

# A Taking by Another Name: Challenging Historic Preservation After *Cedar Point*

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*In the 1922 case Pennsylvania Coal v. Mahon, Justice Holmes proclaimed that regulations going “too far” constituted takings under the Fifth Amendment. But over a century later, courts rarely find a land-use restriction they think fits this description. This is largely due to Penn Central Transportation Company v. City of New York, the Supreme Court’s “landmark case about landmarks” establishing the judiciary’s highly permissive stance toward historic preservation laws. Though initially employed to save beloved structures from destruction, preservation ordinances have proliferated to prevent the redevelopment of tens of thousands of buildings, worsening the country’s housing shortage.*

*Fortunately, there are signs that the Roberts Court is open to correcting course. In the 2021 case Cedar Point Nursery v. Hassid, the Court reinterpreted two well-established precedents governing takings challenges to favor property owners over regulators. Though so far cabined to “physical” takings, Cedar Point may signal the Court’s appetite for takings challenges to historic preservation laws as well.*

*Part I of this Note discusses the history of preservation in the United States and the Supreme Court’s deferential takings jurisprudence regarding such regulations. Part II explores the costs of this deference, both to individual property owners and society at large. Part III analyzes Cedar Point in light of the Court’s underused but still-extant line of property-protecting precedents to suggest that the Court’s deference to historic preservation laws may soon change. Part IV then offers several avenues that courts could take in the wake of Cedar Point to declare abusive historic preservation practices as takings necessitating compensation, and thereby clarify Takings Clause doctrine in the process.*

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## INTRODUCTION

Tom Messina owned and operated Tom’s Diner in downtown Denver, “flipping pancakes and selling eggs” for twenty years.<sup>1</sup> He had long planned to finance his retirement by selling his restaurant. At the age of sixty, he verged on achieving that goal when a housing developer offered him \$4.8 million to convert the diner into an eight-story apartment building. But the sale stalled when a local nonprofit called “Historic Denver” petitioned the city to designate Messina’s property an historic landmark and thus prohibit its redevelopment. If the preservationists proved successful, the \$4.8 million valuation reflecting the worth of new apartments in a housing-starved city would plummet, and Messina—because of a deferential test the Supreme Court has applied since a landmark case known as *Penn Central*—would receive no compensation from the government.<sup>2</sup>

When Messina received the offer from the developer in 2019, Denver was quickly becoming one of the country’s least affordable cities.<sup>3</sup> Many factors underlie Denver’s failure to accommodate its growing population,<sup>4</sup> but one contributor is the abuse of historic preservation laws like the one wielded against Messina.<sup>5</sup> And this story is not unique to Denver. Historic preservation laws and other

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1. Christian Britschgi, *Neighborhood Activists Would Rather Preserve Tom’s Diner Than Let Its Owner Retire in Peace*, REASON (Aug. 1, 2019), <https://reason.com/2019/08/01/neighborhood-activists-would-rather-preserve-toms-diner-than-let-its-owner-retire-in-peace/> [https://perma.cc/TWS8-XVEN].

2. See Alison Berg, *Denver Housing Costs Skyrocket While Supply Lags. What’s the Fix?*, ROCKY MOUNTAIN PBS (Mar. 30, 2022), <https://www.rmpbs.org/blogs/rocky-mountain-pbs/denver-housing-costs-rent-rising/> [https://perma.cc/2HSA-M4UD] (noting that Denver’s housing supply struggled to meet demand from new arrivals). In *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), the Supreme Court held that a historic preservation designation preventing the redevelopment of Grand Central Terminal—costing its owner several million dollars as a result—did not constitute a “taking” under the Fifth Amendment of the United States Constitution, and thus the government enacting the preservation ordinance did not owe the owner “just compensation” for its action despite the economic harm the ordinance inflicted. See *infra* Section I.B.

3. See *Report: Denver Among U.S. Cities With the Fastest Declining Housing Affordability*, DENVER7 (June 20, 2018), <https://www.denver7.com/lifestyle/real-estate/report-denver-among-us-cities-with-the-fastest-declining-housing-affordability> [https://perma.cc/2MMD-ATLC] (noting Denver’s housing shortage).

4. See *Historic & Projected Population*, METRO DENV. ECON. DEV. CORP. (last updated Jan. 2021), <https://www.metrodenver.org/data-central-preview/266> [https://perma.cc/TZ3T-UTSS].

5. See Edward Glaeser, *Preservation Follies*, CITY J. (2010), <https://www.city-journal.org/html/preservation-follies-13279.html> [https://perma.cc/8XEU-WMR7] (on the role historic preservation plays in exacerbating housing shortages).

land-use restrictions stymie housing construction across America's cities and suburbs, increasing living costs and dampening economic growth in the process.<sup>6</sup> The Supreme Court's interpretation of the Fifth Amendment's Takings Clause—which ostensibly guards against government infringements on private property rights—has offered individuals like Messina little protection from these regulations.<sup>7</sup> But there are signs that takings jurisprudence has reached an inflection point. In 2021, the Supreme Court decided *Cedar Point Nursery v. Hassid*,<sup>8</sup> reinterpreting two well-established precedents guiding how courts review takings challenges in a way that favors property owners over regulators.<sup>9</sup> While much of the commentary surrounding *Cedar Point* has warned that the decision foreshadows the undermining of salutary regulations,<sup>10</sup> this Note argues that by curbing overeager historic preservation practices, *Cedar Point* may help to ameliorate the nation's housing shortage.

The argument proceeds as follows. Part I discusses the origins of historic preservation and explains why current takings doctrine has so far offered little protection from its abuse. Part II discusses the adverse effects of historic preservation today, which were underappreciated at the time of *Penn Central*. Part III then examines the Takings Clause caselaw leading up to and including *Cedar Point*, arguing that the protections the Court has developed against other property regulations logically apply against abusive historic preservation laws as well. Finally, Part IV explores several avenues by which the Court might evolve its Takings Clause doctrine to ensure that property owners are justly

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6. See EDWARD GLAESER, TRIUMPH OF THE CITY: HOW OUR GREATEST INVENTION MAKES US RICHER, SMARTER, GREENER, HEALTHIER, AND HAPPIER 11–12 (2011); see generally Chang-Tai Hsieh & Enrico Moretti, *Why Do Cities Matter? Local Growth and Aggregate Growth* (Nat'l Bureau of Econ. Rsch., Working Paper No. 21154, 2015) (noting the deleterious effects of housing supply constraints in American cities).

7. See *infra* Section I.B.

8. 141 S. Ct. 2063 (2021).

9. See *infra* Section II.B.

10. See generally Nikolas Bowie, *Antidemocracy*, 135 HARV. L. REV. 160 (2021) (warning that *Cedar Point* threatens several labor laws); Mark Joseph Stern, *The Supreme Court's Latest Union-Busting Decision Goes Far Beyond California's Farmworkers*, SLATE (June 23, 2021), <https://slate.com/news-and-politics/2021/06/supreme-court-union-busting-cedar-point-nursery.html> [<https://perma.cc/A23D-MDT6>] (predicting the decision's consequences for regulation “will be swift and severe”); Nathan Newman, *This Supreme Court Case Could Wreck the New Deal Order*, NATION (Dec. 2, 2020), <https://www.thenation.com/article/society/supreme-court-labor-unions/> [<https://perma.cc/BP32-2MZ8>] (warning of a “roll back” of “large swaths of the regulatory state and civil rights laws”).

compensated for losses inflicted by historic preservation laws. Ultimately, this Note argues that a more robust understanding of the protections guaranteed by the Takings Clause would not forbid historic preservation, but would require governments enacting such laws to compensate individuals whose property is targeted with landmark status.

## I. HISTORICAL AND LEGAL BACKGROUND

The rise of the historic preservation movement can be told through the story of New York City's two main train terminals. The first, Penn Station—cramped, damp, and unremarkable today—was once one of the Empire State's proudest structures.<sup>11</sup> In the words of architectural historian Vincent Scully, while one used to “enter[ ] [New York City] like a God,” since Penn Station's destruction began in 1963, one “scuttles in now like a rat.”<sup>12</sup> The demolition of the terminal resulted from its owner's attempt to make up for falling revenues by replacing the Beaux Arts structure with “today's drab station, the new Madison Square Garden, and rent-bearing office towers.”<sup>13</sup> But the most immediate effect of Penn Station's demise was the creation of New York City's Landmarks Preservation Commission (LPC) in 1965.<sup>14</sup> Tasked with identifying historic buildings and protecting them from destruction or alteration, the LPC became the model for similar boards throughout the United States.<sup>15</sup> Fifty years later, over 2,300 historic preservation ordinances now help govern the

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11. See Glaeser, *supra* note 5. Over half a century after its destruction, New York City may soon finally revamp what a New York Times critic calls “North America's busiest and most miserable train hub,” though city officials remain “fuzzy on details.” Michael Kimmelman, *Penn Station Is a Perpetual Mess. Change May Be at Hand*, N.Y. TIMES (July 7, 2023), <https://www.nytimes.com/2023/07/07/arts/design/penn-station-renovation-proposals.html> [https://perma.cc/96ZU-3DZV].

12. Herbert Muschamp, *Architecture View: In This Dream Station Future and Past Collide*, N.Y. TIMES (June 20, 1993), <https://www.nytimes.com/1993/06/20/arts/architecture-view-in-this-dream-station-future-and-past-collide.html> [https://perma.cc/WX6P-N5G5].

13. Glaeser, *supra* note 5.

14. See *About LPC*, NYC.GOV, <https://www1.nyc.gov/site/lpc/about/about-lpc.page> [https://perma.cc/EM2G-8J77] (noting the LPC's creation as a “response to the losses of historically significant buildings in New York City, most notably, Pennsylvania Station”).

15. See William A. Fischel, *Lead Us Not into Penn Station: Takings, Historic Preservation, and Rent Control*, 6 FORDHAM ENV'T L.J. 749, 749 (1995).

nation,<sup>16</sup> thanks in part to a 1978 Supreme Court case concerning New York's other famous train terminal: Grand Central Station.<sup>17</sup>

#### A. THE ORIGINS OF HISTORIC PRESERVATION

Long before New York City's elite rallied to spare further structures from the fate of the original Penn Station,<sup>18</sup> the American historic preservation movement had emerged as a grassroots phenomenon.<sup>19</sup> One of the first successful preservations occurred in 1816, when several historical associations persuaded the city of Philadelphia to purchase Independence Hall (then known as the Old State House), to save the signing place of the Declaration of Independence from destruction.<sup>20</sup> Over the next few decades, local organizations continued to lead preservation efforts for other historic sites,<sup>21</sup> and it was not until 1853 that the first nationwide preservation group, the Mount Vernon Ladies' Association of the Union, organized to save Mount Vernon—the home of George and Marsha Washington—from deterioration.<sup>22</sup> After failing to persuade Congress to purchase Mount Vernon, the Association raised private funds to restore the property.<sup>23</sup> This private-sector-led preservation was emblematic of the time: "Throughout the nineteenth century, the federal government took virtually no active role in preservation and showed no inclination

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16. See NAT'L TR. FOR HISTORIC PRES., A CITIZEN'S GUIDE TO PROTECTING HISTORIC PLACES: LOCAL PRESERVATION ORDINANCES 1 (2002), [https://www.crt.state.la.us/Assets/OCD/hp/grants/certifiedlocalgovernment/documents-and-forms/A\\_Citizens\\_Guide\\_to\\_Protecting\\_Historic\\_Places.pdf](https://www.crt.state.la.us/Assets/OCD/hp/grants/certifiedlocalgovernment/documents-and-forms/A_Citizens_Guide_to_Protecting_Historic_Places.pdf) [<https://perma.cc/SG7E-DXGZ>].

17. See *infra* Section I.B.

18. See, e.g., Tina Cassidy, *The Surprising Role Jackie Kennedy Onassis Played in Saving Grand Central*, BLOOMBERG: CITYLAB (Feb. 3, 2013), <https://www.bloomberg.com/news/articles/2013-02-05/the-surprising-role-jackie-kennedy-onassis-played-in-saving-grand-central> [<https://perma.cc/8PPE-3F2V>].

19. See NORMAN TYLER ET AL., HISTORIC PRESERVATION: AN INTRODUCTION TO ITS HISTORY, PRINCIPLES, AND PRACTICE 12 (2009) ("One aspect of historical preservation has remained consistent throughout its relatively brief history: it is an intensely 'grass-roots' movement.").

20. See *id.* at 27–28.

21. See *id.* at 29 (discussing the purchase of General Anthony Wayne's fortification, Fort Wayne, in Indiana, and the site of the Battle of Fort Meigs in Perrysburg, Ohio).

22. See *id.* at 29–30.

23. See *id.* at 29–30. Other local private organizations, such as the Society for the Preservation of New England Antiquities, also purchased and restored significant architecture in the first several decades of the Republic. See SARA C. BRONIN & J. PETER BYRNE, HISTORIC PRESERVATION LAW 9 (2012).

to recognize or protect buildings of potential historical significance.”<sup>24</sup>

That began to change in the 1930s, when Charleston, South Carolina, became the first city to establish an historic district with regulatory control, enacting “an unprecedented zoning ordinance” barring any “service or filling stations, automobile repair shops, factories or other buildings or businesses which would detract from the architectural and historical setting.”<sup>25</sup> Other cities soon followed suit with similar ordinances.<sup>26</sup> Historic preservation occurred slowly, and then all at once. While in 1945 just two American cities boasted landmark-protection laws, two decades later—encouraged by celebrity supporters such as Jacqueline Kennedy and Lady Bird Johnson—the number had grown to 70.<sup>27</sup> The motivations underlying these ordinances varied. Charleston enacted its zoning code to encourage the segregation of the city, while landmark designations in northern cities, though generally not overtly racist, still reflected the elite interests of the time: “While the Harvard Club, Metropolitan Club, University Club, and Century Association were all deemed worthy of inclusion on the Municipal Art Society’s 1957 preservation survey of New York,” for instance, “the entire borough of Queens was found to have just 10 buildings with landmark potential.”<sup>28</sup>

The United States Congress also enacted a handful of laws reflecting its interest in historic preservation—such as the 1935 Historic Sites Act and the 1966 National Historic Preservation Act. However, the federal government’s role in the outgrowth of historic preservation ordinances was and remains minimal.<sup>29</sup> Rather,

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24. TYLER ET AL., *supra* note 19, at 30.

25. *Id.* at 38.

26. New Orleans, Louisiana, followed suit in 1936; San Antonio, Texas, in 1939; Alexandria, Virginia, in 1946; Williamsburg, Virginia, in 1947; Winston-Salem, North Carolina, in 1948; and the Georgetown neighborhood of Washington, D.C., in 1950. *See id.* at 39.

27. *See* Jacob Anbinder, *What Historic Preservation Is Doing to American Cities*, ATLANTIC (May 2, 2022), <https://www.theatlantic.com/ideas/archive/2022/05/historic-preservation-has-tenuous-relationship-history/629731/> [https://perma.cc/6FMY-HYYL].

28. *Id.*

29. *See* TYLER ET AL., *supra* note 19, at 59. The 1935 Act was primarily a symbolic law establishing that it was “a national policy to preserve for public use historic sites, buildings and objects of national significance for the inspiration and benefit of the people of the United States.” *Historic Sites Act of 1935*, NAT’L PARK SERV., <https://www.nps.gov/subjects/archeology/historic-sites-act.htm> [https://perma.cc/W5Z7-33HB]. The 1966 Act hardly went further, noting that “although the major burdens of historic preservation have been borne and major efforts initiated by private agencies and individuals . . . it is nevertheless necessary and appropriate for the Federal Government to accelerate its historic

historic properties are primarily regulated and protected via legal ordinances enacted by local governments.<sup>30</sup> Hundreds of localities have now passed historic preservation laws, encompassing restrictions ranging from rules preventing the demolition of certain structures to laws dictating how new construction in historic districts must be built.<sup>31</sup>

Historic preservation ordinances are generally administered by a small group of commissioners, who often possess expertise in architecture, urban planning, history, or real estate.<sup>32</sup> Because of this composition, historic preservation commissions tend to exhibit a strong bias toward protecting structures rather than toward allowing their alteration or redevelopment.<sup>33</sup> As a former chair of the New York City Landmarks Preservation Commission once admitted, there is a “growing tendency to use designation for purposes outside the jurisdiction of the law . . . [such as] to

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preservation programs and activities.” National Historic Preservation Act of 1966, Pub. L. No. 89-665, 80 Stat. 915 (initially codified at 16 U.S.C. § 470(b)(7), later omitted). Congress accelerated its efforts by creating the National Register of Historic Places, “the official list of the Nation’s historic places worthy of preservation,” but such a property’s registry on this list places no federal restrictions on what the owner may do with their property up to and including destruction. *FAQs—National Register of Historic Places*, NAT’L PARK SERV., <https://www.nps.gov/subjects/nationalregister/faqs.htm> [<https://perma.cc/FG8W-SNHR>].

30. See TYLER ET AL., *supra* note 19, at 59 (noting the centrality of local control “cannot be overemphasized”). While the federal National Historic Preservation Act plays a role, it primarily does so through enabling local governments to establish historic district commissions that enact and administer local historic ordinances. See *id.*

31. See SARA C. BRONIN & RYAN ROWBERRY, *HISTORIC PRESERVATION LAW IN A NUTSHELL* 191 (2014).

32. See *id.*

33. See Todd Schneider, Comment, *From Monuments to Urban Renewal: How Different Philosophies of Historic Preservation Impact the Poor*, 8 GEO. J. ON POVERTY L. & POL’Y 257, 265 (2001) (on the strong preservationist tendencies of landmarks commission appointees). Schneider recounts several examples:

In Chicago, residents of Palmer Square have used landmark designation to keep out shelters and clinics for low-income people. Across the country, various groups of residents have tried to block the construction of nearby low-income or senior housing by suing for injunctions based on preservation’s legal protections. In one such instance, the residents of a Chicago historic district sued the Department of Housing and Urban Development (‘HUD’) to challenge its approval of federally subsidized rental housing being built inside the district. They did so despite the fact that the building sites were vacant lots with no aesthetic value and that the project would provide low-income housing in an area where gentrification had already reduced the supply of affordable housing.

*Id.* (footnotes omitted). See also, e.g., Lisa Prevost, *Town After Town, Residents Are Fighting Affordable Housing in Connecticut*, N.Y. TIMES (Sept. 4, 2022), <https://www.nytimes.com/2022/09/04/realestate/connecticut-affordable-housing-apartments.html> [<https://perma.cc/9KSF-HQEP>] (“[I]n Greenwich, a developer recently withdrew an application to build a project that would include 58 apartments priced below market rate, after residents . . . said the buildings that would be demolished were historically significant.”).



maintain the status quo [or] to prevent development.”<sup>34</sup> She added, perhaps presciently, that “[t]he misuse of the law places in jeopardy the past and future legitimate designations.”<sup>35</sup>

## B. THE LEGAL BACKDROP: TAKINGS JURISPRUDENCE THROUGH *PENN CENTRAL*

If the sacrifice of Penn Station provided holy zeal to historic preservationists, the sparing of Grand Central in *Penn Central Transportation Company v. City of New York* bestowed upon the movement a legal blessing. This case required the Supreme Court to interpret the Fifth Amendment’s Takings Clause, which reads: “nor shall private property be taken for public use, without just compensation.”<sup>36</sup> Perhaps the only non-disputed interpretation of this provision holds that the government must pay when it takes title over property through eminent domain.<sup>37</sup> It is also generally settled that the government owes compensation when its action “reduces the exclusive right of possession that an owner has in a single parcel of land.”<sup>38</sup> These so-called “physical takings” differ from eminent domain because the owner retains title over the property, but courts still require the government to pay compensation for impinging on the owner’s right to exclude—“perhaps the most fundamental of all property interests.”<sup>39</sup> Finally, but most nebulously, courts have read the Takings Clause

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34. Beverly Moss Spatt, Letter to the Editor, N.Y. TIMES, July 8, 1980, at A16.

35. *Id.*

36. U.S. CONST. amend. V. The Supreme Court has clarified that the Takings Clause limits the federal, state, and local governments through the Fourteenth Amendment. *See* *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 236 (1897) (Although the state “legislature may prescribe a form of procedure to be observed in the taking of private property for public use, . . . it is not due process of law if provision be not made for compensation.”).

37. *See* Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1081 (1993).

38. RICHARD A. EPSTEIN, *SUPREME NEGLECT* 53 (2008) (emphasis in original). *See also* *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005) (noting the “paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property”); *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071 (2021) (“The government commits a physical taking when it uses its power of eminent domain to formally condemn property. The same is true when the government physically takes possession of property without acquiring title to it. And the government likewise effects a physical taking when it occupies property—say, by recurring flooding as a result of building a dam. These sorts of physical appropriations constitute the clearest sort of taking, and we assess them using a simple, *per se* rule: The government must pay for what it takes.”) (internal citations and quotation marks omitted).

39. *Lingle*, 544 U.S. at 539. *See also* Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 752 (1998) (calling the right to exclude the “*sine qua non*” of property).

to require compensation when, in the words of Justice Holmes, a regulation “goes too far” in infringing on property rights.<sup>40</sup> How far is “too far” has generated much heat since Holmes’ century-old pronouncement, but little light.<sup>41</sup>

### 1. *Regulatory Takings*

Scholars often regard Justice Holmes’ opinion in *Pennsylvania Coal Co. v. Mahon* as inaugurating the concept of regulatory takings.<sup>42</sup> “The general rule,” Holmes wrote, “is that, while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking.”<sup>43</sup> Holmes’ “general rule” is often described as unhelpful even by those appreciative of his attempt to defend property rights,<sup>44</sup> partly because his cryptic pronouncement provided few hints of how to determine what regulations went “too far” besides an indication that “the extent of the diminution in value” mattered greatly.<sup>45</sup> Nearly four decades later, the Supreme Court offered some clarification that the purpose of the Takings Clause was “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.”<sup>46</sup>

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40. *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

41. See generally Mark Fenster, *The Stubborn Incoherence of Regulatory Takings*, 28 STAN. ENV’T L.J. 525 (2009) (suggesting the complex muddle that is regulatory-takings jurisprudence is unavoidable).

42. See Cynthia Estlund, *Showdown at Cedar Point: “Sole and Despotism Dominion” Gains Ground*, 2021 SUP. CT. REV. 125, 126 (2021); see also Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1566 (2003) (“According to the standard story in takings law, the whole idea of a ‘regulatory taking’ was regarded as an oxymoron for more than 130 years. There was no such conceptual category, the story continues, until in a moment of distraction or senility Justice Oliver Wendell Holmes created the doctrine in the 1922 decision *Pennsylvania Coal Co. v. Mahon*.”). In this case, the Court for the first time struck down a regulation as an uncompensated taking. The law at issue, Pennsylvania’s Kohler Act, prohibited coal mining that would cause subsidence damage to surface structures, streets, utility lines, and so on. Pennsylvania Coal sued, asserting that this amounted to an uncompensated taking of their property interest in land subject to the law. See Rubinfeld, *supra* note 37, at 1086; *Penn. Coal*, 260 U.S. at 412–13.

43. *Penn. Coal*, 260 U.S. at 415.

44. See, e.g., Claeys, *supra* note 42, at 1625; see also Sam Spiegelman & Gregory C. Sisk, *Cedar Point: Lockean Property and the Search for A Lost Liberalism*, CATO SUP. CT. REV. 167–68 (2020–2021) (“However significant Holmes’s proviso, it offered no practical instruction on *when* it should be applied, besides implying that it would be on rare occasion.”).

45. *Penn. Coal*, 260 U.S. at 413.

46. *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (internal quotations omitted).

But for the most part, the next half-century of regulatory takings cases post-*Pennsylvania Coal* generated little doctrine.<sup>47</sup>

This changed in 1978, with *Penn Central Transportation Co. v. City of New York*. There, the Supreme Court reviewed a challenge to New York City's landmark preservation law brought by the Penn Central Company, which owned Grand Central Station.<sup>48</sup> Penn Central claimed that New York City's preservation ordinance constituted a taking of the air rights over their property, where they had intended to build a fifty-five-story tower that met all other zoning requirements.<sup>49</sup> Under the terms of the ordinance, Grand Central's designation as a landmark would result in numerous restrictions on Penn Central's use of the landmarked site, and they would require LPC approval for any alterations to the property.<sup>50</sup> Thus, by designating their site "protected," Penn Central argued, the city prevented a project that would have generated over \$2 million in rents per year and thus owed Penn Central compensation for that loss.<sup>51</sup>

Justice Brennan, writing for a 6-3 majority, rebuffed Penn Central's challenge.<sup>52</sup> In this "landmark case about landmarks,"<sup>53</sup> the Court examined dozens of takings cases since *Pennsylvania Coal*, found a series of "essentially *ad hoc*, factual inquiries,"<sup>54</sup> and "prescribed more of the same."<sup>55</sup> Indeed, one scholar described *Penn Central* as reflecting "primarily the work of a sleep deprived law clerk trying not to say anything new."<sup>56</sup> In reviewing land-use

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47. See Estlund, *supra* note 42, at 127. Thomas Merrill has helpfully described the regulatory takings doctrine as existing "to prevent the government from evading the obligation to pay just compensation, by disguising what would ordinarily be an exercise in eminent domain as a police power regulation." Thomas W. Merrill, *The Supreme Court's Regulatory Takings Doctrine and the Perils of Common Law Constitutionalism*, 34 J. LAND USE & ENV'T L. 1, 28 (2018).

48. 438 U.S. 104, 115–22 (1978).

49. *Id.* See also RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 119 (1985) and Lawson et al., *Oh Lord, Please Don't Let Me Be Misunderstood: Rediscovering the Mathews v. Eldridge and Penn Central Frameworks*, 81 NOTRE DAME L. REV. 1, 30 (2005) ("Penn Central treated the ultimate issue as a straightforward syllogism: air rights are property; New York deprived Penn Central of the use of its air rights; therefore, New York took Penn Central's property.").

50. See *Penn Cent. Transp. Co.*, 438 U.S. at 111–12.

51. *Id.* at 116. See also EPSTEIN, *supra* note 49, at 119.

52. *Penn Cent. Transp. Co.*, 438 U.S. at 107.

53. Estlund, *supra* note 42, at 127.

54. *Penn Cent. Transp. Co.*, 438 U.S. at 124.

55. Estlund, *supra* note 42, at 127.

56. Peter Byrne, *Penn Central in Retrospect: The Past and Future of Historic Preservation*, 33 GEO. ENV'T L. REV. 399, 419–20 (2021) (noting the clerk who drafted the

regulations, Brennan wrote, the Court “has been unable to develop any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action be compensated by the government” but has nevertheless “identified several factors that have particular significance.”<sup>57</sup> These factors, which would come to define *Penn Central*’s balancing test, include: (1) the “economic impact of the regulation on the claimant”—particularly “the extent to which the regulation has interfered with distinct investment-backed expectations,” and (2) “the character of the governmental action.”<sup>58</sup> Applying these factors to the case before it, the Court held that the application of the historic preservation statute to Grand Central did not constitute a taking.

The Court reaffirmed *Penn Central*’s applicability to regulatory takings challenges in 2002,<sup>59</sup> 2005,<sup>60</sup> and 2017.<sup>61</sup> Reiterating the Court’s commitment to the “ad hoc, factual inquiry approach designed to allow careful examination and weighing of all the relevant circumstances” stemming from *Pennsylvania Coal* and *Penn Central*,<sup>62</sup> the Justices continued to apply an approach to regulatory takings claims that ensured that the government nearly always won.<sup>63</sup>

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decision “prepared his draft over three ‘all-nighters’” and was told by other clerks “the opinion better not say very much”).

57. *Penn Cent. Transp. Co.*, 438 U.S. at 124.

58. *Id.* Clarifying this third factor, Brennan added that a “taking” may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.” *Id.*

59. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Plan. Agency*, 535 U.S. 302, 321 (2002).

60. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540 (2005).

61. *Murr v. Wisconsin*, 582 U.S. 383, 393 (2017).

62. *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 322.

63. See Claeys, *supra* note 42, at 1655 (“*Penn Central* is easy to apply as long as one does not mind if the government always wins.”); James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 35, 88 (2016) (noting that “*Penn Central* balancing involves little more than a rhetorical bow to private property rights in the course of upholding state or local regulation” and “in state court practice, relegation to ad hoc adjudication has marked the death knell for a takings claim”). Krier and Sterk note two Supreme Court doctrines that “stack the cards decidedly in favor of the state.” *Id.*

The first is the Court’s rejection of “conceptual severance,” meaning courts evaluating takings challenges consider the diminution in value affecting the “entire parcel,” not just the parcel allegedly taken. For example, if an ordinance prevents the use of the air column over a piece of land, the challengers will argue that the government has taken 100% of their property interest in the air above their land. But a court would reject this “severance,” instead considering the property interests in the air and land together, and thus find something less than a 100% diminution in value. Under *Penn Central*, this weighs against finding a taking.

## 2. *Physical and Per Se Takings*

Though keeping *Penn Central* intact, the Court has since developed Fifth Amendment doctrines to avoid applying the deferential test to regulations it deems “physical” or “*per se*” takings of property. Whereas a regulatory taking leaves an owner’s right to possess property undisturbed but restricts their ability to use it, a physical taking deprives owners of (at least some of) their property altogether.<sup>64</sup> According to the Court, physical takings always require compensation because of the unique burdens they impose: “A permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner’s right to exclude others from entering and using her property—perhaps the most fundamental of all property interests.”<sup>65</sup> But while many physical takings are clear-cut cases requiring just compensation,<sup>66</sup> the distinction between physical and regulatory takings often breaks down.<sup>67</sup>

For this reason, since *Penn Central*, the Court has deemed certain regulations *per se* takings that also always require compensation, rather than regulatory takings subject to *Penn Central*’s deferential test.<sup>68</sup> The first of these *per se* exceptions, stemming from *Loretto v. Teleprompter Manhattan CATC Corp.*,<sup>69</sup> involves government actions which authorize a permanent physical invasion of private property, however minor. In *Loretto*, the Supreme Court held that a state law requiring landlords to permit cable companies to install cable facilities in apartment

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Second, “the Court’s doctrine also plays fast and loose with the constitutional requirement of just compensation in the event of a taking,” meaning courts can rebuff takings challenges seeking monetary compensation by holding that some form of in-kind compensation was already provided. *Id.* at 88–89. This is what occurred in *Penn Central* itself, wherein the Court held that “transferable development rights”—allowing the owners of Grand Central to build atop other structures—“undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation.” *Penn Cent. Transp. Co.*, 438 U.S. at 137.

64. See EPSTEIN, SUPREME NEGLECT, *supra* note 38, at 97.

65. *Lingle*, 544 U.S. at 539.

66. See, e.g., EPSTEIN, SUPREME NEGLECT, *supra* note 38, at 53–73 (“The simplest illustrations arise when the state takes land outright for a fort, road, or post office.”).

67. See *id.* at 46 (“The crucial modern constitutional distinction between physical and regulatory takings . . . rests on intellectual quicksand.”). Or, as Chief Justice Roberts put it, “[g]overnment action that physically appropriates property is no less a physical taking because it arises from a regulation.” *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021).

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

69. 458 U.S. 419 (1982).

buildings effectuated a taking requiring compensation, despite the minimal diminution in value to the owner's property.<sup>70</sup> The second exception, stemming from *Lucas v. South Carolina Coastal Council*, applies when "the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good."<sup>71</sup> This *per se* rule holds that the government must pay just compensation for such "total regulatory takings," except to the extent that "background principles of nuisance and property law" independently restrict the owner's use of the property.<sup>72</sup> For regulatory takings challenges falling outside of the two relatively narrow exceptions provided by *Loretto* and *Lucas*, however, *Penn Central* still controls—providing legal cover for widespread historic preservation, but imposing extensive and under-acknowledged costs.<sup>73</sup>

## II. THE STAKES: HISTORIC PRESERVATION'S COSTS

Preservationists have come a long way since first struggling to protect George Washington's home in 1853. Today, for example, New York City protects over 37,000 properties, many located in 154 historic districts spread across the five boroughs.<sup>74</sup> Yet even as the number of remaining iconic buildings lacking landmark protection has declined, the pace of preservation has chugged along,<sup>75</sup> driven less by a sudden groundswell in historic consciousness than by quotidian concerns like preserving home

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70. See *id.* at 435.

71. 505 U.S. 1003, 1019 (1992) (emphasis in original) (holding the South Carolina Beachfront Management Act constituted a taking without just compensation for preventing construction on property owner's beachfront properties).

72. *Id.* at 1026–32.

73. See *Lingle*, 544 U.S. at 528 ("Outside these two categories (and the special context of land-use exactions discussed below), regulatory takings challenges are governed by *Penn Central*."). Land-use exactions fall outside the scope of this Note, but see *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013) for a recent explication of exactions principles.

74. See *About LPC*, *supra* note 14.

75. Alexander Kazam, *From Independence Hall to the Strip Mall: Applying Cost-Benefit Analysis to Historic Preservation*, 47 ENV'T L. 429, 433–44 (2017) ("As the opportunity costs of preservation have risen, the marginal benefits have declined. . . . But remarkably, the pace of preservation has remained steady or even accelerated.").

values<sup>76</sup> and avoiding more competition for street parking.<sup>77</sup> Decisions to favor preservation over development therefore have ramifications both small and large.

#### A. PRESERVATION'S COSTS WRIT SMALL

Few would challenge the merits of preserving Independence Hall. Less historically-significant architecture, too, may often merit landmark designation, though who should bear the costs associated with historic preservation status is debatable.<sup>78</sup> But many of the targets of “historic” designations today are not chosen for their aesthetic or historical significance. Egregious examples abound: the city of Chicago once designated as a landmark a nondescript American Correspondence School building located on the University of Chicago campus to stall the expansion of the university’s hospital.<sup>79</sup> In Washington, D.C., preservationists designated a Cleveland Park strip mall as an historic landmark in order to prevent a mid-rise building from taking its place.<sup>80</sup>

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76. See Jerusalem Demsas, *The Next Generation of NIMBYS*, ATLANTIC (July 20, 2022) <https://www.theatlantic.com/newsletters/archive/2022/07/the-next-generation-of-nimbys/670590/> [https://perma.cc/C2H2-HN7H].

77. See Aaron Weiner, *A Lot to Lose: Can a Parking Lot Be an Historic Landmark?*, WASH. CITY PAPER (Apr. 16, 2015), <https://washingtoncitypaper.com/article/371512/a-lot-to-lose-can-a-parking-lot-be-an-historic-landmark/> [https://perma.cc/LQD7-4AAD]. See also Matthew Yglesias, *Commemorate History, Don’t Preserve Old Buildings*, SLOW BORING (Feb. 6, 2023), <https://www.slowboring.com/p/commemorate-history-dont-preserve> [https://perma.cc/XDX2-KHDC] (noting that the “real reason [a strip mall was] designated for historic preservation” was because “[p]eople who live in the area didn’t want more parking on the street . . .”). Other motivating factors behind historic preservation ordinances and other land-use regulations are more nefarious; see *infra* discussion in Section II.A on exclusionary zoning.

78. See, e.g., Mihir Zaveri, *Why Mark Ruffalo and Wendell Pierce Are Fighting for a Crumbling Church*, N.Y. TIMES (June 26, 2023), <https://www.nytimes.com/2023/06/26/nyregion/west-park-presbyterian-church-manhattan.html> [https://perma.cc/5BK2-3VVD] (discussing the fight between congregants of an Upper West Side church, who want “to stop its financial bleeding and use proceeds from [a] real estate deal [with an apartment developer] for better causes, including serving needy people across the city,” and celebrities opposing the church’s application to remove itself from New York City’s list of landmarks despite the congregants’ assertion that the “landmark status present[s] a hardship to the church, which has no money to keep it up”).

79. See EPSTEIN, SUPREME NEGLECT, *supra* note 38, at 125. In Epstein’s recounting, “The political motivation was to slow down the expansion of the university’s hospital for the benefit of nearby neighbors, who opposed the project. These neighbors sold out within a few years anyhow, leaving the university with a markedly inferior facility and an eyesore to boot.” *Id.*

80. See Josh Barro, *DC’s Key Development Failure Isn’t Downtown, It’s Cleveland Park*, FORBES (Apr. 19, 2012) <https://www.forbes.com/sites/joshbarro/2012/04/19/dcs-key-development-failure-isnt-downtown-its-cleveland-park> [https://perma.cc/Q66X-S6FT].

Arlington, Virginia set forth criteria for preservation so pretextual that it became known as the “Strip Mall Preservation Act.”<sup>81</sup>

And even when preservationists ultimately fail, their attempts to designate properties as historic landmarks impose costly delays.<sup>82</sup> New York City’s Landmark Preservation Commission once landmarked a BP gas station as part of an historic district, thereby preventing its redevelopment into a mid-rise condo; a year passed before the LPC reversed course and allowed it to become a seven-story commercial building.<sup>83</sup> The San Francisco Board of Supervisors spent years attempting to block a resident from turning his laundromat into a seventy-five-unit apartment building, requiring an historic evaluation at the owner’s expense after he had already spent over \$900,000 in development costs complying with the city’s other requests.<sup>84</sup> The building was finally demolished to make way for new housing in 2022—eight years after the owner began attempting to develop the property.<sup>85</sup> Preservationists in Nevada City, meanwhile, have attempted to designate nearly the entire city as an historic district to save the “small-town heritage and take back local land use control”—or, more accurately, to prevent the construction of additional housing.<sup>86</sup>

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81. See Kazam, *supra* note 75, at 434 n.42 (citing Miles Grant, *Arlington Passes Strip Mall Preservation Act*, GREEN MILES (July 28, 2011), <http://thegreenmiles.blogspot.com/2011/07/arlington-passes-strip-mall.html> [<https://perma.cc/2T3V-RJN9>]). See also *Historic Preservation of a Strip Mall and Parking Lot*, LEGALLY SOCIABLE (July 21, 2015), <https://legallysociable.com/2015/07/21/historic-preservation-of-a-strip-mall-and-parking-lot/> [<https://perma.cc/448C-8Y8G>].

82. See Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 533 (1981) (“Delay, of course, has its costs . . .”).

83. See Annie Karni, *This Gas Station is a Landmark?!*, N.Y. POST (Apr. 8, 2012), <https://nypost.com/2012/04/08/this-gas-station-is-a-landmark> [<https://perma.cc/34KZ-Q78G>]; Lauren Evans, *“Historic” SoHo BP to Be Turned Into 7-Story Office, Retail Building*, GOTHAMIST (Apr. 11, 2013), <https://gothamist.com/news/historic-soho-bp-to-be-turned-into-7-story-office-retail-building> [<https://perma.cc/GB9X-RE8K>]. The author is indebted to Kazam, *supra* note 75, for these previous examples.

84. See Christian Britschgi, *San Francisco Man Has Spent 4 Years and \$1 Million Trying to Get Approval to Turn His Own Laundromat into an Apartment Building*, REASON (Feb. 21, 2018), <https://reason.com/2018/02/21/san-francisco-man-has-spent-4-years-1-mi> [<https://perma.cc/RC4K-8ZLP>].

85. See Andrew Nelson, *San Francisco’s ‘Historic Laundromat’ Demolished for Housing*, SF YIMBY (May 21, 2022), <https://sfyimby.com/2022/05/san-franciscos-historic-laundromat-demolished-for-housing.html> [<https://perma.cc/YP44-F62S>].

86. Jennifer Nobles, *Nevada City to Vote on Measure W: Results to Potentially Impact City Living*, UNION (Sept. 22, 2022), <https://www.theunion.com/news/nevada-city-to-vote-on-measure-w-results-to-potentially-impact-city-living> [<https://perma.cc/F94G-VQ7C>].



These easy appeals to historic preservation have taken their toll as “[l]ocal governments have stretched the concept of a landmark beyond recognition.”<sup>87</sup> More than 25% of lots in Manhattan are landmarks, as are nearly 20% in Washington, D.C.<sup>88</sup> Los Angeles has thirty-five historic districts encompassing over 21,000 properties<sup>89</sup>—many located in low-density neighborhoods featuring large single-family houses.<sup>90</sup> “Since its inception in 1966, more than 95,000 properties” have been listed in the National Register of Historic Places.<sup>91</sup> Some surely deserve such recognition, but many others just as surely do not.<sup>92</sup>

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87. Kazam, *supra* note 75, at 458.

88. *See id.* New York City and the District of Columbia are two of the nation’s oldest cities, so a higher percentage of landmarked properties there than elsewhere would be expected, but preservation in New York and D.C. goes far beyond the aesthetically and historically significant: New York City has roughly 30,000 lots situated within historic districts today, most of which “are of little inherent importance on their own but are considered by the LPC to be significant because of the way they relate to one another—and can remain so only if all are protected en masse.” Anbinder, *supra* note 27. D.C. has 53 historic districts and the city’s Historic Preservation Review Board approves essentially every application for historic status—such as a one-story Pepco substation that resembles a gray box and was labeled by the *Washingtonian* an “eyesore.” *See* Payton Chung, *DC Has More Historic Buildings Than Boston, Chicago, and Philadelphia Combined. Why?*, GREATER GREATER WASH. (Aug. 3, 2020), <https://ggwash.org/view/78627/dc-has-more-historic-buildings-than-boston-chicago-and-philadelphia-combined-why-2> [<https://perma.cc/TF5L-64V4>] (on D.C.’s unduly high proportion of landmarked buildings); David Alpert, *Should This Plain Box Pepco Substation in Tenleytown Really Be a Landmark?*, GREATER GREATER WASH. (Oct. 18, 2017), <https://ggwash.org/view/65215/should-this-plain-box-pepco-substation-in-tenleytown-really-be-a-landmark> [<https://perma.cc/GT2S-Q3GA>] (describing the Pepco station); *Potomac Electric Power Company Substation No. 38*, DC PRES. LEAGUE: HIST. SITES, <https://historicsites.dcpreservation.org/items/show/1071> [<https://perma.cc/MP43-745D>] (noting the Pepco station’s historic status).

89. *See* Kazam, *supra* note 75, at 461.

90. *See Program Overview*, L.A. CITY PLAN., <https://planning.lacity.org/preservation-design/program-overview> [<https://perma.cc/7HXM-CJRS>].

91. *See National Register Database and Research*, NAT’L PARK SERV., <https://www.nps.gov/subjects/nationalregister/database-research.htm> [<https://perma.cc/Q2LQ-EDU4>].

92. No set formula can determine *ex ante* which structures merit landmark designation and which do not, and this Note is agnostic on the question of desert; such judgments will be left to the political communities in which the structures stand. This Note simply argues that under a proper application of the Takings Clause, property owners would be far more likely to be owed compensation when targeted with historic preservation, and therefore the political communities designating historic landmarks would more honestly assess whether a given landmark designation is worth the price. Forced to bear the cost that their heretofore costless decisions to designate buildings as historic landmarks impose on others, political communities could then determine if a given property indeed deserves landmark status. For a more positive look at historic preservation, see J. Peter Byrne, *Historic Preservation and Its Cultured Despisers*, 19 GEO. MASON L. REV. 665 (2012).

Consider again New York City. Emboldened by the Landmarks Preservation Commission discussed in Part I, preservationists began walling off properties and entire neighborhoods after the *Penn Central* decision in 1978.<sup>93</sup> Within three years, the LPC designated as an historic district a large swath of the Upper East Side, stretching along Fifth Avenue from 59th Street to 78th Street and extending as far east as Third Avenue on certain blocks.<sup>94</sup> Preservation exploded again between May 1989 and December 1993, when 509 extra acres were given historic status, including a vast collection of heterogeneous buildings, “many of them with little architectural distinction.”<sup>95</sup>

The divide between historic and non-historic districts in New York City provided a natural experiment for economists like Harvard’s Edward Glaeser to observe the effects of these land-use restrictions on housing prices. Using a broad range of measures, Glaeser’s research accords with the basic intuitions of supply and demand. Between 1980 and 2002, for instance, prices rose \$6,000 per year more in historic districts than outside them.<sup>96</sup> Sorting by price per square foot and controlling for other factors yields a similar result.<sup>97</sup> Glaeser also found that historic districts tend to be richer, whiter, and less accessible to those without extensive higher education.<sup>98</sup> This is unsurprising. As David Schleicher has

93. See Byrne, *supra* note 56, at 428 (discussing how *Penn Central* gave local jurisdictions wide authority to designate both landmarks and districts).

94. See *Upper East Side Historic District*, FRIENDS OF THE UPPER E. SIDE, <https://friends-ues.org/about/upper-east-side-hd> [<https://perma.cc/T4X2-S4FX>].

95. Glaeser, *supra* note 5. According to Glaeser, this second spate of preservation coincided with a change in LPC commissioner and the mayoral reign of David Dinkins. *Id.* While New York City’s spate of preservation probably lacked the overt racial motivations underlying the creation of Charleston’s historic district, see Anbinder, *supra* note 27, race undoubtedly played a role:

Early hearings on the creation of a historic district in Park Slope praised the largely white neighborhood for being ‘a stable family community,’ and one report noted with approval that a proposed historic district on the Upper East Side featured ‘an active property owners’ association [that] governs and controls its destiny.’ By contrast, an LPC director reported in 1962 that he had visited a majority-Black section of Crown Heights slated for the construction of new housing and could find ‘no structures worthy of designation.’

*Id.* To this day, the LPC’s own website notes that one of the purposes of New York’s landmarks law is to “stabilize and improve property values,” further entrenching existing racial disparities. *Id.*

96. See Glaeser, *supra* note 5.

97. See *id.* (noting that for units between 500 and 1,500 square feet, price per square foot increased by about \$5.50 outside historic districts from 1980 to 1991, and about \$66 per square foot within historic districts).

98. See *id.* (noting average household income in census tracts primarily in historic districts were 74% higher than that of households in tracts outside historic districts,

noted, land-use restrictions have long been used as a tool to ensure racial segregation: “After the Supreme Court barred explicit racial zoning, use and density zoning took off in its place, largely to segment white neighborhoods and then predominantly white towns from racial and economic diversity.”<sup>99</sup>

These insights are long-recognized; a 1985 student Note pointed out that historic districting led to the “displacement of the poor and minorities from neighborhoods undergoing revitalization and the exclusion of these groups from affluent residential areas,” partly due to the increased costs that historic districting imposed.<sup>100</sup> And these basic facts have not changed; “in the most regulated regions,” land-use restrictions such as historic preservation are still “likely responsible for as much as half of the cost of any given housing unit.”<sup>101</sup> Indeed, in extreme cases land-use restrictions can become so destructive of value that desolation improves the land’s potential. One study found London’s land-use regime so inimical to economic value that the Blitz—the period during World War II when German warplanes dropped more than 18,000 bombs on London—was actually accretive, because the damage to existing structures made it possible to build new, larger buildings where that development would have been otherwise prohibited.<sup>102</sup>

Historic preservation laws are not the primary cause of high housing prices, but they are an element of the “zoning and other land use controls [that] play the dominant role in making housing

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residents of the majority-historic tracts were 20% more likely to be white, and almost three-quarters of the adult residents had college degrees, as opposed to 54% in non-historic tracts).

99. David Schleicher, *Exclusionary Zoning’s Confused Defenders*, 2021 WIS. L. REV. 1315, 1324 (2021). Schleicher adds that “strict zoning regulations correlate with segregation, both racial and economic.” *Id.*

100. David B. Fein, *Historic Districts: Preserving City Neighborhoods for the Privileged*, 60 N.Y.U. L. REV. 64, 65, 84–85 (1985). See also Michael Newsome, *Blacks and Historic Preservation*, 36 L. & CONTEMP. PROBS. 423 (1971) (warning that historic preservation was a tool of private redevelopment, displacing people of color both economically and culturally).

101. David Schleicher, *City Unplanning*, 122 YALE L.J. 1670, 1674 (2013) (citing Edward L. Glaeser et al., *Why Is Manhattan So Expensive? Regulation and the Rise in Housing Prices*, 48 J.L. & ECON. 331, 360 (2005)). To be sure, this is a high-end estimate of the effect of land-use restrictions on housing costs. But the underlying point is directionally correct regardless: “[T]he evidence for single-family housing markets across a diverse set of metropolitan areas suggests a big role for regulatory restrictions in a select set of primarily coastal markets.” Glaeser et al., *Why Is Manhattan So Expensive?*, 48 J.L. & ECON. at 360.

102. See Sarah Knapton, *The Blitz Added £4.5 Billion to London’s Annual Economy, Say Experts*, TELEGRAPH (Aug. 6, 2018), <https://www.telegraph.co.uk/science/2018/08/06/blitz-added-45-billion-londons-annual-economy-say-experts> [<https://perma.cc/P3QD-EH3P>] (reporting that researchers calculated that if the Blitz bombings had not taken place, the number of city workers would be around 50% lower).

expensive.”<sup>103</sup> John Mangin thus describes preservation as emblematic of the “new exclusionary zoning,”<sup>104</sup> a tactic often used to “discriminate against people of color and to maintain property prices” in suburban and urban neighborhoods.<sup>105</sup> Indeed, these laws are increasingly seen as a new form of “NIMBYism”<sup>106</sup> that “hides under the cover of preservationism, perverting the worthy cause of preserving the most beautiful reminders of our past into an attempt to freeze vast neighborhoods filled with undistinguished architecture.”<sup>107</sup> Without sufficient pushback,<sup>108</sup> preservationists can impose additional costs and delays on housing projects even when their efforts prove unsuccessful.<sup>109</sup> And the consequences of preservation ordinances are not limited to the cities they govern.

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103. Edward L. Glaeser & Joseph Gyourko, *The Impact of Zoning on Housing Affordability* (Nat'l Bureau of Econ. Rsch., Working Paper No. 8835, 2002).

104. John Mangin, *The New Exclusionary Zoning*, 25 STAN. L. & POL'Y REV. 91 (2014) (describing historic preservation as another tactic like minimum lot sizes, mandatory parking requirements, and prohibitions on multifamily housing to keep density down).

105. Cecilia Rouse et al., *Exclusionary Zoning: Its Effect on Racial Discrimination in the Housing Market*, WHITE HOUSE (June 17, 2021), <https://www.whitehouse.gov/cea/written-materials/2021/06/17/exclusionary-zoning-its-effect-on-racial-discrimination-in-the-housing-market> [<https://perma.cc/LR63-86NJ>]; see also William A. Fischel, *An Economic History of Zoning and a Cure for its Exclusionary Effects*, 41 URB. STUD. 317 (2004) (noting how zoning often serves as a substitute for home-value insurance).

106. NIMBY, which stands for “not in my backyard,” is a pejorative term for individuals (often including preservationists) who are opposed to an excessively wide range of development in their neighborhoods or municipalities. See Schleicher, *City Unplanning*, *supra* note 101, at 1674–75. See also Binyamin Appelbaum, *Much Ado About a Little More Housing*, N.Y. TIMES (Aug. 1, 2019), <https://www.nytimes.com/2019/08/01/opinion/montgomery-county-housing.html> [<https://perma.cc/2SYM-QSCQ>] (quoting a protest letter opposing up-zoning in Montgomery County which concluded: “Just because others flee crime-ridden and poverty-stricken areas doesn’t mean Montgomery County has to be turned into a slum to accommodate them.”).

107. GLAESER, TRIUMPH OF THE CITY, *supra* note 6, at 160–61.

108. While such pushback would ideally come from within the political process, public choice theory suggests why this resistance is unlikely to arise: policies such as exclusionary zoning with diffused costs (discussed further in Section II.B, *infra*) and concentrated benefits (in the form of higher home values for the entrenched interests advocating such policies) are unlikely to inspire mass resistance because the beneficiaries or “winners” of these policies are much more motivated to support the policies than the numerically larger but less organized “losers” are to oppose them. See generally MANCUR OLSON JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 1–18 (1965) (discussing the advantage small groups facing concentrated harms from a given change have in political conflicts with large groups, where the benefit to each from the change is small).

109. See, e.g., Ed. Bd., *Amoeba Music Is Cool but That Isn’t a Reason to Stop New Development*, L.A. TIMES (July 27, 2019), <https://www.latimes.com/opinion/story/2019-07-26/amoeba-new-development-ahf-lawsuit> [<https://perma.cc/2XR3-NAAL>]. See also Britschgi, *supra* note 1.

## B. PRESERVATION'S COSTS WRIT LARGE

Restrictions imposed at the local level reduce the affordability of housing nationwide, and the resultant housing shortage compounds nearly every problem confronting the United States today.<sup>110</sup> One study estimates that if just three cities—New York, San Jose, and San Francisco—loosened their rules against building denser housing to reach the national average level of restrictiveness, total U.S. GDP would be 8.9% higher.<sup>111</sup> Other economists estimate that liberalized building laws could lead to an average income gain of 25%, or around \$16,000 more per person per year.<sup>112</sup> Restricting housing density likewise limits innovation and productivity growth: per one estimate, U.S. labor productivity would be 12.4% higher if all states moved halfway from their current land-use regulation levels to approximate the restrictiveness of Texas.<sup>113</sup> Individual and regional inequality would also improve. In the United States, the rising inequality demonstrated by Thomas Piketty chiefly reflected an increase in the share of income going to landowners, driven by increases in the

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110. See Sam Bowman et al., *The Housing Theory of Everything*, WORKS IN PROGRESS (Sept. 14, 2021), <https://www.worksinprogress.co/issue/the-housing-theory-of-everything> [<https://perma.cc/4XSX-ZL9W>].

111. See Chang-Tai Hsieh & Enrico Moretti, *Housing Constraints and Spatial Misallocation*, 11 AM. ECON. J.: MACROECON. 1, 25–26 (2019). This paper has come under criticism from other economists for both overstating and understating the effect of liberalized land-use regulations. See, e.g., Brian Greaney, *Housing Constraints and Spatial Misallocation: Comment*, <https://drive.google.com/file/d/1iNdQ2YBfUCbc2uH4p9wdnuoVGhJZLSqe/view> [<https://perma.cc/4YU6-5E4K>] (arguing that while the deregulation posited by Hsieh and Moretti would raise aggregate economic output, the effect would be two orders of magnitude smaller than what Hsieh and Moretti report) and Bryan Caplan, *Hsieh-Moretti on Housing Regulation: A Gracious Admission of Error*, ECONLIB (April 5, 2021), <https://www.econlib.org/a-correction-on-housing-regulation/> [<https://perma.cc/E78X-VZWF>] (arguing GDP under Hsieh and Moretti's experiment would be 36% higher, not 8.9% higher). For a useful summary of the current debate around the Hsieh and Moretti paper, see Ilya Somin, *Controversy over an Important Article Finding Large Negative Effects of Zoning*, REASON (Nov. 29, 2023), <https://reason.com/volokh/2023/11/29/controversy-over-an-important-article-finding-large-negative-effects-of-zoning/> [<https://perma.cc/NEH2-ASY2>].

112. See Gilles Duranton & Diego Puga, *Urban Growth and its Aggregate Implications* 37 (Nat'l Bureau of Econ. Rsch., Working Paper No. 26591, 2019). Obviously, GDP growth is not everything, and historic preservation may advance other values not captured by economic statistics. But it is difficult to see the values advanced by many of the examples of historic preservation detailed above. Further, the advancement of cultural or aesthetic values does not obviate the constitutional requirement to pay just compensation which (as Part III, *infra*, argues) is what the Takings Clause requires.

113. See Kyle F. Herkenhoff et al., *Tarnishing the Golden and Empire States: Land-Use Restrictions and the U.S. Economic Slowdown*, 93 J. MONETARY ECON. 89, 90 (2018).

cost of housing.<sup>114</sup> This effect was most pronounced where land-use restrictions on housing predominated.<sup>115</sup> Liberalizing these building rules would reduce not only individual inequality, but regional inequality as well. As two economists note, rising housing prices in high-income areas deter lower-skilled migration from lower-income areas, slowing income convergence between regions.<sup>116</sup>

The social ramifications of land-use restrictions in one community also ripple outward, circumscribing individual preferences. For instance, while American women report wanting an average of 2.7 children, the actual number of children an American woman today is expected to bear is 1.6.<sup>117</sup> This, too, relates to housing: a 10% increase in house prices leads to a 2.8% increase in births among owners but a 4.9% decrease in births for renters, for a net effect of a 1.3% fall in birth rates.<sup>118</sup> Restrictions on cheaper, denser, and more abundant housing also worsen individuals' health,<sup>119</sup> creativity,<sup>120</sup> and ecological impact.<sup>121</sup>

Of course, historic preservation laws are not the only land-use restrictions driving up prices; zoning in general leaves much to be desired.<sup>122</sup> But historic preservation laws are tiles in the mosaic,

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114. See Matthew Rognlie, *Deciphering the Fall and Rise in the Net Capital Share: Accumulation or Scarcity?*, BROOKINGS PAPERS ON ECON. ACTIVITY 1–5 (2015) (finding that “the net capital share has increased since 1948, but once disaggregated this increase turns out to come entirely from the housing sector”) (discussing THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (2014)).

115. See Gianni La Cava, *Piketty's Rising Share of Capital Income and the US Housing Market*, CTR. FOR ECON. POL'Y RSCH. (Oct. 8, 2016), <https://cepr.org/voxeu/columns/pikettyps-rising-share-capital-income-and-us-housing-market> [<https://perma.cc/GZ27-Y6SC>].

116. See Peter Ganong & Daniel Shoag, *Why Has Regional Income Convergence in the U.S. Declined?*, 102 J. URB. ECON. 76 (2017).

117. See Catherine Rampell, *The Baby Bust Won't End Without Government Action*, WASH. POST (May 6, 2021), <https://www.washingtonpost.com/opinions/2021/05/06/baby-bust-wont-end-without-government-action> [<https://perma.cc/HSV9-K8FE>].

118. See Cevat Giray Aksoy, *Short-Term Effects of House Prices on Birth Rates* 1 (Eur. Bank for Reconst. and Dev., Working Paper No. 192, 2016).

119. See, e.g., Bowman et al., *supra* note 110 (discussing differences in Japanese and American obesity rates and land-use laws).

120. See Edward L. Glaeser & David C. Maré, *Cities and Skills*, J. LAB. ECON. 316, 316–19 (2001) (showing urban wage growth through learning and specialization); Enrico Moretti, *The Effect of High-Tech Clusters on the Productivity of Top Inventors* 1–4 (Nat'l Bureau of Econ. Rsch., Working Paper No. 26270, 2021) (showing the effect of density on patenting behavior).

121. See GLAESER, TRIUMPH OF THE CITY, *supra* note 6, at 14.

122. See generally M. NOLAN GRAY, *ARBITRARY LINES: HOW ZONING BROKE THE AMERICAN CITY AND HOW TO FIX IT* (2022) (criticizing zoning laws). See also Andrew Van Dam, *Where We Build Homes Helps Explain America's Political Divide*, WASH. POST (Nov. 24, 2023), <https://www.washingtonpost.com/business/2023/11/24/counties-building-new->

contributing to a sordid picture. Despite its laudable origins,<sup>123</sup> the pitfalls of historic preservation are increasingly recognized across the political spectrum.<sup>124</sup> The Takings Clause offers a remedy—if the courts choose to apply it.<sup>125</sup>

### III. THE INCREASINGLY UNTENABLE ASYMMETRY BETWEEN REGULATORY AND *PER SE* TAKINGS

As introduced in Part I, a court's decision to apply *Penn Central* or a *per se* rule presents two wildly inconsistent regimes for deciding takings challenges.<sup>126</sup> While a regulation requiring

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housing/ [https://perma.cc/8JQC-3BHN] (noting that from “2013 to 2018, zoning and related restrictions added about \$410,000 to the cost of a quarter-acre lot in the San Francisco metro area, \$199,000 in Los Angeles, \$175,000 in Seattle and \$152,000 in greater New York”).

123. See *supra* Section I.A. But note that even the origins of historic preservation are suspect. While Americans today can proudly celebrate the preservation of Independence Hall, recall that the nation's first historic district, downtown Charleston, was created as part of a Jim Crow zoning code. See Anbinder, *supra* note 27.

124. See, e.g., Kriston Capps, *Why Historic Preservation Districts Should Be a Thing of the Past*, BLOOMBERG: CITYLAB (Jan. 29, 2016), <https://www.bloomberg.com/news/articles/2016-01-29/michigan-and-wisconsin-state-republicans-are-crusading-against-historic-preservation-districts> [https://perma.cc/5G2A-SEZE]; Will Doig, *Preserving History, or the 1 Percent?*, SALON (Apr. 14, 2012), [https://www.salon.com/2012/04/14/the\\_new\\_gated\\_communities](https://www.salon.com/2012/04/14/the_new_gated_communities) [https://perma.cc/39CC-HGN6]; Yglesias, *supra* note 77.

125. Given the drawbacks of most land-use restrictions, this Note's preoccupation with historic preservation rather than zoning in general may seem perplexing. From a policy perspective, if the goal is to liberalize land use, why limit the targets of shock therapy? Further, from a legal perspective, if regulatory takings jurisprudence as a whole is convoluted, what justifies limiting a reformed regulatory takings framework to historic preservation rather than all land-use laws? Does a regulation preventing a developer from building a duplex on land zoned for single-family plots deserve different scrutiny than a law preventing the redevelopment of an “historic” strip mall?

In a word, yes. Consider the goal of historic preservation. In *Penn Central*, the Court wrote that in enacting the National Historic Preservation Act, Congress conveyed its belief that “the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people.” *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 108 n.1 (1978). A natural reading of the Takings Clause, notably its inclusion of the term “for public use,” suggests that this is a clear instance of a government action requiring compensation. Hence the justification for singling out historic preservation laws from land-use regulations *in toto*. The entire purpose of historic preservation is to ensure that the structures a given political community deem important remain unaltered for public benefit. This makes historic preservation a far clearer example of property regulations enacted for the public use than, say, laws permitting or proscribing industrial uses of land in a given neighborhood. The former clearly instrumentalize private property for the public's benefit, while the latter may circumscribe a property owner's options but do not effectively conscript the property for one state-decided purpose. See Rubenfeld, *supra* note 37, at 1155–56.

126. See *supra* Section I.B; see also Richard A. Epstein, *A Bombshell Decision on Property Taking*, HOOVER INST. (June 28, 2021), <https://www.hoover.org/research/bombshell-decision-property-takings> [https://perma.cc/H7LK-TSD5].

landlords to install cable boxes triggers the full protection of the Takings Clause, a landmark designation wiping out millions of dollars in value does not. By expanding *Loretto*'s holding so that any abrogation of the right to exclude, permanent or not, now triggers the Takings Clause, the Court's 2021 decision in *Cedar Point* narrowed the space between *Penn Central* and *Loretto*'s *per se* rule.<sup>127</sup> But the discontinuity between *Penn Central* and the *Lucas per se* rule remains. Those challenging economically-destructive property regulations still face the daunting prospect that if the regulation allows their property to retain even a modicum of value, *Penn Central* applies and their petition for compensation will likely fail. This Part argues that in light of the principles underlying the Court's takings jurisprudence and *Cedar Point*'s expansive, property-protecting rhetoric, this once awkward-but-navigable gap has become a chasm—one that is unlikely to survive a renewed round of regulatory takings challenges.

#### A. FAIRNESS, JUSTICE, AND *PENN CENTRAL*'S DECLINING PERSUASIVENESS

Long before Justice Holmes' "too far" pronouncement in *Pennsylvania Coal*, the Supreme Court in *Monongahela Navigation Company v. United States* noted that the Fifth Amendment "prevents the public from loading upon one individual more than his just share of the burdens of government."<sup>128</sup> Justice Holmes reaffirmed this principle when he warned that governments were "in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."<sup>129</sup> The question at the heart of a takings case was "upon whom the loss of the changes desired should fall," and Holmes' answer was upon the government enacting the

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127. See Epstein, *A Bombshell Decision*, *supra* note 126.

128. *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 325 (1893) (awarding full compensation to the Monongahela company, which had expended large sums of money improving the Monongahela River by means of locks and dams, after the United States condemned this property for its own use). This principle, the Court went on, ensures that just compensation is paid when an individual "surrenders to the public something more and different from that which is exacted" from others. *Id.*

129. *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).



change, not the individual subjected to it.<sup>130</sup> This understanding—that the Takings Clause ensures fairness for individual property rights—was expressed again in *Armstrong v. United States* when the Court reiterated that the Constitution bars the “[g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>131</sup>

The Court’s concerns about fairness and justice have shone through many of its seminal takings cases in a way that is relevant to historic preservation laws today. In *United States v. Causby*, for instance—decided three decades prior to *Penn Central*—the Court recognized a taking where continuous flights by U.S. military jets over Causby’s land terrorized his chickens, thus destroying the viability of his commercial chicken farm business.<sup>132</sup> The flights, which “occurred on only 4% of takeoffs and 7% of landings at the nearby airport,”<sup>133</sup> did not destroy “all economically beneficial uses” of the property;<sup>134</sup> however, the Court did not find this dispositive. “There is no material difference,” the Court wrote, between a hypothetical case where the flights took away all use (which the government conceded would constitute a taking), “and the present one, except that [in the present case] enjoyment and use of the land are not completely destroyed. But that does not seem to us to be controlling.”<sup>135</sup>

The principles elucidated in *Monongahela, Pennsylvania Coal*, *Armstrong*, and *Causby* cut in favor of *Penn Central*’s argument that the landmark designation unfairly forced *Penn Central* to bear a cost (the loss of their property right in the air column above Grand Central) for an ostensible benefit (maintaining the aesthetics of Grand Central) enjoyed by the public. Indeed, then-Justice Rehnquist made this argument in his *Penn Central* dissent, citing both *Causby* and *Monongahela* for the proposition that while

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130. *Id.*

131. 346 U.S. 40, 49 (1960).

132. See *United States v. Causby*, 328 U.S. 256, 259 (1946) (“As a result of the noise, respondents had to give up their chicken business. As many as six to ten of their chickens were killed in one day by flying into the walls from fright. The total chickens lost in that manner was about 150.”).

133. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2075 (2021) (citing *Causby*, 328 U.S. at 259).

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

135. *Causby*, 328 U.S. at 261–62. Further, the Court continued, “while the landowner owns at least as much of the space above the ground” as he can occupy or make use of, “[t]he fact that he does not occupy it in a physical sense—by the erection of buildings and the like—is not material.” *Id.* at 264 (citing *Hinman v. Pac. Air Transp.*, 84 F.2d 755 (9th Cir. 1936)).

Penn Central could continue to use the terminal, New York City otherwise “exercise[d] complete dominion and control over the surface of the land” and thus must compensate the owner for its loss.<sup>136</sup> Justice Brennan’s majority opinion sidestepped this point by folding *Causby* under the “character” factor of his test; a taking, he wrote, may more readily be found when the challenged interference with property can be characterized as a physical invasion—as he characterized the jets’ flights—“than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.”<sup>137</sup>

But Justice Brennan’s attempt to distinguish the challenge in *Causby* from that in *Penn Central* now appears weak on at least two fronts. First, given the state of historic preservation laws today, it is far more dubious now than it was in 1978 that historic designations judiciously adjust “the benefits and burdens of economic life” for the common good.<sup>138</sup> Second, Brennan did not adequately address Penn Central’s concern that its property had been “subjected to a nonconsensual servitude not borne by any neighboring or similar properties.”<sup>139</sup>

Perhaps because of these weaknesses, the Court’s jurisprudence since *Penn Central* moved incrementally in Justice Rehnquist’s direction.<sup>140</sup> This became evident in the 1987 case *First English Evangelical Lutheran Church of Glendale v. Los Angeles*,<sup>141</sup> wherein the Court ruled for a church challenging a

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136. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 146 (1978) (Rehnquist, J., dissenting).

137. *Id.* at 124 (majority opinion).

138. See *supra* Part II for a discussion of the economic and social costs of preservation, as well as the often racist and classist motivations and results of historic preservation and other land-use regimes.

139. *Penn Cent. Transp. Co.*, 438 U.S. at 143 (Rehnquist, J., dissenting). While Brennan invoked *Welch v. Swasey*, 214 U.S. 91 (1909), see *id.* at 130 (majority opinion)—a 1909 decision holding height restrictions do not require compensation under the Takings Clause—city-wide height limits justified on safety grounds do not necessarily support individual-property restrictions for aesthetic (or, increasingly, self-interested and exclusionary) reasons. See *supra* notes 101–108 and surrounding text on exclusionary zoning.

140. See generally Chauncey L. Walker & Scott D. Avitabile, *Regulatory Takings, Historic Preservation and Property Rights Since Penn Central: The Move Toward Greater Protection*, 6 FORDHAM ENV’T L.J. 819, 819 (1995) (noting that “a number of state, federal, and Supreme Court decisions have distinguished *Penn Central* and created tests providing greater protection of private property rights by requiring the payment of compensation for regulatory restriction”).

141. 482 U.S. 304, 322 (1987).

California regulatory ordinance temporarily prohibiting construction on its property. The same concerns about justice and fairness motivating now-Chief Justice Rehnquist's *Penn Central* dissent animated his majority opinion in *First English*. Citing a nineteenth-century case construing the Wisconsin Constitution's takings clause, the Chief Justice reaffirmed the Court's view from *Armstrong* that it "would be a very curious and unsatisfactory result" if the Takings Clause meant that "if the government refrains from the absolute conversion of real property to the uses of the public it can . . . in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use."<sup>142</sup> In later cases, the Court "unhesitatingly applied this principle" to find takings where government actions deprived individuals of substantial use and enjoyment of their property.<sup>143</sup>

And yet, despite the apparent turn in the Court's takings jurisprudence, *Penn Central* lived on, limited only by the narrow total-devaluation and permanent-occupation carve-outs discussed above.<sup>144</sup> In a 2002 case known as *Tahoe Sierra*, the Court even narrowed *First English* by applying the *Penn Central* test to a temporary building moratorium in Lake Tahoe to hold that the law did not constitute a taking.<sup>145</sup> With *Penn Central* again reaffirmed, state and lower federal courts continued to apply its deferential test to regulatory takings challenges. Thus, despite the Court's numerous affirmations that the Takings Clause protects individuals from bearing costs fairness and justice demand be borne by the public at large, "*Penn Central* balancing involves little more than a rhetorical bow to private property rights in the course of upholding state or local regulation."<sup>146</sup> Whether in federal or

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142. *Id.* at 316–17 (citing *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 177–78 (1872)).

143. *Id.* at 317 (citing *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *United States v. Dickinson*, 331 U.S. 745 (1947); *United States v. Causby*, 328 U.S. 256 (1946)).

144. See *supra* Section I.B for a discussion of the *Lucas* and *Loretto per se* rules. The Court's "exactions" doctrine provides a further limitation on *Penn Central* but, as noted above, that issue falls outside the scope of this Note. See also *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013); Lee Anne Fennell, *Escape Room: Implicit Takings After Cedar Point Nursery*, 17 DUKE J. CONST. L. & PUB. POL'Y 1, 26 (2022).

145. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 342–43 (2002) (holding that a temporary, regulatory taking claim was not to be assessed based on the *Lucas per se* takings rule, but rather under the *Penn Central* balancing test).

146. Krier & Sterk, *supra* note 63, at 88.

state court practice, “relegation to ad hoc adjudication has marked the death knell for a takings claim.”<sup>147</sup>

But *First English* remains good law,<sup>148</sup> as do *Armstrong*, *Causby*, *Pennsylvania Coal*, and *Monongahela*. The Takings Clause still offers some protection from government acts that go “too far,” however nebulous and shifting “too far” seems to be. And, in light of a much more recent takings decision, the Court’s new majority appears willing to redraw that line again.

### B. INFLECTION AT CEDAR POINT

In 2021, the Supreme Court addressed a California regulation granting union organizers access to agricultural worksites for three hours a day, 120 days a year.<sup>149</sup> In this case, *Cedar Point Nursery v. Hassid*, the conservative 6-3 majority carved out another exception to the Court’s regulatory takings doctrine to more stringently scrutinize a regulation than *Penn Central* would otherwise allow. The dispute in *Cedar Point* arose after members of the United Farm Workers labor union entered Cedar Point’s farm one morning and began shouting through bullhorns.<sup>150</sup> Unhappy with the regulation allowing this activity, Cedar Point challenged it as an unconstitutional *per se* taking, alleging it appropriated without compensation an easement for union organizers to enter their property. The district and circuit courts rejected this challenge, applying the *Penn Central* test and siding with the defendants.<sup>151</sup>

The Supreme Court reversed. By classifying the regulation as a physical occupation and therefore a *per se* taking, the Supreme Court avoided applying *Penn Central*’s deferential balancing test usually applied to regulations, relying instead on the *Loretto* “physical occupation” carve-out for *per se* takings.<sup>152</sup> Now, wrote Chief Justice Roberts, “[w]henver a regulation results in a physical appropriation of property”—even one granting access to

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147. *Id.*

148. Though the Court declined to apply *First English* to the building moratorium being challenged in *Tahoe-Sierra*, Justice Stevens noted that “*First English* was certainly a significant decision, and nothing that we say today qualifies its holding.” *Tahoe-Sierra*, 535 U.S. at 328.

149. See Cal. Code Regs. 8 § 20900(e)(1)(C) (2020).

150. See *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2069–70 (2021).

151. See *id.* at 2070.

152. See *supra* Section I.B.

property for just one-eighth of the hours in a day, one-third of the days in a year—a *per se* taking has occurred, and *Penn Central* has no place.”<sup>153</sup>

Scholars both sympathetic to and unnerved by the Court’s ruling took note of the Chief Justice’s potentially sweeping majority opinion.<sup>154</sup> Richard Epstein excitedly called *Cedar Point* perhaps “the Supreme Court’s most momentous takings decision in decades.”<sup>155</sup> Cynthia Estlund, meanwhile, argued that the Chief Justice’s invocation of Blackstone’s strong conception of private property rights may augur a return to the *Lochner* era.<sup>156</sup> *Cedar Point*, she warned, “potentially reopens long-dormant constitutional assaults on the law of work, landlord-tenant relations, and civil rights.”<sup>157</sup> Welcome or worrisome, what is clear is that the decision has moved takings jurisprudence further from *Penn Central*’s deference. As Lee Ann Fennell posited, *Cedar Point* rendered regulatory-takings doctrine “a gratuitously convoluted analytic environment,” albeit one that “works well as part of a selective scrutiny machine . . . designed to preserve restrictions that broadly conserve the established interests of landowners while scrutinizing and financially burdening any property impositions that do otherwise.”<sup>158</sup> Although Fennell’s is perhaps an overly legal-realist way of viewing the decision, she has a point: *Cedar Point* demonstrates the Supreme Court’s Takings-Clause scrutiny machine in action—a tool which the Court can, consistent with its precedents, choose to apply to historic preservation.

Historic preservation as often practiced today is a prime candidate for this enhanced scrutiny given that *Cedar Point* has led to an illogical and perhaps unsustainable asymmetry between temporary physical occupations and regulations resulting in near-total diminutions in value. If a government action is conceived of as a physical occupation, as in *Cedar Point*, “the Court views even the most trivial temporal shards of physical access as *per se*

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153. *Cedar Point*, 141 S. Ct. at 2072.

154. See, e.g., Epstein, *A Bombshell Decision*, *supra* note 126; Julia D. Mahoney, *Cedar Point Nursery and the End of the New Deal Settlement*, 11 BRIGHAM-KANNER PROP. RTS. CONF. J. 43 (2022); Estlund, *supra* note 42; Fennell, *supra* note 144.

155. Epstein, *A Bombshell Decision*, *supra* note 126. Writing in a similar vein, Julia Mahoney appreciated the Court’s “normalization of property rights,” describing *Cedar Point* as “not a radical decision, but an incremental one . . . [which] (slightly) clarifies takings doctrine.” Mahoney, *supra* note 154, at 54.

156. See Estlund, *supra* note 42, at 145.

157. *Id.*

158. Fennell, *supra* note 144, at 4.

takings.”<sup>159</sup> If not, even a regulation “making land totally unusable for several years”—or, similarly, a landmark designation wiping away millions of dollars in value—“still gets *Penn Central* treatment under *Tahoe Sierra*.”<sup>160</sup> In light of the Court’s long-stated concerns about fairness and justice, this asymmetry seems unlikely to last.<sup>161</sup>

The storm of commentary<sup>162</sup> set off by the Chief Justice’s purportedly modest change in takings jurisprudence<sup>163</sup> suggests why. Richard Epstein argued that *Cedar Point* suddenly put property regulations like rent control or anti-eviction laws “up for grabs” given how divergently the Court scrutinizes what it considers “physical” versus “regulatory” takings.<sup>164</sup> Aziz Huq similarly saw “enough kindling in the Chief Justice’s decision to help spark some dramatic changes in [takings] law” given the Court’s willingness to reinterpret *Loretto*—originally understood as a regulatory takings case—as a decision about the appropriation of property.<sup>165</sup> This kindling is evident from the Chief Justice’s opening lines of Part II of his opinion expounding the origins of the Takings Clause with quotes from the Founders<sup>166</sup> and William Blackstone—the latter cited approvingly for the proposition that “the very idea of property entails ‘that sole and despotic dominion which one man claims and exercises over the external things of the

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159. *Id.* at 40.

160. *Id.* at 41.

161. *See id.* (“We can’t expect this asymmetry to last long, especially when governments can often employ use restrictions as substitutes for access-based regulations.”).

162. *See, e.g.,* Bowie, *supra* note 10; Estlund, *supra* note 42; Epstein, *A Bombshell Decision*, *supra* note 126.

163. *See Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2078–80 (2021) (describing as “unfounded” the dissent’s concerns that the Court’s decision would “endanger a host of state and federal government activities involving entry onto private property”).

164. Epstein, *A Bombshell Decision*, *supra* note 126. “It is pure sophistry,” Epstein wrote, “that the state does not engage in a taking when it authorizes a tenant to stay continuously in possession of the leased premises after the expiration of the lease at a rent that is consciously set below market value.” *Id.* Epstein also expressed dissatisfaction that *Cedar Point* failed to counteract “land-use zoning ordinances, such as density restrictions, [that] can wipe out huge portions of value.” *Id.*

165. Aziz Z. Huq, *Property Against Legality: Takings after Cedar Point*, 109 VA. L. REV. 233, 264 (2023).

166. *See Cedar Point*, 141 S. Ct. at 2071 (“The Founders,” the Chief Justice wrote, “recognized that the protection of private property is indispensable to the promotion of individual freedom.”). The Chief Justice then quoted John Adams’ maxim that “[p]roperty must be secured, or liberty cannot exist,” as well as the Court’s recent reaffirmation that the “protection of property rights is ‘necessary to preserve freedom’ and ‘empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them.’” *Id.*

world, in total exclusion of the right of any other individual in the universe.”<sup>167</sup> The influence of a Lockean conception of property rights is manifest, implying greater protections than the mid-twentieth-century Court offered.<sup>168</sup>

Yet the impact of *Cedar Point* on future historic preservation challenges is uncertain. Despite his championing of property rights, Chief Justice Roberts left *Penn Central* aside from his analysis. “The essential question,” he wrote, “is whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner’s ability to use his own property.”<sup>169</sup> If the former, the regulation is a *per se* taking, and compensation is due; if the latter, *Penn Central* governs, and an owner’s hopes for compensation are likely doomed. Under a rigid application of the Court’s precedents, historic preservation laws likely still fall on the latter side of that line; they do not authorize “invasions” in the same way California’s law authorizing union organizers to enter properties did.

But given *Cedar Point*’s reasoning, it is not clear that such a rote application of precedent would be appropriate. *Cedar Point* categorized *Causby* in the former category (*per se* takings), for instance, even though the overhead military flights could hardly be said to have “physically taken property” from the owner.<sup>170</sup> While the flights can be described as “government-authorized physical invasions” of Causby’s airspace, Chief Justice Roberts also described this as a “property interest taken as a servitude”—exactly how Justice Rehnquist in his *Penn Central* dissent characterized *Penn Central*’s loss of air rights.<sup>171</sup> Given that the rationale for much historic preservation is the benefit to the

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167. *Id.* at 2072 (citing WILLIAM BLACKSTONE, COMMENTARIES 2 (1766)). Blackstone’s understanding of property was capacious and extended beyond the right to exclude: property “consists in the free use, enjoyment, and disposal of all [one’s] acquisitions, without any control or diminution, save only by the laws of the land.” WILLIAM BLACKSTONE, COMMENTARIES 2 (1766). Richard Epstein notes that this last clause on the “law of the land” meant that regular procedures had to be used to deprive an individual of property, not that property was held at the grace of the legislature. EPSTEIN, TAKINGS, *supra* note 49, at 22 n.6.

168. See Spiegelman & Sisk, *supra* note 44 (arguing that *Cedar Point*, despite its flaws, might mark an end to the takings muddle); Mahoney, *supra* note 154 (arguing that *Cedar Point* portends a “normalization” of property rights in which property rights received serious constitutional protection).

169. *Cedar Point*, 141 S. Ct. at 2072.

170. *Id.* at 2073.

171. *Cedar Point*, 141 S. Ct. at 2073; *Penn Cent. Transp. Co.*, 438 U.S. at 143; see also *supra* note 139 and surrounding text.

community, it is thus conceivable that the Court in a future case could consider a preservation ordinance an example of “the government” having “taken property for itself or someone else—by whatever means.”<sup>172</sup>

The Court could also, of course, go further. Rather than incrementally moving more and more property regulations out of the “regulatory takings” bucket and into the “physical or *per se*” bucket, the Court could rethink its approach to regulatory takings entirely—perhaps curing the *Penn Central-Lucas* discontinuity in the process. At least one member of the Court has recently advocated this approach. Noting the centennial of Holmes’ “too far” test in *Pennsylvania Coal*, Justice Thomas urged the Court to finally provide clear guidance as to what “too far” actually means: “If there is no such thing as a regulatory taking, we should say so. And if there is, we should make clear when one occurs.”<sup>173</sup> *Cedar Point* conveyed the Court’s appetite for defending property rights from regulations, at least when it could cast those regulations as “appropriating” property, no matter how small the impact of that appropriation may be.<sup>174</sup> But if the Court wishes to go further and take up Justice Thomas’ call, its precedents, early and modern, provide it with ample opportunities to do so.<sup>175</sup>

#### IV. PLAUSIBLE PATHS OUT OF THE TAKINGS MUDDLE

The preceding analysis sought to show the adverse consequences of excessive land-use regulations—especially historic preservation laws—and explain that the Court’s Takings Clause precedents offer a neglected but increasingly plausible

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172. *Cedar Point*, 141 S. Ct. at 2072.

173. *Bridge Aina Le’a v. Haw. Land Use Comm’n*, 141 S. Ct. 731, 732 (2021) (Thomas, J., dissenting from denial of certiorari).

174. Fennell calculates the compensation owed for many regulations that the Supreme Court deems takings to be quite small, rendering *Cedar Point* possibly less consequential than it may seem. *See Fennell, supra* note 144, at 59.

175. Notably, one federal judge has taken Justice Thomas up on this proposal. In a concurrence, Judge Stephanos Bibas of the Third Circuit Court of Appeals wrote that while he was bound by Supreme Court precedent, a better solution to regulatory takings challenges would be to go back to the original public meaning of the Takings Clause. “Under that standard,” he wrote, “the government would have to compensate the owner whenever it takes a property right and presses it into public use—even if the taking did not involve a physical invasion.” *Nekrilov v. City of Jersey City*, 45 F.4th 662, 681 (3d Cir. 2022) (Bibas, J., concurring). While such a reading that physical invasions are not necessary to find a taking would support the argument advanced here, a thorough investigation of the original understanding of the Takings Clause falls outside the scope of this doctrine-focused Note. *But see infra* Section IV.B.2.



check on this excess.<sup>176</sup> This Part now evaluates a series of paths that the judiciary could pursue to bolster Takings Clause protections, working both inside (section IV.A) and outside (section IV.B) of the reigning *Penn Central* framework; section IV.C then addresses several counterarguments to and questions raised by this Note's analysis. Ultimately, this Note concludes that while wiping the regulatory takings slate clean could prove doctrinally satisfying, further incremental decisions at the federal level and heightened property protections recognized by state courts are preferable.

#### A. WORKING WITHIN THE *PENN CENTRAL* FRAMEWORK

Regulatory takings doctrine, to borrow a memorable analogy from Thomas Merrill, resembles a Scrabble Board.<sup>177</sup> The main stem is *Penn Central*. *Loretto* and *Lucas* branch off in separate directions, each sprouting their own exceptions and qualifications in turn. *Cedar Point* has only added to this jumble, conveying the Court's preference for incremental changes to the doctrine rather than a complete reset of the board. But this does not mean that until the Court reverses itself, plaintiffs hoping to challenge the landmarking of their properties are without hope. *Penn Central*'s ad hoc balancing test has evolved to nearly always favor the government,<sup>178</sup> but the decision itself does not require such an outcome. Though later re-characterized, rather ineffectively,<sup>179</sup> as a three-part test, *Penn Central* itself held that a takings challenge implicates two main factors: (1) the impact of the regulation viewed in light of a claimant's investment-backed expectations; and (2) the

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176. But see Merrill, *supra* note 47, at 29–33, for the drawbacks of such a precedent-based approach. As Merrill notes, however, the Court is likely to continue some form of this incremental approach going forward because “[r]e-winding the clock to 1922 and starting over again with a better interpretation of Justice Holmes’ ambiguous opinion [in *Pennsylvania Coal*] would require overruling *Penn Central* and *Lucas* and *Murr [v. Wisconsin]*, not to mention innumerable decisions that build on these precedents.” *Id.* at 32.

177. See *id.* at 27.

178. See Krier & Sterk, *supra* note 63, at 62 (noting that “courts almost always defer to the regulatory decisions made by government officials, resulting in an almost categorical rule that *Penn Central*-type regulatory actions do not amount to takings”). See also *supra* note 63 noting two possible doctrinal explanations for why applications of *Penn Central* consistently favor the government.

179. See DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 131 (2002) (“It would dignify the approach too much to describe it as a multi-factorial test or even a balancing test. All one can say for certain is that the method is ad hoc[.]”).

character of the government action, with actions that closely resemble direct exercises of eminent domain more likely to constitute compensable takings.<sup>180</sup> Historic preservation laws are vulnerable on both fronts.

### 1. *The Impact of the Regulation*

Consider where this Note started—in Denver, with Tom Messina’s diner. Imagine Denver designated his diner as a landmark, and Messina initiated a takings challenge that found its way to the Supreme Court.<sup>181</sup> As was reported, Messina had long planned to finance his retirement by selling the diner, and was in fact offered \$4.8 million for the property by a developer.<sup>182</sup> A landmark designation, however, would have substantially reduced this valuation because buyers of the property would need to leave the diner intact; housing developments on the lot would be legally barred. The Court would then consider the diminution in value resulting from the designation, and the larger the diminution relative to the total value of the property, the greater the likelihood the designation would constitute a taking requiring compensation.<sup>183</sup>

The landmark designation would not need to reduce the value of the targeted property to zero to trigger Takings Clause

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180. See Lawson et al., *supra* note 49, at 32.

181. The actual ending to this saga was very different. As Historic Denver crowns on its website, in December 2019, “following a sometimes-intense, months-long debate about the fate of the building,” a corporate restaurant group and the longtime owner had the building listed on the National Register of Historic Places. See *Tom’s Diner*, HIST. DENV., <https://historicdenver.org/toms-diner> [<https://perma.cc/WW3V-J439>]. The diner then shut down on March 15, 2020, in response to the coronavirus pandemic, but recently reopened in September 2022 as “Tom’s Starlight” after a long-delayed restoration. See Alayna Alvarez, *Tom’s Diner on Denver’s Colfax Avenue reopens as Tom’s Starlight*, AXIOS: DENV. (Sept. 28, 2022), <https://www.axios.com/local/denver/2022/09/28/toms-diner-colfax-avenue-reopens-toms-starlight> [<https://perma.cc/4R92-2TWX>]. A happy ending for all, perhaps—except those would-be Denver residents who now have fewer residences to choose from, now and forever: Historic Denver secured an easement for the site of the diner from the Colorado Historical Foundation, which protects it against demolition in perpetuity. See Matt Bloom, *Tom’s Diner on Colfax Will Reopen Next Month as a Cocktail Bar and Lounge*, DENVERITE (Aug. 4, 2022), <https://denverite.com/2022/08/04/toms-diner-colfax-relaunch-cocktail-lounge> [<https://perma.cc/2DDX-VDBY>].

182. See *supra* notes 1–3 and surrounding text.

183. This summary simplifies the analysis a bit, as it ignores what has come to be known as the denominator problem in regulatory takings, which falls outside the scope of this Note. See generally Lynda L. Butler, Murr v. Wisconsin and the *Inherent Limits of Regulatory Takings*, 47 FLA. ST. U. L. REV. 99, 101 (2019) (discussing “Constitutional Property’s” denominator problem).

protection. *Lucas* only held that an absolute deprivation in value triggers a *per se* rule implicating a taking; it does not dictate that any deprivation short of a property's full value cannot be deemed a taking.<sup>184</sup> While many substantial deprivations in value have not been considered takings,<sup>185</sup> some have. In *Loveladies Harbor, Inc. v. United States*,<sup>186</sup> for instance, the Federal Circuit Court of Appeals held that a compensable regulatory taking occurred when an ordinance prevented development of a wetland that the owner had expected to develop.<sup>187</sup> The question, as the Federal Circuit saw it, was who should bear the burden when the government designates a property as a wetland to serve the public interest: the affected property owner or the community at large?<sup>188</sup> This raised "a regulatory takings claim and only a regulatory takings claim,"<sup>189</sup> and the court therefore employed the *Penn Central* framework. Applying this balancing test, and noting that there were no state nuisance laws that would restrict the owner from developing the 12.5-acre parcel of land the plaintiff sought to develop within its 51-acre tract, the court found a taking.<sup>190</sup> Thus, just compensation was due.<sup>191</sup>

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184. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 n.8 (1992) (acknowledging that a partial deprivation of economic value might result in a taking under a *Penn Central* analysis).

185. See *Lawson et al.*, *supra* note 49, at 38–39.

186. 28 F.3d 1171 (Fed. Cir. 1994), *abrogated by* *Bass Enters. Prod. Co. v. United States*, 381 F.3d 1360 (Fed. Cir. 2004).

187. In that case, the New Jersey Department of Environmental Protection and the Army Corps of Regulators, acting pursuant to § 404 of the Clean Water Act, denied *Loveladies* a permit needed to develop a wetland on property that the company owned. *Id.* at 173.

188. The court's precise wording was whether, "when the Government fulfills its obligation to preserve and protect the public interest, may the cost of obtaining that public benefit fall solely upon the affected property owner, or is it to be shared by the community at large." *Loveladies*, 28 F.3d at 1175.

189. *Id.*

190. See *id.* at 1174–75 (reporting the trial court's finding that the fair market value of the parcel prior to the permit denial was \$2,658,000 whereas the value after the permit denial was \$12,500). Notably, while the Federal Circuit cited *Lucas*, given the remaining value of the wetland, this regulation did not eliminate "all economically beneficial uses" of the property. *Id.* at 1182 (emphasis added).

191. See *Krier & Sterk*, *supra* note 63, at 67, who report other cases where diminutions in value were sufficient to amount to takings. See also, e.g., *D'Addario v. Plan. & Zoning Comm'n of Darien*, 593 A.2d 511, 516–17 (Conn. App. 1991) (91.4% and 89.5% diminution in value of two lots); *City of Rome v. Pilgrim*, 271 S.E.2d 189, 190–91 (Ga. 1980) (diminution in value from \$25,000–\$30,000 to \$1500–\$2000); *Friedenburg v. N.Y. State Dep't of Env't Conserv.*, 767 N.Y.S.2d 451, 460–61 (App. Div. 2003) (92.5% to 95% not enough to trigger the *per se* wipeout rule, but does amount to a taking based on ad hoc analysis under U.S. Constitution).

Writing a year after the *Loveladies* decision, two practitioners noted its potential significance on the *Penn Central* test, concluding that if presented with the facts of *Penn Central* again, the Supreme Court could “hold that the designation of the Grand Central Terminal as a historic landmark constituted a compensable taking under the Fifth Amendment.”<sup>192</sup> By denying Penn Central the ability to develop a parcel of its property that “(1) was permitted when the property was purchased, (2) did not constitute a nuisance under New York common law, and (3) constituted a reasonable investment-backed expectation of Penn Central,” the landmark designation restricted Penn Central’s property in a manner similar to the development restriction in *Loveladies*.<sup>193</sup> As the authors concluded, “it is conceivable that, when the Supreme Court is next asked to address . . . historic preservation . . . the Court may find that a compensable taking has occurred without overruling *Penn Central*.”<sup>194</sup>

The Supreme Court has not availed itself of the opportunity to address this question again, but the Court’s recent takings jurisprudence renders the practitioners’ forecast even likelier now. The Court could comply with precedent and clarify expectations for property owners and legislators alike by signaling that deprivations of value need not be absolute to require the governments enacting such legislation to compensate those adversely affected.<sup>195</sup> Such a decision, in addition to conforming with *Penn Central* itself, accords with the principles invoked in the

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192. Walker & Avitabile, *supra* note 140, at 842.

193. *Id.* Following the Supreme Court’s decision in *Tahoe-Sierra*, the Federal Circuit walked back its decision in *Loveladies* in a case declining to find a compensable taking where the Bureau of Land Management delayed approving permits for a mining company. *See Bass Enters. Prod. Co. v. United States*, 381 F.3d 1360, 1369 (Fed. Cir. 2004). This Note invokes *Loveladies* here not because it is controlling on the Supreme Court’s future takings jurisprudence—even before *Bass Enterprise*, it obviously was not—but because it is illustrative of the reasoning a future court more inclined to protect property interests might adopt post-*Cedar Point*.

194. Walker & Avitabile, *supra* note 140, at 842.

195. A common counterargument against applying the Takings Clause in such a way is the threat that such an interpretation poses to more salutary regulations. The challenge is thus limiting the applicability of *Lucas* so as to not make it prohibitively expensive for a government to enact any value-altering regulations. Justice Rehnquist’s *Penn Central* dissent was attuned to this problem, drawing a distinction between general zoning regulations aimed at securing “an average reciprocity of advantage” and landmark designations where “a relatively few individual buildings, all separated from one another, are singled out and treated differently from surrounding buildings,” and where “no such reciprocity exists.” *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 140 (1978) (Rehnquist, J., dissenting).

Court's recent takings cases. *Lingle*, for instance, a 2005 decision, "reaffirmed that the law of regulatory takings is fundamentally oriented around fairness to property owners adversely affected by regulations."<sup>196</sup> For a Court as ostentatiously committed to the defense of property rights as the majority in *Cedar Point*,<sup>197</sup> ordinances enacted at the behest of largely unknown preservation commissions that can destroy the value of an individual's property without recompense would seem the height of unfairness.<sup>198</sup> A less deferential application of *Penn Central*'s first factor offers a remedy.

## 2. *The Character of the Regulation*

The second factor noted in *Penn Central*, the "character of the government action,"<sup>199</sup> also favors stricter review of historic preservation laws. As understood by the Court, the more closely a regulation resembles the use of the eminent domain power, the more likely the Court is to consider the regulation a taking.<sup>200</sup> This factor "stresses whether the owner is targeted for disadvantageous treatment" and "has the merit of most closely resembling the concern in *Armstrong*"<sup>201</sup> that the Takings Clause should bar government actors from forcing private individuals to unfairly bear

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196. Lawson et al., *supra* note 49, at 37–38.

197. Beyond *Cedar Point*, two recent Roberts Court decisions convey the current majority's penchant for protecting property rights. In *Knick v. Twp. of Scott*, the Court overturned a long-standing precedent to hold that a "property owner has suffered a violation of his Fifth Amendment rights when the government takes his property without just compensation, and therefore may bring his claim in federal court under § 1983 at that time." 139 S. Ct. 2162, 2168 (2019). And in *Tyler v. Hennepin Cnty.*, the Court reiterated the *Armstrong* principle in holding that a "taxpayer who loses her \$40,000 house to the State to fulfill a \$15,000 tax debt has made a far greater contribution to the public fisc than she owed," and has thus suffered a compensable taking. 598 U.S. 631, 647 (2023).

198. See also *supra* note 33 on the pro-preservation bias of these commissions, and notes 102–108 for the exclusionary motivations often underlying historic designation decisions.

199. *Penn Cent. Transp. Co.*, 438 U.S. at 124.

200. See Lawson et al., *supra* note 49, at 46 (noting the "only plausible" "understanding of the 'character' factor is that it is designed to evaluate the extent to which the government action resembles what has been uncontroversially understood to constitute a taking . . . as it is sensible to envision a continuum along which government actions at one end, such as permanent physical occupations, effect a taking *per se* because they closely resemble the formal exercise of the eminent domain power, whereas government actions at the other end, such as routine land use regulations, almost certainly would not effect a taking. The more closely that a regulatory measure resembles a paradigmatic taking, the more likely that a regulatory taking exists under the *Penn Central* framework.").

201. Steven J. Eagle, *The Four-Factor Penn Central Regulatory Takings Test*, 118 PENN ST. L. REV. 601, 645 (2014).

public burdens.<sup>202</sup> Lower courts have made use of this factor to occasionally find regulatory takings,<sup>203</sup> but this is little comfort to prospective litigants faced with the reality that the vast majority of regulatory takings challenges fail.<sup>204</sup> A decision from the Supreme Court itself may be needed to signal the acceptability of employing this “character” factor to vindicate property rights.

Though *Penn Central* itself concerned historic preservation, applying this “character” factor to classify future applications of historic preservation laws as takings would not require overturning the decision because some historic preservation laws more closely resemble eminent domain than others. For instance, preventing alteration to a building’s façade while allowing construction above or around the structure does not curtail the fundamental rights of property owners to use, dispose of, or exclude others from their property.<sup>205</sup> But the sort of landmarking that prevented the redevelopment of Messina’s diner more closely resembles the exercise of eminent domain, insofar as the community enacting the law would be effectively conscripting the property for their own purposes. The city of Denver need not take title to the diner if it can, through historic preservation, ensure that no structure besides a diner can ever operate there.

The “character” factor can thus cut against historic preservation laws in at least two ways. First, if a landmark designation is significantly unfair to a property owner, in that it forces the owner to shoulder costs that fairness would require be borne by the public, then a court would be justified in requiring that just compensation be paid. Second, if the landmark designation is functionally similar to an exercise of eminent domain, that too suggests that a compensable taking has occurred. Neither of these interpretations requires an overturning of *Penn*

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202. See discussion *supra* Section II.B.1.

203. See, e.g., *CAA Assocs. v. United States*, 91 Fed. Cl. 580, 602 (2010) (weighing the character of government action in favor of finding a regulatory taking because “[r]ather than distributing the burden of providing subsidized housing for thousands of low-and moderate-income families on taxpayers as a whole, the preservation statutes placed the burden on CCA and other owners who were participating in the HUD programs”).

204. See Krier & Sterk, *supra* note 63, at 35.

205. See Lawson et al., *supra* note 49, at 49 (“If the impact on the claimant is the complete loss of one of the three bedrock characteristics of property [the rights to possess, use, and dispose], that impact, economic or otherwise, is so overwhelming that other considerations are simply swamped.”); see also Steven J. Eagle, *The Perils of Regulatory Property in Land Use Regulation*, 54 WASHBURN L.J. 1, 21 (2014) (noting that “[t]he existence of owners’ intrinsic rights in land development likewise has been understood by commentators as a traditional attribute of the common law”).

*Central*; to the contrary, both subsequent precedent and recent scholarship suggest that they are compelled by it.<sup>206</sup>

## B. WORKING OUTSIDE THE *PENN CENTRAL* FRAMEWORK

While *stare decisis* weighs in favor of keeping the *Penn Central* framework intact, the decision has few scholarly defenders; many would be happy to see the Court relegate it to the dustbin of history.<sup>207</sup> But there are ways that courts evaluating a takings challenge to historic preservation could escape *Penn Central*'s deference without overruling the decision. Most incrementally, the Supreme Court could treat a future landmark designation as an appropriation of property rather than a regulation, similar to its treatment of the laws at issue in *Loretto* and *Cedar Point*, and thus avoid applying the *Penn Central* framework. More radically, the Court could revamp its understanding of the Takings Clause by returning to the provision's original meaning—likely jettisoning the physical/regulatory takings distinction that has evolved since *Penn Central* in the process.<sup>208</sup> Finally, state courts could chart their own course, as some did before and even after *Penn Central*.

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206. See also Lawson et al., *supra* note 49, at 49–50 (“[The] Court’s rules concerning *per se* takings fit elegantly into the *Penn Central* framework. If the impact on the claimant is the complete loss of one of the three bedrock characteristics of property [to possess, use, and dispose], that impact, economic or otherwise, is so overwhelming that other considerations are simply swamped. In other words, there are certain impacts on private property owners that are so conceptually large that they constitute a taking without further inquiry.”).

207. See, e.g., John D. Echeverria, *Is the Penn Central Three-Factor-Test Ready for History’s Dustbin?*, 52 LAND USE L. & ZONING DIG. 3 (2000); EPSTEIN, SUPREME NEGLECT, *supra* note 38, at 119–25.

208. Adopting either approach would likely only occur if the Court determined that one of these approaches was consistent with the original public meaning of the Takings Clause. As this Note focuses primarily on the takings doctrine the Court has developed since *Pennsylvania Coal*, an analysis of the original meaning of the Takings Clause falls outside the scope of the argument. However, Judge Stephanos Bibas has recently articulated one such interpretation. See *Nekrilov v. City of New Jersey*, 45 F. 4th 662, 681 (3d Cir. 2022) (Bibas, J., concurring) (writing that under “the Takings Clause’s original public meaning . . . the government would have to compensate the owner whenever it takes a property right and presses it into public use—even if the taking did not involve a physical invasion”). Whether the Takings Clause originally encompassed non-physical takings of property is fiercely contested. For a view that the Takings Clause was not so capacious, see William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995). But see *infra* note 227 (noting scholarship critical of Treanor’s view).

### 1. *Further Broadening Takings Doctrine's Per Se Rules*

As recently reiterated by Chief Justice Roberts, “[w]henever a regulation results in a physical appropriation of property, a *per se* taking has occurred, and *Penn Central* has no place.”<sup>209</sup> As landmark designations do not typically require public access to the structures they affect,<sup>210</sup> reclassifying historic preservation as appropriative acts may seem like a stretch. Given the evolution in takings doctrine toward greater protection of property rights, however, such an interpretation is not beyond imagination. As Jessica Asbridge has noted, the Supreme Court has recognized since *Lucas* that an appropriation “is not just state interference with property, but . . . is the taking over of one’s property for a state-dictated purpose or the impressment of private property into ‘some form of public service.’”<sup>211</sup> Not all acts of preservation would fall under this umbrella—regulations mandating the upkeep of a structure’s façade would likely escape scrutiny—but when a regulation dictates that a property can serve as nothing but a diner, strip mall, or vacant coastline (ostensibly to satisfy the polity’s aesthetic preferences), characterizing such an enactment as impressing private property into “some form of public service” is reasonable.<sup>212</sup>

This approach would continue the Court’s “scrabble board” method of building more and more offshoots from *Penn Central*—hardly improving conceptual clarity and further crowding the board.<sup>213</sup> The offshoot proposed here would weaken the “physical” requirement for finding a *per se* taking while giving courts greater leeway to deem regulations compensable appropriations if they can be said to impress private property into public service. This

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209. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021).

210. See Nicholas Caros, *Interior Landmarks Preservation and Public Access*, 116 COLUM. L. REV. 1773, 1789 (2016).

211. Jessica L. Asbridge, *Redefining the Boundary Between Appropriation and Regulation*, 47 BYU L. REV. 809, 863 (2022) (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1018 (1992)) (“On the other side of the balance, affirmatively supporting a compensation requirement, is the fact that regulations that leave the owner of land without economically beneficial or productive options for its use—typically, as here, by requiring land to be left substantially in its natural state—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.”).

212. See Rubinfeld, *supra* note 37, at 1157 (noting *Lucas* would constitute a taking under his “usings” analysis because “South Carolina sought to put Lucas’s property to use as a tourist attraction, storm-protection barrier, and wildlife habitat”).

213. See Merrill, *supra* note 47 and surrounding text.



development would also exceed that advocated by Asbridge, but not drastically so; under her proposal, only actions that transfer “the right to use property to a third party or government and that results in a state-dictated use unrelated to the owner’s existing use of the property”<sup>214</sup> would constitute appropriations. At least some applications of historic preservation laws today do seem appropriative in nature,<sup>215</sup> and recognizing them as such would be a messy but incremental evolution of takings doctrine, continuing the trend in takings jurisprudence since *Cedar Point*. As the Supreme Court’s most recent takings case, *Tyler v. Hennepin County*, shows, “physical” appropriations of property are sufficient but not necessary to find a compensable taking. In that case, the Court unanimously held that Minnesota’s pocketing of Geraldine Tyler’s home value beyond what the state required to satisfy Tyler’s debt “effected a ‘classic taking in which the government directly appropriates private property for its own use.’”<sup>216</sup> States thus do not need to lay cable wires across one’s house or allow labor organizers to enter one’s land to owe compensation for appropriating a property interest; state actions depriving an individual’s property of value to serve state interests can trigger Takings Clause protections as well.

Whether this evolution would compromise other values like judicial restraint is another question. Such an approach could implicate separation of powers principles, inviting courts to scrutinize decisions made by democratic bodies more strictly than necessary, perhaps overstepping the judiciary’s role. But granting too much deference to legislatures to decide both *how* to regulate private property and *when* such regulations amount to takings also entails risks, as the Supreme Court recognized in *Tyler*.<sup>217</sup> Because the Takings Clause does not itself define “property,” courts draw on “existing rules or understandings” about property rights when determining whether property has been taken in constitutional terms.<sup>218</sup> A state’s understanding of the law cannot be the only

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214. Asbridge, *supra* note 211, at 867.

215. See Rubinfeld, *supra* note 37, at 1155 (noting how “spot zoning,” such as the landmarking of specific properties freezing their use, “would clearly demand compensation . . . because government is dictating the use of property to its owner”).

216. *Tyler v. Hennepin Cnty.*, 598 U.S. 631, 639 (2023) (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Plan. Agency*, 535 U.S. 302, 324 (2002)).

217. See *id.* at 638 (citing *Hall v. Meisner*, 51 F. 4th 185, 190 (6th Cir. 2022), for the proposition that “the Takings Clause would be a dead letter if a state could simply exclude from its definition of property any interest that the state wished to take”).

218. *Id.* at 638 (quoting *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998)).

source of what counts as property, though, or a state “could ‘sidestep the Takings Clause by disavowing traditional property interests’ in assets it wishes to appropriate.”<sup>219</sup> Courts neglecting to scrutinize state and local property regulations thus would not be vindicating principles of separation of powers so much as eviscerating the Constitution’s individual protections.<sup>220</sup> Deference to democratic decision-making is important, but as the Roberts Court has been keen to recognize, deference does not mean abdication.<sup>221</sup>

## 2. *An Originalist Theory of the Takings Clause*

The Supreme Court could also eschew further incrementalism and rebuild takings doctrine from the ground up, following Justice Thomas’ call to “take a fresh look” at whether the Court’s regulatory takings jurisprudence “can be grounded in the original public meaning of the Takings Clause of the Fifth Amendment or the Privileges or Immunities Clause of the Fourteenth Amendment.”<sup>222</sup> A complete originalist analysis of the Takings Clause falls outside the scope of this Note,<sup>223</sup> and would not

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219. *Id.* (quoting *Phillips*, 524 U. S. at 167).

220. This approach may also raise more substantive concerns. For instance, is it normatively unfair to make wealthy landowners bear this cost for the public? Many will argue that it is in fact perfectly equitable given their abundant resources, and there is no need to implore the judiciary to offer further protections to the already-well-off. But this objection seems unavailing in light of the many examples of preservation run rampant cataloged above. The individuals protected by a more robust conception of the Takings Clause would not necessarily be plutocrats but people like Tom Messina—not to mention all of the other individuals *not* subject to takings who stand to benefit from the more abundant housing options that would result from relaxed land-use restrictions. If housing costs are as sensitive to land-use restrictions as the research cited in Part II, *supra*, suggests, then the gains to renters as a class from reduced rents would also offset distributive-justice concerns about the gains property owners would reap from their constitutionally-required just compensation.

221. *See Students for Fair Admissions v. President and Fellows of Harv. Coll.*, 600 U.S. 181, 217 (2023) (“[W]e have been unmistakably clear that any deference must exist ‘within constitutionally prescribed limits,’ and that ‘deference does not imply abandonment or abdication of judicial review.’”) (internal citations omitted); *see also Moore v. Harper*, 600 U.S. 1, 39 (2023) (“Federal court review of a state court’s interpretation of state law . . . should be deferential, but deference is not abdication.”) (Kavanaugh, J., concurring).

222. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1957 (2017) (Thomas, J., dissenting).

223. This is partly because the clause’s meaning is so indeterminate; if those who ratified the Bill of Rights pondered the ambiguities that the Takings Clause entailed, they left no record of their debates. *See Treanor, supra* note 208, at 791 (“There are apparently no records of discussion about the meaning of the clause in either Congress or, after its proposal, in the states.”). And unlike every other clause in the First Congress’ proposed Bill of Rights, no state ratifying convention proposed the Takings Clause. *See AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 78 (1998).

necessarily support more robust protections: The Supreme Court in *Cedar Point* signaled their acceptance of Michael Treanor's oft-cited argument that the clause is limited solely to physical takings,<sup>224</sup> which would provide even less protection from regulatory takings than *Penn Central*. But this "no-taking-without-a-touching" theory of the clause has drawn scholarly criticism<sup>225</sup> and ignores how the meaning of the clause may have shifted when incorporated against the states via the Fourteenth Amendment.<sup>226</sup> Given the Court's recent trend in takings jurisprudence, it seems unlikely that a majority of the justices would conclude that a proper understanding of the Takings Clause offers no protections from regulations.<sup>227</sup> As Judge Stephanos Bibas recently opined, under an originalist analysis of the clause, "the government would have to compensate the owner whenever it takes a property right and presses it into public use—even if the taking did not involve a physical invasion."<sup>228</sup>

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224. See *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071 (2021) ("Before the 20th century, the Takings Clause was understood to be limited to physical appropriations of property.").

225. See, e.g., Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis "Goes Too Far"*, 49 AM. U. L. REV. 181 (1999); James S. Burling, *Is the Doctrine of Regulatory Takings Constitutional? A Review of the Academic Debate over Originalism and Takings*, 9 BRIGHAM-KANNER PROP. RTS. CONF. J. 105 (2020); David A. Thomas, *Finding More Pieces for the Takings Puzzle: How Correcting History Can Clarify Doctrine*, 75 UNIV. COLO. L. REV. 497 (2004).

226. See Michael B. Rappaport, *Originalism and Regulatory Takings: Why the Fifth Amendment May Not Protect Against Regulatory Takings, but the Fourteenth Amendment May*, 45 SAN DIEGO L. REV. 729 (2008); see also *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2163 (2022) (Barrett, J., concurring) (noting the open question of whether, for rights incorporated by the Fourteenth Amendment, courts should consider the original meaning of those rights as of 1791 or 1868).

227. Cf. Merrill, *supra* note 47, at 28 (noting how some form of regulatory takings doctrine is necessary to "prevent the government from evading the obligation to pay just compensation by disguising what would ordinarily be an exercise in eminent domain as a police power regulation"); see also Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 60 (1964) (noting that the "more one examines . . . early explanations of the constitutional purpose of the taking provision, the clearer it becomes that the protection afforded is most properly viewed as a guarantee against unfair or arbitrary government"); Thomas W. Merrill, *The Eagle Theory*, 9 BRIGHAM-KANNER PROP. RTS. J. 17, 27 (2020) (noting "the framing generation would not want a right established by the Constitution to be easily evaded or circumvented through a manipulation of labels. Thus, they would have endorsed the idea of regulatory takings, understood to be an anti-evasion or anti-circumvention doctrine.").

228. *Nekrilov v. City of Jersey City*, 45 F.4th 662, 681 (3d Cir. 2022) (Bibas, J., concurring). Judge Bibas continued: "I suggest that the Takings Clause, originally understood, would have allowed regulatory-takings claims for regulations that take a state-law property right and press it into public use." *Id.*

In practical application, this proposed understanding would likely resemble the interpretation advanced in Jed Rubenfeld's classic article, "Usings," which charts another course out of the takings-doctrine muddle.<sup>229</sup> The Takings Clause must be read in its full context, he argues, as doing so reveals the pertinent phrase is not, "nor shall property be taken," but the subsequent three words, "for public use."<sup>230</sup> This is why a state impounding a delinquent's car is not a taking; the state has not conscripted the car into its service. Rather, a taking for public use, as Rubenfeld construes the phrase, "can occur only when some productive attribute or capacity of private property is exploited for state-dictated service."<sup>231</sup> At least some applications of historic preservation laws would fall under this understanding of the Takings Clause.<sup>232</sup> While a law simply restricting the alteration of a building's façade would not require compensation, "if the effect of such a law in a particular case were to force one specific use on the property as a whole, then the result should be different."<sup>233</sup>

To be sure, Judge Bibas does not have the last word on the clause's original meaning. Scholars such as Richard Epstein urge the Court to follow through on the classical liberal dicta sprinkled throughout *Cedar Point* by holding the Takings Clause protects against all interferences with private property, whether they are easily characterized as "physical" or not.<sup>234</sup> This understanding of

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229. See *supra* notes 37 and 41 and surrounding text.

230. The Fifth Amendment's Takings Clause reads: "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

231. Rubenfeld, *supra* note 37, at 1114–15. Rubenfeld provides a helpful heuristic for drawing a line between regulations and takings, which further suggests that many historic preservation laws would constitute takings: "If the state's interest in taking or regulating something would be equally well served by *destroying the thing altogether* (putting aside any independent considerations that might make such destruction undesirable to the state for other reasons), no use-value of the thing is being exploited. Would Pennsylvania's purpose of supporting surface structures [in *Pennsylvania Coal*] have been served as well by destroying the coal as it was by leaving the coal in place? Obviously not." *Id.* at 1116.

232. This provides another limiting principle for courts concerned that a more robust interpretation of the Takings Clause would implicate too many other regulations affecting property. Interestingly, Justice Stevens seemed to agree with this point in *Penn Central* (he joined the dissent), although he would become a dominant voice supporting broad land-use regulation in later years. See e.g., *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302 (2002). Stevens stated at conference that while the federal government preserves important sites, it must do so at public expense, as this compensation constraint serves to prevent excessive preservation. See Byrne, *Penn Central in Retrospect*, *supra* note 56, at 430 n.165.

233. Rubenfeld, *supra* note 37, at 1161.

234. This would be the most radical approach but also the most coherent. See EPSTEIN, SUPREME NEGLECT, *supra* note 38, at 125 ("The same rule should apply to both occupations

the Clause would treat physical takings identically as regulatory takings, applying the same basic analysis to each: namely, by asking whether the rights that the government obtains under a regulation correspond to a set of interests that would ordinarily be acquired by purchase or eminent domain.<sup>235</sup> There is much to recommend Epstein's approach. Why, for instance, should the installation of a cable box in residential apartments trigger the full protection of the Takings Clause while a landmark designation wiping out millions of dollars in value from an individual's plot of land does not? If the answer is solely, "because that is the way the doctrine since *Penn Central* happened to evolve," it is small wonder members of the Court and academy urge reconsideration. The Constitution does not speak of "regulatory" takings; it provides simply that when property is taken for public use, the owner is entitled to compensation for the loss.

Epstein would thus replace both *Penn Central*'s ad hoc approach to regulatory takings and the *per se* rules the Court has developed for physical takings with a four-step approach.<sup>236</sup> A court would first ask if there has been a taking of private property (e.g., air rights over an existing structure); then, if there has been a taking, if it is justified under the police power so that no compensation is owed (e.g., because the property creates a nuisance); then, if not, if the taking was for a public use; and finally, if so, if just compensation (in cash or in-kind) was paid.<sup>237</sup> Under this approach, most modern applications of historic preservation laws would constitute takings, as would the landmarking decision at issue in *Penn Central* itself. But one weakness of Epstein's approach is the ramifications it would have beyond historic preservation; zoning itself would likely constitute a compensable taking.<sup>238</sup> As welcome as a judicial pushback to zoning would be in some quarters,<sup>239</sup> the Court may consider this to be a bigger bite into bedrock land-use regulation than it would

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and use restrictions. Once either has occurred, the resulting diminution in property values should be *prima facie* compensable in both cases.").

235. See also Merrill, *supra* note 47, at 28–29. Merrill argues that this line of reasoning yields a simple answer to the regulatory takings problem: a government regulation should be deemed a taking if the regulation compels the transfer of an interest that is commonly conveyed by purchase.

236. See Richard A. Epstein, *Disappointed Expectations: How the Supreme Court Failed to Clean up Takings Law in Murr v. Wisconsin*, 11 N.Y.U. J.L. & LIBERTY 151, 194 (2017).

237. See EPSTEIN, SUPREME NEGLECT, *supra* note 38, at 194.

238. See *id.* at 115–19.

239. See, e.g., Gray, *supra* note 122.

like to chew: the Ninth Circuit likely spoke for much of the bench when it insisted that the judiciary was not and should not become the “Grand Mufti” of zoning.<sup>240</sup>

A less-sweeping originalist approach would heed the natural-right analysis of Eric Claeys, who would also eliminate the physical-regulatory distinction in favor of an ad hoc analysis providing heightened scrutiny for property regulations.<sup>241</sup> This approach would apply to all actions that do not formally divest the owner of property through eminent domain, thus avoiding distinctions between regulations and appropriations or physical and regulatory takings.<sup>242</sup> The contents of this ad hoc approach, however, offer few bright-line rules, instead seeking to resolve takings claims by examining whether a government action inflicted a disproportionate burden on the property owner without directly abating a substantial threat or securing a common benefit.<sup>243</sup> The historic preservation law at issue in *Penn Central* itself thus would have been “an easy case for compensation” under this more stringent ad hoc test.<sup>244</sup>

Claeys’ approach would replace one ad hoc test with another, but that seems unlikely to prevent the Court from adopting his rule if the justices’ interpretation of the Takings Clause’s original meaning compels such a holding.<sup>245</sup> Nor would the Court

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240. *Hoehne v. Cnty. of San Benito*, 870 F.2d 529, 532 (9th Cir. 1989) (“The Supreme Court has erected imposing barriers . . . to guard against the federal courts becoming the Grand Mufti of local zoning boards.”); *see also* *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting) (“Our role is not and should be to sit as a zoning board of appeals.”); *see generally* Steven J. Eagle, *Penn Central and Its Reluctant Muftis*, 66 BAYLOR L. REV. 1 (2014) (discussing how federal courts have fashioned ways to avoid hearing regulatory takings disputes).

241. *See* Claeys, *supra* note 42, at 1556–58 (noting how “nineteenth-century cases should dispel any notion that *Penn Central*’s ‘muddle’ is a necessary or inevitable legal development” and advocating judicial consideration of “free action over property to mediate between individual property rights and government social action”).

242. *See* Asbridge, *supra* note 211, at 828 (“By applying an ad hoc approach across the board to all actions that do not formally divest the owner of property through eminent domain, these scholars [including Claeys] also are arguing for the elimination of the Court’s current distinction between regulations and appropriations.”).

243. *See* Claeys, *supra* note 42, at 1646–52.

244. *Id.* at 1646.

245. Stare decisis considerations are unlikely to prove a roadblock either. *See* *Smith v. Allwright*, 321 U.S. 649, 665 (1944) (“[W]hen convinced of former error, this Court has never felt constrained to follow precedent.”); *see also* Kraz Greinetz, *Historic Preservation: Launched from Grand Central Terminal, But Derailing*, 18 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 365, 376–400 (2023) (applying the Court’s recent explication of the factors it weighs when considering whether to overturn a precedent to argue for the overturning of *Penn Central*).

necessarily avoid this approach for being too unworkable. As in the context of regulations implicating the Second Amendment, courts evaluating takings challenges could be expected to assess the scope of an individual's property rights by examining the "historical tradition that delimits the outer bounds of the right."<sup>246</sup> Ultimately, however, any putatively originalist resolution of the takings muddle has a larger problem: as the disagreements among Treanor, Epstein, and Claeys show, the original meaning of the Takings Clause is far from clear,<sup>247</sup> and the historical evidence is not decisive.<sup>248</sup> No clean new doctrine seems likely to arise from such a messy historical record.<sup>249</sup>

### 3. *State Courts as Laboratories of a Takings Revival*

While Supreme Court decisions receive the most attention, the most immediate check on abusive historic preservation laws can likely come from state courts. This is partly the result of the Supreme Court effectively delegating development of takings doctrine to the states.<sup>250</sup> Further, because "[f]ederal takings guarantees set a constitutionally guaranteed floor, not a

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246. *Nekrilov v. City of Jersey City*, 45 F.4th 662, 684 (3d Cir. 2022) (Bibas, J., concurring) (citing *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2127 (2022)).

247. Unlike every other clause in the First Congress' proposed Bill of Rights, no state's ratifying convention proposed the Takings Clause, so discerning its purpose is difficult: it seems "Madison was putting forth his own somewhat prophetic ideas rather than distilling the *Zeitgeist*." AMAR, *supra* note 223, at 78.

248. See Burling, *supra* note 225 (summarizing the academic debate); DANA & MERRILL, *supra* note 179, at 25 ("The truth is that no one who participated in the drafting and ratification of the Takings Clause—included James Madison, who bears the most responsibility for the Clause—had given any sustained thought to the purposes of eminent domain. The understanding of these purposes remained to be worked out over time."); see also Bethany R. Berger, *Eliding Original Understanding in Cedar Point Nursery v. Hassid*, 32 YALE J.L. & HUMAN. 307 (2022) (arguing that the Court's strong protection of property rights in *Cedar Point* conflicts with originalism).

249. Cf. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021) (Barrett, J., concurring) (noting that in part because she "find[s] the historical record more silent than supportive on the question whether the founding generation understood the First Amendment to require religious exemptions from generally applicable laws in at least some circumstances," she would not overrule *Employment Division v. Smith* in light of the "number of issues to work through if *Smith* were overruled").

250. See Stewart E. Sterk, *The Demise of Federal Takings Litigation*, 48 WM. & MARY L. REV. 251, 286 (2006) (explaining that "because takings jurisprudence depends so heavily on state property law, the Supreme Court has effectively—if implicitly—delegated development of takings doctrine to the state courts"). However, since the Court's decision in *Knick*, property owners alleging Takings Clause violations have an easier time bringing suit in federal court. See *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2168 (2019).

constitutionally mandated ceiling,”<sup>251</sup> *Penn Central* leaves state courts free to develop more stringent takings rules than those articulated by the Court.<sup>252</sup> Thus, if state courts find *Penn Central* to be too muddled, or believe that it unfairly denies compensation in many cases, state courts can develop state takings law to better protect property owners—as state courts in New York and Pennsylvania did before and after *Penn Central*.

In the 1974 case *Lutheran Church in America v. City of New York*, for instance, the New York Court of Appeals declared an application of New York City’s landmarks law to a church was “nothing short of a naked taking.”<sup>253</sup> The challengers, occupying JP Morgan’s now-landmarked house, had proposed redeveloping it but were blocked by the preservation ordinance, described by the court as functioning like a “government regulation which severely restricts the use to which the property may be put,”<sup>254</sup> foreshadowing language since echoed by scholars and caselaw. Though decided four years after *Lutheran Church*, *Penn Central* did not foreclose further decisions in this vein. In 1991, the Pennsylvania Supreme Court heard a petition from a group of theater owners challenging a Philadelphia historic preservation law.<sup>255</sup> There, the court held that “by designating the theater building as historic, over the objections of the owner, the City of Philadelphia through its Historical Commission has ‘taken’ the appellee’s property for public use without just compensation in violation of Article 1, Section 10 of the Pennsylvania Constitution.”<sup>256</sup> As it directly challenged the Supreme Court’s interpretation of the substantively-similar federal Takings Clause, the Pennsylvania Supreme Court’s decision surprised legal observers.<sup>257</sup> Unfortunately for those hoping to check the growth of historic preservation, this open defiance would not last long; two years later the Pennsylvania Supreme Court reversed its previous

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251. Claeys, *supra* note 42, at 1558.

252. See Sterk, *supra* note 250, at 287.

253. 35 N.Y.2d 121, 132 (1974).

254. *Id.* at 129.

255. See *United Artists Theater Cir., Inc. v. City of Philadelphia*, 595 A.2d 6 (Pa. 1991).

256. *Id.* at 14. The relevant part of the Pennsylvania Constitution reads, “nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured.” PA. CONST. art. I, § 10.

257. See Daniel T. Cavarelo, Comment, *From Penn Central to United Artists’ I & II: The Rise to Immunity of Historic Preservation Designation from Successful Takings Challenges*, 22 B.C. ENV’T AFFS. L. REV. 593, 610 (1995) (“The majority opinion in *United Artists’* was an unexpected development in American historical preservation law.”).



interpretation of the Pennsylvania Constitution's takings clause, deciding the landmark designation was not a compensable taking after all.<sup>258</sup>

But this path remains open, and given the prominent role state courts play in takings cases, it is possibly the best hope for challenging historic preservation laws in the immediate future—especially in light of the Supreme Court's recent denial of certiorari in a relatively sympathetic regulatory takings case.<sup>259</sup> As two scholars have noted, state courts already “wander off untethered” from the Supreme Court's takings precedents, and the Court's abdication from hearing takings cases “has opened an opportunity for state courts to take the lead in policing state and local regulators”<sup>260</sup>—which, as the Supreme Court has explained, is just what the Takings Clause requires.<sup>261</sup>

### C. PRACTICALITY AND PITFALLS

To summarize: while the Supreme Court has the most freedom of movement to clarify or completely rework its Takings Clause doctrine, state and lower federal courts can also scrutinize historic preservation more closely than a rote application of *Penn Central* would suggest. Such heightened scrutiny is not just legally permissible; in light of the Court's oft-repeated maxim that the Takings Clause guarantees fairness toward property owners,<sup>262</sup> it is arguably constitutionally required.<sup>263</sup> And the benefits of this heightened protection extend beyond merely cleaning up a messy area of law. As Part II aimed to show, the real-world stakes are

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258. See *United Artists Theater Cir., Inc. v. City of Philadelphia*, 635 A.2d 612, 614 (Pa. 1993) (holding “the designation of a building as historic without the consent of the owner is not a ‘taking’ that requires just compensation”).

259. See *Bridge Aina Le'a v. Haw. Land Use Comm'n*, 141 S. Ct. 731 (2021) (Thomas, J., dissenting from denial of certiorari); see also Michael M. Berger, *Whither Regulatory Takings?*, 51 URB. LAW. 171 (2021) (discussing the facts of the case).

260. Krier & Sterk, *supra* note 63, at 92.

261. See Sterk, *supra* note 250, at 291 (noting that the Supreme Court's opinions “frequently articulate” a view of the takings doctrine “as a force for policing regulators”).

262. See Merrill, *supra* note 47, at 29–30 (noting that in regulatory takings cases, the Court is “fond of repeating the statement” from *Armstrong*).

263. See *supra* Part III; *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) (noting that “a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change”); *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (noting that the “Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole”).

massive. In *Penn Central*'s terms, land-use law involves "adjusting the benefits and burdens of economic life to promote the common good."<sup>264</sup> Whatever the calculus of the Court in 1978, the balance has since tipped decidedly against further unchecked preservation.<sup>265</sup>

This is not to say that judicial supervision of land-use laws is the *best* way to ameliorate housing shortages; legislative action can accomplish more.<sup>266</sup> But the judiciary can no more shirk its responsibility to uphold property rights than it can choose to neglect other rights perceived as more fundamental. Nor should it: as Julia Mahoney wrote after *Cedar Point*, "constitutional recognition of property interests, duly enforced by the judiciary, can serve to protect the interests of the working and middle classes."<sup>267</sup> Here, these interests would likely be served by facilitating more housing construction.<sup>268</sup> Basic economic theory predicts that when the cost of something rises, the quantity demanded falls.<sup>269</sup> Thus, if governments must begin compensating property owners targeted by historic preservation, they will designate fewer landmarks—likely sparing future diners, gas stations, and strip malls such as the ones cataloged above from similar fates and allowing new housing to spring up in their steads.<sup>270</sup>

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

265. See discussion *supra* Part II. But see Byrne, *Cultured Despisers*, *supra* note 92 (arguing that the case against historic preservation is overstated).

266. In some states it already has. See, e.g., Brandon Fuller & Nolan Gray, *A Red-State Take on a YIMBY Housing Bill*, BLOOMBERG: CITYLAB (Feb. 20, 2019), <https://www.bloomberg.com/news/articles/2019-02-20/utah-pro-housing-bill-is-zoning-reform-red-state-style> [<https://perma.cc/9AGN-QCDZ>]; Matthew Yglesias, *Ten Years of YIMBYism Have Accomplished a Lot*, SLOW BORING (Oct. 6, 2022), <https://www.slowboring.com/p/ten-years-of-yimbyism-have-accomplished> [<https://perma.cc/PV8T-4VUP>].

267. Mahoney, *supra* note 154, at 45 (quoting James Burling, *Private Property for the Politically Powerful*, 6 BRIGHAM-KANNER PROP. RTS. CONF. J. 179, 182 (2017)).

268. While opponents of new market-rate housing projects often insist that they only benefit the rich, empirical evidence suggests that new construction in expensive places opens up housing and dampens prices in more affordable segments of the regional market. See, e.g., Edward Glaeser & Joseph Gyourko, *The Economic Implications of Housing Supply*, 32 J. ECON. PERSPECTIVES 3 (2018); Evan Mast, *The Effect of New Market-Rate Housing Construction on the Low-Income Housing Market*, 133 J. URB. ECON. 1 (2021); Cristina Bratu et al., *City-Wide Effects of New Housing Supply: Evidence from Moving Chains* (VATT Inst. for Econ. Rsch., Working Paper No. 146, 2021).

269. See generally John G. Ranlett & Robert L. Curry, Jr., *Economic Principles: The Monopoly, Oligopoly, and Competition Models*, 1 ANTITRUST L. & ECON. REV. 107, 112 (1968) (noting that "the quantity demanded varies inversely with price, i.e., that less is purchased at higher prices, and more is purchased at lower prices") (emphasis in original).

270. See *supra* notes 78–87 and surrounding text.

Would the United States then suffer a loss of its cultural heritage? This seems unlikely.<sup>271</sup> Forced by the just-compensation constraint to prioritize which structures to preserve, local governments should engage in not just less but also higher-quality preservation. If the cost of such compensation becomes prohibitive, local governments can still likely find ways to raise the necessary funds to save structures deemed too important to lose, either through public relations campaigns or by paying some form of in-kind compensation.<sup>272</sup> To be sure, the costs will be more difficult to bear if future judicial decisions apply retroactively, thus giving owners of existing historic landmarks grounds to sue for just compensation. But fear of allowing an avalanche of litigation is not a reason to abandon constitutional protections, especially when the risk is low given statutes of limitations<sup>273</sup> and reliance interests.<sup>274</sup>

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271. In fact, the opposite may be true; reduced risk of landmark designation could spur greater creativity in architecture. See, e.g., Rose, *supra* note 82, at 500–501 (1981) (“From an economic standpoint, one might ask whether landmark designation and regulation impose such burdens as to discourage builders from investing in good or unusual architecture in the first place. Might not the original builders aim rather at mediocrity, because they know that prospective future owners may run the risk of landmark controls and consequently pay less for a creative or imaginative building? If so, landmark regulation may work to dampen creativity and in the long run may deprive the community of imaginative and dramatic architecture.”); see also *Penn Cent. Transp. Co. v. City of New York*, 377 N.Y.S.2d 20, 41 (N.Y. App. Div. 1975) (“[A] rigid application of the Landmarks Law designation may well be self-defeating . . . because the individuals who designed, built, indeed underwrote the great structures now deemed worthy of designation as Landmark, undoubtedly did so for a variety of reasons, among which was their intention to profit therefrom. It is not reasonable to assume that if the result of structural distinctiveness is to be a lessening of the entrepreneurial estate, there may well be no structures to designate as Landmarks in the years to come?”).

272. The story of *Penn Central* featured both. See *supra* notes 18 (on the role Jackie Onassis and other celebrities played in rallying support to save Grand Central Terminal) and 63 (on the Court’s acceptance of transferable development rights as in-kind compensation satisfying the Takings Clause’s just-compensation requirement).

273. Since *Knick*, litigants can bring takings claims in state or federal court under 42 U.S.C. § 1983. Because § 1983 does not provide a statute of limitations, federal courts are directed to follow the most analogous state statute of limitations pertaining to injuries to the rights of a person. See *Wilson v. Garcia*, 471 U.S. 261 (1985). This would bar compensation claims for all but the most recent landmark designations: in New York State, for instance, the statute of limitation is just three years and runs from the time of the injury, not the time of discovery. See *In re Coney Is. Plan-Stage 1*, 2023 NY Slip Op. 50148(U) (Sup. Ct. Kings Cnty. 2023).

274. See Samuel Beswick, *Retroactive Adjudication*, 130 YALE L.J. 276, 314 (2020) (noting that the retroactivity of new rules is less likely where “parties’ ‘good-faith’ expectations and reliance on the state of the law at the time they acted” is stronger); see also *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (noting that “retroactivity is not favored in the law”). If the Supreme Court were to revisit this issue, it seems unlikely to announce a rule that risks the financial ruin of local governments for actions they took

A larger concern is that absent an Epstein-inspired revolution in takings jurisprudence,<sup>275</sup> properties preserved as part of historic *districts* are less likely to require compensation because such districts are more akin to the “zoning and permit regimes” that courts generally condone.<sup>276</sup> But this concern cuts both ways. On one hand, requiring compensation for specific landmark designations but not zoning writ large may make courts more willing to expand takings protections because it would free judges from the fear of sitting as a zoning board court of appeal.<sup>277</sup> On the other, recognizing a distinction between preserving individual landmarks and entire districts may undermine the policy rationale motivating this Note’s argument: if localities can continue to employ historic preservation without compensating those afflicted by preserving *more* structures through the creation of historic districts, might the scope of preservation actually increase?

This depends partly on how takings doctrine evolves and how localities create future historic districts. If a neighborhood is already zoned for single-family housing and an ordinance then designates the neighborhood as historic, meaning owners can no longer transform their homes without special permission, courts seem unlikely to declare a taking because this is far from the paradigmatic case of eminent domain.<sup>278</sup> But if a city designates a

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in good-faith reliance on *Penn Central* years ago. See *Janus v. Am. Fed’n of State, Cnty. & Mun. Emps.*, Council 31; AFL-CIO, 942 F.3d 352, 362 (7th Cir. 2019) (noting unanimous agreement among the federal appellate courts that parties acting under color of state law are “entitled to raise a good-faith defense to liability under section 1983”) and *Barr v. Am. Ass’n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2355 n.12 (2020) (plurality opinion) (apparently recognizing the good-faith defense applied in the lower courts). See also William Baude, *Footnote 12 and Retroactive Liability*, REASON (July 6, 2020), <https://reason.com/volokh/2020/07/06/footnote-12-and-retroactive-liability/> [<https://perma.cc/92VT-R762>].

275. See *supra* Section IV.B.2.

276. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Plan. Agency*, 535 U.S. 302, 352 (2002) (Rehnquist, C.J., dissenting) (noting that zoning and permit regimes “are a longstanding feature of state property law and part of a landowner’s reasonable investment-backed expectations”); see also Rubinfeld, *supra* note 37, at 1155–56 (noting that while “spot zoning” as in *Penn Central* “clearly demand[s] compensation” under a proper understanding of the Takings Clause, though “[r]esidential use” zoning is a closer case, . . . the analogy to an eminent-domain appropriation of property or to state impressments of property for public service becomes so attenuated that the idea of a state instrumentalization of property no longer applies” and thus no compensation is due).

277. See *Eagle*, *supra* note 240 and surrounding text.

278. See Rubinfeld, *supra* note 37, at 1156 (“This is not to deny that the surrounding community receives benefits from restricting land to residential use. It is only to acknowledge that making one’s home on a piece of one’s own property is a far cry from the paradigmatic fact patterns of eminent domain, which almost invariably involve direct use of one’s property by or for others.”). See also Merrill, *supra* note 47, at 29–32. Merrill notes

dilapidated business district as historic to ward off development that is otherwise consistent with its land-use regime,<sup>279</sup> under certain strands of takings doctrine a court could hold that a taking has occurred—for example, if the court finds the character or impact of the regulation particularly troublesome under a reinterpreted version of *Penn Central*.<sup>280</sup> Other cases will fall between these two extremes, and present speculation is a poor substitute for future judicial resolution. The immediate point is that a proper application of the Takings Clause offers individuals greater protection than courts currently recognize, and the uncertain protection that a future takings doctrine may offer to a neighborhood is no reason to deny protections to individual neighbors.<sup>281</sup>

## CONCLUSION

Let us return to where we started. Denver, like many American cities, has a history of using its regulatory power to prohibit new housing in response to local pressure. Carol Rose, in her classic 1981 survey of historic preservation law, wrote of the city’s “last-minute creation of an historic district” to prevent a new development in one portion of the city and warned of “the uses that proponents of exclusionary zoning might find for historic district organization.”<sup>282</sup> Over forty years later, Rose’s warning has not just been fulfilled but exceeded, to the detriment of housing affordability, economic growth, and a host of other social concerns.

The Supreme Court’s past and present Takings Clause doctrine offers a solution. Notwithstanding *Penn Central*, the Court’s

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that a simple way to resolve many regulatory takings problems—one that is consistent with Justice Holmes’ opinion in *Penn. Coal*—is to ask whether the government has taken an “exchangeable property right,” in which case compensation would be owed. This approach would “eliminate regulatory takings challenges to general zoning laws, price controls and price supports, and environmental laws,” which cannot be secured by consensual exchange, but would open to challenge conservation and preservation easements and other site-specific restrictions on development. *Id.* at 32.

279. See Barro, *supra* note 80.

280. See discussion *supra* Section IV.A; see also Sax, *supra* note 227, at 73 (noting that pretextual residential zoning ordinances with the real consequence of preventing development of the land can qualify as takings).

281. See generally THE FEDERALIST NO. 65 (Alexander Hamilton) (“If mankind were to resolve to agree in no institution of government, until every part of it had been adjusted to the most exact standard of perfection, society would soon become a general scene of anarchy, and the world a desert.”).

282. Rose, *supra* note 82, at 523–24 (citing Kronholz, *Denver’s Inner City Enjoys a Resurgence*, WALL ST. J., Mar. 30, 1979, at 40, col. 1).

precedents both before and after that case suggest that at least some applications of historic preservation laws sufficiently impinge on property rights to trigger constitutional protection. The tactics a court uses to heighten the Takings Clause scrutiny given to an historic preservation law are ultimately less important than the fact that a court applies greater scrutiny at all. Legislators intent on landmarking private properties will of course remain free to do so—provided they compensate the individuals subject to their decisions—but the promise and purpose of the Takings Clause will thus be fulfilled: the public at large will bear the burdens that fairness and justice command must not be borne by the affected individuals alone.