October 2021

Saving the Nonessential With Radical Tax Policy

Rodney P. Mock

Kathryn Kisska-Schulze

Follow this and additional works at: https://scholarship.law.uc.edu/uclr

Part of the Accounting Law Commons, Disaster Law Commons, Taxation-Federal Commons, and the Tax Law Commons

Recommended Citation

Rodney P. Mock and Kathryn Kisska-Schulze, Saving the Nonessential With Radical Tax Policy, 90 U. Cin. L. Rev. (2021)

Available at: https://scholarship.law.uc.edu/uclr/vol90/iss1/5

This Article is brought to you for free and open access by University of Cincinnati College of Law Scholarship and Publications. It has been accepted for inclusion in University of Cincinnati Law Review by an authorized editor of University of Cincinnati College of Law Scholarship and Publications. For more information, please contact ronald.jones@uc.edu.
SAVING THE NONESSENTIAL WITH RADICAL TAX POLICY

Rodney P. Mock* and Kathryn Kisska-Schulze**

Table of Contents

INTRODUCTION .................................................................................................................. 198

I. THE MONUMENTAL HARM CAUSED BY THE LOCKDOWNS .............. 205

   A. A Virus Originating Seemingly From Nowhere ..................... 206
   B. A History of Mini-Lockdowns and Other Suspensions ....... 209
   C. Locking Down the Nonessentials ....................................... 211

II. PROPOSED LOCKDOWN REMEDIES AND OTHER "FIXES" .......... 216

   A. Taking From the Nonessential Without Just Compensation ........................................... 216
   B. The CARES Act That Never Cared ................................................. 224

       i. Section 2301 – Employee Retention Credit.......... 227
       ii. Sections 2302 & 2305 – Employer Payroll Tax

           Payment Delays and the AMT ........................................ 229
       iii. Section 2307 – Technical Amendments .............. 229
       iv. Sections 2303, 2304, & 2306 – Relaxing the

           Rules .............................................................................. 230

   C. You Can’t Have An Excess Profits Tax Without a War ...... 234

* Rodney P. Mock, J.D., LL.M., Professor, California Polytechnic State University, Orfalea College of Business.
** Kathryn Kisska-Schulze, J.D., LL.M., Associate Professor, Clemson University, Wilbur O. and Ann Powers College of Business, School of Accountancy.

The authors wish to thank the Graduate Tax Program at the University of California, Irvine School of Law for the opportunity to discuss this article at the 2021 A. Lavar Taylor Virtual Tax Symposium on Taxation in a Time of Crisis.
INTRODUCTION

In 1979, Gary Mootz and his partner opened the Male Image barbershop in the Castro district of San Francisco.\(^1\) For over 40 years, patrons walked through its doors to discuss the latest in political and social goings-on, while enjoying $18 dollar haircuts.\(^2\) Little did Mootz know as he rang in the 2020 New Year that an impending viral pandemic, originating thousands of miles away in Wuhan, China, would result in his business being forcibly shut down by a California Executive Order,\(^3\) ultimately resulting in its permanent closure just months later.\(^4\)

Six miles away, foodies and tourists alike have enjoyed meals and unobstructed views of the Pacific Ocean at the Cliff House for 157 years.\(^5\) The iconic restaurant, which weathered a storied history including two fires, earthquake damage, visits by five United States presidents, a movie appearance, and a feature in the video game Watch Dogs 2, likewise could not withstand the financial harm caused by lockdowns and governmental restrictions.\(^6\) On December 31, 2020, the Cliff House closed

2. Id.
4. See Bracco, supra note 1.
More than two thousand miles to its east, Governor Andy Beshear issued an executive order on March 22, 2020, mandating that all nonessential businesses close, leading to the permanent cessation of Highland Fitness, a Louisville, Kentucky neighborhood fitness center. This venture, which operated for over twelve years, succumbed to the financial strains of the lockdowns. Highland Fitness is not an anomaly; by August 2020, almost 300 Louisville businesses closed permanently due to mandated lockdowns and restrictions. For those that remained operational, revenue had declined almost 26 percent since the start of the pandemic, with some revenues falling 50 to 75 percent. These small business casualties, accompanied by countless other stories of the lockdowns' devastating economic impact across the United States, have become increasingly familiar; however, they are largely overshadowed by the COVID-19 public health crisis.

The first confirmed case of COVID-19 appeared in the United States on January 20, 2020. Eleven days after the initial United States patient diagnosis, then-President Donald Trump issued Proclamation 9984, suspending border entry to those arriving from the People’s Republic of China. Just one week prior, China officially locked down Wuhan, which was ground zero for the pandemic, with approximately 11 million

7. Bay City News, supra note 5.
10. Id. See also Highland Fitness, FACEBOOK (July 30, 2020), https://www.facebook.com/HighlandFit/.
11. Haley Cawthon, Yelp data shows nearly 300 Louisville businesses have permanently closed since March, WLJY (Aug. 17, 2020, 11:18 AM), https://www.wlky.com/article/yelp-data-shows-nearly-300-louisville-businesses-have-permanently-closed-since-march/33623385. Note, for simplicity purposes, this article references “lockdown” to include any resulting restrictions on businesses’ free flow of commerce, to include social distancing and ensuing state-mandated capacity limitations on business enterprises.
15. See Proclamation 9984, 85 Fed. Reg. 6709 (Republic of China) (Jan. 31, 2020) (suspending “entry into the United States, as immigrants or nonimmigrants, of all aliens who were physically present within the People’s Republic of China”).
inhabitants.\footnote{16} Less than two months after initiating the Schengen border suspension, and on the same day that the World Health Organization (\textquote{\textsc{WHO}}) declared the virus a global pandemic, the United States temporarily suspended travel from Europe.\footnote{17} On March 13, 2020, as the stock market crashed and oil prices plunged, Mr. Trump declared a \textquote{national emergency}.\footnote{18} America was fighting an invisible enemy, with the Executive branch, politicians, and the media alike, referring to the nation\textquotesingle s crusade against the novel virus as a \textquote{War on COVID}.\footnote{19}

As the outbreak continued, governors in all but seven states issued executive orders directing residents to stay-at-home and temporarily forced any businesses identified as nonessential to close, including retail establishments, dine-in restaurants, fitness centers, and theaters.\footnote{20} Only those ventures deemed essential, such as grocers, emergency services, healthcare, information technologies, transportation, and energy, remained operational.\footnote{21} For the first time in United States history or case
law, arbitrary lines were established to distinguish between essential and nonessential business operations.\textsuperscript{22} Within six months of the pandemic’s onset in the United States, 60 percent of businesses forcibly shut down permanently due to the stay-at-home executive orders.\textsuperscript{23} For those small to mid-size businesses remaining operational, 43 percent reported a “significant to severe impact” due to decreased sales, diminished business valuations, and lost revenue.\textsuperscript{24} In contrast, big-box retailers like Walmart, Target, Costco and Amazon, all essential by state government standards, profited from the forced closures of over 140,000 nonessential businesses.\textsuperscript{25} These large, one-stop establishments that provide food, necessities, contactless shopping, home delivery, and have matured e-commerce platforms, reported record sales in 2020.\textsuperscript{26} Even after states lifted closure restrictions on the nonessential businesses, a myriad of operational constraints required these businesses to maintain capacity limits and follow stringent guidelines.\textsuperscript{27} Forced closures and limitations proved disastrous for already fragile small businesses unable to defend themselves against the financial tsunami.\textsuperscript{28} To address these injustices, some have suggested the

\begin{itemize}
\item \textsuperscript{22} See Irene Jiang, Here’s the difference between an ‘essential’ business and a ‘nonessential’ business as more than 30 states have imposed restrictions, BUS. INSIDER (Mar. 31, 2020), https://www.businessinsider.com/what-is-a-nonessential-business-essential-business-coronavirus-2020-3 (noting that although there existed some types of business operations that all states seemed to identify as being either “essential” or “nonessential”, it was up to each individual city and state to determine more specifically which business could stay open, versus close). See also Omnistone Corp. v. Cuomo, 485 F. Supp. 3d 365 (E.D.N.Y. 2020), and White v. CSX Transp., Inc., 2020 U.S. Dist. LEXIS 192293 (W.D.N.Y. 2020) (identifying the first two United States cases which draw distinctions between “essential” and “nonessential” business operations).
\item \textsuperscript{23} Local Economic Impact Report, YELP (Sept. 2020), https://www.yelpconomica verage.com/business-closures-update-sep-2020.html (Total permanent business closures reported were 97,966).
\item \textsuperscript{25} Hayley Peterson, The pandemic is ramping up the war between Amazon, Walmart, and Target, and making them more powerful than ever, BUS. INSIDER (Aug. 23, 2020, 9:45 AM), https://www.businessinsider.com/amazon-walmart-and-target-are-getting-more-powerful-2020-8. See also Anne Sraders & Lance Lambert, Nearly 100,000 establishments that temporarily shut down due to the pandemic are now out of business, FORTUNE (Sept. 28, 2020, 10:25 AM), https://fortune.com/2020/09/28/covid-businesses-shut-down-closed/.
\item \textsuperscript{27} See, e.g., Staff, Where states reopened and cases spiked after the U.S. shutdown, WASH. POST (updated Sept. 11, 2020), https://www.washingtonpost.com/graphics/2020/national/states-reopening-coronavirus-map/; @CAgovernor, TWITTER (Oct. 3, 2020, 1:00 PM), https://twitter.com /CAgovernor/status/1312437371460173825.
\item \textsuperscript{28} Alexander W. Barik et al., The Impact of Covid-19 on Small Business Outcomes and Expectations, 117 PNAS, no. 30, 17656-17666 (July 28, 2020), https://www.pnas.org/content
imposition of an excess profits tax on large companies profiting from the pandemic. In addition, legal arguments promote that just compensation be provided to closed businesses under the Constitutional Takings Clause. Meanwhile, Congress entertained its own legislative remedies in the form of the Coronavirus and Economic Security Act (hereinafter “the CARES Act”).

To rescue the rapidly declining United States economy and support individuals and businesses, on March 27, 2020, Congress enacted the CARES Act, which contains over $2 trillion in economic relief. In addition to providing taxpayer stimulus checks and business reprieve via Paycheck Protection Program (PPP) forgivable loans, the CARES Act contains several tax relief provisions that relax business’ net operating losses and deduction restrictions. However, at present there are no proposals at the federal or state levels directing compensatory relief specifically to nonessential businesses for the various harms suffered from forcible lockdowns, at the exclusion of the essential businesses.

---

29. See, e.g., Reuven Avi-Yohan, COVID-19 and US Tax Policy: What Needs to Change?, PUB. LAW AND LEGAL THEORY RES. PAPER SERIES, NO. 679 (Apr. 2020) (suggesting the enactment of an excess profits tax on corporations benefitting from the pandemic); Press Release, Rep. Tulsi Gabbard: Reimstate WWH-era Excess Profits Tax on Large Corporations Seeing Windfall Profits from Pandemic to Help Small Business Recovery, TAX NOTES, Dec. 18, 2020 (documenting that Rep. Tulsi Gabbard (HI-02) called on Congress to impose an excess profits tax on large corporations like Amazon, Google, and Walmart that enjoyed significant profits due to the Coronavirus); Bianca Agustin et al., Billionaire Wealth vs. Community Health: Protecting Essential Workers from Pandemic Profiteers, TAX NOTES, 1, 25, Nov. 2020 (proposing an excess profits tax to discourage COVID-19 profiteering); Chuck Collins et al., Billionaire Bonanza 2020, Wealth Windfalls, Tumbling Taxes, and Pandemic Profiteers, INST. FOR POL’Y STUD. 1, 16 (Apr. 23, 2020) (recommending an excess profits tax due to the pandemic); and Allison Christians & Tarcísio Diniz Magalhães, It’s Time for Pillar 3: A Global Excess Profits Tax For COVID-19 and Beyond, TAX NOTES INT’L, at 507, May 4, 2020 (suggesting that global excess profits taxes on companies profiteering from the pandemic will be more successful than individual countries imposing such tax). But see Joseph J. Thornikke, If the Pandemic Is a War Should We Consider a War Profits Tax?, TAX NOTES, 2023-26, Mar. 30, 2020 (suggesting that imposing an excess profits tax for purposes of COVID-19 is beyond the scope of Treasury’s intent in enacting it in the first place); George K. Yin, Is It Really Time for an Excess Profits Tax?, TAX NOTES, 833, May 4, 2020 (suggesting that arguments to impose an excess profits tax to combat the financial strain of COVID-19 are weak).

30. See infra Part II.A.


Soon after the pandemic’s onset, scholars began examining COVID-19’s impact on commercial ventures. Such intellectual contributions include: (1) scrutinizing financial institutions’ ethical behaviors and cultural norms amidst the pandemic, 34 (2) defending large business ventures taking advantage of the CARES Act PPP loans, 35 (3) proposing metrics to allow franchise systems within the food and restaurant industries to better adjust to COVID-19 disruptions, 36 (4) examining the PPP program from a First Amendment perspective, 37 (5) exploring the enforceability of COVID-19 liability waivers on consumers and business owners, 38 and (6) arguing against collegiate institutions hosting revenue-generating sporting events while remaining academically virtual. 39

In addition to the proposal that Congress impose an excess profits tax on COVID-profiting enterprises, scholars have explored broader, tax-specific issues stemming from COVID-19 disruptions. Such inquiries include analyzing flaws in the temporary suspension of deduction limitations on certain business tax losses under the CARES Act, 40 evaluating key tax provisions of the CARES Act with regard to employee benefit plans 41 and business practices, 42 and examining the function of the United States corporate income tax in pandemic-transformed business organizations. 43

This Article adds to the aforementioned literature as follows. First, this Article maintains that essential businesses are not responsible for the annihilation of numerous small businesses. Rather, such is a consequence of the executive action of state governors in response to the perceived threat of COVID-19. 44 Under the Internal Revenue Code of 1986, as amended (“Code”), for-profit enterprises are distinguishable from tax-exempt organizations in that they are, among other factors, vested in being

37. Soucek, supra note 32, at 319-20 (with particular attention paid to strip clubs).
43. Mindy Herzfeld, Corporate Tax in the New Normal, TAX NOTES INT’L, June 1, 2020, at 981.
44. See infra Part I.C.
profitable, thereby enjoying unrestricted commercial activity. Targeting already-thriving, large for-profit entities for profiting during the lockdowns fails to acknowledge the societal obligation that governments have to businesses that were forcibly restricted from engaging in commerce.

In concert with this premise, this Article dismisses recent proposals to impose an excess profits tax on companies benefitting from pandemic lockdowns. Treasury introduced this tax during the previous World Wars in an effort to target businesses engaged in “war profiteering” amidst everyday Americans who otherwise sacrificed “life and limb.” Mr. Trump’s and others’ wartime analogy to a War on COVID, akin to President Ronald Reagan’s War on Drugs, is mere rhetoric. Federal tax policy engenders that an excess profits tax “be used in time of war.” The United States judicial system defines "war" as a hostile engagement between nation[s], government[s], and the like. Suggesting that excess profits taxation be imposed on large companies benefitting from the COVID-19 pandemic contradicts historical tax policy in the United States. Further, this Article proposes that recent lawsuits, brought by injured businesses alleging Takings Clause claims against states that imposed lockdowns, will provide little meaningful relief.

Finally, this Article establishes that the CARES Act does not sufficiently remedy the financial devastation suffered by nonessential businesses as a result of state-mandated lockdowns. Instead, this Article suggests that an overriding public interest warrants significant radical tax

---


46. See infra Part III.

47. See infra Part II.C.


51. See Universal Cable Prods., LLC v. Atlantic Specialty Ins. Co., 929 F. 3d 1143, 1155 (9th Cir. 2019) (citing to 10A COUCH ON INSURANCE § 152:3 (3rd ed. 2017) (defining “war”, in part, as “the employment of force between governments or entities essentially like governments.”). See also Noasha LLC v. Nordic Group of Cos., 630 F. Supp. 2d 544, 554 (E.D. Pa., 2009) (citing to THE COMPACT ED. OF THE OXFORD ENG. DICTIONARY 3682 (26th Ed. 1987), which defined “war” as the “hostile contention by means of armed forces, carried between nations, states, or rulers, or between parties in the same nation or state.”).

52. See infra Part II.A.

53. See infra Part II.B.
reform, which will require Congress to reevaluate the manner in which it views non-profit organizations. Specifically, this Article proposes that certain, qualifying businesses forcibly locked down during the pandemic ("COVID-Companies") should be provided temporary federal tax-exempt status, and any donations made to these entities should be treated as tax deductible.\textsuperscript{54}

To better address how the United States can make COVID-Companies whole again, this Article proceeds as follows. Part I provides an evolutionary discussion of the negative spillover effects resulting from state-mandated lockdowns on business operations in the United States. Part II evaluates recent scholarly proposals to remedy or “fix” these harms. Part III recommends that Code section 501 be revised to provide temporary relief to nonessential businesses, akin to that enjoyed by tax exempt, non-profit organizations. Finally, this Article concludes that society has a vested interest in preserving and resurrecting nonessential businesses, and revolutionary tax reform is the means by which to effectuate nonessential businesses’ recoveries.

I. THE MONUMENTAL HARM CAUSED BY THE LOCKDOWNS

One of the earliest peer-reviewed articles to address the role of social distancing in mitigating pandemic influenza derived from a high school science fair project.\textsuperscript{55} While an abundance of scholarly research is dedicated to studying the function of social distancing to minimize contagion exposure,\textsuperscript{56} prior to 2020, only negligible consideration was given to the impact of social distancing on the restrictive free flow of commerce.\textsuperscript{57} In late 2019, while most people across the globe were doing

\textsuperscript{54} See infra Part III.C.

\textsuperscript{55} Robert J. Glass, et. al., Targeted Social Distancing Design for Pandemic Influenza, 12 EMERGING INFECTIOUS DISEASES 1671 (2006) (Laura M. Glass, one of the authors of this study, was a high school student at the time of publication). See also Ollie Reed Jr., Social distancing born in ABQ teen’s science project, ALBUQUERQUE J. (May 2, 2020) (on file with author).

\textsuperscript{56} See, e.g., Peter Caley et al., Quantifying social distancing arising from pandemic influenza, 5 J. OF THE ROYAL SOC’Y INTERFACE, 631-39 (Oct. 4, 2007) (studying the impact of social distancing amidst potentially infectious contacts); Harunor Rashid et al., Evidence compendium and advice on social distancing and other related measures for response to an influenza pandemic, 16 PAEDIATRIC RESPIRATORY REV. 119 (2015) (examining the role of social distancing against pandemic influenza); Duo Yu et al., Effects of reactive social distancing on the 1918 influenza pandemic, PLOS ONE 12(7) (2017); Joel K. Kelso et al., Simulation suggests that rapid activation of social distancing can arrest epidemic development due to a novel strain of influenza, 9 BMC PUB. HEALTH 117 (2009) (utilizing computer simulations to examine the extent and timing of social distancing measures to quench pandemic influenza spread); and Faruque Ahmed et al., Effectiveness of workplace social distancing measures in reducing influenza transmission: a systematic review, 18 BMC PUB. HEALTH 518 (2017) (analyzing the impact of social distancing in non-healthcare workplaces to slow influenza transmission).

\textsuperscript{57} U.S. DEP’T OF LAB., GUIDANCE ON PREPARING WORKPLACES FOR AN INFLUENZA PANDEMIC, at 4 (2007) (making a brief statement that pandemics may result in employee absences, changes to
anything but socially distancing in their personal or business endeavors, a novel coronavirus began silently spreading its way across Wuhan, China.\(^5\)

History supports that health-related pandemics and small-scale lockdowns are not societal novelties. What makes the COVID-19 pandemic unique, from a commerce perspective, is its breadth of economic calamity, magnitude of residential and commercial lockdowns, and novel distinctions drawn between essential and nonessential business ventures under the law. Events that transpired after COVID-19 impacting the United States now require radical tax policy initiatives to rehabilitate the ensuing economic fallout. To appreciate this Article’s ultimate appeal that critical and revolutionary tax relief be granted to nonessential businesses forcibly closed by governmental mandates, Section A offers a brief narrative of the evolution of COVID-19. Section B discusses the history of mini-lockdowns and other minor suspensions previously instituted. Finally, Section C examines the effect of government lockdowns and other restrictions on America’s small businesses.

### A. A Virus Originating Seemingly From Nowhere

The exact source of the COVID-19 virus was initially thought to originate from Wuhan, China’s Huanan Seafood Wholesale Market.\(^5\) The first recorded cases of Wuhan patients with a suspicious disease presenting as an atypical pneumonia arose in early December 2019.\(^6\) However, evidence suggests that the virus may have been circulating months prior.\(^6\) By New Year 2020 disturbing reports were emerging from China by its “citizen journalists” who then mysteriously disappeared from commerce, and interrupted supply chain).


\(^6\) deLisle & Kui, supra note 59, at 71.

The public eye.62 Gruesome images showed people dying in streets,63 infected residents sealed behind closed doors and left for dead,64 residents forcibly removed from their homes,65 portable crematory cover-ups,66

---


stacks of body bags, claims of patients being burned alive, medical personnel wearing full biohazard suits, and makeshift hospitals built in a matter of days to withstand the volume of sick and dying patients. All of these shocking and theatrical scenes were eerily reminiscent of the 2011 horror movie, Contagion, where a bat virus originating in China made the biological leap from animals to humans before rapidly spreading across the globe.

In the latter part of January 2020, the world watched as Chinese governmental authorities shut down the once thriving Wuhan metropolis. Transportation into and out of Wuhan ceased, and large-scale activities were cancelled. Commentators suggested China’s “sledgehammer” approach to its handling of the pandemic would be deemed unconstitutional in the United States, where individuals reap considerable civil liberties and human rights. Notwithstanding such rights and liberties, by April 2020, social distancing was the “new normal” in the United States—shelters-in-place ensued, in-school learning ceased, essential versus nonessential business categorizations

73. CONTAGION (Participant Media, Image Nation Abu Dhabi, Double Feature Films 2011).
74. deLisle & Kui, supra note 59, at 76.
mysteriously arose,\textsuperscript{78} and all commercial ventures identified as nonessential closed.\textsuperscript{79} While government mandated lockdowns were virtually unheard of in modern United States history, they evolved from a lengthy history of scale lockdowns imposed globally.

\section*{B. A History of Mini-Lockdowns and Other Suspensions}

History suggests that as early as the 17th Century Italian Renaissance, lockdowns were implemented to guard against pandemic health emergencies, terrorism, and industrial cataclysms.\textsuperscript{80} For example, in an effort to contain the 1630 plague, Florence, Italy went into lockdown, with individuals forced to stay home.\textsuperscript{81} When the 1665 bubonic plague emerged in London, the city similarly went into lockdown.\textsuperscript{82} During the 1800s cholera outbreak, ships were barred entry into European ports, contact with known-infected persons resulted in mass quarantining, restrictions were placed on those wanting to enter urban locations, and officials limited the mobility of beggars and prostitutes, who were considered carriers of the disease.\textsuperscript{83}

The Spanish Flu, which has been increasingly likened to the COVID-19 pandemic,\textsuperscript{84} endured lesser prohibitive measures than the 2020 lockdowns.\textsuperscript{85} Although the federal government did not Institute a

\begin{footnotesize}
\begin{enumerate}
  \item Khadilkar, \textit{id}.
  \item \textit{'Lockdown' was used during the Great Plague}, \textit{NEWS LETTER} (Nov. 16, 2020), https://www.newsletter.co.uk/arts-and-culture/film-and-tv/lockdown-was-used-during-great-plague-3037488.
  \item Eugenia Tognotti, \textit{Lessons from the History of Quarantine, from Plague to Influenza A}, \textit{EMERGING INFECTIOUS DISEASES} 254, 255-56 (2013).
  \item See \textit{e.g.}, E. Lars Phillips \\ & Lucas Hamilton, \textit{Coronavirus In Montana: Quarantine Authority In Montana}, 45 MONT. LAW. 12, 14 (2020) (noting the Spanish Flu forced public, religious, and business closures similar to the COVID movement); \textit{COVID-19’s Next Victim? The Rights Of The Accused}, DUBIN RES. \\ & CONSULTING, 44 CHAMPION 22, 23 (2020) (noting the Spanish Flu provided some legal precedent to the COVID-19 pandemic); Russell Lewis et al., \textit{COVID-19 Force Majeure To The Rescue?}, 56 TENN. B.J. 20, 20 (2020) (referencing that the Spanish Flu was the “most challenging epidemic” prior to the emergence of COVID-19).
\end{enumerate}
\end{footnotesize}
nationwide lockdown in 1918, select cities took varied actions to “flatten the curve”. In St. Louis, Missouri the health commissioner closed schools, movie theaters, and social halls while banning public gatherings. In San Francisco, mask mandates became law, with fines imposed for failure to wear face coverings in public. Violet Harris, a 15 year old living in Seattle, Washington, documented her six week lockdown experience and was delighted once her school finally reopened.

Estimates suggest that 500 million people were infected with the Spanish Flu worldwide, and between 50 and 100 million people perished. Adjusted for today’s current population, this death toll equates to between 175 and 350 million deaths. In the United States alone, approximately 675,000 people died.

More recently, in 2003 Toronto, Canada issued a city-wide lockdown, closed nonessential businesses, implemented social distancing measures, and required at least 13,000 people to quarantine in an effort to curb Severe Acute Respiratory Syndrome (SARS). President Dr. Ernest Bai Koroma issued a three-day lockdown in Sierra Leone in 2014 amidst the Ebola outbreak. Ebola also resulted in the closure of governmental offices in Liberia for 30 days, schools in Nigeria for 43 days, as well as schools and universities indefinitely in Guinea until the outbreak was under control.


---

87. Id.
88. Id.
91. John M. Berry, 1918 Revised: Lessons and Suggestions for Further Inquiry, in THE THREAT OF PANDEMIC INFLUENZA: ARE WE READY? 58, 58 (Knobler et al. eds. 2005) (adjustment based on 1918 population, which was 28 percent of the current population).
94. AIDNAN I. QUIRESHI, EBOLA VIRUS DISEASE: FROM ORIGIN TO OUTBREAK 188 (2016).
95. Hodge, Jr. et. al., supra note 94, at 360-61.
96. Jasmine Coleman, Brussels lockdown: How is city affected by terror threat?, BBC (Nov. 24,
residents were asked to avoid gatherings, restaurants and cafes closed early, and soldiers patrolled the streets amidst warnings of “serious and imminent” terrorist attacks. In 2019, a one month lockdown was imposed on a Russian naval base following an accidental missile explosion. Certainly, brief lockdowns of military bases, governmental offices, and schools in the United States have become the norm following active or potential shooter incidents. While each of these instances are critical to understanding the efficacy of emergency preparedness across numerous fronts, none of these historic examples come close to paralleling the unprecedented magnitude of global lockdowns resulting from COVID-19, and the financial calamity that followed.

C. Locking Down the Nonessentials

The first mandatory COVID-19 lockdown was recorded on January 23, 2020, in three Chinese cities: Wuhan, Ezhou, and Huanggang. Referred to as the “Wuhan lockdown,” the Chinese central government levied the “largest attempted cordon sanitaire in human history,” unknowingly creating a framework for globally mandated closures that included travel bans and business cessations. On that date, Wuhan had only 495 positive COVID-19 cases. The next day, China instituted lockdowns in twelve additional cities, and by January 28, 2020, a total of seventeen cities in the country were forcibly shut down. As a result, trains and bus systems were suspended, temperature detection centers were established, cafes, theaters and exhibitions closed, gatherings were cancelled, and

---


masks became mandatory.\textsuperscript{104} Virtually overnight, food became scarce, streets emptied, and Lunar New Year festivities were cancelled.\textsuperscript{105}

It took slightly over a month before the first European country announced a shutdown. On March 9, 2020, Italy issued a national lockdown.\textsuperscript{106} Schools and universities closed, visitors were banned from prisons, sporting events and outdoor gatherings were forbidden, curfews ensued, pubs closed, and travel restrictions were enforced.\textsuperscript{107} Italy’s ventilator crisis unfolded across television screens as the world watched.\textsuperscript{108} Countries around the globe reacted swiftly by instituting lockdowns, including in Europe, South America, Australia, the Philippines, and the Caribbean.\textsuperscript{109}

Puerto Rico was the first United States territory to institute a lockdown on March 15, 2020.\textsuperscript{110} Puerto Ricans were required, by executive order, to remain indoors for two weeks, with an overnight curfew beginning at nine o’clock.\textsuperscript{111} Violators were subject to a maximum fine of $5,000 or six months imprisonment.\textsuperscript{112} Most businesses were also forcibly shut down, with exceptions granted to grocers, pharmacies, medical equipment companies, carry-out dining, gas stations, and banks.\textsuperscript{113}

The first state in the United States to institute a move was California. On March 4, 2020, Governor Gavin Newsom declared a State of Emergency.\textsuperscript{114} The announcement came one week after Orange County officials declared health and local emergencies, without any recorded cases in the area at the time.\textsuperscript{115} On March 16, 2020, seven Bay area counties issued "shelter-in-place" orders, demanding that millions of residents stay in their homes, with exceptions granted to certain essential

\begin{thebibliography}{10}
\bibitem{105} Id.
\bibitem{107} Id.
\bibitem{109} Global Covid-19 Lockdown Tracker, supra note 101.
\bibitem{110} Id.
\bibitem{112} Id.
\bibitem{113} Id.
\bibitem{115} Id.
\end{thebibliography}
services and the homeless.\footnote{116} As more counties in the United States adopted shelter-in-place orders, Newsom issued the first statewide shelter-in-place order on March 19, 2020.\footnote{117} His \textit{Executive Order N-33-20}, which cited to the United States Department of Homeland Security’s Cybersecurity & Infrastructure Security Agency (CISA), designated certain critical infrastructures as having a “special responsibility” to remain operational during the pandemic.\footnote{118} The CISA lists sixteen critical infrastructure units that are “imperative during the response to the COVID-19 emergency” for public health, safety, and community well-being.\footnote{119} Around the same time period, Mr. Trump issued a memorandum documenting, in relevant part, “if you work in a critical infrastructure industry, as defined by the Department of Homeland Security, such as healthcare services and pharmaceutical and food supply, you have a special responsibility to maintain your normal work schedule.”\footnote{120}

Newsom’s Executive Order indicated that categorized units identified by the CISA are “so vital to the United States that their incapacitation or destruction could have a debilitating effect on security, economic security, public health or safety…” thus requiring that these businesses remain operational during the closure.\footnote{121} All businesses falling outside of such were ordered closed. Those refusing to abide by the Order were subject to a misdemeanor and fines up to $1,000, six months imprisonment, or both.\footnote{122}


\footnote{117} \textit{See Exec. Order No. 33-20, supra note 3.}


\footnote{119} \textit{See id.}


\footnote{121} \textit{Exec. Order No. 33-20, supra note 3} (In addition, the Order states that Governor Newsom “may designate additional sectors as critical in order to protect the health and well-being of all Californians”). \textit{Id.}

\footnote{122} \textit{Id. See also Cal. Gov’t Code § 8665 (1983).}
Following California’s stay-at-home order, a cascade of states quickly followed including Colorado, Hawaii, Illinois, Massachusetts, Michigan, Ohio, New York, and Virginia. Only seven states withheld from issuing such orders. Each jurisdiction that executed a stay-at-home order likewise created various distinctions between essential versus nonessential operations. While each state’s definition of “essential” (allowed to operate) as compared to “nonessential” (not allowed to operate) varied, many jurisdictions utilized the CISA guidance.

Violators of these orders faced criminal misdemeanor penalties, fines, and imprisonment. In May 2020, for example, a Dallas, Texas beauty salon owner was jailed for opening her business in defiance of the state emergency order. That same month, in Camden, New Jersey, a gym owner was arrested following a series of citations for refusing to comply with the state’s closure. Even Elon Musk reopened his Tesla factory

124. States that did not issue stay-at-home orders, supra note 20.
125. Id.
126. Defining critical industries, essential, and nonessential businesses, BALLOTPEA,
production line in defiance of Alameda County’s shelter-in-place order, later prompting the billionaire’s decision to relocate Tesla’s headquarters to Texas.¹³₀

Amidst the increasing phenomenon surrounding state-mandated closures, there appeared at the outset to be minimal federal encouragement to issue such orders. In fact, most news reports from March and April 2020 indicate that Mr. Trump encouraged “shuttered businesses to reopen,”¹³¹ Meanwhile, the Executive Office designated the Department of Homeland Security to identify critical businesses that should remain open during the pandemic and encouraged people to work from home when possible.¹³²

While characterizing essential versus nonessential businesses was left to the states,¹³³ on May 19, 2020, the CISA published an updated advisory memorandum, listing specific businesses that might fall within the critical infrastructure workforce of the United States. However, the memo noted that the list was not “a federal directive or standard” and “individual jurisdictions should add or subtract essential workforce categories based on their own requirements and discretion.”¹³⁴ States thus made independent determinations, resulting in a clash of business categorizations across the nation. Almost immediately, scholars began opining on remedies to save the nonessentials, while Congress passed the CARES Act in an attempt to “fix” the United States economy.


¹³² See Coronavirus Guidance for America, supra note 121.


¹³⁴ Supra note 119.
II. PROPOSED LOCKDOWN REMEDIES AND OTHER "FIXES"

In the Spring of 2020 when state-mandated closures reached their peak, approximately 140,000 businesses in the United States were shut down. By August of 2020, reopenings resulted in a comparatively smaller number of closures. However, almost 98,000 businesses had already permanently shuttered. These extensive closures were a result of state and local governments’ exercising police powers to regulate businesses during the health emergency.

Various reactions to the pandemic raise important questions regarding the constitutionality of such closures, particularly with respect to police powers and due process rights. While outside the scope of this Article to evaluate the constitutionality of forced closures, it is important to consider whether business owners are entitled to “just compensation” after their property was "taken" by the government, and whether such a premise is a realistic vehicle for uniform relief. In addition, Congress’ enactment of the CARES Act raises important questions as to whether such rapidly produced legislation adequately targeted nonessential businesses. Finally, scholarly proposals to implement an excess profits tax on companies profiting from COVID-19 policies contradicts historical tax policy in the United States. To better appraise these issues, Section A examines the constitutional arguments in support of nonessential businesses shuttered during the lockdowns. Section B evaluates whether the CARES Act really “cared.” Finally, Section C demonstrates that Mr. Trump’s and others’ use of the term “war” in reference to the COVID-19 pandemic is merely a metaphor to describe the challenges facing the country, rather than an actual claim that the United States is at war.

A. Taking From the Nonessential Without Just Compensation

The United States Supreme Court has supported the use of state police powers as far back as 1824, when Chief Justice John Marshall in Gibbons v. Ogden identified police powers as “that immense mass of legislation, which embraces everything within the territory of a state, not surrendered

136. Id. (By August 2020, state-mandated closures reduced business closures to 65,769).
138. Id.
to the general government." Chief Justice Marshall further acknowledged “that inspection laws, quarantine laws, and health laws of every description…” fall within the purview of state powers. Valid state police powers include laws and regulations enacted with the intent to secure and improve the population’s health and safety, and authority to enforce such laws generally resides with the governor.

The Supreme Court has yet to rule on the issue of mandatory communicable disease quarantining. Nevertheless, in the 1905 Supreme Court case, Jacobson v. Massachusetts, the Court ruled on the issue of mandatory vaccinations, thus providing some minimal guidance. The defendant in that case appealed a Massachusetts Supreme Court decision holding that the state’s smallpox vaccination mandate was constitutional. The Supreme Court affirmed the lower court’s decision, stating, in relevant part:

[T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint…a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.

Notably, however, the Jacobson Court also stressed the need for courts to intervene when state police powers are “exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what is reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons.” Notwithstanding such, the courts have generally conceded to public health authorities or legislatures in enforcing public health decisions with minimal exceptions. It is, however, feasible that select state governors exceeded...
their police power discretion when imposing lockdowns. Only history will tell whether such actions were reasonable, and not arbitrary, in light of the public health threat.150

When evaluating the legitimacy of state police powers within the context of COVID-19, scholar Edward Richards notes, “when fear is great, the public supports intrusive public health actions. When fear wanes... support wanes and officials hesitate to employ the police powers.”151 Richards does, however, acknowledge a peculiar phenomenon with regard to the recent coronavirus pandemic, observing that some courts chose to circumvent Jacobson, substituting their own judgment over that of public officials.152 Still, for more than 200 years a state’s authority to regulate and protect public health has been legally sustained,153 and thus far Jacobson remains the leading decision on the appropriate legal standard when assessing the exercise of state police powers.154

Within the milieu of COVID-19, it may prove challenging to question the validity of states’ actions to close nonessential businesses under the color of their protected police powers, absent evidence of arbitrary and unreasonable orders, or a Supreme Court overhaul of Jacobson.155 The courts have historically hesitated to apply the Due Process and Takings Clauses of the United States Constitution when governmental action takes

necessity must be in order to allow the board’s discretion to be exercised.

150. See James Gallagher & Kevin Kiley v. Galvin Newsom, No. CVCS20-0912 (Cal. App. Dep’t Super. Ct. Nov. 2, 2020)(holding that Newsom’s Executive Order regarding elections was unconstitutional as he exercised legislative power in violation of the separation of powers. The governor was further enjoined and prohibited from exercising any power under the California Emergency Services Act which amends, alters or changes existing statutory law or makes new statutory law or legislative policy).

151. Id. at 104-05 (citing to Milton J. Rosenau, The Uses of Fear in Preventive Medicine, 162 Bos. Med. & SUR. J. 305 (1910)).

152. Id. at 105. See also, e.g., Robinson v. Attorney General, 957 F. 3d 1171(11th Cir. 2020) (in finding that the state of Alabama had not made a “strong showing that is likely to succeed on its merits” with regard to its suspension of medical procedures, including abortions, during the COVID-19 pandemic, the Court found that Jacobson “was not an absolute blank check for the exercise of governmental power”). Id. at 1179. See also Roman Catholic Diocese v. Cuomo, 141 S. Ct. 63, 70 (2020) (Gorsuch, J., concurring) (“Jacobson hardly supports cutting the Constitution loose during a pandemic”). Id. at 212. But see Roman Catholic, 141 S. Ct. at 79 (Sotomayor, J., dissenting) (“Justices of this Court play a deadly game in second guessing the expert judgment of health officials.”).


155. See Jeffrey D. Jackson, Tiered Scrutiny In A Pandemic, 12 CONLAWNOW 39, 44 (2020).
the form of property regulation pursuant to state police powers. However, if state police powers are called into question, as observed recently in Robinson v. Attorney General and Roman Catholic Diocese v. Cuomo, the next examination is whether states’ orders to shutter businesses categorized as nonessential, while allowing essential businesses to thrive, pass constitutional scrutiny.

One of the principal civil rights guaranteed to persons in the United States is their right to due process under the Fifth and Fourteenth Amendments of the Constitution. The Fifth Amendment, which applies to federal action, specifically states, in relevant part, “no person shall…be deprived of life, liberty, or property, without due process of law….” The Fourteenth Amendment, applicable to individual state actions, similarly denotes, "nor shall any State deprive any person of life, liberty, or property, without due process of law…" In coalition with these due process protections, the Takings Clause indicates that property cannot be taken for public use “without just compensation.” Thus, when persons are forcibly deprived of their own private property for public use, they are entitled to fair compensation.

In the 1960 Supreme Court case, Armstrong v. United States, Justice Hugo Black wrote that the Takings Clause “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.” More than sixty years later, Justice Black’s sentiment has been extensively supported by scholars and courts as the decisive construal of Takings Clause policy. It is here, within the sphere of Armstrong

157. See Robinson v. Attorney General, 957 F. 3d 1171(11th Cir. 2020); Roman Catholic Diocese v. Cuomo, 141 S. Ct. 63 (2020). It is important to note that neither of these cases dealt with nonessential businesses being closed. In Robinson, the Court examined the legitimacy of abortion procedure suspensions in Alabama during the pandemic, while in Roman Catholic the Court reviewed whether in-person capacity restrictions on religious houses of worship were violative of plaintiffs’ right to free action during the pandemic when such capacity impositions were not put on stores, factories, and schools.
158. Johnson, supra note 138.
160. U.S. Const. amend. XIV § 1 (emphasis added). See also Laitos, supra note 160 (documenting that the 14th Amendment applies to state-level actions).
161. U.S. Const. amend. V.
162. See Laitos, supra note 160, at 9.
dogma, that aptly lays the starting point for analyzing whether states’ categorical decisions to forcibly close nonessential businesses were constitutional. It is also here where the authors suggest, from a tax policy standpoint, that fairness and justice warrant the protection of COVID-Companies, as the public as a whole should bear the economic burden of the lockdowns and not specific businesses.  

Amidst the various Spring 2020 lockdowns enacted by governors, nonessential businesses alone, in most states, bore the public burden of succumbing to forced closures. Property held by these businesses was, in essence, seized by the states after mandated closures went into effect, as business assets could no longer be commercially utilized, and the sale or lease of any such assets was impractical. While Justice Black made clear that not “every destruction or injury to property by governmental action has been held to be a ‘taking’ in the constitutional sense,” similarities can certainly be drawn between the petitioner lien holders in Armstrong and nonessential business owners harmed by state lockdowns.  

In Armstrong, the lien holders were entitled to recover the value of their liens after the United States government took title to a shipbuilder’s boats and materials following a contract default. Prior to the default, the petitioner-lien holders maintained regular, viable commercial enterprises whereby they furnished materials to the shipbuilder, which the shipbuilder then used to construct boats. When the government
ultimately took title to the boats and materials, the petitioners had yet to be paid, thus resulting in their successful argument that the government’s actions were a taking of their property without fair compensation.\footnote{171} In a similar manner, the state lockdowns impacted thousands of nonessential business owners who were previously running active commercial business operations.\footnote{172} Like the Armstrong lien-holders, the owners of these companies ran normal, day-to-day commercial ventures until their state governor instituted a mandatory lock-down, thus diminishing, or in some cases wholly abolishing, the value of their enterprises.

The Supreme Court recognizes two types of takings under the Fifth Amendment: (1) actual, physical takings of property by the government, and (2) regulatory takings.\footnote{173} Throughout most of the COVID-19 closures, states did not levy direct, physical seizures of property from residents as a result of the lockdowns.\footnote{174} Instead, nonessential business lockdowns were perhaps more representative of regulatory takings, whereby state governments limited the use of private property to such a degree that it deprived property owners of any economically reasonable use or value of their property.\footnote{175} With regard to regulatory takings, the Supreme court splices them into two categories: (1) categorical or \textit{per se} takings\footnote{176} and (2) partial takings.\footnote{177}

\textit{A \textit{per se} taking occurs when a governmental regulation “denies all economically beneficial or productive use of land.”}\footnote{178} It serves as the functional equivalent of “physical appropriation” of one’s private property.\footnote{179} Applying this standard to the various state level lockdowns...
depends on the particular facts and circumstances of each case. Certainly, in _Lucas v. South Carolina Coastal Commission_, the Supreme Court’s pronouncement that property “cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted,” creates an extraordinary legal hurdle for nonessential businesses pursuing a _per se_ taking if the state ultimately reopened for business. On the other hand, businesses that never recovered from these closures, and were unable to remain commercially viable due to bankruptcy, loss of key employees, financial deprivation, event scheduling, or any other economic annihilation, would theoretically have _per se_ takings.

Constitutional arguments for nonessential businesses that reopened after state closures lifted would likely fall within the parameter of a partial regulatory takings claim. In these situations, businesses’ values did not deplete to zero. However, because of state-mandated lockdowns, businesses’ commercial values diminished and, in many cases, substantially depleted. Analyzing the efficacy of partial takings claims is more stringent than that of _per se_ takings, requiring satisfaction of a three-part test pursuant to _Penn Central v. New York City_. Here, the Supreme Court articulated specific factors as relevant to the inquiry: (1) the economic impact of the regulation, (2) the extent to which the regulation interfered with the distinct and reasonable investment backed expectations, and (3) the character of the state’s action. As noted above, applying these standards would result in a case-by-case evaluation of each business. The Takings Clause has historically been applied to unreasonable price controls that deprive businesses of a reasonable profit. It is thus not entirely out of the realm of imagination that regulations, or in this case, governors’ orders, mandating that nonessential businesses close during the pandemic are perchance challengeable under _Penn Central_.

The challenges with nonessential businesses seeking just compensation via the Takings Clause are, however, multipronged. First, lawsuits would have to be filed by nonessential businesses already financially harmed by lockdowns. Not all of these ventures will have the financial wherewithal or desire to file costly lawsuits after suffering such devastation. Moreover, thousands of businesses in every state have been impacted by the

---

180. See id. at 1016.
184. Baughman et al., _supra_ note 184.
lockdowns. These lawsuits would clog the state and federal court dockets unless they were either consolidated or brought forth in some form of class action suit.

Second, nonessential businesses would have to prove injurious economic impact due to state-mandated closures. In some cases, this could prove exceedingly difficult given that some states have instituted second and third "rolling" lockdowns after previously lifting restrictions. Third, businesses would have to show the extent to which the closure interfered with their distinct and reasonable investment-backed expectations. This, again, may be exceptionally challenging depending on the extent of closures and restrictions involved. Certain businesses may also not have been locked down per se, but the operational restrictions were so draconian that such was the functional equivalent of being locked down. 185

In addition, injured businesses would have to successfully contend that the character of the government action of temporarily closing businesses amidst a global pandemic in an effort to protect the public health was not of greater interest than individual businesses' interests in remaining operational. 186 Perhaps the more reasonable approach with regard to this prong would be questioning governors’ justifications as to why some businesses were categorized as nonessential, while others were deemed essential. 187 Finally, there is a reasonable probability that not every state will have sufficient resources to provide just compensation to harmed businesses in light of increasing budgetary shortfalls. 188 A more appropriate response would require deployment of compensatory damages at the national level, and for purposes of this Article, in the form of radical tax reform. 189

In instances where states could possibly afford paying recompense to injured businesses that succeed in overcoming the constitutional hurdles of the Takings Clause, providing a case-by-case legal analysis for every

---

185. Draconian restrictions might include, but are not limited to, extensive limits on numbers of customers, and/or forcing indoor operations to move outdoors.
186. See Leon County v. Gluesenkamp, 873 So. 2d 460, 468 (Fla. Dist. Ct. App. 2004) (“In determining the character of the government action, courts must… balance appellees’ interests against the County’s needs to protect the public.”).
187. See Stephen L. Carter, Businesses Suing Over COVID-19 Shutdowns May Have a Case, BLOOMBERG (Apr. 26, 2020), https://www.bloomberg.com/opinion/articles/2020-04-26/business-owners-suing-over-covid-19-shutdowns-may-have-a-case (raising important questions as to why some states allowed golf courses to remain open, while others did not; why Walmart in Pennsylvania was allowed to remain operational, but liquor stores in the state were not; and why in Michigan liquor stores could remained open, but clothing stores were forced closed).
189. See infra Part III.C.
suit filed would be inefficient, expensive, and cumbersome. Perhaps such concerns played a role in Congress’ decision to pass the CARES Act, a rushed piece of tax legislation touted as critical economic relief for businesses and individuals. Scholars have since opined, however, that the CARES Act cannot be the only Congressional response available to alleviate the financial burdens of the pandemic. As discussed below, Congress’ failure to provide substantial reprieve to nonessential businesses by way of the CARES Act warrants further, more tailored relief.

B. The CARES Act That Never Cared

In response to the nascent COVID-19 recession, on March 27, 2020, Mr. Trump signed into law the CARES Act to provide emergency supplemental appropriations to individuals, families, businesses, health services, educational programs, and state and local governments. Public media referred to the $2.2 trillion dollar emergency aid legislation as unprecedented and remarkable. The CARES Act was third in a line of federal coronavirus relief bills signed that month. The CARES Act was intended to provide economic support across numerous fronts, including recovery rebate payments, payroll tax relief, unemployment insurance, 401(k) loan limit increases, charitable

---

190. See Pamela Foohey et al., CARES Act Gimmicks: How Not To Give People Money During a Pandemic and What To Do Instead, U. ILL. L. REV. ONLINE 81 (2020), at 81-2 [hereinafter Foohey et al., CARES Act Gimmicks]; Pamela Foohey et al., The Folly of Credit as Pandemic Relief, 68 UCLA L. REV. DISC. 126 (2020) (proposing the need for additional economic relief to Americans over and above the CARES Act);
191. See, e.g., Foohey et al., CARES Act Gimmicks, supra note 191, at 82 (promoting that the CARES Act financial support is not enough to provide helpful economic assistance to individuals harmed by the pandemic); Wallace, supra note 41 (proposing that the CARES Act unlimited pass-through deduction is not a “targeted response” to the COVID-19 circumstances).
194. Will the $2.2 Trillion Coronavirus Aid Package Be Enough?, KNOWLEDGE@WHARTON (Mar. 31, 2020), https://knowledge.wharton.upenn.edu/article/will-the-2-trillion-coronavirus-relief-package-be-enough/.
196. CARES Act, supra note 31, at § 6428.
197. Id. at § 2302.
198. Id. at § 3603.
199. Id. at § 2202(b).
saving the nonessential with radical tax policy

200. Id. at § 2204.
201. Id. at § 1102.
202. Id. at § 4003.
203. Id. at § 2303.
204. Id. at §§ 4022 and 4023.
205. Id. at § 3508.
206. See Wallace, supra note 41, at 2 (noting that the hastily enacted CARES Act exemplifies "a regular mode of tax legislating").
207. See Vincent, supra note 43, at 127 (noting that the CARES Act corrected a drafting error included in the TCJA that impacted qualified improvement property bonus depreciation).
208. See, e.g., CARES Act, supra note 31, at § 2303 (enacting modifications for net operating losses), and § 2306 (increasing allowable limitations on business interest expense deductions).
209. See id. at § 1103.
210. See id. at § 1113.
211. See id. at § 4021.
212. See supra notes 165-65, 169 and accompanying text.
213. See supra Part I.C.
214. CARES Act, supra note 31, at § 2301(c)(2)(A). See also TCDTRA, supra note 31, at § 303(b) (defining the term as, "any employer (A) which conducted an active trade or business in a qualified disaster zone at any time during the incident period of the qualified disaster with respect to such qualified
purposes of employee retention credit. At best, these credits provided $5,000 of relief per employee, which was minimally increased by the Tax Certainty and Disaster Tax Relief Act of 2020 ("TCDTRA"). Such was not nearly enough to cover the monumental losses suffered under the lockdowns. Other than the aforementioned, every other relief provision included in the CARES Act applies to all ventures, regardless of characterized distinction.

The CARES Act is comprised of several business tax assistance provisions intended to relieve the financial burdens on companies impaired by COVID-19. Embedded within Subtitle C of the CARES Act, these business provisions provide tax flexibility, and extend temporary relief for certain facets of the TCJA. The following chart identifies the pertinent sections of the CARES Act that provide some form of tax reprieve for all business operations in the United States.

<table>
<thead>
<tr>
<th>Applicable CARES Act Provisions</th>
<th>Brief Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employee Retention Credit For Employers Subject to Closure Due to COVID-19 CARES Act § 2301</td>
<td>Provides eligible employers with a refundable payroll tax credit of up to $5,000 for qualified wages paid to employees from March 13, 2020, to December 31, 2020.</td>
</tr>
<tr>
<td>Updated per the TCDTRA of 2020 § 303</td>
<td></td>
</tr>
<tr>
<td>Delay of Payment of Employer Payroll Taxes CARES Act § 2302</td>
<td>Allows an employer to defer its deposit and payment of the employer’s share of Social Security and select railroad retirement taxes.</td>
</tr>
<tr>
<td>Modifications for net operating losses CARES Act § 2303</td>
<td>Allows a 5 year carryback for NOLs arising in 2018, 2019, and 2020; temporarily repeals the 80% of taxable income limitation carryback rule; and corrects TCJA § 13302(e) by changing the original limitation on</td>
</tr>
</tbody>
</table>

disaster zone, and (B) with respect to whom the trade or business described in subparagraph (A) is inoperable at any time during the period beginning on the first day of the incident period of such qualified disaster and ending on the date of the enactment of this Act, as a result of damage sustained by reason of such qualified disaster”).

215. CARES Act, supra note 31, at § 2301(c)(2) (allowing a credit to be taken by eligible employers against applicable employment taxes in an amount equal to 50% of qualified wages for each employee). Id. at § 2301(a).

216. Id. at § 2301. See also TCDTRA, supra note 31 (increasing the amount of qualified wages).

217. The authors acknowledge that some provisions included in the CARES Act, such as the § 2304, specifically apply to taxpayers other than corporations (i.e., individuals and pass-through entities); however, there still exists no distinction in this section as to whether the benefit extended is available to nonessential businesses, as compared to essential businesses.
2021] SAVING THE NONESSENTIAL 227

| Modification of limitation on losses for taxpayers other than corporations |
| CARES Act § 2304 | Temporarily suspends IRC § 461(i), thus allowing for unlimited pass-through deductions of certain business tax losses. |
| Modification of credit for prior year minimum tax liability of corporations |
| CARES Act § 2305 | Allows corporations to accelerate the use of any of their remaining minimum tax credits (MTCs) for their 2019 tax years from their 2021 tax year, and further allows corporations to instead elect to recover 100% of any remaining MTCs in their 2018 tax year. |
| Modifications of limitation on business interest |
| CARES Act § 2306 | Increases the 30% limitation established in the TCJA on the deduction for business interest expense to 50% of adjusted taxable income for tax years beginning 2019 and 2020; and beginning in 2020 taxpayers can also elect to use their 2019 adjusted taxable income in determining the 50% limitation. |
| Technical amendments regarding qualified improvement property |
| CARES Act § 2307 | Fixes the “retail glitch” created by the TCJA by assigning a 15 year recovery period, and permitting 100% bonus depreciation, for qualified income property (QIP). |

As the above chart depicts, seven of the CARES Act provisions were specifically designed to assist businesses during the pandemic. As previously mentioned, just one provision limits relief specifically to those businesses required to suspend operations because of state-mandated lockdowns. The following subparts analyze these provisions more directly.

1. Section 2301 – Employee Retention Credit

Section 2301 of the CARES Act, later amended by the TCDTRA, provides eligible employers with a refundable tax credit against their share of the employment (payroll) tax, equal to a maximum of 50 percent

---

218. See CARES Act, supra note 31, at § 2301.
of qualified wages paid to employees, with a maximum credit available for each employee of $5,000. To be credit-eligible, employers must run a business operation that was either fully or partially suspended due to governmental orders limiting commerce, travel, or group meetings during 2020. For employers with 100 or less full-time employees, the credit is available on wages up to $10,000 per employee; for those with more than 100 employees, qualified wages are limited to salaries paid to employees who were unable to provide services due to the pandemic. This credit is offered in addition to the Families First Coronavirus Response Act (FFCRA) payroll tax credits related to paid employee leave. While the credit provides some relief to nonessential businesses, it is not enough to offset the totality of economic damages suffered by these entities. In addition, the credit is entirely based on employees and their wages and thus wholly inadequate for the over 34 million non-employer sole proprietors running business operations in the United States. The six remaining CARES Act business tax provisions grant relief to business ventures, regardless of whether they were shut down. One could argue, however, that the entire CARES Act, or a substantial portion of the relief provided under it, should have applied only to businesses forcibly locked down or which suffered a significant decline in gross receipts due to COVID-19 closures. Instead, CARES Act relief was not effectively targeted—granting general tax relief to numerous businesses not in need of financial assistance.

219. This percentage has since been increased to “70 percent of the average quarterly wages paid by the employer in calendar year 2019” per the TCDTRA. See TCDTRA, supra note 31, at § 207(b).
220. CARES Act, supra note 31, at § 2301 (this provision applies to wages paid after March 12, 2020 through December 31, 2020). The total wages that are attributed to an employee are capped at $10,000, thus resulting in a maximum available credit per employee of $5,000. Id. at (a), (b). Note that this amount has since been increased per the TCDTRA.
221. Id. at § 2301(c)(2)(A). This provision also applies to businesses that did not shut down, but which suffered significant declines in gross receipts during this period, and tax-exempt organizations. Id. at (c)(2)(B), (C). See also TCDTRA, supra note 31, at § 207(c) (amending the CARES Act § 2301(b)(1) by striking “for all calendar quarters shall not exceed $10,000”, and inserting, “for any calendar quarter shall not exceed $10,000”).
223. Id. at (c)(3)(A)(i).
225. Self-employment income included in Schedule C of Form 1040, U.S. Individual Income Tax Return, does not qualify for this credit, nor do wages paid to direct family members. For the credit to apply, a sole proprietor must have employees. Per 2018 United States Census data, there are more than 34 million non-employer businesses in the United States. Because many small businesses are sole proprietorships with no employees or non-family member employees, the credit provides no relief to them. For additional data regarding the latest non-employer statistics, see 2018 CBF and NES Combined Report, U.S. CENSUS BUREAU, https://www.census.gov/data/tables/2018/econ/nonemployer-statistics/2018-combined-report.html (last visited Feb. 15, 2021).
226. See Terry Gross, How The CARES Act Became A Tax-Break Bonanza For The Rich, Explained,
2. Sections 2302 & 2305 – Employer Payroll Tax Payment Delays and the AMT

Section 2302 of the CARES Act allows all employers, including governmental entities, to defer the deposit and payment of their share of Social Security and certain railroad taxes as required by the Code.\textsuperscript{227} Section 2305 allows corporations to claim a refund of their alternative minimum tax (“AMT”) credits. In particular, this provision amends Code section 53(e), allowing corporations the opportunity to accelerate recovery of any outstanding minimum tax credits (“MTC”) in tax years beginning in 2019, even though at that time the United States pandemic was non-existent.\textsuperscript{228} This same provision allows corporations the option to recover 100 percent of their remaining MTCs beginning in tax year 2018.\textsuperscript{229} In effect, Congress remarkably chose to provide relief in tax years wholly unrelated to COVID-19.

3. Section 2307 – Technical Amendments

Section 2307 of the CARES Act implements a technical correction to a TCJA provision.\textsuperscript{230} Beginning January 1, 2018, Congress intended to include Qualified Improvement Property (“QIP”) as 15-year property, thus allowing bonus-depreciation eligibility beginning in 2018 via the TCJA.\textsuperscript{231} In doing so, the TCJA eliminated three categories of assets, including Qualified Leasehold Improvement Property, Qualified Restaurant Property, and Qualified Retail Improvement Property, and instead consolidated them all into QIP.\textsuperscript{232} However, because of a Congressional drafting error, QIP was not specifically included in the definition of 15-year property in Code section 163(e)(3)(E), nor as “qualified property” in Code section 168(k)(2)(A).\textsuperscript{233} Thus, QIP remained as 39-year property and was therefore ineligible for bonus depreciation.\textsuperscript{234} To amend this error, the CARES Act implemented a correction which

\textsuperscript{227} See CARES Act, supra note 31, at § 2302(a). See also I.R.C. §§ 3111(a); 3221(a).
\textsuperscript{228} See CARES Act, supra note 31, at § 2305(a)(2), (d). See also I.R.C. § 53(e).
\textsuperscript{229} CARES Act, supra note 31, at § 2305(a)(1), (b).
\textsuperscript{232} See I.R.C. § 168(e)(3)(E).
\textsuperscript{233} See CARES Act Fixes the Retail Glitch, supra note 232.
\textsuperscript{234} Id.
allows for 100 percent bonus depreciation for QIP. These technical corrections are intended to fix prior legislation, rather than provide financial stimulus.

4. Sections 2303, 2304, & 2306 – Relaxing the Rules

Sections 2303, 2304, and 2306 of the CARES Act relax the rules on tax loss and deduction claims. Section 2303 expands taxpayers’ abilities to deduct NOLs arising prior to January 1, 2021 by temporarily repealing the 80% taxable income limitation imposed by the TCJA, thus allowing businesses to completely offset their taxable income using the new 5-year carryback period provided in the CARES Act. As a consequence, NOLs incurred during the 2018-2020 tax years can now reduce taxable income earned during the five-year period prior to the taxable year in which they were incurred, without the taxable income limitation for the 2018-2020 tax years.

While financially valuable, the carry back benefit is moot for small businesses that had yet to turn a profit prior to 2020. The CARES Act does, however, permit businesses to elect to forego the carryback for tax years 2018-2020 to carry forward to future tax years—provided, however, any carryforwards to tax year 2021 and beyond will be subject to the 80% taxable income limitation (and of course the corporate rate is much lower than tax years 2017 and before - i.e., a flat 21% rate). Carrying NOLs forward therefore can prove disadvantageous for many companies.

Considering that only 40 percent of small businesses are ever profitable, and start-up companies have been hit especially hard during the pandemic, Section 2303 is more advantageous to businesses historically in the black. Using NOLs as a form of "financial relief" is also concerning in that determining the exact amount of relief available depends on the tax attributes of each specific company. In addition,

235. See CARES Act, supra note 31, at § 2307.
236. See id. at § 2303(a), (b). See also I.R.C. § 172(a).
240. Martin A. Sullivan, Economic Analysis: Monetizing NOLs During a Recession, 98 TAX NOTES INT’L, 994, 998, June 1, 2020 ("The use of NOLs during the prior two recessions holds two lessons. First, it is inherently difficult for current NOLs to provide immediate cash flow to businesses and rapid stimulus to the economy. Based on a review of procedures and the data, a lag of a year between occurrence of the loss and receipt of a refund seems common. Second, complexity and diminution of tax benefits (attributable to the interaction of carrybacks with other tax provisions) significantly reduces the use of...")
these rules were loosened for tax years wholly unrelated to the pandemic, which is peculiar (i.e., 2018 and 2019). The precise amount of relief available is further complicated as companies require prior year profitability before they can take advantage of NOL carrybacks, and NOLs are not dollar-for-dollar. Thus, such relaxed NOL rules are of great benefit for some companies but of little to no benefit for others. Finally, as stated above, the CARES Act does not distinguish between essential and nonessential businesses, thereby prompting an important question as to why essential businesses profiting from the lockdowns are permitted to utilize relaxed NOL rules against prior profitable years that have no association to the pandemic or mandated lockdowns. Such an arbitrary provision begets a blanket tax giveaway, regardless of whether businesses were harmed by pandemic closures.

Section 2304 of the CARES Act amends Code section 461(l), which imposes limits on excess business losses of noncorporate taxpayers. Before the TCJA’s passage, individuals, estates and taxable trusts that realized business losses directly (or through pass-through entities) could generally offset those losses against non-business income, and carry any resulting NOLs back two years. In 2017, the TCJA restricted the ability to deduct these losses against non-business income to no more than $250,000 (or $500,000 for joint filers). In addition, Code section 461(l) removed the availability of NOL carrybacks. Section 2304 of the CARES Act provides some relief to these limitations. In particular, individuals, estates, and taxable trusts can now temporarily use business losses to offset non-business income above the previously established limits for tax years 2018-2020, with any remaining losses treated as NOLs. These relaxed rules are available for all individuals, estates and taxable trusts; however, they are contingent on each taxpayer's particular

NOL carrybacks below what might be expected based on the conventional wisdom that carrybacks are more valuable than carryforwards.

241. For example, a NOL carried back to tax years 2017 (and prior) are subject to graduated corporate rates ranging from 15% to 35% with two surcharge tax brackets of 39% and 38%, respectively. Therefore, the exact amount of the "dollar-for-dollar" refund to the taxpayer depends on what the entity's "taxable income" was for that tax year involved (e.g., if it was 15%, it is 15% times the carryback). For tax years, 2018 and forward, however, the corporate rate is a flat 21%, so any carryback deduction will be exposed to a 21% rate with a resulting dollar-for-dollar refund.

244. See CARES Act, supra note 31, at § 2304. See also I.R.C. § 461(l) (2017) (preventing noncorporate taxpayers from deducting business losses in excess of $250,000 ($500,000 for joint returns)).
246. See CARES Act, supra note 31, at § 2304(a). See also Karch & Ruff, supra note 244.
247. CARES Act, supra note 31, at § 2304(c). See also Karch & Ruff, supra note 244.
tax circumstances. Section 2304 is largely impractical for many small businesses.\textsuperscript{248} Suspending this provision only allows those taxpayers with exorbitant incomes to deduct the full amount of their tax losses against available non-business income, thus reducing or eliminating their income tax liability currently and retroactively.\textsuperscript{249} In comparison, small businesses that have little-to-no ability to offset losses in this manner will continue to struggle. Funding large tax cuts for the wealthy, instead of creating pandemic relief tax policy aimed at supporting those most negatively impacted by the lockdowns, is largely inappropriate.\textsuperscript{250}

Completing the trifecta of CARES Act provisions aimed at tax loss and deduction relief, section 2306 relaxes the limitations imposed by the TCJA on the deductibility of business interest expenses.\textsuperscript{251} Code section 164(j) previously enforced a limitation on the deduction for business interest expenses based on the sum of the taxpayer’s business interest, including 30 percent of their adjusted taxable income and floor plan financing interest for the taxable year.\textsuperscript{252} These limits were imposed on businesses with average annual gross receipts of $25,000,000 or more over the prior three year period.\textsuperscript{253} Many small businesses designated as nonessential were never limited by this provision because of the gross receipts threshold. Nevertheless, section 2306 lessened these limitations by increasing the adjusted taxable income percentage to 50 percent for tax years 2019 and 2020.\textsuperscript{254} In addition, beginning in 2020 taxpayers can elect to use their 2019 adjusted taxable income to determine the 50 percent limitation.\textsuperscript{255} This provision benefits taxpayers whose income fell in 2020, as compared to 2019.\textsuperscript{256} Overall, however, the usefulness of this provision to small businesses is questionable due to the gross receipts threshold.

Congress’ failure to distinguish between essential and nonessential businesses in the CARES Act is a fatal flaw in addressing lockdown inequities. In many respects, the CARES Act was a knee-jerk reaction to a crisis, indiscriminately sprinkling tax benefits upon businesses with little thought given to tailoring the specific relief to those needing it

\textsuperscript{248} CARES Act, supra note 31. See also Karch & Ruff, supra note 244.
\textsuperscript{249} Wallace, supra note 41.
\textsuperscript{250} See Jeff Cox, A Record 20.5 million jobs were lost in April as unemployment rate jumps to 14.7%, CNBC (May 8, 2020), https://www.cnbc.com/2020/05/08/jobs-report-april-2020.html.
\textsuperscript{251} See CARES Act, supra note 31, at § 2306. See also I.R.C. § 163(j)(2017).
\textsuperscript{252} See I.R.C. § 163(j)(1).
\textsuperscript{253} See I.R.C. §§ 163(j)(3); 448(c)(1).
\textsuperscript{254} CARES Act, supra note 31, at § 2306 (a)(10)(A)(i).
\textsuperscript{255} Id. at (a)(10)(B).
most—the nonessentials. The essential businesses that remained operational and profitable do not require additional tax relief. With the exception of the payroll retention credit, Congress’ decision to grant tax relief to all businesses merely accelerated the unfair advantage essential companies already had over the nonessentials. It serves as the proverbial salt in the wound of governmental injustice.

Another concern is that the relief provided under the CARES Act was not substantial enough to offset the magnitude of economic devastation caused by the lockdowns. While in totality the CARES Act provided over $2 trillion in funds, many small businesses may never recover. For those that survived, McKinsey estimates it may take decades to financially recuperate, requiring long-term, hand-holding solutions akin to the below-proposed tax-exemptions. The unique issues faced by small businesses, including slim margins, low financial resilience, heavy debt, and minimal cash liquidity to fund the additional costs required for Center for Disease Control (CDC) compliance, makes rapid recovery extremely difficult.

There has not been a level playing field in the marketplace since March 2020. Nonessential businesses were benched, while essential businesses hit home runs—posting record sales and profits. The CARES Act enhanced this inequity. Cleaning services, grocers, fitness equipment companies, mask makers, and telehealth companies thrived because of increased consumer demands. From January to August 2020, e-commerce sales exceeded $2 billion on 130 separate days, as compared to 2019 when only two days hit such a mark. While online sales skyrocketed, brick-and-mortar establishments crumbled.


259. Id.

260. Id. See also infra Part III.C.

261. See id.


percent of businesses listed on Yelp closed permanently due to lockdown disruptions and restrictions.\textsuperscript{266} Eight hundred small businesses filed for Chapter 11 bankruptcy between mid-February and July 31, 2020.\textsuperscript{267} Hospitality operations, sports and performing art centers, restaurants, bars, and clothing stores were among the hardest hit.\textsuperscript{268} While the CARES Act provided unemployment aid and small business payroll support systems, it also gave financial assistance to companies profiting during the lockdowns.\textsuperscript{269}

Economic aid under the CARES Act is disproportionally granted to large companies.\textsuperscript{270} The economic relief should have been directed at nonessential businesses forcibly shut down. If Congress really "cared" about small businesses, it would have offered deliberate and targeted support, carefully distinguishing between essential and nonessential businesses. Responding to concerns that essential businesses and select industries have financially capitalized on the lockdowns, some have proposed that an excess profits tax should be imposed to curb corporate profiteering, as next discussed.\textsuperscript{271}

\textbf{C. You Can't Have An Excess Profits Tax Without a War}

On January 31, 2020, United States Secretary of Health and Human Services ("HHS"), Alex M. Azar II, pronounced a public health emergency.\textsuperscript{272} Within two months, Mr. Trump declared a "national emergency."\textsuperscript{273} Rather than frame the emergency as a public health crisis, however, Mr. Trump and others, both domestically and abroad, employed wartime rhetoric to reference COVID-19.\textsuperscript{274} Such metaphorical use of the term "war" during the global pandemic is perhaps not surprising, given


\textsuperscript{268} Bryan Pietsch, \textit{20.5 million people lost their jobs in April. Here are the 10 job types that were hardest hit}, BUS. INSIDER (May 12, 2020), https://www.businessinsider.com/jobs-industries-careers-hardest-by-coronavirus-unemployment-data-2020-5.

\textsuperscript{269} Bivens & Shierholz, supra note 258.


\textsuperscript{271} See, e.g., Christians & Magalhães, supra note 29.


\textsuperscript{273} Facher, supra note 18.

\textsuperscript{274} Musu, supra note 140.
the United States’ obsession with war.275 Still, categorizing a national public health emergency as “war” is not a formidable approach to salvaging nonessential businesses harmed by lockdowns and restrictions.

Even before declaring a national emergency, in March 2020, Mr. Trump labeled himself as a “war-time president” battling an invisible enemy.276 That same month, French President Emmanuel Macron told his people, “We are at War.”277 In April 2020, Queen Elizabeth informed her constituents, “we will meet again,” summoning the spirit of World War I while assuring her country that “Together we are tackling this disease.”278 Politicians in the United States made similar wartime references amidst the pandemic. New York Governor Andrew Cuomo referred to health care workers as “soldiers in this fight.”279 Alabama Governor Kay Ivey informed her state, “[w]e are at war with an invisible enemy.”280 Even Bank of America CEO Brian Moynihan publicly acknowledged, “[w]e’re in a war to contain this virus.”281

Such rhetoric manifests a sustained history of leaders declaring “war” against an enemy, no matter how realistically palpable the opponent is.282 In 1971, President Richard Nixon declared a “war on cancer.”283 President George W. Bush was the first to use the term “war on terrorism” in reference to a battle with no identifiable enemy nation-state.284 President Lyndon B. Johnson used wartime rhetoric in reference to the “war on poverty.”285 President Ronald Reagan’s infamous “war on drugs”


276. Id.


282. Renfro, supra note 276.


284. See id. (“I do not intend that the war against poverty become a series of uncoordinated and unrelated efforts…”).

campaign resulted in some questioning whether it was, instead, a “war on Blacks.” In fact, such combative expression is so commonplace in American culture that it has been exploited across numerous political escapades, including the “war on reason,” “war on cops,” “war on culture,” and “war on truth.”

Some have questioned the social costs of using warfare metaphors as a substitute for circumstantial reality. The use of such rhetoric has led certain Americans to feel marginalized, diversified, and fatigued, while others enjoy the abstract glorification that their nation is engaged in battle, without actually experiencing the “horrors and sacrifices” of war.

War, by definition, equates to “a state of usually open and declared armed hostile conflict between states or nations.”

The COVID-19 pandemic is not a war any more than the fight against
cancer or heart disease. Unlike actual wars that often come to an end, the "war" against COVID-19 may never fully conclude, as similarly realized in health battles against pneumonia, the common cold, human immunodeficiency virus (HIV), or herpes. Disease is certainly an enemy of the people, making it easy for humanity to embrace a wartime metaphor to feel secure against its rage.

However, those who suggest that an excess profits tax be imposed on large companies benefitting from COVID-19 are misappropriating such rhetoric. Imposing an excess profits tax to combat the pandemic’s economic damage would contradict historical tax policy, as federal tax policy supports the use of an excess profits tax only “in time[s] of war.”

The United States first experimented with an excess profits tax during the Civil War. In 1893, the state of Georgia adopted a graduated excess profits tax based on a ratio of invested capital to profits. The tax was a consequence of a generalized public concern over certain war-profiting, particularly with regard to those manufacturing uniforms and other war-related materials.

A munitions tax was instituted on profits in the Revenue Act of 1916. In addition to the typical income tax, the munitions tax was a flat excise tax of 12.5 percent imposed on the net profits from the sale or disposition of munitions. “Munitions” included ammunition, and other articles of war like gunpowder, firearms, cannons, electric motor boats, and...
submarines.\textsuperscript{308} Claude Kitchin, United States House of Representatives majority leader, and chairman for the House Ways and Means Committee, defended the tax, noting that companies like DuPont held a monopoly on the sale of gun powder to the government.\textsuperscript{309}

In 1917, the excess profits tax entered the taxing landscape to finance World War I.\textsuperscript{310} In particular, the United Kingdom (UK), Canada, New Zealand, South Africa, France, Italy, and the United States introduced excess profits taxes in light of the massive governmental expenditures needed for combat.\textsuperscript{311} In the United States, the eight percent tax was levied on corporations and partnerships with net income exceeding $5,000 and eight percent of actual capital invested.\textsuperscript{312} It was met with significant controversy and protest,\textsuperscript{313} resulting in few paying any tax under the original bill.\textsuperscript{314} Instead, the Revenue Act of 1917 was largely superseded by the War Revenue Act, which Congress implemented to help defray war costs.\textsuperscript{315} The new revenue act included graduated rates ranging from 20 to 60 percent.\textsuperscript{316} The War Revenue Act was in effect only briefly, subsequently replaced one year later.\textsuperscript{317} The 1918 excess profits tax was only levied on corporations, at a rate of 80 percent.\textsuperscript{318} While the rate varied in tax years 1919, 1920 and 1921, it increased to an astounding 95 percent during World War II.\textsuperscript{319} The tax has since remained dormant.

Recently, as many essential businesses’ profits increased dramatically amidst state lockdowns, commentators proposed the re-deployment of an

\textsuperscript{308} Id.
\textsuperscript{309} Mehroura, supra note 49, at 184 n. 25, 204-05.
\textsuperscript{310} Peter A. Prescott, Taxing Luck, 83 MISS. L.J. 117, 129 (2014).
\textsuperscript{312} Revenue Act of 1917, 65 P.L. 50, 39 Stat. 1000 (1917) (Capital was defined to include cash paid in, the cash value of assets other than cash at the time of payment, and undivided profits used or employed in the business.). Id.
\textsuperscript{313} George E. Holmes, The Excess Profits Tax of 1917, 4 THE BULL. OF THE NAT’L TAX ASSOC. 7, 7 (1918) ("A storm of protest greeted the introduction of this bill, which was heightened by the unfortunate expression of its sponsor that the tax would be collected and paid north of the Mason and Dixon line. Nevertheless, the bill was enacted in its original form, but its effect was nullified by the Act of October 3, 1917...”).
\textsuperscript{314} Id. ("A small amount of tax was collected under the Act of March 3, 1917, from corporations and partnerships whose fiscal years ended after the beginning of the calendar year and prior to the passage of the later law.”).
\textsuperscript{315} War Revenue Act, ch. 63, 40 Stat. 300 (1917). See also Holmes, supra note 314, at 7.
\textsuperscript{316} Scott A. Hodge, The History of Excess Profits Taxes Not as Effective or Harmless as Today’s Advocate’s Portray, TAX FOUND. (July 22, 2020), https://taxfoundation.org/excess-profits-tax-pandemic-profits-tax/.
\textsuperscript{317} Id.
\textsuperscript{318} Id.
\textsuperscript{319} Id.
excess profits tax to remedy perceived inequitable profiteering.\(^{320}\) Professor Reuven S. Avi-Yonah was one of the first tax scholars to do so, suggesting that such taxes be employed at a rate of 95 percent on companies benefitting from the pandemic.\(^{321}\) He recommended using a modified version of the average earnings method to calculate the excess profits tax, using book income instead of taxable income.\(^{322}\) He suggested the 95 percent tax rate should apply against the excess amount of income over a certain calculated base amount.\(^{323}\)

Many economists have similarly recommended implementing an excess profits tax to target COVID-profiting companies,\(^{324}\) as have certain tax policy institutes.\(^{325}\) Congressional member Tulsi Gabbard (D-Hawaii) introduced a resolution in the House of Representatives for an excess profits tax on corporations benefiting from the pandemic and use the revenue to assist small businesses.\(^{326}\) Her proposal suggests a 95 percent tax rate (similar to Avi-Yonah’s proposal), using average “gross receipts” from 2016-2019 as the base from which to subtract 2020 gross earnings.\(^{327}\) Scholars Tarcisio Magalhaes and Allison Christians suggest

---


322. Id. (In addition, using net (taxable) income as the base is problematic because many highly profitable corporations can reduce or eliminate their tax liability by using deductions for tax purposes but not for book purposes. For example, Amazon paid little tax in 2019 because it (a) expenses physical equipment like servers and warehouses under the TCJA, (d) expenses R&D, and (c) deducts the excess value of its stock over the exercise price of stock options…Therefore, the tax base should be book income, not taxable income.”). See also Michelle L. Engler, Corporate Tax Shelters And Narrowing The Book/ Tax “GAAP”, 2001 COLUM. BUS. L. REV. 539, 541 (2001).

323. Id.


327. Id. ("That it is the sense of the House of Representatives that Congress should reinstate a pandemic excess profits tax on large corporations who have made excess profits due to the pandemic and
that imposing a national-level excess profits tax would be ineffective, as
the mobility of numerous business’ capital and profits would enhance
existing base erosion and profit shifting concerns. Instead, they
recommend a "global excess profits tax," where country-by-county
reporting exists, thus making such tax imposition more efficient and
effective. Other commentators, like Joseph J. Thorndike, suggest that an excess
profits tax misaligns the current issues, arguing that a "health care crisis"
is distinctly different from a wartime crisis and the respective "sacrifices"
involved. Some decry proponents of an excess profits tax as using the
pandemic as an opportunity to further pre-crisis preferences for higher
taxation on profitable multinationals. In addition, some scholars find
that historic excess profits taxes were difficult to administer, created
compliance complexities, undermined innovation, and impacted
economic growth. Certainly, others have proposed additional tax
solutions to the COVID-19 crisis, including expanding sales taxes,
imposing mark-to-market taxation on certain types of wealth, and
implementing digital advertising taxes.

At first glance, proposals to increase taxation on companies that
"profited" from the pandemic are superficially alluring. While
nonessential businesses lost profits due to closures, essential businesses
were permitted to thrive. However, the current COVID-19 crisis is by no
means a "wartime" scenario; nor does it involve the same physical
sacrifices as required on foreign battlefields during actual wartime.
Instead, as discussed, the "wartime" metaphor that Mr. Trump and others
have used in reference to the pandemic is mere rhetoric. Mandated
lockdowns, and corresponding damages, were a direct result of numerous
(albeit, not all) state governors’ actions, rather than an enemy

related government restrictions by using average gross earnings from 2016, 2017, 2018, and 2019 and
subtract the average from total 2020 gross earnings, and apply a 95-percent tax rate to the excess profits
which shall be directed to fund economic relief to small businesses."). It is unclear whether this resolution
would apply to book income or tax income.

328. Christians & Magalhães, supra note 29, at 508; Tarcisio Diniz Magalhães & Allison
329. Magalhães & Christians, supra note 329.
330. Joseph J. Thorndike, Should We Tax Excess Profits or Pandemic Profits? 167 TAX NOTES
FED. 399, 404, Apr. 20, 2020, ("As I have argued recently, I'm not entirely convinced that the moral
arguments buttressing wartime excess profits taxes will translate so easily into the current pandemic
emergency; limiting the profits of arms manufacturers carries a different moral and political valence than
limiting profits of vaccine producers.").
331. George K. Yin, Is it Really Time for an Excess Profits Tax? 167 TAX NOTES FED. 833, 834,
332. See Hodge, supra note 317.
333. See e.g., Lauren Loricchio, Academics Offer Solutions to Address COVID-19 Fiscal Crisis,
334. See supra Part II.C.
combattant. Essential businesses played no part in this decision-making process, which effectively evolved from federal CISA guidance.

Imposing an excess profits tax on pandemic-profiting businesses is a slippery slope because of the vagueness in identifying with any certainty what “profiting” means under the circumstances. For example, should profits attributable to the overriding health crisis, including vaccine or Personal Protective Equipment (PPE) sales, be included? Should select business ventures, allowed to remain operational in some states, but forcibly closed in others, be targeted for profiting? Does merely being in a state of a pandemic warrant the imposition of an excess profits tax on abnormally high profits; and if so, how would excessive profits be determined?

During war times, increased military spending helped expand economic activity and the gross domestic product (GDP). Historically, the United States government spent significant funds on military contracts for war-like amenities, including ammunition and aircraft. Governmental contracts guaranteed a market for wartime production. The United States government constructed and owned contractor-run factories that manufactured wartime products, and purchase agreements between the government and the private sector helped eliminate private production risks. Throughout, lives were lost on foreign battlegrounds, thus legitimizing a tax on the "excess" profits of the "merchants of death" that profited from manufacturing weapons, ammunitions, and aircraft.

COVID-profiting businesses do not resemble war-profiting merchants. For example, Home Depot’s increased lumber sales due to persons

335. See supra Part I.C.
336. Id.
337. See Thorndike, supra note 29, at 2026 (suggesting that health care in general conceptually profits from the personal suffering of others, yet it also produces a good for society and those suffering).
338. In keeping with this query, the authors question how “abnormally high” would be determined? Would a theoretical standard be required to help establish what earnings should otherwise “look like”, perhaps based on prior earnings or capital?
339. Economic Consequences of War on the U.S. Economy, INST. FOR ECON. & PEACE, https://www.economicsandpeace.org/wp-content/uploads/2015/06/The-Economic-Consequences-of-War-on-US-Economy_0.pdf (last accessed Sept. 25, 2021) (“Using data from the Bureau of Economic Analysis, figure one shows the composition of U.S. GDP in consumption, investment, government spending and net exports and imports in per-capita terms. It can be seen the war years of 1941 to 1945 saw one of the most significant short term increases in economic growth in the history of the U.S. economy.”).
341. See Thorndike, supra note 29, at 2024.
342. Id.
343. Id.
tackling home improvement projects while under state-mandated quarantines should not result in added tax penalization any more than increased lumber sales should following hurricanes. Likewise, the surplus in persons’ streaming movies while under quarantine should not result in Amazon Prime being penalized with additional taxes, any more than when viewers set TV viewing records during blizzards. Increased lumber sales and video streaming as a result of unanticipated state actions should not be equated to circumstances where businesses manufacture ammunition under guaranteed government contracts with no market risk while soldiers are on the front lines dying.

An additional concern in imposing an excess profits tax is defining the exact nature of "excess" profit. It is not uncommon for a successful company, like Amazon, to continually outperform analysts’ expectations in predicting its quarterly earnings. If expert analysts are unable to accurately predict Amazon’s earnings, then there is little confidence that the United States government can adequately predict what a base amount of Amazon’s "normal" earnings should look like, and what constitutes "excess" earnings. An excess profits tax would surely stifle growth, innovation and efficiencies in companies exceeding earnings expectations. Even prior to the COVID-19 pandemic, Amazon was surpassing earning prospects.

As discussed, two methods have historically been used to assess a company's excess profits: (1) the invested capital method and (2) the


351. Id.

352. Id.

353. See supra note 305 and accompanying text.
average earnings method.\textsuperscript{354} As scholar Avi-Yonah suggests, the invested capital method may be problematic for high-tech companies that are not capital intensive.\textsuperscript{355} Instead, he suggests the average earnings method be used.\textsuperscript{356} In deploying this method, he recommends using book income instead of taxable income because of companies like Amazon having low tax exposure.\textsuperscript{357}

While book income can be significantly higher than taxable income, it is based on an entirely different set of principles, namely GAAP.\textsuperscript{358} In contrast, taxable income is determined under the Code.\textsuperscript{359} As scholar Mitchell Engler notes, these two sets of rules create a “mismatch of tax and book reporting[.]”\textsuperscript{360} The Code provides various opportunities for taxpayers to reduce their taxable income to the extent possible; in contrast, corporate managers are encouraged to increase their book income to the extent possible as shareholders, investors, and creditors prefer companies with high earnings. For tax purposes, losses and deductions are generally favored; in contrast, losses and deductions decrease book income and are thus generally disfavored. From a tax policy perspective, it would be inappropriate to assess a tax on excess profits defined under a set of rules outside the purview of the Code. Such concern would likewise exist if a global excess profits tax was imposed using GAAP principals.

The above recommendations suggest a repackaged version of a long-standing concern that many tax scholars harbor with respect to multinational companies earning significant income without paying their fair share.\textsuperscript{361} However, recommending an excess profits tax as a backdoor means of addressing this issue is not appropriate. Such endorsement misses the underlying point of the excess profits tax, and its historical purpose. It also runs contrary to the current direction of the Code and the many tax incentives and avoidance opportunities it provides.

Numerous companies deemed “essential” were profiting long before the onset of the pandemic,\textsuperscript{362} taking advantage of the evolving

\begin{itemize}
\item \textsuperscript{354} See supra note 323 and accompanying text.
\item \textsuperscript{355} See Avi-Yonah, supra, note 322.
\item \textsuperscript{356} Id.
\item \textsuperscript{357} Id.
\item \textsuperscript{358} Engler, supra note 323, at 541.
\item \textsuperscript{359} Id.
\item \textsuperscript{360} Id.
\item \textsuperscript{361} See Yin supra, note 332.
\end{itemize}
marketplace shift from brick-and-mortar to online. State lockdowns only accelerated the technological shift in the marketplace. Still, while Amazon and others did indeed profit, they spent substantial amounts on CDC safety measures to remain operational.

As this Article purports, it is the United States government’s responsibility—not profiting enterprises—to make small businesses "whole" again. If essential companies, like Amazon, are identified as not paying enough taxes in light of their profits, it is the Code that must be amended to “fix” the issue, regardless of the pandemic. The excess profits tax is more appropriately designed for times of war; not by nomenclature but reality. The economic damage suffered by small businesses was a direct result of state-mandated lockdowns. Not every small business was financially decimated during the pandemic and, likewise, not all operational businesses enjoyed increased profits. Those that did filled a void in the free-market. Satisfying this need involved market-place and financial risk, rather than governmental assistance, co-ownership, or guarantees. Manufacturers during the pandemic did not profit from making weapons of war, but instead from toilet paper production. Tax law encourages profit making. Any proposals wanting to define what a "normal" profit base should look like in order to tax the excess runs contrary to existing tax law. Instead of taxing excess profits, this Article suggests that qualifying businesses that were forcibly locked down during the pandemic be granted temporary federal tax-exempt status during their economic recovery period and donations made to them be tax deductible.

III. RADICALIZING NON-PROFIT LAW FOR “COVID COMPANIES”

Historically, there exists a bright-line division between for-profit and


366. It is important to consider that the alternative minimum tax (AMT) was eliminated for corporations under the TCJA. Thus, from a Congressional standpoint, there is no theoretical "minimum" amount of federal tax that companies should be paying. See TCJA, supra note 231, at § 12001.


not for-profit organizations in the Code and judicial system. While continued support for this lucid distinction remains, some advocate that such rigid partition be relaxed to accommodate the increasing number of companies engaging in corporate social responsibility, for-profit philanthropy, and social enterprise. In their seminal essay, *The Case For For-Profit Charities*, scholars Anup Malani and Eric Posner promote that tax benefits, akin to those granted to non-profit organizations, be extended to for-profit firms providing large-scale community benefits. Responding to Malani and Posner’s proposition, scholar Brian Galle criticized the legal transmutation of for-profit companies into charitable organizations, arguing that such metamorphosis would diminish, among other things, the nondistribution constraint and "warm glow" effects attributable to charitable organizations. Notwithstanding, philanthropic companies like Google.org have pursued the for-profit charitable model, even without the benefits of favorable tax-exempt status.

Based on the staggering number of nonessential, for-profit businesses harmed or permanently shuttered as a consequence of state-mandated COVID-19 lockdowns, this Article advances that easing the legal barrier between for- and not-for-profit organizations has reached a critical apex.

369. See I.R.C. § 501(c)(3)-(4); Treas. Reg. §§ 1.501(c)(3)-1 and 1.501(c)(4)-1. See also, e.g., Hobby Lobby Stores, Inc. v. Sebelius, 723 F. 3d 1114, 1186 n. 10 (10th Cir. 2013) (noting that while the government differentiates for- and not-for-profit organizations, numerous corporate forms fail to mirror the bright line distinction), and Summers v. Cherokee Children & Family Servs., 112 S.W. 3d 486, 500 (Tenn. App. 2002) (professing that the distinction between for- and not-for-profit entities lies in the premise that for-profit entities allow for private enrichment, while "nonprofit organizations are subject to the non-distribution constraint.").

370. See, e.g., Brian Galle, *Keep Charity Charitable*, 88 TEX. L. REV. 1213, 1223 (2010) ("... extending the charitable-contribution deduction to include contributions to for-profit firms creates risks that are not worth the putative benefits. For-profit charity threatens to shift costs to charities, weaken the warm glow of giving, distort managerial incentives, and diminish or confuse donor choice."); Benjamin Moses Leff, *The Case Against For-Profit Charity*, 42 SETON HALL L. REV. 819 (2012) (arguing that it is proper for the government to withhold the deductibility of charitable contributions of for-profit enterprises); and Victor Fleischer, Response: "For Profit Charity": Not Quite Ready for Prime Time, 93 VA. L. REV. IN BRIEF 231 (2008) (positing that extending non-profit status to philanthropic for-profit entities is unworkable as a tax concept).

371. See, e.g., Anup Malani & Eric A. Posner, *The Case for For-Profit Charities*, 93 VA. L. REV. 2017 (2007) (proposing that federal tax law change to provide tax benefits to for-profit entities operating for “charitable” purposes), and Susannah Camie Tahk, *Crossing the Tax Code’s For-Profit, Nonprofit Border*, 118 PENN. ST. L. REV. 489 (2014) (suggesting that federal tax law change to encourage more cross-sector collaborations between for- and not-for-profit entities to allow for greater social good via corporate social responsibility, for-profit philanthropy, and social enterprise).


373. See Galle, supra note 371, at 1217, 1224-25 ("Mixing charitable enterprise with the for-profit form would undermine the benefits of warm glow for everyone...Malani and Posner's proposal would create this confusion by making it unclear whether any given firm producing charitable services was paying its employees a share of profits.").

The pandemic’s impact, and ensuing state closures, accelerated a monumental secular change in the United States economy from standard brick and mortar to a landscape dominated by multinational technology companies. 375 This Article suggests that a genuine public interest exists in protecting and fostering nonessential businesses’ perpetuities. Such public interest is not solely relegated to the equity in making these businesses “whole” again but embodies a societal interest in preserving the stout economic and innovative forces that these ventures provide. 376

To help resurrect those businesses negatively impacted by COVID-19 closures, this Article posits a revolutionary federal tax solution, which applies the ideals of pre-existing federal tax policy to a new problem. Such elucidation is perhaps similar to NASA scientist Katherine Goble Johnson’s use of “old math” to calculate the trajectory of John Glenn’s space capsule, as illustrated in the movie Hidden Figures. 377 Her answer to the problem: Euler’s Method; to which one engineer jeers, “That’s ancient”, prompting her firm resolve, “Yes. But it works.” 378

Current tax policy, while robust, is insufficient to meet the economic needs of nonessential businesses as traditionally applied. The United States is facing abnormal times and somber economic setbacks. There is nothing “normal” about restricting taxpayers’ abilities to run legal business operations due to severe government ascendancy; nor is it “ordinary” to confine consumers to their residences for lengthy periods of time. When a targeted group of businesses is selectively allowed to remain operational, while others are forcibly shut down, the conventional metrics of horizontal and vertical equity dissipate the boundaries of garden variety tax policy analysis.

Applying the same conventional tax policy to both locked-down and operational ventures, as the CARES Act purports to do, is simply not good tax policy. Similarly, employing carbon-copy vertical equity to both


377. HIDDEN FIGURES (20th Century Fox 2016).

378. Id.
profitable (operational) and nonessential (locked down) businesses is illogical. This Article suggests that employing the traditional notions of tax-exempt status to qualifying COVID-Companies is one solution to revitalizing the economic lifeblood of the United States economy. Allowing COVID-Companies, for a time, the same tax benefits afforded not for-profit organizations would allow these businesses to mitigate federal income tax exposure during their economic recovery period and incentivize individuals and profitable entities to participate in their renewal. This revolutionary application of “old” tax policy, strategically directed at COVID-Companies, need not be hindered by the longstanding scholarly debate surrounding for- and not for-profit charitable entities, but instead be the catalyst for resurrecting small business operations injured by government-mandated lockdowns. To evaluate the application of tax-exempt status on COVID-Companies, Section A considers the societal need to protect and foster nonessential businesses. Section B examines the application of “old” tax law to a new problem. Finally, Section C proposes that Code section 501(c) be revolutionized for COVID-Companies.

A. Protecting and Fostering Nonessential Businesses

Current and proposed small business tax policy measures, such as accelerated depreciation allowances, employment tax credits, and qualified business income deductions, are inadequate to address the long-term impact that state lockdowns have on nonessential businesses. Data evidences that COVID-19 closures resulted in 60 percent of businesses collapsing. Without significant financial assistance, small businesses floundering under the pandemic’s weight will likewise fail. To protect and foster these ventures’ perpetuities, novel and well-designed economic aid to COVID-Companies must be straightforward

---

381. CARES Act, supra note 31, at § 2301.
382. See TCJA, supra note 231, at § 199A.
385. Bartik et al., supra note 28, at 17666.
and devoid of overly complicated rules and byzantine eligibility requirements.\footnote{386. \textit{Id.} (noting that 13 percent of respondents (out of more than 5,800 small businesses surveyed) documented they did not anticipate taking out CARES Act PPP loans due to application hassles, federal governmental distrust, or complicated eligibility rules).}

Small businesses tend to be financially fragile, having neither the economic sustainability nor requisite equity base to remain operational amidst a global pandemic.\footnote{387. \textit{Id.} at 17656, 17665 (documenting that small firms are "extremely fragile", having only enough cash to sustain themselves for approximately 2 weeks). \textit{See also} Mirit Eyal-Cohel, \textit{Why Is Small Business The Chief Business Of Congress?}, 43 RUTGERS L.J. 1, 3 n. 4 (2012) (proposing that small businesses do not have enough equity base (collateral) to secure loans and credit).} In addition, some may be unable to secure the accounting or legal counsel necessary to understand the myriad of tax details embedded in the CARES Act.\footnote{388. Andrew Osterland, \textit{Here’s why a nightmare tax season is ahead for small businesses}, CNBC (Dec. 14, 2020), https://www.cnbc.com/2020/12/14/heres-why-a-nightmare-tax-season-awaits-small-businesses.html.} While some may have the financial means to file federal lawsuits challenging the constitutionality of state closures,\footnote{389. \textit{See supra Part II.C.}} it is impractical to consider that every—or perhaps even most—small businesses harmed by state closures can fiscally withstand the expenses and hazards of litigation amidst deteriorating governmental revenues.\footnote{390. \textit{See supra} notes 119-21 and accompanying text.}

As discussed, imposing an excess profits tax on essential businesses profiting from the pandemic is not the ideal means to address nonessential business funding amidst a non-wartime period.\footnote{391. Nonessentials are weary of governmental intrusion.\footnote{392. See Nick Pecoraro, "I’m tired of being told what to do": Local ‘nonessential’ business opening ahead of Newsom’s schedule, \textit{GOLD COUNTRY MEDIA} (May 5, 2020), https://goldcountrymedia.com/news/174248/im-tired-of-being-told-what-to-do-local-nonessential-businesses-opening-ahead-of-newsoms-schedule/.} They were initially targeted by the Executive Office as recommended for closure\footnote{393. \textit{See supra} note 20.} and subsequently shut down against their will in most states.\footnote{394. For those that defied lockdown orders, the media is replete with stories of governmental authorities imposing fines.\footnote{395. \textit{See e.g.,} Leila Miller, \textit{This L.A. company was hit with the state’s largest ever Covid-19 fine. Some say it’s a model for worker safety}, \textit{L.A. TIMES} (Sep. 25, 2020), https://www.latimes.com/california/story/2020-09-25/la-me-overhill-farms-safety-committee; \textit{Jim Guy}, \textit{$35,000 in fines}}
Small businesses are vital to the United States employment sector. If their closures continue, the federal government may need to devote further resources to fund unemployment benefits. Of the more than 32.5 million United States business operations, 31.7 million are “small”. Since 2000, small businesses account for 65.1 percent of net new job creation. However, the United States Census Bureau Survey reports that approximately 34.2 percent of small businesses were financially impacted by COVID-19. A separate survey identifies that 43 percent of small and mid-size businesses suffered “significant to severe” impacts from the pandemic, with small businesses being most harshly affected. Although the term "small" is not inescapably synonymous with the term “nonessential,” data supports that small businesses—the quintessence of economic prosperity in the United States—have been disproportionately impacted by lockdown orders. With fiscal aid vacillating, federal relief strained amidst bipartisan pushback, and state budgets emaciated, novel avenues must be considered to better foster and preserve nonessential businesses throughout their economic recovery from the pandemic.

---


398. Frequently Asked Questions, supra note 398.

399. Id.

400. Small Businesses Feel Biggest Impact, supra note 24 (per this survey, small businesses were identified as those having 1-4 employees).


402. Id.

B. Applying “Old” Tax Law To a New Problem

The Code provides tax-exempt status to 29 variations of Code section 501(c)(3) charitable organizations. These non-profit organizations, no matter the type, are exempt from federal income taxation so long as certain requirements are satisfied. Federal law likewise grants individuals and corporations tax deductions for charitable contributions made during the year, if so permitted under Code section 170. However, tax deductibility restrictions exist; for example, donations made to section 501(c)(3) organizations are deductible, while donations made to section 501(c)(4) "social welfare" organizations are not.

Congress’s legislative intent in providing tax-exempt status to non-profit organizations was to support groups that promote the general welfare, thereby partially relieving the federal government of financial burdens. More pointedly, while Treasury loses revenue by providing tax-exempt status to qualifying organizations, such loss is

404. See I.R.C. § 501(c)(3). See also Chad J. Pomeroy, Let My Arm Be Broken Off At The Elbow, 71 OKLA. L. REV. 453, 462 n. 35 (2019). Examples of § 501(c)(3) organizations, which encompass “corporations, any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition… or for the prevention of cruelty to children or animals.…” include the Bill and Melinda Gates Foundation, National Collegiate Athletic Association, United Way, Special Olympics, and Boy Scouts of America. Other types of entities falling within the parameter of § 501(c)(3) exemption from tax include civil leagues, labor organizations, chambers of commerce, recreational clubs, fraternal orders and societies, cemetery companies, credit unions, certain insurance companies, and veteran organizations. See I.R.C. § 501(c)(1), (2), (4)-(29).

405. For example, per I.R.C. § 501(c)(3), organizations are prohibited from attempting to influence legislation and supporting any candidates for public office, whereas veterans organizations under I.R.C. § 501(c)(19) are not prohibited from engaging in such activities.

406. See I.R.C. §§ 170(a) (permitting a tax deduction for charitable contributions made); 170(b)(1) (providing percentage limitations for individuals), and 170(b)(2) (providing a 10% taxable income limit for corporations). See also Jennifer McCrabb Black, Reforming 501(c)(3): Putting the “Charity” Back In The Charitable Deduction, 13 RICH. PUB. INT. L. REV. 251, 253 (2010).

407. I.R.C. § 170(c) defines “charitable contribution” narrowly, to include only certain types of donations such as those made to the government. I.R.C. § 501(c)(3) organizations, and veteran's organizations. I.R.C. § 501(c)(4) organizations are not included in this list, thus delineating the ability of donors to take a tax deduction for contributions made to them per I.R.C. § 170(a)(1); however, some have advocated that “social welfare organizations” be treated in a similar manner to charitable organizations, thereby permitting the deductibility of donations. See e.g., IRS Denials of Charitable Status: A Social Welfare Organization Problem, 82 MICH. L. REV. 508 (1983).

408. H.R. Rep. No. 75-1860, at 19 (1938) (“The exemption from taxation of money and property devoted to charitable and other purposes is based on the theory that the Government is compensated for the loss of revenue by its relief from financial burdens which would otherwise have to be met by appropriations from other public funds, and by the benefits resulting from the promotion of the general welfare.”). See also Bob Jones University v. United States. Goldsboro Christian Schools, Inc., 461 U.S. 574 (1983) (“Congress sought to provide tax benefits to charitable organizations, to encourage the development of private institutions that serve a useful public purpose or supplement or take the place of public institutions of the same kind. Tax exemptions for certain institutions thought beneficial to the social order of the country as a whole, or to a particular community, are deeply rooted in our history, as in that of England.”).
counterbalanced by the federal government appropriating less taxpayer money to public service engagements funded by charitable organizations.\textsuperscript{409} Indeed, with more than one million charitable non-profits in the United States, these organizations are on the economic front lines of feeding the hungry, housing the homeless, and educating the populous.\textsuperscript{410}

The United States enjoys a rich history of charitable purpose organizations.\textsuperscript{411} During his 1831 visit to America, Alexis de Tocqueville perceived the establishment of voluntary associations that better served the common good.\textsuperscript{412} Such associations led to the founding of “hospitals, prisons, and schools.”\textsuperscript{413} Even volunteer fire departments, still in existence today, found early root in 19th century American settlements.\textsuperscript{414}

Federal tax exemption for charitable organizations was first codified in the Tariff Act of 1894;\textsuperscript{415} however, the Supreme Court found unconstitutional the Tariff Act’s income tax, resulting in the abandonment of charitable tax-exempt status.\textsuperscript{416} The Revenue Act of 1909 restored the Tariff Act’s tax-exempt language, setting forth a private inurement prohibition.\textsuperscript{417} Two years later, in 1913, Congress ratified the Sixteenth Amendment, which made the income tax constitutional, and passed the Revenue Act of 1913, which provided tax-exempt status for select non-profit organizations.\textsuperscript{418} Individual income tax deductions first became available under the Revenue Act of 1917.\textsuperscript{419} It was not until the Revenue Act of 1936, however, that similar corporate tax deductions were

\textsuperscript{409} Id. See also Lloyd Hitoshi Mayer, \textit{A (Partial) Defense of § 501(c)(4)’s “Catchall” Nature}, 21 N.Y.U. J. LEGIS. & PUB. POL’Y 439, 457 (2018) (describing that for an organization to qualify for I.R.C. § 501(c)(3) status, the organization’s activities must be shown to lessen the government’s own burdens).


\textsuperscript{412} Id. at 1728.

\textsuperscript{413} Id. (citing to 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 106 (Phillips Bradley ed., Henry Reeve trans., Alfred A. Knopf 1951) (1840)).


\textsuperscript{415} Chaffee, supra note 412 at 1735. See also Tariff Act of 1894, ch. 349, 28 Stat. 509 (1894).

\textsuperscript{416} Chaffee, supra note 412 at 1735. See also Pollock v. Farmer’s Loan & Trust Co., 158 U.S. 601, 634 (1895).

\textsuperscript{417} Corporate Income Tax of 1909, Pub. L. No. 61-5, 36 Stat. 112 (1909) (The private inurement prohibition disallows tax-exempt organizations from using income or assets to unreasonably benefit board members, trustees, officers, or key employees).

\textsuperscript{418} See Chaffee, supra note 412, at 1735-6. See also U.S. Const. amend. XVI ; Revenue Act of 1913, ch. 16, § 106, 38 Stat. 114, 172 (1913).

\textsuperscript{419} War Revenue Act of 1917, ch. 63, § 214(a), 40 Stat. 300, 330 (1917).
introduced. The modern Code came to fruition with the passage of the Revenue Act of 1954, which introduced Code section 501(c) for tax-exempt organizations. While numerous other amendments and acts have levied select requirements on charitable organizations, the current section 501 is a highly refined provision spanning two centuries of congressional contemplation.

Like small businesses, non-profit organizations are integral to economic stability and mobility in the United States. They provide essential public benefits that either fall outside the scope of government intrusion or relieve the government from providing similar assistance. These organizations profoundly rely on outside donations to finance their operations, and the tax benefits afforded under Code section 501(c)(3) enable them to remain competitive. As previously discussed, some suggest that Congress should relax section 501(c) restrictions to allow social enterprise organizations, that straddle for- and not for-profit missions, to enjoy more favorable tax treatment.

Beyond the scope of social enterprises, there now exists a credible public purpose in expanding section 501 to include COVID-Companies. Prior to pandemic closures, 43 percent of small businesses in the United States made less than $50,000 in annual sales. Currently, the average small business owner/operator salary is about $65,000. More than 27 million non-farm sole proprietorship tax returns were filed in 2018.

---

421. Id. at 1762. See also Revenue Act of 1934, ch. 277, § 23, 48 Stat. 680, 690.
422. Id. at 1737.
423. Id.
424. Naomi Camper, A Strong Nonprofit Sector is Key to Thriving Communities, ASPEN INSTITUTE (Mar. 7, 2016), https://www.aspeninstitute.org/blog-posts/a-strong-nonprofit-sector-is-key-to-thriving-communities/.
427. Id.
428. See Justin Blount & Patricia Nunley, What Is A “Social” Business An Why Does The Answer Matter?, 8 BROOK. J. CORP. FIN. & COM. L. 278, 304-05 (2014) (noting that due to social enterprises straddling the line between for- and not for-profit organizations, novel hybrid entities are necessary to help acclimate these blurred organizations).
Small businesses are the pulse of the economy; however, COVID-19 lockdowns have forced many of these businesses to exhaust their life savings to keep their respective businesses afloat. Unemployment rates reached unprecedented levels since the pandemic’s onset. Early stage small business losses may have longer-term job loss and economic equality implications. Current estimates predict the United States labor force may not yield to pre-pandemic levels until 2022. To help buffer the impact on small businesses, the historic notions of Code section 501 should be relaxed to allow COVID-Companies tax-exempt status during their recovery. If granted temporary tax-exempt status, section 501(c)(3) and complementary Code section 170 would provide COVID-Companies refuge to help salvage lost competitive advantages and customer bases amidst pandemic-related government lockdowns.

C. Making IRC Section 501(c) Work for COVID-Companies

This Article recommends that Congress revolutionize Code section 501(c)(3) to aid small businesses harmed by pandemic closures. COVID-Company, tax-exempt status should be extended to qualifying businesses via default classification under the check-the-box regulations or by filing an income tax return specifically designed for businesses electing COVID-Company tax-exempt status. To bring this proposal to fruition, Congress must substantially loosen or eliminate the section 501(c)

439. I.R.S. Form 990, Return of Organization Exempt From Income Tax, is the method by which non-profit organizations file their annual income tax returns. This article proposes that this form either be amended to include COVID-Company status, or a new I.R.S. form could be crafted to account for COVID-Companies electing to be treated as non-profit organizations.
restrictions, which include limits on private inurement, lobbying and political activities, the commerciality doctrine, the unrelated business tax as well as the tax-exempt purpose requirement for COVID-Companies. Qualifying entities would then be required to convert into federal tax corporations, as sole proprietorships, partnerships, limited liabilities companies, and other pass-through entities that are generally not permitted to operate as tax-exempt.

COVID-Company status should be restricted to businesses that fiscally suffered under the lockdowns. To qualify, Congress could use language similar to that of the CARES Act section 2301. Thus, eligible employers must have operated a business that was either fully or partially suspended because of governmental orders during 2020. Any businesses not forcibly locked down by government order, but which suffered significant economic hardship, should likewise qualify for COVID-Company status if they can demonstrate a significant decline in gross receipts. The CARES Act section 2301 establishes a bright line test to determine if an eligible employer has suffered a significant decline in gross receipts. For purposes of COVID-Company tax-exempt status, this Article suggests this test would suffice.

In addition, COVID-Company eligibility should be limited to small businesses, and tax-exempt status for qualifying entities should be granted

440. See I.R.C. § 501(c)(3) (“no part of the net earnings of which inures to the benefit of any private shareholder or individual”).
441. See id. See also I.R.C. § 501(b)(1) (“In the case of an organization to which this subsection applies, exemption from taxation under subsection (a) shall be denied because a substantial part of the activities of such organization consist of carrying on propaganda, or otherwise attempting, to influence legislation…”).
442. See I.R.C. § 501(c)(3) (“no part of the [tax-exempt organization’s] net earnings of which inures to the benefit of any private shareholder or individual.”; I.R.C. § 501(c)(4)(b) (documenting that the tax-exempt organization’s primary activity cannot have “a direct counterpart in, or [be] conducted in the same manner as is the case in the realm of for-profit organizations.”)
443. See I.R.C. § 501(b).
444. Organizations under I.R.C. § 501(c)(3) must be both organized and operated exclusively for one or more exempt purposes described in subsection (3). The organizational test looks at the entity’s organizational documents, such as articles of incorporation, to insure it complies; the operational test looks to the entity’s activities to determine if its operations are consistent with its charitable purpose.
445. See I.R.C. § 501(c)(3). See also Roche’s Beach, Inc. v. Comm’r, 96 F.2d 776, 778 (2d Cir. 1938) (“To gain exemption…. The petitioner must be a corporation”). See also Alicia E. Plerhoples, Nonprofit Displacement And The Pursuit Of Charity Through Public Benefit Corporations, 21 LEWIS & CLARK L. REV. 525, 540 (2017).
446. CARES Act, supra note 31, at § 2301.
447. Id. at § 2301(c)(2)(A). Business that did not shut down, but which suffered a significant decline in gross receipts during this period, and tax-exempt organizations also qualify for this credit. Id. at § (c)(2)(B), (C).
448. Id. at § 2301(c)(2)(B).
449. Id. at § 2301(c)(2)(B)(i). A significant decline in gross receipts essentially entails comparing 2020’s quarterly gross receipts to 2019’s quarterly gross receipts. For a significant decline, the 2020 receipts must be less than 50% of the gross receipts from the same quarter in the prior year.
for a limited period that would allow these businesses the opportunity to regain economic footing, without relying indefinitely on government and private party funding. Limiting tax-exempt status to small businesses can be achieved by deploying an average gross receipts threshold, similar to the gross receipts test in Code section 448(c).\(^{450}\) “Gross receipts” includes sales net of returns and allowances, and any amounts received for services.\(^{451}\) To be considered a small taxpayer, Code section 448(c) sets forth an average gross receipts test for a three year period, where a taxpayer’s receipts do not exceed $25,000,000.\(^{452}\) If and when a COVID-Company fails to satisfy the average gross receipts test, it would be required to revert back to its former for-profit status without penalty. COVID-Companies should also be given the option to voluntarily opt out of tax-exempt status at any time. The tax year for the COVID-Company non-profit would end in the year the business fails to pass the gross receipts test or the year of for-profit election.

For entities electing into COVID-Company tax-exempt status, donations made to them should likewise qualify for Code section 170 tax deductibility.\(^ {453}\) While most COVID-Companies would arguably remain for-profit entities during their tax-exempt election period, it is unlikely that the “warm glow” effect associated with non-profit organizations would hinder third parties from donating to them.\(^ {454}\) Already, the public is contributing to small businesses affected by the pandemic.\(^ {455}\) The GoFundMe Small Business Relief Initiative has revolutionized the manner in which donors can give to businesses facing financial depletion.\(^ {456}\) These public donations, even without accompanying tax benefits, demonstrate the broad social interest that outside parties have in preserving nonessential businesses. Tax-deductibility would further encourage third-party giving, while also incentivizing estate and gift tax level contributions, as well as corporate donations. Particularly, large-scale companies that profited from the lockdowns may be more

\(^{450}\) I.R.C. § 448(c) sets forth an average gross receipts test for corporations and partnerships.

\(^{451}\) Treas. Reg. § 1.448-1T(f)(2)(iv) (“Gross receipts” also include interest, original issue discount, tax-exempt interest, dividends, rents, royalties, and annuities).

\(^{452}\) I.R.C. § 448(c)(1). This $25,000,000 threshold has been increased for inflation to $26,000,000 or less for tax years beginning in 2021, 2020 and 2019. See Rev. Proc. 2020-45, I.R.B. 1016 (Oct. 26, 2020).

\(^{453}\) I.R.C. §§ 501(c)(3) & 170. In addition, an estate tax deduction should be permitted under I.R.C. § 2055, as well as a gift tax deduction under I.R.C. § 2522.

\(^{454}\) See Galle, supra note 371, at 1224-25 (regarding the typicality of “warm glow” effects associated with charitable organizations).


\(^{456}\) Id.
incentivized to aid nonessential companies in getting back on their feet.\textsuperscript{457} Some may argue that bestowing tax-exempt status on COVID-Companies is unjust, as a direct affront to non-profit charitable organizations competing for the same funds.\textsuperscript{458} However, COVID-Companies were forcibly locked out of the free market economy, prohibited for a time from making any form of profit due to government mandates. Any competitive edge that might arise from COVID-Companies being granted tax-exempt status would balance the injustices of being forcibly closed at no fault of their own. Criticisms have been raised about non-profit entities engaging in for-profit activities, while simultaneously enjoying the benefits of tax-exempt status.\textsuperscript{459} Scholars Gail Lasprogata and Marya Cotton note that non-profits participate in for-profit activities because “they have been forced into the positions they are in by the harsh and unforgiving fiscal environment and the need for more capital to stay alive.”\textsuperscript{460} This is the same merciless landscape that COVID-Companies are now forced to endure; it is therefore justifiable that they be granted similar Congressional reprieve as non-profit organizations.

To the extent COVID-Companies compete with preexisting charitable organizations engaging in similar commercial activities, this Article maintains that such competition is a necessary evil. Like the rest of the United States economy, non-profit organizations need small businesses and their employees. In 2019, $309.66 billion of all charitable giving, equating to 69 percent, was derived from individuals.\textsuperscript{461} In comparison, charitable funding by corporations amounted to just $21.09 billion.\textsuperscript{462} With 20.6 million jobs in the United States lost at the onset of the pandemic,\textsuperscript{463} it is improbable that individual contributions to charitable organizations will remain sustainable without new job growth. Charitable organizations are feeling the impact of the profound unemployment

\textsuperscript{457} See I.R.C. § 170(a), (b)(2). See also Brock Blake, \textit{Amazon: Small Business Friend or Foe}, FORBES (Sep. 23, 2019), https://www.forbes.com/sites/brockblake/2019/09/23/amazon-friend-or-foe/?sh=6684e7267367 (noting that Amazing is increasing its “efforts to encourage small and medium-sized businesses to partner with the brand. The company recently announced it has launched 150 tools and services since the beginning of the year, all aimed at helping independent small and medium-sized businesses grow their online sales. Last year Amazon Storefronts launched to help customers shop exclusively from U.S.-based small businesses.”).

\textsuperscript{458} This argument already exists even within the realm of non-profit and for-profit sector enterprises. See Gail A. Lasprogata & Marya N. Cotton, \textit{Contemplating “Enterprise”: The Business And Legal Challenges Of Social Entrepreneurship}, 41 AM. BUS. L. J. 67, 73 (2003).

\textsuperscript{459} Id.

\textsuperscript{460} Id.


\textsuperscript{462} Id.

created by the lockdowns. Allowing COVID-Companies the possibility of increased outside donations would give these injured businesses the opportunity to replenish their own commercial activities. Once economically revitalized, COVID-Companies will be in a position to resume sustainable gifting back to the non-profit sector that so heavily relies on individual contributions, thus helping to bring the United States economy back full circle.

IV. CONCLUSION

Following the first confirmed United States case of COVID-19, state governors issued orders directing residents to shelter in place, while forcing nonessential businesses to temporarily close. Only those ventures deemed essential were permitted to remain operational. For the first time in United States history, distinctions were made between essential and nonessential business operations, ultimately devastating the latter, while big-box retailers economically flourished.

To remedy the economic calamity facing nonessential businesses, proposals have been made to include challenging the constitutionality of state governors’ actions under the Takings Clause and imposing an excess profits tax on COVID-profiting companies. While these proposals raise important issues that warrant closer examination, they are each flawed in that they fall short of addressing the magnitude of the economic problem and the technological shift in the United States economy.

Imposing an excess profits tax on COVID-profiting companies may appear desirable on the surface; however, such a premise contradicts historical United States tax policy, which restricts the use of the tax to actual wartime engagements against enemy combatants. In addition, imposing an excess profits tax fails to address the root issue surrounding economically devastated businesses—that governmental action was the cause of the financial downturn. Essential businesses are not responsible for the economic destruction of numerous small businesses; thus, targeting for-profit entities that legally increased their profits during state-mandated lockdowns digresses from the fact that it is the government that should bear the burden of rehabilitating those businesses that were

465. See supra Part I.A., B.
466. See supra Part I.C.
467. See supra Part II.A.
468. See supra Part II.C.
forcibly restricted from participating in commercial engagement. While alternative suggestions that injured businesses should file lawsuits against state governments alleging constitutional takings garner considerable merit, the ability of devastated businesses to now tackle expensive and lengthy litigation is improbable. Further, depleted budgets would restrict states’ abilities to provide just compensation.

In an attempt to remedy economic concerns arising during the pandemic, Congress passed the CARES Act.\textsuperscript{469} However, the CARES Act, in conjunction with the more recent Tax Certainty and Disaster Tax Relief Act of 2020, does not adequately remedy nonessential businesses, as it fails to directly target economic recovery for the nonessentials. Instead, the tax legislation benefits both essential and nonessential businesses, resulting in exacerbated inequities. This is particularly concerning given that the government found such distinction crucial when determining which businesses to take profits from at the onset of the pandemic but markedly absent when determining how to alleviate the resulting financial harms.

This United States has a quasi-charitable responsibility to economically heal those businesses that ultimately bore the greatest incumbrance.\textsuperscript{470} No business or set of businesses should bear the financial public burden of a national health crisis alone. To address the novel social circumstances resulting from COVID-19, radical tax policy is needed.\textsuperscript{471} This Article recommends that nonessential businesses be granted a complete "shield" from taxation in the form of temporary non-profit status.\textsuperscript{472} To bring this proposal to fruition, this Article proposes that Congress loosen or eliminate Internal Revenue Code section 501(c) restrictions, restrict “COVID-Company” status to small business that fiscally suffered under the lockdowns, and be available for a limited period to allow qualifying entities the ability to regain economic footing without relying indefinitely on government and private party funding. In addition, this Article suggests that donations made to qualifying businesses be tax deductible, which would then invite a more holistic, national approach to salvaging the nonessential businesses.

\textsuperscript{469}. See supra Part II.B.
\textsuperscript{470}. See supra Part III.A.
\textsuperscript{471}. See supra Part III.B.
\textsuperscript{472}. See supra Part III C.