



4-2022

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Finster, Ethan and Dofelmire,, Jessica editor (2022) "Constitutional Cautions Post-Covid-19: A Proposal for 5th Amendment Protection From Police Power Overreach," *Brigham Young University Prelaw Review*. Vol. 36, Article 4.

Available at: <https://scholarsarchive.byu.edu/byuplr/vol36/iss1/4>

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CONSTITUTIONAL CAUTIONS POST-COVID-19: A PROPOSAL FOR 5TH AMENDMENT PROTECTION FROM POLICE POWER OVERREACH

Ethan Quinn Finster¹

When the COVID-19 pandemic began in early 2020, few predicted the devastating impact it would have on countries and individuals. Governments across the world quickly implemented strict lockdown procedures in an effort to curb the anticipated loss of life. The United States Federal Government implemented its own lockdown campaign in early March 2020. These restrictions were both social and economic, leading to businesses deemed “non-essential”² being forcibly closed by government mandate. “Essential”³ entities which survived forcible closure - such as supermarkets, healthcare providers, transportation systems, and gas stations faced heavy restrictions on customer activity, hours of operation, and operating procedures.

There were many instances in the early months of the pandemic that showed the US government’s willingness to legislate economic controls in times of crisis. For example, the Defense Production Act, invoked by the President of the United States in early 2020, required GM and other US-based manufacturers to produce ventilators. Eventually, the United States’ economy was shuttered with the expectation that COVID-19 would pass quickly, though this hope

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2 U.S. Dept. of Labor, Occupational Safety & Health Admin., OSHA 3990-03, Guidance on Preparing Workplaces for COVID-19 (2020).

3 *Id.*

proved incorrect. Individual states tightened and loosened restrictions on their citizenry in the ensuing months. States acted either in accordance with or in opposition to federally sponsored guidelines set by the Center for Disease Control (CDC)⁴ and the Cybersecurity and Infrastructure Security Agency (CISA)⁵. While states were acting within their 10th Amendment right to utilize authority “reserved to the States respectively”⁶ when setting their restrictions, federal recommendations still colored their decisions. Thus, they were reliant on federal guidance and assistance, especially considering no individual state has the authority or resources necessary to facilitate a country-wide lockdown. While political and social schisms may have exacerbated the state-to-state differences in response, initial policy creation across the country was primarily based on federal mandates.

By April 2021, over 200,000 small businesses had been permanently closed due to the pandemic and millions more were at risk of closing if the restrictions continued.⁷ The Takings Clause of the 5th Amendment⁸ may allow financial reparations for businesses deemed “non-essential” and forced into bankruptcy by government order during the COVID-19 pandemic. Government rulings that lead to a substantial temporary, recurring, or permanent loss of economic

4 Center for Disease Control and Prevention, Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19) (March 8, 2021) <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html#:~:text=Most%20workplaces%20should%20follow%20the,and%20self%2Dmonitor%20for%20symptoms>.

5 U.S. DEPT OF HOMELAND SEC, CYBERSEC. & INFRASTRUCTURE SEC. AGENCY, CISA’s Guidance on Essential Critical Infrastructure Workforce (2021).

6 U.S. CONST. AMEND. X

7 Leland D. Crane et al. Business Exit During the COVID-19 Pandemic: Non-Traditional Measures in Historical Context. The Federal Reserve (April 2020) <https://www.federalreserve.gov/econres/feds/files/2020089r1pap.pdf>. at 33.

8 See *supra* note 13. (“...[N]or shall private property be taken for public use, without just compensation”).

viability or potential for the private property of an individual or group constitutes a taking under the 5th Amendment.

However, the invocation of police powers by state governments to restrict business and consumer activity creates a legal protection around government action that cannot be penetrated by 5th Amendment claims.⁹ This protection persists no matter how well those actions fit within precedential criteria for takings. While police powers are certainly an important aspect of governance in extreme circumstances, the infringement of individual constitutional rights that often accompanies their utilization should be addressed. Moreover, excessive utilization of police powers outside extreme circumstances sets a dangerous precedent for their use in future emergencies.

The COVID-19 pandemic has sparked widespread discussion regarding the legality of actions taken by the government in times of emergency. Concerns surrounding the adequacy of Takings Clause precedent have gained traction, and this paper seeks to build upon and resolve these concerns.¹⁰

I propose an exception to governmental immunity when police powers are invoked. Specifically, I recommend the creation of a legal exception to the existing takings criteria which would allow for 5th Amendment takings claims in cases involving state use of police powers. This exception would provide private citizens recourse while still allowing state governments full legal use of their police powers. It would also act as a deterrent against overreaching government restrictions on property that would otherwise go unchallenged due to the preclusive nature of police powers.

9 Berman v. Parker, 348 U.S. 26 (1954). (This decision allows the state action taken for the benefit of public health without triggering the Takings Clause).

10 Timothy M. Harris, The Coronavirus Pandemic Shutdown and Distributive Justice: Why Courts Should Refocus the Fifth Amendment Takings Analysis, 54 LOY. L. A. L. REV. 455 (2021).

I. BACKGROUND

The extent of COVID-19 lockdowns varied drastically from state to state, but they were all founded in the regulatory guidelines provided by the CISA early in the pandemic. These guidelines advocated direct government intervention in the economy, recommending that companies involved in specific sectors be heavily restricted or closed outright to minimize COVID-19 transmissions; such sectors were termed “non-essential.” The CISA definition for these businesses was:

[P]ublic-facing industries such as entertainment, hospitality, and recreation facilities, including but not limited to community and recreation centers; gyms, including yoga, barre and spin facilities; hair salons and barber shops, nail salons and spas; casinos; concert venues; theaters; sporting event venues and golf courses; retail facilities, including shopping malls except for pharmacy or other health care facilities within retail operations.¹¹

Government restrictions, enabled by police power, had a disproportionate impact on the small businesses in the above listed industries. While large corporations were financially capable of weathering the loss in revenue brought on by these regulations, many small businesses were not.

The definition of “small business” varies by industry, so the US Small Business Bureau developed tests to measure eligibility for “small business status.”¹² For the purpose of this analysis, small businesses will be defined as privately owned corporations, partnerships, or sole proprietorships that have fewer employees and less annual revenue than businesses or corporations.¹³ Roughly 200,000 small businesses closed in 2020 alone,¹⁴ with more expected to

11 See *supra* note 4.

12 U.S. CENSUS BUREAU. What is a Small Business (2021).

13 What is a Small Business? ASQ (2022), <https://asq.org/quality-resources/small-business>.

14 See *supra* note 7.

shutter permanently as restrictions continue in many states across the country. This drop in overall competition allowed larger entities to consume vacant market shares and price out future entrants into the markets. As of now, there is little legal recourse possible for these smaller entities against the regulations that ushered in their bankruptcy.

There is a long history of the United States government intervening in the economy during times of war and peace alike. In many of these instances, claims have been filed against this government action regarding the seizure of property under the 5th Amendment. Bringing a suit regarding the unconstitutionality of a seizure is also commonly referred to as bringing a takings claim. Broadly speaking, takings refer to the seizure of private property for use by the government, though this definition does not reflect the legal interpretations that have been built up around the concept over time. According to the 5th Amendment, for a government action to constitute legal takings, it must fulfill two separate requirements. First, the property in question must be appropriated for “public use,”¹⁵ and second, the government must provide “just compensation”¹⁶ to the owner of the appropriated property. Along with these two fundamental rules, various judicial decisions have created a series of hurdles for the government’s action or invocation of eminent domain, regulatory or otherwise, to pass to maintain its legality.

Regulatory deprivation is characterized as government action that restricts the rights of private property owners or the viable usage of property to a point resembling outright appropriation. Restrictions on property use, as well as the outright seizure of property, can be condemned by the courts as illegitimate takings if done without proper invocation of past precedent or police power. Thus, the “substantial deprivation” of the right to freely use one’s property can constitute a taking without the government’s invocation of eminent domain. This interpretation of the 5th Amendment’s Takings Clause was set as precedent, in part, by *Lucas v. South Carolina Coastal Council*. In a 6-2 decision, the court established that “[W]hen the owner

15 U.S. CONST. AMEND. V.

16 *Id.*

of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good...he has suffered a taking.”¹⁷

If a government regulation or appropriation is deemed illegitimate, or the “just compensation” provided is ruled insufficient, then it is likely that the court will award financial reparations to the injured private party. “Reparation refers to the process and result of remedying the damage or harm caused by an unlawful act. The purpose of reparation is generally understood to reestablish the situation that existed before the harm occurred.”¹⁸ The argument for reparation does not automatically assume liability on behalf of the payee, but it does imply a level of “wrongfulness” regarding their actions. While the issuance and amount of reparation will obviously vary from case-to-case, the court decides what constitutes “just compensation” unless they otherwise waive that responsibility.

Police power is generally defined as “the capacity of the states to regulate behavior and enforce order within their territory for the betterment of the health, safety, morals, and general welfare of their inhabitants.”¹⁹ Use of these powers is solely within the purview of state governments pursuant to the 10th Amendment.²⁰ While the extent of police powers has not been legally defined, they are broadly constrained by statutes and precedent. During the coronavirus pandemic, states invoked police powers to enforce stay-at-home orders and economic shutdowns in an attempt to protect the “health, safety... and general welfare”²¹ of their citizenry. However

17 Lucas v. South Carolina Coast Council. 505 U.S. 1003, 1019 (1992).

18 Carla Ferstman, *Reparations*, Oxford Bibliographies (Jun. 13, 2017) <https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0003.xml#>.

19 Ilya Shapiro, *State Police Powers and the Constitution*, Cato Institute (Sept. 15, 2020) <https://www.cato.org/pandemics-policy/state-police-powers-constitution#background>.

20 See *supra* note 5 (The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people).

21 *Id.*

heavy-handed these regulations may appear, there is no legal protection available to private citizens if the state deems it necessary to take otherwise unconstitutional actions through police powers in the name of public health.

Based on the actions of state and federal government agencies and the precedents in place regarding illegitimate takings, it is likely that the closing of businesses via regulation does not constitute appropriation under the Takings Clause due to state invocation of police power. The COVID-19 pandemic has highlighted the inherent frailty of 5th amendment takings jurisprudence, specifically when police powers are involved. The control wielded by state governments under the 10th Amendment invoked during the initial stages of the pandemic likely precludes small businesses from claiming takings through the 5th Amendment. However, even in a state of emergency, the government is bound by the limits set forth by the Constitution and the precedents that have since been interpreted from it. With this in mind, the use of police powers to justify actions that would constitute illegitimate takings in a normal legislative environment should not be protected against 5th Amendment Takings claims, regardless of intended government relief efforts to reduce the effect of said takings.

An exception must be provided to the Penn Test²² established in *Penn Central Transportation Co. v. New York City*²³ which would recognize legitimate claims of takings violations that are otherwise restricted by police power protections. This change would protect private citizens in future circumstances similar to those encountered during the pandemic and provide a legal hurdle which governments will have to consider before rashly instituting police power-based restrictions.

22 (1) the character of the state action; (2) the economic impact of the regulation; and (3) the regulation's interference with the owner's investment-backed expectations.

23 *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

II. PROOF OF CLAIM

The 5th Amendment wording cited as specifically prohibiting unlawful takings states: “[N]or shall private property be taken for public use, without just compensation.”²⁴ Business owners argue that government-imposed shutdowns constitute “takings” under the Supreme Court precedents. The Court has also set a high standard for what constitutes a taking. “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.”²⁵ This standard, along with the tests put forth to determine whether a taking has occurred, creates an opaque, vague, and ineffective tool with which property owners are supposed to protect themselves.

A. Penn Central Transportation Co. v. New York

In *Penn Central Transportation Co. v. New York City*,²⁶ the corporate owner of Grand Central Station (“the Station”) in New York City was barred from building taller buildings in the airspace of the station due to the building being designated as a landmark. This was denied under the City’s Landmark Preservation Law. The committee tasked with enforcing this law requested that Penn Central Transportation apply for permission to build through the appropriate channels. They then denied permission to build.

Penn Central appealed the decision to the Supreme Court, alleging an illegitimate taking. While Penn Central Transportation Co’s claim was denied, the Supreme Court’s decision included a three-part test to determine whether a taking has occurred:

24 *See supra* note 9 (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).

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

26 *See supra* note 15.

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 investment-backed expectations
3. the character of the governmental action²⁷

This set of prescribed factors was dubbed the Penn Central Test, or Penn Test. A court applies this test to every 5th Amendment takings claim, though *Lucas v. South Carolina Coastal Council* (which will be discussed below) creates an exception. Those who claim that takings occurred based on the government’s pandemic restrictions must first prove the government’s actions meet the standards of the Penn Test.

While this may be difficult to achieve without the suggested prescription, it is made simpler when the recommendation is applied. Police powers provide governments an unmitigated array of capabilities that, as of now, lack adequate restrictions. Currently, almost any action can be taken under the auspices of “police power” so long as it furthers “public safety, public health, morality, peace and quiet, law and order.”²⁸ While these are noble pursuits, they cannot be used as a shield against illegitimate encroachment by the government.

Police powers were never referenced as a justification for New York City’s institution of the Landmark Preservation Law, therefore the proposed requirement to consider police power overreach as takings would not have affected the *Penn Central* ruling.

27 Murr v. Wisconsin, 137 S. Ct. 1933, 1943 (2017); see Penn Cent. Transp., 438 U.S. at 124.

28 See *supra* note 7.

B. Lucas v. South Carolina Coastal Council

In *Lucas v. South Carolina Coastal Council*,²⁹ a private property owner purchased two beachfront lots in an established neighborhood. Two years after his purchase, but before homes could be built that were similar to those in the neighborhood, South Carolina passed the Beachfront Management Act. The act effectively made it impossible for anything to be built on those beachfront lots. Lucas successfully sued South Carolina with a takings claim under the 5th Amendment. In upholding the Circuit court's decision, the Supreme Court outlined a new principle for consideration regarding the validity of a takings claim.

The Court ruled government regulation that “denies all economically beneficial or productive use of land” requires compensation under the Takings Clause unless the regulation in question is consistent with “background principles of . . . property law.”³⁰ These “background principles” are described as concepts akin to eminent domain. A private property owner whose property's complete economic value was obliterated by government action does not necessitate further investigation with the Penn Test, unless that situation was outside previously established property law principles.

Lucas did not challenge South Carolina's assertion that the regulations were put in place to protect the resources natural to that area and to prevent serious public harm.³¹ Instead, the case focused on the implementation of the restrictions stemming from that desire. Similarly, the majority of claims against state and local governments are not arguing against the expressed desire to protect public health during the COVID-19 pandemic, but instead focus on the constitutionality of the actions taken by the government to achieve that goal. When the Court ruled in favor of Lucas, it stated that “the Beachfront Management Act denied a previously permissible productive use and

29 *See supra* note 10.

30 *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).

31 *See supra* note 10 at 1020.

did not therefore constitute a background principle of property or nuisance law that would have exempted the state from providing just compensation.”³²

While there is a stronger case against COVID-related restrictions on businesses when using the *Lucas* rule compared to the Penn Test, it is unlikely that the current precedent would apply similarly to actions taken using police powers as opposed to state legislative power. The court would still find that the South Carolina government had illegally taken Lucas’s property if the proposed exception were in place at the time, unless the state had used police power to do so. Even if the police powers exception was applied in *Lucas*, no decision change would have resulted because of the nature of the legislative power behind the restriction. If South Carolina had seized Lucas’ property after invoking police powers, instead of through the legislative process used in the original case, the proposed exception to the Penn Test would then be triggered and a court would likely maintain a ruling in Lucas’s favor.

If the exception were not in place, and police powers were used, Lucas would have no legal claim against South Carolina for its actions under Police Power Immunity precedents. However, the incorporation of this standard exception would most certainly apply to the current COVID-19 shutdowns. When police powers are used to restrict private property to the point of “total deprivation,” my exception to the Penn Test would permit takings claims. This would directly counteract the exception built into the original *Lucas* loophole requiring the court to ascertain whether the situation was in line with previously established principles of property law.

C. Temporary and Permanent Takings

A private property owner need not have their property physically confiscated from them or have the economic utility of that property regulated away permanently in order for the action to constitute a taking. This fact is crucial to analyzing arguments made against coronavirus-related government restrictions under the 5th Amendment.

32 *Id.* at 1031.

In *First English Evangelical Lutheran Church v. Los Angeles County*,³³ a fire and flood destroyed the recreational center for a religious group sponsoring disabled children. Due to the heavy flooding, Los Angeles County adopted an ordinance that prohibited any further construction in the area that had been destroyed by the floods, including the previous location of the recreation center. The church claimed takings and the Supreme Court ruled that “temporary takings which deny a landowner all use of his property are not different from permanent takings, for which the Constitution clearly requires compensation.”³⁴ Upon remand, the California appellate court relied on *Mugler v. Kansas*³⁵ to find that no compensation was owed because 1) the restrictions were put in place to counteract justified health and safety concerns, and 2) that the church was still allowed to use other parts of the property and it could use the restricted property in any way it wanted besides rebuilding.³⁶

According to both the Penn Test and *Lucas* exception, no temporary takings had occurred. Any claim made by private citizens regarding the seizure of their property during the COVID pandemic would have to surpass government argument that those seizures took place for the health and safety of the general population, which is the foundational principle upon which state police powers are built and are usually invoked.

Another influential case in the sphere of temporary holdings was *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*.³⁷ This case dealt with the claims of 5th Amendment takings by the plaintiffs regarding a thirty-two-month moratorium placed on the development of private land. The plaintiff’s claims were based on the *Lucas* decision, but the court ruled that the restriction did not

33 *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987).

34 *Id.* at 318.

35 *Mugler v. Kansas*, 123 U.S. 623 (1887).

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

37 *Tahoe-Sierra Preservation Cncl., Inc. v. Tahoe Reg. Planning Agcy.*, 535 U.S. 302 (2002).

amount to a taking because of the “parcel as a whole” concept.³⁸ The court explained that the right of private citizens to develop their land was only part of their 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.³⁹

Temporary takings can never be considered “total depreciation” as described in the *Lucas* ruling because the value of the property would return immediately after the restriction is lifted. In these instances, total depreciation did not occur as value was not taken permanently, just for the duration of regulation. *Tahoe-Sierra* established that claims of temporary takings can still be made but must pass the Penn Test before gaining legitimacy. Police power can be used to perform a temporary taking, but its use would prevent citizens from bringing claims they otherwise could in non-emergency circumstances. The Penn Test exception would provide protection for citizens and an opportunity to bring claims in cases of temporary takings and total depreciation alike. This principle was further illustrated by the Court’s ruling in *Seiber v. United States*,⁴⁰ which provides a glimpse at the complex issues taken into consideration when any takings claims are made:

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

38 *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.’”).

39 *Id.* at 332.

40 *Seiber v. United States*, 364 F.3d 1356 (Fed. Cir. 2004).

would otherwise be a permanent taking is temporally cut short.” Temporary takings of this category may result when “a court invalidates a regulation” that had previously affected a taking, “when the government elects to discontinue regulations after a taking has occurred”... 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.”⁴¹

While the invocation of police powers itself does not constitute a “trigger,” the actions taken using its authority can certainly be “triggering events” for purposes of a temporary takings claim. Here, the proposed Penn Test exception would still require a “triggering event,” but the claim would no longer have to pass the Penn Test in order to be recognized as a legitimate claim by the court. Businesses could easily claim takings specifically because police powers were used to create these “triggering events.” This Penn Test police powers exemption would apply just as easily in the case of “extraordinary delays” as described in the court’s decision above.

A “total deprivations” claim would likely be precluded by *Tahoe Sierra*; however, the proposed exception to the Penn Test would allow for an easier claim of temporary takings.

41 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)).

D. Public Health and Safety Exceptions to the 5th Amendment

All major court decisions regarding takings have allowed for the possibility of exceptions to the rule for regulations that concern the health, welfare, and safety of the general population. Regardless of whether these regulations are created by legislative or police power, courts have usually deferred to local jurisdictions as the source of these restrictions, since local governments are able to legislate to meet the unique needs of their respective citizens.⁴² *Mugler v Kansas*⁴³ is the mainstay case regarding the extent of state authority to regulate the health and safety of citizens without providing compensation for an otherwise illegal taking. In 1877, Peter Mugler built a brewery in Salina, Kansas and obtained all necessary permits to legally produce alcohol in the state. In November 1880, the Kansas Legislature passed prohibitions on the manufacture and sale of alcohol for recreational use. In 1881, Peter was indicted by the state for operating his brewery illegally and argued that he was deprived of the economic value of his investments by the Kansas government's

42 See *supra* note 27 (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”).

43 *Id.* at 623.

actions. Mugler's initial convictions were upheld by the Supreme Court, which commented on the questioned principles of taking law.

[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 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.*⁴⁴

This decision allowed massive authority to be left in the hands of federal, state, and local legislatures regarding the supervision of the concept represented as “public health.”

In *Goldblatt v. Town of Hempstead*,⁴⁵ the Supreme Court referred to *Mugler* when it denied compensation to the owner of a private gravel mine within Hempstead's town boundaries. The mine was sued by the town for failing to comply with new ordinances that restricted its activities. The owners of the mine claimed that the new law was an unlawful exercise of police powers since the mine had been in operation for decades beforehand without issue.

44 *Id.* at 668-69 (emphasis added).

45 *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962).

The Supreme Court upheld the ordinance restricting the use of the mine because it was in the public's interest, and the restriction was not "unduly burdensome."⁴⁶

This power was further exhibited in *Berman v Parker*,⁴⁷ when Congress passed the District of Columbia Redevelopment Act and created the District of Columbia Redevelopment Agency. The Agency's purpose was to redevelop areas of the nation's capital it deemed unseemly. This was to be done through the use of eminent domain. Berman, and others whose property was appropriated, brought claims against the agency under the 5th Amendment. The initial decision was appealed up to the Supreme Court, which finally ruled in favor of the government. So long as just compensation was provided, property could be seized for any specific purpose. In this case, the court described the nebulous nature of the typical applications of police powers:

Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power, and do not delimit it.⁴⁸

E. Government Response to the Coronavirus Pandemic

There is debate over whether the general government reaction to the coronavirus pandemic fulfilled the police powers mandate to protect health and public good. Generally, state governments expressly stated that regulations put in place were to reduce the spread of COVID-19 by limiting person-to-person interactions through social distancing. They contended that any damage these restrictions caused small businesses was offset by their promotion of the common good.

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

47 *See supra* note 7.

48 *Noble State Bank v. Haskell*, 219 U. S. 104, 219 U. S. 111.

The Coronavirus Aid, Relief, and Economic Security (CARES) Act,⁴⁹ and the Paycheck Protection Program (PPP) were established in the spring of 2020 to mitigate the harm created by government restrictions. The CARES Act provided \$350 billion to assist small businesses in avoiding layoffs and closures,⁵⁰ while the PPP provided forgivable loans to businesses that needed to maintain staff during initial lockdowns.⁵¹ Along with these protections for businesses, measures were put in place to secure housing for both residential and commercial tenants.

While the federal government did implement some measures to placate the initial needs of businesses shuttered by the use of police powers, the continual extensions of restrictions in some states, contrasted with the swift re-openings of others, has left some parts of the country with far greater burdens than others. Even the implementation of restrictions, where big-box companies were allowed to remain open while smaller shops were forced to close, provides evidence of a drastically uneven application of the law. Precedent set in *Armstrong v. United States*⁵² barred the Government from forcing a select few to bear burdens that should be borne by the entire public. “[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.”

The exception proposed by this paper would provide an avenue for those disproportionately affected by the implementation of police power to maintain their right to bring legitimate claims under *Armstrong*. While standard regulatory power could still discriminate in the manner seen during the pandemic, police power would be restricted in its implementation. Legitimate power would remain in the hands of government bodies, but the emergencies that necessitate its use would have to be broadly applicable enough to warrant

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

50 *Id.*

51 See Andy Puzder, Despite the Rocky Publicity, the Small-Business Loan Program Is Really Working, WASH. POST (Apr. 30, 2020, 2:38 PM).

52 *Armstrong v. United State*, 517 US 456 (1996).

restriction of the “public as a whole” as opposed to small segments as seen previously. The overarching restrictions put in place in reaction to COVID-19 serves as a basis for this standard. These restrictions failed to distribute the burden across the public as a whole, instead placing their most strenuous effects on small business owners. In order to avoid claims under the proposed Penn Test exception, the government would have to be sure that extreme actions taken with police power cannot be construed as discriminatory. The distinction between the use of eminent domain and the invocation of police powers forms the foundation for the implementation of the Penn Test exception. While eminent domain involves the appropriation of private property for use by the public, police powers provide regulatory power over private property for the public interest.

This distinction between property taking and property regulation can be avoided in cases where police powers are used by allowing any property restriction created through police powers to immediately constitute a taking and thereby require just compensation. Police power use must be relegated to extreme circumstances, and this additional rule would not limit their use in times of necessity. This exception would provide a level of protection to private citizens in situations where the government is using police powers to protect its own interests. The knowledge that legitimate 5th Amendment takings claims could still be brought against that government action would disincentivize arbitrary utilization of police powers to regulate property.

III. CONCLUSION

The extent of the damage done to individual businesses by government-sponsored lockdown restrictions is immeasurable. While some struggled but were able to survive through luck or skill, many more closed their doors forever because of their inability to do business. Restaurants, retailers, and small grocers were particularly devastated, leaving owners and employees alike reeling under the restrictive economic weight of these regulations. All the while, large corporations remained open to serve the populace during the height of the pandemic. Unfortunately, current law surrounding the use of

police powers precludes those devastated businesses from seeking just compensation through the Taking Clause of the 5th Amendment.

There is inadequate legal protection in place for citizens faced with regulations made via police powers as opposed to typical legislative processes. While state governments should not be restricted in their use of police powers in times of emergency, the proposed exception to the Penn Test, that activates in circumstances where regulation was created using police powers, would provide security for citizens and legitimize government action. The security of property owners would be better ensured as their 5th Amendment rights are upheld in extraordinary circumstances. Government action would gain legitimacy because government agencies acting with near-limitless police powers would be inclined to consider all possible alternatives to overwhelmingly restrictive measures. Safety restrictions could still be put in place, but individuals would be protected as well.

Adding this determining exception to the Penn Test would safeguard the interests of private citizens while still allowing society as a whole, rather than select individuals, to bear the burdens of catastrophic events necessitating the use of police power.