

Taking One for the Team: COVID-19 Eviction Moratoria as Regulatory Takings

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TABLE OF CONTENTS

I.	INTRODUCTION	346
II.	CALIFORNIA COVID-19 EVICTION MORATORIA	349
	A. <i>Rent Relief Laws</i>	354
	B. <i>Rent Delay Laws</i>	355
	C. <i>Rent Cancellation Laws</i>	356
III.	TAKINGS JURISPRUDENCE	358
	A. <i>Character of the Government Action</i>	360
	B. <i>Interference With Owner's Expectations</i>	361
	C. <i>Economic Impact</i>	362
	D. <i>Per Se Takings</i>	364
IV.	ARE EVICTION MORATORIA REGULATORY TAKINGS?	366
	A. <i>Per Se Takings Under Loretto and Lucas</i>	367
	B. <i>Penn Central Three Factor Balancing Test</i>	371
	1. <i>An Initial Penn Central Question: What is Character?</i>	371
	2. <i>The First Penn Central Factor: Character of</i> <i>Government Action</i>	376
	3. <i>The Second Penn Central Factor: Interference With</i> <i>Investment-Backed Expectations</i>	379
	4. <i>The Third Penn Central Factor: Economic Impact</i>	382
V.	JUDICIAL FLEXIBILITY DURING A PANDEMIC	386
VI.	LEGISLATORS SHOULD PASS RENT RELIEF LAWS	390
VII.	CONCLUSION	395

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I. INTRODUCTION

“You are hereby notified to vacate the premises.” Words no tenant ever wants to read, but words that sound like a death sentence during a pandemic. For tenants struggling to pay rent, like Shamitha Johnson of Walnut Creek, California, the fear of reading these words is overwhelming.¹ “I have a roof over my head and I have food to eat, but I don’t know how long that’s going to be,” said Johnson with tears flowing down her cheeks.² Johnson’s story is a common one:³ she lost her job due to COVID-19 business restrictions and found herself unable to pay the rent.⁴ After missing a rent payment in April 2020, Johnson’s landlord sent her a letter threatening eviction if she failed to pay.⁵ Terrified, she contacted an attorney and learned that the letter was an empty threat.⁶ Emergency eviction restrictions prevented Johnson’s landlord from following through with the eviction.⁷ The attorney told Johnson that she may be able to stay in her apartment for six to twelve months without paying rent.⁸ Stated another way, her landlord might not receive rental income for six to twelve months and currently has no recourse.⁹

1. Michael Finney & Randall Yip, *Coronavirus; Tenant Who Lost Job Due to COVID-19 Given 3 Days to Pay Rent by Landlord; Eviction Feared*, ABC7 NEWS (Apr. 15, 2020), <https://abc7news.com/coronavirus-covid-19-unemployment-furlough/6103011/> [<https://perma.cc/8B4J-83BC>].

2. *Id.*

3. National Multifamily Housing Council found that only 76.6% of apartment households made a full or partial January rent payment as of January 6, 2021. Colin Dunn, *NMHC Rent Payment Tracker Finds 76.6 Percent of Apartment Households Paid Rent as of January 6*, NAT’L MULTIFAMILY HOUS. COUNCIL (Jan. 8, 2021), <https://www.nmhc.org/news/press-release/2021/nmhc-rent-payment-tracker-finds-76-6-percent-of-apartment-households-paid-rent-as-of-january-6/> [<https://perma.cc/S37U-VMQA>].

4. Finney & Yip, *supra* note 1.

5. *Id.*

6. *Id.* See *infra* Part III for a discussion of various emergency eviction restrictions.

7. Finney & Yip, *supra* note 1. Although landlords were unable to follow through with legal evictions, legal aid attorneys continued to report illegal evictions. See DEIDRE SWESNIK, NAT’L HOUS. L. PROJECT, STOPPING COVID-19 EVICTIONS SURVEY RESULTS JULY 2020, at 1–2 (2020). In one survey, ninety-one percent of respondents reported illegal evictions in their area. *Id.* There were also reports of illegal lockouts, utility disconnections, and aggressive intimidation tactics. *Id.* at 1.

8. Finney & Yip, *supra* note 1.

9. Twelve months of no rent has gone from a worst-case scenario to a conservative estimate. For example, the San Diego City Council voted to extend the city’s eviction ban through June 30, 2021. Andrew Bowen, *San Diego Extends Eviction Moratorium Through June 30*, KPBS (May 19, 2020), <https://www.kpbs.org/news/evening-edition/2020/05/19/san-diego-extends-eviction-moratorium-coronavirus> [<https://perma.cc/46VV-9RYR>]. A landlord might not receive rent payments for sixteen months. *City of San Diego COVID-19 Temporary Ban on Evictions*, SAN DIEGO HOUS. COMM’N, <https://www.sdhc.org/eviction-ban> [<https://perma.cc/L7GP-ZSAB>].

Katrina Bilella, a landlord in Chicago, Illinois, has not received rent since March 2020.¹⁰ Although her tenants' leases ended in April, she has been unable to begin eviction proceedings because of COVID-19 eviction restrictions.¹¹ Without her rental income, Bilella could not afford to pay both her own rent and the rental property's mortgage, so she began living with friends and family.¹² However, her mortgage payment is not her only expense at the rental property.¹³ "I also have HOA fees, my homeowners insurance and taxes," said Bilella.¹⁴ Like many landlords, Bilella worries that she may lose her property if she is unable to recoup her back rent soon.¹⁵ "My tenants owe me over \$12,000 in rent," she said.¹⁶ Bilella hopes that her tenants have applied for a \$5,000 grant the city is distributing directly to about 30,000 landlords.¹⁷ Even if her tenants have applied, the odds of

10. Scott Simon, *How Landlords Are Affected by COVID-19 Eviction Moratoriums*, NPR (Sept. 5, 2020, 7:59 AM), <https://www.npr.org/2020/09/05/909968990/how-landlords-are-affected-by-covid-19-eviction-moratoriums> [https://perma.cc/GW6N-3438].

11. *Id.* A tenant's lease does not automatically renew if it expires during the moratorium. See Claire Bough, *What to Do if Your Lease is Ending During the COVID-19 Pandemic*, MYMOVE (Jan. 26, 2021), <https://www.mymove.com/moving/covid-19/tips-if-your-lease-ends/> [https://perma.cc/5GMX-R4CV]. Instead, the tenant only has to vacate upon lease expiration if the tenant is able to do so without increasing the risk of exposure to the virus. See *id.* Once the lease expires, the tenant is a holdover, and the landlord can evict upon the expiration of the moratorium period. See *id.*; Stephen Ellis & Kathryn Domin, *Judicial Council Emergency Eviction Limitations in California Due to COVID-19*, RUTAN & TUCKER, LLP (Apr. 8, 2020), <https://www.rutan.com/judicial-council-emergency-eviction-limitations-in-california-due-to-covid-19/> [https://perma.cc/2JA3-YWB2].

12. Simon, *supra* note 10.

13. *Id.*

14. *Id.* Landlords might also pay for some or all utilities. See *FAQs on Tenant Rights and Paying Rent During the Coronavirus Crisis*, NOLO, <https://www.nolo.com/legal-encyclopedia/faqs-on-tenant-rights-and-paying-rent-during-the-coronavirus-crisis> [https://perma.cc/6NKR-QLQB]. If so, the landlord must continue to do so. See *id.* For a breakdown of one landlord's income and expenses, see Kelly Gurnett, *Here's What Landlords Do with Your Rent Payment Every Month*, PENNY HOARDER (Dec. 28, 2016), <https://www.the-pennyhoarder.com/save-money/rent-and-landlord-expenses/> [https://perma.cc/63B9-5R96].

15. Simon, *supra* note 10. Although foreclosure moratoria have prevented many foreclosures, some landlords are unable to pay lenders once that protection stops. See Jaime Chambers, *Landlords Lose Homes as Foreclosure Moratorium Ends*, FOX 5 SAN DIEGO (Jan. 8, 2021), <https://fox5sandiego.com/news/landlords-lose-homes-as-foreclosure-moratorium-ends/> [https://perma.cc/FW9K-YY4T]. Renters, however, can continue to occupy the premises even if the landlord loses the property to foreclosure. See *id.*

16. Simon, *supra* note 10.

17. *Id.*

receiving the grant are stacked against her.¹⁸ “Around 200,000 tenants have applied, and it’s a lottery,” said Bilella.¹⁹ Although she hopes her tenants will eventually pay, she has resigned to the fact that she may never receive reimbursement.²⁰ “With the housing crisis, it’s now somehow become my civic duty to provide free housing,” said Bilella, lamenting the current situation.²¹ “It doesn’t make any sense, and we’re putting this burden solely on landlords.”²²

These competing perspectives present a myriad of legal and moral questions. One such question is whether governments can eliminate landlords’ legal recourse during an emergency. Specifically, can the government pass regulations that require a property owner to continue renting to a tenant rent-free? One potential protection from such regulation lies in the Fifth Amendment of the Constitution: The Takings Clause.²³ This Comment explores potential Fifth Amendment challenges to COVID-19 eviction restrictions. Part II introduces California and federal COVID-19 eviction laws and lays out an organizational framework for analysis.²⁴ Part III provides background on relevant regulatory takings jurisprudence.²⁵ Part IV analyzes COVID-19 residential eviction laws under relevant regulatory takings tests.²⁶ Part V considers judges’ potential impact on eviction

18. *Id.* President Joe Biden’s \$25 billion federal aid program will increase the availability of these types of programs. See Irina Ivanova, *\$25 Billion in Federal Rent Aid Covers Less than Half of What Tenants Owe*, CBS NEWS (Jan. 22, 2021), <https://www.cbsnews.com/news/rent-relief-25-billion-biden-not-enough/> [<https://perma.cc/B7E3-BWDT>]. Current estimates, however, show renters owe a collective \$57 billion in back rent, meaning landlords are still more likely to not recoup back rent from the federal program. See *id.*

19. Simon, *supra* note 10.

20. *Id.*

21. *Id.* Ms. Bilella is not alone in this sentiment. For a discussion of how eviction bans hurt landlords and renters, see Steve Simpson, *Landlords Should Not Have to Work for Free*, HILL (Jan. 7, 2021, 11:00 AM), <https://thehill.com/opinion/finance/532750-landlords-should-not-have-to-work-for-free> [<https://perma.cc/S6NE-56BA>].

22. Simon, *supra* note 10.

23. U.S. CONST. amend. V. The Takings Clause is alternatively known as the Just Compensation Clause. A major scholar on the topic, Dean William Michael Treanor, argues that the Framers did not intend for the Just Compensation Clause to apply to regulatory takings:

The just compensation clause of the Fifth Amendment reflected the liberalism of its author, James Madison, who in synthesizing revolutionary era trends gave them substance and coherence. Madison intended the clause to have narrow legal consequences: It was to apply only to the federal government and only to physical takings. But he meant it to have broad moral implications as a statement of national commitment to the preservation of property rights.

William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 708 (1985).

24. See *infra* Part II.

25. See *infra* Part III.

26. See *infra* Part IV.

moratorium challenges.²⁷ Finally, Part VI proposes the solution that the Federal Government should pass legislation to provide direct rent relief for COVID-19-affected tenants.²⁸

II. CALIFORNIA COVID-19 EVICTION MORATORIA

To slow the spread of the novel Coronavirus and the resulting disease, COVID-19, federal, state, and local governments formulated diverse legislation restricting business operations.²⁹ Lawmakers primarily sought to keep all but essential workers quarantined in their homes.³⁰ While useful to combat the spread of disease, business closures left many tenants unable to pay rent.³¹

27. See *infra* Part V.

28. See *infra* Part VI.

29. *State COVID-19 Data and Policy Actions*, KFF (Oct. 27, 2021), https://www.kff.org/health-costs/issue-brief/state-data-and-policy-actions-to-address-coronavirus/?gclid=EAlaIqobChMI86KEv-v46wIVKD2tBh1VDwtmEAAYAiAAEgIbGPD_BwE [https://perma.cc/5BNP-B9UF]. News reports from March 2020 stated that the original lockdown was intended to last for ten to twelve weeks. See Andrea Shalal & Susan Heavey, *U.S. Coronavirus Lockdown to Last 10-12 Weeks, Top Trump Official Says*, U.S. NEWS (Mar. 22, 2020, 10:07 AM), [usnews.com/news/us/articles/2020-03-22/us-coronavirus-lockdown-to-last-10-12-weeks-top-trump-official-says](https://www.usnews.com/news/us/articles/2020-03-22/us-coronavirus-lockdown-to-last-10-12-weeks-top-trump-official-says) [https://perma.cc/WU6H-WHJW]. Although lockdowns and stay-at-home-orders began lifting early in the summer of 2020, a second spike of infections caused cities to reinstate many orders in December 2020. See *How is Each State Responding to COVID-19?*, NPR (Dec. 4, 2020, 1:45 PM), <https://www.npr.org/2020/03/12/815200313/what-governors-are-doing-to-tackle-spreading-coronavirus> [https://perma.cc/8RTN-CRHS]. For a timeline of California's emergency response to COVID-19, see *Timeline: California Reacts to Coronavirus*, CALMATTERS, <https://calmatters.org/health/coronavirus/2020/04/gavin-newsom-coronavirus-updates-timeline/> [https://perma.cc/G65N-XHYD].

30. California was the first state to impose a stay-at-home order for non-essential workers. See *California Becomes First State to Order Lockdown*, KSLA NEWS 12 (Mar. 20, 2020, 10:10 AM), <https://www.ksla.com/2020/03/20/california-becomes-first-state-order-lockdown/> [https://perma.cc/23J2-BDMH]. Essential services, like grocery stores, pharmacies, gas stations, and delivery services, remained open. *Id.*

31. Paul Davidson, *What Happens If You Can't Pay Rent on April 1 Because Coronavirus Forced You Out of Work?*, USA TODAY (Apr. 1, 2020, 9:02 AM), <https://www.usatoday.com/story/money/2020/03/31/coronavirus-what-happens-if-you-cant-pay-rent-due-pandemic/5099013002/> [https://perma.cc/ZL5Z-CGWY]. Studies show that inability to pay rent is not uniformly distributed among renters. See *Tracking the COVID-19 Economy's Effects on Food, Housing, and Employment Hardships*, CTR. ON BUDGET & POL'Y PRIORITIES, <https://www.cbpp.org/research/poverty-and-inequality/tracking-the-covid-19-recessions-effects-on-food-housing-and> [https://perma.cc/27JY-TSAF]. First, low-wage industries lost the highest percentage of jobs. *Id.* The Bureau of Labor Statistics reported that from February to December 2020, eleven percent of low-wage jobs were lost, compared to only six percent across all industries. *Id.* Also, as of January 15, 2021,

Legislators predicted a “tsunami of evictions,” and many passed new emergency laws to prevent it.³²

At the state level, California utilized both executive orders and statewide legislation to restrict a landlord’s ability to evict tenants. On March 4, 2020, California Governor Gavin Newsom proclaimed a State of Emergency in response to rising COVID-19 cases and the State’s first confirmed COVID-19 death.³³ Within two weeks of this proclamation, Governor Newsom issued executive order N-28-20, which authorized “local governments to halt evictions for renters and homeowners.”³⁴ Governor Newsom “strongly encourage[d] cities and counties take up this authority to protect Californians.”³⁵ On March 27, 2020, Governor Newsom issued Executive Order N-37-20, which banned the enforcement of eviction orders for renters affected by COVID-19 through May 31, 2020.³⁶ Landlords could not evict tenants

approximately 14 million adult renters were behind on rent payments. This accounts for about nineteen percent of all adult renters in the United States, but renters of color account for a disproportionate share with twenty-eight percent of Black rental households and twenty-four percent of Latinx rental households reporting that they are behind on rent payments. *Id.* Further, over twenty-five percent of renters living with children reported being behind on rent. *Id.*

32. Leticia Miranda, *A ‘Tsunami of Evictions’ is Coming, Warn Housing Advocates*, NBC NEWS (July 15, 2020, 3:10 PM), <https://www.nbcnews.com/business/business-news/tsunami-evictions-coming-warn-housing-advocates-n1233965> [<https://perma.cc/49M4-GH2W>].

33. *Governor Newsom Declares State of Emergency to Help State Prepare for Broader Spread of COVID-19*, OFF. GOVERNOR GAVIN NEWSOM (Mar. 4, 2020), <https://www.gov.ca.gov/2020/03/04/governor-newsom-declares-state-of-emergency-to-help-state-prepare-for-broader-spread-of-covid-19/> [<https://perma.cc/W64M-9UQS>]. The first domestic COVID-19 death was, at this time, thought to be a former passenger of the Grand Princess cruise ship. Julie Johnson, *First Coronavirus Death in California Linked to Princess Cruise Ship*, SEATTLE TIMES (Mar. 5, 2020, 6:18 AM), <https://www.seattletimes.com/nation-world/first-coronavirus-death-in-california-linked-to-princess-cruise-ship/> [<https://perma.cc/2TDE-LZSY>]. Over one hundred passengers from the Grand Princess cruise ship would eventually test positive for the virus. Thom Jensen, *The Grand Princess COVID Outbreak: 10 Months Later*, NBC BAY AREA (Dec. 28, 2020, 10:33 AM), <https://www.nbcbayarea.com/news/coronavirus/the-grand-princess-covid-outbreak-10-months-later-2432182/> [<https://perma.cc/3K2B-9WB9>]. In April 2020, researchers discovered that the first domestic COVID-19 related death had occurred on February 6, 2020, in Santa Clara, California. Erin Allday & Matt Kawahara, *First Known U.S. Coronavirus Death Occurred on Feb. 6 in Santa Clara County*, S.F. CHRON. (Apr. 22, 2020, 9:21 AM), <https://www.sfchronicle.com/health/article/First-known-U-S-coronavirus-death-occurred-on-15217316.php> [<https://perma.cc/2K BX-PURE>].

34. *Governor Newsom Issues Executive Order to Protect Renters and Homeowners During COVID-19 Pandemic*, OFF. GOVERNOR GAVIN NEWSOM (Mar. 16, 2020), <https://www.gov.ca.gov/2020/03/16/governor-newsom-issues-executive-order-to-protect-renters-and-homeowners-during-covid-19-pandemic/> [<https://perma.cc/AR97-36LT>].

35. *Id.*

36. *Governor Newsom Takes Executive Action to Establish a Statewide Moratorium on Evictions*, OFF. GOVERNOR GAVIN NEWSOM (Mar. 27, 2020), <https://www.gov.ca.gov/2020/03/27/governor-newsom-takes-executive-action-to-establish-a-statewide-moratorium->

for nonpayment if the tenant provided written notice to the landlord that, due to COVID-19, the tenant could not pay all or part of the rent.³⁷ Although originally set to expire on May 31, 2020, Governor Newsom extended Executive Order N-28-20 authorizing local governments to halt evictions to July 28, 2020,³⁸ then to September 30, 2020.³⁹ California then passed Assembly Bill 3088 (AB 3088), which prohibited a landlord from evicting a tenant financially impacted by COVID-19 through January 31, 2021.⁴⁰ Two days before AB 3088 expired, California enacted Senate Bill 91 (SB 91), which extended the residential eviction moratorium through June 30, 2021.⁴¹ Finally, California enacted Assembly Bill 832, which

on-evictions/ [https://perma.cc/6SHG-YGHW]. Executive Order N-37-20 gave certain tenants a longer deadline to respond to a complaint seeking to evict the tenant for nonpayment of rent. See Susan DiCicco et al., *California Executive Orders Provide Consumer and Commercial Relief During COVID-19*, JD SUPRA (Apr. 5, 2020), <https://www.jdsupra.com/legalnews/california-executive-orders-provide-79364/> [https://perma.cc/9MJX-B8W5]. To qualify, the tenant must notify the landlord in writing within seven days that the tenant needed to delay paying rent because of COVID-19 hardship. *Id.* The order specifically altered section 1167 of the California Code of Civil Procedure and prohibited law enforcement and courts from enforcing a qualifying eviction. *Id.*

37. See OFF. GOVERNOR GAVIN NEWSOM, *supra* note 36.

38. *Governor Newsom Signs Executive Order on Actions in Response to COVID-19*, OFF. GOVERNOR GAVIN NEWSOM (May 29, 2020), <https://www.gov.ca.gov/2020/05/29/governor-newsom-signs-executive-order-on-actions-in-response-to-covid-19-5-29-20/> [https://perma.cc/UKU7-L9HC].

39. *Governor Newsom Signs Executive Order on Actions in Response to COVID-19*, OFF. GOVERNOR GAVIN NEWSOM (June 30, 2020), <https://www.gov.ca.gov/2020/06/30/governor-newsom-signs-executive-order-on-actions-in-response-to-covid-19-6-30-20/> [https://perma.cc/SQJ9-C4NZ].

40. Tenant, Homeowner, and Small Landlord Relief and Stabilization Act, Assemb. B. 3088, 2019–2020 Reg. Sess. (Cal. 2020). Assembly Bill 3088 required a tenant to pay twenty-five percent of their back rent by January 31, 2021, to continue receiving protections. *Id.*

41. Talya Gulezyan & Whitney Hodges, *California Legislature Extends Residential Eviction Moratorium and Implements Rental Assistance Program for Landlords and Tenants*, JD SUPRA (Feb. 10, 2021), <https://www.jdsupra.com/legalnews/california-legislature-extends-1121625/> [https://perma.cc/9YSP-JJD7]. SB 91 allocated \$2.6 billion for rental relief. Mike Nemeth, *Gov. Newsom Signs Bill with \$2.6 Billion in Federal Funds for Unpaid Rent*, CAL. APARTMENT ASS'N (Jan. 29, 2021), <https://caanet.org/gov-newsom-signs-bill-with-2-6-billion-in-federal-funds-for-unpaid-rent/> [https://perma.cc/9TTJ-DX4K]. Landlords were able to receive eighty percent of the back owed rent but were required to permanently forgive the remaining twenty percent. *Id.* Landlords that refused to forgive rent would only be able to receive twenty-five percent of their back rent. *Id.* Also, tenants had to meet certain requirements to qualify, including earning less than eighty percent of the area median income for 2020. *Id.* SB 91 also prioritized lower-income tenants that had earned fifty percent or less of the area median income. *Id.*

extended the statewide eviction through September 30, 2021.⁴² At the federal level, the Centers for Disease Control and Prevention (CDC) also stayed evictions federally through December 31, 2020.⁴³ Congress extended this national eviction moratorium through January 31, 2021.⁴⁴ The CDC then further extended the ban through March 31, 2021.⁴⁵ After two more extensions, the ban finally expired on July 31, 2021, but the CDC reimposed it days later.⁴⁶ On August 27, 2021, the Supreme Court struck down the CDC's eviction ban due to lack of congressional approval.⁴⁷

Prior to the passage of AB 3088 and SB 91, cities and counties throughout California enacted independent legislation aimed at preventing evictions.⁴⁸ During 2020, California cities and counties implemented hundreds of resolutions, ordinances, orders, and regulations that restricted the eviction process during the COVID-19 pandemic.⁴⁹ These restrictions varied in

42. Chris Barta, *COVID-19 California Eviction Moratoriums (Bans) and Tenant Protections*, NOLO, <https://www.nolo.com/legal-encyclopedia/coronavirus-covid-19-california-eviction-bans-and-tenant-protections.html> [<https://perma.cc/N9QE-HWP6>].

43. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292 (Sept. 4, 2020). However, the CDC declaration does not affect California because AB 3088 and SB 91 implement stronger eviction protections than those the CDC declaration establishes. *Id.*

44. Jerusalem Demsas, *The Covid-19 Relief Bill Has Saved Up to 40 Million People from Eviction — for Now*, VOX (Dec. 29, 2020, 2:00 PM), <https://www.vox.com/2020/12/29/22204471/congress-trump-biden-relief-stimulus-renters-eviction-crisis-moratorium-direct-assistance-landlords> [<https://perma.cc/RS6P-HTFF>].

45. Lisa Rowan, *CDC Extends Renters' Eviction Moratorium Through March. Is More Rent Relief Next?*, FORBES (Feb. 3, 2021, 12:54 PM), <https://www.forbes.com/advisor/personal-finance/eviction-moratorium-extended-to-end-of-march/> [<https://perma.cc/72HK-2TR9>]. On February 25, 2021, United States District Court Judge J. Campbell Barker held that the CDC eviction moratorium violated the U.S. Constitution. *Terkel v. Ctrs. for Disease Control*, 521 F. Supp. 3d 662, 676 (E.D. Tex. 2021). Judge Barker held that the federal eviction moratorium exceeded the Federal Government's commerce power under Article I of the Constitution. *Id.* The opinion explicitly states that this holding "does not question that the States may regulate residential evictions and foreclosures, as they have long done." *Id.* at 666. To view the unpublished opinion, see Hailey Konnath, *Judge Says CDC Can't Block Evictions Over COVID-19*, LAW 360 (Feb. 25, 2021, 11:35 PM), <https://www.law360.com/articles/1359176/attachments/0> [<https://perma.cc/4VXJ-4U7K>].

46. Sanford Shatz & Shaun Ramey, *Supreme Court Strikes Down the CDC's Second Eviction Moratorium*, AM. BAR ASS'N (Sept. 14, 2021), https://www.americanbar.org/groups/business_law/publications/blt/2021/09/eviction-moratorium/ [<https://perma.cc/J43T-MFNH>].

47. *Id.*

48. Barta, *supra* note 42.

49. See Danielle Leidner-Peretz & Stacy Jo, *Temporary Eviction Moratoriums—Novel Coronavirus (COVID-19)*, APARTMENT ASS'N GREATER L.A. (Mar. 25, 2020), <https://aagla.org/2020/03/temporary-eviction-moratoriums-novel> [<https://perma.cc/J5AP-575L>]; Barta, *supra* note 42.

effect; some merely altered the filing deadlines for civil cases,⁵⁰ while others prohibited tenant evictions for nonpayment, no fault reasons, nuisance, or unauthorized occupants or pets if related to COVID-19.⁵¹ Many of these laws overlapped one another, often with municipalities passing independent eviction restrictions, even though the county within which they sit had already passed its own restrictions.⁵²

This Comment does not attempt to analyze every variation of COVID-19 eviction-restricting law. Instead, for ease of reference, this Comment will use “eviction moratoria” to mean any law that, due to COVID-19, prevents a landlord from initiating an otherwise legal eviction proceeding. Further, because of the immense amount of legislation, this Comment will organize these laws into three broad categories: (A) laws that establish funds to compensate landlords directly for a tenant’s missed rent; (B) laws that allow a tenant to defer rent payments, and (C) laws that permanently eliminate a renter’s obligation to pay rent.

50. See Blaine Corren, *Judicial Council Revises Emergency Rule on Statutes of Limitations in Civil Cases*, CAL. CTS. NEWSROOM (May 29, 2020), <https://newsroom.courts.ca.gov/news/judicial-council-revises-emergency-rule-statutes-limitations-civil-cases> [<https://perma.cc/G5XY-SEFG>].

51. *About L.A. County’s COVID-19 Tenant Protections Resolution*, L.A. CNTY. CONSUMER & BUS. AFFS., <https://dcba.lacounty.gov/noevictions/> [<https://perma.cc/M365-QD8>]; *COVID-19 – Eviction Moratorium*, CITY OF SANTA MONICA, <https://www.santamonica.gov/coronavirus-eviction-moratorium#tenantfaqs> [<https://perma.cc/58NF-SPAN>]. Some eviction moratoria also prohibited evictions under the Ellis Act. See Barta, *supra* note 42. The Ellis Act allows a landlord to evict tenants unconditionally for the purpose of removing the rental units from the market entirely. *Id.* Following an Ellis Act eviction, the landlord is unable to rent the apartment for five years following the evictions, except at the same rate the previous tenants had paid. *Id.* Also, a landlord utilizing the Ellis Act must uniformly evict all tenants, rather than evicting specific tenants based on their current rental rate. *Ellis Act: State Law Restricting Change in Use of Property*, STIMMEL L., <https://www.stimmel-law.com/en/articles/ellis-act-state-law-restricting-change-use-rental-property> [<https://perma.cc/RA87-UXSQ>].

52. For example, Los Angeles County passed eviction moratoria, but city governments within Los Angeles County also passed their own restrictions and tenants can take advantage of whichever law best serves them. See *Board of Supervisors Expands Eviction Moratorium, Rent Freeze to Protect Additional Renters Across Los Angeles County*, L.A. CNTY., <https://covid19.lacounty.gov/covid19-news/board-of-supervisors-expands-eviction-moratorium-rent-freeze-to-protect-additional-renters-across-los-angeles-county/> [<https://perma.cc/SB72-FXNE>]; *Inglewood Coronavirus/COVID-19 Eviction Moratorium*, ASTANEHE L., <http://astanehelaw.com/2020/03/20/inglewood-coronavirus-covid-19-eviction-moratorium/> [<https://perma.cc/D8GX-HPFH>].

A. Rent Relief Laws

This Comment will refer to eviction moratorium laws that pay a distressed tenant's rent as "rent relief laws." Although rent relief laws are often passed in conjunction with rent delay laws,⁵³ this Comment will analyze them independently. Further, this Comment will refer to rent relief laws as only applicable in situations where the tenant qualifies for the relief, rather than laws that simply allocate some funding to rent relief programs. Like other eviction moratoria, rent relief laws prohibit evictions for a specific duration, but these laws also enable a tenant to apply to a government program for relief from paying back rent.⁵⁴ After approval, the program then pays the landlord directly.⁵⁵ Typically, rent relief laws require tenants to demonstrate that they are at or below a certain income level.⁵⁶ Rent relief laws differ on other requirements,⁵⁷ but laws that utilize funding from the Federal Government's CARES Act or Coronavirus Relief Acts require proof of legal immigration status.⁵⁸ Typically, rent relief laws do not require the tenant to repay the funds.⁵⁹

53. The same laws that establish rent delays—a grace period to repay rent—often will include funding for rental relief programs. See Phillip Molnar, *San Diego Approves \$15.1M Rent Relief Program, Extends Eviction Moratorium*, SAN DIEGO UNION-TRIB. (June 30, 2020, 4:40 PM), <https://www.sandiegouniontribune.com/business/story/2020-06-30/san-diego-approves-15-1m-rent-relief-program> [https://perma.cc/AL5T-6RBP]. These programs typically allow rent delays for everyone experiencing COVID-19-related financial hardship and provide rental relief for low-income renters. See *id.*

54. *LA Renters Relief Program to Begin Taking Applications Monday*, NBC L.A. (July 11, 2020, 11:45 AM), <https://www.nbclosangeles.com/news/local/los-angeles-renters-relief-program-application-pandemic-rent-covid-19-coronavirus/2392854/> [https://perma.cc/249N-UASH].

55. *City of San Diego COVID-19 Housing Stability Assistance Program Frequently Asked Questions*, SAN DIEGO HOUS. COMM'N, <https://www.sdhc.org/housing-opportunities/help-with-your-rent/covid-19-rental-assistance/> [https://perma.cc/95ZA-Q3NR].

56. See *Housing Stability Assistance Program*, SAN DIEGO HOUS. COMM'N, <https://www.sdhc.org/housing-opportunities/help-with-your-rent/covid-19-rental-assistance/> [https://perma.cc/VK5L-GS69]. Some rent relief programs consider the tenant's pre-emergency income rather than the income after the onset of the emergency order. See *2021 COVID-19 Emergency Renters Assistance Program*, L.A. HOUS. DEP'T, <https://housing2.lacity.org> [https://perma.cc/Q36M-AN9V].

57. For example, the City of Los Angeles requires proof of tenancy within the city and does not require proof of legal immigration status. See L.A. HOUS. DEP'T, *supra* note 56. The City of San Diego requires that applicants show they are not receiving other subsidies and do not have sufficient savings to pay rent. See CNTY. OF SAN DIEGO, COUNTY OF SAN DIEGO'S COVID-19 EMERGENCY RENTAL ASSISTANCE PROGRAM FREQUENTLY ASKED QUESTIONS (FAQ) 2 (2020).

58. See Molnar, *supra* note 53 ("Because money will come from federal sources, it may only go to U.S. citizens or authorized immigrants.").

59. See CNTY. OF SAN DIEGO, *supra* note 57, at 3 ("A tenant is not required to pay back the subsidy, it is a grant.").

B. Rent Delay Laws

This Comment will refer to eviction moratorium laws that delay a COVID-impacted tenant's obligation to pay rent as "rent delay laws." Rent delay laws neither forgive a renter's obligation to pay rent nor compensate the landlord.⁶⁰ Under rent delay laws, a tenant is not required to pay any rent for a specific period—often the duration of the emergency order.⁶¹ Typically, rent delay laws also eliminate late fees and allow the tenant to repay rent without accruing interest.⁶² Unlike many rent relief laws, rent delay laws rarely require tenants to show that they are at or below a certain income level, nor do they require tenants to show a lack of savings.⁶³ To qualify for a rent deferment under many rent delay laws, a tenant must only provide the landlord with written notice attesting that

60. See CITY OF SANTA MONICA, *supra* note 51.

61. Many rent delay laws go beyond the duration of the emergency order and will grant tenants time after the expiration to repay the rent. See Liam Dillon, *Eviction Protections Are Expiring. What Does This Mean for Struggling California Tenants?*, L.A. TIMES (Aug. 7, 2020, 5:00 AM), <https://www.latimes.com/homeless-housing/story/2020-08-07/assessing-california-rent-relief-eviction-protections-end> [<https://perma.cc/DL6P-666A>]. In Los Angeles, tenants will have a full year to repay back rent after the emergency order expires. *Id.*

62. See CITY OF SANTA MONICA, *supra* note 51. These laws eliminate late fees set out in the rental contract. See *id.* Landlords thus might also challenge eviction moratoria under the Contracts Clause. U.S. CONST. art. I, § 10. Karl Manheim stated that the Takings and Contracts Clauses often run parallel in eviction law:

To claim that certain prerogatives, such as the right to exclude, remain intrinsic in the definition of property, is reminiscent of discredited natural law theories. The transformation of the landlord-tenant relationship, from one based on estates to one predominantly contractual in nature suggests the inapplicability of property dominion concepts to modern tenancies. From a traditional doctrinal property perspective, statutory extension of leaseholds redefines estates in property. Just cause eviction laws create a new estate, somewhere between a term for years and a life or defeasible estate. However, from a modern contractual perspective, such laws merely extend the period of the mutually dependent obligations of the landlord and tenant—notably, to furnish housing services and to pay rent. The takings and contracts clauses protect similar interests, and contain similar elements. The focus in cases alleging impairment of contract, as in takings cases, is substantiality of governmental interference, strength of the public purpose, and balancing. Thus, it is unremarkable that laws which survive one challenge usually survive the other.

Karl Manheim, *Tenant Eviction Protection and the Takings Clause*, 1989 WIS. L. REV. 925, 1010–11 (footnotes omitted).

63. *Los Angeles County's Eviction Moratorium/Rent Deferment Order*, STUBBS ALDERTON & MARKILES, LLP (July 22, 2020), <https://stubbalderton.com/eviction-moratorium-rent-deferment-order> [<https://perma.cc/662U-7HPT>] (stating that Los Angeles County only requires the tenant to self-certify that they are financially impacted by COVID-19).

they are financially impacted by COVID-19 and will not be paying rent.⁶⁴ However, California’s AB 3088 and SB 91 require that a tenant provide notice under penalty of perjury that the tenant is unable to pay rent because of Coronavirus hardship.⁶⁵ Under SB 91, a landlord may require tenants to provide further documentation if the tenant earns over 130% of the local median income.⁶⁶ To enforce these eviction restrictions, cities or the State of California may fine landlords that attempt to evict tenants that have declared a COVID-related hardship.⁶⁷

C. Rent Cancellation Laws

Finally, this Comment will refer to proposed laws that eliminate a tenant’s obligation to pay rent, without requiring the tenant to apply for rental relief, as “rent cancellation laws.” As of writing this Comment, no legislative body had yet enacted any of these proposed rent cancellation laws.⁶⁸ These

64. Stephanie Lin, *Landlord Advocates Critical of New California Eviction Relief Law*, KCRA (Sept. 1, 2020, 11:09 PM), <https://www.kcra.com/article/landlord-advocates-critical-of-new-california-eviction-relief-law/33868159#> [<https://perma.cc/5V5S-ZG76>]; CITY OF SANTA MONICA, *supra* note 51.

65. Alexei Koseff, *Can’t Pay the Rent? Here’s How California’s New Pandemic Eviction Law Affects You*, S.F. CHRON. (Sept. 1, 2020, 7:23 PM), <https://www.sfchronicle.com/politics/article/Can-t-pay-the-rent-Here-s-how-California-s-15534057.php> [<https://perma.cc/VEH2-N8PA>]; *New Senate Bill 91 Forms Available for Extension of Tenant Relief Act*, APARTMENT ASS’N GREATER L.A. (Feb. 1, 2021), <https://aagla.org/2021/02/new-senate-bill-91-forms-available-for-extension-of-tenant-relief-act/> [<https://perma.cc/3RWU-E4H8>].

66. Hoge Fenton, *New Eviction Moratorium and Rental Assistance*, HOGE FENTON (Feb. 4, 2021), <https://www.hogefenton.com/news-events/new-eviction-moratorium-rental-assistance/> [<https://perma.cc/2D3D-L5UV>]. This requirement further signals the legislature’s desire to prioritize the limited relief available for lower-income renters in greater need. The CEO of the California Apartment Association complained of “tenants and residents who can afford to pay rent but choose to game the system.” Emily Hamann, *New Eviction Prevention Bill Would Require Tenants to Still Pay Portion of Rent*, SACRAMENTO BUS. J. (Aug. 28, 2020, 10:26 PM), <https://www.bizjournals.com/sacramento/news/2020/08/28/eviction-prevention-bill-tenants-pay-portion.html> [<https://perma.cc/WQ6P-SVSU>].

67. See CITY OF SANTA MONICA, *supra* note 51. These protections also apply to other means of intimidation or harassing tenants, including locking a tenant out of the premises, disconnecting utilities, or removing the tenant’s personal property. See Jonathan Marvisi & Jonathan Sandler, *California Statewide Eviction Moratorium Extension for Residential Tenants: To Forgive or Not to Forgive?*, JD SUPRA (Feb. 11, 2021), <https://www.jdsupra.com/legalnews/356alifornia-statewide-eviction-2718258/> [<https://perma.cc/EF2H-UT9Y>]. Further, California’s SB 91 fines landlords between \$1,000 and \$2,500 per violation and extended the protections through June 30, 2021. *Id.*

68. Ithaca, New York passed the first resolution in the United States that would enable the city’s mayor to cancel rent, but the New York State Government did not approve the resolution. Julia Falcon, *Ithaca, New York Says It Will Cancel Rent Payments*, HOUS. WIRE (June 12, 2020, 1:24 PM), <https://www.housingwire.com/articles/356alifo-new-york-says-it-will-cancel-rent-payments/> [<https://perma.cc/J5B4-N5MK>].

proposed rent cancellation laws would forgive a tenant's obligation to pay rent for the duration of the emergency period.⁶⁹ For example, one proposed rent cancellation law would waive residential rent for ninety days for any tenant that lost income due to COVID-19.⁷⁰ This law would then forgive mortgage payments for landlords impacted by this rent waiver but would not reimburse affected landlords that do not have a mortgage.⁷¹ A second proposed rent cancellation law would cancel all rent for any tenant, regardless of income level.⁷² This law would cancel all rent obligations retroactively from April 1, 2020, through one calendar month after the end of the pandemic.⁷³ Affected landlords would then apply for relief from a government program, but landlords seeking relief would have to agree to certain restrictions.⁷⁴

69. S.B. S8125A, 2019–2020 Leg. Sess. (N.Y. 2020).

70. *Id.*

71. *Id.*

72. *Rep. Ilhan Omar Introduces Bill to Cancel All Rent and Mortgage Payments During the COVID-19 Pandemic*, ILHAN OMAR (Apr. 17, 2020), <https://omar.house.gov/media/press-releases/rep-ilhan-omar-introduces-bill-cancel-all-rent-and-mortgage-payments-during> [<https://perma.cc/X3RJ-Y7BR>]. Representative Omar renewed her call to cancel rent and mortgages eight months after her original proposition in April 2020. *See* Zack Friedman, *Ilhan Omar: Cancel Rent and Mortgage Payments*, FORBES (Dec. 4, 2020, 1:06 PM), <https://www.forbes.com/sites/zackfriedman/2020/12/04/ilhan-omar-cancel-rent-and-mortgages/?sh=7e83b11619f7> [<https://perma.cc/WG28-SFK8>]. Representative Omar is not alone in her desires. The Cancel Rent Movement has coordinated rent strikes in cities across the nation, comprising over 200,000 tenants. *See* Annie Lowrey, *Cancel Rent*, ATLANTIC (May 2, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/cancel-rent/611059/> [<https://perma.cc/886T-74RX>].

73. *See* ILHAN OMAR, *supra* note 72.

74. These restrictions would include a five-year rent freeze, a prohibition on discriminating against rental applicants based on their source of income or sexual orientation, a requirement to coordinate with public housing authorities to fill any new vacancies, forgiveness of any arrearage owed at the end of five years, and an agreement to not report the tenants to any credit reporting agency. Nicholas Mooney, *Watch List – Proposed Rent and Mortgage Cancellation Act of 2020 Suspends Payments During Pandemic but Requires Landlords and Lenders to Meet Severe Criteria if They Seek Repayment*, JD SUPRA (Apr. 21, 2020), <https://www.jdsupra.com/legalnews/watch-list-proposed-rent-and-mortgage-31618/> [<https://perma.cc/G2NV-ZPKG>].

III. TAKINGS JURISPRUDENCE

California landlords, apartment associations, and similar homeowners' groups have already brought litigation challenging the eviction moratoria.⁷⁵ Often these complaints assert a violation of the Fifth Amendment's Takings Clause.⁷⁶ Specifically, these challengers claim eviction moratoria are regulatory takings.⁷⁷ Before analyzing the potential success of these claims, this Comment first discusses the doctrinal foundation of regulatory takings.

The Fifth Amendment states: “[N]or shall private property be taken for public use, without just compensation.”⁷⁸ Referred to generally as the Takings Clause, this clause prevents the Federal Government from taking private property without compensating the owner.⁷⁹ The Fourteenth Amendment applies the Fifth Amendment's Takings Clause to all state actors.⁸⁰ There are generally two categories of takings: condemnation and inverse condemnation. The government's power to take property for public use—via a legal process called condemnation—is not specifically enumerated in the Constitution, but courts have long held that this power of eminent domain “requires no constitutional recognition; it is an attribute of sovereignty.”⁸¹ In a condemnation action, the government is able to take ownership of private property regardless of the owner's consent under certain circumstances.⁸² Conversely, a property owner can bring an inverse condemnation action against the government.⁸³ In an inverse condemnation action, the owner alleges that the government action or regulation has

75. *Landlords File Multiple Lawsuits Alleging Undue Financial Burdens*, OUR WEEKLY L.A. (Sept. 18, 2020, 12:00 AM), <http://ourweekly.com/news/2020/sep/18/landlords-file-multiple-lawsuits-alleging-undue-fi/> [<https://perma.cc/5G77-M568>].

76. Hannah Albarazi, *LA Sued over COVID-19 Eviction Moratorium, Rent Freeze*, LAW 360 (June 11, 2020, 11:08 PM), <https://www.lsc.gov/media-center/blog/2020/06/12/la-sued-over-covid-19-eviction-moratorium-and-rent-freeze> [<https://perma.cc/A4RE-V9HA>].

77. See Complaint at 1–2, *Apartment Ass'n of L.A. Cnty., Inc. v. City of Los Angeles*, 500 F. Supp. 3d 1088 (C.D. Cal. 2020). In *Apartment Association of Los Angeles County, Inc.*, the plaintiffs sought declaratory and injunctive relief from the Los Angeles eviction ordinances because the government had not paid just compensation. The District Court ultimately denied the plaintiffs' motion. *Apartment Ass'n of L.A. Cnty., Inc. v. City of Los Angeles*, 500 F. Supp. 3d 1088, 1091, 1093, 1101 (C.D. Cal. 2020).

78. U.S. CONST. amend. V.

79. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 782 (1995). Notably, Dean Treanor had also previously described this same clause as the “Just Compensation Clause.” See generally Treanor, *supra* note 23.

80. Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings “Muddle,”* 90 MINN. L. REV. 826, 829 (2006).

81. *Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878).

82. *Kohl v. United States*, 91 U.S. 367, 373–74 (1875).

83. *United States v. Clarke*, 445 U.S. 253, 257 (1980).

effectively taken the property, even though the government has not taken ownership of the property.⁸⁴

The government does not have unlimited power to take property, but rather the government may only take for “public use.”⁸⁵ However, the Supreme Court has held that legislatures should be afforded “broad latitude in determining what public needs justify the use of the takings power.”⁸⁶ Although a private property owner may prevent condemnation by showing that the use is not for a legitimate public purpose, a private property owner seeking compensation in an inverse condemnation action concedes that the government took for public use and now must pay for that privilege.⁸⁷

As mentioned above, inverse condemnation actions do not only arise when the government destroys property.⁸⁸ Government regulation—such as a regulation banning evictions during a pandemic—may also require just compensation if the regulation “goes too far” and is a functional equivalent to direct condemnation.⁸⁹ In 1978, the Supreme Court expanded upon the

84. *Id.* A useful analogy for inverse condemnation actions is the “you broke it, you bought it” theory, where the government action either actually destroyed private property or effectively destroyed the property’s value through regulation, and the property owner now seeks compensation. Robert H. Thomas, *Cal App: Intentionally Flooding Land to Protect the Environment is a Physical Taking*, INVERSE CONDEMNATION (Jan. 21, 2016), <https://www.inversecondemnation.com/inversecondemnation/2016/01/cal-app-allowing-flooding-in-order-to-protect-the-environment-is-a-physical-taking.html> [<https://perma.cc/TB9Y-4PX>]. As an example of a destruction taking, a court found that the government destroyed private property by intentionally flooding the private land during a hurricane. *In re Upstream Addicks & Barker (Tex.) Flood-Control Reservoirs*, 146 Fed. Cl. 219, 227–28 (2019). Alternatively, the government may effectively destroy the property’s value by prohibiting the owner’s ability to build on the land. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

85. *Kelo v. City of New London*, 545 U.S. 469, 483 (2005).

86. *Id.* For a discussion of *Kelo* and its effects on takings jurisprudence, see Gregory J. Robson, *Kelo v. City of New London: Its Ironic Impact on Takings Authority*, 44 URB. L. 865 (2012).

87. A claimant asserting that the government regulation was not for public use is bringing a due process challenge rather than a taking claim. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005) (“[I]f a government action is found to be impermissible—for instance because it fails to meet the ‘public use’ requirement or is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action.”); see also *Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003).

88. See *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 174–76 (1871).

89. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); *Lingle*, 544 U.S. at 539. In his dissenting opinion in *Murr v. Wisconsin*, Justice Thomas stated that, prior to *Mahon*, 260 U.S. 393, “the Takings Clause reached only a direct appropriation of property” and that Justice Holmes merely announced a general rule not grounded in the Constitution. Justice Thomas further called for a reconsideration of regulatory takings jurisprudence.

appropriate regulatory takings test in *Penn Central Transportation Co. v. New York City*.⁹⁰

In *Penn Central*, the Court established a framework of balancing factors for courts to consider ad hoc when deciding if a regulation effects a taking.⁹¹ Although *Penn Central* set forth potentially seven independent factors,⁹² the very next year, the Supreme Court distilled the test down to focus on the following three: (1) the character of the governmental action, (2) the regulation's interference with reasonable investment-backed expectations, and (3) the regulation's economic impact.⁹³ The *Penn Central* ad hoc test remains the "default" test courts apply to most cases.⁹⁴ Notwithstanding the *Penn Central* factors, there are two exceptions to the default test where the Court will find a taking per se. The first scenario is where a regulation results in a permanent physical occupation of the property,⁹⁵ and the second is where the regulation completely eliminates the property's economic value.⁹⁶ This Comment first discusses the *Penn Central* factors, followed by the two per se scenarios.

A. Character of the Government Action

The first *Penn Central* factor is the character of the government action. In *Penn Central*, Justice Brennan stated that "a taking may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life."⁹⁷ Courts may alternatively look to the reciprocity of advantage enjoyed by the burdened owner.⁹⁸ The reciprocity of advantage test analyzes the

Murr v. Wisconsin, 137 S. Ct. 1933, 1957 (2017) (Thomas, J., dissenting) (quoting *Lucas*, 505 U.S. at 1014).

90. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123–28 (1978).

91. *Id.*

92. David Crump, *Takings By Regulation: How Should Courts Weigh the Balancing Factors?*, 52 SANTA CLARA L. REV. 1, 3 (2012). Professor Crump identifies at least six factors, including interference with distinct investment-backed expectations, extent of physical invasion, broad public purpose, regulation of noxious use, uniquely public functions, and comprehensiveness of reciprocity of advantage. *See id.* at 12–16. A potential seventh factor is magnitude. *Id.* at 17.

93. *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

94. *See Lingle*, 544 U.S. at 538.

95. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

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

97. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). For a contemporary discussion of physical takings jurisprudence, see Lynda L. Butler, *The Governance Function of Constitutional Property*, 48 U.C. DAVIS L. REV. 1687, 1689–95 (2015).

98. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491 (1987).

burdens and benefits the regulation places on a property owner.⁹⁹ In other words, the more directly and greatly the burdened owner enjoys the benefits and advantages of the government's regulation, the less likely the court is to find a taking.¹⁰⁰ Still others argue that, as part of the character analysis, courts should consider the public importance of the regulation's goal; the importance of the regulation's goal weighs against the court requiring the government to compensate the owner.¹⁰¹

B. Interference With Owner's Expectations

Next, a court will analyze the regulation's interference with the landowner's investment-backed expectations.¹⁰² Courts often utilize a foreseeability test to determine if the owner should have known that the government was likely to implement a regulation affecting the owner's investment.¹⁰³ A 2001 *en banc* decision by the Federal Circuit lists three relevant factors: (1) whether the regulation affected a "highly regulated industry"; (2) whether

99. See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). The reciprocity of advantage test has shifted from a utilitarian perspective—focusing on maximizing benefits for all of society—to a Rawlsian theory—maximizing fairness and justice. See Jan G. Laitos, *Takings and Causation*, 5 WM. & MARY BILL RTS. J. 359, 360–63 (1997).

100. *Keystone Bituminous Coal Ass'n*, 480 U.S. at 491 ("The Court's hesitance to find a taking when the State merely restrains uses of property that are tantamount to public nuisances is consistent with the notion of 'reciprocity of advantage' that Justice Holmes referred to in *Pennsylvania Coal*."). Reciprocity of advantage is best illustrated with basic land use principles. A hypothetical planning commission prohibits industrial manufacturing in a residential zone. If a property owner in that zone desired to manufacture, then the regulation has placed some burden on the owner. On the other hand, the owner also enjoys reciprocal benefits from the regulation because it also applies to the owner's neighbors. The owner could develop the land in a permitted manner and not have to endure the nuisances that would accompany a manufacturing operation next door.

101. See *Bass Enters. Prod. Co. v. United States*, 381 F.3d 1360, 1370 (Fed. Cir. 2004).

102. See *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979). Citing *Penn Central*, Justice Rehnquist stated that the Court should evaluate the regulation's interference with "reasonable investment backed expectations." *Id.* (emphasis added) (citing *Penn Cent. Transp. Co.*, 438 U.S. at 124). Notably, *Penn Central* held that the Court should evaluate the regulation's interference with "distinct investment-backed expectations." *Penn Cent. Transp. Co.*, 438 U.S. at 124 (emphasis added). This minor change in verbiage may have had profound effects on takings jurisprudence, allowing judges to first analyze if investment expectations are reasonable.

103. See *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 227 (1986) ("Those who do business in [a] regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." (quoting *Fed. Hous. Admin. v. Darlington, Inc.*, 358 U.S. 84, 91 (1958))).

the plaintiff was aware of the problem the regulation sought to correct at the time of purchase; and (3) whether the plaintiff could have “reasonably anticipated” the enactment of such regulation based on the regulatory environment at the time of purchase.¹⁰⁴ Although the Supreme Court rejected a bright-line rule that prior notice categorically bars an owner from compensation,¹⁰⁵ courts have nonetheless rejected takings claims when the property owner had prior notice of the regulation.¹⁰⁶ Additionally, under the investment-backed expectations factor, courts determine if the regulation frustrates the property’s specific purpose and whether proscription of the purpose is allowed under traditional nuisance claims.¹⁰⁷

C. Economic Impact

Finally, the court will analyze the regulation’s economic impact on the property.¹⁰⁸ Although courts have developed many different techniques for analyzing economic impact, the overarching rule is that the greater the economic impact of a government action, the greater the likelihood of a taking.¹⁰⁹ The court must initially decide what part of the parcel should control when determining the regulation’s impact, often called the “denominator question.”¹¹⁰ Typically, courts apply the “parcel-as-a-whole” rule which requires the court to consider the plaintiff’s entire parcel regardless of the portion the regulation affects.¹¹¹ Next, the court must determine how the

104. Commonwealth Edison Co. v. United States, 271 F.3d 1327, 1348 (Fed. Cir. 2001) (en banc).

105. Palazzolo v. Rhode Island, 533 U.S. 606, 632–33 (2001) (O’Connor, J., concurring). In her concurring opinion, Justice O’Connor resisted adopting any per se rules regarding the presence or lack of investment-backed expectations and instead reiterated that investment-backed expectation analysis is “one factor that points toward the answer to the question whether the application of a particular regulation to particular property ‘goes too far.’” *Id.* at 634–36 (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)). Subsequently, the Supreme Court in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency* relied heavily on Justice O’Connor’s concurrence to guide the Court’s evaluation of investment-backed expectations. *Tahoe-Sierra Pres. Council v. Tahoe Reg’l Plan. Agency*, 535 U.S. 302, 335–36 (2002). For further discussion of Justice O’Connor’s impact on the investment-backed expectations factor, see J. David Breemer & R.S. Radford, *The (Less?) Murky Doctrine of Investment-Backed Expectations After Palazzolo, and the Lower Courts’ Disturbing Insistence on Wallowing in the Pre-Palazzolo Muck*, 34 SW. U. L. REV. 351, 352–55 (2005).

106. John D. Echeverria, *Making Sense of Penn Central*, 23 UCLA J. ENV’T L. & POL’Y 171, 183–84 (2005).

107. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992).

108. Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979).

109. Echeverria, *supra* note 106, at 178.

110. Andrew C. Gresik, *Blurring the Denominator: Murr v. Wisconsin and the Increasing Complexity of Takings Analysis*, 2018 WIS. L. REV. 1231, 1232–33.

111. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130–31 (1978); *Murr v. Wisconsin*, 137 S. Ct. 1933, 1952 (2017). The “parcel-as-a-whole” encompasses more

regulation affects the specific parcel. A common method for analyzing economic impact is the “with and without method,” where courts compare the property’s current fair market value with and without the regulation.¹¹² The regulatory takings doctrine is meant to require the government to compensate owners for government actions that are “functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.”¹¹³ Accordingly, a court is unlikely to find a compensable taking unless the property’s diminution in value substantially exceeds fifty percent, often requiring the diminution to approach ninety percent.¹¹⁴

than a parcel’s square footage. In *Penn Central*, Justice Brennan rejected the petitioner’s argument that the New York City Landmarks Law took the air rights above the station by prohibiting the station to develop upward. *Penn Cent. Transp. Co.*, 438 U.S. at 136–38. Because the court analyzes the regulation’s burden on the property, a challenger—like the petitioner in *Penn Central*—wants the parcel to only encompass the affected portion. If the court only analyzes that affected portion, it is more likely to find a taking. See Keith Woffinden, Comment, *The Parcel as a Whole: A Presumptive Structural Approach for Determining When the Government Has Gone Too Far*, 2008 BYU L. REV. 623, 623–25. Conversely, the more inclusive the court’s definition of the parcel, the larger the denominator grows and the less the regulation burdens the property owner by comparison. *Id.*

112. See *Bass Enters. Prod. Co. v. United States*, 54 Fed. Cl. 400, 401 (2002). Professor Echeverria found significant issue with this approach because it disproportionately favored the claimant:

The “with and without” approach systematically *overstates* the actual impact of a restriction because it calculates the effect of lifting the regulation as to the claimant’s property while implicitly assuming the regulation will continue to apply to other properties in the community. This one-sided arithmetic grants a claimant credit for the negative effects of regulatory restrictions while giving the public no credit for the positive effects of regulation on the claimant’s property due to the restrictions on neighboring properties. Stated differently, this calculation allows the claimant to claim a “loss” of private property value when a large part of the value of the property has actually been created by the public through regulatory controls.

Echeverria, *supra* note 106, at 180–81 (footnotes omitted).

113. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005).

114. Mark W. Cordes, *Takings Jurisprudence as Three-Tiered Review*, 20 J. NAT. RES. & ENV’T L. 1, 39 (2005). Although a diminution in value of greater than seventy-five percent is typically necessary, courts have not always found such impact sufficient. In *Rith Energy, Inc. v. United States*, the Court of Federal Claims rejected the plaintiff’s taking claim even though the regulation had reduced the property’s value by ninety-one percent. *Rith Energy, Inc. v. United States*, 270 F.3d 1347, 1349, 1353 (Fed. Cir. 2001).

D. Per Se Takings

In addition to the ad hoc *Penn Central* three-factor test, the Supreme Court has also held that, under two specific circumstances, the government regulation effects a taking per se.¹¹⁵ If a court finds a per se taking, the government must compensate the property owner regardless of the other *Penn Central* factors.¹¹⁶

The Supreme Court established the first categorical taking circumstance in *Loretto v. Teleprompter CATV Corp.*, where the Court held that a “permanent physical occupation of property is a taking.”¹¹⁷ In *Loretto*, a New York law required building owners to allow a cable company to mount cable TV equipment to their buildings.¹¹⁸ The disputed equipment that led to this Supreme Court decision was a half-inch diameter cable and a cable box measuring less than one cubic foot mounted to the exterior of the building.¹¹⁹ Despite the small intrusion, the Court found a taking.¹²⁰ Quoting *Penn Central*, the Court held that when the character of the government’s action is a permanent physical occupation, there is a taking “without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.”¹²¹

The Supreme Court established the second per se taking circumstance in *Lucas v. South Carolina Coastal Council*.¹²² There, the Court held that the government must compensate when a regulation deprives an owner of

115. *Lingle*, 544 U.S. at 538.

116. *First Eng. Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987).

117. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 423 (1982). Although the Supreme Court held that physical occupations result in per se takings, the Court has not always rigidly followed its own holding. For a discussion of the Court’s application of the physical occupation per se rule, see John D. Echeverria, *What Is a Physical Taking?*, 54 U.C. DAVIS L. REV. 731 (2020).

118. *Loretto*, 458 U.S. at 421–22.

119. *Id.* at 422. For a picture of the cable equipment—more likely an image of the building with updated equipment—at issue in *Loretto*, see Robert H. Thomas, *Takings Pilgrimage, Upper West Side Edition*, INVERSE CONDEMNATION (Jan. 10, 2017), <https://www.inversecondemnation.com/inversecondemnation/2017/01/takings-pilgrimage-upper-west-side-edition.html> [<https://perma.cc/F2V8-ZW5B>].

120. *Loretto*, 458 U.S. at 434–35.

121. *Id.* The Supreme Court has since held that *Loretto* requires the government to pay for any permanent physical invasion regardless of its size. See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) (“First, where government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation.”).

122. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

“all economically beneficial us[e]” of the property.¹²³ In *Lucas*, a developer purchased two lots, intending to build single-family homes.¹²⁴ Two years after the purchase, South Carolina barred construction of permanent structures on certain coastal property, including the two lots.¹²⁵ Notably, the landowner still owned the property, and the property likely retained some value even with the building moratorium.¹²⁶ Regardless, the Court relied on the lower court’s finding that the regulation eliminated the property’s economic value and had therefore effected a taking.¹²⁷ The Court limited claims to “the extent that background principles of nuisance and property law independently restrict the owner’s intended use of the property.”¹²⁸ This last exception enables the government to avoid liability if the landowner would not have been allowed that use originally.¹²⁹ Thus, states may proscribe uses that violate “the background principles of the State’s law of property and nuisance” without fear of takings liability.¹³⁰

123. *Id.* at 1019 (“[W]hen the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.”).

124. *Id.* at 1006–07. South Carolina had already passed legislation restricting development in the state’s coastal zone almost a decade before Mr. Lucas purchased his lots. See Douglas N. Silverstein, Note, *Lucas v. South Carolina Coastal Council: Where Has the Supreme Court Taken Us Now?*, 15 WHITTIER L. REV. 825, 827 (1994). However, the South Carolina Coastal Council revised the baseline for determining what properties were in the coastal zone. *Id.* at 827–28. Mr. Lucas thus found his parcels on the wrong side of the line. *Id.*

125. *Lucas*, 505 U.S. at 1007.

126. Carol Necole Brown & Dwight H. Merriam, *On the Twenty-Fifth Anniversary of Lucas: Making or Breaking the Takings Claim*, 102 IOWA L. REV. 1847, 1854 (2017).

127. *Lucas*, 505 U.S. at 1031–32.

128. *Id.* at 1026–32. These background principles are essentially an affirmative defense for the regulation to prevent paying just compensation to the owner. An easy example would be if an owner purchases land with the intent of creating a new widget manufacturing operation. This owner then modifies the land such that it would now be unfit for any other purpose. Previously unknown to anyone, however, the widget-manufacturing process produces toxic fumes that cause significant health issues to the neighboring businesses. In this hypothetical, the regulatory body could prohibit the production of widgets and deprive the landowner of all economically viable use of land without compensation. The background principle of nuisance that prevents a landowner from noxious use of land that interferes with others eliminates the categorical taking claim. See *id.* A much more interesting issue arises in the context of the public trust doctrine as a background principle of property law because sea level rise is converting private land into public land. See Tim Duane, *Climate Disruption and Sea Level Rise: Legal Issues for Coastal Land Use in California*, CAL. REAL PROP. J. & PUB. L.J. JOINT ISSUE, Winter 2019, at 12.

129. Brown & Merriam, *supra* note 126, at 1852.

130. *Id.*

IV. ARE EVICTION MORATORIA REGULATORY TAKINGS?

Sir William Blackstone defined the right of property as “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”¹³¹ This statement often supports the proposition that property ownership is fundamental and absolute. Scholars now describe this “Exclusivity Axiom” as Blackstone describing a particular extreme ideal of property ownership, rather than an absolute truth.¹³² Property rights as we know them, Blackstone stated, evolved with society: from common ownership to possessory rights to intentional disposition, as civilization developed, so too did an owner’s rights to property.¹³³ Nonetheless, our society has adopted the idea that property ownership yields sacred rights, whether or not Blackstone shared that sentiment.¹³⁴

The most notable of these rights is the right to exclude.¹³⁵ The Supreme Court has held in multiple opinions that “the right to exclude others” is “one of the most essential sticks in the bundle of rights that are commonly characterized as property.”¹³⁶ Because of the primacy of the right to exclude, a government regulation that restricts it—such as a law preventing an owner

131. 2 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, A FACSIMILE OF THE FIRST EDITION OF 1765–1769, at 2 (Univ. of Chi. Press 1979).

132. See Carol M. Rose, *Canons of Property Talk, or, Blackstone’s Anxiety*, 108 YALE L.J. 601, 603–04 (1998). Professor Robert Burns argued that Blackstone did not view property as outside control of courts and legislature:

[F]or Blackstone, property was not one of the rights of which the legislature is merely declaratory, though it indeed may have some inchoate foundation in nature. The wisdom and will of the legislature determines the law of property—civil and criminal. Although private property is said to be an absolute right, the protection of which is a primary aim of government, absolute rights are largely sacrificed for the blessings of civil society. The only divinely given right to property, prior to civil law, is the right of all men to share the earth as common property. Private property may have providential basis, since the development of the human race led to a time when occupancy would bestow exclusive title, but civil institutions are, for Blackstone, no less providential: judicial and statutory shaping of property rights share that same historical-providential authority.

Robert P. Burns, *Blackstone’s Theory of the “Absolute” Rights of Property*, 54 U. CIN. L. REV. 67, 85 (1985) (footnotes omitted).

133. See BLACKSTONE, *supra* note 131, at 7 (“Necessity begat property; and, in order to insure that property, recourse was had to civil society, which brought along with it a long train of inseparable concomitants . . .”).

134. See JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW 4–5 (4th ed. 2007).

135. Professor Merrill argued that “the right to exclude others is more than just ‘one of the most essential’ constituents of property—it is the sine qua non.” Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998).

136. *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979); see also *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1044 (1992); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 831 (1987).

from evicting tenants—must subject the government to potential compensable takings liability.¹³⁷ Accordingly, courts will apply the per se and ad hoc takings tests to establish under what conditions an eviction moratorium will require compensation as a regulatory taking.

A. *Per Se Takings Under Loretto and Lucas*

Unfortunately for landowners challenging eviction moratoria, the per se rules of *Loretto* and *Lucas* are unlikely to prove successful. First, as noted above, the categorical rule established in *Loretto* states that a permanent physical occupation is a per se taking of private property requiring just compensation.¹³⁸ Unlike the facts in *Loretto*, eviction moratorium laws do not require a landowner to permanently affix a physical object to their property.¹³⁹ However, a court may still categorize physical occupations by third parties—in this case tenants—as physical occupations.¹⁴⁰ Similarly, although the government is not directly appropriating the property for public use, eviction moratorium laws enable a third-party to occupy the property, which the Supreme Court has held may still effect a taking.¹⁴¹ Accordingly, property owners are able to argue that all three types of eviction moratorium laws result in physical occupation. Their arguments' success, however, may turn on how the tenancy started.

137. *Kaiser Aetna*, 444 U.S. at 179–80 (“In this case, we hold that the ‘right to exclude,’ so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation.”).

138. See *supra* notes 118–22 and accompanying text.

139. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 423 (1982).

140. See *Kaiser Aetna*, 444 U.S. at 179–80. The Ninth Circuit has also held that occupation by tenants can satisfy physical occupation. See *Hall v. City of Santa Barbara*, 833 F.2d 1270, 1276 (9th Cir. 1986). There, the court invalidated a city ordinance that transferred a possessory right from the landowner to the tenants. *Id.* at 1273–74. Relying on *Loretto*, the court found that the physical occupation by tenants was no different than government occupation:

Nor does it matter that the physical occupation here is by tenants and not by the City of Santa Barbara itself. The Court addressed this point in *Loretto*, holding that “[a] permanent physical occupation authorized by state law is a taking without regard to whether the State, or instead a party authorized by the State, is the occupant.”

Id. at 1277 (quoting *Loretto*, 458 U.S. at 433 n.9).

141. *Nollan*, 483 U.S. at 831 (holding that the government enabling the public to use private property to access a beach requires compensation).

The Supreme Court has held that physical occupation by a tenant does not effect a taking when the owner initially allowed the occupation.¹⁴² In *Yee v. City of Escondido*, a mobile home park owner claimed that a city rent control ordinance combined with California's mobile home residency law effected a per se taking by permanent physical occupation.¹⁴³ California's mobile home residency law required the park owner to give twelve-months' notice before evicting, and the mobile home park owner could not object to an existing tenant selling their space to a new tenant.¹⁴⁴ Concurrently, the city rent control law decreased rents and required approval from the city council to raise rents in the future.¹⁴⁵ The mobile-home-park-owning petitioners claimed that these laws deprived them of all use of their real property and granted to the current tenants and successors in interest the right to permanently occupy the petitioners' property.¹⁴⁶ The Court held that, because the landlords agreed to rent their property initially, there is not a per se physical taking under *Loretto*.¹⁴⁷

Even if property owners can establish physical occupation, eviction moratoria challengers must also prove that the occupation resulting from eviction moratoria is permanent.¹⁴⁸ In *Yee*, the Court based its holding, at

142. *Yee v. City of Escondido*, 503 U.S. 519, 526–28 (1992).

143. *Id.* at 523. For a discussion of the procedural history and underlying facts of *Yee v. City of Escondido*, see Kari Anne Gallagher, Comment, *Yee v. City of Escondido: Will Mobile Homes Provide an Open Road for the Nollan Analysis?*, 67 NOTRE DAME L. REV. 821 (1992).

144. *Yee*, 503 U.S. at 528.

145. *Id.* at 524.

146. *Id.* at 525.

147. *Id.* at 526–28 (“Put bluntly, no government has required any physical invasion of petitioners’ property. Petitioners’ tenants were invited by petitioners, not forced upon them by the government.”).

148. *See supra* notes 118–22 and accompanying text. A recent eviction moratorium challenger framed their *Loretto* argument on the fact that Los Angeles indefinitely—rather than permanently—banned evictions:

The Ordinances in this case fall squarely within the “physical occupation” line of cases the United States Supreme Court has held constitute “per se” categorical takings for which the government is required to pay “just compensation.” The Ordinances force property owners and lessors to accept the occupation of tenants without any payment of rent concurrent with the occupancies. While the Ordinances purport to allow owners to recover rent from such individuals at some point in the future, they do nothing to protect property owners from losses they will undoubtedly sustain when such tenants are unable to pay their rental obligations in the future or to compensate property owners for the rent they could have obtained from new paying tenants if the City did not indefinitely ban evictions. The City has thus eliminated the property owners’ fundamental constitutional right to exclude nonpaying tenants from their respective properties. As Justice Thurgood Marshall proclaimed in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982), “property law has long protected an owner’s expectation that he will be relatively undisturbed at least in the possession of his

least in part, on the fact that the rent ordinance did not entirely remove the landowner's ability to evict the tenants, but only delayed their ability to do so.¹⁴⁹ Unlike the eviction restrictions in *Yee*, where the landlord was able to evict after giving twelve-months' notice, many eviction moratoria remove a landlord's ability to evict regardless of notice.¹⁵⁰ However, although at one point eviction moratorium laws were repeatedly extended,¹⁵¹ rendering them arguably indefinite,¹⁵² California and federal eviction moratoria have since expired.¹⁵³ Accordingly, property owners asserting *Loretto* permanent physical occupations will likely fail as the eviction laws proved to be temporary.

A taking claim under the second categorical rule carved out in *Lucas* likely fares no better than those under *Loretto* for very similar reasons.

property" and "[t]o require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury."

Complaint, *supra* note 77, at 34–35.

149. *Yee*, 503 U.S. at 528. Justice O'Connor, writing for the majority, found that state compulsion was necessary to find a taking under rent control:

At least on the face of the regulatory scheme, neither the city nor the State compels petitioners, once they have rented their property to tenants, to continue doing so. . . . A different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy.

Id. at 527–28.

150. *The Temporary Eviction Moratorium*, CITY & CNTY. OF S.F., <https://sfrb.org/temporary-eviction-moratorium> [<https://perma.cc/6DCZ-BDP3>]. The San Francisco County website states that landlords are permanently barred from evicting tenants based on back rent during the emergency period. *Id.* The amendments provide that no tenant may be evicted for non-payment of rent that become due while the Governor's Executive Order on evictions is in effect (currently March 4, 2020 through August, 2020, unless extended), even if the rent is not paid after the Mayor's six-month extension period expires. *Id.* In other words, it creates a permanent eviction moratorium for missed rent payments that became due during the Governor's Executive Order on evictions.

151. Eviction bans originally protected San Diego renters through August 2020. Eric S. Page, *City Extends Eviction Moratorium for Renters, Businesses*, NBC SAN DIEGO (Jan. 26, 2021, 2:07 PM), <https://www.nbcsandiego.com/news/coronavirus/city-extends-eviction-moratorium-for-renters-businesses/2504206/> [<https://perma.cc/U2ZF-A8A5>]. Then California state law protected tenants through January 2021. *Id.* The San Diego City Council later extended the eviction ban through June 30, 2021. *Id.*

152. See Robert H. Thomas, *Evaluating Emergency Takings: Flattening the Economic Curve*, 29 WM. & MARY BILL RTS. J. 1145, 1186 (2021).

153. Clifford Colby & Dale Smith, *The Federal Eviction Moratorium Is Gone. What Renters Should Know Now*, CNET (Sept. 3, 2021), <https://www.cnet.com/personal-finance/the-federal-eviction-moratorium-is-gone-what-renters-should-know-now/> [<https://perma.cc/8NYE-E9U8>].

Under *Lucas*, the government must compensate an owner when a regulation deprives an owner of “all economically beneficial uses” of their land.¹⁵⁴ However, the Court limited its holding to “the extraordinary circumstance when no productive or economically beneficial use of land is permitted.”¹⁵⁵

A *Lucas* challenge of rent relief laws—where the government pays the landlord directly—would make little sense.¹⁵⁶ *Lucas* requires an elimination of all economic value, but under rent relief laws, the government pays the landlord.¹⁵⁷ Even California landlords accepting relief funds under SB 91, which offers maximum reimbursement of eighty percent of back rent and requires landlords to forgive any remaining debt,¹⁵⁸ could not bring successful *Lucas* claims because their properties would retain significant value.¹⁵⁹

However, a *Lucas* challenge to rent delay or rent cancellation laws could gain traction. A clever litigator could argue that a rent delay law might,¹⁶⁰ and a rent cancellation law surely will, eliminate all economic value for the duration of the moratorium. This argument centers, again, on what should be the appropriate denominator.¹⁶¹ Although the denominator question often centers on the physical size of the parcel,¹⁶² claimants could alternatively argue a temporal denominator focused solely on the duration of the moratorium. However, the Supreme Court rejected this same basic

154. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

155. *Id.* at 1017. Consistent with this analysis, eviction challengers in *Apartment Association of Los Angeles County* declined to assert a *Lucas* argument. See Complaint, *supra* note 77, at 2–5, 34–35.

156. See *supra* Section II.A.

157. See, e.g., L.A. HOUS. DEP’T, *supra* note 56; SAN DIEGO HOUS. COMM’N, *supra* note 56; SAN DIEGO HOUS. COMM’N, *supra* note 55.

158. See Gulezyan & Hodges, *supra* note 41.

159. See *Lucas*, 505 U.S. at 1019. Eviction restriction challengers are not the only claimants likely to lose on a *Lucas* theory. *Lucas* claims have an astoundingly low success rate:

Our review of more than 1,700 cases in state and federal courts reveals only 27 cases in 25 years in which courts found a categorical taking under *Lucas*. By percentage, that works out to a *Lucas*-claim success rate of just 1.6%. This does not mean *Lucas* is unimportant, however. Rather, the paucity of successful *Lucas* claims itself tells a significant story about the importance of pleading takings claims.

Brown & Merriam, *supra* note 126, at 1849–50 (footnotes omitted).

160. A foreseeable example is one where a landlord is unable to successfully recoup back rent because the tenant is judgment proof. The landlord would lack any meaningful recourse and would never receive any compensation from the tenant. In this hypothetical scenario, the rent delay law has actually eliminated all rental income for the duration of the moratorium.

161. See *supra* notes 108–09 and accompanying text.

162. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1952 (2017).

argument in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*.¹⁶³

The claimant in *Tahoe-Sierra* argued that a 32-month moratorium on development was a categorical *Lucas* taking.¹⁶⁴ The claimant argued, and the lower court found, that the moratorium effected a per se regulatory taking because it deprived the owner of all economically beneficial use for the moratorium's duration.¹⁶⁵ Nonetheless, the Supreme Court declined to allow this "conceptual severance" to establish a *Lucas* categorical taking.¹⁶⁶ The Court held that, if a property owner was able to divide a parcel temporally, any delay caused by regulation would result in a per se taking.¹⁶⁷ In effect, *Tahoe-Sierra* prevents a challenger—like a clever litigator arguing a wipeout for the duration of the eviction moratorium—from focusing solely on the period of the regulation.¹⁶⁸ Accordingly, a landlord is likely to fail on a *Lucas* theory because both rent delay and rent cancellation laws will not have permanently eliminated all economic use.¹⁶⁹

Because a court is unlikely to find that any of the three categories of temporary eviction moratoria effect a per se taking under *Loretto* or *Lucas*, litigants will have to run the gauntlet under the ad hoc *Penn Central* test.

B. Penn Central Three Factor Balancing Test

1. An Initial Penn Central Question: What is Character?

Landlords bringing inverse condemnation claims must convince a judge that, based on the eviction law's character, interference with expectations, and economic impact, the government has effectively taken the owner's

163. See generally *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302 (2002).

164. *Id.* at 331.

165. *Id.* at 316. This description of the lower court's holding is over-simplified. The case's complex procedural history before reaching the Supreme Court spanned over a decade. See Daniel L. Siegel, *The Impact of Tahoe-Sierra on Temporary Regulatory Takings Law*, 23 UCLA J. ENV'T. L. & POL'Y 273, 280–83 (2005).

166. *Tahoe-Sierra*, 535 U.S. at 331.

167. *Id.* ("Of course, defining the property interest taken in terms of the very regulation being challenged is circular. With property so divided, every delay would become a total ban; the moratorium and the normal permit process alike would constitute categorical takings.")

168. For a discussion of this temporal taking analysis, see Ann Oshiro, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency: A Significant Ripple in Takings Jurisprudence*, 41 HOUS. L. REV. 167, 173 (2004).

169. See *supra* notes 33–47 and accompanying text.

property.¹⁷⁰ An accurate assessment of claimants’ potential arguments requires first clarifying what “character” means. As noted above, courts often look to the original holding in *Penn Central* that a physical invasion is more likely to effect a taking than a regulation that merely alters a property owner’s economic benefits.¹⁷¹ The absence of clear guidelines, however, allowed courts to develop their own alternative, and often contradicting, tests.¹⁷² Some courts consider the government’s necessity for the regulation, finding that when the government acts unquestionably in the interest of public health, safety, welfare, and morals, the action is less likely to effect a taking.¹⁷³ Under this version of the character test, a government regulation in response to a legitimate public emergency, such as a pandemic, is less likely to require compensation.¹⁷⁴ For example, a recent court case analyzing

170. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123–28 (1978).

171. *See, e.g., Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 516 (1987).

172. Echeverria, *supra* note 106, at 186. Professor Echeverria identifies nine potential definitions of character that courts have used. *Id.* at 186–99. Professor Echeverria further argues that the confusion surrounding the character prong stems from identity issues within takings jurisprudence:

The basic problem with regulatory takings doctrine—exemplified by the varying and contradictory definitions of the term “character”—is that it has been asked to carry too much weight. Properly interpreted, regulatory takings doctrine should focus exclusively on providing financial compensation for legitimate government actions that single out one or a few property owners for severe, disproportionate economic burdens. Too often, however, the Takings Clause has been treated as establishing a kind of catch-all constitutional remedy for alleged wrongs by government actors affecting property. As a result, the Takings Clause has been offered up as the appropriate remedy for what, more logically, should be viewed as potential due process violations. It is obvious that property rights advocates have asserted expansive readings of the Takings Clause because they are dissatisfied with the well-worn traditions of judicial deference in due process cases. They hoped to find in relatively immature takings doctrine sufficient maneuvering room to support the kind of robust judicial intervention in economic policymaking not seen since the era of *Lochner*. This brand of judicial activism is certainly problematic for various reasons. But the critical point for present purposes is that the effort to use the Takings Clause to prosecute claims that more logically should proceed under other constitutional headings has contributed to making takings a muddled legal doctrine.

Id. at 199 (footnotes omitted).

173. *See TJM 64, Inc. v. Harris*, 475 F. Supp. 3d 828, 834, 839 (W.D. Tenn. 2020) (holding that the state acted under its valid police power when enacting COVID-19 business restrictions and therefore did not effect a compensable taking even though the other two factors supported plaintiff’s taking claim); Thomas, *supra* note 152, at 1164. Professor Thomas argues that courts should instead require the government to prove necessity as an affirmative defense in order to avoid compensation liability. Thomas, *supra* note 152, at 1170.

174. D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 U. MIA. L. REV. 471, 517 (2004).

COVID-19 business restrictions under *Penn Central* found that, although the economic impact and interference with investment-backed expectations factors favored compensation, the restriction's character outweighed the other two factors because the regulation was in response to a national public emergency and thus required no compensation.¹⁷⁵ However, courts analyzing eviction moratoria should resist reducing the three factor test into this type of "one strike rule"¹⁷⁶ for three reasons: (1) unlike in the case of business closures, landlords are still required to provide their "product"; (2) eviction moratoria do not prevent a noxious or nuisance-like use of the kind that the police power typically regulates; and (3) courts adequately consider the community's need for the regulation under the reciprocity of advantage test.

First, eviction moratoria differ from typical COVID-19 business restrictions because, while businesses are prevented from selling their good or providing their service,¹⁷⁷ eviction moratoria require the landlord to continue to provide their private property without receiving compensation.¹⁷⁸ A recent eviction moratorium challenger extended this logic by noting that the government has not required grocery stores to give out free groceries in exchange for future payment if the shopper can show economic hardship.¹⁷⁹ Although a court may find this analogy tenuous,¹⁸⁰ it illustrates that COVID-19 business restrictions differ significantly from eviction moratorium laws.

175. See *TJM 64, Inc.*, 475 F. Supp. 3d at 837–39.

176. Adam R. Pomeroy, *Penn Central After 35 Years: A Three Part Balancing Test or a One Strike Rule?*, 22 FED. CIR. BAR J. 677, 677–79 (2012). For further discussion on the development of the three-factor balancing test in its present form, see Thomas W. Merrill, Environmental Distinguished Lecture, *The Supreme Court's Regulatory Takings Doctrine and the Perils of Common Law Constitutionalism*, 34 J. LAND USE & ENV'T L. 1, 13–16 (2018).

177. Greg Labate & Rachel Patta Howard, *California Places More COVID-19 Related Restrictions on Businesses and Employers*, NAT'L L. REV. (July 6, 2020), <https://www.natlawreview.com/article/california-places-more-covid-19-related-restrictions-businesses-and-employers> [<https://perma.cc/5KQS-G88E>]. Business restrictions may more accurately be frustrating business rather than preventing it. Many businesses have continued operations despite restrictions. See Kate Cimini, *Going Underground: California Business Operates in Secret Amid Pandemic Restrictions*, CAL MATTERS (Jan. 22, 2021), <https://calmatters.org/california-divide/2021/01/california-businesses-go-underground-pandemic/> [<https://perma.cc/LGV5-FLJE>].

178. See *supra* Part II.

179. OUR WEEKLY L.A., *supra* note 75.

180. Courts would easily point out that, unlike a grocery store giving out free groceries, a landlord is not required to give tenants full ownership of the property. See *supra* Section II.B. Instead, tenants are allowed temporary use of the property and will likely pay back the rent owed to the property owners. *Id.*

In addition to allowing the tenant to occupy the private property, landlords must also maintain the property to conform with the warranty of habitability and state law.¹⁸¹ Accordingly, landlords bear an even more significant burden than other COVID-restricted businesses because landlords must forgo regular income while continuing to pay for services out of pocket.¹⁸²

Second, evictions are unlike the typical nuisances that the police power prevents.¹⁸³ States use the police power to prevent a citizen from conducting themselves or using their property in a manner detrimental to the general welfare.¹⁸⁴ Courts have held that a government may restrict harmful or noxious uses of property without compensation even if such restriction deprives the owner of the property's beneficial use.¹⁸⁵ Examples of such

181. *California Habitability Laws*, IPROPERTY MANAGEMENT, <https://ipropertymanagement.com/laws/warranty-of-habitability-california> [<https://perma.cc/6YTJ-92EB>]. California habitability laws continue to subject landlords to potential liability. Landlords must provide basic necessities like plumbing, heating, electrical, and exterior repairs. *See id.* Interestingly, a tenant typically has the option of withholding paying rent if the landlord fails to make necessary repairs within a certain time. *Id.* Although withholding rent while already not paying may seem like the landlord has nothing to lose, in reality, the landlord may also face civil liability if the conditions are unsafe and result in injury. *See Injuries to Tenants on Rental Property*, JUSTIA, <https://www.justia.com/real-estate/landlord-tenant/information-for-tenants/injuries-on-the-premises/> [<https://perma.cc/Z5QY-ZWY9>].

182. A potential counterargument would point out that restricted businesses still must pay significant overhead during the pandemic. Although there are undoubtedly situations where a business must pay full overhead despite reduced business, the majority will face reduced income and reduced overhead. Also, many eviction moratoria protect commercial tenants as well. *See, e.g.,* Allan Low & Anne Li, *California Governor Issues Executive Order N-80-20 Regarding Commercial Evictions*, JD SUPRA (Oct. 2, 2020), <https://www.jdsupra.com/legalnews/california-governor-issues-executive-45471/> [<https://perma.cc/J4MB-A3HW>]. However, this also raises the separate discussion of foreclosure protection, which is beyond this Comment's scope.

183. Admittedly, the distinction between the government taking for public use—which requires compensation—and the government preventing public harm through police power—which does not—is a blurred line beyond the scope of this Comment. For an in-depth discussion of this distinction or lack thereof, see generally Christopher D. Supino, *The Police Power and “Public Use”: Balancing the Public Interest Against Private Rights Through Principled Constitutional Distinctions*, 110 W. VA. L. REV. 711 (2008). However, allowing the government to categorically avoid compensation in any scenario where the government has legitimate need for the regulation would eliminate regulatory takings altogether. Inverse condemnation claimants are not challenging the legitimacy of the government regulation but acknowledging that the government has a legitimate reason to pass the regulation and must pay for its burdens. A challenge to the regulation's legitimacy—asserting the regulation does not meet the low standard of rational basis—results in invalidation of the regulation, not compensation. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005). For further discussion of government action under the police power and why it should not categorically avoid the requirement of compensation under regulatory takings, see Thomas, *supra* note 152.

184. 1 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 1.42 (2021).

185. *Mugler v. Kansas*, 123 U.S. 623, 668–69 (1887).

harmful uses include natural gas production,¹⁸⁶ liquor distillation,¹⁸⁷ and brick manufacturing.¹⁸⁸ The requirement for compensation thus turns on whether the neighboring landowners could have prevented the property use in court under the State’s private nuisance laws.¹⁸⁹ If, in the absence of the regulation, a surrounding landowner could have prevented that use through private litigation, the owner is not entitled to compensation because the regulation then merely prohibits activity that the court deems a nuisance.¹⁹⁰ Applying this principle to evictions, a surrounding property owner could not prevent the landlord from evicting a nonpaying tenant through a lawsuit in the absence of the regulation.¹⁹¹ Although COVID-19 eviction moratoria serve a critical function of preventing homelessness during a pandemic,¹⁹² evicting a nonpaying tenant is not a use that violates the background principles of nuisance and property law.¹⁹³

186. See, e.g., *Walls v. Midland Carbon Co.*, 254 U.S. 300, 309–10 (1920).

187. See *Mugler*, 123 U.S. at 653.

188. See, e.g., *Hadacheck v. Sebastian*, 239 U.S. 394, 404, 413–14 (1915).

189. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992) (“A law or decree [that prohibits, without compensation, all economically beneficial use of land] must . . . do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State’s law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.”).

190. See *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 491 n.20 (1987) (“[S]ince no individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has not ‘taken’ anything when it asserts its power to enjoin the nuisance-like activity.”).

191. Somewhat to the contrary, landlords face potential liability for not evicting a tenant—or abating the nuisance in another manner—if a tenant becomes a nuisance. *HUD Issues Fair Housing Guidance Regarding Local Nuisance Ordinances*, NAT’L LOW INCOME HOUS. COAL. (Sept. 19, 2016), <https://nlihc.org/resource/hud-issues-fair-housing-guidance-regarding-local-nuisance-ordinances> [<https://perma.cc/9HA6-6TKW>].

192. See Chris Coons & Ray Brescia, *Preventing Homelessness in a Pandemic*, THE HILL (Aug. 5, 2020, 1:30 PM), <https://thehill.com/blogs/congress-blog/politics/510684-preventing-homeless-crisis-in-the-pandemic> [perma.cc/5ZNA-PRXA]. Homelessness exacerbates conditions that lead to COVID-19 outbreaks. Although shelters provide a potential respite from the elements, they are also a potential hotspot for infections. See Gary Warth & Paul Sisson, *Coronavirus Outbreak Detected at San Diego Convention Center Homeless Shelter*, SAN DIEGO UNION-TRIB. (Dec. 10, 2020), <https://www.sandiegouniontribune.com/news/health/story/2020-12-10/coronavirus-outbreak-detected-at-san-diego-convention-center-homeless-shelter> [<https://perma.cc/5BBM-LZ4H>].

193. See *Lucas*, 505 U.S. at 1029–30; see also Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1239–41 (1967).

Third, a court should not simply assess whether the legislature is acting under their police power. Instead, a court analyzing the community's need for the regulation should consider the regulation's necessity as part of the "reciprocity of advantage."¹⁹⁴ This analysis looks at the regulation's benefits to the community compared to the regulation's burden, focusing on how the regulation distributes those burdens and benefits.¹⁹⁵ Because this test analyzes the regulation's overall benefit to the community, the reciprocity of advantage test adequately considers the community's need for the regulation.¹⁹⁶

In summary, the *Penn Central* three-factor test is an inquiry into the regulation's burden on the property owner.¹⁹⁷ As such, courts analyzing the regulation's character should not focus solely on the government's justifications for the regulation but should instead analyze the distribution of the regulation's burdens and benefits.¹⁹⁸ Because the government's rationale for the regulation should not be dispositive, courts should continue to analyze a COVID-19 eviction regulation's character under the available tests.

2. *The First Penn Central Factor: Character of Government Action*

Under Justice Holmes's traditional definition of character, all three versions of eviction moratoria lean toward finding a compensable taking because eviction moratorium laws remove a landlord's ability to evict a

194. Echeverria, *supra* note 106, at 204.

195. *Id.*

196. Some commentators argue that courts should apply the reciprocity of advantage test more broadly to account for the *average* reciprocity of advantage enjoyed by the entire community. See, e.g., Raymond R. Coletta, *Reciprocity of Advantage and Regulatory Takings: Toward a New Theory of Takings Jurisprudence*, 40 AM. U. L. REV. 297, 303 (1990). This theory expands the test beyond the scope Justice Holmes first announced in *Penn Central*. See *id.* Under this version, the benefits of the community at large offset the burden of those the regulation impacts. See *id.*

197. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005) ("Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights.")

198. Focusing solely on the justifications for regulations leads to interesting results. For example, in Colorado, a fleeing shoplifter broke into a residential home in an attempt to hide from police. See *Lech v. Jackson*, 791 F. App'x 711, 713 (10th Cir. 2019). Police subsequently shot out the home's windows, deployed teargas grenades, and used a remote vehicle equipped with a battering ram to open various holes in the exterior of the home. *Id.* The homeowners sought compensation for the destruction of their home. *Id.* The Tenth Circuit upheld the district court's denial of the taking claim, stating that the home was destroyed pursuant to the police power and thus required no compensation. *Id.* at 719. For an image of the destroyed home, see Tim Cushing, *Appeals Court Says It's OK for Cops to Destroy Someone Else's House to Apprehend a Criminal Suspect*, TECHDIRT (Nov. 4, 2019, 8:04 PM), <https://www.techdirt.com/articles/20191030/15530543295/appeals-court-says-ok-cops-to-destroy-someone-elses-house-to-apprehend-criminal-suspect.shtml> [<https://perma.cc/F8SH-4XGP>].

tenant.¹⁹⁹ Under the reciprocity of advantage test, the compensation argument flounders for rent relief laws, strengthens for rent delay laws, and peaks for rent cancellation laws.

First, under many rent relief laws, government programs compensate landlords for rent but restrict the landlord's ability to evict tenants for reasons unrelated to payment.²⁰⁰ In certain situations, the tenant would not be occupying the property but for the government's regulation.²⁰¹ Justice Brennan might have found this result more closely resembles a physical invasion that leans toward compensation.²⁰² However, applying the reciprocity of advantage test, rent relief laws provide a less than compelling argument for compensation.²⁰³ These programs directly compensate the landlord with taxpayer funds when a tenant is unable to pay.²⁰⁴ Therefore, the rent relief law's burden is not disproportionately applied to the landlord. Instead, the community collectively pays for the rent relief law's benefits, such as preventing homelessness that would increase the spread of COVID-19.²⁰⁵

199. *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979) (“In this case, we hold that the ‘right to exclude,’ so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation.”). Even commentators arguing that governments should have more ability to enact land use legislation without fear of compensation concede that removing a landowner's ability to exclude is more significant than merely regulating the landowner's use of the property. *See, e.g., Coletta, supra* note 196, at 303.

200. For example, the Los Angeles eviction moratorium prohibits a landlord from evicting a tenant for having unauthorized pets or occupants. L.A. CNTY. CONSUMER & BUS. AFFS., *supra* note 51; CITY OF SANTA MONICA, *supra* note 51. This further reduces the landlord's ability to exclude persons—or animals—from the property.

201. Many landlords would likely have evicted the nonpaying tenant to try to find new renters or to simply live on the premises themselves. As mentioned earlier, some landlords have moved in with friends or family because they can't afford to pay the mortgage on their rental properties in addition to their own living expenses. *See Simon, supra* note 10.

202. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). The Supreme Court has faced the question of government-caused temporary invasions of private property in several cases where government repeatedly flooded private property, and the outcomes of those cases have varied. *See Brian T. Hodges, Will Arkansas Game & Fish Commission v. United States Provide a Permanent Fix for Temporary Takings?*, 41 B.C. ENV'T AFFS. L. REV. 365, 367–75 (2014).

203. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491 (1987); *see supra* Section III.A.

204. *See supra* Section II.A.

205. Studies have predicted that homelessness could rise forty-nine percent nationally over the next four years due to the pandemic. Suzette Hackney, *COVID-19 Could Devastate the Homeless. How Will America Pick Up the Pieces?*, USA TODAY (Jan. 30, 2021, 3:15

Next, rent delay laws add another layer of limitation by restricting a landlord's ability to evict a tenant due to nonpayment.²⁰⁶ Again, like rent relief laws, a landlord might successfully argue the regulation resulted in a physical invasion.²⁰⁷ However, unlike rent relief laws, the reciprocity of advantage test²⁰⁸ reveals rent delay laws place a disproportionate burden on landlords. Rent delay laws require a landlord to continue to rent property to a nonpaying tenant that, in the best-case scenario, will repay the landlord at some point in the future.²⁰⁹ In those scenarios where the landlord does not recoup back rent, that landlord alone will have paid for the regulation's benefits that the entire community enjoys.²¹⁰ The landlord's burden under that scenario would outweigh the reciprocal benefits and would lean toward compensation.

Finally, proposed rent cancellation laws require a landlord to continue renting their property to a tenant without compensation or accept additional rental restrictions in exchange for government compensation.²¹¹ Of the three categories of eviction moratoria, rent cancellation laws most significantly burden landlords and afford landlords the least benefit. Accordingly, under the character factor, courts are most likely to find that rent cancellation laws effect a compensable taking.²¹² However, the character of the government

AM), <https://www.usatoday.com/story/opinion/2021/01/30/covid-19-exacerbates-homelessness-lack-data-could-make-worse/4286017001/> [<https://perma.cc/7QHR-WBKP>]. Increased homelessness affects a community, not just those pushed into homelessness. The community should therefore contribute to its prevention. Rent relief programs are taxpayer funded, thereby spreading the overall burden. Notably, landlords would still pay taxes and contribute to the relief.

206. See *supra* Section II.B.

207. *Penn Central*, 438 U.S. at 124.

208. *Keystone Bituminous Coal Ass'n*, 480 U.S. at 491; see *supra* notes 98–100 and accompanying text.

209. See *CITY OF SANTA MONICA*, *supra* note 51. Even in the scenario where the renter pays back rent once it becomes due, the landlord will have sacrificed the time value of money while awaiting reimbursement or may have taken out loans. See *infra* Section IV.B.2.

210. The landlord will not only have paid for the community's benefit of decreased homelessness and infection, but the landlord will have also directly paid for the tenant's housing out of pocket. The indirect benefit to the landlord—less homelessness—comes at a severe personal cost that might include the landlord losing their own home. See Simon, *supra* note 10.

211. See Mooney, *supra* note 74. Rent cancellation laws that require the landlord to accept certain conditions to receive compensation are the least burdensome—but most realistic—version of the proposed laws. See Falcon, *supra* note 68. Proposed rent cancellation laws that offer no opportunity for reimbursement would thus be an even greater burden. See *id.*

212. This Comment only analyzes a small aspect of the average reciprocity of advantage of these laws. For a more thorough discussion of the test and its economic perspectives, see generally William W. Wade & Robert L. Bunting, *Average Reciprocity of Advantage: "Magic Words" or Economic Reality—Lessons from Palazzolo*, 39 URB. L. 319 (2007).

action is not the only factor that determines whether the regulation is a taking. Courts will also look at whether the regulation interferes with the owner's reasonable investment-backed expectations.

3. *The Second Penn Central Factor: Interference With Investment-Backed Expectations*

A regulation's interference with investment-backed expectations often centers on the property owner's awareness of such regulation at time of purchase.²¹³ Due to their unpredictability, all three types of eviction-moratoria present strong arguments for finding a compensatory taking. However, as one might easily assume, rent relief laws provide the weakest argument, rent delay laws provide a stronger argument, and rent cancellation laws provide the strongest argument.

After *Kaiser Aetna v. United States*, the inquiry into the regulation's interference with investment-backed expectations must begin with an analysis of the expectations' reasonableness.²¹⁴ Landlords will easily meet this burden because courts have held that the expectation must be reasonable, "like expecting rent to be paid . . ."²¹⁵ Courts therefore use expected rent as a yardstick to decide the reasonableness of other expectations.²¹⁶ After this preliminary inquiry, courts next analyze the regulation's foreseeability and its frustration of the property's purpose.

The foreseeability test outlined in *Commonwealth Edison Co. v. United States*²¹⁷ shows that all three types of eviction laws are not outstandingly

213. Echeverria, *supra* note 106, at 183.

214. *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

215. *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1120 (9th Cir. 2010) (en banc).

216. *Id.* (stating that a landlord purchases a property to acquire an income stream from rents based on the laws as they currently existed at the time of purchase). The court noted that a landlord could not reasonably expect a law to miraculously change in the landlord's favor that would lead to a windfall. *See id.* For most landlords impacted by COVID-19 eviction moratoria, the opposite is true: landlords purchased the property when these laws did not exist and reasonably expected the laws to remain substantially the same.

217. *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1348 (Fed. Cir. 2001) (en banc).

The cases suggest three factors relevant to a determination of a party's reasonable expectations. First, was the company operating in a highly regulated industry? Second, did the company know of the problem at the time it engaged in the activity? Third, in the light of the regulatory environment at the time of the activities, could the possibility of the assessments have been reasonably anticipated? . . . [W]e do not need to decide whether the presence of only one of these factors, without more, suffices to establish a lack of reasonable expectations.

foreseeable. With the introduction of rent control and fair housing laws, rental properties are likely within a highly regulated industry.²¹⁸ Nonetheless, except for owners that purchased property after the Coronavirus pandemic began, no property owner that purchased their property before 2020 could have reasonably foreseen that a global pandemic would require local, state, and federal governments to pass regulations prohibiting evictions.²¹⁹ Commentators calling these laws “unprecedented” further emphasizes the lack of foreseeability.²²⁰ Further, eviction restrictions are not subsequent amendments to pre-pandemic legislation.²²¹ However, courts might deem the *extensions* of the laws as subsequent amendments to the initial restrictions, and owners that purchased after the initial restrictions would therefore have far weaker arguments because they had notice.²²² Although

Id.

218. California enacted unique statewide rent control laws on January 1, 2020. See Jenna Chandler, *Here’s How California’s Rent Control Law Works*, CURBED L.A. (Jan. 6, 2020, 2:41 PM), <https://la.curbed.com/2019/9/24/20868937/california-rent-control-law-bill-governor> [<https://perma.cc/9JEL-YWT2>]. The Tenant Protection Act of 2019 (AB 1482) forbade landlords from raising rent more than five percent, plus local inflation, in one year. *Id.* Governor Gavin Newsom described AB 1482 as the “nation’s strongest statewide renter protections.” *Id.* Thus, California rental properties were even more highly regulated than other states.

219. David J. Ball et al., *Contractual Performance in the Age of Coronavirus: Force Majeure, Impossibility and Other Considerations*, NAT’L L. REV. (Mar. 18, 2020), <https://www.natlawreview.com/article/contractual-performance-age-coronavirus-force-majeure-impossibility-and-other> [<https://perma.cc/JG4S-MKUJ>] (discussing foreseeability of COVID-19 in force majeure clauses). Some articles point to certain persons—including Bill Gates—as predicting the global pandemic. See Hillary Hoffower, *Bill Gates Has Been Warning of a Global Health Threat for Years. Here Are 12 People Who Seemingly Predicted the Coronavirus Pandemic*, BUS. INSIDER (Dec. 15, 2020, 7:36 AM), <https://www.businessinsider.com/people-who-seemingly-predicted-the-coronavirus-pandemic-2020-3> [<https://perma.cc/LK3K-UZ55>]. Although Bill Gates may have predicted the pandemic, the majority of reasonable purchasers of rental properties likely did not expect to forego rents for a year or more.

220. See, e.g., Chris Arnold, *CDC Issues Sweeping Temporary Halt on Evictions Nationwide Amid Pandemic*, NPR (Sept. 1, 2020), <https://npr.org/sections/coronavirus-live-updates/2020/09/01/908581048/sweeping-new-eviction-ban-from-trump-administration> [<https://perma.cc/2GWV-DGNA>]; Andrew J. Starrels, *City of L.A.’s New Ordinance Foretells More Trouble for Multifamily Property Owners*, HOLLAND & KNIGHT (May 15, 2020), <https://www.hklaw.com/en/insights/publications/2020/05/las-new-ordinance-foretells-more-trouble> [<https://perma.cc/D2PQ-TXYA>].

221. *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 227 (1986).

222. *Id.* (“Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end.” (quoting *Fed. Hous. Admin. v. Darlington, Inc.*, 358 U.S. 84, 91 (1958))).

notice would not categorically bar these claims,²²³ courts would likely reject them nonetheless.²²⁴

Courts will next analyze the property's purpose and the level to which the regulation frustrates that purpose.²²⁵ First, rent relief laws frustrate a rental property's purpose the least. A rental property's primary purpose is to generate rental revenue.²²⁶ Because rent relief laws directly compensate landlords in the event of a nonpaying tenant,²²⁷ they do little to frustrate this primary purpose.

Conversely, rent delay laws significantly frustrate this purpose by removing the landlord's primary means of recourse should the tenant stop paying.²²⁸ Although these laws are temporary and allow the landlord to recover back rent after a certain time,²²⁹ rent delay laws nonetheless prevent the rental property from generating consistent revenue.²³⁰ Contrary to this expectation of consistent revenue, the owner may deplete savings or take out further

223. See *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001).

224. Echeverria, *supra* note 106, at 183–84. A purchaser of a rental property after the onset of eviction moratoria would likely unsuccessfully argue that they were not sufficiently on notice. A purchaser may have assumed—like government officials and most citizens did—that the pandemic would not last. Purchasers could point to the original expiration dates of the eviction moratoria as evidence that they expected to forego rent for the duration of the law and that the continued extensions of the laws have long interfered with those expectations. See *supra* notes 33–47 and accompanying text.

225. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992).

226. *How to Acquire and Establish a Rental Property*, BANKRATE (Oct. 8, 2020), <https://www.bankrate.com/mortgages/refinancing/how-to-establish-a-rental-property/> [<https://perma.cc/8XSE-KQN3>]. The landlord may have invested in the property for the purpose of eventually selling it for an appreciated value, but the rental payments would offset some or all of the costs of ownership in the meantime.

227. See *supra* Section II.A.

228. See Carrie Ferland, *Landlord Rights & Nonpayment of Rent*, SFGATE, <https://homeguides.sfgate.com/landlord-rights-nonpayment-rent-8279.html> [<https://perma.cc/LH2Y-HUWN>]. Not only do rent delay laws remove a landlord's ability to evict a nonpaying tenant, but they also remove the landlord's ability to charge late fees. See L.A. CNTY. CONSUMER & BUS. AFFS., *supra* note 51.

229. See *supra* Section II.B.

230. See Eric Ruxton & Larry Aikins, *Rental Property Has Proven To Be a Consistent and Reliable Source of Income*, TERRACE ASSOCS. (Oct. 23, 2016), <http://www.terraceassociates.com/blog/2016/10/23/rental-property-has-proven-to-be-a-consistent-and-reliable-source-of-income> [<https://perma.cc/S6LV-4QJC>]. Landlords are not only unsure if a tenant will pay their rent, but they are also unsure if eviction moratoria will be reinstated. See *supra* notes 33–47 and accompanying text. This uncertainty further frustrates the landlord's expectation of receiving regular income.

loans to make mortgage payments or pay for property maintenance.²³¹ Accordingly, the regulation’s level of interference may depend on the person or entity holding the property. A small landlord would likely exhaust savings more quickly than a large property management group, and a small landlord may require loans or lines of credit that accrue interest.²³² Regardless, a regulation requiring a landlord to forgo rental revenue for a substantial amount of time—potentially fourteen or more months²³³—is a significant frustration.

Finally, rent cancellation laws would most significantly frustrate a rental property’s primary purpose. Rent cancellation laws would require a landlord to forgive a tenant’s obligation to pay in direct conflict with the very definition of rent.²³⁴ In addition to the regulation’s character and interference with expectations, a court will also consider the regulation’s economic impact.

4. *The Third Penn Central Factor: Economic Impact*

An economic impact analysis requires first establishing what property interest will serve as the property’s baseline value or “denominator.”²³⁵ For example, suppose a landlord rents out a duplex. If one unit’s tenant stops paying rent, the denominator could either be that one unit or the

231. Fortunately, landlords have access to a wide range of options for loans or potential grants. Landlords could take advantage of federal assistance, such as an Economic Injury Disaster Loan, SBA loans, IRS tax credits, or Federal Reserve Main Street Loans. *See Federal COVID-19 Response and Recovery Programs*, CAL. STATE ASSEMBLY, <https://ajed.assembly.ca.gov/content/federal-covid-19-response-and-recovery-programs> [<https://perma.cc/DR6G-94NN>]. Alternatively, the California Small Business Loan Guarantee provides loans for small businesses that are not eligible for federal funds. *See Landlords - Protection Information*, HOUS. IS KEY, https://housing.ca.gov/landlord/protection_guidelines.html [<https://perma.cc/CJL5-58CN>].

232. The United States Census Bureau found that individual “mom and pop” landlords owned the majority of single-family rental properties, accounting for almost twenty-three million units. Diana Olick, *Small Landlords Dip Into Savings as Their Tenants Struggle to Pay Rent*, CNBC (Aug. 24, 2020, 11:38 AM), <https://www.cnbc.com/2020/08/24/small-landlords-dip-into-savings-as-their-tenants-struggle-to-pay-rent.html> [<https://perma.cc/5QWE-CN2Q>]. A third of those renters were unable to pay rent in August 2020. *Id.* Over a third of these small landlords had already accessed emergency savings as of August 24, 2020. *Id.*

233. Gavin Newsom barred residential evictions by issuing Executive Order N-37-20 on March 27, 2020. *See* OFF. GOVERNOR GAVIN NEWSOM, *supra* note 36. California’s SB 91 prevents residential evictions through June 30, 2021. *See* Gulezyan & Hodges, *supra* note 41. Even though the eviction moratorium finally expired at the end of September 2021, a renter may have been behind on rent before the pandemic began. *See supra* notes 42–47 and accompanying text; Simon, *supra* note 10.

234. *See supra* Section II.C; *Rent*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/rent> [<https://perma.cc/MV8L-MS4C>].

235. *See* *Murr v. Wisconsin*, 137 S. Ct. 1933, 1945 (2017).

entire property, including both units.²³⁶ This denominator question becomes more difficult as a landlord's number of rented units increases: should a court consider a twelve-unit complex owned by a single landlord as a single property or should a court analyze each unit independently? Case law suggests that the former option—analyzing the parcel as a whole with all units—is more likely.²³⁷ Such analysis may cause issues for a landlord of a large property that is able to collect rent from some units but not others.

The denominator issue does not only consider the property's physical footprint but also the duration of the restriction. The Supreme Court in *Tahoe-Sierra* declined to analyze a loss in value for a specific time period because, if the Court analyzed only a specific period of time, any restriction that caused a delay could be deemed a per se taking under *Lucas*.²³⁸ Although a court may be unlikely to find that a temporary restriction effects a per se taking, eviction moratoria challengers may find salvation in *First English Evangelical Lutheran Church v. County of Los Angeles*.²³⁹ There, the Court held that “temporary takings [that] deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation.”²⁴⁰ Therefore, a court may still find a taking even though the eviction moratoria are temporary if the landlord is able to demonstrate sufficient economic impact.²⁴¹ All three types of eviction restrictions will prove this is a difficult feat.

236. Although a simplified version of the denominator question would focus on the actual lot lines of the parcel, more complex questions arise when the regulation affects a specific aspect of the parcel, such as a height restriction. For a discussion of the relevant factors a court will consider in resolving the denominator question, see Gresik, *supra* note 110.

237. See *Murr*, 137 S. Ct. at 1948 (holding that two lots owned by a single owner should be considered a single parcel for an economic impact analysis based on state law).

238. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 306, 331–32 (2002). The Supreme Court in *Tahoe-Sierra* also refused a proposed categorical rule finding a taking for any moratorium lasting more than one year. *Id.* at 341–42. The Court instead focused on the District Court's finding that the thirty-two-month moratorium was reasonable. *Id.* Thus, a court finding the eviction moratorium reasonable may further hurt a challenger's chances of success.

239. *First Eng. Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

240. *Id.* at 318. The Court in *First Evangelical* also held that, once a regulation effects a taking, invalidation of the regulation is not a sufficient remedy. *Id.* at 322. Instead, the state actor must also compensate the owner for the duration of its impact. *Id.* Therefore, a successful taking claim to eviction moratoria would not simply result in lifting the ordinance.

241. See *id.* at 318.

First, rent relief laws would have the least economic impact on a landlord. Before enactment of the rent relief laws, the landlord received 100% of rent. Now, the landlord continues to receive 100% of rent. Although, in reality, there may be a delay between the tenant's application for relief funding and the landlord's receipt of the funds, this deprivation of a small amount of time value of money is likely negligible.²⁴² Similarly, any administrative burden on the landlord of actually securing the funds is likely to fall short of an extreme impact.²⁴³

Next, unlike rent relief laws, rent delay laws have a significant economic impact on this hypothetical landlord. Again, the landlord was receiving 100% of rent from their tenant prior to the eviction moratorium. Now, for the duration of the eviction moratorium, the landlord is receiving none of their entitled rent.²⁴⁴ Rent delay laws, however, do not forgive the renter's obligation to pay rent in the future.²⁴⁵ Instead, they delay the renter's obligation to a future date and often prohibit late fees or interest accrual.²⁴⁶ A landlord, therefore, has the right to demand the rent at a future date.²⁴⁷ For some landlords, the tenant will pay the entire balance when it comes due, and the landlord, having only sacrificed the revenue's time value, would ostensibly be in the same economic position in which they would have been without the rent delay law. In those cases, a court is unlikely to find a taking.²⁴⁸

242. Some eviction moratorium challengers assert that the time value of money is a constitutional right. See Complaint, *supra* note 77, at 36.

243. Rental properties are a highly regulated industry. See *supra* note 218 and accompanying text. As such, a small administrative burden would not result in takings liability. Landlords and property management companies already must comply with a plethora of regulations, reporting requirements, and inspections. For example, rental properties in California must have a smoke detector. Jenna Marie, *Does a Landlord Have to Provide Smoke Detectors?*, SFGATE (Dec. 9, 2018), <https://homeguides.sfgate.com/landlord-provide-smoke-detectors-55847.html> [<https://perma.cc/9FVC-83BM>]. However, these requirements do not result in *Loretto* takings. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982). Justice Holmes stated in *Pennsylvania Coal* that “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.” *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

244. Although California's AB 3088 originally required a tenant to pay twenty-five percent of their back owed rent by January 31, 2021, SB 91 extended this requirement to June 30, 2021. See Mike Nemeth, *New COVID-19 Bill Includes Federal Funds for up to 80% of Unpaid Rent*, CAL. APARTMENT ASS'N (Jan. 25, 2021), <https://caanet.org/new-covid-19-bill-includes-federal-funds-for-up-to-80-of-unpaid-rent/> [<https://perma.cc/G5SJ-VUFV>].

245. CITY OF SANTA MONICA, *supra* note 51.

246. L.A. CNTY. CONSUMER & BUS. AFFS., *supra* note 51.

247. Under SB 91, a California landlord could file a claim in small claims court for back rent on August 1, 2021. See Gulezyan & Hodges, *supra* note 41.

248. See Cordes, *supra* note 114, at 39. The Takings Clause prohibits the government from taking private property “without just compensation.” U.S. CONST. amend. V. Thus, a governmental body could limit its taking liability by providing such compensation. If a rent delay law ultimately becomes a rent relief law, the government could avoid takings

While waiting for the back rent, some landlords may have borrowed funds to continue paying for their mortgages or other maintenance costs and would also lose out on interest payments.²⁴⁹ Even for these landlords that have borrowed funds to survive between rent payments, the regulation's economic impact is likely minor and still leans heavily toward finding no taking.²⁵⁰

Unfortunately, it is unlikely that all tenants will be able to pay the back rent once it becomes due.²⁵¹ Although many laws allow landlords to bring suit in small claims court to recoup the funds,²⁵² a distressed tenant may still be unable to pay. If a landlord is forced to sell their property before recouping these funds—for instance because they could not continue to pay maintenance costs or did not have sufficient savings to support themselves without rental income—the landlord may be able to argue that the rent delay law deprived them of all future rent from that property. This scenario presents the most realistic and strongest argument for finding a compensable taking.²⁵³

liability in most scenarios. The Treasury's \$25 billion Emergency Rental Assistance Program makes it more likely—although not certain—that rent delay laws make this shift. *See* Annie Nova, *States Will Soon Start Giving Out \$25 Billion in Rental Assistance. How to Apply*, CNBC (Jan. 22, 2021, 12:16 PM), <https://www.cnbc.com/2021/01/22/states-will-soon-start-giving-out-25-billion-in-rental-assistance-.html> [<https://perma.cc/929L-89SY>].

249. Katy O'Donnell, *The Flip Side of Trump's Eviction Ban: Landlords Face Big Crunch*, POLITICO (Sept. 11, 2020), <https://www.politico.com/news/2020/09/11/trump-eviction-ban-hurts-landlords-412740> [<https://perma.cc/AK23-TNY2>]; *see supra* note 230.

250. *See* Cordes, *supra* note 114, at 39.

251. Mark Zandi, the chief economist at Moody's Analytics, found that eighteen percent of all American renters were behind on their rent as of January 1, 2021. Diana Olick, *Nearly 20% of Renters in America Are Behind on Their Payments*, CNBC (Jan. 25, 2021, 12:10 PM), <https://www.cnbc.com/2021/01/25/nearly-20percent-of-renters-in-america-are-behind-on-their-payments.html> [<https://perma.cc/NUC8-5AHJ>]. The average delinquent renter is almost four months behind on rent. *Id.* Renters owe a collective \$57.3 billion in back rent. *Id.*

252. Patrick McGreevy, *California Renters to Receive COVID-19 Eviction Protections Under Bill Signed by Gov. Gavin Newsom*, L.A. TIMES (Aug. 31, 2020, 10:04 PM), <https://www.latimes.com/california/story/2020-08-31/california-renters-covid-19-eviction-protections-bill-gavin-newsom-legislature> [<https://perma.cc/5AYB-P7BJ>].

253. Although this is a stronger argument, the denominator question still presents issues. The property had more value beyond its ability to generate rent. For example, the owner would not have sold the property for free. An exceptional—but more clear-cut—case would be if a nonowner had been granted the right to all rents the property generates. That claimant might even argue a total *Lucas* wipeout. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

Finally, rent cancellation laws may have less economic impact than rent delay laws in some cases. Because some proposed rent cancellation laws also create federal funding to reimburse landlords for cancelled rent,²⁵⁴ a landlord may suffer less economic impact. However, proposed rent cancellation laws that do not feature reimbursement funds are likely to have a greater impact than rent delay laws.²⁵⁵ In these situations, a renter's obligation is forgiven, and the landlord does not have legal recourse to recoup these funds.²⁵⁶ Accordingly, a landlord would simply have to sacrifice their entire rental income for the duration of the rent cancellation period. Depending on how long the landlord had been renting the property before the moratorium, this may be close to all of the landlord's rental income. For instance, if the owner purchased and began renting the property nine months before the moratorium began, and the moratorium lasts nine months, the moratorium reduced the owner's rental income by half. However, in the case where a landlord purchased and started renting a property just before the eviction moratorium, the moratorium has eliminated nearly all of the landlord's rental income. In these rare scenarios, rent delay laws may near the "extreme" economic impact needed for a successful taking claim.²⁵⁷

In summary, there may be very specific, albeit rare, situations where eviction moratoria provide claimants with plausible arguments for demanding compensation. However, a judge considering the public policy of supplying shelter during a pandemic might utilize the *Penn Central* test's flexibility to decide against even these plausible scenarios.

V. JUDICIAL FLEXIBILITY DURING A PANDEMIC

Regulatory takings jurisprudence—specifically, the *Penn Central* ad hoc, three-factor test—does not provide judges with rigid standards or uniform tests to decide when a regulation meets the vague standard of “go[ing] too far.”²⁵⁸ Legal and academic commentators alike call out the inconsistent

254. Mooney, *supra* note 74.

255. See S. S8125A, 2019–2020 Leg. Sess. (N.Y. 2020).

256. See *id.*

257. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005). Although rental income is one piece of this puzzle, the underlying property values also may play a part in this calculation. Some communities are seeing property values continue to increase, especially communities that offer greater amounts of space, while other communities are seeing huge loss of growth. San Francisco, for example, has seen rental rates drop but housing prices increase for single-family homes. Tessa McLean, *What's Next for the Bay Area Housing Market? Experts Weigh In*, SFGATE (July 27, 2021, 11:38 AM), <https://www.sfgate.com/realestate/article/Bay-Area-housing-market-predictions-2021-15857084.php> [https://perma.cc/25CU-AZ4T]. A court might consider the property's rising value as an overall benefit to the property owner which might offset some of the burden of the regulation.

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

and confusing applications of regulatory takings law.²⁵⁹ This Section investigates how the flexibility inherent in a judicial analysis consisting primarily of “factual inquiries”²⁶⁰ will affect judges’ analyses during this and future public emergencies.

Although factor-balancing tests may be inherently unreliable because of their subjective nature, the *Penn Central* factor test presents a unique level of flexibility due to its combination of subjective standards and inconsistent applications.²⁶¹ Regarding its ad hoc nature, United States Circuit Court Judge James Oakes commented that “in a gray-area case like *Penn Central*, . . . jurisprudence permits purely subjective results, with the conflicting precedents simply available as makeweights that may fit pre-existing value judgments as to the relative worth of the legislation as opposed to the importance or dollar value of the property rights at stake.”²⁶² Judges are therefore able to pick and choose what precedents and rationale justify their desired outcome, limiting litigants’ ability to reliably predict a suit’s outcome.²⁶³

Unfortunately for claimants seeking compensation for COVID-19 eviction restrictions, this judicial flexibility will likely weigh against finding a taking. First, history shows that prevailing on a regulatory taking claim is a difficult task, even without a pandemic. For instance, an empirical study of over 2,000 cases between 1979 through 2012 found that less than ten percent

259. See, e.g., *Lingle*, 544 U.S. at 539 (“[O]ur regulatory takings jurisprudence cannot be characterized as unified.”); Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part I—A Critique of Current Takings Clause Doctrine*, 77 CALIF. L. REV. 1299, 1304 (1989) (“[I]t is difficult to imagine a body of case law in greater doctrinal and conceptual disarray.”).

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

261. The Supreme Court has reinforced this inconsistency by stating that the Court has “generally eschewed any ‘set formula’ for determining how far is too far.” *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992). The Court has used similar language in over a dozen opinions to resist creating a uniform application of takings law. See Stephen Durden, *Unprincipled Principles: The Takings Clause Exemplar*, 3 ALA. C.R. & C.L. L. REV., no. 2, 2013, at 25, 30–31.

262. James L. Oakes, “Property Rights” in *Constitutional Analysis Today*, 56 WASH. L. REV. 583, 613 (1981).

263. The unprecedented nature of a pandemic will likely make predicting outcomes even more difficult for litigants. See Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective on Penn Central Transportation Co. v. City of New York*, 13 WM. & MARY BILL RTS. J. 679, 691 (2005) (“Under *Penn Central*’s vague, multi-factor approach one cannot reliably tell what ‘the law’ is, and how it applies to the controversy at hand without first taking years to let judges have a go at it on an ad hoc basis in each of the many factual variants of regulatory impositions on rights of private property ownership.”).

of cases resulted in a successful regulatory taking claim.²⁶⁴ The study further found that “courts almost always deferred to the regulatory decisions made by government officials, resulting in an almost categorical rule that *Penn Central*-type regulatory actions do not amount to takings.”²⁶⁵ This great deference to legislators further hinders eviction moratoria challengers because judges may be unlikely to interfere with legislative decisions during an unprecedented pandemic.²⁶⁶ Specifically, some scholars claim that courts should afford legislators more deference during an emergency because legislators are more properly situated to assess and respond to the situation than judges.²⁶⁷ Finally, judges may be unlikely to find a regulatory taking and award compensation for the simple fact that just compensation may be astronomical. As of July 2020, economists estimated that Americans already owed landlords \$20 billion in past-due rent.²⁶⁸ As of January 2021, this estimate nears \$60 billion.²⁶⁹ A judge is unlikely to require city and county governments to provide huge sums of money during a time of economic recession.²⁷⁰

264. James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 35, 64 (2016) (noting that these results might overstate the success rate because the study did not factor in subsequent reversals).

265. *Id.* at 62.

266. For a recent example of judicial interference during a financial crisis, we can look back to the 2008 subprime mortgage crisis. Prior to the crisis, a homeowner at risk of eviction could only challenge the eviction procedure itself. *See generally* Udi Sommer & Quan Li, *Judicial Decision Making in Times of Financial Crisis*, 95 JUDICATURE 68 (2011). Once evictions became frequent, judges began allowing homeowners to challenge the foreclosure process and would stay the eviction until that challenge was resolved. *See id.* Similarly, in California, judges allowed the homeowner to challenge the lender’s compliance with the Homeowner Bill of Rights. *See id.* Judges also began to accept new forms of evidence that they would have rejected previously. *See id.* Judges effectively slowed down the foreclosure and eviction process to afford borrowers more time to find alternative resolutions.

267. *See* Eric A. Posner & Adrian Vermeule, *Emergencies and Democratic Failure*, 92 VA. L. REV. 1091, 1104 (2006) (“Judicial review should be less strict, and more accommodating or deferential, in emergencies than in normal times. Courts cannot systematically improve upon government’s first-order balancing of security and liberty.”). For further discussion of constitutional accommodation of emergency governmental action, *see* Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605 (2003).

268. Michelle Conlin, *U.S. Renters Owe \$21.5 Billion in Back Rent; Republicans Offer No Eviction Relief*, REUTERS (July 29, 2020, 2:53 PM), <https://www.reuters.com/article/us-usa-housing-evictions/u-s-renters-owe-21-5-billion-in-back-rent-republicans-offer-no-eviction-relief-idUSKCN24U394> [<https://perma.cc/2LL4-J6L9>].

269. *See supra* note 251.

270. *See* Khalil Shahyd, *The Potential Eviction Crisis Could Create a Debt Time Bomb*, NRDC (July 7, 2020), <https://www.nrdc.org/experts/khalil-shahyd/potential-eviction-crisis-could-create-debt-time-bomb> [<https://perma.cc/V55B-Z83U>]. This prediction became less certain with President Trump nominating Justice Amy Coney Barrett to the Supreme Court. This shift to a 6-3 conservative Court may have profound impacts on takings jurisprudence. Conservative justices—like Justices Gorsuch, Kavanaugh, and Barrett—are likely to swing the Court toward a more pro-property rights stance. If the Supreme

Even though the realism of judicial interference during an emergency and astronomical damages weighs against the practicality of finding in COVID-19 challengers' favor, it is nonetheless important that judges consider regulatory takings claims against the background principles set forth in the Constitution. Prior to *Penn Central*, the Supreme Court stated that "[t]he 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."²⁷¹ Known as the Armstrong Principle, courts have held this phrase as the central consideration when deciding takings claims.²⁷² Similarly, although judges may be tempted to grant greater deference to legislators during an unprecedented emergency, courts must also remember that "the ultimate strength of our constitutional guarantee lies in the unhesitating application in times of crisis and tranquility alike."²⁷³

In reality, successful takings challenges will be rare, both because the takings test presents formidable hurdles²⁷⁴ and because judges have the ability to effect their desired outcomes due to the test's inherent flexibility. Landlords will thus have little recourse in the courts. It is therefore left to legislators to pass laws that ensure renters remain safe at home and landlords receive appropriate compensation.

Court does weigh in on a taking claim, they may even restructure the takings test to grant less deference to legislators. Similarly, President Trump appointed many conservative-leaning federal court judges. See *Federal Judges Nominated by Donald Trump*, BALLOTPEdia, https://ballotpedia.org/Federal_judges_nominated_by_Donald_Trump [<https://perma.cc/L9T2-HDY4>]; Mark Sherman, Kevin Freking & Matthew Daly, *Trump's Court Appointments Will Leave Decades-Long Imprint*, AP NEWS (Dec. 26, 2020), <https://apnews.com/article/joe-biden-donald-trump-judiciary-coronavirus-pandemic-us-supreme-court-c37607c9987888058d3d0650eea125cd> [<https://perma.cc/KSU2-TD6K>]. After *Knick v. Township of Scott*, these federal judges have much more influence on takings claims because the door is open for litigants to challenge state legislation in federal courts. *Knick v. Township of Scott*, 139 S. Ct. 2162, 2167–68 (2019).

271. *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The *Armstrong* Principle has not escaped criticism. Some scholars argue that the *Armstrong* Principle's focus on the relationship between the government and its citizens are inappropriate guides for takings jurisprudence. See Durden, *supra* note 261, at 42–44, 61–64.

272. See, e.g., *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005); *First Eng. Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318–19 (1987); *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 332 (2002).

273. *United States v. Bell*, 464 F.2d 667, 676 (2d Cir. 1972).

274. See *supra* Part IV.

VI. LEGISLATORS SHOULD PASS RENT RELIEF LAWS

To protect renters and landlords, legislators should enact rent relief laws that more effectively combat future evictions, increase efficiency, and increase government accountability. Because state governments lack the ability to create fiat currency, the Federal Government must take on this task.²⁷⁵

Eviction moratorium laws enacted during the pandemic primarily seek to decrease COVID-19 infections.²⁷⁶ These laws prevent tenant evictions that would likely result in either increased occupancy with friends and family or homelessness.²⁷⁷ However, rent delay laws and rent cancellation laws offer a temporary fix to a long-term problem.²⁷⁸ Specifically, rent delay laws only delay an impending eviction crisis.²⁷⁹ Although in some scenarios, tenants may be fortunate enough to rebound from their financial strain before the eviction moratoria expire, the more likely outcome is that landlords seek to evict tenants in arrears as soon as the moratoria lift. One study estimated that nearly forty million Americans were at risk of eviction after eviction bans expire.²⁸⁰ Similarly, proposed rent cancellation laws

275. Jonathan Fox & Rose Marie Cantanno, *Opinion: Don't Cancel Rent Without Protecting Homeowners*, CITY LIMITS (Apr. 20, 2020), <https://citylimits.org/2020/04/20/opinion-dont-cancel-rent-without-protecting-homeowners/> [<https://perma.cc/EN8M-6HUK>]. Fiat currency is not backed by a commodity. James Chen, *Fiat Money* INVESTOPEEDIA (Oct. 25, 2021), <https://www.investopedia.com/terms/f/fiatmoney.asp> [<https://perma.cc/92RM-UVA6>]. Although the Federal Government cannot print its way out of tremendous debt, it has the ability of preventing some of the short-term economic results of the pandemic.

276. See Andrew J. Starrels & Kelsey Marie Falkenberg, *Los Angeles Eviction Moratorium Upheld by Ninth Circuit; Uncertainty Continues*, HOLLAND & KNIGHT (Aug. 31, 2021), <https://www.hklaw.com/en/insights/publications/2021/08/los-angeles-eviction-moratorium-upheld-by-9th-circuit> [<https://perma.cc/SDH8-78VD>].

277. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292 (Sept. 4, 2020). COVID-19 is spread via airborne droplets when someone coughs, sneezes, or speaks. *Considerations for Owners and Operators of Multifamily Housing Including Populations at Increased Risk for Complications from COVID-19*, CTR. FOR DISEASE CONTROL & PREVENTION (May 5, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/multifamily-housing.html> [<https://perma.cc/N7AA-MZGL>]. Thus, close living quarters increase the likelihood of spreading COVID-19. *Id.*

278. Housing advocates predict that landlords will seek to evict delinquent tenants as soon as eviction moratoria lift. See, e.g., Taylor Moore, *We're Heading Toward an Eviction Cliff. What Renters Need to Know About Their Rights*, NEXT ADVISOR (Sept. 14, 2020), <https://time.com/nextadvisor/mortgages/eviction-cliff/> [<https://perma.cc/V6NB-4NAF>]. Without relief funding, any extension of eviction restrictions will only delay an “eviction cliff.” See *id.*; Sylvan Lane, *Advocates Plead for Housing Aid as Eviction Cliff Looms*, HILL (Oct. 11, 2020, 8:00 AM), <https://thehill.com/policy/finance/520444-advocates-plead-for-housing-aid-as-eviction-cliff-looms> [<https://perma.cc/G2XT-BGFU>].

279. See Lane, *supra* note 278.

280. Emily Benfer et al., *The COVID-19 Eviction Crisis: An Estimated 30-40 Million People in America Are at Risk*, ASPEN INST. (Aug. 7, 2020), <https://www.aspeninstitute.org>.

shift the burden from the tenant to the landlord, requiring the landlord to absorb the costs of the pandemic.²⁸¹ Many smaller landlords would be unable to carry such a burden and may lose their properties.²⁸² To effect a long-lasting solution, the government must step in and distribute this burden.

With the national debt increasing at record rates, passing legislation that pays all back rent is easier said than done.²⁸³ However, the government has the advantage of being able to properly redistribute this debt over all taxpayers, an advantage that landlords do not have. Further, governments are not required to give the money away. Some lawmakers have proposed legislation that would allow renters to pay back the government over the course of several years.²⁸⁴ Finally, the Federal Government has already taken important steps toward this end. At the end of 2020, former President Trump approved a relief package including \$25 billion in rental relief.²⁸⁵

org/blog-posts/the-covid-19- eviction-crisis-an-estimated-30-40-million-people-in-america-are-at-risk/ [https://perma.cc/6YL2-S6NG].

281. See *supra* Section II.C.

282. Fox & Cantanno, *supra* note 275. Large property management companies are likely to replace the small, independent landlords that lose their properties. See Aaron Mendelson, *Will Corporate Landlords Gobble Up Homes During Downturn? California Politicians Are Concerned*, LAIST (May 28, 2020, 6:30 AM), https://laist.com/2020/05/28/will_corporate_landlords_gobble_up_homes_during_downturn_california_politicians_are_concerned.php [https://perma.cc/NK2W-Z6MG]. This shift in rental property presents its own set of issues, including raising overall rents and producing a higher hurdle to future property purchasers. See *id.*

283. A Congressional Budget Office report projected that the federal debt would exceed the national gross domestic product in 2021. Gina Heeb, *National Debt Set to Become Larger than the Entire U.S. Economy, CBO Says*, FORBES (Feb. 11, 2021, 4:25 PM), <https://www.forbes.com/sites/ginaheeb/2021/02/11/national-debt-set-to-become-larger-than-the-entire-us-economy-cbo-says/?sh=4788c83e1e8e> [https://perma.cc/2VVJ-HA5R]. This report did not factor the \$1.9 trillion stimulus package under debate. *Id.*

284. Louis Hansen, *Coronavirus: Will California Tenants, Landlords and Taxpayers Split the Bill for Unpaid Rent?*, MERCURY NEWS (July 6, 2020, 11:14 AM), <https://www.mercurynews.com/2020/07/06/coronavirus-will-tenants-landlords-and-taxpayers-split-the-bill-for-unpaid-rent/> [http://perma.cc/PM8M-LJLT].

285. Jacob Pramuk, *Trump Signs Covid Relief and Government Funding Bill Days After He Suggested He Would Block It*, CNBC (Dec. 27, 2020, 8:13 PM), <https://www.cnn.com/2020/12/28/trump-signs-covid-relief-and-government-funding-bill-days-after-suggesting-hed-block-it.html> [https://perma.cc/N6JF-XBRT]. The Emergency Rental Assistance Program funds state programs that aid renters with a household income at or below eighty percent of the area median. *Treasury Launches \$25 Billion Emergency Rental Assistance Program; Opens Portal to Begin Disbursement of Funding to State, Local, and Tribal Governments*, U.S. DEP'T OF THE TREASURY (Jan. 7, 2021), <https://home.treasury.gov/news/press-releases/sm1228> [https://perma.cc/G37Z-8U3Q]. Eligible households must

President Biden has also included \$25 billion in rental assistance in his proposed American Rescue Plan.²⁸⁶ This funding will provide critical temporary relief to many, but a permanent solution will require even more funding.²⁸⁷

Although the United States has not faced a pandemic of this scale in over 100 years,²⁸⁸ the United States is not new to an eviction and foreclosure crisis.²⁸⁹ Legislators can find guidance in the problems and solutions that followed the 2008 subprime mortgage crisis. Like the “COVID-19 eviction tsunami,” the United States faced unprecedented foreclosures and evictions in late 2008 and 2009.²⁹⁰ In response, lawmakers proposed legislation like those proposed to combat the current eviction crisis. Among these was

also demonstrate that one or more persons living there has experienced hardship due to COVID-19 or is at risk of homelessness. *Id.*

286. Thomas Wade, *The American Rescue Plan and Housing*, AM. ACTION F. (Feb. 10, 2021), <https://www.americanactionforum.org/insight/the-american-rescue-plan-and-housing/> [<http://perma.cc/2QUT-3BEY>]. Democrats in Congress aim to pass President Biden’s \$1.9 trillion economic relief package by March 14, 2021. Joseph Zeballos-Roig, *Democrats in Congress Are Ramping Up Efforts to Enact Biden’s \$1.9 Trillion Stimulus Package Within the Next Month*, BUS. INSIDER (Feb. 16, 2021), <https://www.businessinsider.com/stimulus-democrats-efforts-approve-biden-rescue-plan-within-month-march-2021-2> [<https://perma.cc/T28A-Y4X5>].

287. See Ivanova, *supra* note 18. Recent commentators have also found that the disbursement of funds disproportionately favors less populated states. States with lower populations received over five times more aid per renter than more heavily populated states. Romina Ruiz-Goiriena & Aleszu Bajak, *How Much Rent Relief Will I Get? You’re More Likely to Get Help if You’re White and Live in Rural America*, USA TODAY (Jan. 7, 2021), <https://www.usatoday.com/story/news/nation/2021/02/10/covid-rent-relief-emergency-rental-assistance-not-enough-big-states/4413471001/> [<https://perma.cc/S487-CXQA>].

288. The 1918 H1N1 influenza pandemic was the deadliest pandemic in American history for over 100 years. *1918 Pandemic (H1N1 virus)*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/flu/pandemic-resources/1918-pandemic-h1n1.html> [<https://perma.cc/28EV-2CHB>]. The CDC estimates that 500 million people—a third of the world’s population at the time—were infected. *Id.* The United States saw an estimated 675,000 deaths. *Id.* As of February 26, 2021, the CDC reported 503,587 American deaths from COVID-19. *COVID Data Tracker Weekly Review*, CTR. FOR DISEASE CONTROL & PREVENTION (Feb. 26, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html> [<https://perma.cc/2WG4-2ZK3>]. Unfortunately, by January 2022, the CDC reported over 850,000 American deaths from COVID-19, far surpassing the 1918 pandemic. *COVID Data Tracker*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://covid.cdc.gov/covid-data-tracker/#datatracker-home> [<https://perma.cc/VU67-YGD9>].

289. Although the United States has faced many economic recessions, the most notable foreclosure crises are those during the Great Depression of the 1930’s and the Great Recession of 2007. For a discussion of the common financial issues that plagued both economic downturns, see Price Fishback et al., *Collateral Damage: Foreclosures and New Mortgage Lending in the 1930’s*, VOX EU (Jan. 18, 2019), <https://voxeu.org/article/foreclosures-and-new-mortgage-lending-1930s> [<https://perma.cc/36UE-HGV2>].

290. See Jeff Ostrowski, *Why the Coming Foreclosure Crisis Will Look Nothing Like the Last One*, BANKRATE (Sept. 1, 2020), <https://www.bankrate.com/mortgages/foreclosures-crisis-wont-look-like-great-recession/> [<https://perma.cc/K4KU-8CKB>].

the Home Affordable Modification Program (HAMP), which prevented foreclosures and evictions by financing modifications of loans backed by Freddie Mac and Fannie Mae.²⁹¹

One potential loan modification in HAMP was principal reduction, which is analogous to rent relief and rent delay laws. Principal reduction reduces the amount owed on the loan to match the new, depressed value of the property.²⁹² In certain situations, lenders forgave the original loan amount beyond the new value.²⁹³ Alternatively, more similar to rent delay laws, HAMP encouraged mortgage servicers to grant some borrowers a forbearance period with a reduced monthly payment.²⁹⁴ To further assist states with loan modifications and eviction prevention, President Obama passed the Hardest Hit Fund in 2010, which provided nearly \$10 billion to states facing unemployment rates exceeding the national average and housing price declines greater than twenty percent.²⁹⁵ California received over \$2 billion and was able to fund foreclosure-prevention programs,

291. For a discussion of the Federal Government's response to the subprime mortgage crisis, see Michael Calhoun, *Lessons from the Financial Crisis: The Central Importance of a Sustainable, Affordable and Inclusive Housing Market*, BROOKINGS (Sept. 5, 2018), <https://www.brookings.edu/research/lessons-from-the-financial-crisis-the-central-importance-of-a-sustainable-affordable-and-inclusive-housing-market/> [<https://perma.cc/568T-FXMG>].

292. Julia Kagan, *Principal Reduction*, INVESTOPEDIA (Mar. 1, 2020), <https://www.investopedia.com/terms/p/principal-reduction.asp> [<https://perma.cc/XS59-TSBJ>]; *Principal Reduction Alternative Under the Home Affordable Modification Program*, IRS (Sept. 20, 2020), <https://www.irs.gov/newsroom/principal-reduction-alternative-under-the-home-affordable-modification-program> [<https://perma.cc/6AZQ-NCLT>].

293. *Understand the Terms of Your Modification*, MAKING HOME AFFORDABLE (Dec. 30, 2016, 12:02 PM), <https://www.makinghomeaffordable.gov/already/Pages/already-mha-understand-terms-modification.aspx> [<https://perma.cc/R4ZX-WRB3>].

294. Borrowers were still required to pay the entire principal, but the total balance was repaid over a longer period. *Programs*, HOME AFFORDABLE MODIFICATION PROGRAM, <https://www.hmpadmin.com/portal/programs/index.jsp> [<https://perma.cc/Y8A7-Y62E>]. There is a notable difference between these loan modifications and rent delay laws in that lenders sometimes faced less risk than landlords do. Lenders could give this forbearance knowing they could still eventually foreclose on the property should the borrower default again. Under rent delay laws, the landlord has no collateral with which to secure the loan. If the renter is unable to ever pay, the landlord loses that income. For a discussion of practical recovery options for landlords during COVID-19, see Carr McClellan, *Practical Considerations for Landlords and Tenants in the Wake of COVID-19*, LEXOLOGY (May 18, 2020), <https://www.lexology.com/library/detail.aspx?g=27d9d122-c465-41bd-8282-4da27a50475b> [<https://perma.cc/J9LD-MSHF>].

295. *Hardest Hit Fund*, U.S. DEP'T OF THE TREASURY (Nov. 16, 2020, 11:35 AM), <https://home.treasury.gov/data/troubled-assets-relief-program/housing/hhf> [<https://perma.cc/84C5-CC6X>].

including mortgage payment assistance for homeowners that suffered involuntary unemployment.²⁹⁶ As they have in the past, the Federal Government must give states funding to protect those at risk of losing their homes.²⁹⁷ Additionally, immediate funding could save more than just people's homes.

Rent relief laws would also have the advantage of saving litigants both time and money from pursuing either small claims to recoup back rent or challenging the laws as potential takings. "It has been aptly said that these days, to pursue a regulatory taking case, one has to have ten years, a million-dollar litigation budget, endless patience, and bulldog-like tenacity."²⁹⁸ Under rent delay laws, a landlord may bring a civil suit for back rent against the tenant after a certain period.²⁹⁹ The effort and expense of litigating these claims may exceed the back rent or the tenant may still be unable to pay.

Most importantly, rent relief laws internalize the costs of government regulation. Requiring a government to pay for its regulation directly ensures that governments only enact regulations when benefits exceed costs.³⁰⁰ If the enacting government is unwilling to pay the costs of its regulation via tax revenue, the government should not simply force a subsection of those taxpayers to pay for the regulation. Rent delay and cancellation laws do just that; they require some citizens—like landlords providing housing for economically-distressed tenants—to pay for the regulation that is meant to benefit all citizens.

296. See KEEP YOUR HOME CAL., <https://keepyourhomecalifornia.org/> [<https://perma.cc/FP5A-DSLX>].

297. Although funding is part of the solution, the other requirement is speed. A recent study found that California enacted specific foreclosure prevention laws well before the Federal Government enacted HAMP that prevented 250,000 foreclosures and preserved \$300 billion in housing wealth. Stuart Gabriel, Matteo Iacoviello & Chandler Lutz, *A Crisis of Missed Opportunities? Foreclosure Costs and Mortgage Modification During the Great Recession*, 34 REV. FIN. STUD. 864, 865 (2021). The study estimates that similar foreclosure prevention laws could have prevented an additional 100,000 foreclosures had other states enacted them in high-foreclosure counties. See generally *id.*

298. Kanner, *supra* note 263, at 692.

299. See *supra* Section II.B; see also note 250 and accompanying text. California legislators decided to make back rent recoverable as consumer debt in small claims court to slow evictions once the moratoria lift. *Questions Answered on Small Claims Court and Recovering Rent Debt Accrued During the Pandemic*, BORNSTEIN L., <https://bornstein.law/questions-and-answers-on-small-claims-court-and-covid-debt/> [<https://perma.cc/8WG7-C5T7>]. Notably, California law exempts rent debt suits from the \$5,000 cap, and landlords are able to file as many lawsuits as they need, eliminating the prohibition on filing more than two small claims in one calendar year that exceed \$2,500. See Douglas Lane, Camarin Madigan & Auria Maleksalehi, *Eviction Relief for California Residential Tenants*, JD SUPRA (Sept. 16, 2020), <https://www.jdsupra.com/legalnews/eviction-relief-for-california-23508/> [<https://perma.cc/NX2U-3YEG>].

300. See Richard A. Epstein, *Whose Democratic Vision of the Takings Clause? A Comment on Frank Michelman's Testimony on Senate Bill 605*, 49 WASH. U. J. URB. & CONTEMP. L. 17, 23 (1996).

VII. CONCLUSION

Each type of eviction moratorium law presents unique arguments and challenges for a claimant seeking compensation under the Fifth Amendment. The three categories of eviction moratorium laws differ most significantly in their economic impact on the landlord. Proposed rent cancellation laws would, in most circumstances, provide the strongest takings argument because the government is directly eliminating all of the landlord's economic benefit in the rental property. However, even in this scenario, the claimant must show that the rent cancellation results in an extreme economic impact, which may prove difficult depending on how long they have owned the property. Next, rent delay laws offer plausible, although far less certain, takings claims in the event that the tenant never pays the back rent owed. Although a landlord that receives all of the owed rent may claim they have lost the time value of their income, this would likely be a minor economic impact falling far short of the extreme impact required. Finally, rent relief laws are the least likely to result in a successful compensable taking claim. Even though a rent relief law may temporarily deprive landlords of the use of their properties, like in the case of tenants remaining after the lease expires, these laws directly compensate landlords for this deprivation.

While there are certain situations where eviction moratoria may result in compensation, they will be exceedingly rare. Judges may use the takings test's flexibility to avoid a controversial ruling resulting in evictions during a pandemic. Accordingly, it is up to the legislators to protect both renters and landlords by compensating landlords for their sacrifice during this pandemic.

Finally, although we all hope that COVID-19 will be the last pandemic, the unfortunate reality is that similar emergencies will likely become more common. Courts and legislators will use the precedents set during this time to make future decisions when we inevitably find ourselves in a similar catastrophe. Therefore, we must not forget that this burden is all of ours to bear, and lawmakers should not force it upon a disproportionate few.

