

RENT REGULATIONS AFTER CEDAR POINT

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In 2021, the Supreme Court decided Cedar Point Nursery v. Hassid, a landmark case that established a new categorical rule in takings law: When the government enacts a regulation authorizing a temporary invasion of a property owner’s land, it effects a per se taking under the Fifth Amendment for which it must pay just compensation. By examining the interaction between this holding and legal challenges to New York’s Housing Stability and Tenant Protection Act (HSTPA) of 2019, this Note explores the implications of the Court’s decision for rent regulation legislation. This Note considers alternative analytical paths a court considering rent regulation legislation could pursue in the wake of Cedar Point. Under a maximalist approach, a court could find that the HSTPA infringes on the landlord’s “right to exclude” and is thus a compensable taking. Under a minimalist approach, a court could apply one of the Cedar Point exceptions to uphold the HSTPA as constitutional. Ultimately, this Note argues that the maximalist approach is at odds with precedent, endangers antidiscrimination housing laws, and hampers the government’s ability to make housing more economically accessible for citizens who may not otherwise have access to adequate shelter. It concludes that courts should apply an expansive reading of the Cedar Point exceptions when confronted with constitutional challenges to rent regulation legislation like the HSTPA.†

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† This Note describes pending litigation on the question of whether New York’s Rent Stabilization Law as amended by the HSTPA constitutes a taking under *Cedar Point*. As this Note went to print, the United States Court of Appeals for the Second Circuit issued a decision in *74 Pinehurst LLC v. New York*, Nos. 21-467(L), 21-558(Con), 2023 WL 1769678 (2d Cir. Feb. 6, 2023), holding that it does not. For comments on the Second Circuit’s decision and its impact on this Note’s analysis, see *infra* Addendum.

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INTRODUCTION

In 2021, the Supreme Court decided *Cedar Point Nursery v. Hassid*, a landmark case that established a new categorical rule in takings law: When the government enacts a regulation authorizing a temporary invasion of a property owner's land, it effects a per se taking under the Fifth Amendment for which it must pay just compensation.¹ This Note explores the implications of this decision for the constitutionality of rent regulations.

New York City has a long history of robust rent regulation laws.² In 2019, the state legislature passed the Housing Stability and Tenant Protection Act (HSTPA), which further strengthened the city's rent regulation regime.³ Landlords immediately launched a series of legal challenges to the law under the Fifth Amendment, all of which were dismissed based on Supreme Court precedent upholding rent control as constitutional.⁴

1. 141 S. Ct. 2063, 2072 (2021).

2. For a detailed history of New York City's rent control laws, see W. Dennis Keating, *Rent Regulation in New York City: A Protracted Saga* [hereinafter Keating, *A Protracted Saga*], in *Rent Control: Regulation and the Housing Market* 151, 151–64 (W. Dennis Keating, Michael B. Teitz & Andrejs Skaburskis eds., 1998) [hereinafter *Rent Control: Regulation and the Rental Housing Market*].

3. Housing Stability and Tenant Protection Act of 2019, ch. 36, 2019 N.Y. Laws 154 (codified as amended in scattered sections of N.Y. Laws (McKinney 2022)).

4. See *infra* section II.B.

After *Cedar Point*, however, this precedent appears less certain. The plaintiffs whose suits were dismissed have since appealed, citing *Cedar Point* as confirmation that New York City's rent regulation regime constitutes a compensable taking under the Fifth Amendment.⁵

This Note analyzes the various approaches that the Second Circuit, or any court considering an analogous regulation, could take when applying *Cedar Point* to the rent regulation context. Part I provides context for this discussion by reviewing the regulatory and physical takings doctrines under the Fifth Amendment, describing rent control and various academic arguments that have been advanced for and against it, and detailing the legal challenges levied against rent regulation regimes under the Fifth Amendment. Part II considers the impact of the HSTPA on New York's rent regulation laws, describes the unsuccessful challenges to its constitutionality prior to *Cedar Point*, discusses the *Cedar Point* decision as a turning point in takings law, and surveys the renewed appeals brought against the HSTPA after the decision came down. Part III presents various analytical alternatives the court could pursue and considers the normative implications of each approach. Under a maximalist approach, the court could find that the HSTPA infringes on the landlord's "right to exclude" and is thus a compensable taking under *Cedar Point*. Under a minimalist approach, the court could apply one of the *Cedar Point* exceptions to uphold the HSTPA as constitutional. Ultimately, this analysis reveals that adopting the maximalist approach is at odds with Supreme Court precedent, whereas the minimalist approach accords with settled law. This Part further argues that the minimalist approach is not only the best reading of the *Cedar Point* opinion as a doctrinal matter but is also more desirable from a policy perspective because it preserves the government's ability to address housing affordability and to enact antidiscrimination housing laws. This Note therefore concludes that the *Cedar Point* exceptions both can and should be read to encompass legislation regulating relations between landlords and tenants.

I. TAKINGS LAW AND RENT REGULATIONS

State laws regulating rental rates have been subjected to challenges under a variety of constitutional theories. Landlords challenging these statutes frequently invoke the Takings Clause of the Fifth Amendment to argue that rent control is unconstitutional because it either appropriates their property or regulates it to an impermissible degree. This Part traces the history of these legal challenges and their intellectual foundation. Section I.A focuses on the Supreme Court's takings jurisprudence prior to *Cedar Point*. Section I.B provides a brief history of rent control and engages the major philosophical arguments that have been advanced for and

5. See *infra* section II.D.

against it by legal scholars. Section I.C demonstrates how courts have evaluated takings challenges to rent control ordinances. This history both shows that the constitutionality of rent control was well settled under the Court's takings jurisprudence prior to *Cedar Point* and informs how takings challenges to legislation like the HSTPA should be approached in its wake.

A. *Regulatory and Physical Takings Under the Fifth Amendment*

The Takings Clause of the Fifth Amendment of the U.S. Constitution requires that no "private property be taken for public use, without just compensation."⁶ This provision, which is the "central constitutional restriction on the power of government to acquire or restrict private property rights," gives the government the ability to take private property under its sovereign power of eminent domain so long as it provides compensation to the property owner.⁷ While the government can formally concede that it is acting under the Fifth Amendment by initiating a condemnation proceeding, litigation on the threshold question—whether there was a taking—occurs when government action burdens an owner's property but the government denies that such action is sufficiently burdensome to constitute a taking.⁸

For the Takings Clause to be implicated, government conduct must affect legally cognizable property.⁹ Property interests are generally created and defined by state law,¹⁰ but the boundaries of these interests are not always clearly defined. Under the modern conception of property, "property" refers not to the thing itself but to the "bundle of rights" inhering in the person's relationship to that thing.¹¹ The bundle of rights theory originated in the early twentieth century and has since become the "dominant legal paradigm" for lawyers, scholars, and courts when discussing property ownership.¹² It developed as a corrective to the "physicalist" definition of property famously articulated by William Blackstone as a

6. U.S. Const. amend. V.

7. Robert Meltz, Dwight H. Merriam & Richard M. Frank, *The Takings Issue: Constitutional Limits on Land Use Control and Environmental Litigation* 3 (1998).

8. *Id.*; see also Lee Anne Fennell, *Escape Room: Implicit Takings After Cedar Point Nursery*, 17 *Duke J. Const. L. & Pub. Pol'y* 1, 5 (2022) ("[F]or the past century, the [Takings Clause] has also been read to require compensation for governmental acts that, although they are not explicit exercises of eminent domain, nonetheless burden property in ways that are deemed to be functionally equivalent.").

9. Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 *Ecology L.Q.* 307, 317 (2007).

10. *Id.*

11. *Id.*

12. Denise R. Johnson, *Reflections on the Bundle of Rights*, 32 *Vt. L. Rev.* 247, 247 (2007); see also Jane B. Baron, *Rescuing the Bundle-of-Rights Metaphor in Property Law*, 82 *U. Cin. L. Rev.* 57, 62–67 (2013) (tracing the intellectual history of the bundle of rights theory).

“sole and despotic’ relationship between a person and a thing.”¹³ While Blackstone’s definition “posits nearly limitless rights consolidated in a single owner, who can exclude all others[,] . . . [t]he bundle metaphor also highlights that property involves not just ‘one man’ and his ‘external things,’ but multiple parties tied together in relationships that are social as well as legal.”¹⁴ Under the modern conception of property, for example, a landlord’s bundle of rights “require[s] consideration of the tenant’s interests.”¹⁵

Precisely what rights the bundle is composed of is a topic of scholarly debate. In 1961, A.M. Honoré published an essay naming eleven “incidents” of property ownership, among which were the rights to possess, use, and manage property, free from a durational limit.¹⁶ This list is seen as the “starting point for describing the core bundle of private property rights.”¹⁷ Though various rights in this bundle have been debated as disposable, the “right to exclude” is one of the few sticks in the bundle that has been consistently associated with property ownership.¹⁸ Whether it should be privileged above other rights in the bundle is less clear.¹⁹ Professors Jonathan Klick and Gideon Parchomovsky separate modern property scholars into the “progressive property” or “exclusion essentialism” camps.²⁰ Those on the progressive property side “recognize more exceptions to the default rights of an owner to exclude, or put differently, . . . expand recognition of the public’s interest in privately held property”;²¹ those in the exclusion essentialist camp recognize exclusion “as an important organizing principle that enables parties to economize on information and transaction costs.”²² In short, the exclusion essentialists believe “exclusion lie[s] at property’s core,”²³ while the progressive property adherents believe it can occasionally take a backseat to other rights in the bundle.

13. Johnson, *supra* note 12, at 250 (quoting 2 William Blackstone, *Commentaries* *2).

14. Baron, *supra* note 12, at 58.

15. *Id.* at 83.

16. A.M. Honoré, *Ownership*, in *Oxford Essays in Jurisprudence* 107, 112–28 (A.G. Guest ed., 1961).

17. Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition From Marx to Markets*, 111 *Harv. L. Rev.* 621, 663 (1998).

18. Jonathan Klick & Gideon Parchomovsky, *The Value of the Right to Exclude: An Empirical Assessment*, 165 *U. Pa. L. Rev.* 917, 919 (2017) (“[E]ven notable legal realists such as Felix Cohen conceded that the right to exclude is indispensable to all property relationships.”).

19. Baron, *supra* note 12, at 69 (“Should we privilege one stick in the bundle as essential, and if so, how would we recognize that stick?”).

20. Klick & Parchomovsky, *supra* note 18, at 921.

21. *Id.* (internal quotation marks omitted) (quoting Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 *Calif. L. Rev.* 107, 145 (2013)).

22. *Id.*

23. Baron, *supra* note 12, at 93.

Although courts acknowledge the bundle of rights theory to explain the rights inhering in ownership, “judicial references to a parcel of land as ‘the property’” implicitly suggest that courts conceive of property as the thing itself and not the right.²⁴ To the extent that individual rights in the bundle are conceived of as property, the Supreme Court has previously explained that government action must “‘chop[] through the bundle’ entirely,” rather than impact only a single strand, for a per se taking to occur.²⁵

Until 1922, the only burdens the Supreme Court recognized as takings were appropriations or complete physical invasions of property enacted by the government.²⁶ In *Pennsylvania Coal Co. v. Mahon*, however, the Supreme Court introduced the new notion of the “regulatory taking,” wherein a government regulation of property can work a taking if it goes “too far” in regulating the owner’s use.²⁷ What it means to go too far has been fleshed out in a series of Supreme Court cases since the 1970s but remains murky.²⁸

The doctrine in this area “is a mix of per se rules and balancing tests, with an ample amount of ambiguity thrown in.”²⁹ *Lucas v. South Carolina Coastal Council*, for example, introduced the rule that a government regulation is a per se taking if it completely eliminates the economic use of land.³⁰ But the Supreme Court has reduced the force of this holding by explaining that regulations are not takings if they duplicate what the government was already authorized to achieve under “background principles” of state property law.³¹ Most regulatory takings cases are therefore evaluated under the multifactor balancing test established in *Penn Central Transportation Co. v. New York City*, which requires that a court examine, among other factors, the regulation’s economic impact on the

24. Meltz, *supra* note 9, at 317.

25. *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2438 (2015) (Sotomayor, J., dissenting) (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982)).

26. Meltz, *supra* note 9, at 328; see also William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 *Colum. L. Rev.* 782, 792 (1995) (“Most of the early caselaw came from state courts . . . [that] held that compensation was required if government physically took property, but not if it merely regulated the owner’s use of property.”).

27. 260 U.S. 393, 415 (1922); see also Meltz, *supra* note 9, at 328.

28. Meltz, *supra* note 9, at 328; see also Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 *Yale L.J.* 203, 205 & n.1 (2004) (collecting sources to support the “[c]onventional wisdom . . . that the Supreme Court’s takings doctrine is a muddle”).

29. Meltz, *supra* note 9, at 328.

30. 505 U.S. 1003, 1015 (1992).

31. Meltz, *supra* note 9, at 329; see also Michael C. Blumm & Rachel G. Wolfard, *Revisiting Background Principles in Takings Litigation*, 71 *Fla. L. Rev.* 1165, 1169 (2019) (“Th[e] background principles defense . . . has swallowed the categorical per se takings rule *Lucas* established, simply because there are many more background principles than economic wipeouts.”).

property owner, its degree of interference with the owner's reasonable investment-backed expectations, and the property's character to determine whether a regulation goes far enough to characterize it as a taking.³²

Under this regulatory takings jurisprudence, whether the government will have to pay just compensation for the regulation it enacts is an open question resolved through an “essentially ad hoc, factual inquir[y].”³³ But if the regulation involves the “government physically occup[ying] or invad[ing] private property, or caus[ing] or authoriz[ing] other persons or things to do so,” the inquiry hinges on only one consideration, rather than a multifactor balancing test.³⁴ In 1982, the Supreme Court decided *Loretto v. Teleprompter Manhattan CATV Corp.*, a seminal case in which an apartment building owner challenged a New York law that prohibited property owners from interfering with the installation of cable television facilities on their premises.³⁵ The building owner discovered the existence of a television cable on her building after purchasing it and brought suit alleging a Fifth Amendment taking without just compensation.³⁶ The Court noted that the government action was of “unusually serious character for purposes of the Takings Clause” because it involved “physical intrusion” onto the plaintiff's property.³⁷ It held that “when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred.”³⁸ That the cable wire at issue in *Loretto* was a small intrusion was irrelevant to the Court.³⁹ The duration of the intrusion, however, bore upon their decision.⁴⁰ Thus, a new categorical rule was born: When the government enacts or authorizes a permanent physical occupation on private property, it works a per se taking, regardless of the occupation's size.⁴¹

This rule governed until *Cedar Point Nursery v. Hassid*,⁴² when the Court held that government-authorized physical occupations are per se takings, regardless of their duration.⁴³ That decision is discussed in Part II.

32. 438 U.S. 104, 124 (1978); see also Meltz, *supra* note 9, at 329.

33. *Penn Central*, 438 U.S. at 124.

34. Meltz, *supra* note 9, at 360.

35. 458 U.S. 419, 423 (1982).

36. *Id.* at 424.

37. *Id.* at 426.

38. *Id.*

39. *Id.* at 436–37 (“[C]onstitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied.”); see also Fennell, *supra* note 8, at 6 (“Notably, the size of the physical occupation was irrelevant to the takings inquiry, bearing only on the appropriate amount of just compensation.”).

40. *Loretto*, 458 U.S. at 428 (“[T]his Court has consistently distinguished between flooding cases involving a permanent physical occupation, on the one hand, and cases involving a more temporary invasion . . . on the other.”).

41. See Fennell, *supra* note 8, at 6 (explaining that *Loretto* established the rule that regulations that “work[] a permanent physical occupation” are automatically implicit takings).

42. 141 S. Ct. 2063 (2021).

43. See *infra* section II.C.

B. *Rent Control and Its Critics*

Rent control, or “the public regulation of the rent charged to tenants for housing accommodation,”⁴⁴ is historically a “product of crisis.”⁴⁵ Its origins in the United States date back to World War I, when rent control legislation was passed in some localities, including New York City, in response to increasing unrest associated with the war-induced housing shortage.⁴⁶ In 1942, the federal government enacted rent control as a “national emergency measure” in certain areas impacted by World War II.⁴⁷ After these wartime measures ended, rent control disappeared everywhere in the United States except for New York City, where it was extended by the state government.⁴⁸ In the 1960s, other localities began implementing rent control regulations in response to pressure imposed by “rent inflation and a growing tenants’ movement.”⁴⁹ These victories for tenants’ rights advocates were followed by backlash from landlords and their advocates; they won concessions in the 1980s and 1990s in the form of more favorable regulatory conditions and the repeal of some rent control laws.⁵⁰ Landlords’ and tenants’ “political fortunes” have continued to “wax[] and wane[],” with landlords resisting regulation and tenants arguing for increased protections.⁵¹

As Professor W. Dennis Keating notes, “Despite its popularity with tenants, rent control . . . has [frequently] been attacked as economically inefficient and counterproductive as an instrument for redistributing housing benefits.”⁵² Scholars from many disciplines—and across the political aisle—have critiqued it as a policy matter.⁵³ One famous critique

44. W. Dennis Keating, *Rent Control: Its Origins, History, and Controversies*, in *Rent Control: Regulation and the Rental Housing Market*, supra note 2, at 1, 1.

45. *Id.* at 3.

46. *Id.* at 3–4.

47. *Id.* at 4.

48. *Id.*

49. *Id.*

50. *Id.* at 5–6.

51. *Id.* at 6.

52. *Id.* at 9.

53. See, e.g., Dirk W. Early, *Rent Control, Rental Housing Supply, and the Distribution of Tenant Benefits*, 48 *J. Urb. Econ.* 185, 202 (2000) (arguing that rent control results in an increase to the price of unregulated units, which imposes extra costs upon tenants who are unable to obtain a regulated unit); Paul Krugman, *Opinion, Reckonings; A Rent Affair*, *N.Y. Times* (June 7, 2000), <https://www.nytimes.com/2000/06/07/opinion/reckonings-a-rent-affair.html> (on file with the *Columbia Law Review*) (arguing that rent control hurts tenants and creates “[b]itter relations between tenants and landlords”); see also Tom Slater, *From Displacements to Rent Control and Housing Justice*, 42 *Urb. Geography* 701, 702 (2021) (“It is not just economists on the right who argue against rent control.”). But see Richard P. Appelbaum, Michael Dolny, Peter Dreier & John I. Gilderbloom, *Scapegoating Rent Control: Masking the Causes of Homelessness*, 57 *J. Am. Plan. Ass’n* 153, 157–58 (1991) (refuting the argument that rent control produces homelessness); Richard Arnott, *Time for Revisionism on Rent Control?*, *J. Econ. Persps.*, Winter 1995, at 99, 117–18 (arguing that

is advanced by Professor Richard Epstein, who argues against the efficacy of rent control on utilitarian grounds.⁵⁴ Epstein contends that all rent regulations are inconsistent with any theory of efficient social regulation because “the winners [always] gain less than the losers lose,” resulting in a net social loss.⁵⁵ According to Epstein, rent regulation “introduces distortions on the ending of old leases and forming of new ones” by decreasing the market incentive for tenants to leave a controlled unit, which in turns leads to neighborhood stagnation and dislocation.⁵⁶ He also argues that the landlord’s incentive structure is distorted by these regulations: Landlords are disincentivized to invest in new construction and led to make bizarre but economically efficient choices like letting units fall into disrepair.⁵⁷ Thus, he argues, rent regulations ultimately exacerbate the housing shortages they are meant to address.⁵⁸

By contrast, Professor Margaret Radin denies that utilitarianism is the best framework by which to evaluate the efficacy of rent control.⁵⁹ Radin describes the pure utilitarian as being concerned with “the general loss to overall welfare or happiness or wealth” to the subordination of all else.⁶⁰ But because a person’s home is “bound up with one’s personhood,” she argues that residential housing should not be treated as “any old market commodity,” subject to a utilitarian analysis that considers only market prices and efficiency.⁶¹ Rejecting general economic welfare as the only relevant metric, she identifies additional factors to consider when evaluating rent control’s value, including “the nonmonetary benefit to current tenants.”⁶²

As a legal matter, rent control is less contentious. Still, the view that rent control constitutes a taking is not without precedent: Epstein has long contended that rent control is unconstitutional under his reading of the Takings Clause, where “[a]ny interference with an incident of private property is a taking and will only be legitimate if the holders of all incidents are compensated with a proportionate share of the gains generated by the

economists should reconsider their traditional hostility to rent control and evaluate modern rent controls on a case-by-case basis).

54. Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 *Brook. L. Rev.* 741, 760 (1988) [hereinafter Epstein, *Rent Control*].

55. *Id.* at 761.

56. *Id.* at 763.

57. *Id.* at 765–67.

58. *Id.* at 767 (“Reduced returns mean reduced investments, so that rent control statutes only exacerbate the housing shortages they are said to alleviate.”).

59. Margaret Jane Radin, *Residential Rent Control*, 15 *Phil. & Pub. Affs.* 350, 350–52 (1986).

60. *Id.* at 356–57.

61. *Id.* at 358, 362.

62. *Id.* at 356.

interference.”⁶³ Though Epstein claims this is a plain reading of the Takings Clause, philosopher Leif Wenar critiques his conclusion as “implausibly expansive.”⁶⁴ In Wenar’s view, the “source of the expansiveness” is mainstream acceptance of property as “*rights not things*”—that is, the bundle of rights theory.⁶⁵ Wenar argues that under Epstein’s view of the Takings Clause, it is “inevitable that ‘taking private property’ will be construed as ‘limiting any private property entitlement,’” and thus that the Takings Clause will find increasingly counterintuitive applications.⁶⁶ Wenar is not alone; many property theorists critique the bundle of rights metaphor based on concerns that making “every interest its own property right” will lead to “over-fragmentation and over-propertization.”⁶⁷ But for Epstein and others, this fragmentation is precisely the point: By conceiving of each separate stick in the bundle as a property interest in and of itself, the opportunities to demand compensation from the government whenever it regulates the property owner increase.⁶⁸

Under Radin’s framework, a tenant’s claim to preservation of their home is stronger than a commercial landlord’s claim to their business.⁶⁹ This argument suggests that rent control is not a taking because landlords are not intrinsically entitled to a certain return on their investments.⁷⁰ In a variation on this argument, philosopher Lawrence Becker suggests that rent control cannot “reasonably be regarded as a ‘taking’ in a philosophically defensible sense” because “[w]hat we do not have in the first place cannot be taken, and nothing is clearer, conceptually and historically, than that titles to real property do not . . . include the sort of immunity that would bar rent control.”⁷¹ Becker points out that a tax increase, like the imposition of rent control, “is an alteration of the owner’s right to the income from the property. . . . But it would be unreasonable for an individual . . . to expect immunity from taxation in

63. Leif Wenar, *The Concept of Property and the Takings Clause*, 97 *Colum. L. Rev.* 1923, 1935–38 (1997) (describing Epstein’s conservative-libertarian view of the Takings Clause).

64. *Id.* at 1942 (listing a range of government regulations that would be labeled “takings” under Epstein’s theory).

65. *Id.* at 1943.

66. *Id.* at 1942–43 (speculating that laws requiring cars to have seat belts could be takings under Epstein’s theory, among other absurd outcomes).

67. Baron, *supra* note 12, at 69.

68. *Id.* at 77 (“[F]or libertarians such as Richard Epstein, who note that the ‘protection of each incident in [sic] the standard bundle of rights from state regulation reduces state power,’ it is the ‘unitary conception of property rights that is in fact vulnerable to creeping statism.’” (quoting Richard A. Epstein, *Bundle-of-Rights Theory as a Bulwark Against Statist Conceptions of Private Property*, 8 *Econ J. Watch* 223, 232–33 (2011)) (misquotation)).

69. Radin, *supra* note 59, at 360.

70. *Id.* at 377.

71. Lawrence C. Becker, *Rent Control Is Not a Taking*, 54 *Brook. L. Rev.* 1215, 1216 (1989).

our system [or] . . . to cry ‘Taking!’ when a modest tax increase in announced.”⁷²

Becker’s position on the legal question is informed by his critiques of Epstein’s insistence that rent control should be abandoned on economic inefficiency grounds. Both Becker and Radin argue that Epstein’s viewpoint is deficient because it exclusively prioritizes economic efficiency—Radin, because it ignores the personhood aspects of the home, and Becker, because there is no compelling reason to elevate economic efficiency above all other values when alternative justifications for private property exist. In Becker’s view, the fact that private property can be justified through many different frames, including labor, liberty, and utility, bars “any attempt to set up a single criterion (such as economic efficiency) for determining the scope of titles.”⁷³ How one conceives of the scope of a title informs whether one thinks a taking has occurred. In other words, these normative frameworks necessarily shape each scholar’s approach to the takings question. Separating the question of whether rent control is justified on policy grounds from the question of whether it is legally problematic is therefore difficult.

C. *Legal Challenges to Rent Control Under the Fifth Amendment*

Unsurprisingly, given this historical and philosophical context, rent regulations have been subjected to many legal challenges.⁷⁴ Although landlords have tried a variety of legal tactics, most challenges are based on the Takings and Due Process Clauses of the U.S. Constitution.⁷⁵ Because this Note considers how recent doctrinal developments may affect takings claims against New York City’s current rent regulations, this section focuses only on the history of takings challenges.

Rent control legislation has been challenged as both a regulatory and per se physical taking. The Supreme Court first considered the constitutionality of rent control in *Block v. Hirsh*, when a landlord challenged the District of Columbia’s temporary rent control legislation enacted in 1919.⁷⁶ The Act secured the right of a tenant to occupy rental property after the lease ran out so long as they continued to pay rent but gave the landlord the option to reclaim the property for their own use provided they submit thirty days’ written notice.⁷⁷ Hirsh, a landlord seeking to

72. *Id.* at 1217.

73. *Id.* at 1219.

74. Keating, *A Protracted Saga*, *supra* note 2, at 167 (“Landlords have repeatedly challenged the constitutionality of rent control, claiming that it violates state and federal constitutional guarantees of contract, due process, and equal protection, and that it represents a taking of private property without just compensation.”).

75. See Karl Manheim, *Rent Control in the New Lochner Era*, 23 *UCLA J. Env’t L. & Pol’y* 211, 213 (2005) (“Virtually every constitutional theory has been tried.”).

76. 256 U.S. 135, 153 (1921).

77. *Id.* at 154.

recover possession of the first floor of a leased building, challenged the Act as a taking of property “not for public use and without due process of law,” and the Court of Appeals agreed, finding it unconstitutional.⁷⁸ The Supreme Court reversed, upholding the Act as a valid exercise of the government’s police power.⁷⁹

Notably, this case was decided during the Supreme Court’s *Lochner* era, when the Court “interpreted the federal constitution to allow the states to regulate prices only of those businesses ‘affected with a public interest’ or during a temporary ‘emergency.’”⁸⁰ In *Block*, the Court found both to be true. That the Act was enacted as a temporary measure in response to an emergency that was a “publicly notorious and almost worldwide fact”⁸¹—the housing shortage associated with World War I—imbued “the letting of buildings in the District of Columbia with a public interest so great as to justify regulation by law.”⁸² To support this conclusion, the Court explained that “housing is a necessary of life” and noted that the rental real estate market in the District of Columbia was heavily monopolized in “comparatively few hands,” suggesting that government intervention was required to regulate the power imbalance between landlords and tenants.⁸³

Though the modern doctrine no longer requires a finding of emergency, the basic principle established in *Block*—“that government can regulate housing conditions to maintain or improve living conditions”—still stands.⁸⁴ State governments may regulate housing under their general police power.⁸⁵ That such regulations might economically harm landlords is not a “barrier to the exercise” of this valid power.⁸⁶ Despite this well-established principle, rent regulations have faced a variety of challenges since the 1920s. Most have advanced the argument that rent control or stabilization laws are regulatory takings because they deprive the landlord of a fair financial return.⁸⁷ A few, however, have argued that rent control

78. *Id.* at 153.

79. *Id.* at 156–58.

80. W. Dennis Keating, *The Courts and Rent Control*, in *Rent Control: Regulation and the Rental Housing Market*, supra note 2, at 27, 27 [hereinafter Keating, *The Courts and Rent Control*] (quoting Kenneth K. Baar & W. Dennis Keating, *The Last Stand of Economic Substantive Due Process—The Housing Emergency Requirement for Rent Control*, 7 *Urb. Law.* 447, 467 (1975)); see also Manheim, supra note 75, at 213 (“It is somewhat remarkable that even during periods of extraordinary judicial protection of property rights, rent control laws have nonetheless survived.”).

81. *Block*, 256 U.S. at 154.

82. *Id.* at 155.

83. *Id.* at 156.

84. Meltz et al., supra note 7, at 299.

85. Keating, *The Courts and Rent Control*, supra note 80, at 30.

86. *Bowles v. Willingham*, 321 U.S. 503, 518 (1944).

87. Meltz et al., supra note 7, at 298.

and stabilization ordinances are per se physical takings under *Loretto*.⁸⁸ Neither argument has prevailed at the Supreme Court.⁸⁹

The closest landlords have come to successfully arguing that rent regulations constitute per se takings is in the context of mobile home parks. These cases present a slightly different factual scenario than rent regulations in New York City because tenants in mobile home parks own their mobile homes but lease their lot in the park from the park's owner.⁹⁰ *Pinewood Estates of Michigan v. Barnegat Township Leveling Board* centered on the interaction of two laws: a state law prohibiting park owners from removing a mobile home solely because the home had been sold to another owner, and a town rent control ordinance preventing the park owners from raising rents.⁹¹ Mobile home park owners alleged that, taken together, these two laws worked a taking of their property under a physical occupation theory.⁹² Under these two regulations, tenants could choose to sell their mobile home to another owner for an unregulated price, and then the mobile park owner would be required to continue leasing the lot to the new tenant at the regulated rent rate.⁹³ By reading the term "property" as used in the Takings Clause to include "the entire 'group of rights inhering in the citizen's [ownership],"⁹⁴ the Third Circuit agreed that these two laws effectively transferred the landlord's "possessory interest" in the mobile home lots to the tenants and thus worked a taking.⁹⁵ The court noted that this decision was consistent with decisions upholding ordinary rent control ordinances as constitutional because, under most rent control regimes, landlords are free to select and rent to the new tenants.⁹⁶

This same argument found purchase in *Hall v. City of Santa Barbara*, where a nearly identical factual scenario resulted in a takings determination by the Ninth Circuit on a physical invasion theory.⁹⁷ The court similarly distinguished between mobile home park regulations and municipal rent ordinances.⁹⁸ The court found the crucial distinction to be that the interaction of the mobile home regulations and the rent control

88. *Id.* at 302–03.

89. See *Yee v. City of Escondido*, 503 U.S. 519, 532 (1992) (rejecting the argument that a rent control ordinance constitutes a physical taking under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)).

90. *Manheim*, *supra* note 75, at 227–28.

91. 898 F.2d 347, 349 (3d Cir. 1990), abrogated by *Yee*, 503 U.S. 519.

92. *Id.*

93. *Id.*

94. *Id.* at 350 (quoting *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 n.6 (1980)).

95. *Id.* at 353.

96. *Id.* at 355.

97. 833 F.2d 1270, 1279–80 (9th Cir. 1986), abrogated by *Yee v. City of Escondido*, 503 U.S. 519 (1992).

98. *Id.* at 1279.

ordinance “changes the fundamental relationship between the parties, giving landlord and tenant complementary estates in the same land.”⁹⁹ By contrast, “the typical rent control statute modifies the landlord/tenant relationship somewhat to protect tenants from perceived evils of the free-enterprise system.”¹⁰⁰

The Supreme Court implicitly overruled both *Hall* and *Pinewood Estates* in *Yee v. City of Escondido*, the most recent Supreme Court decision to affirm the constitutionality of rent control.¹⁰¹ In *Yee*, the same interaction between a mobile park regulation and rent control ordinance was challenged, but the Court held that no physical taking had occurred because the landowners were not required to submit to the physical occupation of their land—instead, they had voluntarily rented their land to mobile home owners.¹⁰² Because the “element of required acquiescence is at the heart of the concept of occupation,” once the owners voluntarily rented their land, no regulation or state law could effect a taking on a physical occupation theory.¹⁰³ Though the petitioners tried to argue that occupation by tenants was akin to the circumstances in *Loretto*,¹⁰⁴ the Court reasoned that the apposite case was in fact *FCC v. Florida Power Corp.*¹⁰⁵ In that case, the respondent had voluntarily leased space on its utility poles and the government had subsequently exercised its statutory authority to regulate the pole attachment agreements, substantially lowering the amount the respondent could collect in pole attachment rents.¹⁰⁶ Because the pole owners had voluntarily leased the space, the *Florida Power* Court rejected the argument that the government occupation constituted a per se taking. It held that, when determining whether *Loretto* governs, “it is the invitation, not the rent, that makes the difference.”¹⁰⁷

Yee seemed to definitively preclude claims that rent regulations are physical takings under the Fifth Amendment. As discussed in Part II, however, the Court’s recent decision in *Cedar Point Nursery v. Hassid* has renewed speculation that per se takings claims against rent regulations could succeed.¹⁰⁸

99. *Id.*

100. *Id.*

101. *Yee*, 503 U.S. at 525–26.

102. *Id.* at 527–28.

103. *Id.* at 527 (quoting *Fed. Comm’n Comm’n v. Fla. Power Corp.*, 480 U.S. 245, 252 (1987)).

104. *Id.* at 525 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)).

105. *Id.* at 532.

106. *Fla. Power Corp.*, 480 U.S. at 247–49.

107. *Id.* at 252; see also *Yee*, 503 U.S. at 532 (quoting *Fla. Power Corp.*, 480 U.S. at 252).

108. See Richard A. Epstein, A Bombshell Decision on Property Takings, Hoover Inst. (June 28, 2021), <https://www.hoover.org/research/bombshell-decision-property-takings> [<https://perma.cc/JS29-YCS5>] [hereinafter Epstein, A Bombshell Decision] (suggesting

II. LEGAL CHALLENGES TO THE HSTPA BEFORE AND AFTER *CEDAR POINT*

This Part considers the factual and legal developments that complicate the conclusion that rent regulations are constitutional under the Fifth Amendment. Passage of the HSTPA in 2019 altered New York City's rent stabilization laws by enacting the "strongest tenant protections in history."¹⁰⁹ Meanwhile, the Supreme Court decided *Cedar Point*, which blurred the boundaries between appropriation and regulation by finding that a regulation is a per se taking if it appropriates the property owner's right to exclude even temporarily.

Section II.A describes the rent regulation laws in New York City before and after passage of the HSTPA, and section II.B examines the legal challenges brought against the Act by landlords and their advocates prior to the *Cedar Point* decision. Section II.C considers the *Cedar Point* decision as a turning point in takings law. Finally, section II.D evaluates how *Cedar Point* might impact challenges to rent regulations by examining the arguments against the HSTPA advanced on appeal.

A. *The HSTPA*

New York City serves as an exemplar of the rent-regulated city.¹¹⁰ Rent control legislation was first passed in New York City in 1920, and since then the city has operated under "some form of rent control—federal, state, or local"—for a cumulative total of over fifty years.¹¹¹ New York City's regulated housing stock is largely governed by a web of laws—collectively, the Rent Stabilization Law (RSL)—that "regulate rent increases, entitle tenants to certain services, require landlords to renew tenant leases at the tenant's will, and restrict the grounds for which a tenant can be evicted."¹¹² These laws, "codified throughout New York's legal system," have been the subject of intense debate among landlords and tenants.¹¹³ In 2019, a newly Democratic state legislature, prompted by tenant advocacy groups, proposed a series of reforms to the RSL that would dramatically strengthen

that the state's power "to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails" is up for grabs after *Cedar Point* (internal quotation marks omitted) (quoting *Loretto*, 458 U.S. at 440)).

109. Charles K. Gehrich, Note, Stronger Than Ever: New York's Rent Stabilization System Survives Another Legal Challenge, 90 *Fordham L. Rev.* 831, 833 (2021) (internal quotation marks omitted) (quoting Press Release, N.Y. State Senate, Senate Passes Strongest Tenant Protections in State History (June 14, 2019), <https://www.nysenate.gov/newsroom/press-releases/senate-passes-strongest-tenant-protections-state-history> [<https://perma.cc/B587-WM6K>]).

110. Keating, A Protracted Saga, *supra* note 2, at 151 ("New York City has had the greatest experience with rent regulation of any municipality in the United States.").

111. *Id.*

112. Gehrich, *supra* note 109, at 836.

113. *Id.*

tenant protections.¹¹⁴ The proposed reforms were ultimately passed and signed into law by then-Governor Andrew Cuomo as the HSTPA in 2019.¹¹⁵

The HSTPA made several significant changes to the existing rent regulation regime in New York City. Previously, the RSL contained a “sunset provision,” which meant that it had to be renewed by the legislature every four to eight years.¹¹⁶ The HSTPA eliminated this sunset provision, effectively making permanent the rent regulations that had previously been temporary.¹¹⁷ The HSTPA also eliminated the ability to remove units from regulation once the units reached a set rental price, known as the “deregulat[ion]” or “decontrol” threshold.¹¹⁸ The overall effect of these changes was to permanently lock landlords of rent-regulated buildings into increasing rent only to the extent authorized by the Rent Guidelines Board, the regulatory body responsible for establishing rent adjustments under the RSL.¹¹⁹

The HSTPA also constricted a property owner’s ability to change the use of their property by raising the threshold for condominium conversion. For landlords frustrated by rent regulations, another method of removing property from the offending regulatory regime had been conversion, the process whereby owners of rental apartments convert their buildings to individually owned condominiums.¹²⁰ To convert, an owner must obtain purchase agreements from a set number of tenants.¹²¹ The HSTPA increased the threshold of existing tenants that must agree to buy their apartments before an owner can convert from fifteen to fifty-one percent.¹²² Some speculated that this change would effectively end the process of condo conversion.¹²³

114. *Id.* at 833.

115. Housing Stability and Tenant Protection Act of 2019, ch. 36, 2019 N.Y. Laws 154 (codified as amended in scattered sections of N.Y. Laws (McKinney 2022)).

116. N.Y.C. Homes & Cmty. Renewal, Strengthening New York State Rent Regulations: The Housing Stability and Tenant Protection Act of 2019, at 13 (2020), <https://hcr.ny.gov/system/files/documents/2020/02/rent-regulation-hstpa-presentation.pdf> [<https://perma.cc/U7P7-T62D>] (discussing major changes the HSTPA enacted on the RSL).

117. *Id.*

118. *Id.* at 7.

119. About, N.Y.C. Rent Guidelines Bd., <https://rentguidelinesboard.cityofnewyork.us/about/> [<https://perma.cc/5H6X-WG23>] (last visited Oct. 5, 2022).

120. David A. Fine, Comment, The Condominium Conversion Problem: Causes and Solutions, 1980 Duke L.J. 306, 307 (noting that “conversion provides an opportunity for landlords with ever decreasing profits to sell their properties for substantial gains”).

121. G. Gregory Handschuh & Victor A. Cohen, Tenant Protection in Condominium Conversions: The New York Experience, 48 St. John’s L. Rev. 978, 988 (1974).

122. Josh Barbanel & Will Parker, New York Condo Conversions Near the End, A Casualty of Rent Reform, Wall St. J. (July 9, 2019), <https://www.wsj.com/articles/new-york-condo-conversions-near-the-end-a-casualty-of-rent-reform-11562583612> (on file with the *Columbia Law Review*).

123. *Id.*

These changes enacted by the HSTPA—the elimination of deregulation loopholes so that rent increases are permanently capped and decided by the Rent Guidelines Board and the increased difficulty of converting a rental building into condominiums—significantly decreased property owners’ abilities to circumvent the rental regulations in New York and sell or rent their properties at “market” rate. It was no surprise, then, that the HSTPA was immediately met with pushback from landlords and their advocacy groups.

B. *Legal Challenges to the HSTPA*

Shortly after the HSTPA was signed into law in June 2019, several legal challenges were launched against it by landlords and their advocates. On July 15, 2019, the Community Housing Improvement Program and the Rent Stabilization Association of New York City (together, the “CHIP plaintiffs”) filed suit in the Eastern District of New York, alleging, among other arguments, that the RSL as amended by the HSTPA constituted an uncompensated physical taking of private property.¹²⁴ In November 2019, another group of landlords (the “74 Pinehurst plaintiffs”) filed a nearly identical suit.¹²⁵ Central to both challenges was the idea that the amended RSL demolished the landlords’ right to exclude, a fundamental stick in the bundle of property rights. The two challenges were jointly dismissed (though not consolidated) by Judge Eric R. Komitee of the Eastern District of New York in 2020.¹²⁶ The court explained that “[p]hysical takings are characterized by a deprivation of the ‘entire bundle of property rights’ in the affected property interest—‘the rights to possess, use and dispose of’ it.”¹²⁷ Because the HSTPA does not disturb the landlords’ title to and ability to sell their properties, the court found that the other “sticks” in the bundle—possession and disposal—were retained by the landlords, and thus no taking had occurred.¹²⁸

Other challengers argued that the HSTPA does in fact deprive landlords of these additional rights in the bundle. In December 2019, the Building and Realty Institute (BRI) of Westchester and Putnam Counties filed suit in the Southern District of New York alleging that the RSL as amended by the HSTPA deprives property owners of “their basic ownership right . . . to possess, use, and dispose of their property” by,

124. Complaint at 63–87, *Cmty. Hous. Improvement Program v. City of New York*, 492 F. Supp. 3d 33 (E.D.N.Y. 2020) (No. 19-CV-4087 (MKB)) (“[T]o rent out a pre-1974, six-unit-plus building covered by the RSL, a building owner must acquiesce in a set of rules that impose on the owner the indefinite physical occupation of rented units by tenants and their successors at below-market rents with any increases controlled by government regulation.”).

125. Complaint for Declaratory Relief, Injunctive Relief, and Just Compensation at 76–81, *74 Pinehurst LLC v. New York*, 492 F. Supp. 3d 33 (E.D.N.Y. 2020) (No. 19-cv-6447).

126. *Cmty. Hous. Improvement Program*, 492 F. Supp. 3d at 44.

127. *Id.* at 43 (citing *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2427 (2015)).

128. *Id.*

among other mechanisms, “virtually eliminat[ing]” the property owner’s ability to convert their buildings by raising the condominium conversion threshold.¹²⁹ In January 2020, a group of landlords (the “G-Max plaintiffs”) filed a similar suit,¹³⁰ arguing that requiring majority consent prior to conversion transfers the “right to dispose” from property owner to tenant.¹³¹ In combination with this and other provisions, the plaintiffs alleged that the HSTPA “permanently abrogated one of the core ownership rights in the bundle associated with property ownership” by eliminating the sunset provision of the RSL.¹³² In an opinion and order jointly addressing both cases, Judge Kenneth M. Karas of the Southern District of New York dismissed these physical takings challenges based on *Yee v. City of Escondido*,¹³³ in which the Supreme Court clarified that a physical taking occurs only when the government “requires the landowner to submit to the physical occupation of his land.”¹³⁴ Because the HSTPA “does not compel physical occupation” but merely changes the conditions under which buildings can be converted, the court determined that it does not effect a physical taking.¹³⁵ A final challenge mounted by a group of landlord plaintiffs (the “335-7 plaintiffs”) in February 2020¹³⁶ was dismissed by Judge Edgardo Ramos of the Southern District of New York based on the same precedent cited in the other challenges and supported by the outcome in the preceding suits.¹³⁷

Dismissal of these five suits seemed to signal that the RSL as amended by the HSTPA is safe from Fifth Amendment physical takings challenges. But in June 2021, the Supreme Court decided a case that could disrupt the reasoning upon which each of these courts relied.

C. Cedar Point Nursery v. Hassid as a Turning Point in Takings Law

In March 2021, the Supreme Court heard a challenge to a California regulation granting labor organizations a right to enter an agricultural employer’s property to organize workers.¹³⁸ The regulation in question, promulgated in order to allow agricultural employees their right to self-organization under the California Agricultural Labor Relations Act of

129. Complaint para. 100(h), Bldg. & Realty Inst. of Westchester & Putnam Cntys., Inc. v. New York, No. 19-CV-11285 (KMK) (S.D.N.Y. Sept. 14, 2021), 2021 WL 4198332.

130. Complaint para. 6–7, G-Max Mgmt. v. New York, No. 20-cv-634 (S.D.N.Y. Sept. 14, 2021), 2021 WL 4198332.

131. *Id.* para. 7.

132. *Id.*

133. *Bldg. & Realty Inst.*, 2021 WL 4198332, at *16.

134. *Id.* at *13 (quoting *Yee v. City of Escondido*, 503 U.S. 519, 527 (1992)).

135. *Id.* at *15.

136. Complaint para. 4, 335-7 LLC v. New York, 524 F. Supp. 3d 316 (S.D.N.Y. 2021) (No. 1:20-cv-01053).

137. *335-7 LLC*, 524 F. Supp. 3d at 328–37.

138. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2069 (2021).

1975, mandated that employers allow organizers access to their property for up to three hours per day, 120 days per year.¹³⁹ The agricultural employers challenged this regulation as an unconstitutional physical taking under the Fifth Amendment—an argument that failed at both the district court and the Ninth Circuit.¹⁴⁰

In a majority opinion released in June 2021, the Court reversed the Ninth Circuit, pronouncing the access regulation a *per se* taking under the Fifth Amendment.¹⁴¹ The decision began by rearticulating the distinction between cases in which the federal government physically appropriates property, by either taking title to it, physically taking possession of it, or occupying it,¹⁴² and cases in which the government imposes a regulation that restricts “an owner’s ability to use his own property,”¹⁴³ as well as their respective implications for compensation.¹⁴⁴ Crucially, the Court pointed out that “[g]overnment action that physically appropriates property is no less a physical taking because it arises from a regulation.”¹⁴⁵ The majority determined the “essential question” in this case to be “whether the government has physically taken property for itself or someone else—by whatever means.”¹⁴⁶ Under this framing, the Court held that “[w]hen a regulation results in a physical appropriation of property, a *per se* taking has occurred, and *Penn Central* has no place.”¹⁴⁷

To elucidate the distinction between regulation and appropriation, the Court defined the property interest at stake as “a right to invade” and alternately “the right to exclude.”¹⁴⁸ By giving union organizers access to the growers’ land for “three hours per day, 120 days per year,” the regulation “appropriate[d] for the enjoyment of third parties the owners’ right to exclude.”¹⁴⁹ In other words, because the regulation restricted the owner’s right to exclude, it crossed over from regulation to appropriation. The property right at stake was only one stick in the larger bundle of property rights, but because this stick is “treasured,” “fundamental,” and “essential,”¹⁵⁰ any encroachment on this right brings the regulation into

139. *Id.*

140. *Id.* at 2070–71.

141. *Id.* at 2080.

142. *Id.* at 2071.

143. *Id.*

144. When a regulation restricts an owner’s right to use their own property, the *Penn Central* balancing test applies, and just compensation is owed only when a regulation goes too far. But when a physical appropriation occurs, the government “must pay for what it takes.” See *supra* section I.A.

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

146. *Id.*

147. *Id.*

148. *Id.* (“The access regulation appropriates a right to invade the growers’ property and therefore constitutes a *per se* physical taking.”).

149. *Id.*

150. *Id.*

the sphere of appropriation. Though the Supreme Court has previously given great weight to the right to exclude,¹⁵¹ in *Cedar Point*, the Court effectively elevated it from an essential stick in the bundle to the compensable property interest itself.

The Court found it inconsequential that the labor regulation required only temporary access for union organizers to the growers' property because, when a regulation appropriates the right to exclude, neither the appropriation's size nor duration bears on whether a taking has occurred.¹⁵² Instead, these considerations bear only on the amount of compensation considered just under the circumstances.¹⁵³ Similarly, that the regulation allowed intermittent rather than continuous invasion of the employer's property was irrelevant because "[t]he fact that a right to take access is exercised only from time to time does not make it any less a physical taking."¹⁵⁴ The labor regulation was still an appropriation because the government took the "right to invade" from the growers and gave it to the union organizers, circumscribing the property owner's fundamental "right to exclude."¹⁵⁵

In a dissenting opinion, Justice Stephen Breyer pushed back on this formulation, arguing that the "access to organizers" requirement "does not 'appropriate' anything; it regulates the employers' right to exclude others."¹⁵⁶ Justice Breyer disputed the idea that a violation of the "right to exclude" automatically means a physical taking has occurred: He acknowledged that "[a] 'taking' may be *more readily* found when the interference with property can be characterized as a physical invasion by government" but argued that such a characterization does not inevitably mean that a taking has occurred.¹⁵⁷ The dissent further argued that the majority misconstrued the Court's precedents to find that a regulation granting temporary access could be considered a physical taking. In the dissent's view, case law confirming that a permanent access right is still a physical taking even if exercised only occasionally does not imply that a regulation allowing a *right* to "access only from 'time to time'" is a taking.¹⁵⁸ In the former, the intruders have a right to enter at any time and

151. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (describing the right to exclude as "one of the most treasured strands" in the bundle); *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (describing it as "one of the most essential sticks").

152. *Cedar Point*, 141 S. Ct. at 2074.

153. *Id.*

154. *Id.* at 2075.

155. *Id.* at 2075–76.

156. *Id.* at 2081 (Breyer, J., dissenting).

157. *Id.* at 2085 (alteration in original) (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).

158. *Id.* at 2086 (distinguishing *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987)).

exercise it at their discretion. In the latter, the right to enter is limited to “certain occasions.”¹⁵⁹

Justice Breyer went on to explain that ignoring this distinction between temporary and permanent access rights places “large numbers of ordinary regulations in a host of different fields that . . . permit temporary entry onto (or an ‘invasion of’) a property owner’s land” at risk of being declared *per se* physical takings.¹⁶⁰ In Justice Breyer’s view, requiring the government to pay just compensation for each of these temporary-entry regulations is not only antithetical to the idea that we “live together in communities . . . [that] require[] different kinds of regulation” but also flatly “impractical.”¹⁶¹ To illustrate the implications of this decision, Justice Breyer listed a number of the regulations that might be endangered by the majority’s holding, including workplace, food, and manufacturing inspections.¹⁶²

To address the concerns raised in Justice Breyer’s dissent, the majority articulated three exceptions to its holding. First, the Court clarified that the decision “does nothing to efface the distinction between trespass and takings,” and therefore trespass, characterized by “[i]solated physical invasions[] not undertaken pursuant to a granted right of access,” is still properly assessed as a tort rather than a physical taking.¹⁶³ Second, the Court noted that “many government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights.”¹⁶⁴ When a government is asserting a “pre-existing limitation upon the land owner’s title,” that limitation cannot itself serve as a taking.¹⁶⁵ These limitations “also encompass traditional common law privileges to access private property,” such as the right to enter in the event of public necessity, to effect an arrest, or to effect a constitutionally sound government search.¹⁶⁶ Third, rights of access ceded as a condition of receiving government benefits do not constitute takings. Under this exception, the Court noted that “government health and safety inspection regimes will generally not constitute takings” because the government can condition the granting of permits and licenses for doing business on the requirement that those businesses submit to inspections that involve physical access to their

159. *Id.*

160. *Id.* at 2087–89.

161. *Id.*

162. See *id.* at 2087–88 (noting that the at-risk regulations “include activities ranging from examination of food products to inspections for compliance with preschool licensing requirements”).

163. *Id.* at 2078 (majority opinion).

164. *Id.* at 2079.

165. *Id.* (internal quotation marks omitted) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028–29 (1992)).

166. *Id.*

properties.¹⁶⁷ With these exceptions in place, the Court found Justice Breyer's fear about the impacts of its holding to be "unfounded."¹⁶⁸

By distinguishing a previous Supreme Court precedent, *Pruneyard Shopping Center v. Robins*,¹⁶⁹ the Court also implicitly introduced a fourth exception. In *Pruneyard*, the Court held that the right to engage in leafleting at a public mall was not a taking of the shopping center owner's property.¹⁷⁰ To explain why no physical taking occurred under these circumstances, the *Cedar Point* Court said that "[l]imitations on how a business generally open to the public may treat individuals on the premises are readily distinguishable from regulations granting a right to invade property closed to the public."¹⁷¹ Though the Court did not count this among its articulated exceptions, its reasoning indicates that regulations authorizing physical access are not takings if the invaded property is "generally open to the public."¹⁷²

Despite the majority's assurances that its decision faithfully applied the Court's precedents rather than signaling a major shift in takings law, many commentators saw the decision differently and noted its potential application to the rent regulation context. Epstein speculated that *Cedar Point* may be "the Supreme Court's most momentous takings decision in decades."¹⁷³ He argued that the Court's decision called into question the longstanding principle that "[s]tates have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails."¹⁷⁴ In Epstein's view, after *Cedar Point*, it is "pure sophistry to claim that the state does not engage in a taking when it authorizes a tenant to stay continuously in possession of the leased premises after the expiration of the lease at a rent that is consciously set below market value."¹⁷⁵ Professor Nikolas Bowie similarly suggested that *Cedar Point* might impact rent control policies, eviction protections, and other renter protections because those protective policies "prohibit landlords from excluding people from their property."¹⁷⁶ He argues that construing these policies as takings would adversely impact workers by

167. *Id.*

168. *Id.* at 2078.

169. 447 U.S. 74 (1980).

170. *Id.* at 83.

171. *Cedar Point*, 141 S. Ct. at 2076–77.

172. *Id.* at 2077.

173. Epstein, A Bombshell Decision, *supra* note 108.

174. *Id.* (internal quotation marks omitted) (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982)).

175. *Id.*

176. Nikolas Bowie, Antidemocracy, 135 Harv. L. Rev. 160, 197 (2021).

entrenching the “structural domination that compels workers to live in areas with few employment opportunities.”¹⁷⁷

D. *Renewed Legal Challenges Against the HSTPA After Cedar Point*

Landlord advocacy groups across the country took notice of *Cedar Point*.¹⁷⁸ In New York, the 74 Pinehurst plaintiffs, whose suit had been dismissed jointly with the CHIP plaintiffs,¹⁷⁹ appealed from the district court’s decision, citing *Cedar Point* as “confirm[ing] the validity of Plaintiffs’ physical-takings claims.”¹⁸⁰ The plaintiff-appellants argued that *Cedar Point* precludes the argument that a taking has not been effectuated because the property owner retains rights other than exclusion.¹⁸¹ In their view, that the owner of a rent-stabilized apartment is “compelled to renew the lease unless the tenant chooses to leave” is “enough to state a physical-takings claim” under *Cedar Point*.¹⁸² They also alleged that the HSTPA’s grant of “broad successorship rights, preventing owners and their families from occupying their own apartments, restricting owners’ possessory rights in other ways, and eliminating any path to deregulation of apartments” further strengthens their claim.¹⁸³

In its briefing, the city argued that *Cedar Point* only reaffirmed that the government may regulate the landlord–tenant relationship. It reasoned that, according to the fourth exception established in *Cedar Point*, “limits ‘on how a business generally open to the public may treat individuals on the premises’ constitute use restrictions analyzed as potential regulatory takings.”¹⁸⁴ Such limits are distinct from regulations—like the access regulation at issue in *Cedar Point*—“granting a right to invade property closed to the public.”¹⁸⁵ The appellees argued that the rental apartments

177. *Id.*

178. See Andy Monserud, Minneapolis Landlords Challenge Tenant-Screening Rules, Courthouse News Serv. (Oct. 20, 2021), <https://www.courthousenews.com/minneapolis-landlords-challenge-tenant-screening-rules/> [<https://perma.cc/E4SA-VZUC>] (“Attorneys for a group of landlords argued before an Eighth Circuit panel that a city ordinance regulating tenant-screening procedures was an unconstitutional taking, citing the U.S. Supreme Court’s recent decision in *Cedar Point Nursery v. Hassid* as widening the range of regulations that constitute takings.”).

179. See *Cnty. Hous. Improvement Program v. City of New York*, 492 F. Supp. 3d 33, 38, 54 (E.D.N.Y. 2020).

180. Reply Brief for Plaintiffs-Appellants at 3, 74 Pinehurst LLC v. New York, Nos. 21-467(L), 21-558(Con) (2d Cir. Feb. 6, 2023), 2021 WL 3723163.

181. See *id.* at 8 (arguing that *Cedar Point* “confirms that the District Court erred by dismissing Plaintiffs’ physical-takings claims on the ground that owners of rent-stabilized apartments retain bare legal title to, and the ability to sell, those apartments”).

182. *Id.* at 5.

183. *Id.*

184. Brief for City Appellees at 28, 74 Pinehurst LLC, Nos. 21-467(L), 21-558(Con), 2021 WL 3406392 (quoting *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2077 (2021)).

185. *Id.*

were necessarily open to the public because the property owners “invited the presence of residential tenants” and thus were not subject to the *per se* analysis required by *Cedar Point*.¹⁸⁶ In rebuttal, the plaintiffs-appellants argued that the exception the Court carved out in *Cedar Point* applies only to businesses as “open” as malls, not to “[p]laintiffs’ apartments, which are by definition ‘open’ only to their tenants and those tenants’ invitees.”¹⁸⁷

The Second Circuit has yet to weigh in on how *Cedar Point* affects the rent regulation inquiry. The following Part considers how courts can answer the question presented in these appeals: Is New York’s RSL as amended by the HSTPA unconstitutional under *Cedar Point*? And if it is unconstitutional, what are the implications?

III. HOW *CEDAR POINT* MIGHT AFFECT A TAKINGS CHALLENGE IN THE RENT REGULATION CONTEXT

How the *Cedar Point* decision will bear on the constitutionality of laws like the HSTPA remains to be seen. This Part evaluates the various analytical paths a court could pursue by investigating their doctrinal logic and normative implications. Section III.A elaborates the maximalist approach, under which courts would find that *Cedar Point* renders rent control unconstitutional by virtue of the tenant’s presence on the landlord’s property and considers how just compensation would be measured under this approach. Section III.B presents the minimalist approach: It analyzes application of the implied “general public” and “background principles” exceptions to rent regulations to propose that even legislation as robust as the HSTPA could be found constitutional under *Cedar Point*. Section III.C argues that theoretical and policy considerations also weigh in favor of adopting the minimalist approach.

A. *The Maximalist Approach: How Courts Might Read Cedar Point to Find that the HSTPA Is a Taking*

As discussed in Part II, *Cedar Point* both validates the centrality of the right to exclude and elevates the right from a stick in the bundle to a legally cognizable property interest itself. The potential application of this holding to rent regulations is straightforward: By enacting laws that limit landlords’ ability to control whom they rent their property to, how much they rent their property for, and whether to exit the rental market entirely, the government appropriates from the landlords their right to exclude for the enjoyment of the occupying tenants, who may remain in situ despite the landlord’s desire to rent or sell the apartment at market rate. Under this reading, *Cedar Point* would invalidate any rent regulation that requires

186. *Id.*

187. Reply Brief for Plaintiffs-Appellants, *supra* note 180, at 13.

a landlord to enter into or renew a lease, including the HSTPA, regardless of its specific terms.

If a court decides to read *Cedar Point* expansively to make all rent control a taking, it will then have to address the second half of the Takings Clause: What “just compensation” is owed under these circumstances? Scholarship on the modern purpose of the just compensation requirement argues that it is motivated by two principal justifications: “deterrence and justice.”¹⁸⁸ The just compensation requirement presumably deters the federal government from taking property unless strictly necessary because of the costs it bears in doing so.¹⁸⁹ Professor Katrina Miriam Wyman argues, however, that, given the “many variables affecting the impact of takings compensation on governmental decision making,” calibrating just compensation to “encourage efficient government choices” will not always have its intended effect.¹⁹⁰ Instead, the just compensation requirement is better seen as an effort to achieve corrective justice for the property owner from whom the property has been taken.¹⁹¹ The question then becomes: How do you make that person whole?¹⁹²

The commonly accepted answer to this question is that the government should pay whatever amount would make a takee objectively indifferent to the taking. Many scholars argue that this undercompensates takees because it does not incorporate their subjective attachment to the property.¹⁹³ Despite calls for reform, the Supreme Court has indicated that an objective measure of just compensation—usually fair market value—is a more appropriate standard because calculating subjective value is not administratively feasible.¹⁹⁴ The fair market value standard means that “the owner is entitled to receive ‘what a willing buyer would pay in cash to a willing seller’ at the time of the taking.”¹⁹⁵

In the context of temporary takings—such as rent control—the compensation standard is better formulated as the “‘fair rental value’ of the asset for the said period.”¹⁹⁶ In other words, had the apartment been

188. Katrina Miriam Wyman, *The Measure of Just Compensation*, 41 U.C. Davis L. Rev. 239, 246 (2007).

189. *Id.* (“[T]he compensation requirement constrains governmental takings because it presents a budget constraint. Without it, governments would not incur financial costs in exercising eminent domain, and presumably, there would be more governmental takings.”).

190. *Id.* at 248.

191. *Id.* at 250.

192. *Id.*

193. *Id.* at 256–62 (describing reform proposals for aligning just compensation with the takee’s subjective valuation of the property).

194. *Id.* at 253 (“[T]he Court has suggested that subjective indifference is not a practical objective for takings compensation because it is nearly impossible for an outsider to accurately determine how much an owner subjectively values his or her losses.”).

195. *Id.* at 252 (quoting *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979)).

196. Amnon Lehavi, *Temporary Eminent Domain*, 69 Buff. L. Rev. 683, 712 (2021) (“The basic principle established in the Second World War cases, which dealt with explicit

deregulated, how much would the landowners have been able to rent it for? Determining just compensation could therefore be as simple as measuring “the difference between the market rental value and the regulated rental.”¹⁹⁷ Calculating this measure, however, may prove “practically unfeasible and normatively troubling” because it does not take into account the costs incurred by the property owner as a consequence of the temporary taking and thus does not return them to as good a position as if the property had not been taken.¹⁹⁸ To remedy this deficiency, the Court has previously considered costs such as the “‘reasonable cost of moving out the property stored and preparing the space for occupancy by the subtenant’ . . . as well as the cost of ‘fixtures and permanent equipment destroyed or depreciated in value.’”¹⁹⁹ Employing this same logic, the Court might consider the costs incurred by building owners in the course of trying to escape regulation—such as capital improvements and costs associated with frequent turnover between tenants²⁰⁰—in its calculations. Given the widespread practice of investing in units to raise the rent to meet the deregulation threshold,²⁰¹ the cost to the government of paying out just compensation could be astronomical.

At the other extreme, a court might find the measure of just compensation to be minimal based on the still-standing constitutional rent regulations that burden a rental property. For example, if the court were to strike down just one provision of the HSTPA as unconstitutional, such as the condo conversion provision, while retaining others, such as abolishment of the deregulation threshold, there may be no difference between the unregulated and regulated price of the apartment, in which case just compensation would be nil. Even if the court were to strike down the entire HSTPA as unconstitutional based on the totality of its restrictions, the “unregulated” price of the apartment might be the rental price under New York City’s previous rent regulation regime, under which rent increases were still hampered by the Rent Guidelines Board’s restrictions. Thus, if the HSTPA is unconstitutional under *Cedar Point* but the court retains the state’s ability to regulate rent prices to some extent, the cost to the government—and the monetary gain afforded to landlords—could be negligible.

temporary eminent domain, was that the compensation should *not* be based on ‘fair market value,’ . . . [but] rather, on the ‘fair rental value’ of the asset for the said period.”).

197. Epstein, Rent Control, *supra* note 54, at 746.

198. Lehari, *supra* note 196, at 712.

199. *Id.* at 713 (quoting *United States v. Gen. Motors Corp.*, 323 U.S. 373, 383 (1945)).

200. Kim Barker, Behind New York’s Housing Crisis: Weakened Laws and Fragmented Regulation, *N.Y. Times* (May 20, 2018), <https://www.nytimes.com/interactive/2018/05/20/nyregion/affordable-housing-nyc.html> (on file with the *Columbia Law Review*).

201. *Id.*

B. *The Minimalist Approach: How Courts Might Read Cedar Point to Find the HSTPA Constitutional*

As discussed earlier, the new categorical rule established by *Cedar Point* is subject to a number of exceptions. The HSTPA may fall within two of them. Section III.B.1 discusses application of the general public exception implicitly endorsed by the *Cedar Point* Court. Section III.B.2 considers whether regulation of the landlord–tenant relationship falls within the background principles exception.

1. *General Public Exception.* — Landlord–tenant relationships may fall within the exception carved out for businesses open to the general public.²⁰² By distinguishing *Pruneyard*, the *Cedar Point* Court indicated that government-authorized temporary physical invasions of property are constitutional when the property is open to the general public.²⁰³ Professor Lee Anne Fennell suggests that establishing that the landowner “actually invited the intrusion” is therefore “the simplest way for the government to escape liability for a *per se* physical taking.”²⁰⁴

There is ample support to suggest that efforts to establish the constitutionality of the HSTPA under this exception will succeed. Courts have consistently held that once landlords voluntarily open their property to tenants, the government has broad power to regulate the landlord–tenant relationship,²⁰⁵ which suggests that when a landlord “voluntarily opens her property for use by others (e.g., by renting it), [the] right to exclude is partially waived.”²⁰⁶

As Fennell points out, however, *Cedar Point* does not entirely answer the question of what standard applies when a property owner opens up their property to a “subset of nonowners,” rather than to the general public.²⁰⁷ If the Court follows *Yee*, “it might seem there is no *per se* physical taking associated with regulating the landlord-tenant relationship in ways that enable the tenant (or any other initially authorized resident) to remain in place for a longer time or on terms different from those the

202. See *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2077 (2021) (“Limitations on how a business generally open to the public may treat individuals on the premises are readily distinguishable from regulations granting a right to invade property closed to the public.”).

203. *Cedar Point*, 141 S. Ct. at 2076–77; see also Fennell, *supra* note 8, at 10.

204. *Id.* at 14.

205. See *Yee v. City of Escondido*, 503 U.S. 519, 527 (1992) (“The government effects a physical taking only where it requires the landowner to submit to the physical occupation of his land.”).

206. Manheim, *supra* note 75, at 226.

207. Fennell, *supra* note 8, at 15 (explaining that *Cedar Point* “provides definitive guidance” only “where the subset in question consists of your own workers—at least when they live off-site”).

landlord contemplated.”²⁰⁸ But whether the Court will adhere to this precedent is unclear.²⁰⁹

One compelling argument for doing so is implied by the Court’s reasoning in *Yee*, which explains that once a “landowner decides to rent his land to tenants, the government may place ceilings on the rents the landowner can charge or require the landowner to accept tenants he does not like without automatically having to pay compensation.”²¹⁰ In support of this statement, the Court cited *Heart of Atlanta Motel v. United States*,²¹¹ the landmark case in which the Court held that Congress’s adoption of the Civil Rights Act of 1964, prohibiting discrimination in public accommodations, was a constitutional exercise of its Commerce Clause power.²¹² The Court in *Cedar Point* also alluded to *Heart of Atlanta Motel* in explaining the distinction between the business open to the general public and property closed to the public.²¹³ The implication is that businesses open to the general public are not free to exercise their “right to exclude” for discriminatory reasons. Considering a landlord’s property to be closed to the public could therefore potentially endanger the ability of the state and federal government to enact antidiscrimination housing laws.

This hypothesis is supported by commentary on the case and its implications. Journalist Elie Mystal critiqued the Court’s decision in *Cedar Point* by pointing out that its logic was “repurposed from arguments segregationists used against civil rights activists.”²¹⁴ By reviving the argument that the Fifth Amendment protects a fundamental right to exclude, he argued that the Court’s decision “opened the door to . . . long-

208. *Id.*

209. *Id.* at 15–16 (“It seems possible, even likely, that the Court might revisit *Yee* in a future case and impose some limits on this form of the open-door argument.”); see also Erwin Chemerinsky, *Chemerinsky: Does Precedent Matter to Conservative Justices on the Roberts Court?*, ABA J. (June 27, 2019), <https://www.abajournal.com/news/article/chemerinsky-precedent-matters-little-to-conservatives-on-the-roberts-court> [<https://perma.cc/T6DJ-AW2J>] (“Recent decisions of the Roberts Court indicate that the five conservative justices overall will give little deference to precedents that they want to overrule.”). But see William Baude, *Precedent and Discretion*, 2019 Sup. Ct. Rev. 313, 316 (2020) (“The Court’s decisions to stand by precedent are far more common, and often less justified, than its decisions to overrule.”).

210. *Yee*, 503 U.S. at 529 (citations omitted).

211. *Id.* (citing *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 261 (1964)).

212. *Heart of Atlanta Motel*, 379 U.S. at 261.

213. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2076 (2021) (noting that the Court rejected the claim that “provisions of the Civil Rights Act of 1964 prohibiting racial discrimination in public accommodations effected a taking” in *Heart of Atlanta Motel*); see also Fennell, *supra* note 8, at 14–15 (“Apparently, then, a government access requirement does not work a *per se* taking if the owners have opened up the property to the public at large—even if the owners would prefer to exclude some people or uses.”).

214. Elie Mystal, *Yesterday’s Union-Busting Supreme Court Decision Was a Segregationist Throwback*, *Nation* (June 24, 2021), <https://www.thenation.com/article/society/cedar-point-court/> [<https://perma.cc/Z6CJ-M7WX>].

discredited views of how property owners might use that property as an excuse to deny civil rights across the spectrum.”²¹⁵ The Court’s distinction between private property and property open to the general public was presumably intended to assuage these fears and thus counsels towards an expansive reading of the exception.²¹⁶

In their appeal from the lower court’s decision, the 74 Pinehurst plaintiffs argued that the HSTPA could not fall within this exception because of its provisions compelling “owners against their wishes to *renew* a lease with an existing tenant, or to enter into new leases with a former tenant’s successors.”²¹⁷ They argue that such provisions do not “regulat[e] the landlord-tenant relationship” but rather “*compel[] the existence*” of one, and thus *Yee* does not govern.²¹⁸ *Yee*, however, precludes this argument. There, the Court considered and rejected the “petitioners’ contention that the ordinance amounts to compelled physical occupation because it deprives petitioners of the ability to choose their incoming tenants.”²¹⁹ Because the petitioners had chosen to “voluntarily open their property to occupation by others,” the Court held that they could not now “convert regulation into the unwanted physical occupation of land,” even though they had to enter into leases with new tenants selected by the former ones.²²⁰ Thus, under the logic of *Yee*, the HSTPA’s requirement that the owner “accept a third-party’s occupation beyond the term to which the owner agreed” does not convert it from constitutional regulation to unconstitutional occupation.²²¹

The 74 Pinehurst plaintiffs also attempt to distinguish *Yee* on the grounds that the challenged mobile park ordinance did not “compel[] owners [sic], once they have rented their property to tenants, to continue doing so.”²²² They argue that “[i]n light of the RSL’s provisions subjecting owners to perpetual rental obligations and closing off avenues to recapture use and possession of their apartments,” the HSTPA is manifestly different than the ordinance at issue in *Yee*.²²³ But again, the

215. *Id.*; see also Eduardo M. Peñalver, *The Obscure Case that Could Blow Up American Civil-Rights and Consumer-Protection Laws*, *Atlantic* (Mar. 25, 2021), <https://www.theatlantic.com/ideas/archive/2021/03/cedar-point-scotus/618405/> [<https://perma.cc/74TB-ZDMD>] (“By the farmers’ interpretation of the Fifth Amendment, requiring an anti-Semitic hotel owner to rent a room to an orthodox-Jewish family would seem to amount to a permanent physical occupation . . . by the government, because it requires the prejudiced owner to allow access . . . by people he would rather exclude . . .”).

216. See *Bowie*, *supra* note 177, at 195 (suggesting that the “best explanation” for the distinction was the Court’s desire to avoid invalidating the Civil Rights Act).

217. Reply Brief for Plaintiffs-Appellants, *supra* note 180, at 9.

218. *Id.*

219. *Yee v. City of Escondido*, 503 U.S. 519, 530–31 (1992).

220. *Id.* at 531.

221. Reply Brief for Plaintiffs-Appellants, *supra* note 180, at 9.

222. *Id.* at 10 (quoting *Yee*, 503 U.S. at 527–28) (misquotation).

223. *Id.* at 11.

factual scenario in *Yee* closely parallels the plaintiff's case. In *Yee*, the petitioners argued that the "statutory procedure for changing the use of a mobile home park"—which required six or twelve months of notice to evict the tenants—"is in practice 'a kind of gauntlet,' in that they are not in fact free to change the use of their land."²²⁴ The Court dismissed this because no petitioner had established that they had tried and failed to run the gauntlet.²²⁵ Similarly, the 74 Pinehurst plaintiffs *do* have statutory methods of changing the use of their property—for example, by meeting the fifty-one percent threshold for condo conversion—but argue that it is too difficult to do so under the statutory conditions, without demonstrating that they tried.

These parallels to *Yee* suggest that extending *Cedar Point* to the rent regulation context would require overturning established precedent. Given that the Supreme Court's doctrine of stare decisis requires that a decision be left standing unless there are compelling justifications for overturning it,²²⁶ jettisoning *Yee*—a relatively uncontroversial decision—seems unlikely. Lower courts may attempt to bring rent regulations within the ambit of *Cedar Point* by arguing that when a landlord opens their property to a tenant it is no different than when a business owner opens their property to an employee because, in both cases, the access right is extended temporarily and for a specific purpose to a limited population.²²⁷ This argument, however, does not accord with the Supreme Court's precedents on landlord–tenant relations, which recognize housing as a "necessary of life"²²⁸—thus implicitly endorsing Radin's argument that housing implicates personhood²²⁹—and prevent landlords from choosing to participate in the rental market while objecting that regulation of that same market constitutes a *per se* taking.²³⁰

224. *Yee*, 503 U.S. at 528 (quoting Reply Brief for the Petitioners at 10 n.16, *Yee*, 503 U.S. 519 (No. 90-1947), 1992 WL 545134).

225. *Id.*

226. See *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (explaining that stare decisis promotes the "evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process"); see also *Ramos v. Louisiana*, 140 S. Ct. 1390, 1411–15 (2020) (Kavanaugh, J., concurring in part) (describing the origins of stare decisis and the Court's considerations when deciding whether to overturn cases, including whether the decision was "egregiously wrong," has caused "significant negative jurisprudential or real-world consequences," and whether "overruling the prior decision would unduly upset reliance interests").

227. See *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980) (noting that "by choice of its owner," the business at issue was "open to the public to come and go as they please").

228. *Block v. Hirsch*, 256 U.S. 135, 156 (1921).

229. See *supra* notes 59–62 and accompanying text.

230. *Yee*, 503 U.S. at 532 ("[The rent control ordinance] does not authorize an unwanted physical occupation of petitioners' property. It is a regulation of petitioners' *use* of their property, and thus does not amount to a *per se* taking.").

2. *Background Principles Exception.* — For courts resistant to the idea that rental properties can be characterized as open to the general public, the Court’s background principles exception is another viable pathway to determine that rent regulations fall outside *Cedar Point*’s ambit. The *Cedar Point* Court exempted from its holding “government-authorized physical invasions” that are “consistent with longstanding background restrictions on property rights.”²³¹ To explain this exception, the Court cited *Lucas v. South Carolina Coastal Council*,²³² a regulatory takings case in which the Court held that the “government does not take a property interest when it merely asserts a ‘pre-existing limitation upon the land owner’s title.’”²³³ Among the preexisting limitations noted by the Court in *Cedar Point* are nuisance law,²³⁴ “traditional common law privileges to access private property,”²³⁵ and the “privilege to enter property to effect an arrest or enforce the criminal law under certain circumstances.”²³⁶

This list, however, is not exclusive, and in some cases, preexisting statutory laws serve as background principles in the takings context.²³⁷ Immediately following *Lucas*, many courts followed a rule that takings claims “brought by a landowner who purchased property subject to an existing regulatory proscription and subsequently had his or her use restricted by that regulation” were barred by the background principles logic.²³⁸ Many courts denied takings challenges to rent regulations based on this reasoning.²³⁹ The Supreme Court eventually clarified that takings claims were “not barred by the mere fact that . . . title was acquired after the effective date of the state-imposed restriction”²⁴⁰ but did not preclude the possibility that statutory regimes could sometimes serve as background principles.²⁴¹

231. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2079 (2021).

232. 505 U.S. 1003 (1992).

233. *Cedar Point*, 141 S. Ct. at 2079 (quoting *Lucas*, 505 U.S. at 1028–29).

234. *Id.* (“For example, the government owes a landowner no compensation for requiring him to abate a nuisance on his property, because he never had a right to engage in the nuisance in the first place.” (citing *Lucas*, 505 U.S. at 1029–30)).

235. *Id.* (“One such privilege allowed individuals to enter property in the event of public or private necessity.”).

236. *Id.*

237. Michael C. Blumm & Lucas Ritchie, *Lucas’s Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 Harv. Env’t L. Rev. 321, 354–58 (2005) (discussing the history of statutory law as background principle).

238. *Id.* at 354–55.

239. See Manheim, *supra* note 75, at 234–35.

240. Blumm & Ritchie, *supra* note 237, at 356 (alteration in original) (internal quotation marks omitted) (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 632 (2001) (O’Connor, J., concurring)).

241. *Id.* at 356–57 (describing instances where courts held that statutory provisions served as background principles sufficient to bar a takings claim).

Professor Michael C. Blumm and Lucas Ritchie note that Chief Justice William Rehnquist's dissent in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*²⁴² gives insight into the “types of regulations that are sufficiently traditional in scope to be background principles of property law.”²⁴³ Based on the Chief Justice's explanation that “zoning and permit regimes are a longstanding feature of state property law[,] . . . [z]oning regulations existed as far back as colonial Boston[,] . . . and New York City enacted its first comprehensive zoning ordinance in 1916,”²⁴⁴ Blumm and Ritchie extrapolate that “*Lucas* background principles analysis insulates from takings liability any legislatively decreed use restriction with a lineage antedating 1916.”²⁴⁵ Though lower courts have not applied this principle with any specificity, they do take the age of a regulation into account when determining whether it serves as a background principle.²⁴⁶

As discussed in Part II, rent regulations in New York have spanned a century. If “vintage” is a primary factor in determining whether statutory provisions serve as background principles of law, New York's rent regulation regime certainly passes the test. Understanding rent regulations as a background principle of law also accords with the argument advanced by Becker that certain limitations on “use and income rights”—like taxes and rent control—are “reasonably expectable sorts of restrictions, even if they are inconvenient, offensive, or surprising to the people who suffer them.”²⁴⁷ Landlords entering into the business of renting their property presumably know there will be restrictions limiting how they can interact with tenants, including, in a regulated market, how much profit they can derive from them. And although the specifics of the regime may change over time, its basic contours remain the same.²⁴⁸ Based on this reasoning, a court could find that rent regulations constitute background principles of law and are thus exempt from takings liability under *Cedar Point*.

C. *Theoretical and Policy Considerations*

As the previous sections make clear, the minimalist approach better accords with precedent. In addition to the doctrinal roadblocks to adopting the maximalist approach, theoretical and policy considerations

242. 535 U.S. 302, 352 (2002) (Rehnquist, C.J., dissenting).

243. Blumm & Ritchie, *supra* note 237, at 358.

244. *Id.* (third and fifth alterations in original) (quoting *Tahoe-Sierra*, 535 U.S. at 352 (Rehnquist, C.J., dissenting)).

245. *Id.*

246. See Blumm & Wolfard, *supra* note 31, at 1193–203 (reviewing regulations that lower courts have determined to be background principles and noting that the courts have “not agreed with how long a statute must exist for it to become a background principle”).

247. Becker, *supra* note 71, at 1216.

248. See *Bldg. & Realty Inst. of Westchester & Putnam Cntys., Inc. v. New York*, No. 19-CV-11285, 2021 WL 4198332, at *15 (S.D.N.Y. Sept. 14, 2021) (arguing that the “HSTPA merely changes the percentage required to convert buildings into condominiums”).

counsel against an expansive application of *Cedar Point* to rent regulations. The maximalist reading, a great victory for the libertarian view of the Takings Clause advanced by Epstein,²⁴⁹ is potentially at odds with a layperson's understanding of the Takings Clause, as discussed in Part I.²⁵⁰ Widening the gap between how legal academics and "other citizens of the democratic polity" understand the Constitution disserves "transparency in a democratic society's basic laws."²⁵¹ Professor Bethany R. Berger shows that the maximalist reading is also at odds with the original understanding of the Fifth Amendment.²⁵² Berger's research finds that rights to enter property originated in the seventeenth century and "flourished and were captured in statutes, cases, and state constitutions in the period around drafting and ratification" of the Constitution.²⁵³ An originalist understanding of the Takings Clause, in other words, would not treat the right to exclude as a stand-alone property interest capable of being taken.²⁵⁴ Given the current Supreme Court's originalist bent,²⁵⁵ Berger's research makes the Court's conclusion in *Cedar Point* surprising. It also indicates that originalist judges interpreting *Cedar Point* might be inclined to read the holding narrowly and the exceptions expansively.²⁵⁶

Policy considerations bolster these theoretical points. At the root of the rent regulation debate is a conflict between "the provision of decent, affordable shelter and the creation of wealth for homeowners."²⁵⁷ Justifications for rent regulations often rest on the assumption that "the displacement of low income residents and the dispersal of their

249. Wenar, *supra* note 63, at 1936 ("Epstein accepts—indeed he celebrates—the conservative-libertarian conclusions that everyone since Hohfeld has been trying to avoid: that government takes property whenever it disturbs any privately held property right and must compensate for all such disruptions.").

250. *Id.* at 1945 ("[I]nfluential academic approaches to the Takings Clause are surprisingly distant from each other and from a nonspecialist sense of what the Clause means.").

251. *Id.* at 1925.

252. Bethany R. Berger, *Eliding Original Understanding in Cedar Point Nursery v. Hassid*, 33 *Yale J.L. & Humans* 307, 315 (2022) ("[M]ost agree that the founders did not believe government restrictions on [property] use were takings.").

253. *Id.* at 318.

254. *Id.* at 331 ("By holding that all physical invasions of property are per se takings, *Cedar Point v. Hassid* elides the public understanding of property at the time of the founding.").

255. Emily Bazelon, *How Will Trump's Supreme Court Remake America?*, *N.Y. Times Mag.* (Feb. 27, 2020), <https://www.nytimes.com/2020/02/27/magazine/how-will-trumps-supreme-court-remake-america.html> (on file with the *Columbia Law Review*).

256. Berger, *supra* note 252, at 310 ("[T]he *Cedar Point* exceptions create a second chance for originalist judges to make good on their originalist commitments.").

257. Michael Diamond, *Affordable Housing and the Conflict of Competing Goods: A Policy Dilemma*, in *Affordable Housing and Public-Private Partnerships* 1, 3 (Nestor M. Davidson & Robin Paul Malloy eds., 2009) ("To the extent society seeks to preserve an affordable housing unit for the long term, it must restrict the wealth that an owner can derive from the sale or rental of that property.").

preexisting communities is a societal ill that should be remedied.”²⁵⁸ Implicit in these justifications—and explicit in Radin’s argument regarding rent control²⁵⁹—is the view that a tenant’s claim to affordable housing should be weighted more heavily than a landlord’s interest in wealth production. In Epstein’s view, such a calculation is “risky.”²⁶⁰ He argues that privileging the claim of a “tenant in possession” over that of a landlord is an arbitrary value judgment with no meaningful limiting principle.²⁶¹ So as not to make assessments about “whose goals, aspirations, and desires” matter more, Epstein argues that “every person should count for one and only one” when determining how to balance conflicting interests.²⁶²

Under this view, rent regulation regimes are undesirable because they place a weight on one side of the scale, privileging the rights of tenants over landlords in an economic relationship and leading to the undesirable redistribution of wealth to the tenant that should belong to the landlord.²⁶³ From an economic perspective, Epstein predicts that such redistribution leaves landlords unwilling to invest in their properties and unable to buy new ones, thereby decreasing the overall housing stock and harming tenants as well as landlords.²⁶⁴ But even if tenants do not feel such negative effects, the forced redistributive effect of rent regulation alone is troubling for those who believe that a state should operate according to laissez faire economic principles.²⁶⁵ Though the strength of this argument is diminished by the fact that the “forced” redistribution is enacted through legislation passed by democratically elected representative bodies and therefore presumably reflects a majority’s perspective on how to organize societal interests, a court could nonetheless conclude that rent regulations like the HSTPA are unconstitutional under *Cedar Point* based on a desire to avoid the redistributive effects of such legislation and advance free-market, anti-interventionist principles.

258. Jeffrey James Minton, *Rent Control: Can and Should It Be Used to Combat Gentrification?*, 23 *Ohio N.U. L. Rev.* 823, 850 (1997).

259. See *supra* section I.B.

260. Epstein, *Rent Control*, *supra* note 54, at 771 (“It is very risky to announce that some persons or some roles count for more than others.”).

261. *Id.* (“Once we intuit that certain positions, and hence certain people, are special, then we have to determine just how special they really are.”).

262. *Id.* (internal quotation marks omitted) (quoting the old utilitarian maxim).

263. Peter D. Salins, *Reflections on Rent Control and the Theory of Efficient Regulation*, 54 *Brook. L. Rev.* 775, 775 (1988).

264. *Id.* (“Epstein argues[] rent regulation . . . is a negative sum game where tenants, as a class, lose as well as landlords.”).

265. See Eduardo M. Peñalver, *Reconstructing Richard Epstein*, 15 *Wm. & Mary Bill Rts. J.* 429, 433 (2006) (arguing that Epstein is “unwilling to concede the justice of using coercion to overcome the same collective action problems that make it virtually impossible for private actors . . . to provide adequate and effective social assistance for the poor” (footnote omitted)).

This approach, however, could severely restrict the state's ability to enact its policy goals. Radin's view that rent control cannot be evaluated through a simple utilitarian analysis posits that rent control serves a different, more important, societal interest than wealth maximization: keeping people housed.²⁶⁶ Although Radin does not go so far as to suggest that housing is a fundamental right, this idea has been advanced elsewhere.²⁶⁷ For example, a right to housing framework exists in Europe, where the "concept . . . draws legitimacy from a strong consensus that housing is a fundamental necessity to which all persons need access in order to maintain a basic level of dignity and have an opportunity to achieve their full potential as human beings."²⁶⁸ Some scholars have gone so far as to theorize housing as a "freedom right" based on housing's role as a "bedrock" for all other rights.²⁶⁹ Under this conception, the right to housing is at least on par with property rights.²⁷⁰

This framework has not gained much traction in the United States, where a "supply of affordable rental units for low-income individuals, who are most at risk of experiencing homelessness," has continued to dwindle.²⁷¹ But a court need not fully endorse housing as a fundamental right to be concerned with the state's ability to house its citizens. Although federal housing programs provide some support, "much of the responsibility for providing and ensuring that adequate housing is available . . . lies with local governments," who "regulate housing through licensing landlords, conducting code enforcement, controlling rents . . . , and enforcing landlord-tenant laws."²⁷²

266. Radin, *supra* note 59, at 360.

267. See, e.g., Thomas Byrne & Dennis P. Culhane, *The Right to Housing: An Effective Means for Addressing Homelessness?*, 14 *U. Pa. J.L. & Soc. Change* 379, 379 (2011) (noting that "[a] number of international human rights instruments establish a right to housing, with the most important being the 1948 Universal Declaration of Human Rights and the 1966 United Nations International Covenant on Economic, Social, and Cultural Rights" (footnote omitted)); Lucy A. Williams, *The Right to Housing in South Africa: An Evolving Jurisprudence*, 45 *Colum. Hum. Rts. L. Rev.* 816, 817–18 (2014) (noting that a right to housing is among the fundamental rights protected by the South African Constitution).

268. Byrne & Culhane, *supra* note 267, at 380–81.

269. See generally Peter King, *Housing as a Freedom Right*, 18 *Hous. Stud.* 661 (2003) (arguing that housing is a "freedom right" by building on the work of Professors Jeremy Waldron and Martha Nussbaum to show that a right to a place to perform elemental functions is necessary to human flourishing).

270. *Id.* at 662.

271. Byrne & Culhane, *supra* note 267, at 386–87; see also W. Dennis Keating, *The Right to Housing: The Goal Versus the Reality*, in *The Routledge Handbook of Housing Policy and Planning* 11, 13 (Katrin B. Anacker, Mai Thi Nguyen & David P. Varady eds., 2019) [hereinafter Keating, *The Right to Housing*] (collecting American critics' perspectives on the right to housing).

272. Keating, *The Right to Housing*, *supra* note 271, at 14.

Even with these tools in place, cities are “incapable of meeting the needs of all who need adequate housing.”²⁷³ In New York City, for example, rent stabilization regulates “around one million rental units housing approximately 2.5 million tenants,” but half of the city’s tenants are rent-burdened, meaning that more than thirty percent of their income goes to rental payments.²⁷⁴ Following the maximalist approach would thus eliminate one essential tool from the state’s arsenal, further diminishing its ability to provide adequate housing. For courts concerned with avoiding hampering the state’s ability to house its citizens, this is a compelling reason to follow the minimalist approach.

CONCLUSION

How the *Cedar Point* decision will impact constitutional challenges to rent regulation legislation like the HSTPA is not yet clear. *Cedar Point*’s “various ad hoc exceptions” give courts “plenty of grist to grind into new doctrinal protections of favored laws.”²⁷⁵ There are therefore alternative doctrinal paths a court could pursue depending on its methodological and normative commitments. Applying the maximalist approach to find rent regulations unconstitutional avoids the redistributive effects of such legislation. This approach, however, is at odds with precedent, endangers antidiscrimination housing laws, and hampers the government’s ability to make housing more economically accessible for citizens who may not otherwise have access to adequate shelter. Therefore, faced with a choice about how to interpret *Cedar Point*’s holding, courts should apply an expansive reading of its exceptions to uphold rent regulations like the HSTPA.

ADDENDUM

Shortly after this Note was finalized for publication, the Second Circuit released its decision in *74 Pinehurst LLC v. New York*, rejecting the argument that the RSL as amended by the HSTPA effected a physical taking of the landlords’ property under *Cedar Point*.²⁷⁶ The court relied on a version of the “general public” exception described in this Note, quoting *Cedar Point* for the proposition that “where—as here—property owners *voluntarily* invite third parties to use their properties, regulations of those properties are ‘readily distinguishable’ from those that compel invasions of properties closed to the public.”²⁷⁷ The court then turned to *Yee v. City*

273. *Id.*

274. *Id.* at 15.

275. Bowie, *supra* note 177, at 198.

276. Nos. 21-467(L), 21-558(Con), 2023 WL 1769678, at *2 (2d Cir. Feb. 6, 2023).

277. *Id.* (quoting *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2077 (2021)); see also *supra* section III.B.1 (discussing the general public exception).

of *Escondido* to imply that a landlord's property is not closed to the public once rented to tenants.²⁷⁸

Though the immediate challenges to the HSTPA are now resolved, the larger question of how *Cedar Point* applies in the landlord–tenant context remains in dispute. While the Second Circuit adopted the minimalist approach, the Eighth Circuit recently signaled a willingness to take the maximalist route.²⁷⁹ In *Heights Apartments, LLC v. Walz*, property owners challenged a state eviction moratorium that required them to extend or renew leases with existing tenants despite the tenants' failure to pay rent.²⁸⁰ The court held that the landlords stated a plausible physical takings claim under *Cedar Point*.²⁸¹ It distinguished *Yee v. City of Escondido* on the grounds that *Yee* concerned a property owner's obligation to enter into a lease with a new tenant, whereas the eviction moratorium required landlords to extend leases with existing tenants.²⁸² While New York City's laws also obligate landlords to renew leases with existing tenants, the Second Circuit recognized no such distinction in *74 Pinehurst*.²⁸³

These decisions demonstrate a percolating tension among circuits regarding *Cedar Point's* impact on legislative or executive action that requires landlords to renew leases with existing tenants.²⁸⁴ This disagreement suggests that the Supreme Court may eventually take up the question of whether legislation like the HSTPA constitutes a taking. Until then, this Note provides continued guidance to any court wrestling with the relationship between the Fifth Amendment and rent regulations in the wake of *Cedar Point*.

278. See *74 Pinehurst LLC*, 2023 WL 1769678, at *2 (“[W]hen ‘a landowner decides to rent his land to tenants’ the States ‘have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails.’” (quoting *Yee v. City of Escondido*, 503 U.S. 519, 528–29 (1992))).

279. See *supra* section III.A (discussing the maximalist approach); *supra* section III.B (discussing the minimalist approach).

280. 30 F.4th 720, 724–25 (8th Cir. 2022).

281. *Id.* at 733.

282. *Id.*

283. See *74 Pinehurst LLC*, 2023 WL 1769678, at *2 (rejecting the argument that a landlord's obligation to offer a renewal lease under the RSL constitutes a physical taking).

284. See *Williams v. Alameda Cnty.*, Nos. 3:22-cv-01274-LB, 3:22-cv-02705-LB, 2022 WL 17169833, at *11–12 (N.D. Cal. Nov. 22, 2022) (declining to follow the Eighth Circuit's reasoning in *Heights Apartments* and holding that municipal eviction moratoria are not *per se* takings).

