Ensuring People Have Access to Their Homes: Updating Penn Central and Tahoe-Sierra

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Introduction

During March to May of 2020, multiple counties in North Carolina closed their borders to out of state residents in an effort to combat the spread of Covid-19.[1] Joseph Blackburn and others who owned property in the county but lived in Richmond were, for two months, unable to visit or use their property as they had intended.[2] Although Blackburn and the other homeowners did not contest the government's ability to shut down travel, they did ask for a remedy under the Fifth Amendment Takings Clause.[3] The Takings Clause clarifies that "[no] private property [can] be taken for public use, without just compensation."[4] The Takings Clause is the root of eminent domain law, and requires the government to pay when taking ownership of private property.[5] The government can take ownership physically or through a regulatory taking, where legislation frustrates the purpose of the purchased land.[6] In *Blackburn v. Dare County*, the Fourth Circuit held for the county.[7] Although certiorari was unfortunately denied, the Fourth Circuit opinion is notable for how its decision reflects current problems in takings jurisprudence.

The Fourth Circuit Court based its opinion on similar logic to the district court, which used the factors in *Pennsylvania Central Transportation Company v. City of New York* (*hereinafter "Penn Central"*) for commercial real estate, "including (1) 'the economic

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1 *See* Blackburn v. Dare Cnty., 486 F. Supp. 3d 988, 993 (E.D.N.C. 2020).

2 *See id.*

3 *See id.* at 993, 995.

4 U.S. Const. amend. V.

5 *See id.*; *see generally* Pa. Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).

6 *See generally* Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922).

7 *See* Blackburn v. Dare Cnty., 58 F.4th 807, 815 (4th Cir. 2023).

impact of the regulation on the claimant;' (2) 'the extent the regulation has interfered with distinct investment-backed expectations;' and (3) 'the character of the governmental action.'"[8] Using the *Penn Central* factors, the *Blackburn* court found no taking because the plaintiffs retained ownership and some of the land's value ignores the inherent value homeowners give residential property.[9] The *Penn Central* factors, and takings jurisprudence in general, undervalue residential plaintiffs by their focus on property in purely economic terms.[10] Almost all regulatory takings precedents come from cases where investors sue to protect investment properties rather than their homes.[11] The generally less sympathetic business plaintiffs have led takings jurisprudence to be stacked against homeowners.[12] *Blackburn* is only one example. Many laws that eliminate homeowners' right to live in their own homes have been upheld because of a lack of economic stake or loss.[13] To stop this injustice, the Supreme Court should change the *Penn Central* factors regarding personal property, specifically by altering the first factor, which involves the impact on the quiet enjoyment of the claimant, and the second factor, the extent to which the regulation has interfered with the distinct investment-backed expectation of the plaintiff's quiet enjoyment.[14] The new standard would better respect the founders' goal of protecting residential property, follow the text of the Fifth Amendment, and acknowledge the special vested interest of residential homeowners.

Part I contains the history of regulatory takings with specific emphasis on the *Penn Central* factors.x Part II focuses on temporary regulatory takings, with emphasis on the dichotomy of *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*[15] (*hereinafter* "*Tahoe-Sierra*") and *First English Evangelical Lutheran*

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[8] *See id.* at 812; *see also Pa. Cent. Transp. Co.*, 438 U.S. at 124.

[9] *Blackburn*, 58 F.4th at 812–13.

[10] *See id.* at 811–13.

[11] *See infra* Section III.B for case examples.

[12] *See infra* Section I.C.

[13] *See* Mann v. State, 603 S.E.2d 283, 286 (Ga. 2004) (finding that the Georgia Supreme Court upheld a sex offender buffer zone which forced the plaintiff out of his home because the owner had no economic stake or loss).

[14] For the current factors, see *Pa. Cent. Transp. Co.*, 438 U.S. at 124 ((1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action).

[15] *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan Agency, 535 U.S. 302, 303 (2002).

Church of Glendale v. County of Los Angeles.[16] It further explains how temporary takings are supposed to apply when a taking was committed and the property was returned to the homeowner before the lawsuit was completed. Part III delves into historic American property law, revealing how it traditionally treats residential property with an increased amount of equity to cover for the disadvantage given to residential plaintiffs. Part IV provides a brief explanation of the doctrine of quiet enjoyment and gives another example of equity protection. Further, it sets up a necessary part of a solution for the lack of residential property protection. Combining the quiet enjoyment and takings doctrines supports the conclusion that the *Penn Central* factors should be changed.

Part I of the Analysis overviews how changing the doctrine for temporary regulatory takings is a more logical application of the law compared to the current standard. First, the new standard better matches the Takings Clause's goal of protecting public property, spreading public burden, and blocking uncompensated government takings of property. Second, clarifying the distinction between residential and commercial properties would reconcile different attitudes and settle current legal confusion around this area of law. Third, equitable concerns would be addressed by supporting the residential plaintiffs who have been disadvantaged over the years. Fourth, this change would benefit the nation economically by increasing homeownership. The benefits cover many of the major reasons for changing the standard.

To conclude, Part II addresses counterarguments and clarifies important information. Part II defines residential property to ensure only residential homeowners benefit. Part II corrects misconceptions about the application of quiet enjoyment in this context, both that sentimental value would be included in the price and that quiet enjoyment could start being used to stop nuisance complaints, are addressed for clarification. Attacks on the relevancy of the change to the sample case address the argument of the change being redundant, because the courts already protect the rights of residential plaintiffs by pointing to a lack of uniformity in the law. This discussion of counterarguments will ensure this Article is properly contextualized. This Article concludes with a discussion of how this change could be implemented and the immediate positive effect it could have on residential homeowners.

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[16] *See* First Eng. Evangelical Lutheran Church of Glendale v. Cnty. of L.A., 482 U.S. 304, 304–05 (1987).

BACKGROUND

I. REGULATORY TAKINGS

Understanding regulatory takings requires starting at the doctrine's origins. The birth of the doctrine in *Pennsylvania Coal Company v. Mahon* established (1) that takings exist only when the government regulates the entire parcel and land and (2) that the Fifth Amendment exists in part to protect citizens from government overreach.[17] *Penn Central* created the factors used by the Supreme Court today, so discussion of the case background is necessary to understand modern takings law.[18] Modern jurisprudence, exemplified by *Lingle v. Chevron U.S.A. Inc.*[19] and *Lucas v. South Carolina Coastal Council*,[20] clarifies the current scope of regulatory takings, the importance of return on investment, and the continued use of the *Penn Central* factors.

A. *Taking in Law Rather than Fact*

The concept of regulatory takings evolved through the government taking actions that eliminated the entire value of a citizen's property.[21] In *Mahon*, a 1922 coal mining case, two key principles of regulatory takings doctrine were established.[22] The Supreme Court defined takings as a concept of managing the buyer's expectations when purchasing property.[23] The Court held the offending law was unconstitutional because it prevented the coal company from using the land as intended.[24] The Supreme Court also discussed the difference between regulatory takings and state police powers, specifying how a desire to protect public interest does not exempt the government from paying for devaluing private property.[25]

In *Mahon*, Mr. Mahon was granted surface rights by the Pennsylvania Coal Company on land the company retained mining

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17 *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 412, 415 (1922).

18 *See Pa. Cent. Transp. Co.*, 438 U.S. at 124.

19 *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 534, 540 (2005).

20 *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1003–04 (1992).

21 *See Mahon*, 260 U.S. at 393.

22 *See id.*

23 *See id.* at 415.

24 *See id.*

25 *See id.* at 412–13.

rights over.[26] Mr. Mahon denied the company any right to mine after new state legislation made mining near residential homes illegal.[27] The case went up to the Supreme Court, which ruled in favor of the coal company, struck down the state act, and gave insight into regulatory takings law.[28] The Supreme Court defined a regulation as a taking when it "goes too far," stating too far is "a question of degree" which cannot be answered in "general propositions" but must be answered on a case-by-case basis.[29] The rule established in *Mahon* was merely when the statute removed all value from the coal company's land, the state had gone beyond the constitutional line, which constituted a taking.[30] The principle of *Mahon* has remained important as the caselaw develops around taking limitations on police power.

The *Mahon* Court also discussed the line between takings and police powers, expressing concern over undue government expansion.[31] In responding to precedent widening state police power, the Supreme Court explained how the "natural tendency of human nature" is for the government to extend its regulatory powers until "private property disappears."[32] Discussing how the regulation in question had "the same effect" as destroying the company's coal, the Supreme Court refused to accept the mine-blocking regulation as a valid use of state police power.[33] The *Mahon* opinion wraps up with a warning – the United States is "in danger of forgetting that a strong public desire to improve the public condition" does not allow "short[] cuts [through] the constitutional way of paying for the change."[34] Nothing here is stopping the government from acting, paying out the coal company would suffice, but "in general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders."[35]

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26 *Id.* at 412.
27 *See Mahon*, 260 U.S. at 412.
28 *See id.* at 416.
29 *Id.* at 415–16.
30 *Id.* at 413, 416.
31 *See id.* at 413.
32 *See id.* at 415.
33 *Mahon*, 260 U.S. at 414–15.
34 *Id.* at 416.
35 *Id.* at 413, 415–16.

B. *The Limits of De Facto Takings*

The law around regulatory takings grew in the coming decades, creating more precedent necessary for the current inquiry. *Penn Central* brought on the next era of cases, attempting to formalize the ideas behind *Mahon* into an official test.[36] Background on the case and the factors listed are helpful to contextualize the current state of takings law.[37]

The *Penn Central* case related to the New York City Landmarks Preservation Commission's refusal to allow the Penn Central Transportation Company to construct a building on top of Grand Central Terminal.[38] The transportation company stood to lose several million dollars if it remained unable to build the expansion.[39] The Supreme Court took the case, in part to resolve the confusing state of regulatory takings law after *Mahon*.[40] The Supreme Court decided for the Commission, considering primarily three economic factors for regulatory takings cases.[41] The Supreme Court considered the (1) "economic impact of the regulation on the claimant;" (2) "extent to which the regulation has interfered with distinct investment-backed expectations;" and (3) "character of the governmental action" to determine whether a regulatory taking had occurred.[42] On economic impact, the Supreme Court focused on the regulations' lack of effect on *Penn Central*'s "present use" of the terminal and *Penn Central*'s ability to find other uses for "the airspace above the Terminal" to justify barring the company's recovery.[43] The first factor is based on whether the plaintiff's property retains any value after the regulation.[44] In terms of the distinct backed expectations, *Penn Central* did not lose its "primary expectation concerning the use of the parcel."[45]

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36 *See Pa. Cent. Transp. Co.*, 438 U.S. at 124–25.

37 *See generally id.* at 124.

38 *Id.* at 107.

39 *Id.* at 142 (Rehnquist, J., dissenting).

40 *See id.* at 124 (majority opinion).

41 *See id.* at 124, 130–31 (finding further that when another factor, whether "the interference with property can be characterized as a physical invasion," is mentioned, it has been treated as a part of the third prong in the three-prong test used by the Supreme Court).

42 *Pa. Cent. Transp. Co.*, 438 U.S. at 124.

43 *See id.* at 136–37.

44 *See id.*

45 *Id.* at 136.

The somewhat straightforward second factor asks if the expectation being ignored is the one invested in by the parties.[46] Here, *Penn Central's* case was likely harmed by the fact that it failed to act on any upward expansion plan in the multiple decades since it had opened in 1913.[47] For the final factor, the Supreme Court has disfavored when "the interference with property can be characterized as a physical invasion," but favored when the "restrictions imposed are substantially related to the promotion of the general welfare" equally over subjective benefits to some citizens.[48]

C. *De Facto Takings in Modern Jurisprudence*

Modern caselaw has reenforced the *Penn Central* factors, focusing on the need for the whole property value to be limited and on blocking the creation of additional restrictions.[49] The dichotomy of *Lucas v. South Carolina Coastal Council*[50] and *Palazzolo v. Rhode Island*[51] show the modern focus on the whole property. *Lingle v. Chevron* works alongside the other cases to track how the *Penn Central* factors have been protected.[52] The importance of developers being the plaintiffs is highlighted throughout the analysis.

Two beachfront property cases function in tandem to express a clear principle – the whole property must be impacted for a taking to occur.[53] In *Lucas*, the Supreme Court dealt with a beachfront owner whose property was rendered "valueless" after a South Carolina environmental law barred construction on certain beaches.[54] The Supreme Court found for the property owner, finding that "all economically beneficial use" of a property is removed when the state deprives an owner of the entire intended value of their parcel in a way unrelated to "the State's

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46 *Id.* at 124–25.

47 *See id.* at 115–18.

48 *See Penn Cent. Transp. Co.*, 438 U.S. at 124, 138.

49 *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030 (1992); *see generally* Palazzolo v. Rhode Island, 533 U.S. 606 (2001); *see generally* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 534 (2005).

50 *See Lucas*, 505 U.S. at 1003.

51 *See Palazzolo*, 533 U.S. at 631–32.

52 *See Lingle*, 544 U.S. at 538–39.

53 *Palazzolo*, 533 U.S. at 631.

54 *See Lucas*, 505 U.S. at 1008–09 (citing the South Carolina Court of Common Pleas decision through App. to Pet. for Cert. 37).

law of private nuisance."[55] Once the whole property is involved, taking the complete, or in Lucas's case, almost complete, value of the property counts as a taking.[56] Despite this principle, the Supreme Court in *Palazzolo* found against a beachfront property owner fighting an almost equivalent regulation a decade later.[57] The difference in the *Palazzolo* case was a small "uplands portion" of land was untouched and could still be improved.[58] Ignoring arguments about splitting the property, the Supreme Court refused to call the law a "total deprivation" due to the uplands portion.[59] A regulatory taking, thus, cannot be made to touch only a percent of a given property.[60] The almost complete economic deprivation of Lucas's property could constitute a taking, but an almost complete physical seizure of Palazzolo's property could not.[61]

The modern cases are also notable for how they rely on the *Penn Central* factors instead of other rationales, solidifying the importance of *Penn Central* in this area of law. The *Lucas* opinion removed a possible "harmful or noxious use" basis for ignoring *Penn Central*, holding that it only applied when state nuisance law had previously made a property use illegal.[62] The *Palazzolo* decision blocked claims that "acquisition of title after the effective date of the regulations barred the takings claims."[63] In a third case, *Lingle*, the Supreme Court rejected another opposing philosophy to the *Penn Central* factors when a Hawaii law barred certain oil profits.[64] In deciding to uphold the law, the Supreme Court struck down an argument that the law in question needed to "substantially advance legitimate state interests" to allow a taking.[65] A takings analysis is about the "burden imposed on property rights," how well a government regulation advanced state interests is irrelevant to

[55] *Id.* at 1027–29.
[56] *Id.*
[57] *See Palazzolo*, 533 U.S. at 630–32.
[58] *Id.* at 630.
[59] *Id.* at 632.
[60] *See id.* at 631.
[61] *See generally Palazzolo*, 533 U.S. at 606; *Lucas*, 505 U.S. at 1003.
[62] *Lucas*, 505 U.S. at 1022–23.
[63] *Palazzolo*, 533 U.S. at 632.
[64] *See Lingle*, 544 U.S. at 533.
[65] *Id.* at 540–44.

the analysis.[66] The Supreme Court's repeated rebuffing of attempts to alter the *Penn Central* test is a testament to the test's longevity.

II. TEMPORARY TAKINGS: A CONFLICTING HISTORY

Temporary regulatory takings are a new concept within the idea of regulatory takings. In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, the original temporary takings case, the Supreme Court used an equitable rationale when overruling a state law on temporary takings grounds.[67] In contrast, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* specified the doctrine's limitations.[68] The concern of the dissenters in *Tahoe-Sierra* and scholarship in the temporary takings space, and lower court caselaw all reveal dissatisfaction with the current state of temporary takings jurisprudence.[69] In *Blackburn v. Dare County*, Blackburn was blocked from living in his home only temporarily, so a discussion of temporary regulatory takings is necessary to clarify his standing even after the taking ended.[70]

A. *The Concept of Temporary Regulatory Takings*

The brief and contradictory nature of temporary takings leads to an undeveloped area within regulatory takings law.[71] Both *First English* and *Tahoe-Sierra*, and their contentious dissents, clarify the current standing of the law.

The story of temporary takings began with a flood that destroyed a local church camp for handicapped children.[72] The local government, scared of future property loss, banned the church or any property owner from rebuilding on flooded lands for years.[73] The church sued

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66 *Id.* at 543 (finding that whether a law advances a state interest is distinct from the law's character and is relevant to a *Pa. Central* analysis but is based on how equally any benefit from the law is distributed across a state's population).

67 *First Eng. Evangelical Lutheran Church of Glendale*, 482 U.S. at 317, 321–22.

68 *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 331–32.

69 *See id.* at 303, 343; *see also* Murr v. Wisconsin, 582 U.S. 383, 412–15 (2017); Pompano Beach v. Yardarm Restaurant, Inc., 641 So.2d 1377, 1383–89 (Fla. Dist. Ct. App. 1994).

70 *Blackburn*, 486 F. Supp.3d at 993–94.

71 *See Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 331-32; *First Eng. Evangelical Lutheran Church of Glendale*, 482 U.S. at 318–320.

72 *See First Eng. Evangelical Lutheran Church of Glendale*, 482 U.S. at 307.

73 *See id.*

for damages but was denied because the land had been returned to the church before the suit was completed.[74] The Supreme Court held that, when a temporary action is a "taking, the Just Compensation Clause of the Fifth Amendment requires that the government pay the landowner for the value of the use of the land during this period."[75] *First English* created the idea of a temporary regulatory taking, where a homeowner can be compensated for the limited time the taking occurred.[76] Three Justices dissented from the majority, the first of many controversies arising around the idea of temporary takings.[77] Although not against the idea of temporary takings, the dissent understood temporary regulatory takings, unlike temporary physical takings, to need a firmer "dividing line" due to their commonality.[78] The concern over a lack of limits on temporary takings is further debated by the Court almost a decade later.[79]

The Supreme Court used existing limits on legislative takings to limit temporary takings, which left temporary takings as an area of law with more questions than answers.[80] In *Tahoe-Sierra*, landowners challenged a regional planning agency's effort to block land development until a comprehensive land-use plan was created.[81] The opinion, insistent that it was "qualif[ying]" the holding of *First English*, explains how the actions of the government must "have already worked a taking" under the *Penn Central* factors to qualify as a temporary taking.[82] Despite seeming logical on its face, the *Tahoe-Sierra* decision is confusing as the majority seems to go against *First English* to find the "temporary nature" of the legislation as grounds for calling it a mere "diminution of value."[83] Both dissents express concern over the issues. Justice Thomas thought "*First English* put to rest the notion that the relevant denominator is land's infinite life."[84] Chief Justice Rehnquist agreed, noting how *First English* exempted "longstanding"

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74 *See id.* at 308–10.
75 *Id.* at 314.
76 S*ee id.* at 304.
77 *See id.* at 322.
78 *First Eng. Evangelical Lutheran Church of Glendale*, 482 U.S. at 330.
79 *See generally Tahoe-Sierra Pres. Council*, 535 U.S. at 306–13 (2002).
80 *See id.*
81 *See id.*
82 *Id.* at 328, 331.
83 *Id.* at 332.
84 *Id.* at 355 (Thomas, J., Dissenting).

features like "zoning and permit regimes" from temporary takings but was being altered by the majority.[85] The Supreme Court seems to have left an unclear doctrine for lower courts and scholars to apply.

B. *Temporary Takings Complications*

When two conflicting opinions define a doctrine, scholarly writing on the issue often tries to explain the cases' discrepancies. A few cases have occurred in recent years that showcase the questionable standing of the caselaw. Confusion among scholars on remedies, the beginning and end of temporary takings, and the cases' rationale are touched upon. The result is an area of law that needs further clarification because of internal contradictions.

Scholarship regarding the *Tahoe-Sierra* and *First English* principles express confusion in how to properly understand the doctrine of temporary takings. One scholar found how "lower courts have often been confused by the terminology of takings and have had particular trouble with the permanent versus temporary labels" used by the Supreme Court throughout the *Tahoe-Sierra* decision.[86] Despite seeing the *Tahoe-Sierra* opinion as a step forward, the scholar concludes that "work remains in defining a regulatory taking."[87] More analysis is needed to define the specifics of temporary takings. Another study looking at how lower courts interpreted the *Tahoe-Sierra* decision found a lack of unity and consistency in lower court interpretations of the decision. [88] The study found many states have used "alternative" methods, including "dicta" and individualized "remedies," to right temporary takings injustices towards property owners as opposed to using clear standards.[89] The variation in state authorities makes a complicated jurisprudence even more confusing for the average citizen and reaffirms how the temporary takings doctrine lacks clear direction.

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85 *See Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 351–52 (Rehnquist, J., Dissenting).

86 *See* Thomas E. Roberts, *An Analysis of* Tahoe-Sierra *and Its Help and Hindrance in Understanding the Concept of a Temporary Regulatory Taking*, 25 U. HAW. L. REV. 417, 418 (1987–1988).

87 *Id.*

88 *See* Laura Lydigsen, *"Fairness and Justice" After* Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*: Subsequent Regulatory Takings Decisions Under the "Parcel as a Whole" Framework*, 82 WASH. U. L. Q. 1513, 1514 (2004).

89 *Id.* at 1551.

The lower courts' struggle to rule consistently on temporary takings has led multiple researchers to report on discrepancies present in caselaw. One scholar called the Eleventh Circuit temporary taking case *Resolution Trust Corporation v. Town of Highland Beach* "difficult to comprehend" from a remedy standpoint.[90] The Eleventh Circuit is not alone, as one state appellate court stated that "takings law is one of the most confused areas in American jurisprudence."[91] The literature repeatedly stresses disunity and confusion among the lower courts, a sign the Supreme Court should act to get to the root of the issue.[92] One reason for this divide may be the way takings law struggles to balance equity in cases with different types of plaintiffs.[93]

III. RESIDENTIAL PROPERTY: A HISTORY OF PERSONAL FEELING TRUMPING PRECEDENT

Some background on the American use of equity in property law is necessary to understand the reasoning behind adjusting the *Penn Central* factors. Leading legal scholarship on the issue of property and equity often ties the two together.[94] Modern caselaw, such as *Tyler v. Hennepin County*[95] and the response to *Kelo v. City of New London*,[96] gives examples of how property law uses equity to support residential rights. Equity in other types of property law, including when a government can take property, clarifies the importance of equity in property law jurisprudence. Historically and culturally, equity should be a consideration when ruling on property law.

A. *Historic Importance of Equity in Property*

Before talking about how equity interacts with takings law, the connection between property law and equity should be established. Quotes from the formation of property law allude to the historic

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90 *See* Gregory M. Stein, *Pinpointing the Beginning and Ending of a Temporary Regulatory Taking*, 70 WASH. L. REV. 953, 1003 (1995).

91 *Id.* at 1010 n. 234 (citing *Pompano Beach*, 641 So.2d at 1377).

92 *See* Roberts, *supra* note 86, at 418; Lydigsen, *supra* note 88, at 1513.

93 *See infra* Section I.C.

94 *See* Blackstone, *infra* note 101, at 134–35; Pitt, *infra* note 109.

95 Tyler v. Hennepin Cnty., 598 U.S. 631, 642 (2023).

96 *See generally* Kelo v. City of New London, 545 U.S. 469 (2005); *see also* Dana Berliner, *Looking Back Ten Years After* Kelo, 125 YALE L. J. FORUM 82, 88–89 (2015).

significance of the concepts of equity and fair treatment for property owners.[97] Legal theory before the United States' founding, as well as the founding documents themselves, repeat the importance of individual rights in relation to property.[98] Modern scholarship echoing the historic views provides a modern perspective on the continuation of the connection between equity and property law.[99]

Equity, in various forms, has been a part of property law from its origination.[100] The philosophical roots of property law often mention equity as a guiding concern.[101] William Blackstone, writing in *Commentaries on the Laws of England* in 1765, respects this principle when he stated "so great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community."[102] Following the spirit of Aristotle, Locke, and many other philosophers, Blackstone pays special respect to an individual's right to their private property, seeing protection of it as fundamental to Western legal tradition.[103]

The founders, heavily influenced by Blackstone, made the importance of property clear in multiple ways during the writing and passing of the United States Constitution.[104] In *Federalist 10*, one of the most impactful Federalist Papers to current American jurisprudence, James Madison wrote that "the protection of [the diverse faculties of men that originate property rights] is the first object of government."[105] Although Madison is talking in part about diversity of thought, Madison connects the two since, without individual property rights, a citizen's ability to engage in societal discussion is limited by a lack of security.[106] Madison also pays credence to equity and property, arguing that the purpose of government is to protect, not regulate or balance, individual

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97 *See* Blackstone, *infra* note 101, at 134–35; Pitt, *infra* note 109; Madison, *infra* note 104.

98 *See id.*

99 *See generally* Stern, *infra* note 114; *see also* Gormley, *infra* note 115.

100 *See* Blackstone, *infra* note 101, at 134–35 ANNENBERG CLASSROOM, *infra* note 109; Madison, *infra* note 104.

101 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: A FACSIMILE OF THE FIRST EDITION OF 1765—1769 1:134–135 (1979), https://bit.ly/3TSzGrh.

102 *See id.*

103 *See id.*

104 THE FEDERALIST NO. 10 (James Madison).

105 *See id.*

106 *See id.*

property rights.[107] Indeed, Justice Brandeis found "the right to be let alone" to be a fundamental English principle.[108] Brandies's reverence for residential ownership is deeply rooted in the Anglo-American legal tradition.[109] Founding-era English leader William Pitt stated that "the poorest man may in his cottage bid defiance to all the forces of the crown" due to property rights given to "all Englishmen."[110]

The importance of private property comes up throughout the Bill of Rights, giving insight into the goal of fairness lying behind property law.[111] The Third Amendment bars any soldier from being "quartered in any house, without the owner's consent" during peacetime.[112] The focus on owner consent and the protection of private property seem to be equitable constructions. The Fourth Amendment is even more direct, protecting "the right of the people to be secure in their . . . houses."[113] Many scholars found reverence for the home to be inherent in the Fourth Amendment, with one referring to the special protections given to the home negatively as "housing exceptionalism"[114] and another positively as a "nearly-sacred resolve" to protect "the inner sanctum of the home."[115] Used to protect people from unreasonable search and seizure, the Fourth Amendment again reveals how important ensuring control of one's property was to the founders.[116] The Fifth Amendment, central to this Article's argument, focuses the most on property rights by barring harm to them without "due process of law" and, in some cases, "just compensation."[117] The founders chose "just," a synonym

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107 *See id.*

108 Olmstead v. United States, 277 U.S. 438, 478 (1928) (*overruled* by Katz v. United States, 398 U.S. 347 (1967)).

109 ANNENBERG CLASSROOM, OUR RIGHTS ch. 22 (2023) (citing William Pitt, former British Prime Minister, Speech on the Excise Bill (Mar. 1763)), https://www.annenbergclassroom.org/resource/our-rights/rights-chapter-22-right-privacy/.

110 *See id.*

111 U.S. CONST. amend. III.

112 *See id.*

113 U.S. CONST. amend. IV.

114 Stephanie M. Stern, *The Inviolate Home: Housing Exceptionalism in the Fourth Amendment*, 95 CORNELL L. REV. 905, 908 (2010).

115 Ken Gormley, *One Hundred Years Of Privacy*, 1992 WIS. L. REV. 1335, 1358 (1992).

116 *See generally* Kansas v. Glover, 589 U.S. 376 (2020) (applying the Fourth Amendment in the context of government searches and seizures).

117 U.S. CONST. amend. V.

of equitable, to define the compensation and the use of due process to promote fair decisions.[118]

Modern legal scholarship which focuses on temporary regulatory takings often takes equity and fairness into account.[119] One scholar focused her article on the concept of "fairness and justice" and the "underlying principles governing regulatory taking[s]."[120] The scholar's connection between fairness and just property law decisions is central to her argument, which is that "unfairness [towards landowners] in some situations" has led states to "avoid the parcel as a whole" rule "as a result of unfairness."[121] The lower courts have avoided using legal rules in the takings space, possibly due to equitable concerns. Another scholar argues, however, that due to the regulatory takings precedent being "unrelated to the sweeping economic impact of the Covid-19 shutdowns," takings law should be broadened to help stop the "prolonged loss of livelihood" suffered by many businesses in the new environment.[122] Again, literature focuses on what is fair and just and what protects homeowners's property rights, over the letter of the law. Using equity without dividing corporate and residential interests makes it hard to address the concerns of all parties, so the Supreme Court will have to address the divide going forward.

B. *Public Reluctance For Residential Takings*

Examples of takings cases decided due to equitable concerns provide insight into how the theory of tying equity to property law becomes practice. Two cases where takings were impacted by sympathetic plaintiffs and concern for fair treatment of property illustrate the importance of equity in property law in general.[123]

The two clearest examples of this phenomenon are in distinct areas of property law, with one regarding physical takings and one related to when the government has just cause to activate eminent domain. Across different areas of law, the value of equity and fairness is proven to be deeply woven into the American legal system today. In

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118 *Id.*

119 *See* Roberts, *supra* note 86, at 418; Lydigsen, *supra* note 88, at 1513.

120 *See* Lydigsen, *supra* note 88, at 1517.

121 *Id.* at 1544, 1546.

122 Jeffrey Manns, *Economic Liberty Takings*, 29 GEO. MASON L. REV. 73, 79 (2021).

123 *See generally Kelo*, 545 U.S. 469; Tyler v. Hennepin Cnty., 598 U.S. 631 (2023).

Tyler, the Supreme Court found the government taking excessive home equity when satisfying delinquent property debt unconstitutional on largely equitable grounds.[124] Mrs. Tyler owned a condominium, worth roughly $40,000, which was seized in its entirety by the government to pay off the $15,000 she had accumulated in debt.[125] To determine whether a taking had occurred, the Supreme Court looked heavily to "history and precedent," citing principles of fair debt recovery defined by "King John . . . in the Magna Carta" and codified by "Parliament," "Blackstone," and many state constitutions.[126] Takings, like other areas of constitutional law, are largely determined by the meaning and goals present during the founding era. Ending with a statement that Mrs. Tyler "made a far greater contribution to the public fisc than she owed," and was forced "to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," the Supreme Court found for her.[127] The Supreme Court's decision seems to have been influenced by an equitable consideration of what the government is owed and the harm done to the plaintiff.

The second case, relating to when eminent domain can be practiced, is more telling for the public reaction to the injustice that occurred than the decision itself. In *Kelo*, New London attempted to "acquire . . . property from unwilling constituents" to further a "development plan" which included giving "the pharmaceutical company Pfizer, Inc." the rights to "build a $300 million research facility."[128] Although the Supreme Court found its authority extended "only to determining whether the City's [plan] are for a public use," which "over a century of [Supreme Court] case law . . . dictates an affirmative answer to," the Supreme Court hesitated on the equitable implications.[129] One can see this in the conclusion, where the Supreme Court specifies how it "do[es] not minimize the hardship" put on homeowners and expressly allows states to "plac[e] further restrictions" on eminent domain through state "constitutional law" or "state eminent domain statutes."[130] Taking the hint from the Supreme Court's borderline support of the practice,

124 *See Tyler*, 598 U.S. at 631.

125 *See id.* at 635.

126 *Id.* at 639–43.

127 *See id.* at 639–47 (citing Armstrong v. United States, 364 U.S. 40, 49 (1960)).

128 *Kelo*, 545 U.S. at 469, 472–73.

129 *Id.* at 490.

130 *Id.* at 489.

citizens successfully campaigned in forty-seven states to change their laws and avoid this outcome.[131] Although not the same area of law, the vitriolic response of the American population and the Supreme Court to the idea of violating people's ownership of their homes for commercial purposes emphasizes how important the value of residential property is for America up to the modern day.

Lastly, past equitable concerns have prompted the Supreme Court to alter the *Penn Central* test by changing the weight of the factors.[132] In *Hodel v. Irving*, the Supreme Court was asked to rule on the constitutionality of an act restricting the ability of Native Americans to transfer their minor shares of tribe land to anyone but their tribe.[133] The minimal nature of the interest at stake immediately makes any takings claim an uphill battle. The Supreme Court found, despite the result of the first two factors leaving the law seemingly "constitutional," the "extraordinary" and "unprecedented" limitation on "one of the most essential sticks in the bundle of rights" made the law unconstitutional.[134] When the Supreme Court has historically seen an inequitable limitation on property rights, it normally does not hesitate to shift the normal balance of property rights to accommodate the equitable result.[135] The lack of clarity in the line between alienation and takings gives an example of how the Supreme Court can alter the factors to achieve necessary changes.

IV. THE RIGHT OF QUIET ENJOYMENT

The solution proposed originates from the legal conception of the right of quiet enjoyment. This Article first explains how various circuits have broadened quiet enjoyment from its limited common law origins in the interest of fairness. It then runs through the standing of quiet enjoyment in the Fourth Circuit, pointing to modern cases in the Fourth Circuit where quiet enjoyment was protected. In total, the state courts define quiet enjoyment as a substantial degree of ownership interference in a tenant's right to use the property.[136]

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131 *See* Berliner, *supra* note 96, at 88–89.

132 *See* Hodel v. Irving, 481 U.S. 704, 716 (1987).

133 *See id.* at 706–07.

134 *See id.* at 716 (citing Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).

135 *See generally Hodel*, 481 U.S. at 704.

136 *See* Smith v. McEnany, 170 Mass. 26, 28 (Mass. 1897).

Quiet enjoyment refers to the ability of tenants to use their space free from invasion.[137] The doctrine originally focused on physical invasions of a tenant's space. *Smith v. McEnany*, where the Massachusetts Supreme Court found landlord intrusion into a tenant's apartment space to be a violation of quiet enjoyment, is one example.[138] Over time the doctrine evolved to include activities which, although taken outside the residence, made the environment unlivable.[139] The concept of tenant enjoyment being defined as tenant control seemed to grow into a larger concept of comfortable living. In a recent quiet enjoyment case, multiple circuits clarified the modern standard defining quiet enjoyment as "breached when the landlord obstructs, interferes with, or takes away from the tenant in a substantial degree the beneficial use of the leasehold."[140] Other states have, with or without using the exact words, similarly defined quiet enjoyment.[141] The goal of quiet enjoyment seems to be to allow renters to live comfortably in the leasehold.

The Fourth Circuit follows the analysis of other courts, as evidenced by two recent quiet enjoyment cases.[142] *Anders Larsen Trust v. Board of Supervisors of Fairfax County*,[143] in which standing on quiet enjoyment was granted for a new teenage rehabilitation center, works in conjunction with *Nationwide Mutual Insurance Company v. Regency Furniture, Incorporated*,[144] where a tenant was denied quiet enjoyment when complaining of excess rent. The *Nationwide* court found increasing business rent regarding recent court decisions did not "substantially interfere with [plaintiff's] presence" or hit the "essences

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137 *See id.*

138 *See id.* at 27–28.

139 *See* Blackett v. Olanoff, 358 N.E.2d 817, 818 (Mass. 1977) (finding a violation of the right of quiet enjoyment when loud music was played throughout the night); *see also* Javins v. First Nat. Realty Corp., 428 F.2d 1071, 1073–74 (D.C. Cir. 1970) (holding a right to quiet enjoyment in a building with 1,500 housing code violations).

140 *See, e.g.*, Telecom Acquisition Corp. I, Inc. v. Lucic Enter., Inc., 62 N.E.3d 1034, 1042 (Ohio Ct. App. 2016); Hamilton Brownfields Redevelopment, LLC v. Duro Tire & Wheel, 806 N.E.2d 1039, 1044 (Ohio Ct. App. 2004).

141 *See generally* Caesar v. Westchester Corp., 280 A.3d 176, 189 (D.C. Ct. App. 2022) (finding "either an actual interference with a tenant's right to possess her property or a constructive eviction" to violate the right of quiet enjoyment).

142 *See, e.g.*, Anders Larsen Tr. v. Bd. of Supervisors of Fairfax Cnty., 872 S.E.2d 449 (Va. 2022); *see* Nationwide Mut. Ins. Co. v. Regency Furniture, Inc., 963 A.2d 253 (Md. Ct. Spec. App. 2009).

143 *See Anders Larsen Tr.*, 872 S.E.2d at 450, 453.

144 *See Nationwide Mut. Ins. Co.*, 963 A.2d at 271.

of the obligation" for the lease.[145] The *Anders* court, on the opposite end, found the "diminished property value and increased traffic" hitting neighborhood houses to be likely violations of the covenant of quiet enjoyment.[146] Both cases reveal how comfort in the home and accessibility are vital parts of quiet enjoyment access.[147]

Literature on the right of quiet enjoyment, as well as its growth in recent years, supports the definition. Firstly, scholarship seems to support the doctrine's continued expansion.[148] One scholar highlights *Khol v. PNC*, where the Supreme Court of Pennsylvania expanded the doctrine and found litigation "brought in bad faith, maliciously, or otherwise without probable cause" to be a violation of the covenant of quiet enjoyment.[149] Another scholar found, that although "a small minority of jurisdictions" have moved away from the doctrine, the right of quiet enjoyment is "holding up."[150] Quiet enjoyment seems to spread and solidify its place throughout the United States. Additionally, scholarship in the area finds quiet enjoyment to be violated when a tenant is "deprive[d] . . . of beneficial enjoyment of the premises" by the "landlord's acts."[151] The government, here stepping into the same category as the landlord, seemingly would not be responsible for the acts of other citizens but only its own. Ultimately, caselaw and scholarship work together in ways that appear to promote the doctrine's strength and connection to comfort and accessibility.

ANALYSIS

I. REASONS TO CHANGE THE STANDARD

This Article hopes to change the wording of the *Penn Central* factors in residential takings jurisprudence. The *Penn Central* factors currently are "(1) 'the economic impact of the regulation on the claimant[,]'. . . (2) 'the extent to which the regulation has interfered with

145 *Id.* at 266–67.

146 *Anders Larsen Tr.*, 872 S.E.2d at 453.

147 *See id.* at 449.

148 *See generally* DiPietro, *infra* note 149, at 2; *see also* Grant, *infra* note 150, at 57.

149 Patrice Wade DiPietro, *Malicious Litigation Breaches Covenant Of Quiet Enjoyment*, 9 No. 4 LAW. J. 2, 9 (2007) (citing Kohl v. PNC Bank Nat. Ass'n, 912 A.2d 237 (Pa. 2006)).

150 Eugene Grant, *Disturbing Concepts: Quiet Enjoyment And Constructive Eviction In The Modern Commercial Lease*, 35 REAL PROP. PROB. & TR. J. 57, 58 (2000).

151 *Id.* at 63.

distinct investment-backed expectations[,]' . . . and (3) 'the character of the governmental action.'"[152] This Article proposes changing the factors when considering a residential taking to (1) the impact on the quiet enjoyment of the claimant, (2) the extent to which the regulation has interfered with the distinct investment-backed expectation of quiet enjoyment of the plaintiff, and (3) the character of the government action. Part of *Penn Central*'s second factor is kept so economic loss is able to play a role when necessary, but is altered along *Penn Central*'s first factor in an attempt to ensure violations of quiet enjoyment would be addressed. Changing the *Penn Central* factors when the property is residential would have numerous benefits.

This Section outlines the many arguments for changing the *Penn Central* Factors. Three legal arguments will be followed by two policy arguments to support the change. The first legal argument is textual. Supreme Court precedent and the United States founding documents confirm how the Fifth Amendment Takings Clause exists to protect public property and "bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[153] The *Penn Central* factors leave residential property comparatively unprotected, in an arguable violation of the Fifth Amendment, because the factors were tailored toward business plaintiffs. Second, the new factors would explain the vast divide in takings precedent. Equity seems to have caused the law to vacillate based on whether big businesses or local homeowners have had their property targeted. The law is much stricter towards businesses, to the point where the precedent gets hard to reconcile without addressing equity.[154]

In addition to the legal arguments, two policy arguments help make the case for changing the *Penn Central* factors. Historically, the amount of big business cases have stacked caselaw against residential plaintiffs. Separating residential property would put those people at a historically unfair disadvantage. Second, protecting residential property is economically valuable. Homeownership has proven to lead to increased wealth, because allowing people to protect their residential

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152 *See* Blackburn v. Dare Cnty., 58 F.4th 807, 812 (4th Cir. 2023).

153 Arkansas Game & Fish Comm'n v. United States, 568 U.S. 23, 31 (2012).

154 *See Pa. Cent. Transp. Co.*, 438 U.S. at 104 (finding that a business was unable to find success but an individual was); *see also* Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992) (finding that a business was unable to find success but an individual was).

homes encourages them to allocate resources individually.[155] Freedom of choice allows for maximization of efficiency and a freer society.[156] Adopting a new standard would be a step toward further defining takings law.

A. *The Adjustment Reflects Current Property Law*

Takings jurisprudence concludes that depriving a person's ability to live in their home is a taking.[157] The original text of the Fifth Amendment, "[no] private property [can] be taken for public use, without just compensation," protects private property by creating a hard line on the government's taking of private property.[158] This Article focuses on temporary takings, so the public use part of the definition is largely irrelevant to the analysis.[159] An older edition of Black's Law Dictionary, useful in reflecting a more traditional understanding of takings, defines a taking as a "transfer of possession, dominion, or control," with additional clarification that a taking can "be effected by persuasion, enticement, or inducement."[160] The definition by its nature implies multiple forms and means of takings. Taking money with force and taking an idea by persuasion are different forms of the same idea. The definitions are united not by the object taken, but by the deprivation of the interest. Allowing a quiet enjoyment taking, in the same way as regulatory and temporary takings, arguably fits within the text and ideas of the Fifth Amendment by reflecting that taking a residential home is different than taking a business or good. Treating residential property differently to protect it from seizure seems to follow the founding tradition of protecting citizens from uncompensated takings.

Supreme Court precedent further clarifies how a quiet enjoyment taking would fit into Fifth Amendment jurisprudence.[161] The Supreme Court has long found that a good purpose for a taking does not excuse the state's constitutional obligations.[162] *Mahon* wraps up with a warning:

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[155] *See* Neil Bhutta et al., *Changes in U.S. Family Finances from 2016 to 2019: Evidence from the Survey of Consumer Finances*, 106 FED. RSRV. BULL. 1, 22–23 (2020).

[156] *See* Milton Friedman, *Free Markets and Free Speech*, 10 HARV. J. L. & PUB. POL. 1, 1 (1987).

[157] *See generally Pa. Cent. Transp. Co.*, 438 U.S. at 124, 130.

[158] U.S. CONST. amend. V.

[159] *See generally* Berman v. Parker, 348 U.S. 26 (1954) (discussing public use).

[160] *Taking*, BLACK'S LAW DICTIONARY (4th rev. ed. 1968).

[161] *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 416 (1922); *Pa. Cent. Transp. Co.*, at 136.

[162] *See, e.g.*, *Mahon*, 260 U.S. at 416.

the United States is "in danger of forgetting that a strong public desire to improve the public condition" does not allow the government to ignore people's rights to enjoy their property.[163] Blocking a property owner's right to use their residential property as a residence should be seen as another form of ignoring property rights. A multitude of takings cases find takings tied to the "primary expectation concerning the use of the parcel," which connects takings to the purpose with which the property owner bought the land.[164] The Supreme Court also found takings when an action is "so frequent as to be a direct and immediate interference with the enjoyment" of a residential property.[165] Blocking the purpose of a home fits into this definition of a taking. The quiet enjoyment change would expand other growths in takings law over the years.

Literature arguing against founding support for regulatory takings is not concrete enough to disprove evidence that the Constitution leans towards protecting the rights of residential homeowners. Scholarship, like *The Original Understanding of the Takings Clause* from the Georgetown Law Center, argues the founders meant to limit compensation to physical government takings.[166] Little to no discussion of the topic by the founders exists, so one has to extrapolate. The colonial property law the founders grew up with, quotes by the founders, the lack of regulatory takings in early America, and the founders' respect for representative democracy all lead one to conclude the founders would have been against allowing regulatory takings.[167] Their work does not impact this Article's argument that the expansion respects the text and spirit of takings law. When both current Supreme Court precedent and the Constitution's text are positive towards regulatory takings, relying on loose legislative history over both is a questionable way to determine interpretation.[168] It serves as a reminder that the federal government was far smaller when the Constitution was written, and needed far less

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163 *Id.*

164 *Pa. Cent. Transp. Co.*, 438 U.S. at 136.

165 United States v. Causby, 328 U.S. 256, 266 (1946).

166 *See generally* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 782–83 (1995).

167 *See generally id.*

168 *See* Abner J. Mikva, *The Muzak of Justice Scalia's Revolutionary Call to Read Unclear Statutes Narrowly*, 53 SMU L. REV. 121, 122–24 (2000) (discussing how notable jurists, specifically Justice Scalia, have been hesitant of legislative history and have encouraged a more hesitant approach towards the concept).

land.[169] It is possible the founders did not discuss regulatory takings due to the foreignness of the topic. The uncertainty allows precedent and the text of the Constitution to protect the proposed expansion of regulatory takings on a textual basis.

B. *The Change Could Fix Court Divides*

The new standard would also address the confusing divide in property law researchers are currently struggling with. Analyzing *Tahoe-Sierra*, scholar Thomas Roberts of the University of Hawaii states that the Supreme Court must specify "what type of government action can effect a temporary taking."[170] He found the Supreme Court's conclusion that "illegal" government actions can be found to be temporary takings was against the spirit of the Takings Clause, as doing so mixes takings with due process.[171] This confusion over what can be a temporary taking, and the varying uses of the *Penn Central* test, could be solved at least in part by creating a dividing line between residential and commercial property. The Supreme Court could specify that the *Penn Central* factors apply firmly to businesses, but residential properties are put under the more lenient quiet enjoyment standard. Treating residential properties differently could be a step in resolving Justice Roberts's confusion over when temporary takings apply. Laura Lydigsen, writing in the Washington University Law Quarterly after *Tahoe-Sierra*, found "little agreement among scholars" on whether the opinion was designed to be "narrowly crafted" or to have a "broad impact."[172] Adopting the quiet enjoyment standard could explain this varied treatment by allowing business takings to be judged narrowly by the previously established *Penn Central* factors, while protecting residential takings.

Changing the *Penn Central* factors should also address the equity concerns found by current takings scholars. Although arguing for changing the *Penn Central* factors to benefit economic liberty, professor Jeffrey Manns points out how the "disruption of the . . . expectations" of business owners calls for changes that "restore greater balance

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169 *See* ABNER CASS ET AL., ADMINISTRATIVE LAW: CASES AND MATERIALS 1, 3 (8th ed. 2020); *see also* RICE U. AM. GOV'T Chap. 15.1 (1st ed. 2016), https://textbooks.whatcom.edu/amgov/chapter/15-1/.

170 *See* Roberts, *supra* note 86, at 418.

171 *Id.*

172 *See* Lydigsen, *supra* note 88, at 1515.

between the exercise of state police powers and the expectations" of property owners.[173] Although the Article focuses on broader changes for business, the idea of an "unbalanced equation" and "disconnect," hurting local owners speaks to the cry for equity within property law.[174] The use of the quiet enjoyment factors would be an easy way to better protect the rights of the most vulnerable property owners, without having to change well-defined property rules.

C. *Fixing the Lack of Residential Representation*

One of the appeals of changing the standard is the possibility of righting the historic underrepresentation of residential property owners in takings claims. A vast majority of takings clause claims are brought by large businesses, not by small landowners.[175] Most landowners do not have the money to raise large-scale takings claims, so often only profitable businesses would be likely to have the resources to fight for their property.[176] This creates a scenario where big businesses like Chevron and Penn Central are arguing taking claims to the Supreme Court far more than residential homeowners.[177] When a smaller plaintiff gets a claim to the Supreme Court, it is normally a local developer looking to alter property.[178] The underrepresentation seemingly disadvantages residential landowners for two reasons. One, from a practical standpoint big businesses are unlikely to argue for stricter treatment compared to residential owners. To do so would be against the business's interest. Two, businesses likely make the individual

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173 *See* Manns, *supra* note 122, at 79–80.

174 *Id.* at 77.

175 *See generally* Robert Meltz, *Takings Decisions of the U.S. Supreme Court: A Chronology*, CONG. RSCH. SERV., July 20, 2015, https://sgp.fas.org/crs/misc/97-122.pdf (explaining that only nine of the fifty-five Supreme Court cases involving takings from 1978 to 2015 had an individual as a party. If one removes claims related to Indian benefits, what remains are only a few cases run by public interest groups. Even cases with individuals like *Lucas* are often larger property developers rather than individual homeowners).

176 *See* Gloria Guzman & Melissa Kollar, *Income in the United States: 2023 – Current Population Reports*, U.S. CENSUS BUREAU (Sept. 10, 2024) (finding average household income to be $80,610); Adriene Hill, *How much does a big Supreme Court case like gay marriage cost?*, MARKETPLACE (Mar. 25, 2013), https://www.marketplace.org/2013/03/25/how-much-does-big-supreme-court-case-gay-marriage-cost/.

177 *See id.*

178 *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992) (showing that Lucas is unique in that he was represented throughout the case by local counsel rather than involving property law scholars).

liberty argument as convincingly as a local homeowner would because a business will not be harmed the same way. No Justice will feel the same moral pull when deciding *Penn Central* owner's ability to multiply its immense wealth as when allowing the government to take a person's home. The occasional victories won by residential property owners do not happen as frequently as they would in a court system which hears all disputes equally regardless of private resources.

Changing the standard to accommodate the needs of residential homeowners would likely support homeowners and increase confidence in the larger legal system. The quiet enjoyment standard could in theory be a strong defense for homeowners, protecting local homeowners from having their homes overtaken by the government. Caselaw relating to small takings by the government could be made public, helping develop the doctrine compared to the prior business-focused cases. Putting residential homeowners on an even footing would create a solid foundation for legal equity in an area of law long deprived of it. Measures encouraging homeownership would also lead to a more comfortable reliance on the legal system by the American population, as history has shown people to be mistrustful of what they view as governmental abuse of the takings doctrine.[179] Numerous practical benefits aside, equality in the application of the law is also a moral goal for any legal system, including the United States, to aspire to achieve.[180]

Big business having more sway than residential homeowners at the Supreme Court, a possible counterargument against the new standard, is incorrect. The argument, popularized by articles in the *Washington Post* and *New York Times*, finds the Roberts Court to be especially "receptive to business concerns" because the Roberts Court supposedly heard and decided more cases for big business compared to previous Chief Justices.[181] The first reason the argument made by the *Washington Post* and *New York Times* does not go against this Article is because it does not reflect the makeup of the Supreme Court in the previous decades where many takings cases were decided.[182] Jeffrey Rosen, writing one of the articles, cites Justice Douglass in the mid-19th

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179 *See* Berliner, *supra* note 96, at 82–93.

180 *See* Suzy Killmister, *Constructing Moral Equality*, J. AM. PHIL. ASS'N, 1–19 (2022).

181 Jeffery Rosen, *Supreme Court Inc.*, N.Y. TIMES, Mar. 16, 2010; *see* Katrina Vanden Heuvel, Opinion, *A court of, by and for the 1%*, WASH. POST, July 3, 2012.

182 *See id.*

Century, saying he was "ready to bend the law in favor of the environment and against the corporations."[183] The second reason the argument put forth by the *Washington Post* and *New York Times* does not apply is because it is often inaccurate. In one of many articles disagreeing with the premise of a Supreme Court bias towards businesses, George Mason Law School Professor Ilya Somin found the claims inaccurate due to a lack of ability for scholars to firmly test them.[184] Experts have no idea how many cases big businesses would have won without bias, whether a decision is supportive of a business's right, or the effect of suits not litigated for or against business interests.[185] The argument made by the *Washington Post* and *New York Times*, although not disproven, is too suspect to stand against the overall trend of takings law.

D. *Benefiting Free Market Property Growth*

The other important policy argument is that changing the residential standard to relate to quiet enjoyment would lead to economic benefits for the United States. When deciding among differing interpretations of the law, judges should consider what will be beneficial for society on an economic level. Here, changing the standard can lead to more residential homeowners keeping their homes rather than giving their homes to the government. In multiple ways, private homeownership has been found to benefit the economy by giving homeowners capital, which the homeowners use more effectively than the government.[186] The efficiency argument must be addressed as a final point in favor of giving reasonable freedoms to resident homeowners.

Owning a home raises the amount of money homeowners have each year compared to the rest of the population.[187] The Federal Reserve Bulletin found, between 2016 and 2019, income levels were "considerably higher for homeowners . . . than other families" in part because "the median net housing value (the value of a home minus home-secured debt) rose to about $120,000 from about $106,000 in

183 Jeffery Rosen, *Supreme Court Inc.*, N.Y. TIMES, Mar. 16, 2010.

184 *See* Ilya Somin, *The "Pro-Business" Supreme Court Revisited*, VOLOKH CONSPIRACY (Dec. 20, 2010), http://bit.ly/3uiM88N; *see* Stephen Richer, *The Alleged Pro-Business Bias of the Supreme Court. . . Sigh. . .*, FORBES, Oct. 15, 2012.

185 *See* Somin, *supra* note 184.

186 *See* Bhutta et al., *supra* note 155, at 22.

187 *Id.*

2016."[188] This data is coupled with a large decrease in home ownership, with the 2016 homeownership rate being the "lowest recorded in the Survey of Consumer Finances (SCF) since 1989" and the 2019 rate still being "below the peak observed in 2004."[189] The Federal Reserve shows the correlation between homeownership and wealth, as well as the diminishing percent of the population buying homes.[190] *Forbes* also found that "sustainable homeownership has provided for wealth accumulation for owners" and that "a typical homeowner will be ahead of a typical renter by a multiple of 45 on a lifetime financial achievement scale."[191] The article discusses how homeowners "trade up" their property and "contribute to economic growth" directly through creating "expenditures related to lawn care, home remodeling, new furniture, mortgage origination, moving, and an inducement to build new homes."[192] Regulatory takings limit homeownership whenever they block a residential homeowner from living in or getting any value out of their home. The fewer regulations barring people from owning property across the country, the more people will own homes and, thus, economically benefit. Since changing the *Penn Central* factors to focus on quiet enjoyment will limit regulatory takings, it will also increase homeownership.

The benefits of home ownership spiral out to the economy due to the efficiency with which people spend their own money.[193] The *Forbes* article touches on the net benefit point, explaining how the "multiplier effect" brings homeowner's goods into the local economy through "one new job [being] supported [for] every two home sales."[194] The question is why the multiplier effect benefits the economy more when individuals, not the government, are the spenders. Individuals may spread out spending more, but the government has investment programs one would think serve the same purpose. Economist Milton Friedman provides one answer, which is the comparatively high level of self-interest individuals have in spending their own money.[195]

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188 *Id.* at 3, 8.

189 *Id.* at 22.

190 *Id.*

191 Lawrence Yun, *Why Homeownership Matters*, FORBES (Aug. 12, 2016), https://www.forbes.com/sites/lawrenceyun/2016/08/12/why-homeownership-matters/.

192 *Id.*

193 *Id.*

194 *Id.*

195 *See* Russ Roberts, *An Interview with Milton Friedman*, 17 CHAP. L. REV. 477, 477 (2014).

Individuals generally "spend [their] own money more carefully than [they] spend other people's money."[196] To Friedman, one's inspiration to spend efficiently is tied to both whether the person directly receives the benefit of the spending and whether the person is spending money he or she earned.[197] The government spending money it did not earn on third parties is a category four expenditure, the least efficient of the four categories of expenditures defined by Friedman.[198] Here, government takings replace residential homeowners' use of their own money on themselves, a category-one expenditure because of the high desire to spend efficiently on oneself, with a category-four expenditure where the government is spending other people's money on third parties.[199] The increase seen in homeowners' use of funds explains the economic phenomenon, and any change supporting homeowners will be good for the economy. The efforts outlined to protect people from residential takings would help improve the economy.

II. ADDRESSING COUNTER-ARGUMENTS

A few counterarguments must be addressed to prove the merits of changing the *Penn Central* factors. The counterarguments range from conceptual concerns with transferring concepts from one area of law to another, to functional concerns about the necessity and practicality of the change. The concerns can be mitigated or made inapplicable by using various legal standards. Skeptical readers of this Article may find other areas of concern, but this Section serves to protect the argument from unfounded criticism.

The first concern is about defining residential property. Critics may be concerned about a definition business-owners could abuse, like using loopholes to allow business-owners to sue for quiet enjoyment takings on property whose purpose was never tied to residential use. Basic definitions, such as a place where the owner has lived, could be worked around by savvy businessman. A definition for residential property is also necessary for deciding what to do with businesses run from the home. At-home businesses fall in a twilight area between

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196 *See id.* at 477.

197 *See* Milton & Rose Friedman, *Four Ways to Spend Money*, FREE TO CHOOSE NETWORK (as excerpted from *Free to Choose*, Harcourt Brace Jovanich, Inc.), https://bit.ly/3OZyocD (last visited Dec. 3, 2022).

198 *See id.*

199 *See id.*

residential and commercial properties. Defining residential properties is necessary to address critics' valid concerns and make a complete argument.

Although defining residential property has never come up in the concept of regulatory takings, Congress gave a definition of residential which, with minor edits, would apply here and solve the concerns.[200] In the U.S. Code, residential property is defined for the Section as:

> a single-family dwelling, the construction of which began before July 1, 1991, together with such land on which the dwelling and appurtenant buildings are located as is in the same ownership as such dwelling and as the Secretary designates as reasonably necessary for the owner's continued use and occupancy of the dwelling.[201]

Dwellings, defined in the Fair Housing Act, have been found when "the facility is intended or designed for occupants who 'intend to remain in the [facility] for any significant period of time'" and "would 'view [the facility] as a place to return to' during that period.'"[202] Combining the definitions, and removing the time and additional area restriction, makes residential property defined as a place built for a family of occupants who would remain at the place for a significant time. The government's definition would solve the problems mentioned previously. Courts could not give benefits to business-owners spending one night in their place of work, as it would not be significant. Businesses that run out of people's homes would fall under the standard, which encourages entrepreneurship. Using the federal definition alleviates any concerns about business-owner abuse.

Other concerns appear with how quiet enjoyment would be defined. Quiet enjoyment claims can sometimes be triggered by loud noise or housing complaints, so direct application could cause all kinds of burdensome litigation.[203] To ensure the spirit of the Takings Clause remains throughout the change, quiet enjoyment would have to be limited to complete eradication of rights in a similar

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200 *See* 16 U.S.C. § 410(x-2).

201 *Id.*

202 Lakeside Resort Enter., LP v. Bd. of Sup'rs of Palmyra Twp., 455 F.3d 154, 158 (3d Cir. 2006) (citing U.S. v. Columbus Country Club, 915 F.2d 877 (3d Cir. 1990)).

203 *See generally* Anders Larsen Tr. v. Bd. of Supervisors of Fairfax Cnty., 872 S.E.2d 449 (Va. 2022); *see also* Nationwide Mut. Ins. Co. v. Regency Furniture, Inc., 963 A.2d 253 (Md. Ct. Spec. App. 2009).

way to how nuisance is treated in takings cases.[204] Loud noises and housing violations, for example, could be nuisances but do not harm one's fundamental right to access and live in the property under the proposed change. The government barring entry, either directly or indirectly through something like making a presence on the property dangerous, would limit quiet enjoyment to full violations of one's right to enjoy their own property. The subjective importance of living in one's home, although important for determining when a residential regulatory taking has occurred, will not be factored into the damages people receive. Subjective value is a slippery slope when it comes to the law, and the current use of fair market value will remain to calculate damages. Avoiding subjective pitfalls will protect the change from being applied too widely.

Although not vital to the argument's fundamental point, valid concerns can be raised about whether *Blackburn v. Dare County* functions as a useful sample case. [205] Numerous other factors at play in *Blackburn*, not addressed in this Article, made it unclear whether the case verdict would change under the new legal system proposed in the Article.[206] The government has, for example, been given increased leniency under takings precedent to handle diseases such as COVID-19.[207] *Blackburn* also refers to an out-of-state vacation property, presumably not applying to anyone living in the home because they would be a state resident.[208] In addition to case specific complications not hurting the fundamental crux of the argument, however, to change the *Penn Central* factors, the statute in the case could hypothetically create examples of the government overreach this Article argues against. One can imagine a family member of Blackburn getting a job and wanting to permanently move to their North Carolina house, but the family member is blocked until their move into the state is finalized. Similar regulations striking even harder at the concept of residential ownership could stem from

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204 *See Causby*, 328 U.S. at 266 (stating that "[f]lights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land. We need not speculate on that phase of the present case.").

205 *See generally* Blackburn v. Dare Cnty., 58 F.4th 807, 988 (4th Cir. 2023).

206 *See id.*

207 *See* Miller v. Schoene, 276 U.S. 272, 278–80 (1928) (allowed mandated tree destruction of trees to prevent the spread of cedar rust due to, among other factors, the need to protect the public).

208 *See Blackburn*, 486 F. Supp. 3d at 993.

Blackburn if rules are not established to prevent them. Takings law is a broad area and creating a new standard for residential homeowners is only one step in modernizing takings law to be more equitable without altering the whole takings system.

The last argument to address, that judges already apply residential protections in practice, can be dismissed through the information already gathered. The repeated use of equity in caselaw presents a pattern of cases following the quiet enjoyment standard already, so fears of redundancy are logical concern.[209] In contrast, a pattern is much harder for judges to notice and follow than a rule. Multiple recent cases prove judges will use the *Penn Central* factors without balancing equity for homeowners, dismissing any claims of an already present de facto exception.[210] Without a firm rule, property owners may be harmed and may have to endure extra legal costs to fight for their rights. The importance of equity must be established in precedent to avoid this harm.

CONCLUSION

Changing the *Penn Central* factors to better reflect the situation of residential homeowners is a necessary step for ensuring just property rights. If adopted, one could see a future where contradictory precedent is reconciled as the Supreme Court clarifies a distinction the courts have attempted to solve for centuries. The textual backing for the Takings Clause would be benefited and expanded by such a change, as it would further the equitable goals of the Takings Clause. The limits placed on the change, both basing the concept on quiet enjoyment and requiring the whole property to be affected, would ensure the benefits go to only homeowners in situations where the homeowners need protection from these increasingly common takings. Most importantly, the change would benefit society and catch temporary regulatory takings jurisprudence up to other areas of the law which accommodate less fiscally prosperous plaintiffs. The economic benefit of homeownership and the trust put in the legal system would further many goals hoped for when interpreting legislation. The Fourth Circuit missed setting

[209] *See generally* Tyler v. Hennepin Cnty., 598 U.S. 631, 642 (2023); *see also* Kelo v. City of New London, 545 U.S. 469 (2005).

[210] *See Blackburn*, 486 F. Supp. 3d at 988.

a new standard in *Blackburn* but could hopefully do so in a future case.[211] *Blackburn* aside, something must be done to protect residential homeowners from an unconstitutional infringement on their property rights.

211 *See id.* at 1001.