COMMENTS

Vacancy Taxes: A Possible Taking?

Christine Dong†

Vacancy taxes are an increasingly popular solution to the paradoxical problem of high housing demand coupled with high vacancy. Cities across the country facing housing shortages have either implemented or are considering adopting vacancy taxes to encourage property owners to rent or sell their property. Soon after San Francisco adopted a vacancy tax with one of the broadest definitions of vacancy, property owners lobbed a constitutional challenge under the Takings Clause, taking advantage of a moment of doctrinal instability.

This Comment seeks to make sense of how this and similar potential challenges would fare, given an expanding, property-protective takings doctrine, but a high constitutional tolerance for taxes. Using the San Francisco vacancy tax as a concrete example, this Comment evaluates possible arguments that the tax effects a regulatory or physical taking. It contends that even this stringent vacancy tax would not be a taking under either framework, and highlights elements of a different vacancy tax or regulation that may tip the scales of this analysis. It explores original understandings of land use (and nonuse) regulations to argue that fines levied on the nonproductive use of property are a background principle of property law that generally precludes the conclusion that vacancy taxes are takings.

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† B.A. 2017, University of Chicago; J.D. Candidate 2025, The University of Chicago Law School.

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INTRODUCTION

Many U.S. cities face severe housing shortages. In California, 17% of homeowners and 30% of renters spend more than half of their household income on housing, while the state's population growth outpaces the rate of new housing supply.[1] New housing can be expensive and slow to develop, offering little immediate relief. Denser housing faces additional challenges from zoning ordinances and unhappy neighbors, owners, and renters alike. As a result, lawmakers have looked to increase the rental supply without developing more housing and have focused on the use—or rather, *nonuse*—of existing properties. In San Francisco, more than forty thousand homes are considered vacant.[2] Across California, 1.2 million units, apartments, and single-family homes may sit vacant according to a California Association of Realtors estimate.[3]

Today's vacant homes no longer conjure images of boarded windows. Instead, the popular imagination is one of perfectly habitable apartment buildings left vacant while greedy institutional landlords wait for prices to rise before they sell, or "hold[ ] an essential good off-market in the hopes of forcing [rental] policy more favorable to them."[4] While it may seem paradoxical for tight housing markets and high vacancy rates to exist simultaneously, both market frictions and rational decision-making by the property owner can contribute to this result.[5] In jurisdictions with strong tenant protections, an owner may prefer to leave a property vacant rather than to rent it. In New York City, for instance, the

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1 Natalie Hanson, *Amid Housing Crisis, California Cities Look to Target Vacant Homes with Taxes*, COURTHOUSE NEWS SERV. (Aug. 3, 2022), https://perma.cc/J98N-BH4Z.

2 *See* Ballot Simplification Committee, *Proposition M: Tax on Keeping Residential Units Vacant*, S.F. VOTER INFO. PAMPHLET & SAMPLE BALLOT [hereinafter *Proposition M*], https://perma.cc/Z5F2-WH9J.

3 Hanson, *supra* note 1.

4 Sam Rabiyah, *More Than 60,000 Rent-Stabilized Apartments Are Now Vacant—and Tenant Advocates Say Landlords Are Holding Them for 'Ransom'*, THE CITY (Oct. 19, 2022), https://perma.cc/B6RR-H9XB.

5 *See* Mariona Segú, *The Impact of Taxing Vacancy on Housing Markets: Evidence from France*, 185 J. PUB. ECON., May 2020, at 1, 3.

Community Housing Improvement Program (CHIP), the trade association of rent-stabilized owners, reports that a web of rent control laws "make it more cost-effective to keep an apartment vacant" because owners cannot raise rents high enough to justify repairs.[6] A 2018 study shows that San Francisco's 1994 rent control expansion may have led to a 15% reduction in the rental supply of small multifamily housing, as landlords sought to evade regulations by converting existing rental stock to higher-end, owner-occupied condominium housing and new construction rentals.[7] To many, today's vacancies reflect a different kind of decay—greed.

Enter the vacancy tax. Cities levy this special tax on owners of unused or underused properties, though they vary greatly in how they determine affected property types, tax rates, and, importantly, whether a property is considered vacant.[8] Unlike most taxes, a vacancy tax's primary aim is not to raise revenue; rather, its primary purpose is *regulatory*—to reduce vacancy rates by encouraging owners of vacant properties to rent or sell.[9] In fact, proponents of the San Francisco vacancy tax, called the Empty Homes Tax,[10] have explicitly stated that they "hope no one pays this tax" and instead "want every vacant unit filled with people who need homes."[11] Similarly, San Francisco's Controller has described the tax's "stated purpose" as "reducing the number of residential vacancies."[12] The secondary purpose, should the primary purpose fail, would be to collect taxes on the vacant properties and then subsidize affordable housing initiatives using the resultant tax revenues.[13] The more successfully the vacancy tax fulfills its primary purpose, the less successfully it will achieve its secondary purpose of raising revenues.

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6 Rabiyah, *supra* note 4.

7 *See* Rebecca Diamond, *What Does Economic Evidence Tell Us About the Effects of Rent Control?*, BROOKINGS INST. (Oct. 18, 2018), https://perma.cc/D49M-UFLR.

8 *See infra* Part II.

9 *Proposition M*, *supra* note 2 (noting a "stated purpose of reducing the number of residential vacancies").

10 S.F., CAL., BUS. & TAX REGULS. CODE, art. 29A, §§ 2950–2963 (2024). The ordinance is known as the "Empty Homes Tax Ordinance," and the tax it imposes is known as the "Empty Homes Tax." *Id.* § 2901. This is not to be confused with San Francisco's "Vacancy Tax Ordinance," S.F., CAL., BUS. & TAX REGULS. CODE, art. 29, §§ 2901–2911 (2024), which deals with retail, as opposed to residential, vacancies.

11 *Proposition M*, *supra* note 2.

12 *Id.*

13 *Id.* (stating that the ordinance would establish a fund that would "provide rental subsidies and fund the acquisition, rehabilitation, and operation of multiunit buildings for affordable housing.")

While vacancy taxes have existed in some U.S. cities for nearly a decade, they are increasingly popular today, with cities like Berkeley and Santa Cruz having enacted or announced plans to enact such taxes.[14] Outside of California, a bill modeled on San Francisco's residential vacancy tax was introduced in the New York State Assembly in February 2023 and is pending in the Assembly Housing Committee as of June 2024.[15] This recent burst of popularity has also brought vacancy taxes under scrutiny. In February 2023, a group of landlords sued the City of San Francisco in state court, arguing that the City's vacancy tax was a taking of private property without just compensation in violation of the Fifth Amendment, among other constitutional and state law claims.[16] The plaintiffs argued that the tax interfered with their right to exclude others—here, tenants—from their properties, a fundamental right protected by the Takings Clause of the Fifth Amendment.[17]

The vacancy tax, which could be a powerful tool in the fight for fair housing, thus faces a constitutional challenge. If the vacancy tax is a taking, the government would need to provide just compensation to affected property owners. Just compensation would likely take the form of reimbursement, nullifying the purpose and effect of the tax. Moreover, cities considering implementing vacancy taxes would need to carefully structure their regimes to withstand similar constitutional challenges. Thus, for cities facing the possibility of mounting legal challenges to this increasingly popular policy, determining whether and when vacancy taxes are takings may prove critical to developing workable vacancy tax policies.

This Comment provides a roadmap for municipalities as they confront these issues, locating vacancy taxes within the complex and changing landscape of takings doctrine. Part I discusses the development of takings jurisprudence and the context of prior

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14 *See* Hanson, *supra* note 1.

15 Assemb. B. 4455, 2023–2024 Reg. Sess. (N.Y. 2023); *see also* Sophie Harrington & Yvette Chen, *The Living Dead of Property, Zombie Homes and Pieds-á-Terre Invade NYC's Neighborhoods: Here's How to Inoculate Against Them (Hint: It's a Tax)*, CTR. FOR NYC NEIGHBORHOODS (Nov. 28, 2023), https://perma.cc/5NKE-5VRS. Honolulu, Hawaii, introduced a residential vacancy tax bill in 2022, which passed the first reading but died in committee in 2024. *See Bill 9: Relating to Real Property Taxation*, HONOLULU CITY COUNCIL (last updated Feb. 1, 2024), https://perma.cc/5MRZ-64US.

16 *See generally* Complaint, Debbane v. City and County of San Francisco, No. CGC-23-604600 (Cal. Super. Ct. Feb. 9, 2023).

17 *Id.* at 14–15.

takings challenges to housing and tax policies. Part II provides an overview of vacancy taxes broadly, as well as a discussion of the unique features of San Francisco's Empty Homes Tax Ordinance—one of the most stringent vacancy taxes—and the legal challenge it currently faces. Part III argues that taxes, including the vacancy tax, are like any other regulation that can be assessed under the multifactor test articulated in *Penn Central Transportation Co. v. City of New York*.[18] This reconciles classical views about taxes and takings, as well as Supreme Court precedent and scholarly conceptions about the distinction between the two. Moreover, the takings doctrine has always embedded traditional "background principles" of property law.[19] While the Supreme Court has not catalogued those principles in detail, originalist understandings of acceptable property regulations can help cast light on when a modern property regulation is a taking. This Comment further suggests that the Court's willingness to consider and use originalist arguments, particularly when deciding whether property has been taken,[20] would tip in favor of municipalities, which have historically enjoyed great power to fine owners of unused or underused land.[21] In the end, the Comment argues that both regulatory and physical takings claims would likely fail against the San Francisco Empty Homes Tax Ordinance, thus freeing other municipalities or states to begin imposing vacancy taxes should their legislatures determine these taxes suit their housing policy needs.

I. CURRENT STATE OF THE LAW

Part I.A provides an overview of takings doctrine, including the bifurcation of takings analysis into regulatory and physical takings, and its application to challenges involving housing policy and confiscations of money. Challenges to housing policy have generally failed because courts have refused to allow landlords who voluntarily rented property to tenants to later claim that tenant protections transformed the transaction into a taking. More recently, landlords have found some success challenging policies that make it so difficult to exclude tenants that they arguably

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18 438 U.S. 104 (1978).

19 *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029–30 (1992).

20 *See* Tyler v. Hennepin County, 143 S. Ct. 1369, 1374–78 (2023).

21 John F. Hart, *Colonial Land Use Law and its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1266–67 (1996).

grant physical access. Part I.B examines the conceptual differences between taxes and takings. The Court has held that confiscations of discrete funds can be takings, potentially muddying some of the theoretical distinctions between taxes and takings. Nonetheless, the difference is of utmost importance: taxes are almost never takings. This has important implications for how to make a plausible claim that a vacancy tax can be a taking.

A. Takings

The Takings Clause of the U.S. Constitution[22] forbids the government from taking private property for public use without just compensation.[23] This prohibition is incorporated against the states through the Due Process Clause of the Fourteenth Amendment.[24] Traditionally, the government effects a taking when it physically occupies private property or takes ownership and control of property through formal proceedings.[25] For example, when the government seeks to lay train tracks or build highways across private land, it must compensate the landowners pursuant to an eminent domain proceeding; the government cannot simply confiscate the land for its public projects. This doctrine "bar[s the] 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."[26]

1. Regulations challenged as takings are evaluated under a deferential legal standard.

Today, the takings doctrine extends beyond physical appropriations of private property to regulations that unduly restrict an owner's ability to use his property. The Supreme Court first recognized that a regulation could go so far as to "be recognized as a taking" in *Pennsylvania Coal Co. v. Mahon*.[27] The case addressed a 1921 Pennsylvania law forbidding subsurface coal mining that would "cause the subsidence of . . . any structure used as a human habitation."[28]

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22 U.S. CONST. amend. V.

23 *Id.*

24 *See* Chi., Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 241 (1897).

25 Yee v. City of Escondido, 503 U.S. 519, 522 (1992).

26 *Penn Cent.*, 438 U.S. at 124.

27 260 U.S. 393 (1922); *id.* at 415.

28 *Id.* at 412–13.

In 1878, the Pennsylvania Coal Company conveyed surface land to the Mahons but expressly reserved the right to mine underneath.[29] After the law was enacted, however, the Mahons sued to enjoin the company from mining beneath their property.[30] Justice Oliver Wendell Holmes, Jr., writing for the majority, noted that where the right to mine coal had been reserved, "[t]o make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it."[31] He also distinguished other coal mine regulations on the grounds that they improved safety conditions for miners and thus "secured an average reciprocity of advantage."[32] He construed the law in question, however, as providing disproportionate protection to private individuals, especially compared to the extent of the taking.[33]

Mahon did not develop a specific test for when regulations are takings, and for the next several decades, the Supreme Court conducted "ad hoc, factual inquiries" when faced with regulatory takings challenges.[34] This changed in 1978, with the landmark decision in *Penn Central Transportation Co. v. City of New York*. Penn Central sought to build an office building on top of Grand Central Terminal, a designated landmark.[35] Successful development would reap upwards of $3 million per year.[36] But Penn Central's efforts were blocked pursuant to New York City's Landmarks Law,[37] which aimed to protect designated landmarks from changes that would "destroy or fundamentally alter their character."[38] To assess the challenge, the Court distilled the factors that had "particular significance" in previous regulatory takings cases into a three-factor balancing test to determine when a regulation amounts to a taking, considering: (1) the economic impact of the regulation, (2) the interference with owners' reasonable investment-backed expectations, and (3) the character of the governmental action.[39] Applying this test, the Court held that

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29 *Id.* at 412.

30 *Id.*

31 *Mahon*, 260 U.S. at 414.

32 *Id.* at 415.

33 *Id.* at 414 ("Furthermore, it is not justified as a protection of personal safety. . . . On the other hand[,] the extent of the taking is great.").

34 *See Penn Cent.*, 438 U.S. at 124.

35 *Id.* at 115–16.

36 *Id.* at 141 (Rehnquist, J., dissenting).

37 N.Y.C., N.Y., ADMIN. CODE §§ 25-301 to -322 (2024).

38 *Penn Cent.*, 438 U.S. at 109.

39 *Id.* at 124.

denying Penn Central the ability to build an office building in the airspace above Grand Central Terminal was not a taking.[40]

First, the Court determined that the Landmarks Law did not have a sufficiently substantial economic impact. Through a series of examples, the Court illustrated that this first prong is extremely difficult to satisfy. For example, a law prohibiting the continued operation of an "otherwise lawful business" that was inconsistent with neighboring uses was not a taking.[41] Similarly, the Court had previously held that a regulation that diminished a property's value by more than three-fourths did *not* effect a taking.[42] This Landmarks Law had a much more modest effect: it did not even "impair[ ] the present use of the Terminal."[43] Compared to the status quo, Penn Central suffered *no* economic loss and was far from meeting the high burden of the economic impact prong.

Second, the Court similarly found that this law did not interfere with Penn Central's reasonable investment-backed expectations to the extent necessary to qualify as a regulatory taking. Merely denying owners the "ability to exploit a property interest" previously believed to be available for development did not rise to the level of interference with reasonable investment-backed expectations.[44] Instead, the *Penn Central* Court framed this prong of its test to disfavor regulations that nullify the specific purpose of a transaction.[45] In the case at hand, the owner could "continue to use the property precisely as it ha[d] been used for the past 65 years: as a railroad terminal containing office space and concessions."[46] As one commentator noted, Penn Central was not

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40 *Id.* at 138.

41 *Id.* at 126 (citing Hadacheck v. Sebastian, 239 U.S. 394 (1915)).

42 *Id.* at 131.

43 *Penn Cent.*, 438 U.S. at 135 (noting that this is in direct contrast to another takings case, *United States v. Causby*, 328 U.S. 256 (1946), in which the government's low-altitude flights above farmer Thomas Lee Causby's property were held to be a taking).

44 *Id.* at 130.

45 *Id.* at 127 (citing *Mahon*, 260 U.S. at 393, as the "leading case" for when frustration of "distinct investment-backed expectations" amounts to a taking). Justice William Brennan wrote that the regulation in *Mahon* had nearly the same effect as completely destroying the rights the claimant had *expressly* reserved in the transaction. *Id.* Other cited examples for this proposition included the "complete destruction" of a claimant's lien in certain property and a restriction that made property "wholly useless." *Id.* at 128.

46 *Id.* at 136.

prevented from operating "in the manner it expected when it purchased the property."[47] Therefore, the majority held that the law "[did] not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel."[48]

Finally, Penn Central failed to convince the Court that the character of the government action rendered it a taking. The Court noted that when the interference with property "can be characterized as a physical invasion by government" rather than the result of "some public program adjusting the benefits and burdens of economic life to promote the common good," it is more likely to be a taking.[49] Because the regulation at issue was generally applicable to a large class of landmark buildings, and meant to, per the majority, "improv[e] the quality of life in the city as a whole," the majority held that it was more similar to the latter.[50]

In sum, the Supreme Court has adopted a very restrictive test for when regulations effect takings, and challenges invoking *Penn Central* have typically failed. In fact, under the *Penn Central* regime, it has been said that "to pursue a regulatory taking case, one has to have ten years, a million-dollar litigation budget, endless patience, and bulldog-like tenacity."[51]

The major exception to this pattern of failed regulatory takings challenges is *Lucas v. South Carolina Coastal Council*.[52] In *Lucas*, the Court recognized a category of per se regulatory takings when "regulation [ ] deprives land of all economically beneficial use."[53] The petitioner bought residential lots on which he intended to build single-family homes, but a new state environmental statute barred him from building any permanent habitable structures on his parcels.[54] The trial court concluded that this ban on construction "deprive[d] Lucas of any reasonable economic use of the lots . . . and render[ed] them valueless."[55]

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47 Lisa R. Strauss, Comment, *The Takings Clause as a Vehicle for Judicial Activism:* Eastern Enterprises v. Apfel *Presents a New Twist to Takings Analysis*, 16 GA. ST. U. L. REV. 689, 694 (2000); *see also* E. Enters. v. Apfel, 524 U.S. 498, 537 (1998).

48 *Penn Cent.*, 438 U.S. at 136.

49 *Id.* at 124.

50 *Id.* at 134.

51 Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective of* Penn Central Transportation Co. v. City of New York, 13 WM. & MARY BILL RTS. J. 679, 692 (2005).

52 505 U.S. 1003 (1992).

53 *Id.* at 1027.

54 *Id.* at 1006–07.

55 *Id.* at 1009 (quotation marks omitted) (quoting Appendix to Petition for Writ of Certiorari, Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992) (No. 91-453)).

Drawing on precedent and practical considerations, the Court held that this law effected a taking. A total deprivation of economic value would, after all, seem to easily satisfy all three *Penn Central* factors, and would arguably be rare enough that its application would not be administratively burdensome for the government.[56]

At the same time, the *Lucas* Court recognized an important exemption from the categorical rule: a regulation cannot effect a taking if it merely prohibits something "previously permissible under relevant property and nuisance principles."[57] In toto, *Lucas* stood for the proposition that, though property owners "necessarily expect[ ]" some newly enacted restrictions, severe limitations "cannot be newly legislated" without effecting a taking.[58] This exception preserves states' abilities to regulate, for example, noxious uses of property under their police powers.[59] The state could validly bar continued industrial operations in residential areas for being disruptive or potentially unsafe.[60] Yet beyond nuisance, the *Lucas* Court was silent on what these "background principles" of property law were.[61] Ultimately, the Court simply directed the lower court to determine whether common law principles would have prevented the petitioner from using his property as he desired.[62]

2. Regulations that grant physical access amount to per se physical takings.

The Court has also held that regulations can constitute per se *physical* takings. In *Loretto v. Teleprompter Manhattan CATV*

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[56] *See id.* at 1017–20. The Court provided several justifications for this new rule. Among those that seem to align best with the *Penn Central* factors include that total deprivation of value is a substantial economic impact and more likely to seem like "the equivalent of a physical appropriation" and less likely to seem like a mere adjustment of the "benefits and burdens of economic life." *Lucas*, 505 U.S. at 1017 (quotation marks omitted in second quote) (quoting *Penn Cent.*, 438 U.S. at 124).

[57] *Id.* at 1029–30.

[58] *Id.* at 1029.

[59] *See, e.g.*, *id.* at 1027 (citing *Pa. Coal Co.*, 260 U.S. at 413) ("[S]ome values are enjoyed under an implied limitation and must yield to the police power.").

[60] *Id.* at 1022 (citing as examples *Hadacheck*, 239 U.S. 394, which held that a law barring the operation of brick mill in residential area was not a taking, and *Goldblatt v. Hempstead*, 369 U.S. 590 (1962), which held that a law that effectively prevented the continued operations of a quarry in a residential area was not a taking).

[61] *Lucas*, 505 U.S. at 1030–32. *See generally* David L. Callies & J. David Breemer, *Selected Legal and Policy Trends in Takings Law: Background Principles, Custom and Public Trust "Exceptions" and the (Mis)use of Investment-Backed Expectations*, 36 VAL. U. L. REV. 339 (2002).

[62] *Lucas*, 505 U.S. at 1031.

Corp.,[63] the Court recognized that the government effects a taking when it statutorily authorizes a "permanent physical occupation," irrespective of the size of the area permanently occupied.[64] The *Loretto* Court held that a New York law requiring landlords to permit the installation of television cables on their properties—which took up "only about one-eighth of a cubic foot of space on the roof" of Loretto's building—was a taking.[65] The Court drew on the fact that even a minimal physical occupation destroys several sticks in the bundle of property rights when made permanent: the owner cannot possess or use the occupied space, nor can he exclude the occupier from possession and use.[66] Of these traditional property rights, the Court emphasized that "the power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights."[67] Recognizing that physical intrusions by the government are a restriction of "an unusually serious character," the Court has deemed *permanent* physical intrusions, no matter their size, as "extreme" under the third *Penn Central* factor concerning the nature of the governmental action.[68] Thus, though the Court announced a per se rule, it limited the scope of its application to regulations that affected permanent physical intrusions on property.

In 2021, the scope of the per se test articulated in *Loretto* was expanded by the Supreme Court's decision in *Cedar Point Nursery v. Hassid*.[69] The Court held that a California regulation authorizing labor organizers to "take access" to property belonging to agricultural employers for a maximum of 360 hours a year to solicit support for unionization was a per se physical taking, despite the fact that the regulation neither authorized a permanent physical invasion under *Loretto*, nor totally deprived the property owners of economic value under *Lucas*.[70] Instead, the Court held that, "whenever a regulation results in a physical appropriation of property, a *per se* taking has occurred."[71] The Court

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63 458 U.S. 419 (1982).

64 *Id.* at 426. The Court noted that there is "less need to consider the extent of the occupation in determining whether there is a taking in the first instance." *Id.* at 438. Instead, "a court should consider the extent of the occupation as one relevant factor in determining the compensation due." *Id.* at 437.

65 *Id.* at 421, 435; *Loretto*, 458 U.S. at 443 (Blackmun, J., dissenting).

66 *Id.* at 435 (majority opinion).

67 *Id.*

68 *Id.* at 426.

69 141 S. Ct. 2063 (2021).

70 *Id.* at 2069–72.

71 *Id.* at 2072.

reasoned that this regulation was a per se taking because, "[r]ather than restraining the growers' use of their own property," the regulation appropriated the owners' "right to exclude," lauded by the Court as "one of the most treasured" and "fundamental" rights of property ownership.[72] The implications are still somewhat unclear but are thought to be significant, as evidenced by the flurry of scholarship on the decision's unanticipated consequences.[73]

3. Landlords have found limited, but growing, success challenging housing laws as takings.

Against the backdrop of this evolving doctrine, landlords have used takings doctrine to challenge various attempts to make housing fair and affordable, insofar as those regulations limit total freedom over the property. As the following cases illustrate, landlords have rarely been successful.

In an early case, *Yee v. City of Escondido*,[74] mobile park owners argued that a rent control ordinance, in conjunction with a law limiting a mobile park owner's ability to terminate a mobile homeowner's tenancy, amounted to a physical occupation of property.[75] The Court rejected this per se physical taking argument. Regardless of the economics, the Court held that the "government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land."[76] When the "government authorizes a compelled physical invasion of property," the Takings Clause requires compensation.[77] Because the plaintiffs "voluntarily rented their land to mobile home owners," and the regulation did not compel the landlords to continue renting to

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72 *Id.* at 2072–73.

73 *See, e.g.*, *id.* at 2087 (Breyer, J., dissenting) (discussing "the large numbers of ordinary regulations" that "permit temporary entry onto . . . a property owner's land"); Julia D. Mahoney, Cedar Point Nursery *and the End of the New Deal Settlement*, 11 PROP. RTS. J. 1 (2022) (collecting examples of alarm and criticism); Aziz Z. Huq, *Property Against Legality: Takings After* Cedar Point, 109 VA. L. REV. 223, 258, 261 (2023) (characterizing the decision as an "inflection" in takings jurisprudence, while recognizing little immediate change in the lower courts following the decision); Amy Liang, Note, *Property Versus Antidiscrimination: Examining the Impacts of* Cedar Point Nursery v. Hassid *on the Fair Housing Act*, 89 U. CHI. L. REV. 1293 (2022). *But see* Lee Anne Fennell, *Escape Room: Implicit Takings After* Cedar Point Nursery, 17 DUKE J. CON. L. & PUB. POL. 1 (2022) (taking the stance that "*Cedar Point*'s bark may prove worse than its bite").

74 503 U.S. 519 (1992).

75 *Id.* at 527.

76 *Id.* (emphasis in original).

77 *Id.*

tenants, there was no such physical taking.[78] Noting that it was unclear whether petitioners made a regulatory taking argument in the complaint and whether the court below addressed the argument,[79] the Court declined to decide whether the ordinance amounted to a regulatory taking,[80] finding that the determination was outside the scope of the questions presented in the petition for certiorari.[81] However, the Court observed that many of the petitioners' arguments might be relevant to a regulatory takings challenge, in particular whether there is a "sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance" and whether the ordinance unjustly concentrates the burdens on petitioners.[82]

For decades, *Yee* foreclosed most, if not all, housing-related takings claims. When landlords argued that housing regulations were extremely burdensome, courts would point to the decisive factor that they voluntarily opened their property to tenants. *Cedar Point* brought new life to such claims because it potentially sidestepped the *Yee* voluntariness analysis when it comes to excluding existing tenants.[83]

Since *Cedar Point*, landlords have sought to characterize certain fair housing laws as grants of access, and some have even found success in the federal appellate courts. In *301, 712, 2103 & 3151 LLC v. City of Minneapolis*,[84] the Eighth Circuit evaluated a Minneapolis ordinance requiring landlords to evaluate applicants for rental housing by either inclusive screening criteria or individualized assessment.[85] Under the first option, landlords could not reject tenant applications based on "specifically listed criminal, credit, or rental history."[86] Under the second, landlords could

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78 *Id.* at 531.

79 *Yee*, 503 U.S. at 534. ("Portions of their complaint and briefing can be read either to argue a regulatory taking or to support their physical taking argument.").

80 *Id.* at 538. This was largely because the Supreme Court granted certiorari on a single question pertaining to the Takings Clause, based on a split between state appellate and federal appellate courts. The federal cases held that mobile home ordinances effected physical, not regulatory, takings, so "[f]airly construed, then, petitioners' question presented is the equivalent of the question[,] 'Did the court below err in finding no physical taking?'" *Id.* at 537.

81 *Id.* at 534–38.

82 *Id.* at 530.

83 *See* Heights Apartments, LLC v. Walz, 30 F.4th 720, 733 (8th Cir. 2022); *see also* Sam Spiegelman, *Rent Controls and the Erosion of Takings-Clause Protections: A Sordid History with Recent Cause for Optimism*, 15 FORDHAM URB. L.J. 357, 399–402 (2023).

84 27 F.4th 1377 (8th Cir. 2022) [hereinafter *301*].

85 *Id.* at 1380.

86 *Id.*

rely on those criteria, but then had to also accept and consider supplemental evidence, and specify the basis for denial of the applicant in writing.[87] Landlords challenged the ordinance as a taking and sought an injunction, which the district court denied. On appeal, the Eighth Circuit noted in dictum that "an ordinance that would require landlords to rent to individuals they would otherwise reject might be a physical-invasion taking" per *Cedar Point*.[88] But the court did not address the merits of this issue because the individualized assessment served as a fail-safe against the state's imposition.[89] This individualized assessment option was analyzed under *Penn Central*, and because of the landlords' failure to offer any evidence in support of the three factors, was not held to be a taking.[90] The court noted that evidence of increased third-party screening costs or higher volumes of application materials could have supported the plaintiffs' arguments about the ordinance's economic harm and interference with investment-backed expectations.[91] This case is particularly interesting because the landlords had already chosen to open their properties. Yet as the state gradually interfered with the landlords' choice of tenants, it arguably granted physical access.[92] The Eighth Circuit's dictum thus suggests that a landlord's invitation does not categorically preclude a taking.

A spate of housing-related takings challenges also followed from the unprecedented eviction moratoria imposed during the COVID-19 pandemic. Many landlord plaintiffs invoked *Cedar Point*, while the government defendants argued that *Yee* controlled instead. The district court in *Gallo v. District of Columbia*[93] confronted an argument that prohibiting evictions for nonpayment of rent was a taking under *Cedar Point*.[94] The court refused to apply *Cedar Point*, holding that, given the facts of the case, *Yee* controlled because the landlord had "invited the nonpaying tenant onto his property."[95] The court also determined the

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87 *Id.*

88 *Id.* at 1383.

89 *301*, 27 F.4th at 1383.

90 *Id.* at 1383–84.

91 *Id.* at 1384.

92 The Eighth Circuit explained that "since *Horne*, this court has not cited *Yee*, while acknowledging *Horne* and its voluntary exchange principle." *Id.* at 1383.

93 (*Gallo I*) 610 F. Supp. 3d 73 (D.D.C. 2022).

94 *Id.* at 87.

95 *Id.* The court also noted that other courts rejected the application of *Cedar Point*, citing *Jevons v. Inslee*, 561 F. Supp. 3d 1082, 1105–08 (E.D. Wash. 2021), *vacated as moot*, 2023 WL 5031498 (9th Cir. 2023). *Gallo I*, F. Supp. 3d at 88.

eviction moratoria did not constitute a regulatory taking.[96] Seeking reconsideration of this point, Gallo asserted that "[a] tenant who stops paying rent is no longer a tenant" but rather a member of the public to whom the government is granting access to the landlord's property.[97] The court disagreed because, although the individual was no longer paying rent, Gallo had invited that person onto the property at an earlier time.[98]

The Eighth Circuit arrived at the opposite conclusion in *Heights Apartments, LLC v. Walz*,[99] holding that *Cedar Point*—not *Yee*—controls in the eviction moratorium context, and that the plaintiff had alleged a plausible per se physical taking under *Cedar Point*.[100] The court distinguished the ordinance in *Yee* as merely restricting the amount of rent that could be charged, and highlighted that the *Yee* landlords sought to exclude *future* tenants, rather than *existing* ones.[101] Moving on to the regulatory takings analysis, the court also found that the plaintiff had successfully pleaded all three *Penn Central* factors—economic impact, interference with reasonable investment-backed expectations, and character of the government action.[102] The eviction moratorium deprived the plaintiff of rental income and the ability to manage the property according to the leases' terms, and "no landlord could have reasonably expected regulations of the duration and extent present" in the moratorium.[103] On the third factor, the court agreed that the moratorium was not "broadly beneficial" and improperly concentrated the cost of fighting homelessness on a narrow subset of rental property owners.[104] The court also noted that when landlords exclude tenants who materially breach their leases, they do not impose negative externalities on the public at

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96 *Id.* at 89–91. The court noted that the significant cost incurred "cuts in [the landlord's] favor" on the economic effects prong, but he ultimately did not meet that standard, as he could have applied for landlord emergency assistance. *Id.* at 90. Moreover, there was insufficient effect on investment-backed expectations. Gallo operated in the housing industry, which has a history of regulation, and he could have no reasonable expectation that regulation could not be strengthened to achieve established policy goals, especially in times of emergency. *Id.* Finally, the court held that the regulation had a legitimate purpose, especially considering the backdrop of the COVID-19 pandemic. *Id.* at 90–91.

97 Gallo v. District of Columbia (*Gallo II*), 659 F. Supp. 3d 21, 24 (D.D.C. 2023).

98 *Id.*

99 30 F.4th 720 (8th Cir. 2022).

100 *Id.* at 733.

101 *Id.*

102 *Id.* at 733–35.

103 *Id.* at 734.

104 *Heights Apartments*, 30 F.4th at 734.

large,[105] suggesting that regulating in the absence of negative externalities on society may make the nature of the regulation tip toward a taking.

4. Takings can apply to money or fungible goods.

The substantive scope of what kinds of property can be governed by a takings analysis is not limited to real property, but extends to, for example, personal property,[106] intellectual property,[107] and surpluses in excess of property tax debt.[108] Exactions cases, involving conditions on property development permits, have illustrated that certain types of financial obligations can also be takings.[109]

In *Horne v. Department of Agriculture*,[110] the Court held that the Takings Clause can apply to personal property—in this case, raisins. When the Hornes refused to reserve a percentage of their crop for the government, free of charge, as required by regulation, the government assessed a fine and civil penalty.[111] The Supreme Court held that this reserve requirement effected a physical taking, as title to the reserve raisins passed from the grower to the government and the raisin growers lost their entire "bundle" of property rights in the reserved raisins.[112] This holding raised interesting questions with respect to the voluntariness argument in *Yee*. The government had argued that the reserve requirement was not a physical invasion taking "because raisin growers voluntarily choose to participate in the raisin market."[113] This recalled an argument made and rejected in *Loretto* that the "law was not

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105 *Id.* at 735.

106 *Horne v. Dep't of Agric.*, 576 U.S. 350, 358 (2015).

107 *Id.* at 359–60.

108 Tyler v. Hennepin County, 143 S. Ct. 1369, 1376 (2023) ("[The County] could not use the toehold of the tax debt to confiscate more property than was due.").

109 Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 615 (2013) ("[W]e have repeatedly found takings where the government, by confiscating financial obligations, achieved a result that could have obtained by imposing a tax.").

110 576 U.S. 350 (2015).

111 *Id.* at 356.

112 *Id.* at 361–62.

113 *Id.* at 365. The government had relied on *Ruckelshaus v. Monsanto Co.*, which had ruled that a "voluntary" exchange of property interests, in that case, Monsanto's trade secrets on health and safety issues related to their pesticides, "for the economic advantages of a registration can hardly be called a taking." 467 U.S. 986, 1007 (1984); *see also* John D. Echeverria & Michael C. Blumm, Horne v. Department of Agriculture*: Expanding Per Se Takings While Endorsing State Sovereign Ownership of Wildlife*, 75 MD. L. REV. 657, 685 (2016).

a taking because a landlord could avoid the requirement by ceasing to be a landlord."[114] The *Horne* Court once again rejected that argument. Indeed, *Cedar Point* later cited *Horne* for the proposition that "'basic and familiar uses of property' are not a special benefit that 'the Government may hold hostage, to be ransomed by the waiver of constitutional protections.'"[115] Because this was a physical appropriation, personal property was equally protected by the Takings Clause, as no distinction could be found in text, history, or precedent.[116]

In addition to real and personal property, monetary fines have also given rise to takings challenges. Exactions—conditions attached to land use permits with the aim of mitigating the consequences of development enabled by the permits[117]—can "amount to a taking outside the permitting process."[118] In two key cases, *Nollan v. California Coastal Commission*[119] and *Dolan v. City of Tigard*,[120] the Court held that an exaction must bear both an "essential nexus"[121] to and "rough proportionality"[122] with the development's impacts to avoid being classified as a taking.[123] For instance, a development project that would moderately strain the city's water resources might be conditioned on moderate improvements to the water infrastructure without being a taking.

More recently, the Court expanded the realm of exactions to include land use permits that are conditioned on the applicant paying money. In *Koontz v. St. Johns River Water Management District*,[124] a 5–4 court held that the *Nollan* and *Dolan* rules apply when the government gives the property owner the option of paying money instead of ceding the property interest.[125] Landowner Coy Koontz Sr. had applied for a permit from the St. Johns River

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114 *Horne*, 576 U.S. at 365 (discussing *Loretto*).

115 Fennell, *supra* note 73, at 30.

116 *Horne*, 576 U.S. at 357–60. The Court conceded that *Lucas* suggested a distinction between real and personal property in regulatory takings cases, but even then, "people still do not expect their property . . . to be actually occupied or taken away." *Id.* at 361 (citing *Lucas*, 505 U.S. at 1027–28).

117 Timothy M. Mulvaney, *The State of Exactions*, 61 WM. & MARY L. REV. 169, 172 (2019).

118 *Id.* at 177.

119 483 U.S. 825 (1987).

120 512 U.S. 374 (1994).

121 *Nollan,* 483 U.S. at 837.

122 *Dolan*, 512 U.S. at 391.

123 *See Dolan*, 512 U.S. at 391, 398; Mulvaney, *supra* note 117, at 178.

124 570 U.S. 595 (2013).

125 *Id.* at 611.

Water Management District to develop his wetlands property.[126] The District denied his application, instead giving him the options of reducing the size of his development or paying to improve other District-owned wetlands.[127] Some commentators have argued that the *Koontz* Court articulated a new per se takings rule, that "a government-imposed monetary obligation attached to specifically identified assets is a per se taking, unless it is a tax."[128]

The Court bypassed the question of "teasing out the difference between taxes and takings" by resorting to practical considerations, such as whether respondents had power—or claimed to be exercising power—to tax when taking property or money.[129] Instead, the majority claimed that courts would be able to discern when the government is collecting a tax and when it is engaging in a taking.[130] But the Court left open the question of *how* to distinguish taxes from takings, especially when there is a direct link between the government's demand and rights attached to a specific parcel of real property, as in the case of a vacancy tax.

B. When Are Taxes Takings?

There are two primary ways to think about a vacancy tax: as a regulation designed to incentivize property owners to become landlords, or purely as a tax.[131] The first may be properly analyzed under traditional property law doctrines, such as takings law and landlord-tenant law. The second poses a more difficult question about the line between taxes and takings.

Taxes necessarily require the government to "take," in the colloquial sense, money from private parties. Both taxes and takings are "exercises of the sovereign power over individual property" for some exchange of compensation or benefit.[132] However, it

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126 *Id.* at 602.

127 *Id.*

128 Michael C. Miller, Note, *The New Per Se Takings Rule:* Koontz*'s Implicit Revolution of the Regulatory State*, 63 AM. UNIV. L. REV. 919, 940 (2014).

129 *Id.* at 616–17.

130 *Id.* at 617 ("For present purposes, it suffices to say that . . . we have had little trouble distinguishing between the two.").

131 It is unlikely to incentivize the property owner to inhabit the vacant property. A person can only occupy so many properties, and it is vacant presumably because of the owner's choice not to make this property his primary residence but keep it for investment or limited personal consumption (e.g., summer homes).

132 Eric Kades, *Drawing the Line Between Takings and Taxation: The Continuous Burdens Principle, and Its Broader Application*, 97 NW. U. L. REV. 189, 200 (2002) (quoting People v. Mayor of Brooklyn, 6 Barb. 209, 214 (N.Y. Gen. Term 1849)).

makes no sense to say that all taxes are takings. First, taxes result in a benefit to the taxpayer, even to those subject to higher tax rates. After all, "[t]axes are what we pay for civilized society."[133] This in-kind compensation—namely, the existence of functioning society, with law, order, and economic stability—inures a greater benefit to those with greater wealth and consumption.[134] Generally, "as long as [a tax] is based on equitable and reasonable principles, [it] is not construed as a violation of the right to property, but rather as a profit-sharing mechanism used to distribute wealth created through the joint project between an individual and the community."[135] Second, practically speaking, if every tax were a taking requiring just compensation, that would necessarily mean refunding all taxes to taxpayers. Taken to its natural conclusion, this principle would deprive the government of all revenues; indeed, it would prevent the government from taxing at all.[136] The Takings Clause clearly cannot require that absurd result.

Thus, despite the similarities between taxes and takings, courts treat them very differently, tending to "scrutinize" regulations challenged as takings while giving "deferential constitutional review of tax provisions."[137] The judiciary may be "poorly equipped to consider when a particular tax crosse[s] the line between a 'legitimate use' and an 'abuse of power.'"[138] Instead, ordinary political safeguards protect constituents from abusive taxes. Thus, the Court has consistently rejected claims challenging the constitutionality of excessive tax rates under the Takings and Due Process Clauses.[139] When faced with a tax, the Court typically applies rational basis review.[140] As such, the Court has upheld highly unequal property taxes as long as the basis "is not wholly arbitrary,"[141] and refused to strike down narrowly targeted taxes

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133 Compania General de Tabacos de Filipinas v. Collector of Internal Revenue, 275 U.S. 87, 100 (1927) (Holmes, J., dissenting) (distinguishing between a tax and a penalty).

134 Reuven S. Avi-Yonah & Yoseph M. Edrey, *Constitutional Review of Federal Tax Legislation*, 2023 U. ILL. L. REV. 1, 36.

135 Yoseph Edrey, *Constitutional Review and Tax Law: An Analytical Framework*, 56 AM. U. L. REV. 1187, 1124 (2007).

136 Michael C. Dorf, *Distinguishing Taxes from Takings: A Belated Look at the* Koontz *Case*, DORF ON LAW (July 17, 2023), https://perma.cc/BA59-4AFG.

137 Eduardo Peñalver, *Regulatory Taxes*, 104 COLUM. L. REV. 2182, 2198 (2004).

138 *Id.* (citing McCulloch v. Maryland, 17 U.S. 316, 430 (1819)).

139 *Id.* at 2199.

140 *Id.*

141 *Id.* at 2201–02. The author discusses *Nordlinger v. Hahn*, 505 U.S. 1 (1992), where California's adoption of Proposition 13 resulted in enormously different property taxes for similarly valued parcels of property based on whether people purchased the property before the statute went into effect. The Court noted that "[s]tates have large leeway in

known as special assessments as long as the assessment funds a project that is likely to confer some benefit to the affected property holder.[142] Thus, the Supreme Court has "repeatedly rejected the argument that a tax—even a tax on a small set of businesses—may . . . constitute a taking simply because it may force some of the regulated entities out of business."[143]

Taxes with regulatory purposes are also presumptively constitutional. The Court has held that "a tax does not cease to be valid merely because it regulates, or even definitively deters the activities taxed."[144] This is true even if "the revenue obtained is obviously negligible . . . or the revenue purpose of the tax [is] secondary."[145] For example, in *United States v. Sanchez*,[146] the Court upheld the provision of the Marihuana Tax Act[147] that imposed a special tax on marijuana dealers, despite the petitioners' claims that the section imposed a "prohibitive burden."[148] Moreover, the Court recognized that the power to tax may even reach beyond a legislature's regulatory purview.[149]

That does not mean that a tax can never be a taking. The extreme example of an income tax of 100% imposed on a single individual would likely violate the Takings Clause.[150] Nineteenth-century cases noted that the foundational bases for taxes and takings are the same and sought to "ensure that those paying taxes and assessments received some form of compensation."[151] The understanding, at least in 1889, was that

> [i]t would be unreasonable to say that the authors of the [Takings Clause] intended to forbid the taking under one right without just compensation, and intended to allow such

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making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Nordlinger*, 505 U.S. at 11.

142 Peñalver, *supra* note 137, at 2202–03.

143 Unity Real Est. Co. v. Hudson, 178 F.3d 649, 674–75 (3d Cir. 1999).

144 United States v. Sanchez, 340 U.S. 42, 44 (1950) (citing Sonzinsky v. United States, 300 U.S. 506, 513–14 (1937)).

145 *Id.*

146 340 U.S. 42 (1950).

147 Pub L. No. 75-238, 50 Stat. 551 (1937), *invalidated by* Leary v. United States, 395 U.S. 6 (1969).

148 *Sanchez*, 340 U.S. at 43–44.

149 *Id.* at 44–45 (citing A. Magnano Co. v. Hamilton, 292 U.S. 40, 47 (1934)) ("[C]ourts have sustained taxes although imposed with the collateral intent of effecting ulterior ends which, considered apart, were beyond the constitutional power of the lawmakers to realize by legislation directly addressed to their accomplishment.").

150 Kades, *supra* note 132, at 189.

151 *Id.* at 201.

> appropriation under another right; that they intentionally closed one gap, but intentionally left another down by which the same wrong, in effect, could be accomplished.[152]

A plurality of four Justices in *Eastern Enterprises v. Apfel*[153] held the Coal Industry Retiree Health Benefit Act of 1992[154] (the Coal Act) unconstitutional after applying a takings analysis.[155] The Coal Act required a company that had once been in the coal industry but had since exited to retroactively pay benefits due to retired coal miners.[156] The Petitioners claimed that the Coal Act "impose[d] an involuntary tax or premium obligation upon conduct completed thirty to fifty years ago."[157] Justice Sandra Day O'Connor's plurality opinion applied the *Penn Central* factors to the regulation.[158] On the first factor, economic impact, the plurality injected a *Dolan*-like notion of proportionality into the analysis and held that the liability was disproportional because the company had exited the industry.[159] The analysis of the other two factors focused on the retroactivity of the tax.[160] The "severely retroactive burden" meant that it "substantially interfere[d] with Eastern's reasonable investment-backed expectations."[161] And because the Coal Act "singles out certain employers to bear a burden," the character of the governmental action was one that "implicate[d] fundamental principles of fairness underlying the Takings Clause."[162]

In the wake of *Eastern Enterprises*, scholars have posited several theoretical dividing lines between taxes and takings. First is a potential distinction between taxation's general liabilities and taking's deprivation of specific assets.[163] This form-over-substance

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[152] *Id.* (citing People v. Daniels, 22 P. 159, 163 (Utah 1889)).

[153] 524 U.S. 498 (1998).

[154] 26 U.S.C. §§ 9701–9722 (1992), *invalidated by E. Enters.*, 524 U.S. 498 (amended 2006).

[155] While five Justices held the Coal Act unconstitutional, Justice Anthony Kennedy wrote separately to "disagree with the plurality's Takings Clause analysis." *E. Enters.*, 524 U.S. at 539.

[156] Strauss, *supra* note 47, at 694.

[157] Brief for Petitioner at 38, E. Enters. v. Apfel, 524 U.S. 498 (1998) (No. 97-42).

[158] Strauss, *supra* note 47, at 708; *see also E. Enters.*, 524 U.S. at 530.

[159] Strauss, *supra* note 47, at 707; *see also E. Enters.*, 524 U.S. at 529.

[160] *See* Strauss, *supra* note 47, at 709–10.

[161] *E. Enters.*, 524 U.S. at 532, 536.

[162] *Id.* at 537.

[163] Kades, *supra* note 132, at 193. While earlier takings cases posited that a takings claim was only applicable to real property, this distinction has since eroded with *Horne* and *Koontz*.

rule helps to limit using the Takings Clause to launch challenges to any government program that reallocates some benefits and costs.[164] However, this formal distinction "may on occasion fail to keep taxation and confiscation clearly apart" when "[t]axes [are] set so high that the taxpayer is forced to dispose of specific property . . . in order to satisfy his tax obligation."[165]

A second view distinguishes taxes and takings based on the relative size of the group impacted.[166] Taxes are usually broadly applicable, while the traditional notion of takings in the eminent domain context singles out specific property for discrete purposes. This is similar to Chief Justice John Marshall's view that the difference is rooted in "the ability of people affected by taxes to organize and protect their interests," while it is unlikely for the small numbers of citizens who face a "once in a lifetime" takings burden to mount an effective challenge in the political arena.[167] Justice Antonin Scalia also suggested that the primary purpose of just compensation for such concentrated regulatory burdens is "to force the political process to consider more carefully the aggregate costs created by its regulatory actions."[168] But this is also an imperfect explanation, as the "Court has approved steeply progressive taxes that were intentionally aimed at *very small segments* of the population," including income taxes that applied to fewer than 0.1% of households.[169]

Professor Eric Kades proposed a different rule, the Continuous Burden Principle (CBP), where a tax must not impose burdens with large discontinuities between one taxpayer and another.[170] The CBP seeks to differentiate most taxes from takings, but identify some extreme taxes as takings.[171] Ultimately, Kades suggested looking at the marginal burden imposed on any given group.[172] For instance, even in a progressive taxation scheme, there is a minimal difference in tax burden from one taxpayer to

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164 *Id.* at 196.

165 Walter J. Blum & Harry Kalven, Jr., *The Anatomy of Justice in Taxation*, 7 U. CHI. L. OCCASIONAL PAPER 5 (1973).

166 Kades, *supra* note 132, at 198.

167 Peñalver, *supra* note 137, at 2221 (citing Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285, 306–07 (1990)); *see also id.* at 2198.

168 *Id.* at 2220 (citing Pennell v. City of San Jose, 485 U.S. 1, 21–22 (1988) (Scalia, J., concurring in part and dissenting in part)).

169 *Id.* at 2226 (emphasis in original).

170 Kades, *supra* note 132, at 223.

171 *Id.* at 224.

172 *Id.*

the next.[173] On the other end of the spectrum, a taking of a single piece of property, there is a discontinuity in burden from that property owner to the next-least-burdened property owner. While this rule has intuitive appeal, Kades has recognized that it does not reflect the Court's takings jurisprudence: it suggests that the regulation in *Penn Central* should have been a taking while the regulation in *Lucas* should not have been.[174]

In sum, the doctrine does not disclose a clear consensus on the dividing line between taxes and takings. Yet each theory canvassed above broadly captures two notions: first, that unfair, targeted burdens may tip the analysis onto the takings side of the spectrum; and second, that courts may need to take a countermajoritarian approach to determine when taxes can be fairly said to be takings. Finally, while *Koontz* was decided in the exactions context, it appeared to lay out an additional guiding principle, namely the importance of the direct link to a specific parcel of property.[175]

II. VACANCY TAXES

Having mapped out the evolution of takings doctrine, this Part describes the vacancy taxes to which that doctrine may be applied. Part II.A describes common elements of vacancy taxes, such as how vacancy is defined, exemptions to the tax, and how the tax is levied. It spotlights the features of San Francisco's Empty Homes Tax Ordinance[176] (EHTO), comparing it to other vacancy taxes to illustrate its expansive view of vacancy. Part II.B then maps out the legal challenge San Francisco currently faces over its vacancy tax and the core legal arguments in the complaint.

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173 *See, e.g.*, *id.* at 230 (depicting a graph of this scenario).

174 *Id.* at 248–49. Kades noted that the Landmarks Law in *Penn Central* only affected 0.04% of landowners in New York City, implying a major discontinuity. The CBP is inconsistent with *Lucas* for the opposite reason: it is possible to conceive of regulations that may eliminate 100% of the value of one property, 99% of the value of the next, and so forth, such that there are no major discontinuities.

175 This could prove important given that the Supreme Court decided in *Sheetz v. County of El Dorado*, 144 S. Ct. 893 (2024), that legislative "exactions" may also effect a taking, bringing the line of cases dealing with discretionary, administrative exactions into play for legislation that looks like regulation of property use. *Id.* at 902.

176 S.F., CAL., BUS. & TAX REGULS. CODE, art. 29A, §§ 2951–2963 (2024).

A. Overview of Vacancy Taxes

Vacancy taxes come in different flavors but share five features in common. First, they define a period of time that constitutes "vacancy."[177] For example, in Oakland, California, a property is considered vacant if it is "in use less than fifty (50) days in a calendar year."[178] San Francisco, on the other hand, defines "vacancy" more broadly in the EHTO, sweeping in properties occupied 182 days or less in a tax year.[179]

Second, a vacancy tax specifies a tax rate for each type of property. Common property types include undeveloped parcels, residential single-family homes, and residential multifamily buildings. Oakland's vacancy tax applies broadly to all property types but specifies different rates per unit or parcel for each type.[180] The EHTO only targets buildings with more than two units under the theory that "such buildings are more likely to include one or more units held vacant by choice and are more likely to include multiple vacancies."[181] The tax applies to owners of "Residential Units" in those multiunit buildings.[182] This means that owners of single-family homes and even duplexes will not be liable under the EHTO if those properties are left vacant.[183] However, someone who owns a single micro-condominium unit in a

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177 Washington, D.C.'s vacancy tax is the odd one out in this case, with a multifactor test for determining when a building is vacant, rather than a hard rule based on the number of days of nonuse. A "'[v]acant building' means real property improved by a building which . . . has not been occupied continuously; provided, that in the case of residential buildings . . . the Mayor determines that there is no resident for which an intent to return and occupy the building can be shown." WASHINGTON, D.C., CODE § 42-3131.05(5) (2024). The Code then lists eight factors the Mayor can consider, such as accumulated mail, neighbor complaints, utility meters showing low or no usage, or deferred maintenance. *Id.*

178 *Vacant Property Tax (VPT)*, CITY OF OAKLAND, https://perma.cc/9E5R-XM9N.

179 Specifically, the tax targets properties vacant for more than 182 days in a tax year, consecutive or nonconsecutive. S.F., CAL., BUS. & TAX REGULS. CODE, art. 29A, § 2953(j) (2024). San Francisco's Empty Homes Ordinance has additional provisions that are not typical of vacancy taxes. It potentially classifies as "vacant" a unit that is leased to the owner's sibling, parent, or child under a "bona fide lease intended for occupancy." *See id.* § 2952 (defining "Vacancy Exclusion Period," "Lease Period," "Owner's Group," and "Related Person"). While this may prevent landlords of vacant multiunit properties from nominally listing every family member as a tenant to circumvent the tax, it also sweeps in properties put to productive use by family members.

180 *Vacant Property Tax (VPT)*, *supra* note 178.

181 S.F., CAL., BUS. & TAX REGULS. CODE, art. 29A, § 2951(c) (2024).

182 *Id.* § 2953 ("[T]he City imposes an annual Empty Homes Tax on each person that owns a Residential Unit for keeping that Residential Unit Vacant.").

183 *Id.* § 2955(d) ("A person that owns any Residential Unit located in a building with two or fewer Residential Units shall be exempt from the Empty Homes Tax with respect to any Residential Unit located in that building.").

building with more than two units would be liable for the tax should they occupy the unit for fewer than 182 days each year. Moreover, applicable tax rates can change over time.[184] San Francisco's tax, for example, would charge just $2,500 for a small unit of less than 1,000 square feet in 2024.[185] But that same unit, if left vacant through 2026, would face a quadrupled charge of $10,000.[186] The city could charge owners of units over 2,000 square feet $20,000 annually if the units are left vacant from 2024 to 2026.[187] So, the owner of a single vacant triplex could face a tax of $60,000 per year. For comparison, the average property tax on a home in San Francisco is roughly $7,000.[188]

Third, a vacancy tax ordinance lists exemptions to such tax liability. These exemptions may apply to the owner or the property. Oakland provides exemptions for owners who are "very low income" or face "demonstrable hardship unrelated to personal finances," or buildings that are under "active construction" or subject to a pending "building permit application."[189] San Francisco also has exemptions for "time to fill vacant units before the tax applies . . . , including repair of an existing unit, new construction, a natural disaster or death of the owner."[190] However, unlike Oakland, San Francisco does not specify any exemptions for hardship or income.[191]

Fourth, the tax ordinance often specifies what the city can do with collected revenues. San Francisco will create a Housing Activation Fund that provides rent subsidies for the elderly and low-income households, and funds the acquisition, rehabilitation, and operation of unoccupied buildings for affordable housing.[192]

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184 In addition to increased taxes based on length of the vacancy discussed below, the Empty Homes Tax is also scheduled to scale with inflation. *Id.* § 2953(h) (stating that rates are to be "adjusted annually in accordance with the increase in the Consumer Price Index: All Urban Consumers for the San Francisco/Oakland/San Jose Area for All Items as reported by the United States Bureau of Labor Statistics, or any successor to that index, as of December 31st of the preceding year, beginning with the 2025 tax year").

185 *Id.* § 2953(b)(1).

186 S.F., CAL., BUS. & TAX REGULS. CODE, art. 29A, § 2953(g)(1) (2024).

187 *Id.* § 2953(g)(1).

188 Khristopher J. Brooks, *Here's Where Homeowners Pay the Most—and Least—In Property Taxes*, CBS NEWS (Apr. 6, 2023), https://perma.cc/A668-E9AB.

189 *Vacant Property Tax (VPT)*, *supra* note 178.

190 *Proposition M*, *supra* note 2.

191 *See* S.F., CAL., BUS. & TAX REGULS. CODE, art. 29A, § 2955 (2024).

192 *Proposition M*, *supra* note 2.

Finally, the taxing jurisdiction sets out how it will administer the tax. Cities rely on varying methods to identify which properties are vacant. San Francisco requires each person covered by the EHTO to file a return, creating a rebuttable presumption that the Residential Unit is vacant for any owners who fail to file.[193] In contrast, Oakland appears to proactively identify vacant properties based on available data and mail notices to those properties.[194] Property owners that receive those mailings may petition and provide evidence to show that the property was not vacant.[195]

B. Legal Challenges to Vacancy Taxes

In early 2023, a group of San Francisco property owners sued the City and County in California state court, arguing that the vacancy tax is an "illegal special tax" whose implementation is barred by both the Takings Clause and other state law provisions.[196] The complaint emphasized the main objective of the tax as reducing the number of residential vacancies.[197] It claimed that the tax, despite its name, is "in fact, a penalty with a predominantly regulatory purpose . . . [to] compel[ ] property-owners to rent out their real property."[198] The complaint attempted to frame this tax in terms of a physical taking, invoking *Cedar Point* to call the tax "a government-compelled invasion of the right to exclude strangers from one's property."[199] It stated that "imposing substantial monetary penalties, rather than [ ] direct fiat makes no difference" to the constitutionality of the ordinance.[200] Tellingly, the complaint repeatedly used the language that the ordinance

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193 S.F., CAL., BUS. & TAX REGULS. CODE, art. 29A, § 2954 (2024). For San Francisco's *commercial* vacancy tax, there is also an option to report a vacant commercial property. *Commercial Vacancy Tax (CVT)*, OFF. OF THE TREASURER & TAX COLLECTOR, CITY AND CNTY. OF S.F., https://perma.cc/6JPS-SM6Y.

194 OAKLAND, CAL., MUN. CODE § 4.56.100 (2024).

195 *Id.*

196 Natalie Hanson, *Property Owners Sue San Francisco over Voter-Backed Vacancy Tax*, COURTHOUSE NEWS SERV. (Feb. 10, 2023), https://perma.cc/P8T5-EMVW.

197 Complaint at 13–14, Debbane v. City and County of San Francisco, No. CGC-23-604600 (Cal. Super. Ct. Feb. 9, 2023).

198 *Id.* at 14.

199 *Id.* at 4 n.2.

200 *Id.* at 16. The complaint cites *Levin v. City and County of San Francisco*, 71 F. Supp. 3d 1072 (N.D. Cal. 2014), for this proposition. However, that case involved a San Francisco ordinance requiring landlords of rent-controlled properties to pay lump-sum relocation expenses to tenants when they apply to withdraw from the rental market, approximately equal to two years of the difference between the tenant's current rent-controlled rate and the market rate for a comparable unit. *Id.* at 1075–77. But this was a monetary exaction the court subjected to the *Nollan*/*Dolan* framework. *Id.* at 1083–84.

"seeks to compel."[201] Even when viewed as a tax, the complaint alleged that the EHTO would impermissibly "impose a charge for the enjoyment of a right granted by the federal constitution."[202] As of early June 2024, the lawsuit is ongoing, with a hearing for summary judgment set for August 2024.[203] Trial has been set for December 2024.[204] While this is the only vacancy tax–related lawsuit ongoing, as more municipalities seek to implement vacancy taxes—especially ones as harsh as San Francisco's—additional legal challenges are likely to arise.

Stiff vacancy taxes incentivize well-resourced property owners to challenge the measure in court if they fail at the polling booth. The takings doctrine is sufficiently murky to convince property owners that a well-pleaded and persuasive takings challenge could succeed against vacancy taxes. Accordingly, when the choice comes down to actively managing vacant properties to make sure they are sufficiently occupied, paying a hefty tax, or doing away with the tax altogether, property owners may be led to believe that their best option is to make the argument that vacancy taxes are takings and see where the chips fall. In cities struggling with limited affordable housing solutions, whether this constitutional challenge will succeed is an important consideration for city officials deciding whether to pursue this option or expend political capital elsewhere.

III. A VACANCY TAX LIKELY DOES NOT EFFECT A TAKING

This Part attempts to resolve the question of whether vacancy taxes are takings under the various frameworks described in Part I.[205] San Francisco's Empty Homes Tax Ordinance illustrates the application for those frameworks because, to date, it is

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[201] Complaint at 17, Debbane v. City and County of San Francisco, No. CGC-23-604600 (Cal. Super. Ct. Feb. 9, 2023).

[202] *Id.* at 15 (citing Murdock v. Pennsylvania, 319 U.S. 105, 113 (1943)). However, *Murdock* also noted that while, for example, a state cannot impose a tax "for the privilege of carrying on interstate commerce . . . [,] it may tax the property used in, or the income derived from, that commerce." 319 U.S. at 113.

[203] Plaintiff's Notice of Motion & Motion for Summary Judgment or Summary Adjudication; Points & Authorities in Support Thereof, Debbane v. City and County of San Francisco, No. CGC-23-604600 (Cal. Super. Ct. May 23, 2024).

[204] Notice of Time and Place of Trial and Trial Related Orders, Debbane v. City and County of San Francisco, No. CGC-23-604600 (Cal. Super. Ct. Jan. 17, 2024).

[205] There is one caveat: this Part will not analyze vacancy taxes under the exactions framework because there are no land use permits or conditions involved in a vacancy tax scheme.

the most stringent vacancy tax in the United States.[206] Thus, if a takings challenge to San Francisco's tax succeeds, it would open the doors to other similar challenges across the country; if such a challenge fails, this might settle the issue, or at least discourage the adoption of taxes like San Francisco's.

Because the applicability of a particular takings framework can be outcome determinative, fitting the vacancy tax into a particular framework is key to this analysis. Unlike past challenges to taxes under the Takings Clause, the challenge against the EHTO frames the taking in terms of the property rights associated with the underlying vacant property, not merely the money collected through the tax. Because vacancy taxes primarily serve to regulate the use of property, property owners could raise plausible arguments that the EHTO is a taking under several of the frameworks introduced in Part I.[207] This Part addresses those frameworks in turn.

Part III.A argues that the EHTO may be considered a regulation, and therefore analyzed under *Penn Central*, and applies the *Penn Central* analysis to the EHTO. Part III.B explores the unlikely, but not inconceivable, argument that the vacancy tax compels property owners to grant access to the property. Under this argument, the EHTO would fall within the per se physical taking framework developed in *Cedar Point*. Finally, Part III.C asserts that, because background restrictions on property can foreclose determinations of both regulatory and physical takings, an originalist analysis can decisively tip vacancy taxes such as the EHTO away from a takings determination. Early acceptance of land-use regulations that address unproductive use and nonuse of property suggests that these types of regulations may be part of such background restrictions.

A. Regulatory Taking Analysis Under *Penn Central*

Vacancy taxes can be assessed as regulatory takings. Calling a vacancy tax a "tax" does not deprive it of its regulatory character. After all, taxation has a goal beyond raising revenue or

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[206] Irina Ivanova, *San Francisco Could Get 90% of Its Homeless off the Streets with the Country's Fiercest Housing Speculation Tax, but Landlords Are Already Fighting It Tooth and Nail*, FORTUNE (Oct. 21, 2023), https://perma.cc/8EKC-CNYQ.

[207] Because payment of the tax is not a condition for granting of a government permit or development of the property, the EHTO likely cannot be analyzed as an exaction under *Koontz* and *Nollan*/*Dolan*.

redistribution: "a regulatory goal."[208] "Every tax is in some measure regulatory. To some extent, it interposes an economic impediment to the activity taxed, as compared with others not taxed."[209] For example, a Pigouvian tax is one implemented to deter certain activities by forcing actors to internalize the social harm. A common example of Pigouvian taxation is in the pollution context, where a manufacturer could be taxed per unit of pollution, to ensure that it only pollutes "if the value of the pollution-generating activities exceeds the harm, such that the social value of those activities is positive."[210] Some economists even think that such taxes are superior to command-and-control regulations.[211] Moreover, the Court has itself stated that the "essential question is not . . . whether the government action at issue comes garbed as a regulation. . . . It 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."[212] Thus, despite the formal designation as a tax, if a vacancy tax has a clear regulatory purpose, it is valuable to assess whether it substantively restricts a property owner's ability to use his property, putting it squarely within the domain of *Penn Central* analysis. An assessment of any vacancy tax should therefore focus on substance over form and whether it severely restricts a property owner's ability to use his property. These factors all point to the conclusion that a tax that restricts a property owner's ability to use his property is like any other government action or regulation that can be assessed under the *Penn Central* regulatory taking framework.

The *Penn Central* test is the proper starting point for a vacancy tax challenged as a regulatory taking, given the vacancy tax's close relationship to specific property interests and its predominantly regulatory purpose. This regulatory purpose, directed at limiting the right to exclude from a specific property, is what separates this tax from property taxes more broadly. When a plaintiff claims a regulation effects a taking, the *Penn Central*

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208 Reuven S. Avi-Yonah, *Taxation as Regulation: Carbon Tax, Health Care Tax, Bank Tax and Other Regulatory Taxes*, 1 ACCT., ECON. & L., no. 1, 2011, at 4.

209 Sonzinsky v. United States, 300 U.S. 506, 513 (1937).

210 Jonathan S. Masur & Eric. A. Posner, *Toward a Pigouvian State*, 164 U. PA. L. REV. 93, 95 (2015). Pigouvian taxes have been suggested in the gasoline tax context as well. However, as the authors noted, despite the theoretical appeal of the Pigouvian tax, there has been no federal agency adoption of such a tax.

211 *Id.* at 95; *see also* Avi-Yonah, *supra* note 208, at 4–5.

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

balancing test does not ask the court to first decide whether the regulation is of some type that typically implicates the Takings Clause before it is applied. Rather, it is exactly by applying the test that the court determines whether a given regulation is a taking.[213] This method of identifying a taking is circular to some degree, but it satisfies our intuitions for why a 100% tax on an individual would be a taking: it is wholly arbitrary and wipes out economic value. We can also derive the same per se tests for taxes when they are challenged as takings, such that we get a result consistent with *Lucas* if the tax is assessed at 100% of the individual's income. This reconciles the classical view from the nineteenth-century cases, the plurality view in *Eastern Enterprises*, and the theoretical work of scholars. While *Penn Central*'s balancing test is sometimes fact-intensive, it should be straightforward to determine whether most taxes—like most regulations—are takings. The economic impact of most taxes, after all, is generally spread out and merely incremental as applied to any individual, and such measures are generally (if often begrudgingly) baked into taxpayers' expectations. Only wholly novel tax structures that impose especially onerous burdens on small subsets of taxpayers, as opposed to incremental ones in type or degree, would likely face real scrutiny and present close questions under the balancing test.[214]

The question thus becomes whether vacancy taxes like the EHTO qualify as takings under *Penn Central*'s three-prong test. They do not. The first prong, economic impact, would be assessed by looking at the size or proportionality of the tax. The second prong, investment-backed expectations, would apply to whether there was sufficient notice or if the tax imposed "severe retroactive liability."[215] Further, this prong could look at whether the tax forecloses the viable exercise of any then-bargained-for property rights. Finally, the character of the action would look to

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[213] *See also* Quarty v. United States, 170 F.3d 961 (9th Cir. 1999) (applying the *Penn Central* factors to an estate tax and finding the tax was not a taking). While Kades wrote that "if Breyer really believe[d] that the Takings Clause did not apply to the facts of *Eastern Enterprises*, he should have chided O'Connor for invoking [the *Penn Central*] Takings test," courts need not decide at the outset whether the Takings Clause could apply to the facts. Kades, *supra* note 132, at 194.

[214] *See, e.g.*, John R. Suggs, Note, *What's In a Name?: Takings, Taxation, & Categorizing the Wealth Tax*, 41 REV. BANKING & FIN. L. 720, 754 (2022) (discussing wealth taxes from a taxes and takings lens).

[215] *See, e.g.*, *Quarty*, 170 F.3d at 969–70.

singling out or arbitrariness. Part III.B, below, considers each of these prongs in turn.

We look first to the economic impact of the EHTO, which could be quite significant. For instance, a larger three-unit building, if left vacant for three consecutive years, could incur a tax of $60,000 per year by 2026—more than eight times the average property tax on a home in San Francisco.[216] If the owner plans to leave the unit vacant indefinitely, he would be subject to ongoing elevated annual taxes, which could represent a significant loss, though the tax burden is unlikely to surpass the value of the property.[217] But the impact on the property's fair market price would likely be minimal. Because the tax is only imposed on the owner for keeping the unit vacant, this tax would not be passed on to a buyer who intends to occupy the unit. Thus, unless potential buyers *know* the seller is desperate to sell a property to avoid a tax, the seller may be able to get fair market value for the property, which is what courts have traditionally considered when determining whether a regulation diminishes the value of a property.[218] Thus, this prong would likely not lean in favor of a taking. That said, it is possible that some variation on the vacancy tax that does surpass the value of the property, whether by expanding the definition of "vacant," or sharply increasing the tax rate, could tilt this prong in favor of a taking, because it takes away more of the economic value of the property from the owner.

The second prong, interference with investment-backed expectations, also militates against finding a taking here. Property owners cannot establish a taking "simply by showing that they have been denied the ability to exploit a property interest that

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[216] *See* Brooks, *supra* note 188.

[217] Assuming thirty years of vacancy (the duration of the Empty Homes Tax Ordinance), an annual payment of $60,000, 3% inflation, and a discount rate of 10%, the value in today's dollars is more than $700,000. While significant, it is unlikely that a triplex in San Francisco is selling for less than that. *See, e.g.*, *Time to Buy San Francisco Multifamily?*, CAP. BRIDGE PARTNERS (Nov. 19, 2023), https://perma.cc/3DPN-RUBF (listing average per unit prices). But note that it would be silly to allow such a speculative calculation by the owner—they cannot predict what they will do the property in a few years.

[218] *See Penn Cent.*, 438 U.S. at 131 (discussing an instance when even diminution of a property's value by 75% did not establish a taking). In the aggregate, a selling frenzy could depress market prices regardless of buyer knowledge. But the impact will likely not be as drastic as a 75% cut in prices. *See* Xiaodi Li, *Do New Housing Units in Your Backyard Raise Your Rents?*, 22 J. ECON. GEOGRAPHY 1309, 1330 (2021) ("For every 10% increase in condo stocks, condo sales prices decrease by 0.9%."). And while demand may be weakened from buyers who do not intend to occupy the unit more than 183 days each year, it is unclear how much of an effect that will have on the market value of such properties.

they heretofore had believed was available for development."[219] The tax is not applied retroactively. Property owners have plenty of notice and even the opportunity to change their use of the property to avoid the tax.[220] Moreover, property owners should recognize that the government has broad taxing power related to the use of property, particularly in the context of primary residences.[221] A vacancy tax seems functionally equivalent to the inverse of a primary residence tax exemption, strengthening the notice argument. This may be fatal to the takings claim because it seems more in line with expectations, instead of interfering with them. In California, for instance, the state constitution provides for a reduction in the taxable value of a qualifying owner-occupied home that is the principal place of residence.[222] This necessarily implies that any additional residences, including those left empty, are taxed at a higher effective rate. Thus, like the tax exemption, the vacancy tax operates to minimize tax burdens from owner-occupied property but increase taxes for nonoccupancy. It should be no surprise that the government might extend that to personal taxes related to the use of property. To be persuasive on this prong, plaintiffs would need to argue that the vacancy tax is as extreme in duration and extent as the eviction moratorium in *Heights Apartments*. Thus, this characterization may be most persuasive in courts that adopt the Eighth Circuit's reasoning.

The third prong of this test, the character of the governmental action, could be the strongest argument in favor of characterizing a vacancy tax as a taking. San Francisco's vacancy tax is estimated to affect some forty thousand vacant properties,[223] but it is unclear if this is concentrated in a few large landlords or spread over hundreds or thousands of property owners. The smaller the impacted group, the more likely this is a taking, per *Heights Apartments*.[224] Notwithstanding the questionable wisdom

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219 Steven J. Eagle, *The Rise and Rise of "Investment-Backed Expectations"*, 32 URB. LAW. 437, 440 (2000) (citing *Penn Cent.*, 438 U.S. at 130).

220 It may be unrealistic to expect certain owners to change how they use the property, such as turning a vacation home to a primary residence. But the owners are given a reasonable opportunity to determine how to make this tax fit with their plans.

221 For example, the California Constitution provides a $7,000 reduction in the taxable value for a qualifying owner-occupied home. CAL. CONST. art. XIII, § 3(k); *see also Homeowner's Exemption*, CAL. STATE BD. EQUALIZATION, https://perma.cc/W2AB-DTHJ.

222 CAL. CONST. art. XIII, § 3(k).

223 *Proposition M*, *supra* note 2.

224 *See* 30 F.4th at 734.

or effectiveness of such a tax, it at least has a plausible public policy rationale. Nor is its scope wholly arbitrary. The EHTO's section concerning findings and purpose clearly states that the tax is "limited to buildings with more than two residential units because such buildings are more likely to include one or more units held vacant by choice and are more likely to include multiple vacancies."[225] Furthermore, the EHTO, like the Landmarks Law in *Penn Central*, "improv[es] the quality of life in the city as a whole"[226] when tax proceeds are used to mitigate homelessness. Homeless individuals benefit directly while property owners benefit from increased city services and fewer encampments in their neighborhoods.

B. Physical Taking Analysis Post-*Cedar Point*

Despite their likely failure to cast the EHTO as a regulatory taking, opponents of the tax can take another approach. Following *Cedar Point*, credibly framing the vacancy tax as a grant of access would enable a successful *physical* takings claim. A vacant property is generally one that is closed to the public. One might argue that, in a sense, the vacancy tax forces a grant of access by requiring property owners who did not want to be landlords to nonetheless open up their properties to tenants by threatening their wallets. This hefty tax could be seen as putting a price tag on and eroding their right to exclude. But how should we think about what constitutes a grant of access?

In *Cedar Point*, the grant of access was direct: the regulation explicitly provided for "the right of access by union organizers to the premises of an agricultural employer."[227] Vacancy taxes involve no such direct grant. Had a vacancy tax been framed as a regulation granting access, it almost certainly would have constituted a per se taking. For example, a vacancy regulation could mandate that any property left vacant for more than six months in the previous year be rented out at market rate. This would have been a total appropriation of at least the right to use and exclude, and necessarily grant access to a renter, rendering it a physical taking per *Cedar Point*. Alternatively, such a regulation

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[225] S.F., CAL., BUS. & TAX REGULS. CODE, art. 29A, § 2951(c) (2024).

[226] 438 U.S. at 134.

[227] *Cedar Point*, 141 S. Ct. at 2069 (citing CAL. CODE REGS. tit. 8, § 20900(e) (2020)).

would fail the "voluntariness" test in *Yee*.[228] The fact that the property owner would have earned money in the form of rent from complying with the regulation is no bar to a takings claim; this would instead feature in the just compensation prong of the analysis. "Whether compensation is adequate is an inquiry separate from whether there had been a taking."[229] Yet under the EHTO as written, the property owner is given a choice: (1) pay the tax, (2) occupy the unit, (3) rent out the unit, or (4) sell the unit. Only the last two options can be fairly said to ring the alarm bells that there might be a taking, hence why the complaint challenging the EHTO is only able to argue that the tax "seeks" to compel renting out the units.[230]

A few additional factors complicate the analysis, however. Do the first two options need to be real choices? The EHTO has no general hardship or low-income exception. As such, there may be scenarios in which the first option is eliminated because a property owner simply cannot afford to pay the tax. Hardship may be rare, as owners who can keep a property vacant likely have multiple properties for their own enjoyment or investment. But because the tax is targeted at the type of building where the unit is located, as opposed to the number of vacant units belonging to any owner or group of owners, the EHTO could easily sweep in owners of a single unit that spend most of their time elsewhere. But even if the vacancy tax rate were so high as to exceed the value of the property, would this result in a finding of compelling physical occupation? Rather than focusing on the coerciveness of the tax in the physical taking analysis, this could be more properly analyzed under the *Penn Central* test, under either the economic impact of the regulation or the interference with investment-backed expectations.

The second option—to occupy the unit—may similarly be unavailable for certain property owners, albeit in limited circumstances. This option is perhaps not realistic for a small group of owners who have business or family obligations in other states for more than half of the year.[231] The second class this would affect is the class of owners who own multiple units subject to the vacancy tax. The imposition of this choice would seem to implicate the

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[228] 503 U.S. at 531.

[229] Hall v. City of Santa Barbara, 833 F.2d 1270, 1278 (9th Cir. 1986).

[230] Complaint at 17, Debbane v. City and County of San Francisco, No. CGC-23-604600 (Cal. Super. Ct. Feb. 9, 2023).

[231] *See* S.F., CAL., BUS. & TAX REGULS. CODE, art. 29A, § 2951 (2024).

right to use—or in this case, the right *not* to use. But the right to use is one of the less protected property rights, as discussed in greater detail in Section III.C below, compared to the right to exclude, which is "one of the most treasured" in the bundle of property rights.[232]

To succeed, the plaintiffs in the San Francisco lawsuit would need to draw on the language in *Loretto*, *Horne*, and *Cedar Point* suggesting that voluntariness and ability to opt out of the statutory scheme are not key to whether the scheme effects a taking.[233] The Hornes could have escaped the regulations by exiting the market; Loretto could have escaped the cable requirement by ceasing to be a landlord.[234] None of that mattered because the regulation forced the property owners to relinquish key sticks in their bundles of property rights.[235] The plaintiffs in the San Francisco lawsuit would need to convince the court not only that the ordinance holds ransom the right to exclude, but also that the ransom is so high that it forces the owners to relinquish that right. If that argument holds water, then the ability to opt out by occupying the unit may not matter.

In sum, because it is so difficult to think of any instance in which the vacancy tax would compel a specific kind of use or grant access to third parties, there is no way to shoehorn it cleanly into a *Cedar Point* analysis. Perhaps there would be an extreme scenario if a variation on the tax stated that if a property owner does not pay the tax, then the unit will be registered on some rental listing registry—this would fall under the per se physical taking category. But that seems quite unlikely. Accordingly, only in narrow circumstances might an owner be able to launch an as-applied challenge to this vacancy tax under *Cedar Point* as a per se taking.

C. Originalist Understandings of Takings as Qualifiers

Many originalist scholars and Justice Clarence Thomas question the legitimacy of the regulatory takings doctrine, placing the origins of the doctrine not in Founding-era understandings or practices, but in *Pennsylvania Coal*, an early twentieth-century

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232 *Loretto*, 458 U.S. at 435; *see also supra* Part II.A.

233 *Horne*, 576 U.S. at 365 (discussing *Loretto*); *Cedar Point*, 141 S. Ct. at 2072.

234 *Horne*, 576 U.S. at 365 (discussing *Loretto*).

235 *Id.*

case.[236] To these commentators, only direct, physical seizures of property fall under the original understanding of the Takings Clause.[237] If this interpretation is accepted, one could argue that, as a regulation, the EHTO would summarily not be a taking.

But this narrow interpretation is far from the only, or even a conclusive, understanding.[238] Professor Kris Kobach, for instance, traced the origins of regulatory takings to the 1810s, with "[s]tate courts interpreting the takings clauses of their constitutions . . . embrac[ing] what we might now describe as regulatory takings."[239] Federal courts interpreting the federal Constitution also arguably recognized regulatory takings shortly after the adoption of the Fourteenth Amendment, but retreated, meaning *Pennsylvania Coal* could be seen as a "return to the status quo ante."[240] Because the history is ambiguous, and the text of the Takings Clause can be read to include regulatory takings, even notable originalists such as the late Justice Scalia did not find sufficient reason to turn away from the precedents established so far.[241]

That does not mean that an originalist analysis cannot be applied even within the existing takings framework. The Court has certainly tried to in the takings context, as recently as 2023.[242] The originalist perspective is particularly important in a Takings Clause analysis because of the *Lucas* qualification that "regulations that prohibit all economically beneficial use of land" may not be a taking if they "inhere[ ] . . . in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."[243] The idea is that "if an owner never had a particular right in the first place, it cannot have been taken."[244] This language is echoed in *Cedar Point*, aiming to address the "fear" that the holding would "endanger a host of state

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[236] James S. Burling, *Is the Doctrine of Regulatory Takings Constitutional? A Review of the Academic Debate over Originalism and Takings*, 9 PROP. RTS. J. 105, 115–16, 118 (2020).

[237] *Id.* at 118.

[238] *See id.* at 124–43.

[239] *Id.* at 125 (citing Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 UTAH L. REV. 1211, 1213).

[240] *Id.* Legal advocate James Burling explained that the federal judiciary lagged behind the state courts in developing a robust takings doctrine because the Fifth Amendment was not incorporated against the states until after the Civil War.

[241] Burling, *supra* note 236, at 115.

[242] Tyler v. Hennepin County, 143 S. Ct. 1369, 1375–78 (2023) (relying on history to determine whether the surplus in excess of debt owed is included in the Takings Clause's definition of "property").

[243] *Lucas*, 505 U.S. at 1029.

[244] Fennell, *supra* note 73, at 20.

and federal government activities involving entry onto private property."[245] After all, "many government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights."[246] In *Cedar Point*, the Court did not expand on this concept because it found that "no traditional background principle of property law requires the growers to admit union organizers onto their premises."[247]

Given that the vacancy tax could also be thought of as a land use regulation encouraging active use of the property, it might also be helpful to analyze land use regulations from before and around the time of the Founding to understand if the Takings Clause is properly applied in this land use setting. Thus, even if the EHTO would otherwise seem like a taking—regulatory or physical—historical evidence supporting long-accepted use of fines for failing to make productive use of property at the Founding likely tips it outside a taking. Moreover, because a *Penn Central* takings analysis implicitly compares the governmental action at issue to some allowable baseline, when assessing whether a vacancy tax could ever be a taking, it would be helpful to understand what that baseline is.

For example, it is possible that a vacancy tax could be construed as a nuisance regulation, thus bypassing takings analysis altogether. Nuisance law was developed to allow local governments broad discretion in "maintaining sanitation and health standards and avoiding fire, health, and safety hazards" and "promot[ing] contemporary conceptions of morality."[248] These laws force property users to internalize some of the externalities of their use, such that the property user cannot freely benefit from its activities while dumping the resulting noise, sound, light, or waste from those activities onto the surrounding community. Courts are generally deferential to legislative broadening of the definition of nuisance. In some states, for example, nuisance is defined as "anything that works hurt, damage, or convenience to another."[249]

It might be tempting to argue that because vacant properties are not being used, there are no related externalities from use.

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[245] *Cedar Point*, 141 S. Ct. at 2078.

[246] *Id.* at 2079.

[247] *Id.* at 2080.

[248] Mary B. Spector, *Crossing the Threshold: Examining the Abatement of Public Nuisances Within the Home*, 31 CONN. L. REV. 547, 555 (1999).

[249] *Id.* at 559–60.

However, in some contexts, even nonuse can impose severe externalities on the community.[250] In the context of a housing shortage, the deliberate nonuse of housing—indeed, the active hoarding of housing—has the externality of severely restricting the housing supply, leading directly to many health and safety hazards associated with housing insecurity and homelessness. This directly impacts the unhoused and housing-insecure, who face greater negative health impacts, and the community, in terms of greater public resources expended to mitigate their struggles and clean up public property.[251]

Traditional background principles of property law likely would allow municipalities to impose affirmative obligations on land or real property, as well as tax noncompliance, so a vacancy tax is almost certainly not a taking. It was not rare for public authorities to impose "affirmative use requirements" that "over[rode] preferences of landowners who wanted to leave their land in its existing state or who preferred to make only minimal improvements."[252] These laws directly "conflict with the modern principle that landowners are entitled to cease using their property for reasons that seem sufficient to them, and may simply hold the property for future sale."[253] States would expressly condition grants of land on improvement. Failure to do so within a certain time period could result in forfeiture of the land.[254] Some states also imposed fines on urban landowners who failed to build houses within a certain time.[255] Comparable provisions applied even after the land had been improved, such that if landowners deserted their lands they would become forfeited and "available

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[250] *Cf.* Taisuke Sadayuki, Yuki Kanayama & Toshi H. Arimura, *The Externality of Vacant Houses: The Case of Toshima Municipality, Tokyo, Japan*, 50 REV. REG'L STUD. 260 (2020) (discussing negative externalities from vacancy from depopulation).

[251] *See, e.g.*, *Hundreds of Pounds of Human Waste, Needles Cleaned from Former Homeless Encampment at Echo Park*, CBS L.A. (May 6, 2021), https://perma.cc/ZQ9J-ZN3B; *Homeless & Health: What's the Connection?*, NAT'L HEALTH CARE HOMELESS COUNCIL (Feb. 2019), https://perma.cc/B5HP-YRBS.

[252] Hart, *supra* note 21, at 1259. Municipalities derived this broad regulatory authority from broad grants of authority in their charters, but there were often qualifications for state approval when a town wanted to physically take private land. *Id.* at 1284–85. An early version of the California Constitution similarly granted cities broad authority. CAL. CONST., art. XI, § 11 (1879). The original 1849 California Constitution did not mention what powers are granted to cities.

[253] Hart, *supra* note 21, at 1259–60.

[254] *See id.* at 1262 (discussing ordinances in New Netherland, New York, and Delaware in the late 1600s).

[255] *Id.* at 1277–78 (discussing a South Carolina statute from 1717 that applied fines retroactively as well as prospectively).

for reassignment to citizens who would put the land to active use."[256]

These ordinances and taxes were meant to address similar issues that we see today—for instance, spacious and large lots in desirable parts of urban centers that were not put to productive use, but instead were kept empty for profit. They also reveal that background principles of property law cover not just prohibitions or regulations of noxious property use, but also affirmative "obligation[s] to further important community objectives."[257] Of course, it is more difficult to paint with a broad brush what those community objectives were: some thought vegetation in towns was harmful; others thought lack of shade was harmful.[258] Similarly, different towns found excessive density versus insufficiently dense habitation harmful.[259] Even if units are occupied for 182 days out of the year, localities have broad power to determine whether that counts as productive use. Thus, it suffices to say that the colonies were familiar with—and in favor of—regulations on the nonuse of property that had an equivalent purpose to vacancy taxes.

At the same time, the colonies did not completely disregard the effect of government action on landowners. But compensation was generally provided when "substantial parcels of land were taken for public facilities" and "when government took temporary possession of private property, as in the compulsory lodging of troops."[260] Moreover, the interests of landowners were arguably better represented in legislative deliberations due to colonial voting and officeholding qualifications based on property ownership.[261] And property owners remain a powerful voting bloc today as well.[262]

Thus, from an originalist perspective, it is unlikely that a fine imposed to encourage productive use in lieu of vacancy is a taking. Finding a match to a colonial practice may be more important in vindicating the validity of the vacancy tax than any attempt to analyze it under a regulatory or a physical taking framework.

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256 *Id.* at 1262. Land would generally not be considered deserted for three years, a much longer time period than the vacancy taxes at issue. *Id.* at 1262 n.66.

257 Hart, *supra* note 21, at 1281.

258 *Id.* at 1282.

259 *Id.*

260 *Id.* at 1283.

261 *Id.* at 1284.

262 Alan Durning, *Know Thine NIMBY*, SIGHTLINE INST. (Feb. 14, 2020), https://perma.cc/BTQ3-6Z68.

Even if the tax would otherwise be a regulatory or physical taking, the fact that something like the vacancy tax existed in the colonial tradition would suggest that landowners never did have a right against property fines designed and imposed to incentivize productive property use. Given that the current Supreme Court has shown a willingness to incorporate an originalist approach into its takings analysis,[263] the colonial tradition would be important evidence for a municipality defending its vacancy tax. Such background restrictions on property, not just for use but also for nonuse, could completely vindicate a municipality.

CONCLUSION

As lawmakers in more jurisdictions seek to craft a vacancy tax, they may run into legal challenges about whether the tax effects a taking. Because of the close connection between this type of tax and a potentially compelled invitation to third parties, there may be instances where such a tax invites additional scrutiny. However, that scrutiny should at most take the form of a deferential *Penn Central* examination, not a per se physical takings examination. Original understandings of property use regulations tell us, moreover, that such fines levied on the nonproductive use of property are a background principle of property law that, regardless of economic or investment impact, preclude a conclusion that the vacancy tax is a taking.

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[263] *See, e.g.*, *Tyler*, 143 S. Ct. at 1375–78.