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THE TAKINGS CLAUSE CONFRONTS THE POLICE POWER:

HOW THE CONSTITUTION'S WELL-KNOWN PROTECTION FAILED TO PROTECT JOBS, BUSINESSES, AND THE BROADER ECONOMY IN THE NAME OF COVID-19

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I. INTRODUCTION

A. HISTORICAL OVERVIEW

Most Americans know the gist of what is typically

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referred to as the "Takings Clause"—it is the idea that the government cannot take your property without paying for it. Specifically, after commanding a slew of other "don'ts," the Fifth Amendment concludes by providing ". . . nor shall private property be taken for public use without just compensation."[2] Note, the Clause does not grant a power to take private property, it merely confirms the pre-existing power and prescribes two conditions: (1) public use, and (2) just compensation. Consequently, the government is generally required to pay for your property if they take it for "public use."[3]

So, what's there to argue about? It *seems* cut and dry. Wouldn't the Constitution require the government to pay a property owner if a law, ordinance, or other act takes the property or prevents the owner's use thereof? Like any good response to a legal question, the answer is: it depends. This essay will explain on what terms and for what reasons the answer is "it depends."

To make the topic more practical and timelier, this essay will explain how recent orders in Tennessee related to

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[2] U.S. CONST. amend. V.
[3] *Id.*

the COVID-19 Pandemic may implicate the Takings Clause, which arguments, if any, may render a successful takings claim, and which arguments for a taking should be steered clear of. The author hopes to explain to business owners, individuals, and organizations how and why their business, livelihood, or property could be "taken" or regulated out of existence in the name of COVID-19—and whether they are owed "just compensation."[4]

To contribute to legal scholarship, this essay will introduce the topic in Part II by providing a general historical overview of constitutional takings precedent and the different types of takings. Next, in Part III, the essay will address orders related to the COVID-19 Pandemic—sometimes called "lockdown orders"—in Tennessee, a state which falls on the conservative end of the lockdown-order spectrum. Finally, the essay will conclude in Part IV by addressing the concerns of businesses and their satisfaction with the results of the preceding parts.

In sum, the essay hopes to provide a helpful and practical description of the Takings Clause and how that

[4] *Id.*

Clause applies to recent lockdown orders aimed at curbing the effects of the COVID-19 Pandemic.

II. THE TAKINGS CLAUSE IN APPLICATION

A. THE CLAUSE AND ITS HISTORY

It is always beneficial to start (again) with the text of the Constitution when analyzing a Takings Clause issue. "[N]or shall private property be taken for public use without just compensation."[5] As Chief Justice Roberts recently recounted, when the Founders included this Clause in the Fifth Amendment, "[they] recognized that the protection of private property is indispensable to the promotion of individual freedom."[6] One of those Founders, John Adams, phrased the importance of the Clause in even fewer words: "[p]roperty must be secured, or liberty cannot exist."[7]

Of course, the American Founders did not themselves contrive the idea that rights in property were independent of

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[5] *Id*. It is also worth pointing out the Tennessee Constitution's language: "That no man's particular services shall be demanded, or property taken, or applied to public use, without the consent of his representatives, or without just compensation being made therefor[]." TENN. CONST. art. I, § 21.
[6] Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2071 (2021).
[7] *Id*. (citing JOHN ADAMS, *Discourses on Davila*, 6 WORKS OF JOHN ADAMS 280 (C. Adams ed., 1851)).

government, or at least independent of royal decree. Earlier philosophers and legal scholars like John Locke and William Blackstone deserve proper recognition for their preeminent roles in providing popular, intellectual support for these now-foundational principles of the American Republic.[8]

There is, however, significant reason to believe that other jurisprudent philosophers and writers of the pre-Colonial era would not have shared the modern interpretation of the language used in the American Constitution.[9] For example, Hugo Grotius, an early writer on political philosophy, was a stalwart advocate of the principle behind the compensation clause, but even he believed in limitations on the practice.[10] Another early and influential thinker wrote that "[m]en are obliged naturally to assist each other as much as possible, and to contribute to the perfection and happiness of the fellow creatures . . ." by buying and

[8] *See generally*, JOHN LOCKE, TWO TREATISES OF GOVERNMENT 197 (Thomas Hollis ed., 1764); 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (1766) (discussing general rights in property).
[9] *See* Joseph L. Sax, *Takings and the Police Power*, 74 YALE L. J. 36, 54-57 (1964).
[10] *See* HUGO GROTIUS, 2 ON THE LAW OF WAR AND PEACE 2 § 19 (1625) (writing that "all men" have the right to purchase property at a "reasonable price").

selling property at "a reasonable price from those who have themselves no occasion for [it]."[11]

For this reason, a sect of modern scholars criticize the modern takings doctrine and believe that government is not required to maintain the status quo (or even a beneficial use) of property ownership with respect to profit-seeking activities—that is, if the government acts through regulation instead of condemnation.[12] Thus, to the extent that the pre-American understanding was, as those scholars believe, intended to compensate only physical (as opposed to regulatory) takings, American jurisprudence has charted a new course.[13]

The central tenet of the Takings Clause was expressed most succinctly by Justice Hugo Black: "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."[14] However, the

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[11] EMER DE VATTEL, 1 THE LAW OF NATIONS 20 § 244 (1758).
[12] *See generally* Sax, *supra* note 9.
[13] *See infra* Part II.B.
[14] Armstrong v. United States, 364 U.S. 40, 49 (1960).

Court 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."[15] In large part, the determination of whether a taking is subject to compensation under the Fifth Amendment is based on how the courts classify it – as a per se, regulatory, exaction, or nuisance issue. For that reason, respective tests have developed to allow the court a basis for their decisions.

The preliminary inquiry as to whether a citizen is owed compensation turns on whether a taking has been effectuated.[16] Only then would the secondary question—whether the compensation, if any was provided, was "just"—need to be answered.[17] [18]

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[15] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (quoting Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962)).
[16] *Penn Cent. Transp. Co.*, 438 U.S. at 151.
[17] *Id.*
[18] Some would argue that even if COVID-19 restrictions on businesses and individuals were a taking, a suit would nonetheless be superfluous. Their reason? Just compensation has already been provided in the form of government payments throughout the Pandemic. Undeniably, government assistance was provided to employers via the Paycheck Protection Program. *See* Paycheck Protection Program Flexibility Act of 2020, 116 Pub. L. No. 142, 134 Stat. 641 (2020). Moreover, qualified individuals received

B. DISTINCTIONS AMONGST TAKINGS TYPES

Some takings are clearer than others. For the clearest form of a taking, think of a physical taking by the government—one where the government uses its power of eminent domain to formally condemn and take title to property.[19] An example may be the government taking your roadside ditch to expand a pre-existing highway. Consider also the government's occupation of property, perhaps by repeatedly causing it to flood as a result of building a dam.[20] Any of those would be a physical taking. Compare that "clearest sort of taking"[21] with another, more indirect, form—regulatory takings—where the government hasn't taken title to the land, but its acts have undoubtedly affected it.[22]

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multiple stimulus payments throughout the Pandemic. Still, however, whether those funds would be designated as the "just compensation" demanded by the Fifth Amendment is a question left for another day. Readers should keep in mind that this essay, in discussing the Takings Clause, assumes that no just compensation has been provided.

[19] *See, e.g.*, United States v. General Motors Corp., 323 U.S. 373, 374-75 (1945); United States v. Pewee Coal Co., 341 U.S. 114, 115-17 (1951).

[20] United States v. Cress, 243 U.S. 316, 327-28 (1917).

[21] Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001).

[22] *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322 (2002).

So, you have physical takings and regulatory takings; this article will primarily address the latter.[23] Regulatory takings themselves vary in types, with more than one *per se* rule to guide the analysis. First, a regulation that installs a "permanent physical occupation" on the property *is* a taking.[24] Second, a legitimate regulation promulgated under the state's police power *that controls a "nuisance"* is *never* a taking.[25]

Apart from those two rules, the Supreme Court has, since 1922, developed an approach to determining whether a government regulation goes "too far" to not be considered a taking.[26] Generally speaking, the "too far" test enunciated by Justice Holmes[27] now applies to property use restrictions like

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[23] Government, save the federal government's invocation of the Defense Production Act, *see* Exec. Order No. 13,911, 85 Fed. Reg. 18,403 (Mar. 27, 2020), primarily acted to regulate businesses, not to step in and operate them in place of their owners.
[24] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982).
[25] Hadacheck v. Sebastian, 239 U.S. 394, 412 (1915) (analyzing the plaintiff's position in light of the decision of the Court in *Reinman v. Little Rock*, 237 U.S. 171 (1915), but holding that a regulation aimed at controlling a *specific* nuisance would be different than "if the ordinance were broader" and applied to a class of properties; a decision on which the Court simply stated: "we reserve [judgment]."). In sum, nuisance is the key term for this *per se* rule, and it does not dispel the question addressed herein with regard to COVID-19 lockdown orders.
[26] Penn. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).
[27] *Id.*

zoning ordinances,[28] mining restrictions,[29] and the use of property to sell certain items (say, eagle feathers [30]).

To aid in the determination as to whether a regulation has gone "too far," courts generally apply the "*Penn Central* test." Under this test, courts weigh a number of factors, including (1) the economic impact of the regulation, (2) the regulation's interference with reasonable investment-backed expectations, and (3) the character of the government action.[31] When the balance of this "essentially *ad hoc*"[32] inquiry leans toward a regulation that goes "too far,"[33] courts will generally find a taking.[34] If the government acts through regulation (not formal condemnation) but still physically appropriates property, it is no argument to say that a physical taking has not occurred—whenever physical appropriation has occurred, there is a *per se* taking and *Penn Central* has no place.[35]

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[28] Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387-88 (1926).
[29] United States v. Cent. Eureka Mining Co., 357 U.S. 155, 168 (1958).
[30] Andrus v. Allard, 444 U.S. 51, 65-66 (1979).
[31] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).
[32] *Id.*
[33] Penn. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).
[34] *Penn Cent. Transp. Co.*, 438 U.S. at 124.
[35] Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2072 (2021).

Few could argue that so-called lockdown orders, regulations aimed at prolonging the COVID-19 Pandemic so as to not overwhelm hospitals and medical service providers, physically appropriate property.[36]

As a general matter, lockdown orders prevented the exercise of some properties' intended uses. There is no apparent "permanent physical occupation,"[37] and no physical appropriation of property appears to exist. Moreover, not only do the regulations to be discussed hereinafter not encroach on an owner's right to exclude, they generally prevent a property owner's once-taken-for-granted opportunity to *allow* others onto his property. This is not a physical appropriation but a regulation on the use and enjoyment of property. Thus, the question turns on whether a regulatory taking has occurred. For that reason, it is important to explore the regulatory takings doctrine a bit further.

C. REGULATORY TAKINGS EXPLORED

[36] *See supra* text accompanying note 23.
[37] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (addressing a government regulation that required the property owner to allow a cable company to install its equipment on the property).

Before digging deeper on regulatory takings, it is worth reiterating the maxim coined by Justice Holmes in *Pennsylvania Coal*: "while property may be regulated to a certain extent, if [a] regulation goes too far it will be recognized as a taking."[38] Thus, to determine whether a regulation goes too far, courts must analyze the regulation itself.

"In view of the nearly infinite variety of ways in which government actions or regulations can affect property interests, the Court has recognized few invariable rules in this area."[39] Still, the Court has drawn some clear lines on regulations that are takings—permanent physical occupations[40] and permanent deprivations of all economically beneficial use[41] are both examples. Because they carry with them a "heightened risk that private property is being pressed into some form of public service

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[38] *Penn. Coal Co.,* 260 U.S. at 415.
[39] Ark. Game and Fish Comm'n v. United States, 568, U.S. 23, 31 (2012).
[40] *Loretto*, 458 U.S. at 426.
[41] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 (1992). *See also* Agins v. Tiburon, 447 U.S. 255, 260 (1980); Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987).

under the guise of mitigating serious public harm," Justice Scalia wrote, "when the owner 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."[42]

Otherwise, most takings claims turn on "situation-specific factual inquiries."[43] Guided by Justice Brennan's opinion in *Penn Central*, several factors aid in the factual determination. First, the economic impact of the regulation on the claimant.[44] Second, the interference of the regulation with the distinct investment-backed expectations.[45] Third, the character of the government's action.[46] These factors have become the court's guideposts in regulatory takings analyses.[47]

1. FACTORING IN TEMPORARINESS

For a fuller understanding of takings claims that

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[42] *Lucas*, 505 U.S. at 1018-20 (emphasis in original).
[43] Ark. Game and Fish Comm'n, 568, U.S. at 32 (citing Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)).
[44] *Penn Cent. Transp. Co.*, 438 U.S. at 124 (citing Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962)).
[45] *Id.*
[46] *Id.* (explaining that a taking is less likely when interference arises "from some public program adjusting the benefits and burdens of economic life to promote the common good").
[47] *See* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Ark. Game and Fish Comm'n, 568 U.S. 23 (2012).

could arise based on COVID-19-related orders, to be described in Part III, it is helpful to consider the impact of government actions (allegedly amounting to takings) that are not permanent but temporary. After all, even the sharpest critics of lockdown orders or COVID-19-related restrictions likely believe they will *eventually* relax. And if not, then temporariness need not be factored in, and the analysis becomes simpler still.

As with the other rules described herein, a reader need only look to the Supreme Court of the United States for the general rule on temporary takings. In *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, Justice Stevens and the Court's majority declined to issue a categorical rule on temporary takings that admittedly deprive all economically viable use for a time.[48] Instead, the majority "conclude[d] that the circumstances in this case are best analyzed within the *Penn Central* framework."[49]

Thus, although a limitation may be less than permanent, the temporality will affect the compensation but

[48] 535 U.S. 302, 321 (2002).
[49] *Id.*

not the underlying takings analysis.[50]

D. ENTER THE POLICE POWER

Chief Justice Rehnquist explained the police power as "a deeply ingrained [principle] in our constitutional history" wherefrom "'the Constitution created a Federal Government of limited powers,' while reserving a generalized police power to the States."[51] "[O]ne of the most essential powers of government, [and] one that is least limitable[,]" few restrictions are placed on the police power of the state: it must not be exercised arbitrarily[52] and its exercise must not violate the provisions of the Constitution.[53] Consequently, states have much leeway in exercising their police power.

Justices have taken their own interpretations as to what exactly the power encompasses, with Chief Justice Taney explaining that it may be invoked to prevent "injurious" actions, "idleness, vice[s], or debauchery" amongst citizens.[54] And Justice McClean asserted that the

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[50] *Id.*
[51] United States v. Morrison, 529 U.S. 598, 618 n. 8 (2000) (quoting New York v. United States, 505 U.S. 144, 155 (1992); Gregory v. Ashcroft, 501 U.S. 452, 457 (1991)).
[52] Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915).
[53] Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905).
[54] Thurlow v. Massachusetts, 46 U.S. 504, 577 (1847).

power could be used in "matters which relate to[] moral and political welfare,"[55] while Justice Grier said it could be used to prohibit those things which may be "pernicious in [their] effects, and the cause of disease, pauperism, and crime."[56] Justice Grier also said that "the preservation of the public peace, health, and morals, must come within this category."[57]

Famously, in *Jacobson v. Massachusetts*, Justice Harlan offered his explanation of the power: "the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety."[58] From there, *Jacobson* then quickly turns to the limitations on the states' power, holding:

> The mode or manner in which those results are to be accomplished is within the discretion of the State, subject, of course, . . . only to the condition that no rule prescribed by a State, nor any regulation adopted by a local governmental agency acting under the sanction of state legislation, shall contravene the Constitution of the United States or

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[55] *Id.* at 588.
[56] *Id.* at 631.
[57] *Id.*
[58] Jacobson, 197 U.S. at 25 (citing Lawton v. Steele, 152 U.S. 133 (1894); New Orleans Gas Co. v. Louisiana Light Co., 115 U.S. 650, 661 (1885); R.R. Co. v. Husen, 95 U.S. 465, 470 (1878); Beer Co. v. Massachusetts, 97 U.S. 25 (1877); Gibbons v. Ogden, 9 Wheat. 1, 203 (1824)).

> infringe any right granted or secured by that instrument.[59]

In so writing, the Court establishes that the state's police power is still confined to the bounds established by the Constitution. So as to avoid any confusion on the issue, Justice Harlan provides that rule in explicit terms, saying "[a] local enactment or regulation, even if based on the acknowledged police power of a State, must always yield in case of conflict with the exercise by the General Government of any power it possesses under the Constitution."[60]

More recently, Justices Brennan and Scalia have stated in the context of Takings Clause cases that "where the State reasonably concludes that the health, safety, morals, or general welfare would be promoted by prohibiting particular contemplated uses of land, compensation need not accompany prohibition."[61] Consequently, as the Court in *Jacobson v. Massachusetts* held, the execution of the police power does not escape review under the Constitution; however, its effect on property will not be considered a

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[59] *Id.*
[60] *Id.* (internal citations omitted).
[61] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1023 (1992) (quoting Nectow v. Cambridge, 277 U.S. 183, 188 (1928); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 125 (1978)) (internal quotations omitted).

taking, because it is not serving the constitutional command of a "public use."

The underlying principle of the police power as it relates to takings is that the government is not acting to "take" property because some "public use" may be had from it; on the contrary, the government is preventing a public bad.[62] Of course, this principle has its own detractors, too, for when the government prevents a public bad, it is inevitably furthering a public good. After all, the Takings Clause 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."[63] Those detractors' argument has yet to carry water.

1. CEDAR RUST MAY KILL BUT IT DOESN'T TAKE

A number of cases illustrate just what regulations implicate the police power. Take, for example, *Miller v. Schoene*.[64] There, a Virginia entomologist, acting pursuant to the Cedar Rust Act of Virginia, ordered the plaintiff to destroy its cedar trees because they produced Cedar Rust, a

[62] *See* ERNST FREUND, THE POLICE POWER § 511 (1904).
[63] Armstrong v. United States, 364 U.S. 40, 49 (1960).
[64] 276 U.S. 272 (1928).

fatal disease to apple trees.[65] The statute paid expenses related to the costs of destroying the trees and allowed the owners to keep and use the timber but did not provide compensation for the decrease in value to the property or the value of the trees themselves if they were permitted to live.[66] The Court granted *certiorari* and unanimously upheld the denial of compensation by the Virginia Supreme Court on the takings claim.[67]

Cedar Rust, according to the Court, is an "infectious plant disease . . . which is destructive of the fruit and foliage of the apple, but without effect on the value of the cedar."[68] So, while the cedar trees obtained no benefit from the disease they harbored, the nearby apple orchards were nearly decimated by it. "The only practicable method of controlling the disease and protecting the apple trees from its ravages [was] the destruction of all red cedar trees . . . located within two miles of apple orchards."[69]

While the Court assumed that the cedar and apple

[65] *Id.* at 277.
[66] *Id.*
[67] *Id.* at 281.
[68] *Id.* at 278.
[69] *Id.* at 278-79.

trees' continued presence was mutually exclusive (based on the lower court's finding), it said also that had Virginia chosen *not* to take action to prevent the spread of the disease to apple trees, that inaction could have been seen as harming the apple trees (and, more importantly, their owners).[70] Thus, "when forced to such a choice[,] the state does not exceed its constitutional [police]powers by deciding upon the destruction of one class of property to save another which, in the judgment of the legislature, is of greater value to the public."[71] Moreover, where the public interest confronts a private, individual interest, even the destruction of the latter is ordinary and acceptable in the exercise of the police power—and is not a compensable taking.[72]

The lesson learned from these apple trees is that when a government vested with the police power acts to prevent harm it is not acting pursuant to its taking authority under the Fifth Amendment but its inherent authority under

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[70] *Id.* at 279.
[71] *Id.* at 280.
[72] *Id. See also* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Northwestern Laundry v. Des Moines, 239 U.S. 486 (1916); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Reinman v. Little Rock, 237 U.S. 171 (1915); Sligh v. Kirkwood, 237 U.S. 52 (1915); Lawton v. Steele, 152 U.S. 133 (1894); Mugler v. Kansas, 123 U.S. 623 (1887); Fertilizing Co. v. Hyde Park, 97 U.S. 659 (1878).

the police power.

III. RELEVANCE OF THE TAKINGS CLAUSE TO COVID-19

Rather than a national survey of COVID-19-related orders, this paper shall, in Part III.C, evaluate and recount Tennessee's approach—a notably conservative and relatively limited one—in an effort to make palatable in a few paragraphs what has taken more than one and a half years to develop. First, though, let us set the scene with the factual origins of the COVID-19 Pandemic.

A. WHAT JUST HAPPENED: A BRIEF RECOUNTING OF THE COVID-19 PANDEMIC

To be clear, this is not a scientific paper, nor is its purpose to litigate political, social, or otherwise non-takings topics. Information relating to the origins, continued timeline, and approaches to curbing the effects of the COVID-19 Pandemic continue to develop, and readers should be careful to note modifications and updates to statements made herein. Now, away with the disclaimers!

All are now familiar with the term COVID-19—whether they want to be or not— as the common name for

the SARS-CoV-2 Virus.[73] The first known cases originated in Wuhan, Hubei Province, China, in mid-December 2019.[74] The first reported case in the United States was confirmed in Washington state on January 20, 2020,[75] and the first death occurred in Santa Clara County, California on February 6, 2020.[76]

Secretary of Health and Human Services Alex Azar declared a public health emergency on January 31, 2020,[77] and President Trump declared a national state of emergency on March 13, 2020.[78] While further descriptions relating to caseloads, vaccine development, and political happenings are interesting and could be a helpful contribution to legal scholarship, they do not fit squarely within the topic to be

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[73] Centers for Disease Control and Prevention, *SARS-CoV-2 Variant Classifications and Definitions*, (last visited Oct. 4, 2021), available at https://www.cdc.gov/coronavirus/2019-ncov/variants/variant-info.html.

[74] *See* Centers for Disease Control and Prevention, *CDC Museum COVID-19 Timeline*, (last visited Nov. 5, 2021), available at https://www.cdc.gov/museum/timeline/covid19.html.

[75] *Id.*

[76] Bill Chappell, *1st Known U.S. COVID-19 Death Was Weeks Earlier Than Previously Thought*, NPR (Apr. 22, 2020, 10:04 AM), https://www.npr.org/sections/coronavirus-live-updates/2020/04/22/840836618/1st-known-u-s-covid-19-death-was-on-feb-6-a-post-mortem-test-reveals.

[77] Alex Azar, Determination that a Public Health Emergency Exists, DEPT. OF HEALTH AND HUM. SERV. (Jan. 31, 2020), https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx.

[78] Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020).

addressed here.

In other words, *many* other significant aspects of the COVID-19 Pandemic will not be described here—each with its own potential legal significance. Therefore, the gaps in the timeline from this point forward represent developments that simply do not aid in this particular discussion. Readers can and should find those developments from other trusted sources.

B. TENNESSEE'S APPROACH: ORDERS, MANDATES, AND CLOSURES, OH MY!

Tennessee Governor Bill Lee issued Executive Order ("EO") 14 (together "EO 14") on March 12, 2020, declaring a state of emergency in Tennessee, following the lead of at least seven other jurisdictions.[79] That EO suspended many trade and health regulations aimed at facilitating a faster response to anticipated medical needs in Tennessee.[80] Soon, though, EO 15 was issued, repealing EO 14 and providing a more lengthy and substantive response to the COVID-19 Pandemic.[81]

Asserting power under Tennessee Code Annotated

[79] Tenn. Exec. Order No. 14 (Mar. 12, 2020).
[80] *Id.*
[81] Tenn. Exec. Order No. 15 (Mar. 19, 2020).

section 58-2-107(e)—and just how reassuring is it that the governor's power to "suspend laws and rules regarding the conduct of state business"[82] is buried in the Title 58, Chapter 2, Section 107, *Paragraph e!*—Governor Lee lifted myriad restrictions on truck drivers, construction crews, nurses, pharmacists, physicians, insurance companies, and other "health care workers" with the stroke of his pen.[83]

Two days after the first COVID-19-related death occurred in Tennessee on March 20, 2020,[84] Governor Lee issued EO 17, banning social gatherings of more than ten persons and prohibiting indoor dining, gym use, and visitation to nursing homes or assisted-living facilities.[85] To be fair though, and with great wisdom and timeliness, the Governor did grant some leniency as relates to restaurants serving to-go alcoholic beverages, allowing take-out orders to include certain alcoholic beverages otherwise in violation of open-container laws.[86]

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[82] *Id.* at 2.
[83] *See id.*
[84] *See* CITY OF KNOXVILLE, TIMELINE OF COVID-19 & EXEC. ORDERS (last visited Nov. 7, 2021), available at https://knoxvilletn.gov/government/mayors_office/c_o_v_i_d-19___coronavirus_/timeline_of_c_o_v_i_d-19___executive_orders.
[85] Tenn. Exec. Order No. 17, at 2-3 (Mar. 22, 2020).
[86] *See id.* at 4.

Perhaps what is most notable about EO 17 was the asserted breadth of its next-to-last provision: "Any state or local law, order, rule, or regulation inconsistent with this Order is hereby suspended."[87] That is a breathtaking assertion of power, reminiscent of Louis XIV's famous declaration: "L'État c'est moi"[88]—perhaps Governor Lee has some French blood?

A day later, the Governor ordered dentists, hospitals, and other outpatient service providers to end all non-emergency procedures.[89] That same EO "requested and encouraged" non-hospital healthcare providers to surrender personal protective equipment ("PPE") (masks, gowns, gloves, etc.) to the Tennessee Emergency Management Agency.[90] Note, the surrender of PPE was a request at this point, not a mandate.

By this time, some municipalities in Tennessee (with their own governing health boards) had instituted county-wide stay-at-home orders, including Nashville, Knoxville,

[87] *Id*. at 5.
[88] Roughly translated to "I am the State."
[89] Tenn. Exec. Order No. 18, at 2 (Mar. 23, 2020).
[90] *Id* at 2-3.

and Memphis.[91] Governor Lee followed suit on March 30, 2020, ordering:

> Businesses or organizations that do not perform Essential Services shall not be open for access or use by the public or its members. Such businesses or organizations are strongly encouraged to provide delivery, including delivery curbside outside of the business or organization, of online or telephone orders, to the greatest extent practicable, and persons are encouraged to use any such options to support such businesses during this emergency.[92]

This EO also "urged [Tennesseans]to stay at home, except for when engaging in Essential Activity or Essential Services . . . ."[93] Three days later, "urged" became "required."[94] Other EOs further suspended the regulations originally lifted by EO 15,[95] prevented dental and other healthcare-related

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[91] *See* METRO PUB. HEALTH DEP'T OF NASHVILLE-DAVIDSON CTY, SAFER AT HOME ORDER, (Mar. 15, 2020), available at https://www.asafenashville.org/wp-content/uploads/2020/04/Amended-and-Restated-ORDER-3-FINAL.pdf; KNOX CTY HEALTH DEP'T, SAFER AT HOME ORDER, (Mar. 23, 2020), available at https://knoxvilletn.gov/UserFiles/Servers/Server_109478/File/MayorsOffice/Covid19/knoxcounty-safer-at-home-order.pdf; City of Memphis Exec. Order No. 03-2020 (Mar. 23, 2020), available at https://covid19.memphistn.gov/wp-content/uploads/sites/76/2020/03/Executive-Order-No-03-2020.pdf.
[92] Tenn. Exec. Order No. 22, at 3 (Mar. 30, 2020).
[93] *Id*. at 2-3.
[94] Tenn. Exec. Order No. 23 (Apr. 2, 2020).
[95] Tenn. Exec. Order No. 24, at 2-3 (Apr. 3, 2020).

procedures originally suspended in EO 18,[96] and created new legal provisions allowing for remote notarizations or witnessing for document executions.[97]

C. TO BE OR NOT TO BE: THE END OF THE PANDEMIC

Governor Lee's first EO to turn in a new direction was issued on April 24, 2020, allowing dine-in service to reopen in Tennessee, save in the "six locally run county health departments[,]" which could determine independently whether to reopen indoor dining.[98] [99] Of course, those counties include the more-highly populated cities like Nashville, Knoxville, Memphis, Chattanooga, Bristol, and Kingsport.[100]

Although "[s]ocial gatherings of ten (10) or more remain[ed] prohibited[,]" Governor Lee allowed the return to work of millions of Tennesseans, effective April 29, 2020.[101] EO 30 also "strongly urged" employers to take precautions against COVID-19 and extended the variance for alcohol

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[96] Tenn. Exec. Order No. 25, at 2 (Apr. 8, 2020).
[97] Tenn. Exec. Order No. 26, at 2-3 (Apr. 9, 2020).
[98] Tenn. Exec. Order No. 29, at 2-3 (Apr. 24, 2020).
[99] *See e.g.*, Knox Cty Code § 38-33(a) (granting power to the Knox County Board of Health to act as the independent board for Knox County related to health regulations).
[100] *See* Tenn. Exec. Order No. 29, at 2 (Apr. 24, 2020).
[101] Tenn. Exec. Order No. 30, at 2-3 (Apr. 28, 2020).

sales for take-out or delivery food services, but continued the mandatory closure of "close-contact personal services" like barbershops, salons, and spas, as well as entertainment venues like bars, night clubs, amusement parks, and concert venues.[102]

A week later, though, the Governor issued new guidance for reopening and allowed the close-contact service providers to reopen.[103] And, two days after that, EO 35 allowed entertainment venues to reopen if they could accommodate a 10-person maximum and maintain a social distance of 6 feet.[104] Finally, using words like "encouraged" and "imperative," the Governor issued EO 38, allowing all Tennesseans to return to work unless they exhibited symptoms of COVID-19.[105] And, some restaurants or bars still had capacity or distance restrictions, but they were permitted to reopen for indoor service.[106]

The Governor continued to extend the suspension of laws and regulations throughout 2020 and 2021, while also

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[102] *Id*. at 4-6.
[103] Tenn. Exec. Order No. 33, at 2 (May 5, 2020).
[104] Tenn. Exec. Order No. 35, at 2-3 (May 7, 2020).
[105] Tenn. Exec. Order No. 38, at 2-3 (May 22, 2020).
[106] *Id*. at 7.

addressing masks[107] and spectators at sporting events;[108] however, no further sweeping EOs were issued to "lock down" the state's businesses or employers. In fact, EO 75 ended the restrictions on spectator sporting events at the close of January, 2021.

All of these actions by the Governor applied to 89 of Tennessee's 95 counties.

D. CITIES AND COUNTIES FLEX THEIR MIGHT

Still, as if the Governor's orders alone were not enough, recall the six locally run health boards with rule-making power.[109] Their contribution to the morass of regulations and orders should not go unnoticed.

Take, for example, the Knox County Board of Health. On March 23, 2020, the Board of Health ordered all non-essential businesses, including restaurants, bars, and event venues, closed.[110] That restriction was not lifted until the plan for phased reopening began on May 1, 2020, and even

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[107] *See* Tenn. Exec. Order No. 54, at 2 (July 3, 2020).
[108] *See* Tenn. Exec. Order No. 70, at 3 (Dec. 20, 2020).
[109] *See e.g.*, Tenn. Exec. Order No. 29 (Apr. 24, 2020) (including Davidson, Hamilton, Knox, Shelby, Sullivan, and Madison counties).
[110] KNOX CTY BD. OF HEALTH, KNOX COUNTY SAFER AT HOME ORDER (Mar. 23, 2020), available at https://knoxvilletn.gov/UserFiles/Servers/Server_109478/File/MayorsOffice/Covid19/knoxcounty-safer-at-home-order.pdf.

then the opening was subject to conditions precedent (e.g., community-wide caseloads, testing capacities, table distances of 6 feet, etc.).[111] It would seem reasonable to say that, for the most part, bars, restaurants, and some event venues were pleased to reopen, even with the new restrictions in place.

Regulation 2020-3 ordered the closure of bars *again* in Knox County for indoor service on July 30, 2020, some three months later.[112] That closure continued until August 6, when the Board of Health issued a new curfew on bar service at 10:00 pm.[113] On September 17, 2020, citing an intent to regulate all businesses that serve alcoholic beverages equally, the curfew was extended to 11:00 pm, and other businesses were included under the umbrella of this policy.[114] A discerning and questioning reader will ask why

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[111] *See* KNOX CTY BD. OF HEALTH, A COMMUNITY STRATEGY FOR PHASED REOPENING at 8 (Apr. 30, 2020), available at https://knoxvilletn.gov/UserFiles/Servers/Server_109478/File/MayorsOffice/Covid19/COVID-Reopen-Plan.pdf.

[112] KNOX CTY BD. OF HEALTH, COVID-19 SUPPRESSION IN BARS REGULATION, Reg. No. 2020-3 (July 30, 2020), available at https://covid.knoxcountytn.gov/pdfs/Regulation-2020-3.pdf.

[113] KNOX CTY BD. OF HEALTH, REVISED COVID-19 SUPPRESSION IN BARS REGULATION, Reg. No. 2020-4 (Aug. 6, 2020), available at https://covid.knoxcountytn.gov/pdfs/Regulation-2020-4.pdf.

[114] KNOX CTY BD. OF HEALTH, CURFEW REGARDING THE SALE OR CONSUMPTION OF ALCOHOLIC BEVERAGES IN CERTAIN

that one hour makes a difference, and how a curfew itself serves to slow the spread—both questions providing a basis for further scholarship, though perhaps in a medical journal.

Without going into every regulation decreed by each of the six independent boards of health in Tennessee, it would not be an exaggeration to say that Knox County's approach was similar to that of other municipalities, at least in Tennessee.[115]

IV. SATISFACTION OF BUSINESSES WITH THE RESULT

Whether the Takings Clause is implicated may depend on any number of things, but the one focused on here is the relevance of the so-called police power. If the police power is used to modify an individual's rights in his or her property (e.g., closing non-essential businesses to prevent the spread of COVID-19 or implementing curfews on bars and indoor dining), because those rights, if acted upon, are believed to be "detrimental to public interests[,]"[116] then the

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ESTABLISHMENTS REGULATION, Reg. No. 2020-5 (Sept. 17, 2020), available at https://covid.knoxcountytn.gov/pdfs/20200917171409574.pdf.

[115] *See* Kaylin Jorge, *Open or Closed? Here's the county-by-county breakdown of Tennessee restaurants,* FOX17, (Apr. 27, 2020), available at https://fox17.com/news/local/heres-the-county-by-county-breakdown-of-tennessee-restaurants-reopening-or-staying-closed.

[116] FREUND, *supra* note 62.

Takings Clause has not been implicated, because the government has not extracted a public use but has forbidden a public harm.

With the police power, the property rights of the individual are not impaired because those property rights are better served with public use; rather, those rights are alleged to be harmful to the public at large.[117] So long as the act in question is "a legitimate regulation, operating alike upon all who [come] within its terms[,]" then the exercise of police power will not be invalidated.[118]

A. AN EXAMPLE IN PRACTICE

Dozens of cases have already been brought, seeking injunctions, restitution, or other remedies from the alleged harm of orders similar to those laid out in Parts III.B and III.C. Perhaps most closely addressing the rules described hereinabove is *TJM 64 Inc. v. Harris*, a case brought in the Western District of Tennessee.[119] Seeking an injunction against Shelby County Mayor Lee Harris, a conglomeration of restaurants and their owners sued to enjoin the closure of

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[117] *Id.*
[118] Hadacheck v. Sebastian, 239 U.S. 394, 409 (1915), *aff'g* Ex Parte Hadacheck, 165 Cal. 416, 423 (Cal. 1913).
[119] TJM 64 Inc. v. Harris, 475 F. Supp.3d 828 (W.D. Tenn. 2020).

"limited service restaurants" [*sic*] in that county.[120]

As the court put it there, plaintiffs asserted that Shelby County Health Directive 8 ("Directive 8")[121] was a violation of the Takings Clause of the Fifth Amendment for exacting a regulatory taking by depriving the owners of these specific businesses of all economically beneficial use of their respective property.[122] Alternatively, if the taking did not meet the standard of a categorical taking enunciated in *Lucas* (depriving all economically beneficial use), the plaintiffs asserted that the *Penn Central* test applied and that Directive 8 was still an uncompensated taking.[123]

Although the court addressed the issue based on the underlying question as to whether a temporary restraining order ("TRO") should be granted,[124] its analysis as to the

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[120] *Id*. at 831-33.

[121] SHELBY CTY HEALTH DEP'T, FORMAL ISSUANCE OF HEALTH ORDER AND DIRECTIVE NO. 8, at 3 (July 7, 2020), available at https://www.shelbytnhealth.com/DocumentCenter/View/1761/Health-Directive-No-8-7-7-20 (providing that "all businesses and services in Shelby County may open for business with the following exceptions: 1) Bars, Limited Service Restaurants, and Clubs as defined at https://www.tn.gov/abc/licensing/liquor-by-the-drink-licenses.html 2) Adult entertainment venues; . . . 3) Schools . . . 4) Festivals, fairs, parades, large scale sporting events, and large scale community events. . . .").

[122] TJM 64 Inc. at 832-33 (citing Compl. at 5, 10, TJM 64 Inc. v. Harris, 475 F. Supp.3d 828 (W.D. Tenn. 2020)).

[123] *Id*.

[124] *See id*. at 833-34.

takings claim remains insightful. The court found that no categorical taking had occurred against the plaintiff bars and restaurants because Directive 8 did not prevent *all* economically beneficial use—the bars and restaurants were still permitted to provide take-out service.[125] The court did not address whether a club had suffered a categorical taking by the government's preventing it from opening or providing service to customers.[126] As for a regulatory taking under *Penn Central*, the court analyzed each of the factors in turn.

Recall the *Penn Central* test's factors: (1) the economic impact of the regulation on the claimant, (2) the interference of the regulation with the distinct investment-backed expectations, and (3) the character of the government's action.[127]

The court conceded that the owners' distinct investment-backed expectations supported finding a regulatory taking had occurred, noting that plaintiffs invested in their businesses to operate clubs, restaurants, and bars, and that their expectations of profits had been

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[125] *Id*. at 838.
[126] *See id*. at 837-38.
[127] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (citing Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962)).

dashed by Directive 8.[128] Moreover, the economic impact of the regulation was deemed exceedingly negative in terms of its effect on the businesses,[129] putting factors one and two in the plaintiff's column. However, factor three would overcome the first two, as the court found that the "character of Defendants' actions and the context in which Defendants find themselves, here facing a national public health emergency, cut strongly against a finding that the COVID-19 Closure Orders amount to regulatory takings."[130]

What the court omitted in order to skip past the categorical taking claim and reach the *Penn Central* test is most telling. To move past the categorical taking claim, the court noted that some alternatives for revenue production existed (e.g., carry-out, delivery, etc.) for restaurants and bars. The court, as stated earlier, did not mention how a club or non-food-or-drink-service provider would find another source of revenue. Moreover, the court—just a few paragraphs after saying that not *all* economically beneficial use had been prevented—held that the businesses "will

[128] *Id.* at 838.
[129] *Id.*
[130] *Id.* at 839.

likely be out of business in the next two or three months if [Directive 8] remains in effect[,]" and that the economic consequences would be "disastrous."[131]

Admittedly, the court steered fairly clear of the police power's effect, instead choosing to analyze the takings claim pursuant to *Penn Central*. The court in *TJM 64 Inc.* did use parenthetical explanations as to why the character of the government action—exercising the police power—was important, but the court should not have even reached the question under *Penn Central*. As this essay has explained, to reach the regulatory takings analysis under *Penn Central* is not the proper disposition of a case brought against the effects of an order promulgated under the police power. The court should have (more easily, in fact) applied the rule used in numerous cases,[132] just like the apple trees in *Miller v. Schoene*, and refused to grant the TRO because Directive 8 was not aimed at providing a "public use" but preventing a

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[131] *Id.* at 838.

[132] *See e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Northwestern Laundry v. Des Moines, 239 U.S. 486 (1916); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Reinman v. Little Rock, 237 U.S. 171 (1915); Sligh v. Kirkwood, 237 U.S. 52 (1915); Lawton v. Steele, 152 U.S. 133 (1894); Mugler v. Kansas, 123 U.S. 623 (1887); Fertilizing Co. v. Hyde Park, 97 U.S. 659 (1878).

public harm.[133]

Recall Justice Scalia's words in *Lucas*: "where the State reasonably concludes that the health, safety, morals, or general welfare would be promoted by prohibiting particular contemplated uses of land, compensation need not accompany prohibition."[134]

B. WHY THOSE EMPLOYERS, BUSINESSES, AND INDIVIDUALS ARE DISCONTENT

Imagine for a moment that the year is 2019 and you have just applied for a $200,000.00 line of credit to renovate a second-floor bar in the Old City in Knoxville, Tennessee. The bank gives you the money based on your proposed business model—an Irish pub called "O'Malley's," serving authentic ales, fish-n-chips in a newspaper, and happy hour specials that are sure to draw a crowd—you sign the lease, hire a staff, and order equipment. You complete your renovations in early Fall 2019, opening up just in time for the 2019 SEC football season. After three months of good business, the cold weather slows your crowd and profitability

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[133] *See* FREUND, *supra* note 62.

[134] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1023 (1992) (quoting Nectow v. Cambridge, 277 U.S. 183, 188 (1928); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 125 (1978)) (internal quotations omitted).

seems a bleak prospect.

O'Malley's still owes $195,000 on the line of credit, the wait and cook staffs all expect paychecks, the landlord expects her $7,500 rent payment at the close of the month, and that still leaves insurance, payroll taxes, licensing fees, and food costs to front. Then, on March 23, 2020, the Knox County Board of Health orders the closure of the new pub, along with all the others like it. O'Malley's is permitted to offer carry-out services and delivery options, neither of which will make ends meet. After all, it would take more than $20,000 in revenue to cover expenses. Still, you try the carry-out and delivery options and bring in $6,000 in April, an average of $200 per day, which doesn't even cover the rent, much less the other expenses you face this month.

It goes without saying, the hypothetical O'Malley's is not the only business to have faced this life-changing ordeal. Economists at the Federal Reserve estimate that some additional 200,000 businesses closed as a result of the Pandemic, in addition to the usual 600,000 per year closure

that has been the norm in the U.S. economy.[135] That means an estimated 800,000 businesses in 2020 closed their doors forever. And the hardest hit sector? Those same Fed economists estimate that barbershops, nail salons, and personal service providers closed at a rate higher than any other sector.[136]

As the above Parts explain, when a government acts via its inherent police powers, those actions do not escape constitutional review. However, should O'Malley's claim that the government's lockdown order "took" its property in such a way that compensation is required under the Fifth Amendment, the claim would inevitably and invariably fail. Recall that under the Fifth Amendment, some "public use" must be furthered by the taking. Further, when the government acts to "protect the public health and public safety[,]"[137] the police power's role is not providing a public use but preventing a public harm.[138] Thus, the Takings Clause will not demand compensation.

So, technically, the government has issued its regulations pursuant to its inherent authority under the police power—it owes you nothing, nada, zilch. Would you be content with that result?

Does that align with the rationale for the Takings

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[135] LELAND D. CRANE ET AL., BD. OF GOVERNORS OF THE FED. RES. SYS., BUSINESS EXIT DURING THE COVID-19 PANDEMIC: NON-TRADITIONAL MEASURES IN HISTORICAL CONTEXT 4 (Apr. 2021), available at https://www.federalreserve.gov/econres/feds/files/2020089r1pap.pdf.

[136] *Id*. at 2.

[137] Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905) (internal citations omitted).

[138] FREUND, *supra* note 62.

Clause, as explained by Justice Hugo Black? —"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."[139]

Does it adhere to the admonition issued by Justice Holmes in *Pennsylvania Coal*? "[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[140]

Perhaps the answer to these two questions is "no." Perhaps the public *should* bear the costs of what has been placed on bars, event venues, barbershops, nail salons, and the like. Most restaurateurs, hairstylists, and bar owners probably agree that they alone should not be saddled with those costs. But, as Marine Corps General Mulholland told Captain Benjamin Franklin Pierce in an episode of *M*A*S*H*: "There's not *thing one* you can do about it."[141]

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[139] Armstrong v. United States, 364 U.S. 40, 49 (1960).
[140] Penn. Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).
[141] *M*A*S*H: Tell It to the Marines* (CBS-TV television broadcast Jan. 12, 1981).