Climate Change, Takings, and *Armstrong*

INTRODUCTION

Climate change, especially its symptom of sea level rise, will "unsettle expectations" and present unique challenges to takings jurisprudence.[1] Historically, most takings issues focused on situations with clear instances of causation. For example, requiring a physical intrusion upon or forbidding development on private property clearly hinders a landowners' ability to use their property, make a profit, or recover an investment. In contrast, climate change presents tough causation issues. Externalities and effects may not develop for years or decades and often are borne by individuals and communities far away from where the causal action took place.

A recent Federal Circuit decision arising from the aftermath of Hurricane Katrina illustrates how current takings jurisprudence struggles to account for the changing reality of climate change. This In Brief suggests use of Justice Hugo Black's *Armstrong* principle to help the courts and judges "adapt current rules to the novel issues posed by climate change," as well as provide a more effective remedy for property owners than other forms of climate litigation.[2]

I. THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT

The Fifth Amendment prohibits taking private property "for public use, without just compensation."[3] It "places a condition on the exercise" of taking private property by securing compensation for interference with private property, rather than forbidding governments from taking private property categorically.[4]

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1. *See* Holly Doremus, *Climate Change and the Evolution of Property Rights*, 1 UC. IRVINE L. REV. 1091, 1098 (2011); *see also id.* at 1093 (explaining how climate change "is an especially difficult problem for property law to respond to because it demands continual change rather than merely a single transition to a new equilibrium"); Michael A. Hiatt, Note, *Come Hell or High Water: Reexamining the Takings Clause in a Climate Changed Future*, 18 DUKE ENVTL. L. & POL'Y F., 371, 386 (2008); Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 UCLA. L. REV. 703, 744–48 (2000) (stating takings jurisprudence is just one area of the law that must adapt to climate change).

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

3. U.S. CONST., amend. V.

4. Lingle v. Chevron U.S.A., 544 U.S. 528, 536–37 (2005); *see also* First English Evang. Lutheran Church v. Cty. of Los Angeles, 482 U.S. 304, 315 (2005) ("the [Fifth] Amendment . . . is designed *not to*

First, a taking occurs when government action or regulation results in a "permanent physical occupation" of private property, no matter how small.[5] Next, the "total deprivation" of the use and value of property results in a taking.[6] This occurs "when 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," such as when state regulation prohibits a coastal landowner from developing their property in order to protect the shore.[7] A taking may also occur when government substantially interferes with the "distinct investment-backed expectations" of the property owner.[8] The Supreme Court has moved towards a "generalized fairness test" and considers factors such as the character of the government action, economic impact of the regulation, and the extent of the interference with the property owner's investment.[9] Takings analysis requires fact-heavy analysis and resists set rules.

Climate change "undermine[s] the security of [a property owner's] investments and put[s] pressure on current definitions and distributions of property rights."[10] Courts should turn to a well-established legal theory to address takings cases in the context of climate change and sea level rise.

In *Armstrong v. United States*, a case involving forced transfer of the titles of ships to the United States government, Justice Black in his majority opinion offered a conceptual approach to the takings doctrine that has become the conceptual bedrock of the doctrine.[11] Justice Black wrote "[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."[12] This statement, known as the "*Armstrong*

limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking. Thus, government action that works a taking of property rights necessarily implicates the "constitutional obligation to pay just compensation.").

5. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982); *see also Lingle*, 544 U.S. at 537 ("The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property"); Palazzolo v. Rhode Island, 533 U.S. 606, 607 (2001) ("The clearest sort of taking occurs when the government encroaches upon or occupies private land for its own proposed use"); Doremus, *supra* note 1, at 1100 (takings occur "not only when the government physically appropriates property, but also when it changes the rules of property ownership too drastically or too quickly.").

6. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1078 (1992).

7. *Id.* at 1019.

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

9. Doremus, *supra* note 1, at 1100 (referencing *Penn Central*, 438 U.S. at 124); *see also* J. Peter Byrne, *The Cathedral Engulfed: Sea-Level Rise, Property Rights, and Time*, 73 LA. L. REV. 69, 86 (2012) (explaining how *Penn Central* "canonized an ad hoc fact-sensitive approach to determine whether a regulation effects a regulatory taking").

10. Doremus, s*upra* note 1, at 1101.

11. Armstrong v. United States, 364 U.S. 40, 49 (1960). *Armstrong* concluded a taking occurred when the federal government required a shipbuilder to transfer title of unfinished boats to the federal government, making it impossible for petitioners to enforce their liens on the boat. *Id.* at 48–49.

12. *Id.* at 49.

principle," "has received a remarkable degree of assent across the spectrum of opinion" and is engrained in the "ritual litany" of takings cases.[13] *Armstrong* can satisfy the nascent needs of coastal landowners in a simpler way than other types of climate litigation.

The *Armstrong* principle is a potential, yet underutilized, way for courts to adapt takings and broader property law to address the new legal challenges created by climate change.[14] First, the takings doctrine, which is grounded in property and constitutional law, is a particularly effective strategy for remedying the harms of climate change, as courts are used to dealing with property damage, which is often more digestible than damages involving complex environmental harms.[15] Second, *Armstrong* also enjoys broad support among both legal scholarship and the judiciary.[16] It is engrained in the "ritual litany" of takings decisions.[17] It also is codified in state property rights statutes.[18] A recent Federal Circuit decision illustrates how the *Armstrong* principle can help courts evolve to address climate cases with takings issues.

II. *ST. BERNARD PARISH V. UNITED STATES*

A. Summary

In a 2018 decision, *St. Bernard Parish Government v. United States*, the Federal Circuit concluded the federal government was not liable under the Takings Clause to private landowners in St. Bernard Parish and the Lower Ninth Ward of New Orleans, Louisiana for flooding that occurred as a result of both

13. William M. Treanor, *The Armstrong Principle, the Narratives of Takings, and Compensation Statutes*, 38 WM. & MARY L. REV. 1151, 1153 (1997). The Supreme Court first referred to this mantra as the "Armstrong principle" in a 2002 decision. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agencies, 535 U.S. 302, 321 (2002); *see also* Steven J. Eagle, *The Four-Factor Penn Central Regulatory Takings Test*, 118 PENN ST. L. REV. 601, 613 (2014). *See also* Glynn S. Lunney Jr., *Compensation for Takings: How Much is Just?*, 42 CATH. U. L. REV. 721, 747 (1993); *see, e.g.*, Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 31 (2012) (citing *Armstrong v. United States*); Palazzolo v. R.I., 533 U.S. 606, 633 (2001) (O'Connor, J., concurring); Pennell v. San Jose, 485 U.S. 1, 9 (1988); First English Evangelical Lutheran Church of Glendale v. Cty. of Los Angeles, 482 U.S. 304, 318–19 (1987); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 163 (1980); Penn Cent. Transp. Co. v. New York, 438 U.S. 104, 123 (1978).

14. *See* J. Peter Byrne, *Property in the Anthropocene*, 7 BRIGHAM-KANNER PROP. RTS. CONF. J. 1 (2017) (stating how the *Armstrong* principle can act as an avenue for courts to "alter legal doctrines to address or accommodate the effects of climate change").

15. Doremus, *supra* note 1, at 1101. *Compare* Comer v. Murphy Oil U.S.A., Inc., 598 F.3d 208 (5th Cir. 2010), *with* Am. Elec. Power Co. v. Conn., 562 U.S. 1091, 1091 (2010) *and* N.C. e. rel Cooper v. Tenn. Valley Auth., 515 F.3d 344, 344 (4th Cir. 2008). *But see* Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 849 (9th Cir. 2012).

16. Nestor M. Davidson, *The Problem of Equality in Takings*, 102 NW. U. L. REV. 1, 22 (2008).

17. Lunney, *supra* note 13, at 747.

18. *See, e.g.*, FLA. STAT. ANN. § 70.001(3)(e)(1) (West 2018) (including the following as one of the meanings of the terms "inordinate burden" and "inordinately burdened" found in the statute: "that the property owner is left with existing or vested uses that are unreasonable such that the property owner bears permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large").

government management of levee infrastructure and damage from Hurricane Katrina.[19] Private landowners alleged the Army Corps of Engineers' decades long "construction, operation, and maintenance" of a channel connecting the Gulf of Mexico and New Orleans created a "more direct route" for salt water to flow from the gulf, which altered marshes, destroyed wetlands, and eroded banks.[20] This environmental degradation led in part to an intense storm surge during Hurricane Katrina which "catastrophically flooded" areas in and around New Orleans, including the landowner plaintiffs' property.[21]

In 2012 the Court of Federal Claims concluded the flooding resulted in a "temporary taking" and awarded damages to the landowners.[22] It concluded the Army Corps "no longer had any choice but to recognize that a hurricane inevitably would provide the meteorological conditions to trigger the ticking time bomb . . . and the resulting destruction of wetlands that had shielded the [land] for centuries."[23] The court subsequently awarded damages to the landowners.[24]

The Federal Circuit reversed. The court rejected the argument that the federal government's construction of a channel and subsequent failure to address issues like erosion allowed Katrina flooding to damage their property.[25] First, the court wrote how the failed levee "may well have placed plaintiffs in a better position than if the government had taken no action at all."[26] Next, the court concluded the plaintiffs failed to show how any government action caused their injury.[27] The court also reasoned this was not an appropriate occasion for a temporary takings liability because the flooding was "[n]either intentional [n]or foreseeable."[28] Finally, the court concluded "the government cannot be liable for failure to act, but only for affirmative acts[.]"[29]

19. 887 F.3d 1354, 1357 (Fed. Cir. 2018).
20. *Id.* at 1357–58.
21. *Id.* at 1358.
22. 28 U.S.C. § 1491 (2011). This is a common avenue for bringing takings claims against the federal government. *St. Bernard Parish*, 887 F.3d at 1357 (citing Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 25 (2012) and St. Bernard Parish Gov't v. United States, 121 Fed. Cl. 687 (2015)). This is not a surprising result. The Court of Federal Claims has been successful in redressing situations which, "if left untouched, would have left the property owner severely and adversely affected by the operation of a government regulation." *See* C. Wayne Owen, Jr., *Everyone Benefits, Everyone Pays: Does the Fifth Amendment Mandate Compensation When Property Is Damaged During the Course of Police Activities?*, 9 WM. & MARY BILL RTS. J. 277, 298 (2000).
23. St. Bernard Parish Gov't v. United States, 121 Fed. Cl. 687, 47 (2015).
24. St. Bernard Parish Gov't v. United States, 126 Fed. Cl. 707, 741 (2016).
25. *St. Bernard Parish*, 887 F.3d at 1354, 1358.
26. *Id.* at 1357.
27. *Id.* at 1368.
28. *Id.* at 1360.
29. *Id.* at 1361.

B. Case Analysis

St. Bernard Parish shows how current takings doctrine does not protect landowners in disputes at the intersection of government action and the effects of climate change. This next Part provides a brief analysis of the Federal Circuit's decision, before proposing a renewed application of an established framework in future cases.

St. Bernard Parish tiptoed around the 2012 *Arkansas Game & Fish Commission v. United States* decision, which created a narrow avenue for plaintiffs to recover for damages caused by temporary flooding.[30] Instead, in *St. Bernard Parish*, the Federal Circuit chose to apply an older "blanket exclusionary rule," used in cases prior to *Arkansas Game*,[31] which denied recovery for a single temporary flood, instead of assessing the "particular circumstances of each case," as directed by *Arkansas Game*.[32]

The court's focus on government action versus inaction relies on arbitrary, blurry line drawing.[33] *St. Bernard Parish* relies on the logic of an earlier era of flooding cases, which concluded a taking did not occur when government failed to build a specific piece of infrastructure or engage in one discrete action to protect property.[34] Here, in *St. Bernard Parish*, the government created infrastructure by affirmative action and then failed to maintain it, despite knowing failure could lead to foreseeable and devastating flooding. Legal commentators suggest an explicit focus on government inaction should form the basis for takings liability.[35] State courts have found compensable takings in the case of flooding resulting from government inaction.[36] For example, the California Court of Appeal concluded a compensable taking occurred when government inaction precipitated the flooding of private property because the

30. Ark. Game and Fish Comm'n v. United States, 568 U.S. 23, 37 (2012).

31. *Id.*

32. *Id.*; *see, e.g.*, Big Oak Farms, Inc. v. United States, 105 Fed. Cl. 48, 56 (2012) (agreeing with the government that a single flood which receded does not constitute a takings); *see also* Ridge Line, Inc. v. United States, 346 F.3d 1346, 1357 (Fed. Cir. 2003) (concluding one or two floods is not a taking.)

33. *See, e.g.*, Nat'l Fed. of Indep. Bus. v. Sebelius, 567 U.S. 519, 612 (2012) (Ginsburg, J., dissenting) (citing Archie v. Racine, 847 F.2d 1211, 1213 (7th Cir. 1988) (stating "it is possible to restate most actions as corresponding inactions with the same effect")).

34. *See, e.g.*, Allain-Lebreton Co. v. Dep't of Army, 670 F.2d 43, 44 (5th Cir. 1982) (holding that the decision not to locate a hurricane protection levee on certain lands was not a takings); Bayou Des Familles Dev. Corp. v. U.S. Corps of Eng'rs, 541 F. Supp. 1025, 1042 (E.D. La. 1982).

35. *See, e.g.*, Christopher Serkin, *Passive Takings: State Inaction and the Duty to Protect Property*, 113 MICH. L. REV. 345 (2014) (arguing legal change does not need to be central to regulatory takings claims).

36. *See* Litz v. Maryland Dep't of the Env't, 131 A.3d 923, 931 (2016); Jordan v. St. John's Cty., 63 So.3d 835, 835 (Fla. Ct. App. 2011); Arreola v. Cty. of Monterey, 99 Cal. App. 4th 722, 742 (Cal. Ct. App. 2002); Electro-Jet Tool & Mfg. Co. v. Albuquerque, 845 P.2d 770, 777 (N.M. 1992); Robinson v. City of Ashdown, 301 Ark. 226, 228 (1990).

local government "made the deliberate calculated decision to proceed with a course of conduct, in spite of a known risk."[37]

Finally, the Federal Circuit failed to consider the role of climate change in the takings issue, despite its prominent role in the Court of Federal Claims. The Federal Circuit's decision, which suggests government behavior disregarding the reasonably foreseeable impacts of climate change cannot result in a taking, demonstrates how current takings jurisprudence has yet to adapt to account for the impacts of climate change. This In Brief argues courts should revisit and begin applying the *Armstrong* principle, introduced below, in future cases to better account for the role of climate change.

St. Bernard Parish is an illustrative example of how the *Armstrong* principle can protect landowners. The *Armstrong* principle and the effects of climate change share an interesting parallelism. The *Armstrong* principle, which is intended to ensure burdens are not forced upon some people alone, is an appropriate remedy to address one of climate change's unique issues: its harms are felt disproportionately by certain segments of society.[38] These harms come in two forms. First, both short- and long-term harms come in the form of both physical and earth science processes that are unevenly distributed amongst populations.[39] For example, "[s]ea level rise is expected to be especially pronounced along the Atlantic coast and the Gulf of Mexico," with major cities such as New York, Boston, Miami, and New Orleans, "at [a] high risk of inundation."[40]

Second, harm may come from the development of legal rules responding to climate change, which will cause losses to be "sharply concentrated."[41] A greater focus on the *Armstrong* principle can address this and will allow the "[t]akings doctrine [to] . . . openly address the distributive question with commitments to social responsibility and to equality."[42]

More broadly, greater application of the *Armstrong* principle can ensure that the readily established and foreseeable impacts of climate change, and their effect on property, such as increasingly powerful hurricanes and storm surge, are incorporated into evolving takings and compensation doctrine. For example, the number of Category four and five hurricanes has doubled over the past thirty-five years.[43] The Court of Federal Claims noted the "possibility of catastrophic

37. *Arreola*, 99 Cal. App. 4th at 742. The court elaborated that liability existed when the government "was aware of the risk posed by its public improvement and deliberately chose a course of action—or inaction—in the face of that known risk." *Id.* at 744.

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

39. *See, e.g.*, Doremus, *supra* note 1, at 1102 (explaining how "[p]erhaps surprisingly, sea level rise is not uniform across the globe.")

40. *Id.*

41. *Id.* at 1092.

42. Hanach Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 802 (1999).

43. *See Number of Category 4 and 5 Hurricanes Has Doubled Over the Past 35 Years*, NAT'L SCI. FOUND. (Sept. 15, 2005).

damage to urban areas."[44] It also noted the inevitability of increased recurring flooding due to storm surge.[45] Sea level rise is also well documented. To put this in broader context, "[t]he rate of sea level rise since the mid-nineteenth century has been larger than the mean rate during the previous two millennia."[46] Looking forward, "[g]lobal average sea levels are expected to continue to rise—by at least several inches in the next fifteen years and by one to four feet by 2100."[47] Also, "each of the last three decades has been successively warmer at the Earth's surface than any preceding decade since 1850."[48] While the *St. Bernard Parish* court appears to assume the government's actions occur in a vacuum, not affected by the readily predictable results of climate change, judicial use of this theory can make sure these phenomena are accounted for in takings jurisprudence.

III. THE "*ARMSTRONG* PRINCIPLE" CAN PROTECT LANDOWNERS HARMED BY CLIMATE CHANGE

Armstrong calls for a "distributional fairness rationale."[49] This focus sets the stage for "fairly allocating the costs of public burdens."[50] A pivot towards equality and fairness authorized by takings jurisprudence would provide a much-needed remedy for landowners impacted by climate change.

The *Armstrong* principle ensures protection for the politically powerless. An enhanced focused on *Armstrong* helps achieve the Takings Clause's intended goal of guarding against society's impulse to force an individual to pay for something they did not cause, but the whole community benefits from.[51]

Professor Treanor argues that "[t]he original rationale behind the Takings Clause was to provide heightened protection for those who could not protect adequately their property through the political process."[52] He points to efforts to protect those victimized by colonial governments seizing land to build roads, to prevent the Crown from taking land to grow timber, and to ensure compensation in light of frequent seizures by the Revolutionary Army.[53] Following the

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44. *See* St. Bernard Parish Gov't v. United States, 121 Fed. Cl. 687, 734 (2015).

45. *See* St. Bernard Parish Gov't v. United States, 126 Fed. Cl. 707, 733 (2016).

46. Intergovernmental Panel on Climate Change, *Climate Change 2013: The Physical Science Basis* (2013), https://www.ipcc.ch/report/ar5/wg1/ (summarizing the U.N.'s Intergovernmental Panel on Climate Change's 2013 findings).

47. U.S. GLOBAL CHANGE RESEARCH PROGRAM, CLIMATE SCIENCE SPECIAL REPORT: HIGHLIGHTS OF THE U.S. GLOBAL CHANGE RESEARCH PROGRAM CLIMATE SCIENCE SPECIAL REPORT 10 (2017).

48. Intergovernmental Panel on Climate Change, *supra* note 46.

49. Davidson, *supra* note 16, at 22.

50. Katrina Miriam Wyman, *The Matter of Just Compensation*, 41 U.C. DAVIS L. REV. 238, 250 (2007).

51. Owen, Jr., *supra* note 22, at 295–96.

52. Treanor, *The Armstrong Principle, the Narratives of Takings, and Compensation Statutes*, *supra* note 13, at 1171.

53. William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 788, 790 (1995); *see also* Joseph Sax, *Takings and the Police Power*,

enactment of the Constitution, early legal interpretations also favored providing compensations in instances where a physical destruction of property occurred, much like what occurred to landowners in St. Bernard Parish.[54] This was intended to secure and guarantee physical possession of property.[55]

The landowners in St. Bernard Parish are examples of how politically powerless some coastal landowners are. In the case of *St. Bernard Parish*, respondent landowners disproportionately bore the burden of sea level rise and storm surge. Those primarily harmed when the government-maintained infrastructure failed were minorities not represented in the political process. While St. Bernard Parish itself is predominantly white, Hurricane Katrina disproportionately harmed African Americans, who comprised the majority of deaths from the flooding and suffered the most from the subsequent inadequate federal response.[56] This flooding resulted in a loss of nearly 95 percent of the population of the area.[57] More generally, the effects of climate change will disproportionately harm groups who face "socioeconomic inequalities," such as African Americans and Hispanics.[58] More broadly, already-vulnerable groups, including people of color, the poor, children, and the elderly face the highest risks.[59] Also, climate change "threatens to exacerbate existing social and economic inequalities that result in higher exposure and sensitivity to extreme weather and climate-related events."[60] This is especially the case in coastal areas.[61]

Finally, the application of the *Armstrong* principle in climate cases fits within the traditional narrative of takings cases. Climate-related damage such as flooding falls within the narrative of "tales in which an individual loses, if not

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74 YALE L.J. 36, 64 (1964) (stating how The Takings Clause serves as a "bulwark against arbitrary, unfair, or tyrannical government").

54. Stephen A. Siegel, *Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege and "Takings" Clause Jurisprudence*, 60 S. CAL. L. REV. 1, 79–80 (1986).

55. *Id.* at 80.

56. *See* Jeff Adelson, *Hurricane Katrina transformed New Orleans, the region's makeup after unrivaled exodus in U.S.*, THE ADVOCATE (Aug. 23, 2015), https://www.theadvocate.com/baton_rouge/news/article_d1bd4e2f-396b-5559-ad2a-baa37968d45e.html; *see also* Julianne Landry Laviolette, *Hell & High Water: How Hurricane Katrina transformed St. Bernard*, THE MIAMI HERALD (Aug. 28, 2015), https://www.miamiherald.com/news/weather/hurricane/article32639868.html; *see also* DOUGLAS BRINKLEY, THE GREAT DELUGE: HURRICANE KATRINA, NEW ORLEANS, AND THE MISSISSIPPI GULF COAST 621–22 (2006).

57. Rick Lyman, *Reports Reveal Katrina's Impact on Population*, N.Y. TIMES (June 7, 2006), https://www.nytimes.com/2006/06/07/us/nationalspecial/07census.html.

58. Anthony Leiserowitz & Karen Akerlof, *Race, Ethnicity and Public Responses to Climate Change*, YALE PROJECT ON CLIMATE CHANGE AND GEORGE MASON UNIVERSITY CENTER FOR CLIMATE CHANGE COMMUNICATION 4 (2010), http://environment.yale.edu/uploads/RaceEthnicity2010.pdf.

59. David Reidmiller, et al., *Fourth National Climate Assessment*, U.S. GLOBAL CHANGE RESEARCH PROGRAM (2018), https://nca2018.globalchange.gov/chapter/1/.

60. *Id.*

61. *See* Daniel A. Farber, *Property Rights and Climate Change* 1, 2 n.4 (March 31, 2014), https://ssrn.com/abstract=2418756 (explaining how a one meter sea level rise will affect 9 percent of Florida's land area and 10 percent of the state's population).

everything, a large part of all that she owns."[62] Climate change threatens to destroy entire communities and cultures. Current takings doctrine does not account for how a family may own property for generations or how a taking may destroy an entire community's way of life. The *Armstrong* principle can, as discussed subsequently, provide enhanced compensation and create a possible financial deterrent to actions that will result in wiping out communities. It does not focus on the actual harm to a property owner.[63] Similarly, the takings doctrine is intended to prevent government from destroying a way of life, such as large colonial property owners.[64] The *Armstrong* principle can help the takings doctrine ensure that vulnerable coastal residents' way of life is not destroyed. Finally, these property owners are even more innocent than the "innocent actors" cited in favor of property rights movement: landowners who just want to build on their property, and end up causing some sort of ecological harm.[65]

IV. THE *ARMSTRONG* PRINCIPLE CAN PROVIDE GREATER COMPENSATION PROTECTION THAN CURRENT TAKINGS DOCTRINE

Application of the *Armstrong* principle can create the potential for increased compensation for property owners harmed due to the intersection of government action and climate change. The Fifth Amendment requires government to pay "just compensation" when it takes property.[66] Currently, "[c]ourts will not always order compensation because judicial takings inquiries typically focus on the harm to the property, not on the actual harm to the property owner."[67] Constitutional "just compensation is defined as fair market value, not the subjective value asserted by the owner."[68] Also, "[u]nder [the fair market value] standard, the owner is entitled to receive 'what a willing buyer would pay in cash to a willing seller' at the time of the taking."[69]

Unlike the Supreme Court's focus on the specific fair market value of a parcel in question, the *Armstrong* principle casts a broader net and is focused on the relationship between individual citizens and government. This arms-length

62. Treanor, *The Armstrong Principle, the Narratives of Takings, and Compensation Statutes*, *supra* note 13, at 1162.

63. *Id.* at 1156.

64. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, *supra* note 53, at 788, 790.

65. Treanor, *The Armstrong Principle, the Narratives of Takings, and Compensation Statutes*, *supra* note 13, at 1161.

66. U.S. CONST., amend. V.

67. Treanor, *The Armstrong Principle, the Narratives of Takings, and Compensation Statutes*, *supra* note 13, at 1156.

68. Steven J. Eagle, Property Tests, *Due Process Tests and Regulatory Takings Jurisprudence*, 2007 B.Y.U. L. REV. 899, 926 (2007). *See also* Monongahela Nav. Co. v. United States, 148 U.S. 312, 326 (1893) ("just compensation is for the property, and not to the owner.")

69. United States v. 464.54 Acres of Land, 441 U.S. 506, 511 (1979) (quoting *United States v. Miller*, 317 U.S. 369, 374 (1943)).

transaction method is less useful for climate cases, where a coastal property at risk of flooding may be less desirable. This raw market inquiry does not account for the government's role in depressing the value and therefore does not make the takee "whole."

This method does not comport with the intended purpose of paying just compensation: to make the takee "whole," it still requires property owners to disproportionately shoulder the costs that society as a whole ought to bear. Focusing on the value a marginal owner would attach to the property, may hurt owners. Property owners may value their property higher than fair market value based on factors such as "relocation costs, sentimental attachments, or the special suitability of the property for their particular (perhaps idiosyncratic) needs."[70] More importantly, this method fails to account for the dual impact of climate change and the government action leading up to the actual taking that depresses the value. The *Armstrong* principle will be a better vehicle to ensure the takee is made whole and receives compensation for government action leading to both the taking and a reduced market value. It can distribute losses more broadly, by providing opportunity for greater compensation to landowners, and mitigate the harm of the combination of climate change and government action upon those most adversely affected.

CONCLUSION

Application of the *Armstrong* principle is a simpler way to satisfy the needs of coastal landowners than other types of climate litigation. The traditional notion of the security, longevity, and permanency of property falls away when dealing with climate change and sea level rise.[71] Also, this traditional approach ignores how private property "nourish[es] individuality and healthy diversity" and "political freedom."[72] Judicial embrace of the *Armstrong* principle can both ensure climate victims receive just compensation and at the same time reduce the likelihood that climate change will lead "toward weaker, rather than stronger, individual property rights."[73]

Embrace of the *Armstrong* principle should only be one part of how the courts address climate change and takings. This will be a "difficult, and quite probably, slow, process."[74] The *Armstrong* principle "avoids confrontation of

70. Coniston Corp. v. Hoffman Estates, 844 F.2d 461, 464 (7th Cir. 1988).

71. Farber, *supra* note 61, at 11 (stating "[a]lthough it is undoubtedly useful to think about these issues in terms of current doctrine, a longer view may be needed because sea level rise itself is such a long-term process").

72. JESSE DUKEMINIER, JAMES E. KRIER, ET AL., PROPERTY 51 (7th Ed. 2010).

73. *See, e.g.*, Eagle, *supra* note 13, at 614; *see also* Doremus, *supra* note 1, at 1092; Jean Edward Smith, JOHN MARSHALL: DEFINER OF A NATION 388 (1996) (quoting 6 THE WORKS OF JOHN ADAMS 280 (Charles Francis Adams ed. 1850) (stating "[p]roperty must be secured or liberty cannot exist")). Judicial embrace is not far-fetched, as both liberal and conservative Supreme Court justices have cited the principle. *See* Treanor, *The Armstrong Principle, the Narratives of Takings, and Compensation Statutes*, *supra* note 13, at 1153–54.

74. Doremus, *supra* note 1, at 1092.

the hard question: What do fairness and justice require[?]"[75] Our society must grapple with this question as we face the increasingly drastic effects of climate change. Despite these challenges, we can be optimistic, as "property rights develop when they are needed and in a form that fits that need."[76] As *St. Bernard Parish* demonstrates, the need for takings jurisprudence to adapt to the realities of climate change in order to protect property owners already exists. It is up to us to form a set of rules to ensure a small portion of society does not bear the costs which fairness demands us all to bear. Perhaps the *Armstrong* principle will be used to force society to start make hard land use decisions in the face of climate change. If taxpayers are on the hook for every house or development in harm's way, will there be less incentive to approve shortsighted projects?

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75. Treanor, *The Armstrong Principle, the Narratives of Takings, and Compensation Statutes*, *supra* note 13, at 1154.

76. Doremus., *supra* note 1, at 1092.

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