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Rent Controls and the Erosion of Takings-Clause Protections: A Sordid History with Recent Cause for Optimism

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RENT CONTROLS AND THE EROSION OF TAKINGS-CLAUSE PROTECTIONS: A SORDID HISTORY WITH RECENT CAUSE FOR OPTIMISM

*Sam Spiegelman**

During the Covid era, state and local officials across the country imposed moratoria on evicting tenants — even those who had violated agreed-upon lease terms or, more commonly, those whose leases had simply expired. For over a century, rent controls — from price caps to the various legal conditions placed on free contracting between parties — has typified the so-called muddle in which takings jurisprudence still finds itself. Recently, however, the U.S. Supreme Court has been clearer on the Takings Clause and the meaning of “property” in general. In this new environment, rent controls — diverse in substance and often egregious in application — remain the ideal vehicle for the most property-friendly high court in generations to continue moving the needle in this new property-friendly direction.

This Article surveys the definitional history of “property,” especially how the classical-liberal approach — in which protecting property is the ultimate end, and government the means — better reflects “property” as it was originally publicly understood when James Madison drafted the Takings Clause. It then moves to the nineteenth century, highlighting how the classical-liberal approach won out over the civic-republican view of property as means to governmental ends — the latter an almost perfect inversion of the former. Next, this Article discusses the end of the Lochner era — arguably classical-liberal property’s zenith — and the discouraging emergence of progressive property theory during the New Deal era. We see how this new theory of property, under which definitions can — and often must — change depending on what best suits the popular will, led courts to over-defer to legislative “wisdom,” rubberstamping countless rent controls and other property regulations that, in an earlier era, would have been

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struck down upon even cursory scrutiny of the promulgating government's justifications for enacting them.

This Article concludes with a discussion of recent developments in the rent-control space, most notably the several Covid-related eviction moratoria. It explains that while several courts continue to defer to lawmakers on what is the most extreme form of rent control yet, recent U.S. Supreme Court rulings offer real hope that the justices will overturn these bans and, in doing so, will also admonish lower courts to begin using their independent judgment in appraising the legitimacy of a given rent-control measure.

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INTRODUCTION

On its face, the Fifth Amendment’s Takings Clause is simple enough: “nor shall private property be taken for public use, without just compensation.”¹ But, as with many of the Constitution’s directives, the reality is much more complicated. Fortunately, in its 2021 decision in *Cedar Point Nursery v. Hassid*,² the Supreme Court demonstrated its increasingly straightforward treatment of the Takings Clause — one that cuts through the cacophony of often incompatible tests towards a simple handful, that varies only with respect to factual differences between cases, and that honors the Court’s persistent maxim — known as the “*Armstrong* principle” — 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.”³

Modern rent controls — statutes and regulations that control prices and countless other aspects of the owner-tenant relationship separate from (and often in contravention of) traditional sources like contracts and property law — is an ideal target to test *Cedar Point*’s long-term influence. The Takings Clause ensures that the cost of public benefits is fairly distributed among those who benefit, and forces government to make a realistic evaluation of the costs. It is the Constitution’s recognition that there is no such thing as a free lunch; that if the government presses private property into public service, it cannot compel owners alone to shoulder the burden.

Rent controls — from annual rent-increase caps to just-cause eviction laws — do more than limit how much owners may charge their tenants. Here, the term touches on all public measures taken against properties whose owners have entered them into the rental market. These include restrictions on the power to evict outside the four corners of the lease agreement,⁴ mandating owners pay tenants’ move-out costs,⁵ ostensibly emergency eviction moratoria like those imposed across the country in response to the Covid-19 pandemic,⁶ and right of first refusal provisions that permit tenants

1. U.S. CONST. amend. V (Takings Clause).

2. See 594 U.S. ___, 141 S.Ct. 2063, 2071, 2082 (2021).

3. *Armstrong v. United States*, 364 U.S. 40, 48–49 (1960).

4. See Andrea B. Carroll, *The International Trend Toward Requiring Good Cause for Tenant Evictions: Dangerous Portents for the United States?*, 38 SETON HALL L. REV. 427, 461–75 (2008) (discussing American trends).

5. See Bob Egelko, *Oakland Law Requiring Landlords to Pay Evicted Tenants’ Relocation Expenses Survives Supreme Court Review*, S.F. CHRON. (June 6, 2022), <https://bit.ly/3DdyBE5> [<https://perma.cc/F2PT-UQ56>].

6. See *Covid-19 Global Housing Protection Legislation & Housing Justice Action*, ANTI-EVICTION MAPPING PROJECT, <https://antievictionmappingproject.github.io/covid-19-map/#close> [<https://perma.cc/WJK5-8SND>] (last visited Nov. 2, 2023) (follow hyperlinks for maps to show specific statistics).

to purchase the unit before the owner can sell it to anyone else.⁷ All told, rent control is one of the most fertile areas for moving takings jurisprudence in a more property-friendly direction. Because most rent controls lack the obvious violence of regulations involving government's direct physical invasion of private property (though it certainly permits post-tenancy holdovers to interfere with owners' possessory and exclusionary rights), it is often difficult to convince courts that these controls are beyond a state's police powers⁸ (or, under the so-called "Dillon's Rule" — i.e., local government's express powers that the state has conferred upon it⁹).

Removing unconstitutional rent controls would also be a boon to urban public policy. In a survey of research reports spanning decades and covering a variety of cities, the National Multifamily Housing Council noted the various ways in which tenancy controls end up doing more harm than good for those who need lower prices the most, while delivering windfalls to those who need them the least.¹⁰ The survey found, among other things, that "[w]hile some low-income families do benefit . . . so, too, do higher-income households."¹¹ By incentivizing residents in rent-control units to stay longer than they would have otherwise, renters in general "continue to live in units that are too small, too large[,] or not in the right locations to best meet their housing needs."¹² Other effects include "deterioration or lack of investment" in rent-regulated buildings, "a reduction in the available supply of rental housing" altogether, and "higher rents in the uncontrolled market."¹³

This Article first places rent controls in the context of the longstanding American legal and political battles over the extent of a state's police-power authority to interfere with private property rights. Then, in Part II, it details the toll that that incoherence in takings jurisprudence (and related due-process jurisprudence) has taken on rental owners' property rights, and how their situation signals the failure of the Supreme Court's disorienting approach to takings in general. In Part III, the Article covers the evolving justifications officials offer for imposing such controls, observing how these

7. See, e.g., D.C. CODE § 42-3404.08 (2018); MASS. GEN. LAWS ch. 140, § 32R(d) (2023); N.Y. REAL PROP. LAW § 233-a (McKinney 2019).

8. See, e.g., *Kelo v. City of New London*, 545 U.S. 469, 488–90 (2005); See Raphael Janove, *Yielding to the Confiscation of Public and Private Property: Judicial Deference Under the Copyright and Takings Clauses*, 39 VT. L. REV. 89, 109 (2014).

9. The rule is named after Iowa Supreme Court Chief Justice John Forrest Dillon (1831–1914), who formulated it in *City of Clinton v. The Cedar Rapids & Mo. River R.R. Co.*, 24 Iowa 455, 462 (1868).

10. See LISA STURTEVANT, *THE IMPACTS OF RENT CONTROL: A RESEARCH REVIEW AND SYNTHESIS* 4 (2018).

11. *Id.* at 6.

12. *Id.* at 6–7.

13. *Id.* at 7.

have morphed into fig leaves for what Justice Antonin Scalia once called “off budget” wealth transfers from owners to tenants.¹⁴ Finally, Part IV presents some recent developments in rent controls, including the myriad Covid-related eviction moratoria and the consequences of their cavalier employment, concluding that anti-rent-control litigation before *this* Supreme Court will likely *accelerate* the high bench’s recent drift towards its most property-friendly position in over a century.

I. CLASSICAL-LIBERAL VERSUS CIVIC-REPUBLICAN PROPERTY

A. Defining “Property” at Ratification and in the Young Republic

All takings must also be police-power actions. Government cannot do anything outside (*ultra vires*) its police-power authority.¹⁵ On the other hand, not all police-power actions are takings (e.g., criminalizing murder is not a “taking” of an assailant’s “interest” in killing). Convincing courts and advocates of the true relationship between police powers and takings will go a long way in bolstering property rights, and helps to further free the Supreme Court’s takings jurisprudence from its decades-long quagmire.¹⁶

14. *Pennell v. San Jose*, 485 U.S. 1, 22 (1985) (Scalia, J., concurring in part and dissenting in part).

15. *See* *United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951) (finding the federal government effected a taking when it commandeered a mine for legitimate police-power purposes); *McCutchen v. United States*, 14 F.4th 1355, 1363–64 (Fed. Cir. 2021) (“If a ‘police power’ justification for a measure means that there is no taking, what government acts would fall into the category of takings that the Clause permits (because the act is for a ‘public use,’ *i.e.*, within the ‘sovereign’s police powers’) but only upon payment of just compensation?”); *City of Dallas v. Stewart*, 361 S.W.3d 562, 575–76 (Tex. 2012) (internal citations omitted) (“[T]he law ha[s]” ‘moved beyond the earlier notion that the government’s duty to pay for taking property rights is excused by labeling the taking as an exercise of the police powers,’ because the line between police power and takings is ‘illusory’ and requires ‘a careful analysis of the facts . . . in each case of this kind.’ . . . Because a nuisance determination is an exercise of the police power, it, *like any other determination regarding the police power*, ‘is a question of law and not fact’ that must be answered based upon a ‘fact-sensitive test of reasonableness.”); Emilio R. Longoria, *Lech’s Mess With the Tenth Circuit: Why Government Entities Are Not Exempt From Paying Just Compensation When They Destroy Property Pursuant to Their Police Powers*, 11 WAKE FOREST J. L. & POL’Y 297, 309 (2021) (“[T]he Supreme Court . . . ha[s] never] suggested that there is a compensable distinction between eminent domain claims and police powers claims in the regulatory context.”); Zachary Hunter, *You Break It, You Buy It — Unless You Have a Badge? An Argument Against a Categorical Police Powers Exception to Just Compensation*, 82 OHIO ST. L.J. 695, 702 (“[E]mbracing a categorical police powers exception [to takings liability] requires a different meaning of public use — one that limits its scope.”).

16. *See* Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings “Muddle”*, 90 MINN. L. REV. 826, 831 (2006) (“[T]he *Penn Central* Court attempted to weave a unified takings doctrine out of a pastiche of Fourteenth Amendment substantive due process and Fifth Amendment Takings Clause precedents. The ensuing doctrinal merger effectively eliminated Fourteenth Amendment due process as a

The fight for property rights has been going on for centuries if not millennia.¹⁷ In 1215, the Magna Carta limited the English monarch's right to requisition private property — requiring such takings conform to what passed for due process at the time. Fundamentally, it prevented a very reluctant King John¹⁸ and his successors from taking private property for their own use.¹⁹ For what limited purposes, then, *could* the sovereign confiscate private property? The proto-classical liberal John Locke, echoing earlier legal theorists Hugo Grotius and Samuel von Pufendorf, recognized, according to Professor Jeffrey Gaba, that “the right to individual and exclusive possession . . . could be justified only by a consensual agreement to recognize and respect the property of others.”²⁰ James Kent, the “American Blackstone,”²¹ borrowed from these legal philosophers when describing the “power of regulation” as follows:

But though the property be thus protected, it is still to be understood that the lawgiver has a right to prescribe the mode and manner of using it, so far as may be necessary to prevent the abuse of the right to the injury or annoyance of others, or of the public. The government may, by general regulations, interdict such uses of property as would create nuisances, and become dangerous to the lives, or health, or peace, or comfort of the citizens [E]very person ought [] use his property as not to injure his

distinctive category of inquiry in takings law and eviscerated the states' police power defense.”).

17. See Robert C. Ellickson & Charles DiA. Thorland, *Ancient Land Law: Mesopotamia, Egypt, Israel*, 71 CHI.-KENT L. REV. 321, 324 (1995).

18. So reviled was (and is) the recalcitrant Great Charter's signatory, that in the eight centuries since there has been no King John II. Jonathan Gordon, *King John: Magna Carta, Rebellion, and Myth*, LIVESCIENCE (Apr. 20, 2022), <https://rb.gy/rvl6n> [<https://www.livescience.com/king-john-of-england>].

19. Daniel Woislaw, *The Magna Carta, Property Rights, and the Right of Exclusion*, PAC. LEGAL FOUND. (Feb. 22, 2021), <https://bit.ly/3INzsw1> [<https://perma.cc/LEA8-3MY4>] (“Before this document came into existence, the king made a habit of traveling around the country, consuming the people's food and spending community resources — literally eating them out of house and home.”); MAGNA CARTA (1215), cl. 39, <https://www.crf-usa.org/foundations-of-our-constitution/magna-carta-text.html> [<https://perma.cc/S5UL-6YGW>] (“No free man shall be seized or imprisoned, or *stripped of his rights or possessions*, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land.” (emphasis added)).

20. Jeffrey M. Gaba, *John Locke and the Meaning of the Takings Clause*, 72 MO. L. REV. 525, 534 n.33 (2007) (citing JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 149–53 (1988) for findings based on the proposition that “both Grotius and Pufendorf solved the problem of private property by basing it on a pre-government compact or agreement among all humans.”).

21. George Goldberg, *James Kent, The American Blackstone: The Early Years*, LAW-MAKING AND LAW-MAKERS *in* BRITISH HISTORY: PAPERS PRESENTED TO THE EDINBURGH LEGAL HISTORY CONFERENCE, 1977 157 (Alan Harding ed., 1980).

neighbors, and . . . private interests must be made subservient to the general interests of the community.²²

Kent's formulation implies that the "general interests of the community" justify the state's prevention or injunction of *harmful* private uses, not *any* uses the public chooses.

The true classical-liberal approach permits public interference with private property specifically to prevent or enjoin emanating harms when doing so "improve[s] the overall level of social welfare."²³ This task is best achieved by leaving individuals to control their exclusive realms until doing so detracts from others' control over theirs. We do not "harm all individuals to whom [we] do not . . . lend a helping hand."²⁴ But when it comes to combatting real harms (those against which neighbors "could employ the common law of nuisance to enjoin" it²⁵), the public is entitled to stop these without compensating the owner. Using one's property to harm others is not, and never has been,²⁶ among the rights of ownership.²⁷ In contrast to this classical-liberal position, which prevailed at ratification, was that of the civic

22. Legarre, *infra* note 123, at 781 (quoting 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 340 (2d ed. 1832)).

23. RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION 352 (2014).

24. *Id.* at 355 (citation omitted).

25. *Id.*; see also *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992) ("Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts — by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.").

26. *Sic utere tuo ut alienum non laedas* in Latin translates to "[u]se your property so as not to damage another's." *Sic Utere Tuo Ut Alienum Non Laedas*, BLACK'S LAW DICTIONARY (10th ed. 2014); see also Elmer E. Smead, *Sic Utere Tuo Ut Alienum Non Laedas: A Basis of the State Police Power*, 21 CORNELL L. REV. 276, 276 (1936) ("The principle that one should use his own property in such a way that he does not injure that of another is to be found early in the common law.").

27. Scott M. Reznick, *Empiricism and the Principle of Conditions in the Evolution of the Police Power: A Model for Definitional Scrutiny*, 1978 WASH. UNIV. L. Q. 1, 10 (1978) ("*Sic utere* is the fountainhead maxim from which both the common law of nuisance and the police power arose. As originally applied, *sic utere* 'operated to protect real property from what the courts thought were injuries resulting from the use of another of his real property.' That is, the courts used *sic utere* principles to resolve cost spillover conflicts between the existing uses of neighboring landowners. This relationship in tort between property owners originally caused the maxim and the emerging police power to be defined in terms of the prevention of harms."); *id.* at 2–3 ("During its early manifestations and throughout the nineteenth century, definitional scrutiny incorporated a substantive component derived from the common law of nuisance — the maxim *sic utere tuo ut alienum non laedas*. Under this maxim, courts limited the states' use of the police power to the prospective prevention of harms (negative externalities) to the community and its inhabitants.").

republicans, who, unlike Locke, misinterpreted the “end of the state” to be “the promotion of the common good and virtue.”²⁸ From that perspective, “property” becomes just another state-invented means for maximizing human “happiness,”²⁹ however nebulous and ultimately irreducible “happiness” may be.³⁰

28. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 821 (1995).

29. JEREMY BENTHAM, THEORY OF LEGISLATION 111–13 (R. Hildreth ed., 1864). Jeremy Bentham believed that property was a construct of positive law: “The better to understand the advantages of law, let us endeavor to form a clear idea of *property*. We shall see that there is no such thing as natural property, and that it is entirely the work of law. Property is nothing but a basis of expectation; the expectation of deriving certain advantages from a thing which we are said to possess, in consequence of the relation in which we stand towards it. There is no image, no painting, no visible trait, which can express the relation that constitutes property. It is not material, it is metaphysical; it is a mere conception of the mind. To have a thing in our hands, to keep it, to make it, to sell it, to work it up into something else; to use it — none of these physical circumstances, nor all united, convey the idea of property. A piece of stuff which is actually in the Indies may belong to me, while the dress I wear may not. The ailment which is incorporated into my very body may belong to another, to whom I am bound to account for it. The idea of property consists in an established expectation; in the persuasion of being able to draw such or such an advantage from the thing possessed, according to the nature of the case. Now this expectation, this persuasion, can only be the work of law. I cannot count upon the enjoyment of that which I regard as mine, except through the promise of the law which guarantees it to me. It is law alone which permits me to forget my natural weakness. It is only through the protection of law that I am able to inclose [sic] a field, and to give myself up to its cultivation with the sure though distant hope of harvest. But it may be asked, What is it that serves as a basis to law, upon which to begin operations, when it adopts objects which, under the name of property, it promises to protect? Have not men, in the primitive state, a *natural* expectation of enjoying certain things, — an expectation drawn from sources anterior to law? Yes. There have been from the beginning, and there always will be, circumstances in which a man may secure himself, by his own means, in the enjoyment of certain things. But the catalogue of these cases is very limited. The savage who has killed a deer may hope to keep it for himself, so long as his cave is undiscovered; so long as he watches to defend it, and is stronger than his rivals; but that is all. How miserable and precarious is such a possession! If we suppose the least agreement among savages to respect the acquisitions of each other, we see the introduction of a principle to which no name can be given but that of law. A feeble and momentary expectation may result from time to time from circumstances purely physical; but a strong and permanent expectation can result only from law. That which, in the natural state, was an almost invisible thread, in the social state becomes a cable. Property and law are born together, and die together. Before laws were made, there was no property; take away laws, and property ceases. As regards property, security consists in receiving no check, no shock, no derangement to the expectation founded on the laws, of enjoying such and such a portion of good. The legislator owes the greatest respect to this expectation which he has himself produced. When he does not contradict it, he does what is essential to the happiness of society; when he disturbs it, he always produces a proportionate sum of evil.” *Id.*

30. “Happiness” means different things to different people, and in ways that are sometimes at odds with one another. The Ancient Greeks called it “*eudaimonia*.” See *Aristotle’s Ethics*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (July 2, 2022), <https://rb.gy/wkys1> [<https://perma.cc/NV3P-G4M9>].

The question now is whether this classical-liberal view reflects property's public meaning — the gauge for measuring the original understanding of the Constitution³¹ — at the time Congress ratified the Bill of Rights in 1791. During this period, there were advocates for the civic-republican approach to governance.³² Few at the time appear to have taken the view that *property* was no more than a means to the end of maximizing human happiness. Most held to the opposite — that “liberty,” through the preservation of property, was the ideal avenue to maximal happiness.³³ The former view would, by definition, permit unfettered (and uncompensated) confiscation if and when such takings produced more society-wide happiness than would exist without it. And this happiness-maximizing approach stands in direct contrast to those who “adopt [the] classical-liberal worldview,” that the purpose of government is “liberty-maxim[alization]” (itself seen by most Framers as the

31. On the importance of “original public meaning” to constitutional interpretation, and a balanced treatment of its advantages and drawbacks, see generally Jack M. Balkin, *The Construction of Original Public Meaning*, 31 CONST. COMMENT. 71 (2016).

32. See, e.g., JOYCE APPLEBY, *CAPITALISM AND A NEW SOCIAL ORDER: THE REPUBLICAN VISION OF THE 1790S* 17 (1984) (“Although classical republicanism offered the possibility of establishing an enduring republic where men might enjoy the liberty of civic participation, the theory itself was grounded in an historical realism that cautioned against having too high hopes, given the fickle, power-lusting nature of men.”); BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 23 (1967) (“Study of the sources of the colonists’ thought as expressed in the informal as well as the formal documents . . . reveals . . . a massive, seemingly random eclecticism”); J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLIC TRADITION* 506 (1975) (“It is now possible to explore the history of American consciousness in search of what manifestations of the problems of the republican perspective may be found there”); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–87* 467 (1969) (surveying how republicanism influenced public opinion on lawmaking); see also Steven G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 PA. L. REV. 801, 802 n.1 (1993).

33. See Paul J. Larkin Jr., *The Original Understanding of “Property” in the Constitution*, 100 MARQ. L. REV. 1, 27–46 (2016).

best chance for creating and preserving human happiness³⁴), of which robust property rights is a necessary antecedent.³⁵

Professor Michael Treanor points to the *absence* of just-compensation clauses among state constitutions as evidence that property was essentially understood as a means rather than an end in itself. The logic is difficult to track. In British North America, as in Britain itself, just compensation *was* a relatively novel remedy, at least in the grand scheme of property rights.³⁶ But “property” has a very long history of protection via public-use or due-process provisos (either written or tacitly understood) — stretching back at least to 1215 if not earlier, in the traditions of medieval, classical, and ancient civilizations.³⁷

There is little room here to run through all the evidence that the Taking Clause was intended, primarily, as a classical-liberal limitation on state power (as opposed to a civic-republican expansion of it, as Professor Treanor and other scholars suggest). Professor Eric Claeys summed it up nicely: “Drawing on leading cases and treatises from the fifty years after the Founding,” he concluded that “the Founders and the first generation of American law-treatise authors used social-compact and nature-right principles” — that is, the classical-liberal approach — “to justify property rights, constitutional takings protections, and limit property ‘regulations’” just as well as straightforward eminent-domain actions.³⁸ In his dissent to

34. See EDMUND S. MORGAN, *THE CHALLENGE OF THE AMERICAN REVOLUTION* 55–56 (1976) (“Americans were actually quite shameless about their concern for property and made no effort to hide it, because it did not at all seem shabby to them. The colonial protests against taxation frankly and openly, indeed passionately, affirm the sanctity of property. And the passion is not the simple and unlovely passion of greed. For eighteenth-century Americans, property and liberty were one and inseparable, because property was the only foundation yet conceived for security of life and liberty: without security for his property, it was thought, no man could live or be free except at the mercy of another The Americans fought England because Parliament threatened the security of property. They established state constitutions with property qualification for voting and officeholding in order to protect the security of property. And when the state governments seemed inadequate to the task, they set up the Federal government for the same purpose. The economic motive was present in all these actions, but it was present as the friend of universal liberty. Devotion to security of property was not the attitude of a privileged few but the fundamental principle of the many, inseparable from everything that went by the name of freedom and adhered to the more fervently precisely because it did affect most people so intimately.”).

35. See James S. Burling, *Is the Doctrine of Regulatory Takings Constitutional? A Review of the Academic Debate Over Originalism and Takings*, 9 PROP. RTS. J. 105, 107 (2020).

36. The concept of just compensation did, however, appear as early as 1669, in the Locke-authored FUNDAMENTAL CONSTITUTIONS OF CAROLINA. JOHN LOCKE, FUNDAMENTAL CONSTITUTIONS OF CAROLINA (1669).

37. See generally Ellickson & Thorland, *supra* note 17.

38. Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1565 (2003). In support of this claim, Claeys cites a number of treatises and rulings, from both the Founding Era to recent decades, including James Wilson, *Lectures on*

Kelo v. City of New London, Justice Clarence Thomas listed a number of prominent sources for the proposition that the majority’s ruling — that “public use” could extend to a private purpose that arguably benefitted the public, with no compensation warranted — “would contradict a bedrock principle well established by the time of the founding: that all takings required the payment of compensation.”³⁹

But what, according to Madison and his contemporaries, deserved just compensation? Was it only direct confiscation of realty and personalty? Perhaps only realty? Or did it extend to, say, regulations of property that had the effect of forcing owners to host unwelcome occupants altogether or at discounted rates? To our knowledge there are no cases from the Ratification era, or from the decades following, that speak to this precise question — rent control was simply not a widespread phenomenon at the time.

Justice Thomas’s *Kelo* dissent speaks to the emphasis Enlightenment thinkers placed on the foundations of “property.” And the influence these thinkers — e.g., Locke and Blackstone⁴⁰ — had on Madison and his

Law, in 1 THE WORKS OF JAMES WILSON 69, 228–29 (Robert Green McCloskey ed., 1967) (emphasizing the existence of a social compact in government, derived from man’s inherent reason, freedom, and conscience); *id.* at 223 (reasoning that property rights “would be rendered ineffectual, if we were not secured in the possession of those stores which we collect; for no one would toil to accumulate what he could not possess in security. This security is afforded by the moral sense, which dictates to all men, that goods collected by the labour and industry of individuals are their property; and that property ought to be inviolable”); KENT, *supra* note 22, at 328 (“Every individual has as much freedom in the acquisition, use, and disposition of his property, as is consistent with good order, and the reciprocal rights of others.”); *id.* at 340 (reasoning lawmakers may promulgate “general regulations” pursuant to their “right to prescribe the mode and manner of using” one’s property, “so far as may be necessary to prevent the abuse of the right, to the injury or annoyance of others, or of the public”); Howard Gillman, *The Collapse of Constitutional Originalism and the Rise of the Notion of the “Living Constitution” in the Course of American State-Building*, 11 STUD. AM. POL. DEV. 191, 197–213 (1997); and Philip A. Hamburger, *The Constitution’s Accommodation of Social Change*, 88 MICH. L. REV. 239 (1989). Together, Claeys cites these latter two articles for the proposition that nineteenth-century jurists understood constitutions as mere codifications of broader concepts of natural law. This, according to Claeys, meant that “officials were not supposed to read takings guarantees narrowly simply because they did not include the magic words ‘regulations that strip owners of a fair and equal share of use rights.’” See Claeys, *supra*, at 1574–75; see also *id.* at 1553 (“Early state eminent-domain opinions did not organize takings cases under the same categories that we apply now, but it is still possible to identify a series of decisions that closely resemble modern regulatory takings cases. These decisions drew on social-compact and natural-right political theory to develop broad legal distinctions between property regulations and regulatory takings. If property regulations did not live up to the standards for ‘regulations’ prescribed by natural-right theory, state courts held that the restrictions were ‘violations’ or ‘invasions’ of property rights, which we would now call ‘regulatory takings.’”).

39. 545 U.S. 469, 507–08 (2005) (Thomas, J., dissenting).

40. See Leslie Bender, *The Takings Clause: Principles or Politics?*, 34 BUFF. L. REV. 735, 753 (1985) (“No doubt the strongest arguments for including a compensation provision in our

federalist peers is irrefutable.⁴¹ Despite Treanor's anecdotal evidence that compensation was not *always* paid (he concedes that often it was, even if doing so was not state-constitutionally required), the Founding generation (and the courts affirming their views in the early nineteenth century) at least drew the line at public actions that deprived owners of their right to exclude — what Professor Thomas Merrill called the “*sine qua non*” of ownership.⁴² This right is one among several that various rent controls disrupt, with Covid-related eviction moratoria being the very sharp tip of the iceberg.

The early triumph of classical-liberal “property” over the civic-republican version is important for our present debate on rent control because it means that, in analyzing the Takings Clause, courts should defer to the fundamental limitations on governmental intervention before it considers the legitimacy of the proffered public purpose for doing so. Recognizing this is important in the rent-controls context. If the legitimacy of the government's justifications for imposing such measures is informed by what these might *do* for the public, without consideration of its impact on affected owners relative to the benefits the public stands to gain, then it is far easier for courts to justify landlord-tenant laws that interfere with the fundamental attributes of ownership.

B. The “Property” Fight and the Takings Clause

James Madison, the Constitution's lead author, recognized that there would be some circumstances wherein the public might want to benefit

Constitution were found in Blackstone's *Commentaries*. He was read extensively . . . and spoke directly to this matter.”)

41. See Steven J. Eagle, *Property Tests, Due Process Tests and Regulatory Takings Jurisprudence*, 2007 BYU L. REV. 899, 902–03 (2007) (“The popularity of [the] Lockean view of the founding, combined with the increasing popularity of originalism in constitutional scholarship, led other scholars to mount a counterattack by turning to the theory of Civic Republicanism. They aspired to demonstrate that the Framers' generation was steeped in civic virtue, not Lockean individualism. The classic articles by Professors William Treanor and John Hart met with considerable acceptance. However, this view has been challenged by more recent scholarship. ‘Regardless of the Lockean-Civic Republicanism debate, the evidence is overwhelming that the Framers took property seriously and that a major goal of the Constitution was to protect it.’” (citing Treanor, *supra* note 28, at 785–92; John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099, 1107–31 (2000))).

42. See Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998); see also Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 376 (2003) (“The ‘integrated theory of property,’ maintains that the right to exclude is essential to the concept of property, but it is not the only characteristic, nor is it the most fundamental. Other elements of property — acquisition, use, and disposal — are necessary for a *sufficient* description of this concept. Unlike the bundle theory, however, the integrated theory maintains that the elements of exclusive acquisition, use, and disposal represent a conceptual unity that together serve to give full meaning to the concept of property.”).

(instead of protect themselves) through the appropriation of private property. Thus, just compensation was Madison's and his contemporaries' somewhat novel way of limiting the impact of public appropriation, ensuring that private parties were, in equitable terms, "made whole."⁴³ In contrast, utilitarians view property as one among countless means to the end of delivering the greatest happiness to the greatest number, regardless of the magnitude of harm to those made worse off as a result.⁴⁴

According to the late Professor Frank Michelman, a proponent of utilitarian property rights, the "[s]ecurity of expectation" an individual has to ownership "is cherished, *not for its own sake*, but only as a shield for morale."⁴⁵ Michelman suggests that securing property is not its own moral imperative but just another means of maximizing its usefulness to the whole body politic. "Once admit that not all capricious redistributive effects are totally demoralizing."⁴⁶ Indeed "utilitarian theory can tell us where to draw the line between compensable and noncompensable collective impositions."⁴⁷ Thus, Michelman concludes, "[a]n imposition is compensable if not to compensate would be critically demoralizing; otherwise, not."⁴⁸ In his view, an uncompensated confiscation or invasion of property is proper if it serves the greater good by distributing a certain amount of value to the community without reducing the property's

43. See William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 708 (1985) (Madison "meant it to have broad moral implications as a statement of national commitment to the preservation of property rights. The ideology underlying the [just compensation] clause ran counter to the republicanism espoused by the Anti-Federalists, the opponents of the Constitution. In the years after ratification . . . Madisonian liberalism came to dominate American legal and political thought."). I take issue with Treanor's depiction of the classical-liberal view as having only "come to be seen" as an "important and long-honored" part of the common law around Madison's age — implying that this was not the actual common-law view but an invention of the Founding Era. *Id.* at 715. But, even if Treanor were correct and the classical-liberal (as opposed to civic-republican) view of property was not the default for much of common law history, it had entered the mainstream by the time Congress ratified the Bill of Rights, and remained the consensus position throughout the early republic. Thus, it is entirely originalist to assign this as the default position articulated through the Takings Clause, even if it was a relatively new take circa 1791.

44. See Leigh Raymond, *The Ethics of Compensation: Takings, Utility, and Justice*, 23 ECOLOGY L. Q. 577, 581 (1996) ("Act utilitarianism insists that the individual must attempt to maximize happiness through each separate action, considered on its own merits. This theory permits actors to violate age-old moral edicts" — e.g., the classical-liberal reverence for property rights — "with ethical impunity, as long as the net benefit of the decision is to maximize total happiness.").

45. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1213 (1967) (emphasis added).

46. *Id.*

47. *Id.*

48. *Id.*

productive value to below that amount. Michelman endorsed preeminent philosopher David Hume's view of property as merely "ingrained habits of the mind," and thus rejected Locke's belief (as Michelman put it) that "the advantage of property institutions [lies] in [a] direct relationship between private ownership and productivity."⁴⁹

The civic republicans' utilitarian understanding of property was incompatible with Madison's Lockean approach:

This being the *end of government, that alone is a just government, which impartially secures to every man, whatever is his own . . .* That is not a just government, nor is property secure under it, where the property which a man has in his personal safety and personal liberty, is violated by arbitrary seizures of one class of citizens for the service of the rest.⁵⁰

Madison's Takings Clause, too, was therefore Lockean — not civic-republican. While the civic republicans of his day feared the monopolization of wealth,⁵¹ Madison believed their fears misplaced — or at least to pale in comparison with the dangers the civic-republican program posed.⁵² Civic republicans' misgivings over the concentration of wealth, in Madison's estimation, could not justify the overwhelming costs to all that the state's *unfettered* power to redistribute wealth would impose.⁵³

49. *Id.* at 1209.

50. James Madison, *Property*, NAT'L GAZETTE, Mar. 27, 1792, reprinted in 14 JAMES MADISON, THE PAPERS OF JAMES MADISON 266 (1983) (emphasis added).

51. See Treanor, *supra* note 43, at 699 ("Many republican thinkers pilloried great wealth," which in their view "encouraged greed in its possessors and enabled them to wield undo power." Worse still, "the monopolization of possessions by a few denied to others the minimum of property that they needed to be full participants in the republican polity.").

52. See Treanor, *supra* note 43, at 705 ("The emerging non-republican school of thought, to which such politicians as John Adams, Benjamin Lincoln, James Madison, and Theophilus Parsons belonged, emphasized societal tensions and the benefits to be derived from self-interest. Non-republicans had a more expansive view than republicans of which rights could not be undermined by the state. They sought to create a large sphere within which the individual could exercise privileges and enjoy immunities free from state interference. Their focus on individual rights and their essentially atomistic view of society characterized these non-republicans as liberal thinkers. These liberals stressed the fundamental characters of the property right.").

53. See Treanor, *supra* note 43, at 709–10 ("Madison was a liberal: The ideas of a readily discernible common interest and of property rights subject to government abridgment were alien to him. For Madison, society was characterized by conflicts among interest groups, and those conflicts were often over property. '[T]he most common and durable source of factions,' he wrote, 'has been the various and unequal distribution of property. Those who hold, and those who are without property, have ever formed distinct interests in society.' . . . [Property's] protection was of critical importance. The diversity of interests that possession of property occasioned prevented tyranny, and the acquisition of property was a necessary by-product of the freedom of action he deemed an essential part of liberty. 'Government,' he wrote, 'is instituted no less for protection of the property, than of the persons of individuals.'").

C. The (Rightful) Struggle to Define Progressive “Property”

The civic republicans lost the “property” fight after ratification. The classical-liberal approach proved far more influential among post-ratification rulings. But, in the last century, a new rival to the Lockean, classical-liberal approach has emerged. Since at least the New Deal, progressive thinkers and lawmakers have presented “property” as a much more fluid — and therefore malleable — concept than the common law allows. Their definition of “property” reflects a complete disregard for the original public meaning of the word. And with property itself so weakened, so too are its constitutional protections: “Rejecting the idea that exclusion lies at the core of property law, progressive property scholars call for a reconsideration of the relationships owners and nonowners have with property and with each other.”⁵⁴ The progressive movement of the early to mid-twentieth century had an ever-shifting definition of property purposely not grounded in those *sines qua non* Professor Merrill has identified. And that malleability was a feature, not a bug, designed to permit progressive-dominated governments to engage in utilitarian takings with no regard to the effects of such takings on individuals.

Progressivism is concerned with the state as a viable means of transforming human society.⁵⁵ To that end, “progressive property” means whatever it must in order to maximize the probability of desired policy outcomes — regardless of the bright fundamental lines crossed in the process.⁵⁶ Within this framework, the *sines qua non* of property — *e.g.*, the

54. Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CALIF. L. REV. 107, 107 (2013).

55. See Eric R. Claeys, *Euclid Lives? The Uneasy Legacy of Progressivism in Zoning*, 73 FORDHAM L. REV. 731, 733 (2004) (describing progressivism “as faith in the ‘positive potential of government,’ as a principle that ‘legislative and administrative efforts often result in social and economic progress for the commonweal’” (quoting Charles M. Haar & Michael A. Wolf, *Euclid Lives: The Survival of Progressive Jurisprudence*, 115 HARV. L. REV. 2158, 2197 (2002))).

56. See Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1691–92 (2012) (“But if legal realism and its progeny insisted on anything, it was that property is *not* about things. According to this conventional wisdom, property is a bundle of rights and other legal relations availing between persons. Things form the mere backdrop to these social relations, and a largely dispensable one at that. Particularly with the rise of intangible property, so this story goes, the notions of ownership and property have become so fragmented and untethered to things that property is merely a conclusion, a label we affix to the cluster of entitlements that result from intelligent policymaking. By contrast, *according to the realist and postrealist conventional wisdom, the traditional baselines provided by property law not only were undertheorized and underjustified, but also represented a pernicious superstition and an obstacle to clear thinking and progressive remaking of the social order.* An inclination to take traditional property baselines seriously can then be dismissed as a failure to get with the program and a reflection of lack of sophistication or a partiality for entrenched interests.” (emphasis added)).

rights to exclude, and to use and alienate — pose no barrier to the regulatory restructuring of property rights. In this sense, without a solid and static foundation, property becomes whatever the government deems it to be in order to avoid paying just compensation.

The spread of a progressive definition of “property” is unsurprising in the context of the economic-political era in which it arose. But that does not make this historical trend any less troubling. As this Part explains, the twentieth-century triumph of progressive property theory doomed robust takings protection at all levels of the federal judiciary. But, as Part IV identifies, recent decades have witnessed a drift back to the more property-friendly, classical-liberal approach that prevailed before the progressive turn.

II. THE IMPACT OF THE SUPREME COURT’S INCOHERENT TAKINGS DOCTRINE

A. The Court’s Progressive Turn and the Erosion of Property Rights (1887-1978)

One case in particular — *Penn Central Transportation Co. v. City of New York*⁵⁷ — casts the longest doctrinal shadow over modern takings jurisprudence. In 1978, the Supreme Court ruled that whether a regulation “goes too far” depends on ad hoc factual inquiries into its economic impact on the owner, the owner’s distinct investment-backed expectations, and the character of the government’s action, among other considerations the Court failed to elaborate upon.⁵⁸ Despite *Penn Central*’s failure to establish a test of uniform application, courts usually have no choice but to rely on it when they analyze most regulatory takings claims.

Indeed, the triumph of *Penn Central* is not surprising in light of the Court’s positivistic drift beginning after the first quarter of the twentieth century. This was as much a homegrown development in the legal world as it was the product of outside political pressures. Great-Depression politics, the responsive New Deal, and President Roosevelt’s albeit failed court-packing scheme together scared the Court (or at least five-ninths of it) enough to begin toeing the progressive line, especially on economic

57. 438 U.S. 104 (1978).

58. *See id.* at 124 (“In engaging in these essentially *ad hoc*, factual inquiries, the Court’s decisions have identified *several factors that have particular significance*. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, *relevant considerations*” — i.e., there are other factors can also be pertinent in takings cases. (emphasis added)).

matters.⁵⁹ Justice Sutherland’s “switch in time that saved nine” in *West Coast Hotel Co. v. Parrish*,⁶⁰ upholding Washington State’s minimum wage for women, firmly established the Court as a political creature for at least the next half-century — especially with respect to economic and property regulations.⁶¹

Within this context, the Court retreated from many of its prior positions. One example is its about-face on the Fourteenth Amendment’s Due Process Clause. The Clause prohibits the state from “depriv[ing] any person of life, liberty, or property, without due process of law.”⁶² Courts once subjected such potential deprivations to an exacting standard, keeping on the lookout for “natural” or “fundamental” rights violations, including (and perhaps especially) in the economic sphere.⁶³ And almost all uncompensated takings could be construed as economic due process violations because the regulation of land almost always involves a pecuniary loss.

Even before *West Coast Hotel*, however, there were signs that a majority of justices were reading the political tea leaves and voting accordingly. In *Nebbia v. New York*, the Court held that under the Fourteenth Amendment’s Due Process Clause, “a State is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose” and that courts must give “every possible presumption . . . in favor of [a legislative enactment’s] validity.”⁶⁴

Flashes of the Court’s emerging political character may be found even earlier, for instance in the 1926 case *Euclid v. Ambler Realty Co.*⁶⁵ In *Euclid*, the Court upheld a comprehensive zoning scheme, reasoning that “[i]f the

59. See Mark Tushnet, *The New Deal Constitutional Revolution: Law, Politics, or What?*, 66 U. CHI. L. REV. 1061, 1064 (1999) (“A more sophisticated externalist would look to the economic crisis that occasioned the New Deal to account for the era’s constitutional revolution. A regime in which legislatures were barred from regulating wages, and more generally from adopting policies aimed at directing economic development, no longer seemed acceptable during the Depression.”).

60. 300 U.S. 379 (1937).

61. Stanley I. Kutler, *Raoul Berger’s Fourteenth Amendment: A History or Ahistorical?*, 6 HASTINGS CONST. L. Q. 511, 512–13 (1979) (“From the early twentieth century through the late 1930s, academic and liberal commentators . . . criticized vigorously the abusive powers of the federal judiciary . . . consistently frustrating desirable social policies . . . [T]he judges had arrogated a policymaking function not conferred upon them by the Constitution . . . negat[ing] the basic principles of representative government . . . in favor of the interests of a privileged few After 1937, most of the judiciary’s longtime critics suddenly found a new faith The judges themselves pointed the way of the true faith as they rationalized a minimal judicial role for superintending economic legislation while championing civil rights and civil liberties to the maximum.”).

62. U.S. CONST. amend. XIV, § 1.

63. See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905).

64. 291 U.S. 502, 537–38 (1934) (emphasis added).

65. 272 U.S. 365 (1926).

validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.”⁶⁶ Unfortunately, on several fronts (including property regulations), the Court has, until very recently, adhered to the “presumption of constitutionality” announced in *United States v. Carolene Products Co.*’s famous Footnote Four.⁶⁷ Under this framework, legislative acts are deemed constitutional exercises of a state’s police powers unless there is compelling evidence against officials’ proffered justifications.

The Court’s takings jurisprudence eventually progressed from due respect to downright reverence for legislative “wisdom.” Take, for example, the Court’s determination in *Berman v. Parker* that a legislature’s judgments of its own anti-blight powers are “well-nigh conclusive.”⁶⁸ This stance stands in stark contrast to the Court’s conclusion in *Mugler v. Kansas*, more than a half-century before *Berman*, that the Fourteenth Amendment’s Due Process Clause allows the proscription of behaviors *only* to the extent that such restrictions protect the public from harms to their safety, health, or morals.⁶⁹ In *Mugler*, the Court confronted a state law generally banning the production of alcohol in order to address the social ailments excessive drinking apparently caused.⁷⁰ The *Mugler* Court was not afraid to use its independent judgment in determining whether a legislature’s claim that a specific statute falls under its police powers is authentic or mere subterfuge for a taking or due-process violation.⁷¹ Decided two years before the Supreme Court heard *Mugler*, the New York Court of Appeals case *In re Jacobs* exhibited what would become the *Muglerian* approach (one of many cases in the nineteenth century to do so).⁷² There, New York’s highest court struck down a prohibition on home cigar-rolling, holding that legislators did not have the final word in defining their own powers:

Under the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded, and the determination of the

66. *Id.* at 388.

67. 304 U.S. 144, 152 n.4 (1938).

68. 348 U.S. 26, 32 (1954).

69. 123 U.S. 623 (1887).

70. *Id.* at 660.

71. *See id.* at 661 (“The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty, indeed, are under a solemn duty, to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution.”).

72. *See* 98 N.Y. 98 (1885); *see also* JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT 91 (2008) (“Significantly, during the 1880s several state supreme courts also interpreted due process as protecting economic rights against legislative controls.”).

legislature is not final or conclusive. If it passes an act ostensibly for the public health, and thereby destroys or takes away the property of a citizen, or interferes with his personal liberty, then it is for the courts to scrutinize the act and see whether it really relates to and is convenient and appropriate to promote the public health.⁷³

The *Mugler* Court similarly found that “[it] does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the [state’s] police powers.”⁷⁴ Courts “must, upon their own responsibility, determine whether, in any particular case, these limits have been passed.”⁷⁵

The comparison the Supreme Court drew in *Mugler* between public-harm-preventing regulations (which legislatures may enact without compensation) and public-benefit-conferring ones (which legislatures cannot enact unless they provide compensation) presaged the *Lochner* era, which extended from 1905 until the *Nebbia* and *Parrish* decisions were handed down. During this time period, the Court readily recognized its power to invalidate economic regulations that it found had violated substantive-due-process rights, including the freedom to contract.⁷⁶ Still, pro-*Lochner* justices were far from the anarcho-capitalist zealots that later progressive scholars made them out to be.⁷⁷ Indeed, between *Lochner* and *Nebbia*, the Court in a host of cases involving economic due process claims upheld the challenged laws.⁷⁸ As Professor David Bernstein put it, “*Lochner* turned out to be neither the stuff of libertarian dreams nor of [p]rogressive nightmares.”⁷⁹ In these cases, distinguishing public-harm-preventing measures from public-benefit-conferring ones that overburden too few was not as difficult a task as Justice Scalia later made it out to be in *Lucas v. South Carolina Coastal Council*. In his majority opinion, Scalia wrote that “the distinction between ‘harm-

73. *In re Jacobs*, 98 N.Y. at 110.

74. *Mugler*, 123 U.S. at 661 (alteration in original).

75. *Id.*

76. *See* *Lochner v. New York*, 198 U.S. 45, 61 (1905).

77. *See* David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 82 GEO. MASON L. AND ECON. WORKING PAPER SERIES 1, 3 (2003) (“Historians, political scientists, and legal scholars all told a tale . . . [that] *Lochner* era Supreme Court Justices, influenced by pernicious Social Darwinist ideology, sought to impose their laissez-faire views on the American polity.”); *see also* Barry Cushman, *Teaching the Lochner Era*, 62 St. Louis Univ. L.J. 537, 538 (“Yet the cases invoking liberty of contract as grounds for invalidation constitute a rather small slice of the period’s economic substantive due process jurisprudence. Indeed, only fifteen cases invalidating legislation between 1897 and 1937 did so on the theory that the statute infringed contractual liberty. Moreover, five of these cases did not employ terms such as ‘liberty of contract’ or ‘freedom of contract,’ but simply followed earlier cases that had expressly relied on such a rationale.”).

78. David E. Bernstein, *Lochner v. New York: A Centennial Retrospective*, 83 WASH. U. L. Q. 1469, 1505–07 (2005).

79. *Id.* at 1505.

preventing' and 'benefit-conferring' regulation is often in the eye of the beholder."⁸⁰ But the *Lochner* Court and the lower courts were able to make these distinctions without creating a patchwork of incoherent and incompatible doctrines. Under *Lochner*, then, the Court still called balls and strikes, and neither favored nor disfavored government regulation.

The *Lochner* era, though controversial in contemporary academic circles, was the high watermark for the Court's exercise of its independent judgment. This era ended with *Nebbia* and *Parrish*, and the holding was reburied in *Berman*, where Justice Douglas found that a legislature's ability to adjudge the limits of its own powers is "well-nigh conclusive."⁸¹ In *Berman* the Court had endorsed the District of Columbia's uncompensated destruction of homes in the highly dubious name of fighting "blight" far from the impacted neighborhood. The *Bermanesque* treatment of property rights would continue into this century, despite the Court's repeated pronouncement that the *Armstrong* principle guides its takings jurisprudence.⁸²

B. A "Crazy-Quilt Pattern" of Takings Rules (1960s-1990s)

By the 1960s, increased judicial deference produced a patchwork of takings tests that are often incoherent and sometimes even incompatible with one another. Professor Michelman recognized this in *Property, Utility, and Fairness*, offering several examples of arbitrary and inconsistent applications of takings jurisprudence, including that "[i]f government builds a dam across a navigable stream, impeding the flow of waters away from my . . . mill and reducing its value, it must compensate me if my mill empties into nonnavigable waters, but not if [it] empties into navigable waters."⁸³ Joseph Sax, in his classic *Takings and the Police Power*, likewise noted that takings caselaw features "a welter of confusing and apparently incompatible results. The principle upon which the cases can be rationalized is yet to be discovered by the bench: what commentators have called the 'crazy-quilt pattern of Supreme Court doctrine' has effectively been acknowledged by the Court itself"⁸⁴

80. 505 U.S. 1003, 1024 (1992).

81. See *Berman v. Parker*, 348 U.S. 26, 32 (1954).

82. See, e.g., *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 304 (2002).

83. Michelman, *supra* note 45, at 1170 (alteration in original and citations omitted). Despite his promotion of a utilitarian takings jurisprudence, Michelman did a good job of detailing how far the actual jurisprudence had strayed from its origins.

84. Joseph L. Sax, *Takings and the Police Power*, 74 *YALE L.J.* 36, 37 (1964) (quoting Allison Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 *SUP. CT. REV.* 63, 63 (1962)).

Even as the Supreme Court has attempted to clarify this confusion in the last decade, too many courts are still lost in a doctrinal miasma born of the high court's "crazy-quilt pattern" designs — its amorphous *Penn Central* test among them.⁸⁵ Still, there were some crucial wins in the two decades after *Penn Central*; among these were the "per se takings" cases, which highlighted the Court's willingness to draw *some* uncrossable lines — for instance, its recognition that whenever a regulation involves an actual physical invasion, or deprives an owner of all economic use of their property, it is a categorical taking regardless of the extent or reason for the governmental interference.⁸⁶

While things were not all bad after *Penn Central*, the inconsistency with which the Court doled out wins and losses makes their late-twentieth-century takings jurisprudence at best well-intentioned but poorly executed. At worst, it was downright schizophrenic. But in many ways the 1980s crack-up was the inevitable culmination of more than a half-century of "crazy-quilt pattern" doctrine.⁸⁷ The variety of losing takings claims from the 1920s onwards (and even through the relatively pro-free-market Court of the 1980s and 90s) make clear how damaging to property rights the progressive, post-*Lochner* turn proved to be. No longer calling balls and strikes, the umpires now took most pitchers at their word. After the Burger Court redoubled its *Berman* holding in *Hawaii Housing Authority v. Midkiff*,⁸⁸ the chances of a course correction dwindled substantially; twin Rehnquist-Court rulings seemed to foreclose it altogether.

C. The Supreme Court Rules Against Rental Owners (1988-1992)

The incoherence surrounding the Takings Clause is especially acute in the rent-control context. In *Pennell v. San Jose*, owners challenged mandated rent reductions for "hardship tenants," defined as such through arbitration.⁸⁹ The Court held that the law was not a violation of owners' rights to due process.⁹⁰ An arbitrator's case-by-case assessment of tenants' hardship claims "represents a rational attempt to accommodate the conflicting

85. Dunham, *supra* note 84, at 63. Compare, e.g., *Lech v. Jackson*, 791 F. App'x. 711, 719 (10th Cir. 2019) (determining that the police destruction of a third party's home in pursuit of a fleeing suspect is not a taking requiring just compensation), with *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 325 (1893) (holding that under the Takings Clause, when one "surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.").

86. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992).

87. See Sax, *supra* note 84, at 37.

88. 467 U.S. 229, 239 (1984).

89. 485 U.S. 1, 4 (1988).

90. *Id.* at 15.

interests of protecting tenants from burdensome rent increases while at the same time ensuring that landlords are guaranteed a fair return on their investment.”⁹¹ But as land-use scholar Steven Eagle later noted, “it is very difficult, perhaps impossible, to ascertain what rate of return is a ‘fair rate of return.’”⁹² Justice Scalia’s dissent in *Pennell* (joined by Justice Sandra Day O’Connor) points to the real purpose behind tenancy controls:

The politically attractive feature of regulation [as opposed to taxation and transfer payments] is not that it permits wealth transfers to be achieved that could not be achieved otherwise; but rather that it permits them to be achieved “off budget,” with relative invisibility, and thus relative immunity from normal democratic processes.⁹³

In *Yee v. City of Escondido*, the Court held by an unsettling nine–zero vote that it was within the California municipality’s police powers to limit the price mobile park owners like the Yees could charge for the lots they leased to mobile homeowners.⁹⁴ In combination with a state law restricting eviction, this local ordinance effectively converted these lessees into perpetual tenants, who could then sell their leasehold at a premium. All the Yees could do was watch as their tenants pocketed profits that properly belonged to them. The Court reasoned that “[t]he government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land.”⁹⁵ Since the Yees “voluntarily rented their land to mobile home owners,” there was no physical taking.⁹⁶ The *Yee* Court concluded that the tenancy controls in issue fell within the City’s “broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails.”⁹⁷ The Court latched onto the idea that because the owner freely entered the rental market, then almost nothing that regulates that transactional use — even a tenant’s ongoing physical invasion of the property — is outside the state’s police powers.⁹⁸

While *Yee* did not precipitate a flood of new rent-control measures, it gave existing and future ones the most prestigious of imprimaturs. As Richard Epstein noted soon after the opinion’s publication:

91. *Id.* at 13.

92. STEVEN J. EAGLE, REGULATORY TAKINGS 394 (3d ed. 2005).

93. 485 U.S. at 22 (Scalia, J., concurring in part and dissenting in part).

94. 503 U.S. 519, 526–27 (1992).

95. *Id.* at 527.

96. *Id.*

97. *Id.* at 528–29 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982)).

98. *Id.* at 527–28.

To protect bare possession, while excluding use and disposition from serious constitutional protection, leaves landowners subject to massive regulatory risks without any offsetting social gain Where the Court grants an inch, state and local governments will quickly take a mile, so that virtually all productive use of property may be halted by the thankless stalemate between government veto and private desire: The state may block, but it may not occupy or develop. The bitter confrontation between individual landowners and government . . . should not be regarded as a commentary on the character of individuals locked in deadly conflict with each other. It is attributable to the basic incentive structure created by a set of judicial rules that encourage public coercion and private resistance instead of voluntary agreement.⁹⁹

That is, categorical distinctions that narrow property rights also breed thoroughly unjust results. In separating the analytical framework used to judge *physical* takings from that used to judge its *regulatory* counterpart, *Yee* sets up owners for defeat before they can even make their cases.

D. A Cause for Optimism (2005-Present)

In 2005, just after deciding *Kelo v. City of New London*, the Court's membership changed for the first time in 11 years — the second-longest stretch in its history.¹⁰⁰ Since then, the Court has shown an increased willingness to reorder the post-*Penn Central* status quo. In *Arkansas Game & Fish Commission v. United States*, it ruled that “recurrent floodings [that harmed private property], even if of finite duration, are not categorically exempt from Takings Clause liability.”¹⁰¹ Then, in *Koontz v. St. Johns River Water Management District*, the Court found that the *Nollan/Dolan* test — which requires that conditions placed on a permit bear an “essential nexus” to the requested land use and be “roughly proportional” to the costs that use would impose on the surrounding community¹⁰² — applied even where the state ultimately denied the permit request.¹⁰³

Soon after, in *Horne v. Department of Agriculture*, the Court held that the government's appropriation of personalty is subject to the same constitutional analysis — and protection — as are deprivations of realty.¹⁰⁴ In *Cedar Point Nursery v. Hassid*, the Court ruled that a state law requiring

99. Richard A. Epstein, *Yee v. City of Escondido: The Supreme Court Strikes Out Again*, LOY. L.A. L. REV. 3, 15 (1992).

100. ILYA SHAPIRO, *SUPREME DISORDER: JUDICIAL NOMINATIONS AND THE POLITICS OF AMERICA'S HIGHEST COURT 193–94* (2020).

101. 568 U.S. 23, 27 (2012).

102. See *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987) (“essential nexus”); *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (“rough proportionality”).

103. 570 U.S. 595, 599 (2013).

104. See 576 U.S. 350, 358 (2015).

property owners to allow union organizers access to their property constituted a *per se* physical taking requiring just compensation in every such case.¹⁰⁵ The Court rejected out of hand California's proposition that its union-access law should be analyzed using *Penn Central*'s flexible (and too-often government-favoring) regulatory taking test.¹⁰⁶

On top of all this, the Supreme Court's 2021 invalidation of the Centers for Disease Control and Prevention's (CDC) Covid-related eviction moratorium suggests that the Court might yet reexamine its rent-control precedents.¹⁰⁷ In its *per curiam* order, the Court did not go so far as to reject Congress's authority to impose an eviction moratorium, though it came close. Rather, it was limited to the question of whether the moratorium was within the CDC's congressionally authorized power.¹⁰⁸ Even still, the Court offered some glimpses of a possible analytical approach were Congress to take that action on its own initiative. Citing *Loretto*, which, recall, held that regulations resulting in actual physical invasion are *per se* takings not subject to *Penn Central* balancing¹⁰⁹ — the Court opined that the CDC moratorium “intrudes on one of the most fundamental elements of property ownership — the right to exclude.”¹¹⁰ The Roberts Court also built on Scalia's “off budget” wealth transfer argument from *Pennell v. San Jose*¹¹¹ when it chastised the CDC's “determination that landlords should bear a significant financial cost of the pandemic,” even though “many landlords have modest means.”¹¹² The Supreme Court's invalidation of the CDC moratorium might wind up as the first in a series of rollbacks from *Yee*.¹¹³ These are all good signs and the future of takings law looks bright — or at least brighter than it has been in decades. But there is still much work to be done.

105. *See* 594 U.S. ___, 141 S.Ct. 2063, 2072 (2021).

106. *Id.*

107. *See* Ala. Ass'n of Realtors v. Dep't of Health and Hum. Servs., 594 U.S. ___, 141 S.Ct. 2485, 2490 (2021) (*per curiam*).

108. *Id.* at 2488.

109. *See* *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

110. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489.

111. 485 U.S. 1, 22 (1988) (Scalia, J., concurring in part and dissenting in part).

112. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489.

113. *See* *Yee v. City of Escondido*, 503 U.S. 519, 528 (1992) (“Put bluntly, no government has required any physical invasion of petitioners' property. Petitioners' tenants were invited by petitioners, not forced upon them by the government.”).

III. THE TRIUMPH OF PROGRESSIVE “PROPERTY” AND THE EMERGENCE OF RENT CONTROLS

A. The Gradual Shift in Judicial Perspectives from the Classical Liberal to the Progressive Understanding of Property and the Extent of a State’s Regulatory Powers

The Lockean approach became the prevailing view of the Takings Clause from ratification into the early twentieth century, whereafter progressive scholars and jurists began to question the classical-liberal take. Courts throughout this long period showed how easy it is to call out takings disguised as mere police-power actions.¹¹⁴ Until the twentieth-century turn, the prevailing takings jurisprudence lent little credence to civic-republican or progressive views. Nineteenth-century courts by and large endorsed the Lockean-Madisonian vision of property as deserving of government’s protection, first and foremost.¹¹⁵ Only a compelling public need to prevent or enjoin a private harm justified restrictions without compensation.¹¹⁶

Despite the ease with which courts through the nineteenth century used their own judgment to distinguish police powers from takings,¹¹⁷ for utilitarian legal theorists, this system did not provide the political flexibility that their means-ends approach required. Blurring constitutional lines is not difficult for those who “[do] not view government as a necessary evil, but rather as a positive force for good in a wide range of social situations,” especially “where the comparatively minimalist classical-liberal view was said to have faltered.”¹¹⁸

Today debate persists over where to locate the boundary between mere police-power actions and those that also effect takings. It is often framed as a battle of wits between utilitarian and classical-liberal conceptions of good government. As Professor Epstein put it: “The greatest challenge to the

114. See generally Sam Spiegelman & Gregory C. Sisk, *Cedar Point: Lockean Property and the Search for a Lost Liberalism*, 2021 CATO SUP. CT. REV. 165 (2021).

115. See Treanor, *supra* note 43, at 715–16 (“As courts more and more found a right to compensation, however, [anti-compensation] arguments” rooted in civic-republican traditions “lost their force. With the passage of time, *that right came to seem an important and long-honored* part of the Anglo-American legal tradition. The counter-tradition of legitimized takings was all but forgotten. At least in the historical short term, the future belonged to liberalism and just compensation.” (emphasis added)).

116. See, e.g., *Watertown v. Mayo*, 109 Mass. 315, 319 (1872) (“The law will not allow rights of property to be invaded under the guise of a police regulation for the preservation of health or protection against a threatened nuisance; and when it appears that such is not the real object and purpose of the regulation, *courts will interfere to protect the rights of the citizen.*” (emphasis added)).

117. See Spiegelman & Sisk, *supra* note 114, at 173–78.

118. EPSTEIN, *supra* note 23, at 6.

original constitutional plan comes not from . . . inevitable and salutary historical adaptations, but from a conscious reversal of philosophical outlook on the proper role of government.”¹¹⁹

Building on utilitarian influences, early-twentieth-century progressives believed that “the traditional safeguards against excessive state power that animated early constitutional theory on . . . property rights were . . . pointless roadblocks that the modern technological state should overcome through a greater concentration and use of government power at all levels.”¹²⁰ For those who trust that the state will nearly always act in their citizens’ best interest,¹²¹ this is a harmless and efficient prescription for social and economic improvement. Of course, the state is stocked with people — human beings. And humans are as capable of the rankest evil as they are of the greatest good. For classical liberals, dedicated as they are both to the rule of law and to the primacy of the individual, “the basic dilemma in theory and constitutional design was, and is . . . to maintain order without destroying liberty.”¹²²

The “police power” is shorthand for the state’s inherent authority to protect the health, safety, morals, and general welfare of the public.¹²³ If the classical-liberal view prevails, then *mere regulations* — including rent controls — would not be lawful simply because the legislature claims they will advance the police power. To vet such claims, courts must always exercise their independent judgment, employing at least rational-basis review to determine whether a given regulation plausibly furthers a legitimate public interest.¹²⁴ As Professor Randy Barnett put it: “When ‘surrendering’ one’s executive power to government . . . one receives in return a ‘civil’ right to have one’s liberty rights protected by the police power

119. EPSTEIN, *supra* note 23, at 4–5.

120. *Id.* at 6–7.

121. For evidence against this proposition, see generally J.M. ROBERTS & ODD ARNE WESTAD, *THE PENGUIN HISTORY OF THE WORLD* (6th ed. 2013).

122. EPSTEIN, *supra* note 23, at 4.

123. See *Lochner v. New York*, 198 U.S. 45, 53 (1905) (explaining that the police power “relate[s] to the safety, health, morals, and general welfare of the public”). See generally Santiago Legarre, *The Historical Background of the Police Power*, 9 J. CONST. L. 745 (2007).

124. See Steve Menashi & Douglas Ginsburg, *Rational Basis with Economic Bite*, 8 N.Y.U. J.L. & LIBERTY 1055, 1098 (2014) (“Courts still must apply rational basis scrutiny and have realized, despite the example of *Lee Optical*, that ‘[f]or rationality review to be real rather than sham, the court must be willing to make some independent assessment of legislative purpose.” (quoting Richard H. Fallon Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 373 n.38 (1993)); cf. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–88 (1955) (“[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”).

now in the hands of the civil government.”¹²⁵ That exchange, Locke explained, means “the *Supream* [sic] *Power cannot take* from any Man any part of his *Property* without his own consent.”¹²⁶ “Hence,” Locke continued, “it is a mistake to think, that the *Supream* [sic] or *Legislative Power* of any Commonwealth, can do what it will, and dispose of the Estates of the Subject *arbitrarily*, or take any part of them at pleasure.”¹²⁷

B. Judicial Deference and the Spread of Rent Controls

The rise of rent controls as a feasible public policy was but one variant of the perennial overexpansion of the state’s regulatory authority in response to each major crisis of the twentieth century.¹²⁸ Beginning in the 1920s and intensifying with each passing decade, American courts wandered farther afield from the classical-liberal view of the jurist as an autonomous interpreter of the law. A substantial proportion of judges in the nineteenth and early-twentieth centuries used their own judgment to distinguish non-takings police powers from takings requiring just compensation.¹²⁹ The

125. Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 451 (2004).

126. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 360 (Peter Laslett ed., 1988).

127. *Id.* at 361.

128. See generally ROBERT HIGGS, CRISIS & LEVIATHAN: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT (25th ann. ed. 2012); see *id.* at 4 (“During the nineteenth century the nation became the world’s richest and freest society. The nation’s second century, however, has witnessed a decline of the commitment to limited government and extensive property rights. In 1900 the government still approximated a minimal state. Americans did not practice pure laissez-faire — no society ever did — but they still placed binding constraints on government and allowed relatively few projections of its power into the economic affairs of private citizens. That long-established restraint has largely dissolved during” the last seven decades of the twentieth century); see *id.* at 33 (“Relative to the economy, the government has grown enormously during the twentieth century Much of the growth has occurred during short intervals of national emergency, especially during the [World Wars and the Great Depression.]”).

129. See generally ELY, *supra* note 72. Ely described in great detail how the classical-liberal view prevailed in property-related rulings during the nineteenth century. This extended first to rulings involving the Contract Clause (which by its terms restrains state action) or state-constitutional takings clauses. At nineteenth century’s end, the Supreme Court expanded the reach of the classical-liberal view (though as I have discussed this view would not survive the twentieth century) when it held that the Fourteenth Amendment permitted federal courts to enforce the federal Takings Clause against state and municipal governments. See *Chi., Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 241 (1897) (“In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the fourteenth amendment of the constitution of the United States, and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument.”). Even before then, though, “federal courts clearly signaled their intention to safeguard existing economic arrangements and curtail state legislative authority dealing with property rights.” ELY, *supra* note 72, at 61–62.

answer typically came down to whether the challenged regulation was public-harm-preventing (a non-taking police-power action) or public-benefit-conferring (takings requiring just compensation).¹³⁰ The Supreme Court's gradual departure from this approach reached its apogee (or nadir) in 1954, when Justice William O. Douglas, writing for the majority in *Berman*, held that "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."¹³¹

As the Court put it in *Yee v. City of Escondido*: "When [a] landowner decides to rent his land to tenants, the government may place ceilings on the rents the landowner can charge, or require the landowner to accept tenants he does not like, without automatically having to pay compensation."¹³² The *Yee* Court supported this conclusion by reference to another of its erroneous but unanimous takings opinions, *PruneYard Shopping Center v. Robins*. In that case, the Court held that because a mall had opened itself to the public, it even had to accept entrants' sharing opinions with which the mall's owners felt had no place in a commercial setting, e.g., handing out pro-Israel materials in a shopping center in the Bay Area.¹³³ Presumably *Pruneyard* would have come out different — as *Yee* likely would have — had there been no initial invitation.¹³⁴ The Court agreed with the California Supreme Court's determination that "shopping centers to which the public is invited can provide an essential and invaluable forum for exercising [free speech] rights."¹³⁵ In short, once an owner opens their doors to any kind of public access (and of any duration), it is for the state to decide when and to whom it may close them. *Yee* and *Pruneyard* both ignored the harm principle motivating the classical-liberal understanding of the state's power over private property — and its limits.¹³⁶

Rent controls almost never involve direct appropriations; or, at least that was the case until the rise of Covid-related eviction moratoria. Instead, such rules typically attach only once owners volunteer their properties for rent. Thus, there is at least arguable logical coherence to rent-control proponents' seeing these measures as simply leveling the playing field between unequal economic actors, and not as takings in regulatory garb. This requires convincing courts that this inequality in itself is harmful to the public — not

130. Spiegelman & Sisk, *supra* note 114, at 173–78.

131. *Berman v. Parker*, 348 U.S. 26, 32 (1954).

132. *Yee v. City of Escondido*, 503 U.S. 519, 529 (1992) (internal citations omitted).

133. *See PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 82–84 (1980).

134. *See generally Yee*, 503 U.S.

135. *See Robins v. PruneYard Shopping Ctr.*, 23 Cal. 3d 899, 910 (1979).

136. *See Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984) ("[I]f a legislature, state or federal, determines there are substantial reasons for an exercise of the taking power, courts must defer to its determination that the taking will serve a public use.").

a difficult undertaking given the ultra-deferential style that emerged in the post-*Lochner*, New Deal period.¹³⁷ For property-rights advocates, the progressive reading is anathema to the expansive definition of property shared among American lawyers and jurists, and in common parlance, since before the Founding.¹³⁸

The broadest view of private property — one that includes *all* sticks in the bundle of rights — demands courts, upon their own judgment, distinguish between police-power actions that are also takings from those that are not. If judges simply take lawmakers at their word, then those lawmakers are free to remove as many sticks as they please, defining “property” as only what’s left.¹³⁹ Just because legislatures and municipal councils enacting rent controls proclaim their purpose is to equalize bargaining power among unequal contracting parties (arguably to serve the so-called general welfare) does not require courts let slip their competence to decide when a police-power action is also a taking. Before the 1920s, jurists were not willfully blind to instances of legislative overreach. At least before the progressive turn, courts easily cut through tenuous government arguments that a given police-power action had not worked a taking.¹⁴⁰

For much of American history, tenancy rules were limited to mutual contractual terms and common-law maxims. This changed in a big way during the First World War, when the District of Columbia, among other

137. See Karl Manheim, *Rent Control in the New Lochner Era*, 23 UCLA J. ENV'T L. & POL'Y 211, 219 (2005) (“When it comes to rental housing, leasing the property for financial gain is invariably an expected — and protected — use. The issue becomes more complicated when the economic interest is shared between landlord and tenant.”).

138. ELY, *supra* note 72, at 17 (“It is difficult to overstate the impact of the Lockean concept of property. Strongly influenced by Locke, the eighteenth-century Whig political tradition stressed the rights of property owners as the bulwark of freedom from arbitrary government. Property ownership was identified with the perseverance of political liberty.”). For an alternative view, see generally William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995).

139. See Nicole Stelle Garnett, *From a Muddle to a Mudslide: Murr v. Wisconsin*, 2016-2017, CATO SUP. CT. REV. 131, 132 (2017) (discussing *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017), in which the court upheld Wisconsin’s questionable redefinition of a “parcel” as applies to a specific plot. “On one hand, the Court has long insisted that state laws define the contours of property rights. On the other, it also has admonished that state laws that impose particularly harsh burdens on property owners for other than traditional health and safety reasons will be treated as takings for which the regulated property owners are entitled to compensation. These two ideas are not easily reconciled. If state laws define the contours of property rights, it is reasonable to ask why state laws that restructure those contours — restricting or reshaping property rights — ought ever be considered compensable takings. In other words, if states have the power to define what property *is*, why can’t they *redefine* what it is without compensating property owners? Conversely, giving states *carte blanche* to regulate away all the value of private property would render the protection provided by the Fifth Amendment’s Takings Clause a dead letter.” (emphasis original)).

140. See Spiegelman & Sisk, *supra* note 114, at 173–78.

jurisdictions, imposed rent price caps; it was thought these measures would alleviate the housing shortage caused by a sharp increase in war-related work.¹⁴¹ The Supreme Court signed off on the District's policy in *Block v. Hirsch*, noting the reality of the emergency; but the justices insisted that the cap be lifted once the crisis abated.¹⁴² When it wasn't lifted in time, the Court in 1924 (more than five years after the war's end) stepped in and struck down the policy.¹⁴³ With the emergency at its end, the reasoning went, so too should its counter-measures.¹⁴⁴

Rental price caps returned during the Great Depression and then again during the Second World War, both times as policies to fight sudden housing shortages in major urban areas resulting from a mass influx of workers answering the sharp demands of a wartime economy.¹⁴⁵ One study of the period found that “[r]oughly 80 percent of the 1940 rental housing stock [nationwide] lay in areas that the federal government put under rent control between 1941 and 1946.”¹⁴⁶ The study concluded, as any economist would predict, with many landlords withdrawing their units from the rental market altogether.¹⁴⁷ As constitutional lawyer Timothy Sandefur put it, “[c]ontrols on rents . . . disrupt the normal coordination of supply and demand that takes place in the free market, decreasing the incentives for property owners to provide rental housing and limiting the choices available to those wishing to rent.”¹⁴⁸

141. See John W. Willis, *Short Story of Rent Control Laws*, 36 CORNELL L.Q. 54, 70–71 (1951).

142. *Block v. Hirsch*, 256 U.S. 135, 154 (1921) (“The statute embodies a scheme or code which it is needless to set forth, but it should be stated that it ends with the declaration in section 122 that the provisions of Title 2 are made necessary by emergencies growing out of the war, resulting in rental conditions in the District dangerous to the public health and burdensome to public officers, employees and accessories, and thereby embarrassing the Federal Government in the transaction of the public business. As emergency legislation the Title is to end in two years unless sooner repealed.”).

143. See *Chastleton Corp. v. Sinclair*, 264 U.S. 543 (1924).

144. See *id.* at 547–48 (“We repeat what was stated in *Block v. Hirsh*, 256 U.S. 135, 154, . . . as to the respect due to a declaration of this kind by the Legislature so far as it relates to present facts. But even as to them a Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared. And still more obviously so far as this declaration looks to the future it can be no more than prophecy and is liable to be controlled by events. A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed.”) (certain internal citations omitted).

145. Willis, *supra* note 141, at 76–84.

146. Daniel K. Fetter, *The Home Front: Rent Control and the Rapid Wartime Increase in Homeownership 1* (Nat'l Bureau of Econ. Rsch., Working Paper No. 19604, 2013).

147. See *id.* at 8, 26.

148. TIMOTHY SANDEFUR, CORNERSTONE OF LIBERTY: PROPERTY RIGHTS IN 21ST CENTURY AMERICA 83 (2006).

While rent control costs all greatly, it is the landlords who feel the immediate pinch. For politicians seeking reelection, the long-term consequences matter less than the immediate approval such controls elicit from voters who rent (and who far outnumber landlords). Nowadays, however, without doubt the economic stakes in rent controls anger and enflame. The debate plays out across a multi-axial plane: boomers versus millennials,¹⁴⁹ rich versus poor,¹⁵⁰ and established minority residents about to be priced out versus recent, mostly White, transplants.¹⁵¹ Rent controls stoke these flames in myriad ways, although none more consequential than through the price increases over-regulation inevitably creates.¹⁵²

There are still plenty of rent-control losers beyond landlords. In a data-heavy report produced in 2003, Harvard economist Edward Glaeser found that due to rent control in New York City “approximately 20 percent of apartments are in the wrong hands,” given economic disparities between subpopulations.¹⁵³ In 1995, voters in San Francisco approved a ballot initiative exempting only pre-1980 small multifamily dwellings from the city’s standard rent control package. “Predictably, people subject to the new policy” — that is, tenants who benefitted — “became . . . between [eight] and [nine] percent less likely” to move.¹⁵⁴ This made the housing market more static, as many who might have moved to make room for others who had a greater preference for city-living chose not to in light of this new incentive to stay put. “The new policy” also “created a powerful incentive for landlords either to convert rental units into condominiums or to demolish

149. See Corbin K. Barthold, *Wake Up, California Millennials: Rent Control Is a Generational Con Game*, FORBES (Aug. 20, 2018), <https://www.forbes.com/sites/wlf/2018/08/20/wake-up-california-millennials-rent-control-is-a-generational-con-game/?sh=6ed30cd397b8> [https://perma.cc/MC28-9T7F].

150. See Josh Barbanell, *Wealthy, Older Tenants in Manhattan Get Biggest Boost From Rent Regulations*, WALL ST. J. (June 12, 2019), <https://www.wsj.com/articles/wealthy-older-tenants-in-manhattan-get-biggest-boost-from-rent-regulations-11560344400> [https://perma.cc/GZC7-5YZ6].

151. See Rebecca Diamond, *What Does Economic Evidence Tell Us About the Effects of Rent Control?*, BROOKINGS INST. (Oct. 18, 2018), <https://www.brookings.edu/articles/what-does-economic-evidence-tell-us-about-the-effects-of-rent-control/> [https://perma.cc/X7LN-RW48] (“[I]n the long-run [rent control] decreases affordability, fuels gentrification, and creates negative externalities on the surrounding neighborhood.”).

152. See generally Rebecca Diamond et al., *The Effects of Rent Control Expansion on Tenants, Landlords, and Inequality: Evidence From San Francisco*, 109 AM. ECON. REV. 3365 (2019).

153. Edward L. Glaeser & Erzo F.P. Luttmer, *The Misallocation of Housing Under Rent Control*, 93 AM. ECON. REV. 1027, 1044 (2003).

154. Noah Smith, *Yup, Rent Control Does More Harm Than Good*, BLOOMBERG (Jan. 18, 2018), <https://www.bloomberg.com/view/articles/2018-01-18/yup-rent-control-does-more-harm-than-good> [https://perma.cc/M8RR-B8WW].

old buildings and build new ones.”¹⁵⁵ The result: a 15% reduction in “rental-unit supply” among affected landlords.¹⁵⁶

Despite the vaunted position rent controls occupy in popular political culture — Who would ask to pay more in rent? — there is hope that the courts will lead the charge and persuade Americans keen on rent control that most forms of it are not only unconstitutional, but wholly counterproductive. In recent years, the most property-friendly Supreme Court in generations (made even friendlier with the recent expansion of the so-called conservative wing from five to six justices) has chipped away at some of the precedents upon which rent controls derive their lifeforce. These latest cases — most notably *Cedar Point* — portend a possible return to (or at least a closer drift toward) the classical-liberal distinction between taking and non-taking police-powers actions.

C. Evolving Justifications for Rent Controls

In the 1950s, Professor John Willis argued that rent controls were “in few if any cases . . . adopted because of an abstract idea that state regulation would bring better results than the operation of the laws of economics.”¹⁵⁷ Instead, “in almost every instance the hand of the legislator has been forced by some calamitous event or situation which has upset the normal state of affairs . . .”¹⁵⁸ Years after the World Wars and the Great Depression, President Richard Nixon in the 1970s introduced “shock” anti-inflation price controls, including on rent.¹⁵⁹ While the nature of that inflation crisis differed markedly from the mid-century travails of global war and mass economic decline, runaway inflation still had a far greater claim to the word “crisis” than do the housing shortages used to justify today’s rent controls. Indeed, none of the true crises of the twenty-*first* century — from 9/11, to Hurricane Katrina, to the Great Recession — served to justify widespread imposition of rent controls; especially not forced physical occupation of units that happen to be for rent when a so-called crisis begins. Few owners would (and none should) expect unwelcome parties to occupy their private property past the end date agreed upon. Yet that is exactly what the Covid-era eviction moratoria did: made it impossible for many owners to kick out occupants after the expiration of their lease (or even in the absence of a lease agreement altogether¹⁶⁰).

155. *Id.*

156. *Id.*

157. Willis, *supra* note 141, at 54.

158. Willis, *supra* note 141, at 54.

159. See Higgs, *supra* note 128, at 252–53.

160. See Sara Jean Green, *Seattle Motel Owner Facing Obstacles in Attempt to Evict Squatters from Crime “Hot Spot,”* SEATTLE TIMES (Oct. 27, 2021),

The Covid-19 pandemic was a bona fide emergency, though not of a type that justified the imposition of a nationwide eviction moratorium — especially one emanating from a federal agency instead of from Congress. The Supreme Court struck down the CDC’s eviction moratorium, demonstrating that a majority of the justices place a high bar on what qualifies as an emergency that transforms an otherwise unconstitutional taking into an ordinary exercise of police powers.¹⁶¹ Though the Court based its 6-3 decision on the CDC’s overstep of its congressionally delegated authority, the opinion also clarified that not all owners are sophisticated commercial actors:

The moratorium has put the applicants, along with millions of landlords across the country, at risk of irreparable harm by depriving them of rent payments with no guarantee of eventual recovery. Despite the CDC’s determination that landlords should bear a significant financial cost of the pandemic, many landlords have modest means. And preventing them from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership — the right to exclude.¹⁶²

Perhaps cities and states have declined to use actual crises to justify rent controls because there was no arguable causal connection between those exigencies and fluctuations in the rental housing market. More likely, however, is that lawmakers do not feel the need to use these calamities as cover. Instead, they rely on an extreme judicial deference that relegates most takings claims to a bare rational-basis review at best.¹⁶³ Thus do state and local authorities create so-called crises out of whole cloth. Officials will then point to the failure of initial counter-measures to these fabricated emergencies, including the so-called fix of wealth transfers (such as rent controls), and continue justifying these ostensibly remedial programs *ad infinitum*.¹⁶⁴ We see this in New York’s rent-regulation regime, in which rent-increase caps stay in place so long as a local vacancy rate remains at or

<https://www.seattletimes.com/seattle-news/law-justice/evicting-squatters-from-crime-hot-spot-proving-difficult-for-owner-of-seattle-motel/>.

161. See *Ala. Ass’n of Realtors v. Dep’t of Health and Hum. Servs.*, 594 U.S. ___, 141 S. Ct. 2485, 2489–90 (2021) (per curiam).

162. *Id.* at 2489 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982)).

163. See *Berman v. Parker*, 348 U.S. 26, 32 (1954).

164. See Dave Hogarty, *Housing “Emergency” Enters Fifth Decade; Bloomberg Acts*, CURBED: N.Y. (Mar. 27, 2012), <https://bit.ly/39tjQxI> [<https://perma.cc/HXE9-T5LL>] (“Mayor Bloomberg signed a continuation of current rent regulation laws by declaring a housing emergency that has been going on for as long as the Department of Housing Preservation and Development has been keeping records on its defining statistic. Per the current regulations, a housing emergency that triggers rent control is in effect whenever vacancy rates dip below 5%. In the 40 years that the Dept. of Housing has tracked that figure, it has never been above 5%.”).

below five percent¹⁶⁵ — which it almost always does (that vacancy rate is by no means uncommon for major cities¹⁶⁶). It is difficult to imagine a more egregious breach of the *Armstrong* principle than concocting an emergency that, conveniently, targets a small portion of voters, especially a portion who the majority do not particularly like.¹⁶⁷

Justifications include New York City’s aim of “prevent[ing] exactions of unjust, unreasonable and oppressive rents,”¹⁶⁸ goals that could be achieved without constitutional transgression through contract law principles like unconscionability,¹⁶⁹ instead of blanket draconian restrictions on owners’ property rights. Tax and subsidy-based wealth redistribution could also do the trick and at the same time pass constitutional muster.¹⁷⁰ Oakland, California, meanwhile, uses rent control to “provid[e] relief to residential tenants”¹⁷¹ This sounds an awful lot like a blanket subsidy that forces rental owners to discount prices.

In the District of Columbia, an express purpose for rent controls is to “protect low- and moderate-income tenants from erosion of their income from increased housing costs.”¹⁷² Again, a public relief program that the government should fund with public monies, not by placing a ceiling on price negotiations between owners and renters. In Takoma Park, Maryland, rent control is meant to “maintain economic and ethnic diversity.”¹⁷³ It seems to matter little — or at least the courts do not seem to notice — that “[s]ome of these goals may be in tension” with one another.¹⁷⁴

Not all of these policies are necessarily unsound from an ethical perspective. It is moral — and often a prerequisite for reelection — for elected officials to seek to better the lives of those they represent. But the

165. See Suzannah Cavanaugh, *Fudging the Numbers? Landlords Say NY Gamed Survey to Save Rent Stabilization*, REAL DEAL (Nov. 11, 2021), <https://bit.ly/3X3OIva> [<https://perma.cc/V7R8-CNM6>].

166. See U.S. CENSUS BUREAU, QUARTERLY RESIDENTIAL VACANCIES AND HOMEOWNERSHIP, FOURTH QUARTER 2022 (2023) (finding the vacancy rate among all “principal cities” inside “metropolitan statistical areas” to be 5.9% as of the fourth quarter of 2022).

167. See Hogarty, *supra* note 164.

168. N.Y.C. ADMIN. CODE § 26-501 (New York Legal Publishing, Westlaw through Sept. 30, 2023) (recodified in § 26-502).

169. See generally *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

170. See generally Eric Kades, *Drawing the Line Between Taxes and Takings: The Continuous Burdens Principle, and Its Broader Application*, 97 NW. U. L. REV. 189 (2002).

171. OAKLAND, CAL., MUN. CODE § 8.22.010 (2019).

172. D.C. CODE § 42-3501.02(1) (1985).

173. *Rent Stabilization*, CITY OF TAKOMA PARK HOUS. & CMTY. DEV., <https://bit.ly/3jVTAB2> [<https://perma.cc/FZ6N-SMQK>] (last visited Aug. 17, 2021).

174. See Vicki Been et al., *Laboratories of Regulation: Understanding the Diversity of Rent Regulation Laws*, 46 FORDHAM URB. L.J. 1041, 1045 (2019).

Constitution imposes limits on state action for good reason. Unlimited police powers can ultimately *endanger* the very public health, safety, morals, and general welfare that the sovereign is charged with protecting, even if a legislature has the best of intentions in doing so. Without the right preset rules, it is simply too easy for unbridled state power — essentially, the will of the crowd — to induce majoritarian abuse of the civil liberties and property rights of political, economic, and social and ethnic minorities.¹⁷⁵

Divergent policy *objectives* are not the only distinctions between current rent regulations and the controls implemented during the World Wars. Since the 1960s, the forms of control have expanded well beyond blanket price caps. New York State, for example, now prohibits tenant blacklists that once enabled owners to avoid litigious tenants, and it gives evicted tenants up to one year to move out upon a “show[ing] that [they] cannot find a similar apartment in the same neighborhood.”¹⁷⁶ The voters of St. Paul, Minnesota recently approved a sweeping rent-regulation law that, as one local paper put it before election day, would “not exempt newly built housing” — “quite a change, as almost no rent control programs apply to new buildings,” but rather take effect after a certain number of years.¹⁷⁷ According to one housing policy expert, “without an exemption, the proposed St. Paul

175. See THE FEDERALIST NO. 10, at 75 (James Madison) (Clinton Rossiter ed., 1961) (“If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote. It may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the *Constitution*. When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed. Let me add that it is the great desideratum by which this form of government can be rescued from the opprobrium under which it has so long labored, and be recommended to the esteem and adoption of mankind.”). In Elias Canetti, CROWDS & POWER (Carol Stewart trans., 1984) (1960), the noted sociologist offered a good comparison of violent versus parliamentary crowds. To the violent ones, “[t]here is no risk because the crowd have immense superiority on their side. [Its] victim can do nothing to them.” *Id.* at 49. Whereas, within parliamentary crowds, with its preset rules, “[t]he member of an outvoted party accepts the majority decision, not because he has ceased to believe in his own case, but simply because he admits defeat . . . [i]t is easy for him to do this because nothing happens to him: he is not punished in any way for his previous opposition. He would react quite differently if his life was endangered.” *Id.* at 189.

176. OFF. OF N.Y. ATTY. GEN., CHANGES IN NEW YORK STATE RENT LAW: WHAT YOU NEED TO KNOW 5–6 (2019), <https://ag.ny.gov/sites/default/files/changes-in-nys-rent-law.pdf> [<https://perma.cc/PM8T-D2HB>].

177. Bill Lindeke, *If Approved by Voters, St. Paul’s Rent Control Ordinance Would Be Among the Strictest in the World*, MINNPOST (Sept. 9, 2021), <https://bit.ly/3EwMyMq> [<https://perma.cc/5R7V-AACZ>].

ordinance would significantly reduce new housing in the city.”¹⁷⁸ Lo and behold, in the two years since its rent cap passed, St. Paul has seen new development dry up, even as it surges in its twin city of Minneapolis — which does not have nearly as onerous a rent-control regime.¹⁷⁹ In response, its city council exempted new builds and affordable units from the 3% year-over-year rent cap.¹⁸⁰

While economists are in near-total agreement that rent controls *never* lower prices, and indeed tend to raise them,¹⁸¹ progressive politicians continue to disagree,¹⁸² as do select legal academics.¹⁸³ If some within each of these cadres subtly concede that rent controls do not bring down prices, they likely still will advocate for them on the false pretense that they at least reduce housing inequality by keeping minority communities intact. Because the costs of rent controls fall most vigorously on developers and existing owners, the average tenant cannot observe broader cost effects.¹⁸⁴ They will only see owners pay the price. But in internalizing these costs, owners’ incentives are thrown out of whack. This, inevitably, costs tenants too. Rent controls stifle the kinds and magnitude of profit-driven measures owners would take in a competitive market left (mostly) to its own devices.¹⁸⁵ And this is often to the detriment of those tenants, whom these measures are intended to protect.

Not only do tenancy controls fail to accomplish their stated purposes, they also tend to make things worse. Economists across the political spectrum are in virtual agreement that tenancy controls tend to reduce the quantity and

178. *Id.* (quoting SHANE PHILLIPS, *THE AFFORDABLE CITY: STRATEGIES FOR PUTTING HOUSING WITHIN REACH (AND KEEPING IT THERE)* (2020)).

179. Editorial, *St. Paul Regrets Rent Control*, WALL ST. J. (Oct. 3, 2022), <https://on.wsj.com/3jxtmIC> [<https://perma.cc/E3EC-F37J>].

180. See Max Nesterak, *St. Paul City Council Passes Sweeping Overhaul of Rent Control Ordinance*, MINN. REFORMER (Sept. 21, 2022), <https://bit.ly/3hXPonp> [<https://perma.cc/MM5X-BHM3>].

181. See generally Blair Jenkins, *Rent Control: Do Economists Agree?*, 6 ECON J. WATCH 73 (2009).

182. See, e.g., *Democrats Clamour Again for Rent Control*, THE ECONOMIST (Sept. 19, 2019), <https://econ.st/3Kpuqq0> [<https://perma.cc/5YAK-FJWC>]; Emma Ockerman, *The Squad Has a Plan to Cancel Your Rent*, VICE (Apr. 17, 2020), <https://bit.ly/34oP2z> [<https://perma.cc/Z8MJ-GHRJ>] (discussing some Democratic congresspersons’ support in 2020 for a set of nationwide rent controls to ostensibly address the then-growing Covid-19 pandemic).

183. See generally Edgar O. Olsen, *Is Rent Control Good Social Policy?*, 67 CHI.-KENT L. REV. 931 (1991) (surveying arguments among academics in support of rent controls).

184. See Kriston Capps, *As Housing Costs Spike, Voters Look for Hope in Rent Control*, BLOOMBERG CITYLAB (Nov. 4, 2021), <https://bloom.bg/3IUkpRb> [<https://perma.cc/DU4S-PH7Q>].

185. See *The High Cost of Rent Control*, NAT’L MULTIFAMILY HOUS. COUNCIL, <https://bit.ly/3HY3VGu> [<https://perma.cc/BT9H-6FLM>] (last visited Mar. 8, 2022).

quality of affordable housing.¹⁸⁶ Indeed, as left-leaning Swedish economist Assar Lindbeck put it: “In many cases rent control appears to be the most efficient technique presently known to destroy a city — except for bombing.”¹⁸⁷ Well, even worse than bombing. As one Vietnamese diplomat put it over a decade after the United States left Saigon: “The Americans couldn’t destroy Hanoi, but we have destroyed our city by very low rents. We realized it was stupid and that we must change policy.”¹⁸⁸

Rental price controls and similar measures interfere with more than an owner’s rights to choose who enters their property and with whom they transact. They also weaken the economic security of those who proponents hope (or at least claim) will benefit the most. Take Cambridge, Massachusetts. After its voters dropped the city’s decades-long rent-control regime in 1995, the Boston suburb saw “a tremendous boom in housing investment, leading to major gains in housing quality.”¹⁸⁹ Part of the reason is that under rent-control regimes, “rent regulation holds down housing quality because landlords, afraid they will be unable to recoup their investments, defer maintenance and do not otherwise upgrade housing quality.”¹⁹⁰

And so rent control produces a double whammy — reducing the quantity of available housing while also reducing the quality of remaining stock. Certainly not a winning combination for a successful public policy. Yet proponents still insist “that rent-control policies reduce rents for tenants they target and provide additional benefits” like “increasing residential stability and protecting tenants from eviction.”¹⁹¹ Besides protecting tenants from eviction — not always the preferred outcome when would-be tenants could make more efficient use of such units (think a family of five in 2,500 square feet versus a single man in the same space) — their argument is flat-out

186. See *Rent Control*, CHI. BOOTH: KENT A. CLARK CTR. FOR GLOB. MKTS. (Feb. 7, 2012), <https://bit.ly/3K97PxM> [<https://perma.cc/Y4XK-MEBZ>].

187. Walter Block, *Rent Control*, ECONLIB, <https://bit.ly/2FovAW0> [<https://perma.cc/9G76-AMQ8>] (last visited Jan. 25, 2023).

188. *Id.* (citation omitted) (Foreign Minister Nguyễn Cơ Thạch, from a report in J. OF COMM.).

189. Henry O. Pollakowski, *Rent Control and Housing Investment: Evidence from Deregulation in Cambridge, Massachusetts*, 36 CIVIC REP. 1, 5 (2003).

190. *Id.* at 1.

191. PRASANNA RAJASEKARAN ET AL., RENT CONTROL: WHAT DOES THE RESEARCH TELL US ABOUT THE EFFECTIVENESS OF LOCAL ACTION? 1, 2 (2019), https://www.urban.org/sites/default/files/publication/99646/rent_control_what_does_the_research_tell_us_about_the_effectiveness_of_local_action_1.pdf [<https://perma.cc/Z33N-2U5P>].

wrong. While I have presented some of it, the economic literature countering this conviction is far too profligate to survey in a piece of this length.¹⁹²

Modern rent controls' counterproductivity is dangerous both to the Constitution *and* to our trust in policymakers' and elected legislators' overall competence to improve our lives. One of the prime culprits in this is the Supreme Court's expansive view of a legislature's authority to define its own police powers. And though it has in recent years made some important doctrinal adjustments on this front, the Court still has much left to do to extricate itself — and the country — from this nearly century-old mess. Tenancy controls offer the ideal channel for accelerating this process, precisely because it stands astride police powers and takings; at least semantically, both progressives and classical liberals can easily defend their views of owner-tenant laws and regulations. But with law, semantics is half the battle. The other half is principle, and on that front classical liberals have the clear advantage.

IV. MODERN RENT CONTROLS AND THE POTENTIAL FOR DOCTRINAL MODIFICATION

A. Background and Some Recent Developments

Changes to rental housing policies over the past decade could motivate the federal circuit courts and then the Supreme Court to reexamine prior rulings on tenancy controls. In 2012, the Court declined to hear *Harmon v. Kimmel*, in which the plaintiffs claimed that a New York City law giving tenants an indefinite right to renew effected a taking of their property.¹⁹³ The Court's denial of certiorari in *Harmon* was in keeping with its traditional abstention from matters of state property law.¹⁹⁴ But in 2019, the Court held in *Knick v. Township of Scott* that the requirement that a takings claimant exhaust their state-level efforts to obtain compensation before a federal case ripens "imposes an unjustifiable burden on takings plaintiffs, conflicts with the rest of our takings jurisprudence, and must be overruled."¹⁹⁵ The Court continued: "A property owner has an actionable Fifth Amendment takings claim when the government takes his property without paying for it."¹⁹⁶

192. For a worthy survey of the literature on rent control, see Michael Hendrix, *Issues 2020: Rent Control Does Not Make Housing More Affordable*, MANHATTAN INST. (Jan. 8, 2020), <https://bit.ly/3HlFiPw> [<https://perma.cc/8B7Z-P49N>].

193. See Adam Liptak, *U.S. Supreme Court Declines to Hear Suit Challenging the Rent Stabilization Law*, N.Y. TIMES (Apr. 23, 2012), <https://nyti.ms/2XJQvNc> [<https://perma.cc/UJE3-LY3U>].

194. See *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2188 (2019) (Kagan, J., dissenting).

195. *Id.* at 2167 (majority opinion).

196. *Id.*

Knick and *Cedar Point* have shown that the Court is ready and able to scrutinize state and local justifications for regulations that burden property owners.

The latest amendments to New York State’s notorious Rent Stabilization Laws¹⁹⁷ caused a stir as it wound its way to the Supreme Court’s docket. On February 6, 2023, the Second Circuit affirmed the district court’s dismissal of owners’ takings and due-process arguments against the amendments.¹⁹⁸ While the Supreme Court ultimately denied review,¹⁹⁹ lawsuits of this kind are becoming more prodigious and promising with time. Sooner or later a worthwhile fact pattern will come along and elicit the Court’s attention.

Other fairly recent legal reforms might also draw the Court’s attention. In February 2019, the Oregon legislature enacted the lone statewide rent control program. Indeed this appears to be the only one in American history unrelated to a bona fide emergency.²⁰⁰ Los Angeles followed suit, prohibiting eviction from all residential units except in the case of certain statutory “just causes” — even if the tenant has otherwise violated their lease.²⁰¹ Seattle requires owners large and small accept lease applications on a first-come, first-served basis,²⁰² and prohibits asking potential tenants about their criminal histories or other potential red flags.²⁰³ The Supreme Court declined to hear a contest to the ordinance in April 2020, but a modified version is winding its way through the courts and might find four justices (the number required by Court custom to grant certiorari) more convinced in the wake of *Cedar Point*.²⁰⁴

Just seven states and the District of Columbia include jurisdictions with rent *price* controls: California, Maine, Maryland, Minnesota, New York,

197. For a comprehensive survey of the 2019 changes to New York’s Rent Stabilization Laws, see *Rent Laws 2019 Updates*, N.Y. HOMES & CMTY. RENEWAL, <https://on.ny.gov/3jBAEvk> [<https://perma.cc/L8W9-844Y>] (last visited Feb. 6, 2023).

198. See *Cnty. Hous. Improvement Prog. v. City of New York*, 59 F.4th 540, 557 (2d Cir. 2023), *cert. denied*, No. 22-1095, 2023 WL 6379013 (U.S. Oct. 2, 2023).

199. See generally *id.*

200. See Mihir Zaveri, *Oregon to Become First State to Impose Statewide Rent Control*, N.Y. TIMES (Feb. 26, 2019), <https://nyti.ms/3nMSxH7> [<https://perma.cc/CZC5-JY68>].

201. See Andrew Asch, *L.A. Moratorium to Go, but “Just Cause” Eviction Rules to Come*, REAL DEAL (Oct. 10, 2022), <https://bit.ly/3WtpHtL> [<https://perma.cc/88FA-LTTU>].

202. See Daniel Beekman, *U.S. Supreme Court Won’t Hear Challenge to Seattle’s First-Come, First-Served Law for Rental Applications*, SEATTLE TIMES (Apr. 20, 2020), <https://bit.ly/3jz30Gx>.

203. See Daniel Beekman, *Seattle Rental Applicants’ Criminal Histories Virtually Off-Limits Under New Law*, SEATTLE TIMES (Aug. 14, 2017), <https://bit.ly/3EBxT2N>.

204. See *Yim v. Seattle*, No. C18-0736-JCC, 2021 WL 2805377 (W.D. Wash. July 6, 2021), *aff’d in part, rev’d in part and remanded*, 63 F.4th 783 (9th Cir. 2023), *petition for cert. docketed*, No. 23-329 (U.S. Sept. 28, 2023).

New Jersey, and Oregon.²⁰⁵ Maine and Maryland each have only one rent-controlled jurisdiction — Portland and Takoma Park, respectively. Only Oregon has adopted it statewide²⁰⁶ (and D.C. districtwide²⁰⁷). Finally, there is no state law or rule of lawmaking (*e.g.*, the Dillon Rule, which severely restricts local home rule) preventing county or municipal lawmakers in Delaware, Hawaii, Montana, Nebraska, or Wyoming from enacting local rent controls at any time.²⁰⁸ Jurisdictions that have price caps also tend to overburden owners with additional controls — *e.g.*, bans on criminal background checks of would-be tenants.²⁰⁹ Still, those jurisdictions in which at least some owners are (or can at any time, through local legislation, become) subject to rent control together host almost *one-fourth* of the national population (that is, roughly 82 million people).²¹⁰

In Santa Ana, California, rental owners now have to register units on a municipal database that will make transactions even easier for bureaucrats to track — a system cities nationwide managed without in much less technologically sophisticated times.²¹¹ Until very recently, Elizabeth, New Jersey capped most rent increases at \$20 *per annum* — replacing this with a somewhat less owner-hostile maximum of 3% year-over-year.²¹² Lawmakers in New Mexico are trying to repeal the statewide ban on rent control,²¹³ despite obvious and constitutional alternatives, like a voucher system for tenants experiencing real financial hardship.²¹⁴ Meanwhile, this

205. See *Rent Control Laws by State*, NAT'L MULTIFAMILY HOUS. COUNCIL (July 19, 2022), <https://www.nmhc.org/industry-topics/affordable-housing/rent-control/> [<https://perma.cc/CP4L-BLLG>].

206. See Hans Bader, *Oregon Just Became the First State to Impose Rent Control*, FOUND. ECON. EDUC. (Feb. 28, 2019), <https://bit.ly/3vjzOR9> [<https://perma.cc/D6XL-V374>].

207. See D.C. CODE ANN. § 42-3501.01 (West, Westlaw through Apr. 26, 2023).

208. *Rent Control Laws by State*, *supra* note 206.

209. See generally Beekman, *supra* note 204; see also Evan Symon, *Alameda County Board of Supervisors Vote 4-0 to Ban Criminal Background Checks for Housing*, CAL. GLOBE (Dec. 24, 2022), <https://bit.ly/3WOk5tT> [<https://perma.cc/GVV6-3EM2>].

210. *Rent Control Laws by State*, *supra* note 206 (measured by adding up the population of all states that (1) impose rent control on local governments, (2) expressly permit local governments to impose rent control, or (3) has no preemptions or state-level controls but does not limit any locality from adopting rent control).

211. See *Santa Ana Landlords Must Register Rentals Under New Law*, REAL DEAL (Dec. 22, 2022), <https://bit.ly/3PYRvEc> [<https://perma.cc/MW4X-UECZ>].

212. Camille Furst, *N.J. City Drops Rule Limiting Rent Increases to \$20 a Year*, NJ.COM (Dec. 19, 2022), <https://bit.ly/3YTHAn8> [<https://perma.cc/A6WR-765Y>].

213. See Robert Nott, *State Senator Wants to Repeal New Mexico's Prohibition on Rent Control*, SANTA FE NEW MEXICAN (Nov. 22, 2022), https://www.santafenewmexican.com/news/legislature/state-senator-wants-to-repeal-new-mexicos-prohibition-on-rent-control/article_62b739a2-6907-11ed-bb49-d77b8b404e71.html [<https://perma.cc/52NP-RT6A>].

214. See Kim Shanahan, *There Are Better Ideas than Rent Control*, SANTA FE NEW MEXICAN (Nov. 26, 2022), <https://bit.ly/3hV70Ad> [<https://perma.cc/SZJ6-Y5XX>].

past fall voters approved rental caps seemingly everywhere it was on the ballot. This is not surprising. What incentive do consumers have against voting to lower the price of a staple product? If given the opportunity, all but the most doctrinaire among us likely would vote to cap food prices at our local supermarket (or at least just for *our* groceries). But few would call this fair and equitable to those who invest their time and labors in producing such goods. Why should price caps on housing be any different?

Indeed, the Takings Clause exists precisely to prevent the majority from commandeering a minority's property, especially where the requisition is unrelated to any harmful use on the owners' parts.²¹⁵ Despite this, the march to regulate rent presses on. Besides their unfairness, mountains of data-driven evidence suggest that tenancy controls suppress the quality and quantity of housing.²¹⁶ In Kingston, New York, the rent guidelines board recently reduced existing rents by 15% — possibly first by exaggerating the city's vacancy rate to below the five-percent threshold, beneath which state law permits local rent control.²¹⁷ In Florida, for example, Orange County's attempt to impose rent control despite a statewide ban went all the way to the state supreme court, which ultimately declined to review.²¹⁸ Countless other offending regulations abound across the nation, too numerous to detail here. But those discussed above offer a good glimpse into the depth and breadth of federal, state, and local efforts to regulate tenancies, and with a ferocity unseen in other areas also subject to rigorous regulation.

B. Covid-Related Eviction Moratoria

Then there are the Covid-related eviction moratoria, most of which began in mid-2020 as the pandemic exploded. Though the CDC's version was an obvious overstep of its delegated powers — and thus necessary for the

215. See Mila Versteeg, *The Politics of Takings Clauses*, 109 NW. U. L. REV. 695, 704 (2015) (discussing the Takings clause in general; noting that “viewing [the] Takings clause[] as majoritarian is . . . problematic because, in most societies, property is unequally distributed, and a majority of people might believe that they benefit more from expropriation than from the increased economic growth associated with secure property rights”).

216. STURTEVANT, *supra* note 10, at 4 (“Economists nearly universally agree that rent ceilings reduce the quantity and quality of housing and that even more moderate forms of rent stabilization have efficiency challenges and negative housing market impacts.”).

217. Suzannah Cavanaugh, *Kingston Considers Historic Rent Rollback*, REAL DEAL (Oct. 26, 2022), <https://therealdeal.com/new-york/tristate/2022/10/26/kingston-considers-historic-rent-rollback/> [<https://perma.cc/4Q22-Q7CE>].

218. Steven Ryzewski, *Orange County Commission Chooses to Appeal Rent Control Ruling*, ORLANDO BUS. J. (Nov. 17, 2022), <https://bit.ly/3VtYlme> [<https://perma.cc/9427-6J4LJ>]; McKenna Schueler, *Florida Supreme Court Decides Not to Take up Orange County Rent Control Fight*, ORLANDO WKLY. (Apr. 18, 2023), <https://www.orlandoweekly.com/news/florida-supreme-court-decides-not-to-take-up-orange-county-rent-control-fight-34004934> [<https://perma.cc/9X6K-JS5H>].

Supreme Court to dispatch despite political headwinds — states, counties, and cities across the country imposed similar freezes, intended to limit residential displacement for fear that it would increase Covid rates. (It was assumed that many of the evicted likely would have moved in with family members, increasing household densities, and with it the likelihood of infection.²¹⁹) While many were lifted as the pandemic abated, Los Angeles in January 2022 extended parts of theirs until at least the latter half of this year, “[a]nd possibly beyond.”²²⁰ In their wake are tens if not hundreds of thousands of potential takings warranting just compensation. The next few years should be fertile ground for moratorium-related lawsuits. Litigation that might be the straw to finally break the rent-control “camel’s” back.

Federal courts are split on whether Covid-related eviction moratoria are indeed unconstitutional. Of course, the answer depends on the substance of the ban in a given case. Still, core legal disagreement between federal jurisdictions portends a fast track to a Supreme Court that has thus far been very cautious with Covid-related laws. The Court’s *per curiam* opinion striking the CDC’s nationwide eviction moratorium illustrates that the balance of justices hesitates to tell governments what they can and cannot do to preserve public health, even if responsive actions barely toe the constitutional line.

The split thus far is rooted in some courts’ misunderstanding of *Yee*’s limited application. As discussed, *Yee* did not involve compelling owners to host unwanted guests. Instead, it centered on an “off-budget” wealth transfer between owner and tenant in the form of a price cap the tenant could for a premium bequeath to their successor-in-interest. In *Yee*, a policy prescription — rent-price ceilings — happened to transfer profits from one transactor to another. Crucially, the decision in *Yee* did not force any owner to bear interminable third-party occupation without or well past the expiration of agreed-upon terms. Yet several courts applying *Yee* to Covid-related eviction moratoriums believe it did just that. As the United States District Court for the Eastern District of Washington wrongly put it:

In this case, just as in *Yee*, Plaintiffs voluntarily invited tenants to occupy their properties as residential homes. The state has not required any physical invasion and their tenants were “not forced upon them by the

219. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55292, 55294 (Sept. 4, 2020) (“Evicted renters must move, which leads to multiple outcomes that increase the risk of COVID-19 spread. Specifically, many evicted renters move into close quarters in shared housing or other congregate settings.”).

220. Liam Dillon, *Even in a Hot Market, L.A. Won’t Allow Rent Hikes for Most Tenants Until 2023*, L.A. TIMES (Jan. 3, 2022), <https://lat.ms/36DCrsG> [<https://perma.cc/8TF8-6KTA>] (Los Angeles finally ended its eviction moratorium nearly three years after enacting it, though it has maintained several “eviction controls” that impose undue restrictions on rental owners’ right to transact with whomever they please.).

government.” Plaintiffs’ right to exclude has not been taken because the moratorium compelled no physical invasion or occupation that Plaintiffs would have forfeited in the first place. Instead, the eviction moratorium regulates the landlord-tenant relationship once it is already established.²²¹

This argument is incorrect in several respects. Most crucial, however, is the court’s insistence that “the moratorium compelled no physical invasion or occupation” the impacted owners “would have forfeited in the first place.”²²² The moratoria do *precisely* that. Overnight, moratoria cancelled arms-length, agreed-upon terms made between tens of thousands of tenants and landlords operating in the free market.²²³ State and local eviction bans indeed “compelled” owners to host trespassers who, while it is true were *initially* invited, had long overstayed their welcome.²²⁴ And, having violated the terms of their lease, or, more commonly, having seen its expiration, these tenants lost all proprietary interest in those units that only the state’s intervention then enabled them to occupy.

In contrast to the Eastern District of Washington’s position, the Eighth Circuit in 2022 held — correctly — that *Yee* does not govern regulations, like the eviction moratoria, that involve the ongoing, compelled occupation of private property:

Yee . . . is distinguishable. The rent controls in *Yee* limited the amount of rent that could be charged and neither deprived landlords of their right to evict nor compelled landlords to continue leasing the property past the leases’ termination. The landlords in *Yee* sought to exclude future or incoming tenants rather than existing tenants. Here, the [moratoria] forbade the nonrenewal and termination of ongoing leases, even after they had been materially violated, unless the tenants seriously endangered the safety of others or damaged property significantly.²²⁵

Indeed, the Court in *Yee* expressly disclaimed the decision’s relevance to regulations involving unwanted physical occupation. As the majority put it: “A different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy.”²²⁶ *Walz* properly settled on *Cedar Point* as the guiding precedent for analyzing the constitutionality of eviction moratoriums. Building on this recent high-court ruling, the Eighth Circuit recognized that “[t]he right to exclude is not a creature of

221. *Jevons v. Inslee*, 561 F. Supp. 3d 1082, 1106 (E.D. Wash. 2021).

222. *Id.*

223. *See supra* notes 219–20 and accompanying text.

224. *See supra* note 160 and accompanying text.

225. *Heights Apartments, LLC v. Walz*, 30 F.4th 720, 733 (8th Cir. 2022) (internal citations omitted).

226. *Yee v. City of Escondido*, 503 U.S. 519, 528 (1992).

statute and is instead fundamental and inherent in the ownership of real property.”²²⁷

It is troubling that some federal judges appear keen to contort *Yee* into excusing categories of regulation to which its signatories deemed it inapposite. Less troubling, for the long-term at least, is that using *Yee* to uphold trespassory regulations like eviction bans becomes untenable under even modest scrutiny — say, the level of scrutiny this author confidently expects from the Supreme Court if and when state and local eviction moratoria finally reach its docket.

Rent controls, whether Covid-related or not, reveal a discomfiting truth: still too many modern regimes fail the rule articulated in *Armstrong*, which the Supreme Court has repeated *ad infinitum* throughout its takings case law. Namely, that the Takings Clause “bar[s] 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.”²²⁸ Recent high-court activity suggests a majority of the justices are amenable to extending this principle to questionable tenancy controls. Does all this mean that the end for *Yee* and the whole *Bermanesque* approach to rent controls is nigh? Will legislative bodies finally have to verify their claims that a challenged tenancy control is necessary to the public’s safety, health, morals, or general welfare? Perhaps. But “the road is long, with many a winding turn, that leads us to,” well, “who knows where?”²²⁹ Along the way will be many disappointed owners, and tenants facing higher rents, all because of the ill-considered decision-making of officials playing to the crowd instead of doing what is economically sound — and constitutionally required.

CONCLUSION

Rent controls in the United States vary substantially depending upon the jurisdiction, as do the justifications given for their implementation. At their core, however, these diverse regimes share at least one crucial characteristic: they overburden owners in order to benefit tenants “off budget.” They do this because the alternative would mean imposing the costs on the public writ-large; a move that many politicians calculate would come at great electoral cost. For nearly a century, and especially since its 1978 decision in *Penn Central*, the Supreme Court has deferred to the legislative judgment that rent regulations are valid exercises of the state’s police powers — policies meant, out of public necessity, to cauterize decades-long

227. *Walz*, 30 F.4th at 728 (citing *Cedar Point Nursery v. Hassid*, 594 U.S. ___, 141 S. Ct. 2063, 2072 (2021)); *id.* at 733 (“*Cedar Point Nursery* controls here.”).

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

229. THE HOLLIES, HE AIN’T HEAVY, HE’S MY BROTHER (EMI Studios 1969).

“emergency” housing shortages rather than takings of private property for mere public benefit (which would require compensation). Tenancy controls do not make housing more plentiful or affordable; indeed, they mostly do the opposite. Yet courts still refrain from exercising their independent judgment in rent-control cases. Even where it is obvious that there are no public-harm-preventing purposes behind a challenged regulation, courts will still give legislatures every benefit of the doubt.

Cedar Point and a handful of other recent rulings indicate that the Supreme Court, once complicit in the judiciary’s progressive turn, is moving towards its most property-friendly stance since the 1910s.²³⁰ This inchoate return is long overdue, especially since *Berman*’s “well-nigh-conclusive” approach to judging legislative actions still dominates too many of our courts’ takings decisions.²³¹ Despite some hiccups, the Supreme Court’s recent takings rulings show a willingness — even an eagerness — to finally actualize the oft-referenced but seldom applied *Armstrong* principle, by which “fairness and justice” prevents the state from “forcing some . . . alone to bear public burdens which . . . should be borne by the public as a whole.”²³² Positioned astride the line between workaday regulations and takings, rent controls offer perhaps the most promising vehicle through which this Court can for once and all draw brighter lines to distinguish the two.

The Court is unlikely to revive the precise approach used before the 1930s turn, back when courts still fairly regularly distinguished ordinary regulations from takings by looking at whether the challenged law was truly necessary to quell a private nuisance (whereby no compensation is owed), or was instead purely public-benefit-conferring (requiring compensation).²³³ Still, *Cedar Point* and kindred high-court rulings since at least 2012 continue to bring much-needed hope to property owners and advocates who have for so long waged an uphill battle. A battle that for nearly a century has merely kept on life support a constitutional right integral to all the others. This battle

230. See, e.g., *Pakdel v. City & Cnty. of San Francisco*, 141 S. Ct. 2226, 2230 (2021) (per curiam) (the “finality requirement” for claiming a taking is “relatively modest”); *Walz*, 30 F.4th at 728 (citing *Cedar Point Nursery*, 141 S. Ct. at 2072) (interferences with the right to exclude are *per se* takings); *Knick v. Twp. of Scott*, 139 U.S. 2162, 2188 (2019) (takings claimants do not need to exhaust state-level redress before turning to federal court); *Horne v. Dep’t of Agric.*, 576 U.S. 350, 358 (2015) (the Takings Clause protects personal property to the same extent as real property); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 599 (2013) (an exaction can still be a taking if the authorizing agency ultimately denies a permit application); *Ark. Game & Fish Comm’n v. United States*, 568 U.S. 23, 27 (2012) (temporary deprivations can still be takings).

231. *Berman v. Parker*, 348 U.S. 26, 32 (1954).

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

233. *Spiegelman & Sisk*, *supra* note 114, at 173–78.

should long ago have been resolved in favor of property rights. Instead, for too long we have seen the opposite result. Thankfully, there is fresh cause for optimism.