) ("We must accord good faith to the city in the absence of a clear showing to the contrary and an honest exercise

In *Goldblatt v. Town of Hempstead*,<sup>133</sup> the U.S. Supreme Court—also following *Mugler*—denied compensation for a property owner in Hempstead, New York, who operated a gravel mine within the town’s limits.<sup>134</sup> The town had enacted a new ordinance regulating dredging and excavating and subsequently sued a mine owner for failing to comply with the new law.<sup>135</sup> The mine owners alleged the new law prevented them from operating their decades-old business and was an unlawful exercise of police power.<sup>136</sup> The ordinance prohibited a beneficial use to which the property had been put and was arguably not even a nuisance.<sup>137</sup> The *Goldblatt* Court upheld the ordinance because the interest of the public required it, and the means necessary to accomplish the purpose were not unduly burdensome.<sup>138</sup>

Regulations enacted by states—mostly by governors<sup>139</sup>—in response to the coronavirus pandemic concern widespread public health matters and were largely applicable to all similarly situated land (or business) owners. The health, safety, and welfare cases show courts will generally defer to legislative and executive authorities in their supervision of public health.<sup>140</sup> Those determinations, in turn, are a valid defense to most Fifth Amendment takings cases.

In *Luke’s Catering Service, LLC v. Cuomo*,<sup>141</sup> the Federal District Court of the Western District of New York stated:

When faced with a society-threatening epidemic, state officials are empowered to implement emergency protective measures that infringe federal constitutional rights. They

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of judgment upon the circumstances which induced its action.”) *Hadacheck* involved a challenge to the city’s ordinance preventing the manufacture of bricks or operation of a brickyard. *Hadacheck* alleged the ordinance took his property without compensation, it did not create a public offense and violated the Due Process Clause of the Fourteenth Amendment. The Court rejected his argument, deferring to the legislature’s exercise of its police power. *Id.* at 413.

133. 369 U.S. 590 (1962).

134. *Id.* at 591.

135. *Id.* at 592.

136. *Id.* at 590–91.

137. *Id.* at 592.

138. *Id.* at 594–95 (citing *Lawton v. Steele*, 152 U.S. 133, 137 (1894)).

139. In Washington state, for example, a governor may enact emergency health and safety regulations for thirty days. Any extension must be approved by the state legislature. WASH. REV. CODE ANN. § 43.06.220(4) (LexisNexis 2020).

140. See, e.g., *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613–14 (2020) (Roberts, C.J., concurring) (stating that when state officials “undertake[] to act in areas fraught with medical and scientific uncertainties,” their latitude “must be especially broad”; and “where those broad limits are not exceeded, they should not be subject to second-guessing by an ‘unelected . . . judiciary’”).

141. No. 20-CV-1086S, 2020 WL 5425008, at \*1 (W.D. N.Y. Sept. 10, 2020).

may generally do so at their sole discretion and for so long as is necessary. And as long as the emergency measures bear some real or substantial relation to the threatening epidemic and are not unquestionably a plain invasion of rights, the efficacy and wisdom of those measures are not subject to judicial second-guessing.<sup>142</sup>

The *Luke's Catering* court denied plaintiffs' request for an injunction under inter alia Fifth Amendment takings and equal protection grounds because the plaintiffs failed to demonstrate "beyond all question, a plain, palpable invasion of rights."<sup>143</sup>

#### IV. DUE PROCESS/EQUAL PROTECTION

Opponents to many governor-initiated lockdowns claimed that the actions were "arbitrary" and "capricious."<sup>144</sup> These are buzz words for a potential Fourteenth Amendment substantive due process claim, which may be applied to executive and legislative abuses of power.<sup>145</sup> Generally, to prove a claim under most coronavirus pandemic regulation objections, a claimant would have to show that the regulation is not rationally related to a legitimate government

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142. *Id.* at \*1.

143. *Id.* at \*6.

144. *See, e.g.*, *TJM 64, Inc. v. Harris*, 475 F. Supp. 3d 828, 833 (W.D. Tenn. 2020) ("Plaintiffs' substantive due process challenge alleges that the COVID-19 Closure Order is 'capricious, irrational, arbitrary and abusive conduct . . . ."); *see also COVID Thursday Update: Petition Urges Governor to Lift State of Emergency Order, Outbreak Identified in Concord*, CONCORD MONITOR (Apr. 16, 2020, 12:59 PM), <https://www.concordmonitor.com/COVID-updates-Thursday-rally-to-reopen-New-Hampshire-33919268> (petition urged Governor Sununu to rescind declaration of emergency because "[w]e believe the emergency orders issued by Gov. Sununu are arbitrary and unbalanced, particularly in determining 'essential' and 'non essential' organizations and allowing people to assemble in the supermarket but not in their place of work or community, which are equally susceptible to transmission of the virus"); Molly Beck & Madeline Heim, *GOP Leaders Seeking to Overturn Tony Evers' Coronavirus Orders Aren't Saying What Alternatives They Want*, MILWAUKEE J. SENTINEL (Apr. 23, 2020, 2:29 PM), <https://www.jsonline.com/story/news/politics/2020/04/23/wisconsin-gop-silent-what-new-coronavirus-rules-should-republican-tony-evers-gov-democrat-covid-19/3003763001/> (legislators calling for a Department of Health Service Plan that is not "arbitrary and capricious").

145. *See generally* Rosalie Berger Levinson, *Reining in Abuses of Executive Power Through Substantive Due Process*, 60 FLA. L. REV. 519, 519 (2008) ("[I]t is well established that the Due Process Clause includes a substantive component that 'bars certain arbitrary wrongful government actions "regardless of the fairness of the procedures used to implement them.'").

objective.<sup>146</sup> One way to do this is to show the government action is arbitrary and capricious.<sup>147</sup>

A substantive due process claim is separate and distinct from the takings claim procedures outlined above.<sup>148</sup> However, a coronavirus pandemic shelter-in-place order that reaches the notoriously difficult arbitrary and capricious threshold may, in turn, be a basis for a temporary taking for the time that the regulation was in effect. In other words, if an emergency order was shown to have no rational relation to a legitimate government objective (by showing the regulation is arbitrary and capricious), the property or business owner may be able to obtain damages for the time that the regulation was in effect and the time the regulation was struck down.<sup>149</sup> However, the claimant would still then have to show that the claimant met the three *Penn Central*

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146. *Nectow v. City of Cambridge*, 277 U.S. 183, 187–88 (1928) (“[A] court should not set aside the determination of public officers unless it is clear that their action ‘has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense.’” (quoting *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926))).

147. *See* *Cnty. of Butler v. Wolf*, No. 2:20-cv-677, 2020 WL 5510690, at \*26 (W.D. Pa. Sept. 14, 2020) (finding that the government’s orders closing all “non-life-sustaining” businesses were arbitrary in creation, scope, and administration—and therefore in violation of substantive due process). According to the *Butler* court, “the right of citizens to support themselves by engaging in a chosen occupation is deeply rooted in our nation’s legal and cultural history and has long been recognized as a component of the liberties protected by the Fourteenth Amendment.” *Id.* at \*25.

148. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 529 (2005).

149. Unless the claim relates to a fundamental right or to, *inter alia*, a suspect class. Although a discussion of every potential constitutional right affected is beyond the scope of this Article, other claims that the stay-at-home orders are unconstitutional center on First Amendment rights of expression and association and free exercise of religion as well as civil liberties and privacy. *See, e.g., Three Southern California Churches Sue Gov. Newsom Over Coronavirus Orders*, L.A. TIMES (Apr. 13, 2020, 7:59 PM), <https://www.latimes.com/california/story/2020-04-13/three-southern-california-churches-sue-gov-newsom-over-coronavirus-orders> (“[The] churches . . . argu[ed] that social distancing orders violate the 1st Amendment right to freedom of religion and assembly.”); Kiah Collier et al., *Despite Coronavirus Risks, Some Texas Religious Groups Are Worshipping in Person—With the Governor’s Blessing*, TEX. TRIB. (Apr. 2, 2020, 5:00 PM), <https://www.texastribune.org/2020/04/02/texas-churches-coronavirus-stay-open/> (“Texas is far from the only state to deem religious services essential; more than a dozen others have done so, according to the National Governors Association.”). In *Roman Catholic Diocese of Brooklyn New York v. Cuomo*, the U.S. Supreme Court granted a church’s application for an injunction because restrictions to church attendance were “not ‘neutral’ and of ‘general applicability’”—such restrictions “must satisfy ‘strict scrutiny,’ and this means they must be ‘narrowly tailored’ to serve a ‘compelling state interest.’” *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (quoting *Church of the Lukumi Babalu Aye Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993)).



factors to be compensated for a Fifth Amendment taking. A *Lucas*-style total deprivation claim is likely precluded by *Tahoe Sierra*.<sup>150</sup>

Proving such a claim is, in general, going to be wildly unlikely.<sup>151</sup> There is, however, a narrow precedent for striking down regulations that fail to advance health and safety laws. In *Nectow v. City of Cambridge*,<sup>152</sup> the U.S. Supreme Court examined a zoning regulation in terms of the advancement of police powers of the health, safety, and general welfare of the inhabitants of the City of Cambridge, Massachusetts.<sup>153</sup> *Nectow* was a due process claim case wherein the property owner argued that a zoning regulation, as applied, “deprived him of his property without due process of law in contravention of the Fourteenth Amendment.”<sup>154</sup> The City of Cambridge had zoned part of Nectow’s property as residential, but a special master found that the zoning would not promote the “health, safety, convenience, and general welfare of . . . that part of the . . . city,”<sup>155</sup> because the surrounding properties were put to industrial and railroad purposes and there “would not be adequate return on the . . . investment for the development of the property.”<sup>156</sup> The zoning regulation was struck down.<sup>157</sup>

*Nectow* is important because it finds that a zoning regulation, as applied, failed to advance health and safety regulations and was therefore struck down under the Fourteenth Amendment. However, in determining whether an executive decision is arbitrary and capricious, courts generally set an exceedingly high standard—behavior must “shock the conscience” or constitute the “most egregious official conduct.”<sup>158</sup> This standard will be extraordinarily—but not

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150. *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 895 (Pa. 2020); see also *Nat’l Amusements Inc. v. Borough of Palmyra*, 716 F.3d 57 (3d Cir. 2013) (finding no Fifth Amendment taking under *Tahoe Sierra* for a five-month shutdown of an open-air flea market because of safety concerns related to unexploded munitions from a weapons testing facility).

151. See generally Joseph D. Richards & Alyssa A. Ruge, *Most Unlikely to Succeed: Substantive Due Process Claims Against Local Governments Applying Land Use Restrictions*, 78 FLA. BAR J. 34 (2004) (discussing why substantive due process claims against local governments applying land use restrictions are typically very unlikely to succeed).

152. 277 U.S. 183 (1928).

153. *Id.* at 184.

154. *Id.* at 185.

155. *Id.* at 187 (citation omitted).

156. *Id.* (citation omitted).

157. *Id.* at 188–89.

158. *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998); *Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32, 45 (1st Cir. 1992) (noting that the “shocks the conscience” standard “[leaves] the door slightly ajar for federal relief [only] in truly horrendous situations”).

impossibly—difficult to meet in the coronavirus global pandemic government shutdown context. Shutting down restaurants and hair salons, for example, has a direct correlation to promoting social distancing, which is critical to stop the spread of disease.<sup>159</sup> A substantive due process claim is therefore unlikely to be successful in the coronavirus government shutdown context.

Similarly, there is little hope for petitioners alleging a procedural due process violation. Generally, before a property right is taken, one must be given notice and an opportunity to be heard before a neutral decisionmaker.<sup>160</sup> However, “where the State acts to abate an emergent threat to public safety, postdeprivation process satisfies the Constitution’s procedural due process requirement.”<sup>161</sup> A petitioner would likely have to show there is no relationship between the prohibited activity and the harm sought to be remedied. Further, the general right to do business is not recognized as a constitutionally protected property right that is subject to due process protection.<sup>162</sup>

Some aggrieved plaintiffs have also sought to have coronavirus shutdown orders overturned on Equal Protection grounds. “The Equal Protection Clause of the Fourteenth Amendment commands that no State shall ‘deny any person within its jurisdiction the equal protection of the laws,’ which is essentially a direction that all persons similarly situated should be treated alike.”<sup>163</sup> Plaintiffs must show disparate treatment was based on “impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.”<sup>164</sup>

In *Lebanon Valley Auto Racing Corp. v. Cuomo*,<sup>165</sup> the plaintiffs sought to invoke the Equal Protection Clause by showing disparate treatment by comparing the government’s treatment of crowds attending racetrack events (denied) to crowds attending

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159. See Achenbach, *supra* note 40.

160. See Mathews v. Eldridge, 424 U.S. 319, 348–49 (1976).

161. RBIII, L.P. v. City of San Antonio, 713 F.3d 840, 844 (5th Cir. 2013); see also Gilbert v. Homar, 520 U.S. 924, 930 (1997) (“[W]here a State must act quickly, or where it would be impractical to provide predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause.”).

162. Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 675 (1999).

163. City of Cleburne v. Cleburne Living Ctr. Inc., 473 U.S. 432, 439 (1985) (quoting Plyler v. Doe, 457 U.S. 202, 216 (1982)).

164. Harlen Assocs. v. Inc. Village of Mineola, 273 F.3d 494, 499 (2d Cir. 2001) (quoting LaTrieste Rest. & Cabaret v. Vill. of Port Chester, 40 F.3d 587, 590 (2d Cir. 1994)).

165. 478 F. Supp. 389 (N.D.N.Y. 2020).

demonstrations and riots (permitted).<sup>166</sup> Their appeal for an injunction, however, was denied because there must be specific facts to show “that the comparators are ‘similar in relevant respects.’”<sup>167</sup> According to the court, there was insufficient equivalence between private, capacity-limited venues on one hand and attendees of public protests on the other.<sup>168</sup>

Finally, government orders to shut down thriving businesses may have been enacted without the requisite constitutional authority. In *Wisconsin Legislature v. Palm*,<sup>169</sup> the Wisconsin Supreme Court struck down an order issued by the state Department of Health Services (DHS) that required closure of all non-essential businesses.<sup>170</sup> The court found that in enacting the order, the Wisconsin DHS was required to follow statutory rule-making procedures and failed to do so, and therefore, the penalties for noncompliance were invalid;<sup>171</sup> and that the DHS exceeded its authority under the applicable health regulations.<sup>172</sup>

## V. THE CORONAVIRUS PANDEMIC AND GOVERNMENT ACTION

The government’s forced shutdown of otherwise thriving businesses helped control the pandemic and stemmed an otherwise-catastrophic loss of life.<sup>173</sup>

Most states enacted sweeping shutdown and shelter-in-place regulations that limited commerce and outdoor activities. In Pennsylvania, for example, after declaring a disaster emergency Governor Wolf issued an executive order on March 19, 2020, closing all businesses that were not life-sustaining.<sup>174</sup> Restaurants and bars were singled out for closure, although permitted to offer carry out,

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166. *Id.* at 399.

167. *Id.* at 398 (quoting *Lilakos v. New York City*, 808 Fed. App’x. 4, 8 (2d Cir. 2020)).

168. *Id.* *But see* *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2608–10 (2020) (Alito, J., dissenting) (arguing that allowing casino to operate in Nevada while prohibiting church gatherings constituted unlawfully disparate treatment).

169. 942 N.W.2d 900 (Wis. 2020).

170. *Id.* at 906, 918 (ordering, *inter alia*, “[a]ll for-profit and non-profit businesses’ to ‘cease all activities’ except for minimum operations that Palm deemed basic”).

171. *Id.* at 918.

172. *See id.* (“We further conclude that Palm’s order confining all people to their homes, forbidding travel and closing businesses exceeded the statutory authority of Wis. Stat. § 252.02, upon which Palm claims to rely.”).

173. *See* Achenbach, *supra* note 40.

174. *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 876–77 (Pa. 2020).

drive through, and delivery business.<sup>175</sup> These businesses were closed expressly to “prevent the spread of COVID-19 by limiting person-to-person interactions through social distancing.”<sup>176</sup>

In Washington, Governor Inslee similarly directed all residents to stay at home “except as needed to maintain continuity of operations of essential critical infrastructure sectors and additional sectors as the State Public Health Officer may designate as critical to protect health and well-being of all Washingtonians,” shutting down all non-essential businesses, including restaurants and bars, who were permitted to do take-out business.<sup>177</sup>

In California, Governor Newsom declared a State of Emergency on March 4, 2020.<sup>178</sup> On March 19, 2020, he “order[ed] all individuals living in the State of California to stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure sectors.”<sup>179</sup> Governor Newsom’s Order singled out for closure: dine-in restaurants, bars and nightclubs, entertainment venues, gyms and fitness studios, public events and gatherings, convention centers, and hair and nail salons.<sup>180</sup> The order also listed a number of approved outdoor activities.<sup>181</sup> In late August, the Governor unveiled a new plan to implement phased re-openings on a county-by-county basis.<sup>182</sup>

175. *Id.* at 879. The Governor took steps to ensure that similarly situated entities would be treated the same by employing a federal classification system of business sectors.

176. *Id.* at 880.

177. Proclamation, Stay at Home—Stay Healthy, Proclamation 20-25 by Wash. Governor Jay Inslee app. at 1 (Mar. 23, 2020), <https://www.governor.wa.gov/sites/default/files/WA%20Essential%20Critical%20Infrastructure%20Workers%20%28Final%29.pdf>.

178. Proclamation of a State of Emergency by Cal. Governor Gavin Newsom (Mar. 4, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-SOE-Proclamation.pdf>.

179. Cal. Exec. Order, Executive Order N-33-20 by Cal. Governor Gavin Newsom (Mar. 19, 2020), <https://covid19.ca.gov/img/Executive-Order-N-33-20.pdf>.

180. Mary Blyth Jones, *Gavin Issues Stay-At-Home Orders for Entire State*, COALINGA PRESS (Mar. 19, 2020), <https://coalingapress.org/2020/03/19/executive-order-n-33-20/>.

181. *See, e.g.*, Alix Martichoux, *California Shelter-in-Place: State Issues Weirdly Specific List of Allowed Outdoor Activities*, ABC 7 NEWS (May 1, 2020), <https://abc7news.com/california-list-of-outdoor-activities-is-tennis-allowed-in-may-near-me/6143855/>.

182. *See* Alexei Koseff & Catherine Ho, *California’s New Rule for Coronavirus Reopenings: It’s Not All or Nothing*, S.F. CHRON. (Aug. 31, 2020, 11:10 AM), <https://www.sfchronicle.com/politics/article/California-s-new-rules-for-coronavirus-15522578.php> (“Under the plan, unveiled [Aug. 28, 2020] by Gov. Gavin Newsom, counties will be placed into four color-coded tiers—purple, red, orange and yellow, in descending order of severity—based on the prevalence of the coronavirus in their communities and gradually move through those levels. Restrictions on business and public life will be eased as transmission drops.”).

In hard-hit New York, Governor Cuomo issued a “New York State on Pause” order on March 20, 2020.<sup>183</sup> All non-essential businesses were closed, and any non-essential gatherings of any size for any reason were cancelled or postponed.<sup>184</sup>

Some steps were taken to mitigate the harm to hard-hit businesses, with mixed success. Congress passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act,<sup>185</sup> which, inter alia, provided direct payment to individuals, extended unemployment benefits, allowed employers to delay paying some taxes, eased retirement fund restrictions, and paused student loan interest.<sup>186</sup> The CARES Act also provided \$350 billion to prevent layoffs and small business closures during the coronavirus pandemic shutdown.<sup>187</sup> The small business administration enacted the “paycheck protection program”—a sweeping forgivable loan program for small businesses.<sup>188</sup>

Many jurisdictions enacted legislation prohibiting evictions for both residential and commercial tenants.<sup>189</sup> However, even in states

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183. Ryan W. Miller & Marco della Cava, *Coronavirus Updates: U.S. Infections Approach 20,000; NY, Illinois Unleash Strict Rules; 150 Detroit Cops Quarantined*, USA TODAY (Mar. 20, 2020, 5:36 AM), <https://www.usatoday.com/story/news/health/2020/03/20/coronavirus-updates-us-deaths-cases-stay-home-order-trump/2880695001/>.

184. See N.Y. Exec. Order, Executive Order 202.28, Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency, by N.Y. Governor Andrew Cuomo (Mar. 20, 2020), <https://www.governor.ny.gov/news/no-20228-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.

185. Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020).

186. Leon LaBrecque, *The CARES Act Has Passed: Here Are the Highlights*, FORBES (Mar. 29, 2020, 7:00 AM), <https://www.forbes.com/sites/leonlabrecque/2020/03/29/the-cares-act-has-passed-here-are-the-highlights/#67757e8768cd>; Zack Friedman, *Your Student Loans Are Due January 1*, FORBES (Nov. 10, 2020, 2:45 PM), <https://www.forbes.com/sites/zackfriedman/2020/11/10/your-student-loans-are-due-january-1-here-are-5-potential-scenarios/?sh=597a56423ec3>.

187. LaBrecque, *supra* note 186.

188. See Andy Puzder, *Despite the Rocky Publicity, the Small-Business Loan Program Is Really Working*, WASH. POST (Apr. 30, 2020, 2:38 PM), [https://www.washingtonpost.com/opinions/despite-the-rocky-publicity-the-small-business-loan-program-is-really-working/2020/04/30/970357ce-8b0e-11ea-9dfd-990f9dcc71fc\\_story.html](https://www.washingtonpost.com/opinions/despite-the-rocky-publicity-the-small-business-loan-program-is-really-working/2020/04/30/970357ce-8b0e-11ea-9dfd-990f9dcc71fc_story.html) (“On April 3, the Small Business Administration launched the PPP with \$349 billion. The SBA’s most recent report says that through April 16, the agency approved nearly 1.7 million loans through 4,975 lenders, depleting the entire fund.”). The Trump Administration also limited evictions for residential tenants. Kelly Anne Smith & Lisa Rowan, *Trump’s Eviction Moratorium Aims to Protect Renters, but Evictions Continue*, FORBES (Sept. 14, 2020, 4:54 PM), <https://www.forbes.com/advisor/personal-finance/trumps-eviction-moratorium-aims-to-protect-renters-but-evictions-continue/>.

189. See Fact Sheet, COVID-19 Relief Programs for Businesses and Employers, by Paul Weiss, Rifkind, Wharton & Garrison, LLP (Aug. 31, 2020), <https://www.paulweiss.com/media/3979787/covid-19-relief-programs-for-businesses-and-employers.pdf>; Dan Keating & Lauren

that limited evictions, many renters still face eviction, and the eviction prohibitions are time limited, which may be little help to many small businesses who were shut during the pandemic.<sup>190</sup>

## VI. MOVING FORWARD: ADVANCING DISTRIBUTIVE JUSTICE AND THE ARMSTRONG PRINCIPLE

Takings law is woefully inadequate to compensate individuals who were harmed by the various government shutdowns during the coronavirus pandemic—particularly those whose businesses will have to close permanently due to the shutdown because they are in a particular class of enterprise that concerns gatherings or close contact, like hair salons and dine-in restaurants. The plain language of the Fifth Amendment Takings Clause (“nor shall private property be taken for public use, without just compensation”<sup>191</sup>)—and the admonition in *Armstrong*: “The Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole”<sup>192</sup>—should militate in favor of relief for these disproportionately affected individuals and businesses.

The *Armstrong* Principle is rooted in fundamental historic notions of fairness and justice.<sup>193</sup> This is a central concern of moral philosophy—“when do the needs of the many outweigh the needs of the few?”<sup>194</sup> For Aristotle in particular, this was “distributive justice”

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Tierney, *Which States Are Doing a Better Job Protecting Renters from Being Evicted During the Coronavirus Pandemic*, WASH. POST (Apr. 29, 2020), <https://www.washingtonpost.com/nation/2020/04/29/which-states-are-doing-better-job-protecting-renters-being-evicted-during-coronavirus-pandemic/?arc404=true>; see also Matthew Haag & Conor Dougherty, *#CancelRent Is New Rallying Cry for Tenants. Landlords Are Alarmed.*, N.Y. TIMES (May 1, 2020), <https://www.nytimes.com/2020/05/01/nyregion/rent-strike-coronavirus.html>. But see Emily L. Mahoney, *Home Renters Can't Get Evicted in Florida, but Small Businesses Can*, TAMPA BAY TIMES (Apr. 8, 2020), <https://www.tampabay.com/news/business/2020/04/08/home-renters-cant-get-evicted-in-florida-but-small-businesses-can/> (“Florida’s statewide moratorium on evictions doesn’t include businesses. Gov. Ron DeSantis’ order, issued April 2, states that he is suspending the law for evictions ‘solely as it relates to non-payment of rent by residential tenants due to the COVID-19 emergency.’ The suspension lasts for 45 days.”).

190. Keating & Tierney, *supra* note 189.

191. U.S. CONST. amend V.

192. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

193. Jeffrey M. Gaba, *Taking “Justice and Fairness” Seriously: Distributive Justice and the Takings Clause*, 40 CREIGHTON L. REV. 569, 570 (2007).

194. *Id.* (stating that the issue has “captured the attention of philosophers from Aristotle to *Star Trek*’s Mr. Spock”) (citing *STAR TREK II: THE WRATH OF KHAN* (Paramount Pictures 1982)).

or the “ethical analysis of the distribution of benefits and burdens in society.”<sup>195</sup> “[D]istributive justice” is the restoration of proportionate equality.<sup>196</sup> Goods that determine one’s fortune—like money to pay rent and employees—that are in limited supply should be distributed equally.<sup>197</sup> In Aristotle’s words: “[Distributive] justice . . . is that which is manifested in distributions of honor or money or the other things that fall to be divided among those who have a share in the constitution [civil society] . . . .”<sup>198</sup> Aristotle scholars have further explained that:

The practical effects of distributive justice are considered to be social solidarity and social stability. Hence, society allocates goods according to that social rule that best effectuates the basic purposes of the polity. In this sense, Aristotle’s conception of distributive justice would be welfare maximizing. The definitive test of a “just” allocative rule is that its resulting allocations are proportionate to a primary social value.<sup>199</sup>

In this regard, forcing segments of society—like restaurants and bars—to shoulder the burdens of society interferes with social stability and fails to effectuate the best interests of society.

Applying Aristotle’s notion of “distributive justice” (and the *Armstrong* Principle) is notoriously difficult generally, but particularly so in the coronavirus shutdown of small business context. Courts are ill suited to determine the complex notions of which groups

195. *Id.* (“In Aristotelian terms, this is the issue of ‘distributive justice’ or the ethical analysis of the distribution of benefits and burdens in society.”).

196. ARISTOTLE, *NICOMACHEAN ETHICS* bk. IV, at ch. 4 (William David Ross trans., Oxford, The Clarendon Press 1908) (c. 384 B.C.E.) (ebook); *cf.* James E. Krier & Christopher Serkin, *Public Ruses*, 2004 MICH. ST. L. REV. 859, 859 (arguing that justice would be served through increased compensation in eminent domain cases when there is little evidence of public use).

197. *See* Dana Neaqsu, *A Brief Critique of the Emaciated State and Its Reliance on Non-Governmental Organizations to Provide Social Services*, 9 N.Y. CITY L. REV. 405, 418 (2006); Kathryn Heidt, *Corrective Justice from Aristotle to Second Order Liability: Who Should Pay When the Culpable Cannot?*, 47 WASH. & LEE L. REV. 347, 351 (1990) (“The aim of distributive justice is to establish or provide a method of establishing a proportion according to which the members of society will share so that the most deserving will be entitled to the most, and the least deserving to the least.”).

198. ARISTOTLE, *supra* note 196, bk. V, at ch. 2; *cf.* Judith A. Swanson, *Michael J. Sandel’s Justice: What’s the Right Thing to Do? A Response of Moral Reasoning in Kind, With Analysis of Aristotle and Examples*, 91 B.U. L. REV. 1375, 1385 (2011) (“As Aristotle says, doing the right thing requires doing it at the right time, in the right way, to the right people . . .”).

199. Elbert L. Robertson, *A Corrective Justice Theory of Antitrust Regulation*, CATH. U. L. REV. 741, 743–44 (2000).

should pay a “fair share” or “equal distribution” in fighting the coronavirus.<sup>200</sup> The government shutdown during the coronavirus pandemic unquestionably represents an exercise of the government’s police power to regulate the health, safety, and welfare of the community. But the three-part *Penn Central* Test does not adequately account for equal distribution of burdens.

Yet the *Armstrong* Principle is the ostensible impetus for the three-part *Penn Central* Test:

The question of what constitutes a “taking” for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. While *this Court has recognized that the “Fifth Amendment’s guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole,”* [citing *Armstrong*], this 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* [citing *Goldblatt*]. Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government’s failure to pay for any losses proximately caused by it depends largely “upon the particular circumstances [in that] case.

In engaging in these essentially ad hoc, factual inquiries, the Court’s decisions have identified several factors that have particular significance. 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, of course, relevant considerations. So, too, is the character of the governmental action. A

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200. See *Huntington Beach City Council v. Superior Ct.*, 115 Cal. Rptr. 2d 439, 452 (Ct. App. 2002) (“You can get a Ph.D. in political science studying what ‘fair shares’ are and still not come to any firm conclusion. The subject has occupied political philosophers since at least Aristotle, who, in addressing the subject of ‘distributive justice,’ began a long tradition in political philosophy of thinking about exactly what do you mean by ‘fair’ in ‘fair share.’ It is one of those topics that is particularly suited for the marketplace of ideas.”); see also Gaba, *supra* note 193, at 575 (“[T]he Supreme Court has never seriously explored the implications of viewing the Takings Clause in terms of distributive justice. Indeed, the Court seems to have shied away from any serious analysis.”).



“taking” may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.<sup>201</sup>

Any “set formula”<sup>202</sup> for determining whether “justice and fairness” dictate that a business owner should be compensated because their property has been “taken” should include an express recitation of the *Armstrong* Principle as a determinative fourth *Penn Central* factor when one group has been called upon to bear burdens that should be borne by society as a whole.<sup>203</sup> As a practical matter, the *Armstrong* Principle is repeatedly cited by courts, but is practically *never* a determinative factor in deciding whether, for example, a Fifth Amendment taking has occurred.<sup>204</sup> It should be.<sup>205</sup> The coronavirus

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201. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123–24 (1978) (first and fourth alterations in original) (emphasis added) (citations omitted); *cf.* *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1071 (Stevens, J. dissenting) (“[T]he determination whether a law effects a taking is ultimately a matter of ‘fairness and justice,’ [citing *Armstrong*] and ‘necessarily requires a weighing of private and public interests’ [citing *Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980)]. The rigid rules fixed by the Court today clash with this enterprise: ‘fairness and justice’ are often disserved by categorical rules.”).

202. *Penn Cent. Transp.*, 438 U.S. at 124. Although *Penn Central* refers to a “set formula,” “no magic formula enables a court to judge, in every case, whether a given government interference with property is a taking.” *Ark. Game & Fish Comm’n v. United States*, 568 U.S. 23, 31 (2012).

203. *See contra* Michael Pappas, *The Armstrong Revolution*, 76 MD. L. REV. ENDNOTES 35, 45 (2016) (stating that the *Armstrong* Principle “cannot serve as a meaningful test to determine whether property has been taken”). According to Pappas, “the inquiry as to whether a taking has, in fact, occurred should incorporate no comparative fairness question. It should merely ask whether regulation has gone too far in reducing property expectations.” *Id.*

204. *See id.* at 43–44 ([A]n analysis of all citations to the *Armstrong* principle in lower federal courts and state courts indicates the same result: that the *Armstrong* principle is oft-cited but never the ultimate grounds for resolving a case. These cases citing *Armstrong* tend to fall into one of four categories. First, some cases simply cite and repeat the *Armstrong* principle, usually as a general tenet of takings law. Second, some cases cite the *Armstrong* principle as a component of one of the factors in the *Penn Central* balancing test or cite *Armstrong* as an addition after applying an individualist takings measure. Third, some cases cite *Armstrong* in reliance on its narrow holding to support the assertion that liens or comparable types of property amount to property interests for the purposes of the takings clause. Finally, a fourth set of cases cites *Armstrong* for the general propositions that the destruction or seizure of valuable property can amount to a taking but that not every government action affecting property is necessarily a taking. There are also cases that fall outside of these categories, but, again, none applies *Armstrong* as the primary (or even major) source of reasoning or decision in a case. Of all these cases, none of them offers a robust or even meaningful application of the *Armstrong* principle as a test for whether a taking has occurred.); *cf.* Stephen Durden, *Unprincipled Principles: The Takings Clause Exemplar*, 3 ALA. C.R. & C.L. L. REV. 25, 45 (2013) (stating that the Supreme Court embraces *Armstrong* “at least occasionally”).

205. “[T]he Supreme Court has never seriously explored the implications of viewing the Takings Clause in terms of distributive justice.” Gaba, *supra* note 193, at 575. Rather, “the Court seems to have shied away from any serious analysis,” and continues to “resort[] to the same ad hoc

shutdowns have exposed a glaring inadequacy in the way takings claims are evaluated.

Employing the new and expanded test will not, by any means, open the floodgates of compensation for aggrieved property and business owners, nor unfortunately, will it directly help those who have lost their jobs due to the coronavirus pandemic shutdown. It may extend the possibility of a decision that considers distributive justice in determining whether a property interest has been “taken,” in instances where there is a glaring inequity in distributive justice.<sup>206</sup> This is particularly true, in the “category of cases in which . . . unanticipated regulations destroy a significant portion of the total assets of a property owner.”<sup>207</sup> In many situations, the coronavirus pandemic government shutdown of small businesses that depend on “social distancing” is just such a category of cases.

Expanding takings law by adding a determinative factor to the *Penn Central* Test for unexpected catastrophic regulations will better allow those affected to be heard. The static three-part *Penn Central* Test does not achieve this goal because it does not expressly balance societal interests. Since the *Penn Central* Test represents the touchstone of nearly all takings analyses, courts would be better equipped to make just decisions with an expanded and flexible test—as was originally contemplated in *Penn Central*.<sup>208</sup> This is particularly true in the context of the additional burden created by the temporary takings analysis. Petitioners have the high hurdle of showing that a

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balancing.” *Id.* (noting how, in *Palazzolo v. Rhode Island*, the Supreme Court merely stated that the outcome “depends largely ‘upon the particular circumstances’” of the case).

206. *See, e.g., id.* at 590 (arguing that the U.S. Supreme Court would have reached a different result in *Miller v. Schoene* if the Court had considered “fairness” in deciding whether a taking had occurred (citing *Miller v. Schoene*, 276 U.S. 272, 280–81 (1928))). Of course, *Miller* was decided decades before both *Armstrong* and *Penn Central*.

207. William Michael Treanor, *The Armstrong Principle, the Narrative of Takings, and Compensation Statutes*, 38 WM. & MARY L. REV. 1151, 1155 (1997). Treanor persuasively argues that compensation in cases where “the total net worth of a property owner is dealt a disproportionate blow as a result of a newly instituted government regulation.” *Id.* at 1156; *cf.* *Sanitation & Recycling Indus. Inc. v. City of New York*, 107 F.3d 985, 993 (2d Cir. 1997) (“Impairment is greatest where the challenged government legislation was wholly unexpected.”).

208. *Cf.* Nestor M. Davidson, *The Problem of Equality in Takings*, 102 NW. U. L. REV. 1, 6–8 (2008) (“There is a strong meta-signal in the Court’s endorsement of *Penn Central* as the lodestar of regulatory takings jurisprudence, with its concomitant rejection of rule-based limits on the government’s ability to redefine property rights. Privileging ad hoc, open-ended analysis commits the Court—to the consternation of some commentators—to unfolding the doctrine in a pragmatic common law manner. The Court’s embrace of Justice Brennan’s jurisprudential shrug of the shoulders in *Penn Central* does not quite amount to Justice Stewart’s famous I-know-it-when-I-see-it standard, but it certainly comes close.”).

law is arbitrary or otherwise interfered with a fundamental right—or having government end a regulation after a taking has occurred—then would have to meet the *Penn Central* Test to obtain “just compensation” for a taking.<sup>209</sup> There should be an exception to this procedure in the highly unusual situation of when there is a disproportionately applied, unanticipated and sudden catastrophic change in the law that destroys nearly all of a property owner’s holdings—like during a global pandemic and the ensuing “social distancing” regulations.

Under current law, it is highly unlikely that a petitioner would be able to get around the health and safety exceptions and/or prove that the coronavirus government shutdown regulation was otherwise invalid, or ended after a taking occurred (effecting a temporary taking), but if so, an aggrieved party may still have a viable *Penn Central* argument.<sup>210</sup> Under *Penn Central*, the petitioner would first have to show interference with reasonable investment-backed expectations. Here, many impacted businesses certainly expected to be able to continue their businesses in March and April of 2020 without their governors closing their doors due to a global pandemic.<sup>211</sup> There is a demonstrable interference with investment backed expectations. Next, the petitioner would have to show a diminution in value. Again, this should not be a problem. Appraisers can quantify the losses from a business closure or other loss occasioned by the government shutdown.<sup>212</sup> The character of the

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209. In such a case, a petitioner might also have a right to compensation under 42 U.S.C. § 1983 (2012) (civil action for deprivation of rights). Section 1983 gives individuals the right to sue state actors for civil rights or other constitutional violations, including impairment of contract. *Id.*

210. *But see* *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421–23, 441 (1982) (holding that a New York state law preventing landlords from collecting fees for cable installations on their properties was a taking under the Fifth Amendment).

211. *See, e.g.*, *TJM 64, Inc. v. Harris*, 475 F. Supp. 3d 828, 837–38 (W.D. Tenn. 2020). In *TJM 64*, a federal district court considered whether to grant an injunction and weighed the *Penn Central* factors in determining whether the plaintiffs were likely to succeed on the merits of their claim. The court found that the “[COVID-19 closure Orders] interfere in a significant way with Plaintiffs’ investment-backed expectations in their properties, despite their status as highly regulated entities.” *Id.* at 839. The court also found a diminution in value, but ultimately denied the plaintiffs’ motion based on *Penn Central*’s character of the government action test. *Id.*; *see also* *Elmsford Apt. Assocs., LLC v. Cuomo*, 469 F. Supp. 3d 348, at 155 (S.D.N.Y. 2020) (denying a motion for summary judgment challenging New York’s temporary ban on eviction proceedings under, *inter alia*, a takings theory). Under *Elmsford*, the court found that the petitioners could not reasonably expect to be free of additional rental regulations like the eviction ban. *Id.* at 168–69. The court also found that the character of the government action prong weighed in favor of the defendant because it was a temporary reallocation of resources. *Id.* at 167–68.

212. *See, e.g.*, *Elmsford.*, 469 F. Supp. 3d at 166–68.

government action may be a problem when a shutdown is due to health and safety concerns,<sup>213</sup> but the actual action—and how it relates to those burdens—will depend on the circumstances of the case. Finally, petitioner should be able to show that they have been singled out to bear a burden that should be borne as a whole—depending on the size of the affected population.

In the case of an unanticipated regulation that destroys a significant portion of a property owner's assets—and the petitioner carries a disproportionate burden—there should be a more colorable Fifth Amendment takings argument—even if the regulation is temporarily related to a health and safety violation. This should be a high bar for unprecedented situations that single out particular types of property owners, whose interests are devastated by the unanticipated regulation,<sup>214</sup> and whose burdens are disproportionate to the rest of society. The principles of distributive justice call for no less. Therefore, despite the unquestionably compelling safety and health concerns militating in favor of shutting down businesses that center upon social distancing, these industries should not be forced to bear the brunt of society's burdens, while other industries flourish<sup>215</sup> during the coronavirus pandemic.

This raises the question of where to draw the line in determining whether one group is called upon to sacrifice for the greater good. Distributive justice cannot be absolute in this context. *Armstrong's* reflection of the principle of distributive justice is clear (as is the plain language of the Fifth Amendment), yet the U.S. Supreme Court has

213. *Id.* at 167–69. See *Lebanon Valley Auto Racing Corp. v. Cuomo*, 478 F. Supp. 3d 389, 402 (N.D.N.Y. 2020) (“[W]ith respect to the third factor—the character of the government action—the Court begins by noting its power to outweigh the other two.”).

214. See Gaba, *supra* note 193, at 586–87. Professor Gaba posits an “insurance theory” of sharing the risk to minimize loss in a takings context. According to Professor Gaba, “insurance is appropriately employed only to avoid catastrophic loss from unusual and unpredictable events. Insurance theory indicates that we should not buy insurance to cover relatively small losses that arise from regular and expected events; it is economically more rational to bear such losses ourselves.” *Id.*

215. See *Big Tech's Covid-19 Opportunity*, THE ECONOMIST (Apr. 4, 2020) <https://www.economist.com/leaders/2020/04/04/big-techs-covid-19-opportunity> (“The pandemic will have many losers, but it already has one clear winner: big tech. The large digital platforms, including Alphabet and Facebook, will come out of the crisis even stronger. They should use this good fortune to reset their sometimes testy relations with their users. Otherwise big government, the other beneficiary of the covid calamity, is likely to do it for them.”); Jeremy Kress, *Big Banks Are Growing Due to the Coronavirus—That's an Ominous Sign*, THE HILL (May 1, 2020, 7:30 PM), <https://thehill.com/opinion/finance/495719-big-banks-are-growing-due-to-coronavirus-thats-an-ominous-sign>.

justifiably limited just compensation in areas where the government exercises its police power to protect the health safety and welfare of its residents. According to Justice Oliver Wendell Holmes, “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”<sup>216</sup> The population, therefore, of affected individuals entitled to compensation cannot be so large that it interferes with government’s ability to go on.

Permitting widespread takings for coronavirus pandemic shutdowns may also incentivize businesses to engage in risky behavior by remaining open to get shut down by the government and subsequently receive compensation. Even if this strategy were successful, the government would still retain the ability to shut down businesses, it would just have to pay “just compensation” for doing so.<sup>217</sup> This is, after all, the touchstone of the Fifth Amendment’s plain language.

Zoning changes, and health and safety regulations practically always affect one’s use of property and therefore reduce the value of property.<sup>218</sup> There is also no question that the government shutdown to avert a global pandemic represents a legitimate—even a compelling—public interest. The critical question in determining compensation lies in “distributive justice,” which should be reflected in an overriding—and determinative—factor in the *Penn Central* Test<sup>219</sup> in cases where regulations are disproportionately applied, unanticipated, catastrophic, and sudden—and “destroy a significant portion of the [property owner’s assets].”<sup>220</sup> This approach is consistent with *Armstrong* and the ostensible impetus for the *Penn Central* Test itself.

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216. Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

217. See Ilya Somin, *Does the Takings Clause Require Compensation for Coronavirus Shutdowns?*, VOLOKH CONSPIRACY (Mar. 20, 2020, 10:20 PM), <https://reason.com/2020/03/20/does-the-takings-clause-require-compensation-for-coronavirus-shutdowns/>.

218. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 334–35 (2002) (“[A deprivation of all economic use cannot always be a taking because it] would apply to numerous ‘normal delays in obtaining building permits, changes in zoning ordinance, variances and the like’ . . . as well as to orders temporarily prohibiting access to crime scenes, businesses that violate health codes, fire damaged buildings or other areas we cannot foresee.”).

219. Cf. Treanor, *supra* note 207, at 1155 (stating that cases in which “unanticipated regulations destroy a significant portion of the total assets of a property owner” require compensation under the *Armstrong* Principle).

220. *Id.*

Therefore, there should be two exceptions to this test: (1) when the subject regulation is mitigating a harm caused by the property itself; and (2) when the population of similarly affected parties is too large to constitute a legitimate claim of being “singled out” for carrying a burden that should be shouldered by society as a whole.

First, there should be no taking for a property that is directly causing a situation that calls for a sudden and unanticipated regulation. This exception is analogous to the “background principles” exception in *Lucas*. According to *Lucas*:

[T]he owner of a lake-bed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others’ land. Nor the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault. Such regulatory action may well have the effect of eliminating the land’s only economically productive use, but it does not proscribe a productive use that was previously permissible under relevant property and nuisance principles.<sup>221</sup>

In this regard, properties that cause the harm that the sudden regulation is enacted to protect is akin to a nuisance that does not otherwise deserve protection<sup>222</sup> because it is recognized as a harm to society. In the coronavirus shutdown context, many petitioners have argued that their offending regulations have little bearing on reducing the transmission of disease. Such claimants should have an opportunity to have their interests balanced in a takings test before a court.

Second, the population of affected parties entitled to compensation from a sudden unanticipated and catastrophic regulation that results in a near total loss of property must be identifiable, sufficiently narrow, and with nearly similar impacts. To the extent that a sudden, catastrophic and unexpected regulation wipes out too many property owners’ values, the relief is no less just, but at that point, Fifth Amendment takings law—and the *Armstrong* principle—are not suited to provide compensation. At some point, the relief is legislative,

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221. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029–30 (1992).

222. *See Gaba, supra* note 193, at 587–88 (discussing “blameworthiness” in assessing the validity of a takings claim).

not judicial, and appeals should be to legislators, not to judges.<sup>223</sup> Florida, for example has a statute that mirrors the *Armstrong* principle. Under the Bert J. Harris Private Property Rights Protection Act, compensation is due for regulations that “inordinately burden, restrict, or limit private property rights.”<sup>224</sup> Under that law, a property is inordinately burdened when a property owner “bears permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large.”<sup>225</sup> However, an “inordinate burden” does not include temporary impacts, or remediation of a public nuisance.<sup>226</sup> Therefore, an aggrieved property owner, whose business was shut down by a pandemic regulation probably has no cause of action under this statute—but it’s a close model of a legislative fix. The Florida legislature could, for example, add a clause stating that temporary impacts may be considered for a taking if the regulations are (1) disproportionately applied; (2) catastrophic; and (3) unexpected.

Because of these necessary exceptions, the procedures outlined in this Article will not likely dramatically change the landscape of Fifth Amendment takings law. State and local governments still have sweeping power to regulate for the public health, safety, and welfare. The coronavirus pandemic shutdown is a valid exercise of that power. The point rather is to focus the shift of the analysis to the benefits and burdens of regulations that severely harm property interests that are called upon to shoulder burdens that should be borne by society—in situations involving a disproportionate, catastrophic and unexpected loss. Takings law, as currently applied does not adequately reflect distributive justice or the *Armstrong* Principle.

Another problem with this approach is that it does little to assist front-line workers who have been hardest hit by pandemic-initiated government shutdowns. Those individuals are shouldering disproportionate burdens (job losses) while other segments of society

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223. See, e.g., Treanor, *supra* note 207, at 1174 (suggesting a compensation statute that tracks, in part, the *Armstrong* Principle). The North Carolina legislature proposed a bill that would amend the state Constitution to allow a business to sue the government when partially or completely closed by the Governor’s executive order. Richard Craver, *N.C., House Bill Would Allow Business Owners to Sue Over Shutdowns*, WINSTON-SALEM J. (May 27, 2020) [https://journalnow.com/news/state/n-c-house-bill-would-allow-business-owners-to-sue-over-shutdowns/article\\_a2e16a14-2518-5ec2-9ef3-6264f82e0c19.html](https://journalnow.com/news/state/n-c-house-bill-would-allow-business-owners-to-sue-over-shutdowns/article_a2e16a14-2518-5ec2-9ef3-6264f82e0c19.html).

224. FLA. STAT. ANN. § 70.001 (LexisNexis 2021).

225. *Id.* § 70.001(e)(1).

226. *Id.* § 70.001(e)(1)–(2).

are thriving. The Fifth Amendment takings analysis does little to make these workers whole, although the expanded analysis suggested here, taking into account the *Armstrong* Principle, may dissuade state and local authorities from closing certain businesses in the first place which may preserve jobs. Relief for workers and other segments of society that have been disproportionately burdened otherwise lies with state and federal legislatures.<sup>227</sup>

## VII. CONCLUSION

The harm to many small businesses—and their employees—during the coronavirus government shutdown was widespread, and frequently catastrophic. Restaurants, gyms, retail, and the travel industry were particularly devastated, and workers in these industries may be the least financially able to weather the pandemic’s economic storm.<sup>228</sup>

Unfortunately, absent a showing of arbitrary government action or a physical invasion, those hardest hit will not be able to receive compensation under the Takings Clause of the Fifth Amendment, despite the fact that their livelihood may have been taken (at least temporarily) without just compensation from the government. This is true despite the Supreme Court’s admonition in *Armstrong* and Aristotle’s concept of distributive justice. Takings Clause jurisprudence is therefore inadequate to fully compensate individuals whose property has been “taken” without just compensation. Adding a determinative factor to the *Penn Central* Test for situations that are disproportionate, sudden, and catastrophic may help advance the interests of those who are bearing more of a burden than should justifiably be borne by society as a whole.

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227. Affected workers may also have a narrow constitutional argument. According to the Third Circuit Court of Appeals, “[t]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within both the ‘liberty’ and the ‘property’ concepts of the Fifth and Fourteenth Amendments.” *Piecknick v. Pennsylvania*, 36 F.3d 1250, 1259 (3d Cir. 1994) (quoting *Greene v. McElroy*, 360 U.S. 474, 492, (1959)). However, “it is the liberty to pursue a calling or occupation, and not the right to a specific job, that is secured by the Fourteenth Amendment.” *Id.* (citation omitted).

228. See, e.g., Grant Suneson, *Industries Hit Hardest by Coronavirus in the US Include Retail, Transportation, and Travel*, USA TODAY (Mar. 20, 2020, 7:00 AM), <https://www.usatoday.com/story/money/2020/03/20/us-industries-being-devastated-by-the-coronavirus-travel-hotels-food/111431804/> (“[H]ourly workers in sectors like hospitality and retail may be let go as their companies get less business. This further jeopardizes some of the least financially secure workers in the country—jobs in these fields are often part-time and typically pay low wages.”).



