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The Puzzle of the Constitutional Home

GERALD S. DICKINSON

The home enjoys a special place in American constitutional law. A doctrinal thread runs across the first five amendments that demarcates the home as a realm in which rights enjoy elevated protection. That thread covers rights involving smut, guns, soldiers, searches, and self-incrimination, but inexplicably does not extend to takings. This stark dichotomy between the solicitude of the home for most rights and the opposite for takings produces a deep puzzle.

This Article contends that the answer to this fundamental puzzle is that the Court’s takings doctrine, unlike the home-centric doctrines in the Bill of Rights, is infected with post-Lochner v. New York judicial deference to economic regulation. This has influenced the Court’s aversion to a special protections doctrine to homes under the Takings Clause. This Article argues that, as a matter of constitutional coherence theory, which prizes doctrinal symmetry and harmony, the Court should, in limited circumstances, extend the home-centric thread to protect homes in takings that expropriate title to or impact the economic value of homes.

This Article also grapples with several broader methodological, doctrinal, and theoretical implications. First, the Court consistently applies atextual methods of interpretation of the home. Second, this atextual interpretive pattern of influence supports this Article’s proposition that the home-centric doctrinal thread should extend to takings. Finally, a congruent home-centric Bill of Rights that extends to takings aligns neatly with constitutional coherence theory.

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The home occupies a special place within the Constitution. Americans’ admiration “for the sanctity of the home” is linked to the individual, the family, and the fabric of society. The home is the “moral nexus between liberty, privacy, and freedom of association” and property. This sentiment is the basis of the Supreme Court’s distinctive protections to the home. The Court has had to grapple with the intersection of the meaning of the “home” and the nature of individual rights across a range of constitutional provisions. This engagement has produced a stark dichotomy and a deep puzzle. In most contexts, the Court finds reason to grant special solicitude to a zone of constitutional protection emanating from the distinctive nature of the home. The Court has, in other words, extended itself to textually adhere or doctrinally shape its jurisprudence to protect the home, as opposed to other places and spaces. That solicitude is entirely absent when it comes to the Takings Clause.

To appreciate this dichotomy, take for example the Court’s relatively recent cases where the home was at the center of the Court’s review. In <i>Kelo v. City of New London</i>, Justice Stevens upheld the seizure of homes for economic development purposes as justifiable under the Fifth Amendment Takings Clause. Yet, in <i>District of Columbia v. Heller</i>, the late Justice Antonin Scalia...
elevated the right to bear arms in the "hearth and home" above all other interests under the Second Amendment.\(^5\) This is odd. The Second Amendment does not textually say that the right to bear arms enjoys greater protection in the home.\(^6\) Likewise, the Fifth Amendment does not textually preclude or grant special compensation formulas or heightened scrutiny when homes are subject to physical or regulatory takings.\(^7\) To make his atextual leap in the Second Amendment, Justice Scalia, who purported to ascribe to "public meaning" originalism, leaned on the Fourth Amendment's explicit homebound protections arising from Payton v. New York.\(^8\) There, the Court explained that "the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."\(^8\) Justice Scalia then extended such protections in Kyllo v. United States.\(^9\) However, in Kelo v. City of New London, Justice Stevens—to the dismay of Justice Thomas in his dissent—was uninterested in equating the Fourth Amendment's search and seizure protections in the home with the idea that such protections similarly extend to physically taking homes.\(^10\) Yet, the home-centric doctrinal acrobatics employed by Justice Scalia have also been exercised in other areas of constitutional interpretation throughout the Bill of Rights.

For example, the Court had no trouble lifting the sanctity of the home in Stanley v. Georgia, extolling that “[i]f the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.”\(^11\) The Court later expanded its focus from freedom of mind and thought in the home to protections to “privacy and freedom of association in the home.”\(^12\) Notice again that nothing in the First Amendment remotely offers special protections to or within homes.\(^13\) There are, however, examples of textual clarity, if not, purity, of the home in the Bill of Rights. Indeed, the Court in Youngstown Sheet & Tube

\(^5\) U.S. CONST. amend. II.
\(^6\) U.S. CONST. amend. V.
\(^7\) Heller, 554 U.S. at 576 (Justice Scalia embracing an interpretation of the Constitution that is “guided by the principle that ‘[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.’” (quoting United States v. Sprague, 282 U.S. 716, 731 (1931))).


\(^9\) Kyllo v. United States, 533 U.S. 27, 34 (2001). He noted that “in the case of the search of the interior of homes—the prototypical and hence most commonly litigated area of protected privacy—there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that exists.” Id.

\(^10\) See infra Part IV. A.


\(^12\) United States v. Orito, 413 U.S. 139, 142 (1973).


\(^14\) See U.S. CONST. amend. I.
Co. v. Sawyer gave credence to the Third Amendment’s textual prohibition of quartering soldiers in a home during peacetime, noting that “even in war time, [the Third Amendment requires that] seizure of needed military housing must be authorized by Congress.”\textsuperscript{15} And in Boyd v. United States, the Court explained that its Fourth Amendment search and seizure and Fifth Amendment criminal procedure protections almost run directly into each other, thus giving the home a special place of protection from self-incrimination.\textsuperscript{16} Takings Clause jurisprudence, however, is devoid of special protections to homes and is equally wanting of any special protections in the home.

The Takings Clause, generally, protects homes from takings that do not satisfy the public use requirement or that fail to pay just compensation.\textsuperscript{17} There is nothing special about those well-established limitations; they apply equally to most forms of private property. It is not as if Justice Stevens in, say, Kelo was doctrinally or textually handicapped from doing in takings what Justice Scalia did with guns in Heller or Justice Marshall did with smut in Stanley—that is, formulate a methodological and theoretical interpretation of the home to conclude that a special zone of protection existed. Yet, the Court has simply refused to do so in takings. Why is this?

Justice Thomas’s dissent in Kelo offers perhaps the ultimate clue to solving this mystery. His dissent employs an intradoctrinal maneuver by juxtaposing the Fourth Amendment and the Takings Clause. There, he was alarmed at the majority’s refusal to protect the home, noting that the Court has “elsewhere [in the Fourth Amendment] recognized ‘the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic,’” and that “[t]hough citizens are safe from the government in their homes, the homes themselves are not.”\textsuperscript{18} Importantly, he then stated, “the [majority] tells us that we are not to ‘second-guess the [legislative’s] considered judgments’” but the real issue is “whether the government may take the infinitely more intrusive step [than unlawfully searching a home] of tearing down the petitioners’ homes.”\textsuperscript{20} As a result, Justice Thomas argued, something has “gone seriously awry with this Court’s interpretation of the Constitution.”\textsuperscript{20} He continued, “[w]e would not defer to a legislature’s determination of the various circumstances that establish, for example, when a search of a home would be reasonable,” because we have recognized the “overriding respect for the sanctity of the home.”\textsuperscript{21} Indeed, the uprooting of persons from their homes is, to Justice Thomas, a “justification for intrusive judicial review” as set forth

\textsuperscript{15} Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 644 (1952) (Jackson, J., concurring).
\textsuperscript{16} Boyd v. United States, 116 U.S. 616, 630 (1886).
\textsuperscript{17} U.S. CONST. amend. V.
\textsuperscript{19} Id.
\textsuperscript{20} Id.
\textsuperscript{21} Id. (emphasis added).
in *United States v. Carolene Products.* Several major methodological and theoretical implications about the “constitutional home” emerge in those few lines buried in Justice Thomas’s dissent.

First, Justice Thomas’s dissent implicitly answers why there exists asymmetry of the home in the Bill of Rights. The Takings Clause is infected with post-Lochner *v. New York* deference to economic legislation; the other homebound amendments are not. The Court’s home-centric jurisprudence involving smut, guns, soldiers, searches, and self-incrimination—as opposed to takings—simply has nothing to do with economic legislation, and thus are immune to the Court’s post-Lochner deferential treatment to social and economic regulations. They are, in other words, primarily fundamental rights issues that have shaped a doctrine amenable to protections of homes where liberty and privacy concerns are most pronounced. While the Court’s development of an exactions doctrine provides heightened standards of review in disputes over land use permitting, the level of scrutiny and the rulings, in and of themselves, have not risen to the level of Lochner-era dismay for social and economic legislation.

Second, Justice Thomas’s dissent implicitly alludes to a longing for adherence to coherence theory in constitutional interpretation. His argument is that if the Fourth Amendment provides protections to homes (albeit within the zone of privacy), then it would seem that, as a matter of consistency and symmetry, the Court should likewise extend similar special protections to homes threatened by condemnation for purposes of economic development under the Fifth Amendment. Taken to its logical conclusion, if smut, guns, soldiers, searches, and self-incrimination all enjoy some form of protection or liability regarding the home, then takings should neatly provide a similar result as a matter of uniformity. This Article proceeds in four Parts.

Part II revisits the Court’s jurisprudence protecting the “home” across the first five amendments. The exercise reveals an imbalance and lack of complete coherence in constitutional interpretation: the Court has carved out home-centric doctrines involving smut, guns, soldiers, searches, and self-incrimination, yet the Court offers no equivalent express interest in or direct protection to the home in its takings jurisprudence. There is a tendency among property scholars to reorient the homebound amendments in the Bill of Rights. Margaret Radin has analyzed her theory of “personhood” through the lens of the Court’s decisions giving privacy and liberty protections to the home under its First and Fourth Amendment jurisprudence. See Radin, supra note 1, at 911–1002. In doing so, she identified the
constitutional law scholars to make light of this stark dichotomy. Some go as far as to ignore the schism by reiterating that the Takings Clause offers protections to homes, yet do not acknowledge that the Court’s takings doctrine fails to provide special protections to homes, as opposed to other doctrines in the Bill of Rights. This Part revisits this underexplored lacuna within the “anomalous” nature of the Court’s takings jurisprudence lacking any similar protection to the “home,” contemplating a special class of property protections to a family home against government takings. Id. at 1006. But Radin neither expressly connects all five amendments utilizing interpretive methodologies nor explains why there exists this abrupt departure of protections to the “home” under the Takings Clause. It is worth noting that the Court’s announcement that the Second Amendment also entails a liberty protection to bear arms in the “home and hearth” arrived in 2008, nearly twenty-five years after Radin’s groundbreaking article. See District of Columbia v. Heller, 554 U.S. 570, 629 (2008) (holding that the Second Amendment protects individuals’ rights to carry guns in the home). Benjamin Barros, likewise, has covered the Court’s First and Fourth Amendment jurisprudence in a non-interpretive manner proselytizing the “home,” yet when arriving at the Takings Clause, Barros merely ponders that the Court’s failure in its Kelo v. City of New London decision to “address the unique nature of the home is striking” in light of the “litany of areas in which homes are given special legal treatment.” D. Benjamin Barros, Home as a Legal Concept, 46 SANTA CLARA L. REV. 255, 297 (2006). Barros, like others, fails to provide any explanation for this “striking” fact or embark on the question of why the Court’s takings jurisprudence lacks home-centric protections. See id.

Few scholars have recognized this constitutional puzzle, and only a handful have explored the fundamental question of why this schism exists across the first five amendments. See Akhil Reed Amar, America’s Lived Constitution, 120 YALE L.J. 1734, 1776 (2011) [hereinafter Amar, America’s Lived Constitution]. Amar identifies the Takings Clause as protecting private property, including homes, broadly, and that judges might be “vigilant” in protecting the home by special just compensation calculations. Id. But Amar’s treatment of the home under each of the amendments is cursory, and he, like others, misses an opportunity to resolve the puzzle by asking the bigger question of why the Court’s takings jurisprudence departs from its other homebound amendments. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 267 (1998). While Amar has noted that protections to the home under the Constitution were largely a result of the post-Reconstruction era where the Third Amendment bridged together a “home-centric Second Amendment and a Fourth Amendment that was from the beginning protective of the private domain,” he merely explains that the prevailing dichotomy between “privacy” and “property” may have something to do with distinctions in protections to homes. Id.

Constitutional law scholars have only partially pieced together the amendment puzzle presented in this Article, and none are fixated on the Court’s home-centric void under its takings jurisprudence or attempted to offer explanations for the departure. Darrell Miller has drawn parallels and contradictions between the Second and Fourth Amendments to argue that the right to bear arms in the “home” and in public should be tempered by the First Amendment’s lack of protections to “smut” in public. See Darrell A.H. Miller, Guns as Smut: Defending the Home-Bound Second Amendment, 109 COLUM. L. REV. 1278, 1278 (2009) (arguing for courts to “[t]reat the Second Amendment right to keep and bear arms for self-defense the same as the right to own and view adult obscenity [in the home] under the First Amendment,” and making tacit reference to homebound conceptions across the first five amendments). But Miller declines to extend his proposal, let alone analyze the other “homebound” amendments, especially the Takings Clause, in his piece. Stephanie Stern similarly argues for less emphasis on the “home” under Fourth Amendment search and
“penumbra of home-related rights” to better appreciate the nature of this constitutional puzzle.\textsuperscript{28}

Part III answers the question of why the Court’s takings jurisprudence is devoid of home protections by arguing that the Court’s first five home-centric doctrines in the Bill of Rights are immune to and shielded from the Court’s embrace of post-\textit{Lochner} era judicial deference to economic regulation.\textsuperscript{29} However, the Court’s takings jurisprudence, unlike its homebound counterparts, is focused on advancing a body of law that primarily falls in line with preserving the post-\textit{Lochner} judicial repudiation of substantive due process review of economic legislation.

Part IV seeks to ground this Article’s call for home-centric harmony across the Bill of Rights in coherence theory.\textsuperscript{30} If the Court’s goal is to read the document with an eye towards consistency and accord, then it has arguably failed in the context of a person’s property and privacy rights in the home given the inexplicable absence of special home protections in the Takings Clause. Otherwise, the most logical alternative interpretation would be for the Court to employ a strictly textualist method of interpretation to achieve coherence by extending special protections to the home in the Bill of Rights only where the text commands in the Third and Fourth Amendments. But, of course, such an alternative is a far more radical departure from longstanding home-centric seizure jurisprudence, but like Miller, never gets around to tying the Court’s other amendment jurisprudence on the home together to offer a coherent understanding of what makes protecting homes from takings different from protecting smut, guns, or soldiers. See Stephanie M. Stern, \textit{The Inviolate Home: Housing Exceptionalism in the Fourth Amendment}, 95 \textit{CORNELL L. REV.} 905, 905 (2010) (arguing to replace emphasis on the physical home under Fourth Amendment search and seizure jurisprudence with narrower residential privacy interests). While John Fee notes that “[f]ederal constitutional law recognizes the unique status of the home in several ways” under the First, Third and Fourth Amendments. John Fee, \textit{Eminent Domain and the Sanctity of Home}, 81 \textit{NOTRE DAME L. REV.} 783, 786 (2006). He leaves gaps in homebound interpretations in the Second Amendment and Fifth Amendment self-incrimination clause and concludes that legislative action is required (as opposed to Supreme Court doctrine) to absolutely bar taking homes. \textit{Id.} at 788–89; see also Arianna Kennedy Kelly, \textit{The Costs of the Fourth Amendment: Home Searches and Takings Law}, 28 \textit{MISS. C. L. REV.} 1, 4, 18–28 (2009) (arguing that “home searches” under the Fourth Amendment “should be viewed as takings” under the Fifth Amendment). Thomas Sprankling covers the Third and Fifth, but does not offer an assessment of the home across the first four amendments in relation to the Takings Clause and does not, as this Article does, explore why the Court’s takings jurisprudence neglects to offer greater protections to homes. See Thomas G. Sprankling, \textit{Does Five Equal Three? Reading the Takings Clause in Light of the Third Amendment’s Protection of Houses}, 112 \textit{COLUM. L. REV.} 112, 112 (2012) (arguing that the Fifth Amendment Takings Clause should be read to protect homes from takings in light of the Third Amendment’s protection to the home); see also Michael A. Cottone, \textit{The Textualist Third Amendment}, 82 \textit{TENN. L. REV.} 537, 540–41, 541–54 (2015) (engaging in contextual and intratextual approaches to the Third Amendment).

\textsuperscript{28} Ravin v. State, 537 P.2d 494, 500 (1975).
\textsuperscript{29} See Fee, \textit{supra} note 27, at 788–89. Fee mentions that “in contrast to other areas of the law, eminent domain law” is highly deferential. \textit{Id.}
\textsuperscript{30} See \textit{infra} Part IV.
jurisprudence. Instead, the Court seems content to employ a purposivist and largely precedent-based methodological approach to home limitations in a variety of contexts to achieve coherence. This history of atextualism’s predominance in the home raises the specter that, instead of traditional explanations, such as the privacy versus property dichotomy, constitutional coherence theory is the underlying influence for the Court’s constitutional interpretation. Thus, such a theory should influence the home-centric doctrinal thread to extend to takings. As Richard Fallon explains: [If] the conclusions fail to cohere into a uniform prescription for how the case or issue ought to be resolved, then any or all of the individual conclusions may be reexamined, and the results adjusted . . . in an effort to achieve a uniform outcome. What Fallon and other adherents of coherence theory mean is that the Court, in striving for consistency, ought to adjust the traditional interpretive tools of structure, text, doctrine, and history in a manner that achieves a uniform, coherent outcome.

Thus, where incoherence and inconsistency exist, the Court should adjust some of the tools, such as textualism and doctrinalism, to arrive at the most coherent conclusion. As a result, if faced with a takings challenge where plaintiffs are homeowners who request the Court seek harmony with the rest of its home-centric Bill of Rights doctrines to specially protect the home, the Court should engage, for example, in some formulation of atextualism and intradoctrinalism, to achieve a coherent, uniform outcome. The Court’s prevailing takings doctrine fails to conclude that homes deserve greater protections above all other property interests. Thus, it should, in limited circumstances, find for special compensation formulas, per se and categorical tests, or basic heightened standards of review where homes are subject to taking.

What we are concerned with, then, as readers and interpreters of the Constitution as law, is the ability to read into the document “consistency rather than inconsistency.” Indeed, the dual methodologies of textualism and doctrinalism fit like a glove into coherence theory, because both methods espouse a “certain undeniable aesthetic attraction, appealing to ideals of symmetry and harmony.”

33 Id. at 799. Note that textualism is often referred to as “structural” or “historical” interpretations of the canon. Scholars continue to debate the semantics. For example, Phil Bobbitt set forth six modalities (or methods) of interpretation, which include historical, textual, doctrinal, prudential, structural, and ethical. See Phillip Bobbitt, Constitutional Fate: Theory of the Constitution 3–119 (1982). Akhil Amar argues that “structural” and “historical” interpretations are “documentarian” as they seek to pull meaning from the document itself. See Akhil Reed Amar, Foreword: The Document and the Doctrine, 114 Harv. L. Rev. 26, 30 (2000). He also refers to the method of interpreting the Constitution to identify pattern recognition by juxtaposing adjoining and nonadjoining amendments, clauses, and provisions within and across the document as “intratextualism.” See generally id. For purposes of this Article, specifically Part II, I am implicitly engaging in both textual and doctrinal methods of interpretation across the first five amendments, with a special
However, it is the atextual or doctrinal interpretive pattern of influence grounded in coherence theory that supports this Article’s proposition that the doctrinal thread should extend to takings to achieve coherence by altering its prevailing takings doctrine to impose special protections on homes, if not homeowners. A home-centric Takings Clause would, indeed, bring a variety of constitutional phenomena involving the home into a coherent conception of constitutional interpretation across the Bill of Rights. Few, if any, scholars have engaged these methodological tools and theoretical explanations in the context of the “constitutional home.”

II. THE SUPREME COURT’S HOMEBOUND DOCTRINES REVISITED

William Blackstone has raised the home as a paramount legal concept under American law. He noted that “every man’s house is looked upon by the law to be his castle.” 34 Such sentiments have led to the castle doctrine under Supreme Court precedent, that is, a person’s home is his castle, and the common law traditionally protected the house as a “castle of defence and asylum.” 35 Notable constitutional law scholars, such as John Fee and Akhil Amar, have noted houses as being “singled out above and beyond all buildings” and “a special place for privacy.” 36 As a result, both federal constitutional law and statutory law “recognize the home as a special place worth preserving.” 37 In fact, it was the Republican Party that influenced legislation during Reconstruction to promote homeownership. 38 But, the home is not just a special place.

The locus offers something “uniquely personal,” thus “making it different and in a sense of higher value than other forms of real property.” 39 As Jeanie Suk has explained, the “[h]ome has been central to the articulation of constitutional rights, including the right against unreasonable search and seizure, the right to due process, the right of privacy, and (recently) the right to bear arms,” which “lies at the center of the legal edifice that helps to construct human experience.” 40 Likewise, the home is “treated more favorably” 41 than other types of property, largely because the home is “inextricably part of” our

34 3 WILLIAM BLACKSTONE, COMMENTARIES *288.
36 Amar, America’s Lived Constitution, supra note 26, at 1772.
37 Fee, supra note 27, at 786-87.
39 Fee, supra note 27, at 793.
40 JEANIE SUK, AT HOME IN THE LAW 3, 133 (2009).
41 See Barros, supra note 25, at 255.
Indeed, “with very few exceptions—notably that of the home—the Framers’ conception of liberty related primarily to persons rather than places.”

But, in some circumstances, the “right to possess a home is given more protection than the right to possess other types of property,” such as “[h]omestead exemptions, rights of redemption in foreclosure, just-cause eviction statutes, and residential rent control.” Some argue that the Framers “envisioned a private, parochial, and rather sedentary people” and that the home was “singled out for special constitutional treatment” because it was deemed a “consecrated constitutional location” immune from intrusion. Even under the Fourteenth Amendment, the Court has described the home as a “sanctuary.” In Lawrence v. Texas, the Court found a protected liberty and dignity interest to engage in private consensual sexual activity between consenting adults, especially in the home.

Indeed, jurists join legal scholars in exalting over the home. A few state supreme courts have concluded that the First, Third, Fourth, and Fifth Amendment’s self-incrimination protections created a “zone of privacy” regarding security to and in the home. The Ninth Circuit recognized in United States v. Craighead that the “home occupies a special place in the pantheon of constitutional rights,” including privacy and self-defense-related protections to the “home” under the First, Second, Third, and Fourth Amendments, adding that the Fifth Amendment’s protections to custodial interrogations extended to a suspect’s own home. Indeed, the Supreme Court itself has constructed a Constitution that “manifests a special concern with the protection of the home” except, of course, within its takings jurisprudence. This is a striking,

\footnote{Radin, supra note 1, at 1013.}
\footnote{Timothy Zick, Constitutional Displacement, 86 WASH. U. L. REV. 515, 595 (2009).}
\footnote{See Barros, supra note 25, at 276.}
\footnote{Zick, supra note 43, at 539.}
\footnote{Id.}
\footnote{Lindsey v. Normet, 405 U.S. 56, 82 (1972) (Douglas, J., dissenting in part) (recognizing that tenants have a “fundamental interest” in their housing).}
\footnote{Lawrence v. Texas, 539 U.S. 558, 567 (2003).}
\footnote{See, e.g., Ravin v. State, 537 P.2d 494, 498–502 (1975). This was stated before the Court’s 2008 ruling in Heller, which lifted the “hearth and home” as a special place to bear arms. District of Columbia v. Heller, 554 U.S. 570, 635 (2008).}
\footnote{In United States v. Craighead, 539 F.3d 1073, 1077 (2008), the court stated:}

Under the First Amendment, the “State has no business telling a man, sitting alone in his house, what books he may read or what films he may watch.” The Second Amendment prohibits a federal “ban on handgun possession in the home.” The Third Amendment forbids quartering soldiers “in any house” in time of peace “without the consent of the Owner.” The Fourth Amendment protects us against unreasonable searches and seizures in our “persons, houses, papers, and effects.”

\footnote{Id. (internal citations omitted).}
\footnote{Id.}

\footnote{See Michael C. Dorf, Does Heller Protect a Right to Carry Guns Outside the Home?, 59 SYRACUSE L. REV. 225, 232 (2008); see also Miller, supra note 27, at 1305 (arguing that}
yet strange, dichotomy that I will explore in just a moment. But first, let us explore the Court’s home-centric doctrines involving smut.

A. Smut

We begin by exploring the Court’s handling of cases involving protections to the home under its First Amendment jurisprudence with an eye towards doctrinal interpretations, because the text of the First Amendment does not expressly mention the home.54 The First Amendment, instead, recognizes the state’s interest in regulating and protecting against obscenity, but at the same time protects the right of a person to receive information and ideas, despite the questionable social value or worth of the material.54 This includes prohibiting, to some extent, the state from regulating a person’s private thoughts.55 But what about a person engaging (or indulging) in his desire to read and think about such material in his home?

The Supreme Court in Stanley v. Georgia held that the First Amendment protects a person’s right to possess obscene material in the privacy of his home, even though the Court conceded that the state had the power to regulate obscenity in the public sphere.56 In Stanley, police executed a search warrant to enter Robert Eli Stanley’s home, where they found adult film.57 Stanley was later arrested after the police determined the film was in violation of a Georgia statute.59

Justice Marshall’s majority opinion offers clues into the Court’s constitutional take on the “home.” There, he reiterated the Court’s position that a person has a “right to satisfy his intellectual and emotional needs in the privacy of his own home” and that state regulation cannot “reach into the privacy of one’s own home.”59 Perhaps most worthy of attention is this: “If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.”60

The Court’s ruling in Stanley steadfastly adhered to the “home” as a castle under the First Amendment, reiterating the heightened protection that the Constitution gives to such activity in the home. The Court followed up its Stanley decision in United States v. Williams, where it dealt with Secret Service agents who “obtained a search warrant for William’s home” and found hard guns outside the home should be treated the same way as obscene materials are treated under the First Amendment.

53 U.S. Const. amend. I.
55 Id. at 565–66.
56 Id. at 568.
57 Id. at 558.
58 Id.
59 Id. at 565.
60 Stanley, 394 U.S. at 565 (emphasis added).
drives that contained “images of real children engaged in sexually explicit
conduct.”61 The Court affirmed Stanley, but explained that lewd material and
obscenity of underage children were not protected under the First Amendment.62
Its decision in Osborne v. Ohio likewise found the Stanley ruling “firmly
grounded in the First Amendment.”63
However, it is important to note here that while one may view and enjoy
such material in the home, a person is not protected, as the Court has stated in
United States v. Orito, from distributing such material, even if from within the
home.64 The Supreme Court then, in Paris Adult Theatre I v. Slaton, refused to
extend the protections of lewd material for noncommercial purposes, or in other
words refused to interpret a “theater” as an equivalent to a home.65 Further, the
Court has extended free speech protections to residential areas, paying heed to
the home as a safe space for speech that cannot be infringed upon.66 However,
the right to privacy must yield if particular activities in the home interfere with
the public welfare.67 I will return to this particular limitation in Part III.
Let us now turn to the Second Amendment, where protections to the “home”
were most recently etched into the Court’s jurisprudence.

B. Guns

In District of Columbia v. Heller, the Court held that a total ban on handguns
in the “home” was tantamount to a complete ban on an entire class of arms, and
that the state must permit a person to register and issue a license for the person
to carry a gun in his home.68 The D.C. ordinance specifically required that a
“lawful firearm in the home be disassembled or bound by a trigger lock at all
times, rendering it inoperable.”69 In striking down the ordinance, the Court
showed its concern regarding any prohibition of firearms that extended to the
home, because the “need for defense of self, family, and property is most acute”
in the home and that handguns are regularly used to protect one’s home.70 The
Court’s focus on the home was not by accident. Senator Samuel Pomeroy,
during the debates over the Fourteenth Amendment, stated that “Every man . . . should have the right to bear arms for the defense of himself and family

62 Id. at 288–89.
186, 195 (1986)).
(1980); Rowan v. U.S. Post Office Dep’t, 397 U.S. 728, 738 (1970); Gregory v. City of
Chicago, 394 U.S. 111, 125–26 (1969); Kovaec v. Cooper, 336 U.S. 77, 86–87 (1949);
Martin v. City of Struthers, 318 U.S. 141, 143 (1943).
69 Id. at 628.
70 Id.
and his homestead.”

Justice Scalia’s opinion ventured to the Revolutionary Era to unpack the significance of arms in the home, noting that “[i]n the colonial and revolutionary war era, [small-arms] weapons used by militiamen and weapons used in defense of person and home were one and the same.”

But, Justice Scalia’s opinion also offered an extensive explanation for why the locus of the firearm—the home—as opposed to other spaces or places not readily perceived as private is essential to Second Amendment protections. There, he stated that citizens prefer handgun possession in the home as a form of defense because such guns are “easier to store” and are “accessible” in the event of an emergency, such as when an intruder enters the home to try to wrestle away the gun. Justice Scalia, concerned with intruders like burglars, saw great value in being able to “lift and aim” a handgun in the home while dialing the police with the other free hand versus a long gun that required pointing the gun at the attacker. Besides the multitasking function that a small handgun apparently gives to gun owners when attacked in the home, Justice Scalia may be telling us more about the “home” than is apparent from a surface reading of *Heller*. He then departs from textualism and instead creatively inserts his own version of what the Constitution means by stating that “whatever else [the Second Amendment] leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”

But, as Justice Stevens explained the Framers’ intent, the idea that militiamen could “keep” firearms really meant that they could “store” such arms in their homes to be used in service when called upon, and that “[d]ifferent language surely would have been used to protect nonmilitary use and possession” of arms in the home had that been the intent of the Framers. As Justice Stevens argued, this simply did not include bearing the arms to protect the hearth and home. And, as Justice Breyer questioned, “[w]hat is [the] basis for finding [hearth and home] to be the core of the Second Amendment right?” Is it really the case, largely supported by limited sources, such as a state court decision, that the Second Amendment protects, primarily, persons bearing an arm beside his or her bedside?

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71 CONG. GLOBE, 39th Cong., 1st Sess. 1182 (1866).
73 *Id.* at 629.
74 *Id.*
75 *Id.* at 635.
76 *Id.* at 650–51 (Stevens, J., dissenting).
77 *Id.* at 720 (Breyer, J., dissenting) (alterations added).
78 *Heller*, 554 U.S. at 720 (Breyer, J., dissenting).
C. Soldiers

The Third Amendment states that “[n]o Soldier shall, in time of peace be quartered in any house, without the consent of the Owner.” There was very little debate over the inclusion of an anti-quartering clause in the Constitution. Most states strongly supported such a provision. While the Court has not directly reviewed a challenge grounded in the Third Amendment, its case law has offered useful summaries of the oft-neglected provision. The Amendment has been interpreted as a “property-based privacy interest” that protects “a fundamental right to privacy.” It has not been limited to mere fee simple ownership, but rather to any “lawful occupation or possession with a legal right to exclude others.”

In Griswold v. Connecticut, the Court clarified property-based privacy protections under the Constitution. The Court reasoned that privacy, in and of itself, is based largely on a desire to be secure in their homes, such as having privacy in a marital relationship. Thus, “one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy.”

As a result of the Third Amendment and other constitutional provisions extending special protections to the home, the Court found a general penumbra of privacy in the home. Some have interpreted the amendment to solely embody a “fundamental value” of the “sanctity of the home” and that textually stretching the provision to include nonresidential and non-fee simple ownership or occupation is inappropriate. A literal, textual reading of the amendment only plausibly protects “fee simple owners of houses.” Likewise, the Court in Youngstown Sheet & Tube Co. v. Sawyer gave credence to the Third Amendment’s prohibition of quartering soldiers in a home during peace time, noting that the “Third Amendment [mandates] . . . in war time [any] seizure of needed military housing . . . be authorized by Congress.”

79 U.S. CONST. amend. III.
80 Sprankling, supra note 27, at 128.
81 See id.
82 Engblom v. Carey, 677 F.2d 957, 962 (2nd Cir. 1982).
83 Id. (citing Rakas v. Illinois, 439 U.S. 128, 143-44 n.12 (1978)).
85 See id. at 485-86 (discussing the expansive nature of privacy interests as they relate to marital relations).
86 Rakas, 439 U.S. at 143-44 n.12.
87 See Griswold, 381 U.S. at 484 (stating that the Fourth and Fifth Amendment protections against government invasions of privacy extend to the “sanctity of a man’s home and the privacies of life”).
88 Engblom, 677 F.2d at 967-68 (Kaufman, J., concurring in part and dissenting in part) (arguing that, while “the home is a privileged place,” this protection does not encompass the occupational residences of correctional officers in the scope of their employment).
89 Id. at 968.
90 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 644 (1952) (Jackson, J., concurring).
D. Searches

The Court’s ruling in Payton v. New York is its longstanding pinnacle case drawing a fine line between searches and seizures in public spaces and those conducted in a person’s home.\(^{91}\) There, Justice Stevens’ opinion commingled search and seizure with the concept of the home, finding that while warrantless arrests in public may be constitutional, such arrests in the home are unconstitutional.\(^ {92}\) The Court explained, “the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.”\(^ {93}\) The Court went so far as to say that the purpose of the Fourth Amendment, in and of itself, was to “guard against arbitrary governmental invasions of the home,”\(^ {94}\) and that there existed a distinction between searches and seizures in the office as opposed to the home.\(^ {95}\) However, it is important to note here that the dissent in Payton sought to rein in the home-centric emphasis of the majority’s opinion, noting that the “Fourth Amendment is concerned with protecting people, not places, and no talismanic significance is given to the fact that an arrest occurs in the home rather than elsewhere.”\(^ {96}\) Still, the Court’s homebound approach to the Fourth Amendment influenced subsequent decisions.

In Wilson v. Layne, Chief Justice Rehnquist wrote that a “media ride-along” of reporters into a person’s home while police conducted a search with a warrant violated the Fourth Amendment.\(^ {97}\) There, a group of homeowners, suing federal law enforcement officials under federal law, sought to protect the homebound precedent of the Court’s jurisprudence and extend such protections to not only warrantless searches in the home, but to third-party media and reporters who happen to enter the home during a lawful search.\(^ {98}\) Indeed, this “ride-along intrusion” into a home runs afoul of the Court’s conception of the sanctity of the home.\(^ {99}\) Further, at the core of the Fourth Amendment is what the Court believes to be the “right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.”\(^ {100}\) The Fourth Amendment provides for,

\(^ {91}\) Payton v. New York, 445 U.S. 573, 590 (1980) (“In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house.”).
\(^ {92}\) Id.
\(^ {93}\) Id. at 585 (citation omitted).
\(^ {94}\) Id. at 582 n.17.
\(^ {95}\) Id. at 586 n.25.
\(^ {96}\) Id. at 615 (White, J., dissenting).
\(^ {98}\) See id. at 608 (highlighting petitioners who “contended that the officers’ actions in bringing members of the media to observe and record the attempted execution of the arrest warrant violated their Fourth Amendment rights”).
\(^ {99}\) Id. at 613 (“Surely the possibility of good public relations for the police is simply not enough, standing alone, to justify the ride-along intrusion into a private home.”).
"The right of the people to be secure in their... houses... against unreasonable searches and seizures..."\textsuperscript{102}

However, the Supreme Court has also made clear that the protection is about "people," not "places."\textsuperscript{102} Even so, the Court has also acknowledged that the Fourth Amendment’s protections depend upon the locus, or where the individual is located at the time of the search, and whether he personally has an expectation of privacy in the place searched.\textsuperscript{103}

The Court made an explicit distinction between protections in the home in \textit{Rakas v. Illinois}. There, the Court stated that there is a fine line regarding reasonable expectations of privacy in the home, which is often dependent upon whether the source of the reasonable expectation is “outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.”\textsuperscript{104} Justice Rehnquist, in his majority opinion in \textit{Minnesota v. Carter}, further acknowledged that the “text of the Amendment” meant only that persons “in ‘their’ houses” were protected.\textsuperscript{105} Yet, amidst the Court’s precedential broadening of the concept of the home as a protection, it also provided protections in “some circumstances” to a person housed in the home in another,\textsuperscript{106} such as an overnight guest, because it is “social custom” that should, likewise, be recognized as a daily expectation of privacy.\textsuperscript{107} Justice Stevens has noted that invasion of the home for search purposes without a warrant is “presumptively unreasonable.”\textsuperscript{108} This, the Court has noted, is a “firm line at the entrance to the house” that must not be crossed by police without a warrant.\textsuperscript{109} Justice White, animated by the threat of unchecked law enforcement invasions, explained that the home’s expectation of privacy “is plainly one that society is prepared to recognize as justifiable.”\textsuperscript{110}

Justice Scalia, the architect of the Second Amendment’s protections to the “hearth and home,” explained in \textit{Kyllo v. United States} that “in the case of the search of the interior of homes—the prototypical and hence most commonly litigated area of protected privacy—there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that exists” to withdraw that protection with new technology “not in general public use” that would erode

\textsuperscript{101}U.S. CONST. amend. IV.
\textsuperscript{102}Katz v. United States, 389 U.S. 347, 351 (1967).
\textsuperscript{103}Id. (“What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.”); \textit{see also} \textit{Minnesota v. Carter}, 525 U.S. 83, 83 (1998).
\textsuperscript{105}\textit{Carter}, 525 U.S. at 89.
\textsuperscript{106}Id.
that privacy. Justice Stevens explained that scanning technology that does not physically penetrate the interior of the home is not the same as the physical penetration of the home that many would agree is an example of the chief evil against the Fourth Amendment.

It seems that the Court’s Fourth Amendment jurisprudence on the “home” does not turn on expectations of privacy as the Court has previously stated, but rather on whether the property utilized for privacy is commercial or residential. The Fourth Amendment arguably treats commercial property differently by providing lesser protections to individuals than those owning or occupying a home. Indeed, searches and seizures regarding “purely commercial” transactions in the home of another, without any prior connection to the homeowner-householder, will not violate the Fourth Amendment. However, at the core of the protections is the “psychological primacy of privacy in the home” and the “political and historical role” that the home plays as a “haven” from government overreach. Some argue that the Fourth Amendment was meant to protect property. But the Court quickly disposed of property theories, explaining in Warden v. Hayden that “[w]e have recognized that the principal object of the [amendment] is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts.”

And finally, in Katz v. United States, the Court solidified its position that the Fourth Amendment “protects people, not places.” Yet, the Court has downplayed other forms of property in comparison to the “home” when determining levels of protection. Justice Burger has explained expectations of privacy in a person’s automobile are less than a person’s home. A year later, Justice Burger noted that “open areas” are not analogous to the “curtilage” for purposes of aerial surveillance, and that residences have heightened expectations of privacy. Such distinctions, some argue, “illustrate[] how home-search cases provide additional justification for limiting protection

112 Kyllo, 533 U.S. at 44 (Stevens, J., dissenting).
115 Stern, supra note 27, at 913.
116 See Radin, supra note 1, at 998.
119 See Stern, supra note 27, at 922.
121 Dow Chem. Co. v. United States, 476 U.S. 227, 239 (1986) (holding that open areas in an industrial plant spread over a large geographic area are not akin to the “curtilage” of a dwelling).
outside of the home.” Some have raised concerns that elevating the home as subject to greater protections does not fit the empirical evidence, as “there are many, many more street encounters than searches of private homes.”

E. Self-Incrimination

The Court’s ruling in *Boyd v. United States* expressly commingled the Fourth and Fifth Amendment protections to unlawful searches and self-incrimination in the home, with the text and accompanying doctrine from both amendments running “almost into each other.” There, the Court held that the doctrines:

[A]pply to all invasions . . . of the sanctity of a man’s home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense . . . it is the invasion of his indefeasible right of personal security, personal liberty, and private property . . .

Indeed, the Court there explained that “[b]reaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man’s own testimony, or of his private papers to be used as evidence to convict him of a crime, or to forfeit his goods” is in violation of the Fourth and Fifth Amendments. The Court there laid out the case that the “compulsory production” of evidence against an accused is the same as compelling a person to be a witness against himself is prosecution, which is prohibited under the Fifth Amendment.

III. THE PUZZLE OF THE HOME-LESS TAKINGS CLAUSE

The Takings Clause permits takings of “private property” so long as the government pays and the taking is for a public use. But the Court’s takings doctrine is devoid, unlike its homebound counterparts, of any special interest in or unique protection to the home. Why is this? Constitutional and property scholars would readily point to the privacy versus property dichotomy apparent

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122 See Stern, supra note 27, at 922.
125 Id.
126 Id.
127 Id. (stating that “compulsory extortion of a man’s own testimony” or using “his private papers . . . to convict him”).
128 U.S. Const. amend. V.
129 See Horne v. Dep’t of Agric., 135 S. Ct. 2419, 2426 (2015) (stating that the government may take an individual’s home in line with the Fifth Amendment if it pays just compensation).
on its face when exploring this question.\textsuperscript{131} In the context of property rights, the home is fungible and can be traded on the market for value, whereas the home protections elsewhere in the Bill of Rights cannot be traded on the market. The alienability of the home in the property context does not extend to the inalienability of the right to privacy. For example, a person cannot trade his or her privacy protection to viewing and enjoying smut in his or her home to the next-door neighbor for market value. Nor can a person sell his or her right to bear arms in the home to the government or trader on the market. In other words, the longstanding explanation to the puzzle presented in this Article is that most of the home protections in the Bill of Rights emanate from a zone of privacy rather than private property. And, of course, those are not the same. But this dichotomy, in and of itself, does not explain the atextual aberration of not extending special protections to the home in takings. The home-less Takings Clause is asymmetric with the rest of the Bill of Rights, and the prevailing explanation of privacy-based rights in the home versus property-based protections of the home is not the end of the story.

For decades, the Court did not expressly provide for special protections to bearing arms in the home. It was not until \textit{Heller}, and a particular Justice to write the opinion, that the Court arrived at a homebound doctrine in the Second Amendment.\textsuperscript{132} Likewise, a person cannot sell certain forms of smut from the home, such as child pornography, yet the Court offers special protection to viewing and enjoying permissible smut in the home.\textsuperscript{133} This property-based limitation on sale, but privacy-based exception on possession is evidence of the Court’s fast and loose play with privacy and property dimensions in the Bill of Rights. Indeed, the Court tends to interpret amendments and revisit its precedent in a variety of ways that satisfy its desire to find home-centric protections. Likewise, while takings law is redistributive in nature, it does not preclude a “special” right to the home carved out of the Bill of Rights.

This Part contends that the answer to this textual and doctrinal riddle is that the Court’s home-centric doctrines involving smut, guns, soldiers, searches, and self-incrimination are immune to and shielded from the Court’s embrace of post-
\textit{Lochner} era judicial deference to economic regulation.\textsuperscript{133} However, the Court’s takings jurisprudence, unlike its homebound counterparts, is focused on advancing a body of law that primarily falls in line with preserving the post-
\textit{Lochner} judicial repudiation of substantive due process review of economic

\begin{footnotesize}
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\item[130] See Fee, \textit{supra} note 27, at 788 (“In contrast to other areas of law, eminent domain law regards the home as no different than any other kind of property . . . .”).
\item[133] See McUsic, \textit{supra} note 23, at 647, 653; see also Fee, \textit{supra} note 28, at 793 (discussing place of “home” in eminent domain law in economic terms). Both McUsic and Fee note the deferential treatment that takings enjoys under current Court doctrine, but neither tie the deferential standard back to post-
\textit{Lochner} era deference broadly and how the other amendments are immune from such deference, instead benefitting from strict scrutiny.
\end{itemize}
\end{footnotesize}
legislation. This has hindered, but not fully foreclosed, the possibility of special protections to homes in the takings context.

The text and history of the Takings Clause does not get scholars or jurists very far when determining whether there exists, or should exist, a special protection to the home. James Madison inserted the text into the draft Constitution, and it is unclear to this day what exactly he intended when writing those few words. The historical record is also minimal, showing little evidence of what other Framers intended with the clause. There was virtually no debate about the clause at the time of ratification. Some have argued that the purpose of the Takings Clause was to minimize the possibility of military seizures of personal and real property during wartime. Indeed, much of the Court’s takings jurisprudence has been carved out of thin air with little adherence to the original intent, especially the Court’s regulatory takings and exactions doctrine. Doctrinalism, on the other hand, offers a useful approach to understanding the Court’s aversion to the home in light of the lack of history and text to glean from.

It would seem that even if the Fifth Amendment textually lacks the word “home” or “house,” unlike the Third and Fourth Amendments, protections to the house could still be read into the Court’s takings doctrine. Why not? This is exactly what the Court did in its First and Second Amendment jurisprudence, as well as its self-incrimination clause in the Fifth. Justice Scalia, specifically, offered the latest rendition of conservative doctrinalism to carve out the “hearth and home” protection in gun rights. Likewise, he did the same in Kyllo, raising issue with searches and seizures that threatened the home, as opposed to other places ordinarily understood to be domains of privacy. But something is afoot beyond mere sloppy textualism and doctrinalism or, for that matter, the prevailing privacy versus property dichotomy for why the Court’s takings jurisprudence is “home-less.” The inexplicable absence of home protections in takings can also be explained by the Court’s post-Lochner deferential treatment of social and economic legislation.

134 William Baude, Rethinking the Federal Eminent Domain Power, 122 YALE L.J. 1738, 1794 (2013) (“When [Madison] put forth his draft of what became the Fifth Amendment, the Takings Clause was there, tacked on to the end of some criminal procedure rights and the Due Process Clause. Madison did not specifically discuss the Takings Clause at all. A committee later made minor changes to the Clause’s wording (also without recorded explanation). That version passed the House and Senate, and still there was almost no recorded discussion about the Clause’s purpose.” (citation omitted)).

135 See, e.g., Sprankling, supra note 27, at 131 (positing that “Framers intended the lesser-known Takings Clause would provide greater protection to the home than to other types of property”).

136 Id. at 132.

137 Id. at 115–16.


A. Takings in the Lochner Era

Indeed, revisiting *Lochner* begins to piece together this previously incomplete constitutional puzzle, as it identifies the Court’s deference to “class legislation” as the crux of the home-centric schism in the Takings Clause and the rest of the Bill of Rights. The infamous *Lochner* Court derived the doctrine of “substantive economic due process” from the Fifth and Fourteenth Amendments.\(^{140}\) The Court was unabashedly hostile to “class legislation” that advanced social policies and sought to limit government power to regulate economic relationships through a conservative yet judicially active approach.\(^{141}\) The Court carved out its doctrine targeting economic legislation, which pursued social change, by narrowing its inquiry to whether the government action in dispute was within the police power of the state.\(^{142}\) The economic legislation and regulations attacked by the Court, including some federal courts, included regulatory pricing, restriction on businesses, graduated taxes, and labor legislation.\(^ {143}\) One of the primary explanations for the Court’s lurch towards anti-class legislation was that the Court despised unequal legislation.\(^ {144}\) By doing so, the Court found a way to review the substantive nature of government economic regulation and legislation by asking whether the government exercised its police powers. As a result, the Court severely limited the scope of the state police powers.

The Fifth and Fourteenth Amendment’s Due Process Clause was the origin of the Court’s *Lochner*-era treatment of private property rights. The Industrial Revolution brought significant social and economic transformations in American society. Such change also gave rise to social problems, such as poverty and inequality. Congress and state legislatures stepped in to mitigate these harms. However, the Court would hand down rulings that struck such legislation as an interference with property and liberty. There, the Court found redress and protections against deprivation of property without due process.\(^ {145}\) For the Court, the Constitution protected property from government interference.\(^ {146}\) To rein in government overreach in the realm of private property rights, the Court gave special meaning and interpretation to due process, takings, and property.\(^ {147}\) The late 1800s Court cases were testing grounds for the

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140 *Lochner* v. New York, 198 U.S. 45, 53 (1905) (“The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution.”).
141 See *id.* at 64 (showing hostility to a statute that sought to limit hours worked as it unduly restricted the “freedom of master and employee to contract with each other”).
142 *Id.* at 57.
143 See McUsic, *supra* note 23, at 609.
146 See *Lochner*, 198 U.S. at 61; see McUsic, *supra* note 23, at 611.
147 See McUsic, *supra* note 23, at 612.
The "Lochner" Court to scrutinize legislation that affected property rights. For example, the Court departed from its longstanding interpretation of eminent domain and public use as dealing strictly with physical seizures of title when it gave credence to takings that rendered property unusable. In *Pumpelly v. Green Bay Co.*, the Court found flooding of private property as a result of government action to constitute a taking of private property. The Court then turned to economic legislation that affected private property rights.

In *Chicago, Burlington & Quincy Railroad Co. v. Chicago* and *Fallbrook Irrigation District v. Bradley*, the Court accelerated the theory that it could determine whether a deprivation of property could be considered a taking of property in violation of the Fourteenth Amendment, all in an attempt to forge a bloc of doctrine to preclude class legislation in the areas of private property rights. Then, the Court’s jurisprudence morphed into a combination of criteria to determine if the state deprived a property owner of due process protected rights and whether the action was a taking of private property. This allowed the Court to shift its focus on core property interests such as title, possession, and exclusion to property interests such as economic value. In other words, “the notion of property” became an abstract category of economic interests. In *Chicago, Milwaukee, & St. Paul Railway Co. v. Minnesota*, the Court equated “expected earning power” with traditional definitions of property. Or, for example, the Court in *Pollock v. Farmers’ Loan & Trust Co.* stated that taxes were the equivalent of property, and that legislation prohibiting direct taxation on real property or income was unconstitutional. The concept of property became malleable beyond the core possession and title definitions, which gave the Court flexibility to attack regulations on property rights, particularly those that were redistributive in nature.

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148 See id. at 612–13.
149 See *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 179 (1872).
150 See *McUsic*, supra note 23, at 611 (highlighting the "Lochner" Court's use of doctrinal tools to invalidate legislation based on their "personal belief in laissez-faire economics").
152 See *McUsic*, supra note 23, at 614.
153 See id. at 614. n.35.
154 See id.
155 *Chi., Milwaukee & St. Paul Ry. Co. v. Minnesota*, 134 U.S. 418, 456 (1890) (“Under pretense of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation . . . .”); see also *McUsic*, supra note 23, at 614–17 (discussing the Court’s evolution to understand property as “economic value itself”).
156 *Pollock v. Farmers’ Loan & Tr. Co.*, 158 U.S. 601, 601 (1895); see also *McUsic*, supra note 23, at 615.
As Molly McUsic explained, economic rights became property in the eyes of the Court, and therefore, during the Lochner era, legislation and regulation that affected property could be subject to substantive due process inquiries.\footnote{158} Rate regulation, specifically, was subject to due process inquiries under the Fourteenth Amendment.\footnote{160} In \textit{Munn v. Illinois}, for example, the Court found that such rate regulations on railroads were the equivalent of the state forcing an owner to run a “business with less return than he would receive without the regulation,”\footnote{160} thus viewing such economic regulations as amounting to takings of property for public use without just compensation.\footnote{161} In other words, where the regulation significantly reduced rates, the Court would find a taking for public use without just compensation because the state “cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking.”\footnote{162}

The consistent rulings on economic regulations as equivalent to seizing private property gained considerable support in subsequent cases in the early 1900s.\footnote{163} In \textit{Washington ex rel. Oregon Railroad & Navigation Co. v. Fairchild}, the Court found that requiring a railroad company to make a track connection was “not a mere administrative regulation,” but was a taking of property since the company had to “expend money” and was prohibited from certain “uses” of the land.\footnote{164} By the 1920s, the Court had concluded that regulations “could take property by limiting its use or value, and such a taking would contravene” due process.\footnote{165} For example, in \textit{Pennsylvania Coal Co. v. Mahon}, Justice Holmes explained that legislation affecting the coal mining rights of companies was not a valid exercise of the police power, but was instead a taking.\footnote{167} Because coal mining is valuable and a regulation making it “commercially impracticable to mine certain coal” is the same as destroying it, the regulation is thus an unconstitutional taking.\footnote{167} In \textit{Block v. Hirsh}, the Court upheld a rent control statute.\footnote{169} However, in doing so, the Court reiterated its Lochner-esque doctrine that the police power may be scrutinized if it goes too far as to become nothing

\begin{itemize}
  \item \footnote{158}{\textit{Id.} at 615–16.}
  \item \footnote{159}{\textit{Id.} at 616.}
  \item \footnote{160}{\textit{Id.} at 616, 616 n.49.}
  \item \footnote{162}{\textit{Stone v. Farmers’ Loan & Tr. Co. (The Railroad Commission Cases)}, 116 U.S. 307, 331 (1886).}
  \item \footnote{163}{McUsic, supra note 23, at 617.}
  \item \footnote{164}{\textit{Washington ex rel. Or. R.R. & Navigation Co. v. Fairchild}, 224 U.S. 510, 523 (1912); see also \textit{Curtin v. Benson}, 222 U.S. 78, 86 (1911).}
  \item \footnote{165}{McUsic, supra note 23, at 617.}
  \item \footnote{166}{\textit{Pa. Coal Co. v. Mahon}, 260 U.S. 393, 414 (1922).}
  \item \footnote{167}{\textit{Id.}}
  \item \footnote{168}{\textit{Block v. Hirsh}, 256 U.S. 135, 136 (1921).}
\end{itemize}
more than a regulation equivalent to a taking.\textsuperscript{170} Thus, regulations on rents “might amount to a taking without due process of law.”\textsuperscript{170}

Indeed, the Court “routinely” found economic regulations and legislation where property was affected to equate to takings because it limited its use or economic value.\textsuperscript{171} The market value became as constitutionally protected as traditional sources of “property.”\textsuperscript{172} Thus, any reduction in market value, the Court supposed, was a deprivation of property by taking.\textsuperscript{173} This tied “economic” legislation, and arguably “social” legislation, to the Court’s doctrinal rubrics under the Fourteenth Amendment’s Due Process Clause and increasingly the Takings Clause. The result was that the Court’s jurisprudence viewed any and all substantive property-based economic measures as “subject to judicial supervision, and all could have been invalidated under the Court’s doctrine.”\textsuperscript{174} The Lochner Court’s expansive view of property meant that “[i]f economic value is property, then any change in the common-law rules could be an unconstitutional infringement on property.”\textsuperscript{175}

Amidst the Lochner era’s revolt against legislation affecting liberty and property, the Court never once raised the prospect that legislation that affected specific property interests, such as homes, deserved greater scrutiny. Instead, a diverse range of property, from land to market value, was given broad protections under the Court’s substantive due process inquiries from regulations.\textsuperscript{177} The dawn of the Court’s regulatory takings doctrine saw an opportunity to limit takings that infringed too significantly on classes of homeowners. Yet, in Pennsylvania Coal Co., the Court failed to lift the “home” to the pantheon heights it receives in its sister amendments.

There, Mr. and Mrs. Mahon sued to prevent a coal company from mining under their house, which would remove the supports and cause subsidence of the surface.\textsuperscript{177} At the time, an anti-subsidence statute prohibited mining under residential dwellings to prevent destruction of residences for the public good.\textsuperscript{179} However, the house in dispute had a deed that reserved an estate interest in the subsurface for the coal company, giving it the right to mine under the surface.\textsuperscript{180} The Court struck down the statute as going too far by diminishing the coal

\textsuperscript{169} Id. at 146.
\textsuperscript{170} Id. at 156.
\textsuperscript{171} McUsic, supra note 23, at 617.
\textsuperscript{172} Id. at 618.
\textsuperscript{173} Id.
\textsuperscript{174} Id. at 624. The Lochner Court employed a two-part inquiry. Lochner v. New York, 198 U.S. 45, 57–58 (1905). First was whether the regulation properly furthered the health, safety, and welfare of the citizenry. Id. at 57. Second was whether the regulation or legislation actually fixed the harm caused by the plaintiff. Id.
\textsuperscript{175} McUsic, supra note 23, at 624.
\textsuperscript{176} Id. at 608.
\textsuperscript{177} Pa. Coal Co. v. Mahon, 260 U.S. 393, 394 (1922).
\textsuperscript{178} Id. at 393–94 n.1.
\textsuperscript{179} Id. at 394–95.
company’s property rights in the estate. As noted, the ruling was once part of the Court’s long line of takings cases that scrutinized economic legislation.

The Court paid little attention to or special care for the “single private house” in dispute, instead carving out a new takings doctrine that, as applied to the case at hand, arguably under-protected the house. Justice Holmes’s lack of conviction for the “single private house” is instructive. He minimizes the seriousness of the house by noting that “[t]his is the case of a single private house.” There is “[n]o doubt there is a public interest even in this,” but “[s]ome existing rights may be modified even in such a case.” Notably, the Court stated that where exercises of police power are in dispute, the “greatest weight is given to the judgment of the legislature.” Ultimately, the Court departed from its longstanding separation of takings and exercises of police power by introducing the concept that if regulations “go too far,” they will be deemed “regulatory takings” in violation of the Takings Clause.

Notwithstanding the Court’s lack of interest in homebound protections, the Court’s heavy-handed approach to constraining state exercises of police power that impinged on liberty and property slowly receded. In the post-Lochner era, largely as a result of the Court’s command in Carolene Products, the Court instead embraced deference to economic legislation affecting property interests in takings that starkly contrasted with the Lochner Court. But at the same time, the Court embarked on a crusade of strict scrutiny in cases where fundamental rights were central to a dispute, thus giving the Court a useful tool to address special protections to homes in non-economic legislation cases in which fundamental rights converged with longstanding principles of sanctity of the home.

B. Deference Post-Lochner

The period after 1937 is when the Court, thanks to its ruling in Carolene Products, abandoned its economic substantive due process doctrine for a more relaxed, deferential standard to government economic activity. Justice Stone’s famed footnote four set forth distinctions that would inevitably remove property rights protections from substantive due process review, but leave fundamental rights in the domain of strict scrutiny. The Court carved out an exception to its departure from close scrutiny of economic and social legislation

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180 id. at 395.
181 id. at 413.
182 id.
184 id.
185 id. at 393.
186 See United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938) (holding that legislative judgments for regulatory purposes are presumed legitimate absent a showing otherwise).
187 id. at 152 n.4.
by remaining tethered to the doctrine where fundamental rights were at stake, including freedom of religion, right to privacy, right to self-defense, and freedom of press, speech, and association.¹⁸⁸

The new test, it was determined, was one that set forth whether “in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.”¹⁸⁹ In other words, strict scrutiny would be applied to alleged violations of fundamental rights, but rational basis review, and subsequently deference, would be applied to economic regulations. At the same time, economic and property rights would no longer enjoy the same Lochner-era searching judicial inquiry of government regulation.¹⁹¹ Justice Stone explained that rational basis review—the oft-quoted standard as to whether a regulation bears a reasonable relationship to a legitimate governmental interest—would be applied to regulations and statutes that entailed life, liberty, and property, but that fundamental rights still enjoyed substantive due process review.¹⁹¹ Scholars have questioned the Court’s Carolene Products elevation of fundamental rights as worthy of strict scrutiny, yet relegation of economic and property rights as merely rational basis.¹⁹²

Unlike the first four Amendments, the Takings Clause is limited in protecting private property by the Due Process Clause’s requirement of rational basis review of legislative action in economic and social kind.¹⁹³ Unenumerated rights, such as privacy or the right to marry, have gone from focusing on property rights to focusing on privacy thanks to landmark cases such as Griswold and Katz.¹⁹⁴ Indeed, before Katz, the Court’s Fourth Amendment jurisprudence focused on property concepts, like trespass.¹⁹⁵ But Katz moved the Court in the direction of privacy protections, especially regarding the home.¹⁹⁶

As a result, the Court’s takings jurisprudence has almost exclusively allowed for deferential treatment to takings because such takings usually advance an economic-oriented agenda. As the Court long ago explained in Carolene Products, “regulatory legislation affecting ordinary” economic activity deserves a presumption of rational basis.¹⁹⁷ Such adherence to deference seeped into the Court’s takings jurisprudence even though the core of

¹⁸⁸ M. at 152.
¹⁸⁹ M. at 152.
¹⁹⁰ M. at 152.
¹⁹¹ M. at 152.
¹⁹⁴ Amar, America’s Lived Constitution, supra note 26, at 1771.
¹⁹⁵ M. at 152.
¹⁹⁶ M. at 152.
the Takings Clause is to protect property owners from excessive government regulation. In *Penn Central Transportation Co. v. City of New York*, Justice Brennan stated that the Court would adhere to deferential standards and continue to treat government land use regulations as nothing more than exercises of police powers that deserve the greatest weight of deference, even though the majority carved out an ad hoc balancing test that could conceivably be wielded to constitutionally rein in local legislation and regulation. In *Berman v. Parker*, Justice Douglas surrendered the Court’s substantive due process appetite, instead choosing the Court’s longstanding preference to defer to “social legislation” for the public good. Instead, the Court reiterated that the legislature, not the judiciary, may exercise its powers over its affairs, commingling the legislature’s broad police powers with “public purpose.” Specifically, Justice Douglas noted “when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive,” and “the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation.” Indeed, for matters involving the physical seizure of private property, the role of the Court, Justice Douglas explained, is “extremely narrow.”

This is not to say that the Court immediately abandoned some of the doctrinal tools left by the *Lochner* Court; it simply did not hand down rulings that were averse to economic regulation of property, notwithstanding having the doctrinal tests at its disposal to do so. For example, the Court’s balancing ad hoc test in *Penn Central* could, if the Court decided, be used to strike down a regulation that interfered with investment-backed expectations, or in other words, regulations that impacted economic interests in the name of class legislation. The Court’s per se takings tests formulated in *Lucas v. South Carolina Coastal Council* and *Loretto v. Teleprompter Manhattan CATV Corp.*, likewise, give the Court some teeth to chew away at regulations it finds overly burdensome or redistributive in nature while nonetheless essentially giving governments free rein to regulate property so long as it does not deprive all economically viable use or permanently invade private property. As scholars have noted, this essentially means that the Court defers to and validates the government regulations, even if it leaves less than ninety-five percent of the property available for use. In other words, while the Court has crafted tests that, if it chose, could strike down or scale back regulations of property that seek

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201 *ld.*
202 *Id.*
203 *Id.*
205 See infra Part III.C.
206 *Id.*
to redistribute based on price or market value, it rarely hands down rulings that actually go that far.

Some argue that the Court’s means-end exactions doctrine under the Takings Clause is a return to Lochner-style decision-making.\textsuperscript{207} Glenn Lunney, for example, explains that the Court’s exactions doctrine “is either to ignore [precedent] or to use name-calling—Lochnerism!”\textsuperscript{208} But, as noted above, even if today’s Court still has at its disposal the doctrinal tools used by the Lochner Court to wield against contemporary “liberal economic policy,” the Court simply has refused to go that far.\textsuperscript{209} Recall the Court’s exactions doctrine for example.

There, in both Nollan v. California Coastal Commission and Dolan v. City of Tigard, the majority carved out a heightened standard of review to government actions, usually planning commissions, to withhold a building permit on condition that the landowner concede to the government’s demand.\textsuperscript{210} This is a means-end test that looks at the reasons for the condition and the goal that the government is seeking to achieve. Thus, as a result, the government, under its exactions doctrine, has the burden to show there is an essential nexus and rough proportionality between the public harm caused by the landowner’s development and the condition to mitigate that harm. The Court, shortly after its Nollan decision, explained that regulating property is unconstitutional unless “there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy.”\textsuperscript{211}

In the dissents in both Nollan and Dolan, Justice Brennan and Justice Stevens raised concerns that the direction of the Court’s exactions doctrine inappropriately brought Lochner into contemporary takings doctrine. For example, in Dolan, Justice Stevens leveled a Lochner charge against the majority, arguing that the Court had reasserted the reasoning of Lochner by advancing a means-end test requiring heightened scrutiny of environmental and land use determinations by local governments in a similar vein as the Lochner Court did in refusing to presume a connection between the hours regulation on working in bakeries and the state interest in protecting the public health and safety.\textsuperscript{212} Justice Brennan, likewise, in Nollan argued that the Court had


\textsuperscript{208} Lunney, supra note 207, at 1896.

\textsuperscript{209} See McUsic, supra note 23, at 624.


\textsuperscript{211} Pennell v. City of San Jose, 485 U.S. 1, 20 (1988); see also McUsic, supra note 23, at 639.

\textsuperscript{212} Dolan, 512 U.S. at 406–09 (Stevens, J., dissenting).
implemented a *Lochner* standard that was “discredited for the better part of [a] century.”213 Of course, the majority opinion in those cases pushed back, arguing that the Court had not resuscitated *Lochner*.214 Other scholars such as Richard Levy, on the other hand, argue that the *Lochner*-era Court strategy would be a welcome addition to today’s takings doctrine, as the “problems plaguing the Court in this area can and should be resolved by emerging from *Lochner*’s shadow and integrating economic interests into a broader jurisprudence of constitutional rights.”215

However, the Court’s exactions doctrine does not quite embrace *Lochner* like some have feared.216 The difference is that the Court during the *Lochner* era protected not only core property rights, such as rights of possession, acquisition, exclusion, and disposition, but also economic and market values of property.217 Today’s Court, on the other hand, protects primarily core property rights, such as the right to exclude, acquire, dispose, or develop land, rather than protecting from regulations on prices, profits, or market value.218 The Court, it seems, “leaves far more of the nation’s property constitutionally unprotected from legislation than the *Lochner* Court did.”219 While the methodology the Court employs is reminiscent of *Lochner*—that is, a means-end heightened scrutiny—today’s Court rulings do not extend to protecting income generated from property or striking down regulations that redistribute on that basis like the *Lochner* Court did.220 Moreover, with regards to *Penn Central*, as Barton Thompson explains, “[l]acking an underlying rationale for invoking the takings protections and haunted by the specter of *Lochner*, however, this tripartite approach has provided virtually no significant restrictions on property regulations.”221

One might say that the main difference is not the type of legislation between today’s Court and yesterday’s *Lochner* Court, but the “proportion” of redistributive legislation and regulations at risk.222 Thus, attacks on economic legislation affecting property by the Court today have not been on major economic legislation by the federal or state governments, but primarily focused on environmental and local land use regulations protecting core property interests that give rise to the Court’s means-end tests dating from *Nollan* and *Dolan*, and most recently from *Koontz v. St. John’s River Management*

213 *Nollan*, 483 U.S. at 842 (Brennan, J., dissenting).
214 See *Dolan*, 512 U.S. at 384 n.5; *Nollan*, 483 U.S. at 834 n.3.
216 McUsic, supra note 23, at 608.
217 Id.
218 Id.
219 Id.
220 Id.
222 McUsic, supra note 23, at 609.
It has consistently approved economic regulations affecting property, even though the Court, as noted above, still has *Lochner*-esque doctrinal tools in its toolbox to strike down such legislation. Even post-*Nollan* and *Dolan*, the Court has consistently veered down the road of deference whenever it can, and clarified some of the heightened standard of review language employed in *Nollan* and *Dolan* that some argue is a return to substantive due process.

In *Lingle v. Chevron U.S.A. Inc.*, for example, Justice O’Connor closed the door on the substantive due process inquiries bleeding into takings doctrine, finding it inappropriate for the Court to employ a formula that asks whether a regulation of private property “substantially advances” legitimate state interests. There, the majority declined to commingle substantive due process inquiries of regulations where the crux of the dispute was whether the regulation was a taking. Justice O’Connor was compelled to eviscerate due process from takings as a way to clean up some messy and “regrettably imprecise” dicta left over from *Penn Central*, where the Court left the door open to the possibility that a use restriction on real property could potentially constitute a taking if the regulation was not reasonably enacted to pursue a public purpose.

Then, Justice O’Connor reverted to the Court’s preferred deferential approach, explaining that prior to engaging in inquiries of the underlying validity of a regulation, the Court “presupposes that the government has acted in pursuit of a valid public purpose.” The concern for the majority in *Lingle* was that, if it permitted “substantially advances” inquiries into takings doctrine, then the efficacy of “virtually any regulation of private property,” including state and federal regulations, could conceivably be scrutinized, thus empowering courts to substitute their “predictive judgments for those of elected legislatures.” Indeed, the Court’s prior rule, that regulations must substantially advance a legitimate state interest to survive a takings challenge, was rejected in place of its longstanding preference for deference to legislatures. The same year *Lingle* was handed down, the Court confirmed its willingness to continue its longstanding deference to social and economic legislation in *Kelo*.

There, Justice Stevens deferred to a local government’s “economic development” policy, explaining, “[w]ithout exception, our cases have defined [public purpose] broadly, reflecting our longstanding policy of deference to

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224 See *Koontz*, 570 U.S. at 625 (Kagan, J., dissenting).
226 See *id.*
228 *Lingle*, 544 U.S. at 543.
229 *Id.* at 544.
230 *Id.* at 548.
legislative judgments in this field. Justice Stevens invoked a “strong theme of federalism” in his opinion, noting that such a history is part of the Court’s longstanding “great respect” owed to state legislatures in discerning local public needs in eminent domain determinations. He reiterated that while it was not the Court’s responsibility to question the legislature’s judgment, “nothing” in the opinion “precludes [state legislatures] from placing further restrictions” on takings where the government seeks to redistribute private property in order to achieve economic development for the broader public.

As a result, this deferential treatment in takings doctrine post-Lochner has caused the Court to overlook and refuse to apply a heightened standard that gives greater protections to homes and homeowners than other forms of property. The Court’s refusal to permit special protections to homes is all the more curious in light of the many home-centric takings disputes it has reviewed post-Lochner and the Court’s simultaneous embrace of homebound doctrines under the other Bill of Rights doctrines post-Lochner.

C. The Home-Less Takings Doctrine

As a baseline, without plaintiffs who embody the principle of the sanctity of the home, the Court has had no reason to extend its takings doctrine to specially protect homes or homeowners. The plaintiff in Penn Central was the Penn Central Transportation Company, which owned Grand Central Terminal. Anthony Palazzolo, landowner of beachfront property, was denied a permit to develop wetlands into a private beach club. David Lucas was the owner of two vacant oceanfront lots. Chevron was the plaintiff in Lingle. The plaintiffs in Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency were hundreds of owners of undeveloped land. Ms. Dolan was the owner of a store who sought to expand the premise and pave a parking lot. Coy Koontz’s 14.9-acre swath of undeveloped land was slated for development. Berman concerned the physical seizure of a department

232 Id. at 480.
233 Id. at 482.
234 Id. at 489.
237 Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1008 (1992). Notably, however, David Lucas sought to build a single-family home on the beachfront property. Id. at 1007. While the Court deemed the restriction a taking, it did not give special credence to the fact that regulation prevented all economically viable use of his ability to build a home, but instead that Lucas and his property interest in his land—regardless of what it would be used for later—had been severely restricted. See id. at 1030–32.
Notwithstanding the Court’s aversion to imposing home-centric protections in cases lacking homeowner-plaintiffs, the Court has missed many opportunities to bring the Takings Clause into uniformity with the First, Second, Third, and Fourth Amendments in cases that dealt with a homeowner or a property interest in either building, selling a home, or the seizing of a home.243

In Loretto v. Teleprompter Manhattan CATV Corp., the Court was faced with a relatively sympathetic landowner in Jean Loretto, owner of a multifamily residential apartment building in Manhattan.245 There, the Court missed an opportunity to set forth distinctions in physical invasions of property interests akin to homes where people live, where elements of personhood thrive, and where privacy is sacred. Of course, the invader was not a law enforcement officer or a soldier, but a physical cable imposed by a cable company, permitted to do so by statute.246 The Court had ample opportunity to give special scrutiny to regulations that physically invade or occupy home-like structures. The cable company, in fact, argued that it was permitted to physically occupy the residence, i.e. install cable boxes, because the property relationship at issue was residential rental buildings, and that tenants were granted a property right for cables to be placed on the rooftops.246 Indeed, for the majority, such distinctions were irrelevant. They questioned “why a physical occupation of one type of property but not another type is any less a physical occupation.”247 The physical occupation of “plates, boxes, wires, bolts, and screws” that occupied “space immediately above and upon the roof”249 of apartments did not arouse the Court’s sympathy towards personhood and houses in a way to announce that such physical occupations were, for example, “the chief evil against” takings.249 One could imagine the Court uttering the sanctity of the home in a revisionist version of the Loretto opinion. It did not happen. Two years later, the Court had yet another chance to set forth a home-centric doctrine. It failed.

In Hawaii Housing Authority v. Midkiff, the Court was faced with takings that were for the purpose of breaking up a land oligopoly where the transfer resulted in rental homes being taken from landlords.250 There, the Court deferred to social legislation, explaining that Hawaii was merely attempting to “reduce the perceived social and economic evils of a land oligopoly traceable to their monarchs” and that land systems aimed at “for[ing] . . . individual

243 See Radin, supra note 1, at 989.
245 Id. at 419, 438–39.
246 Id. at 438–39.
247 Id. at 439.
248 Id. at 420, 438.
249 Payton v. New York, 445 U.S. 573, 585 (1980). It was only four years earlier that the Court uttered the now famous homebound words that “the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.” Id. (citation omitted).
homeowners” to lease rather than buy was a regulation that was a “classic exercise of a State’s police powers.” Justice O’Connor, pulling longstanding deferential language from the Court’s line of precedent, explained that “[j]udicial deference is required because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power” to reduce the perceived social and economic evils of land oligopoly that forces thousands of individual homeowners to lease, rather than buy, the land underneath their homes. Again, the Court missed an opportunity to perhaps provide stricter requirements for takings that impeded property interests related to homeowners.

In Nollan, Mr. and Mrs. Nollan had their building permit to replace their already existing bungalow with a larger house denied by the planning commission. Justice Scalia, the architect of home-like sensibilities in Heller and Kyllo, was not persuaded by the rosy, American dream-like profile of the Nollan’s small bungalow, which they enjoyed in the summers and even rented out to vacationers. The Nollans proposed to build a large house, but their permit was denied as a result of their refusal to allow a public easement across their property in exchange for the permit. Justice Scalia’s quirky exactions doctrine remained neutral, neither paying attention to nor making a distinction between a bungalow or other property in a similar dispute. If anything, the majority adhered to longstanding notions of the proverbial bundle of sticks, noting that the right to exclude is one of the most essential of the sticks.

Several years later, in 1992, the Court reviewed David Lucas’s challenge of legislation that barred him from building single-family homes on two residential lots he purchased. He argued the restriction on building permanent habitable structures deprived him of all economically viable use of his property. It is peculiar that the majority, especially the mostly conservative bloc of the Court, did not utilize the home-centric nature of the dispute to give greater protections to landowners seeking to utilize land to build and invest in homes. For one, the South Carolina legislation not only prohibited new buildings, but also restricted the “rebuilding of houses” that were previously destroyed by natural causes. This is especially surprising given the trial court’s finding that the appraisal of the land concluded that its best and highest use would be “luxury single family detached dwellings.” Still, the Court found no reason to narrow the scope of

251 id. at 241–42.
252 id. at 244.
254 id. at 827, 841–42.
255 id. at 825.
256 See id. at 831–42.
257 id. at 831.
259 id.
260 id. at 1064 (Stevens, J., dissenting).
261 id. at 1044 (Blackmun, J., dissenting).
its per se test to offer greater protections to landowners of lots who seek to build single-family homes. The Court could have carved out an alternative categorical test that prohibited legislation that rendered land slated for the development of single-family homes a taking if the regulation deprived the landowner of, say, more than seventy percent economically viable use of the lots, but all economically viable use where the prospective use in dispute was commercial or industrial.

Most recently, in *Murr v. Wisconsin*, the plaintiffs were landowners of two lots, one of which had an old family-owned cabin situated on it.262 The Murr children sought to remove the cabin to a different area in order to develop the lot in dispute into a new residence.264 But state law prohibited the development of the particular lot, thus giving rise to a takings claim.265 This time, the now retired Justice Kennedy was inattentive to the personhood narrative of the plaintiff. He ruled in favor of the government’s exercise of its powers to regulate the lots. In doing so, he never mentioned the arguably unique nature of the family cabin as perhaps overregulated.267

A clue for understanding the mystery behind the Court’s aversion to home-centric protections in takings can be found in *Pennsylvania Coal Co.* There, the Court paid little attention to Mr. and Mrs. Mahon’s “single private house.”267 Instead of offering a special limitation on regulations that under protect the subsurface subsidence that potentially harms the physical structure and economic value of homes, the Court carved out a new “regulatory” takings doctrine agnostic to any distinctions in the property interest affected.268 The Court was instead more interested in striking down legislation that affected the economic value and property interests of a company.270 But the Court did reiterate that where exercises of police power are in dispute, the “greatest weight is given to the judgment of the legislature.”270 That deference would be the standard unless, of course, the regulation goes too far.272

Likewise, take Justice Brennan’s opinion in *Penn Central* for another sign. There, the Court added a new multifactor ad hoc test to the Court’s takings jurisprudence.273 The test allows the Court to strike down regulations it finds too offensive to the investment and economic-backed expectations of landowners. While such doctrinal tools to attack government land use regulations are now available as a result of *Penn Central*, the Court has, for the
most part, declined to bludgeon most local government regulations as takings, and has never shaped its ad hoc test to specially protect the homestead. Instead, it adheres to deferential standards that treat such regulations as nothing more than exercises of police powers that deserve the greatest weight of deference.\textsuperscript{273}

And recall Justice Douglas’s deference to “social legislation” in \textit{Berman} for an additional hint.\textsuperscript{274} There, the Court was focused on respecting urban renewal as a justifiable public good, making no distinction as to the property taken, whether residential homes or commercial businesses.\textsuperscript{275} Justice Douglas explained that “when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive” and “the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation.”\textsuperscript{276}

Similarly, Justice Stevens deferred to a local government’s “economic development” policy in \textit{Kelo}, explaining, “[w]ithout exception, [that] our cases have defined [public purpose] broadly, reflecting our longstanding policy of deference to legislative judgments in this field.”\textsuperscript{277} There, the Court seemed disinterested in providing homes the same level of protection from government expropriation as the home (and its private occupants) receives from warrantless searches or the forced quartering of soldiers in peacetime. \textit{Kelo}, arguably the Court’s most contentious home-centric dispute, was a missed opportunity to bring harmony with the other homebound amendments. The case was the quintessential American dream narrative. There, Ms. Kelo’s little pink house was threatened by eminent domain to make way for a major economic development project that never came to fruition.\textsuperscript{279} Justice Stevens’s opinion never mentions the home as worthy of additional protections, and certainly does not cite to prior rulings under cousin amendments that provided greater protections to the home.\textsuperscript{280} However, in his \textit{Kelo} dissent, Justice Clarence Thomas, troubled by majority’s lack of concern for protecting plaintiffs’ homes, explains the oddity of protecting homes in other constitutional contexts but refusing to do so under the Takings Clause.\textsuperscript{281}

There, Justice Thomas stated that the Court has long recognized “the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic.”\textsuperscript{281} He then juxtaposes the Fourth Amendment’s search and seizure doctrine with the Fifth Amendment’s taking doctrine, arguing that it is difficult to square how “citizens are safe from [police searches] in their homes, [but] the homes themselves are not” protected from

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\textsuperscript{273} \textit{See id. at} 138.
\textsuperscript{274} \textit{Berman} v. \textit{Parker}, 348 U.S. 26, 32 (1954).
\textsuperscript{275} \textit{See id.}
\textsuperscript{276} \textit{id.}
\textsuperscript{278} \textit{See id. at} 473–75.
\textsuperscript{279} \textit{See id. at} 472–90.
\textsuperscript{280} \textit{id. at} 505–17 (Thomas, J., dissenting).
\textsuperscript{281} \textit{id. at} 518.
\end{center}
government seizures.\textsuperscript{282} The Court, he said, has “elsewhere recognized ‘the
overriding respect for the sanctity of the home that has been embedded in our
traditions since the origins of the Republic,’” but that the majority’s ruling
leaves homes themselves unprotected from taking.\textsuperscript{283} Perhaps most prescient is
this excerpt from Thomas’s dissent: “[t]he [majority] tells us that we are not to
‘second-guess the [legislative] judgments,’” but the real issue is “whether the
government may take the infinitely more intrusive step of tearing
down . . . homes,” and as a result something has “gone seriously awry with this
Court’s interpretation of the Constitution.”\textsuperscript{284} He continued: “We would not
defeer to a legislature’s determination of the various circumstances that
establish, for example, when a search of a home would be reasonable,” because
we have recognized the “overriding . . . sanctity of the home.”\textsuperscript{285} Thomas’s
passage in his dissent hints at, but does not explicitly answer, the real dilemma
in the Court’s void in home protections in takings as opposed to other
homebound doctrines in the Bill of Rights.

D. Explanations

Justice Thomas’s dissent is perhaps a useful segue into discussing the lack
of deference afforded to governmental action against fundamental rights.
Indeed, as he noted, the Court does not ordinarily defer to the government’s
determination when it decides to search and seize a home without a warrant.\textsuperscript{287}
The Constitution fundamentally protects such searches under the Fourth
Amendment. As for fundamental rights, the Court is skeptical of deferential
treatment to government determinations. Indeed, the Court does not, as Justice
Thomas explained, defer to the law enforcement officials’ judgments regarding
when and if to enter a home or search and seize property without a warrant.\textsuperscript{288}

It is telling that after the Court’s Carolene Products ruling effectively
ousted Lochner-era judicial scrutiny to economic legislation from the Court’s
Bill of Rights jurisprudence, the Court consistently and systematically carved
out homebound protections in the entire first half of the Bill of Rights, while at
the same time choosing deference over home-centric doctrines in its takings
jurisprudence. Indeed, while the Court made short shrift of governments that
seized homes for economic development or governments that denied building
permits for single family home developments, it regularly found physical entries
into the home to be a chief evil or the right to bear arms in the hearth and home
as more worthy of protection above all other interests.

The District of Columbia ordinance in Heller restricting gun possession in
the home, even if for the health, safety, and general welfare of the public, did

\textsuperscript{282} Id.
\textsuperscript{283} Kelo, 545 U.S. at 518 (Thomas, J., dissenting).
\textsuperscript{284} Id.
\textsuperscript{285} Id. (emphasis added).
\textsuperscript{286} See id. at 517–18.
\textsuperscript{287} Id. at 518.
not receive the kind of deferential treatment an ordinance regulating land use would receive. The right to bear arms, the Court emphasized, is a fundamental right of the individual, not the collective.\textsuperscript{289}

The statute at issue in \textit{Stanley} prohibiting lewd material in the home was purportedly enacted to regulate possession of material “thought to be detrimental to the welfare” of the citizens.\textsuperscript{289} But that argument is weakened when viewed in light of the constitutional limitations on regulations or governmental action that intrudes into one’s privacy. The Court long ago upheld restrictions on the commercial sale of certain obscene material as defensible in limited contexts for the public welfare. Thus, privacy and speech rights in \textit{Stanley} were violated when viewed as fundamental rights issues by the Court requiring closer scrutiny.\textsuperscript{291} This closer scrutiny permitted the Court to glean at the place and space of the violations, and to determine that where such legislative offenses occur, the Court will offer additional protections to ensure fundamental rights are not violated.

Likewise, the statute in \textit{Payton} permitting warrantless arrests and invasions in the privacy of the home when emergency or dangerous circumstances are afoot was not the kind of economic legislation that the Court would ordinarily find for deference.\textsuperscript{291} Instead, the Court employed protections to fundamental rights, as opposed to deference to allowing warrantless arrests to occur.\textsuperscript{293}

Once placed in this historical context against the backdrop of the post-\textit{Lochner} era, the fundamental puzzle—why the Court offers homebound protections in its obscenity, gun rights, quartering soldiers, search and seizure, and self-incrimination doctrines, but neglects an equivalent doctrine under the Takings Clause—becomes clearer. But how can the Court move its takings jurisprudence in line with the rest of its homebound sister amendments? Rather, is homebound concordance and uniformity across the Bill of Rights, where applicable, necessary, or desirable?

\textbf{IV. TOWARDS A THEORY OF COHERENCE OF THE CONSTITUTIONAL HOME}

There are several broader theoretical implications, if not questions, that remain. If textualists are adamant about consistent readings of text, then one might suspect that the Court should only recognize special protections in the home where the text commands in the Third and Fourth Amendments. Such a result would preclude special protections in or to the home involving smut, guns, self-incrimination, and takings. Likewise, one might argue that the home-less Takings Clause is not defective, but rather that the Court’s other various atextual home-centric doctrines are wrong. The concern here is that the “purposivist [and] precedent-based interpretive” methods have gone far beyond the text and

\begin{enumerate}
\item \textsuperscript{288} District of Columbia v. Heller, 554 U.S. 570, 628 (2008).
\item \textsuperscript{289} Stanley v. Georgia, 394 U.S. 557, 560 (1969).
\item \textsuperscript{290} Id. at 565.
\item \textsuperscript{291} See Payton v. New York, 445 U.S. 573, 583 (1980).
\item \textsuperscript{292} Id.
\end{enumerate}
history to resuscitate and maintain the principle of the sanctity of the home in American constitutional law. \(^{293}\) Therefore, it might be said, just leave the homeless takings doctrine in place. Yet, it is difficult to escape the predominantly “atextual nature of the Court’s opinions” involving the home in the other amendments, \(^{295}\) and this suggests that the Court’s lack of homebound limitations in its takings jurisprudence is evidence that it has failed to engage in the same atextual home-centric method of interpretation as its other home-centric doctrines in the Bill of Rights. In other words, the Court has created asymmetry where all doctrinal signs point towards a Bill of Rights of home-centric symmetry. This instance of incoherence in takings doctrine, then, is peculiar.

Constitutional congruence of home protections offers a comprehensive vision of the sanctity of the home in the Bill of Rights that embraces consistency and predictability. This constitutional congruence, in other words, offers a pragmatic mode of interpretation that harmonizes the home consistently in between and across all five amendments, including the Takings Clause. The addition of homebound protections in takings would further allow scholars and jurists to contemplate the home not solely through the lens of an “individual line of constitutional text” as if bound to, say, the Third or Fourth Amendment. \(^{295}\) Rather, pursuing home protections in the Takings Clause harmonizes home-centric doctrines in the Bill of Rights as a whole. \(^{296}\) This is achieved by doing two things at once: inferring the “home’s constitutional primacy from the structure and context of the document itself,” \(^{297}\) and subsequently drawing parallels to the sanctity of the home by leaning on precedent and doctrine from other doctrines within the Bill of Rights. But what is the theoretical basis for the claim that home-centric doctrines across the Bill of Rights should be interpreted congruently and coherently to include special protections in the Takings Clause?

A. Coherence Theory

Our constitutional culture generally aspires to a theory of coherence. Richard Fallon argues that even though the multiple modes of constitutional interpretation—text, structure, history, doctrine—are distinct, they are interconnected in ways that allow interpreters to find “constructivist coherence”—a form of reflective equilibrium that is influenced by reciprocal modes of assessment and reassessment. \(^{298}\) This theory calls for scholars and jurists to “assess and reassess the arguments in” text, history, precedent, and

\(^{293}\) See Jonathan F. Mitchell, Textualism and the Fourteenth Amendment, 69 STAN. L. REV. 1237, 1241 (2017) (citing Thomas C. Grey, Do We Have an Unwritten Constitution?, 27 STAN. L. REV. 703, 709 (1975)).

\(^{294}\) Id.

\(^{295}\) Miller, supra note 27, at 1305.

\(^{296}\) See Dorf, supra note 52, at 232.

\(^{297}\) Miller, supra note 27, at 1304.

\(^{298}\) Fallon, supra note 31, at 1189.
structure to “understand each of the relevant factors as prescribing the same result.”

Doing so, according to Fallon, results in “coherence.” This is because the modes of interpretation are “substantially interrelated and interdependent” and that this reciprocal influence helps achieve constructivist coherence “most of the time.” Constitutional interpretation “prescribe[s]” to embody various interpretations that lead to the “same result.” Fallon explains:

[If the conclusions fail to cohere into a uniform prescription for how the case or issue ought to resolved, then any or all of the individual conclusions may be reexamined, and the results adjusted insofar as plausible within the prevailing conventions of constitutional analysis, in an effort to achieve a uniform outcome.

This is a familiar line of logic that has roots in John Rawls’s teaching of “reflective equilibrium” that advocates for an intellectual process of adjusting and correcting concepts to achieve a coherent theory. Likewise, in the constitutional interpretive context, “our constitutional practice” arguably implicitly prescribes the attainment of coherence. To achieve this coherence and ultimately, for example, home-centric congruence in the Bill of Rights, interpreters rely upon “patterns of influence and adjustment” to make coherence attainable. Indeed, under this theory, the claim for constitutional congruence of home-centric doctrines across the Bill of Rights is substantially supported by the fact that interpreters must utilize, among other methods, textualism and doctrinalism to fully appreciate the desire for a coherent homebound Bill of Rights.

In each separate amendment in the first half of the Bill of Rights, the Court has utilized a variety of interpretive tools to find a zone of protections in or to the home. While smut is given an atextual and largely doctrinal protective treatment inside the home, derived largely from the textual home-centric protections of the Fourth Amendment, both interpretive tools were used to achieve symmetry in home protections. Likewise, the Second Amendment’s atextual and historical treatment by Justice Scalia in Heller relied upon the atextual First Amendment and the textual Fourth Amendment to find consistent application of a homebound protection to the right to bear arms the “hearth and

299 Id. at 1193.
300 Id.
301 Id.
302 Id. at 1240.
303 Id. (emphasis added).
305 Fallon, supra note 31, at 1240 n.230.
306 Id. at 1241.
307 See Miller, supra note 27, at 1305.
home.” The interconnectedness that Fallon speaks to plays out in the Court’s prominent *Kelo* decision, as mentioned in Part III.

The *Kelo* ruling was arguably a commensurability problem. That problem raises the question of what category of interpretation should be used when invoking a particular interpretive tool results in different outcomes. Inevitably, Fallon concludes that “blurring occurs in some cases between” some of the categories of constitutional interpretation. Rereading Thomas’s dissent with an eye towards coherence theory seems to suggest that Justice Thomas was seeking to extend the home-centric doctrinal thread from searches to takings—two amendments adjoined at the hip, but distinct in approaches to home protections.

There, Justice Thomas was concerned with the specter of incoherence, noting that the Court has “elsewhere [in the Fourth Amendment] recognized ‘the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic.” Indeed, textually he finds the “house” substantially protected in the Fourth Amendment, but unprotected in the Takings Clause. He wants it both ways. His concern was that since the Court specially protects persons from warrantless searches and seizures in the home, why should the government be capable of tearing down homes without special limitations? By not reading the Fourth Amendment protections of the home congruently with the Fifth Amendments protections to private property, Justice Thomas concluded that the Court’s interpretation of the Constitution had “gone seriously awry.”

Here, textualism and doctrinalism seem to converge and be interrelated (or blurred) in those few lines of Justice Thomas’s dissent. This “reciprocal influence” between interpretive methods seemed to color Justice Thomas’s implicit plea for coherence. In other words, it would seem that bringing closure to the homebound schism in the Bill of Rights, as this Article calls for, is simply part of the evolution of coherence theory.

Likewise, in the late 1800s, the Court in *Boyd* expressly commingled the Fourth and Fifth Amendment protections to unlawful searches and self-incrimination in the home, with the text and accompanying doctrine from both amendments running “almost into each other.” This was arguably yet another attempt at achieving some coherence, and aligns with the Third Amendment’s mandate to prohibit quartering of soldiers during peacetime. The Court’s *Stanley* ruling was arguably yet another attempt to thread an additional amendment to homebound coherence, as the Court explained that “if the First

209 See supra Part III.C.
210 Fallon, supra note 31, at 1239.
212 *Id.*
213 *Id.*
Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. And again in *Payton*, the Court sought to achieve an advanced thread of coherence by finding that “the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.” Finally, Justice Scalia leaned on the Fourth Amendment’s explicit homebound protections arising in *Payton* to declare, in *Heller*, that there existed an elevated right to bear arms in the “hearth and home” above all other interests under the Second Amendment. Again, underlying these home-centric doctrinal moves is an implicit attempt at coherence theory in constitutional law. Fallon’s “constructive” variation of coherence theory is useful in understanding the process of utilizing each interpretive method to find the same result where possible. Indeed, doing so raises, yet again, the prevailing question in this Article. Why not apply coherence theory to the Takings Clause as a theoretical ground to extend the home-centric doctrinal threat to takings?

B. Consilience

This Article’s conception of the home-centric Bill of Rights begins to look and sound like Jules Coleman’s definition of consilience theory—that is, “other things equal, it is good when a theory can bring a diversity of phenomena under a single explanatory scheme.” Take Newton’s theory of gravitation, and all its conceptions of orbiting planets around the sun. Prior to Newton’s theories, these conceptions were, in the language of constitutional scholars, “individual line[s] of constitutional text” under each Amendment in the Bill of Rights viewed and understood separately from each other. Instead, consilience would ask interpreters to view certain aspects of the Bill of Rights, such as home protections, “as a whole.”

Jules Coleman explains this phenomenon through the lens of tort and criminal law. The two, he argues, are interconnected. In fact, the two might be “unified” under a theory of consilience that shows “why we need these distinct bodies of law, each with its distinct and ineliminable principles.” Likewise, the Bill of Rights, while offering constitutional rights and protections, also espouses generally distinct bodies of constitutional law. Yet, to view these

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319 JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY 41 (2001). I do not claim that Fallon’s constructivist theory and Coleman’s consilience theory are the same, but instead that the two theories tend to strive for consistency and coherence in some fashion using constitutional interpretation.
320 Miller, supra note 27, at 1305.
321 See Dorf, supra note 52, at 232.
322 See COLEMAN, supra note 319, at 42.
323 Id.
bodies of law as interrelated and interconnected is to “explain how the modes of practical reasoning and substantive principle realized in each part of the law express fundamentally or unavoidably (perhaps even necessarily) unique features of that part.” Indeed, applying substantive principles in home-centric doctrines involving smut, guns, soldiers, searches, and self-incrimination gives scholars and jurists a sense of equilibrium that arguably justifies an extension to takings. As Coleman explains in consilience theory:

> The basic point is simply that a good explanation can show how various parts of the whole differ from one another in some systematic or principled way, and how their doing so contributes to the coherence of the whole. In the limiting case, such an explanation might demonstrate that different parts of the whole are necessarily distinct, and that the principles or concepts involved in each are unique.  

Indeed, the “norm of consilience tells us only that a theory that explains” Second Amendment law “in terms of a given set of principles is better to the extent that those principles can also explain other practices” such as Takings Clause law. Thus, “the theory contributes to a more comprehensive understanding of the whole.”

**C. Harmony**

Several questions emerge after answering why the Court’s Bill of Rights jurisprudence fails to provide equivalent protections to homes in takings and why the Court, as a matter of coherence theory, should actively carve out a takings doctrine that specially protects homes. The logical next step is to ask how should the Court construct a homebound pronouncement that brings the Court’s takings jurisprudence into harmony with its counterparts. This is no easy task, because while a “man’s home may be his castle. . . . that does not keep the Government from taking it” under the prevailing takings doctrine. A “general limitation [on taking homes] has not developed.” Indeed, it seems “anomalous” that “some explicit protection to family homes from government taking[s]” has not developed. While the Takings Clause “prohibits the taking of any home (or other private property) without just compensation,” it does not, in any real sense, offer special protections to homes.

As some scholars have noted, “one might expect to find an implied limitation on the eminent domain power” that protects a “special class of

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324 *Id.* at 42–43.
325 *Id.* at 53 n.4.
326 *Id.* at 43.
327 *Id.*
329 Radin, *supra* note 1, at 1006.
330 *Id.*
property like a family home” from a taking “unless the government shows a ‘compelling state interest’ and that [the] taking . . . is the ‘least intrusive alternative.’” This is, in other words, an argument for strict scrutiny where homes are at stake. In the Court’s *Kelo* decision, Justice Kennedy along with the three dissenting Justices, raised the prospect of the Court imposing heightened scrutiny to takings by peering into the motives behind government takings for economic development purposes.334

As Justice Kennedy noted, the majority opinion does not “foreclose the possibility that a more stringent standard of review . . . might be appropriate for a more narrowly drawn category of takings.” Thus, it is plausible that the Takings Clause could be brought in line with its cousin home-centric provisions by relying upon a more stringent standard of review or simply heightened review where homes are threatened by condemnation. Admittedly, “[e]ven if the Court began applying heightened scrutiny” as Justice Kennedy suggested, “it is far from certain that homes would receive any special protection.”335 Some scholars have questioned *Kelo* critics, noting that many “have not clearly articulated a textually grounded constitutional rationale that justifies specifically protecting homes from condemnation.”336

There are, nonetheless, several tweaks that could be made to the Court’s prevailing takings doctrine, including all three veins—eminent domain, regulatory, and exactions—to carve out protections to homes under the Takings Clause, thereby bringing congruence across the first half of the Bill of Rights. A special limitation to taking homes may offer broad special safety to the historical targeting of homes by local governments.337 The root of this Article’s extension of special protections to homes in the takings context lies in what Barton Thompson coins as the “consequential fit” in takings; that is, the Court’s scrutiny of the “relationship between the actions or status of a property owner and the burden imposed on the property owner by the challenged regulation.”338 Indeed, Thompson is referring to the Court’s exactions doctrine born from *Nollan* and *Dolan*, which offers the Court the doctrinal teeth to “sink . . . into the meaty and meaningful question of whether particular property owners, rather than society more broadly, should bear the cost of public goods and services.”339 The concern, as discussed above, is that such doctrinal teeth invites “allusions” to *Lochner*. Yet, this concern is overstated, since the Court does not invalidate government exercises of police power where the effect is price controls on

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332 Radin, *supra* note 1, at 1005–06.
334 *Id.*
335 *Sprankling, supra* note 27, at 120.
336 *Id.*
337 *See* *Fee, supra* note 27, at 795–96.
338 *Thompson, supra* note 221, at 1262.
339 *Id.*
340 *Id.*
property. Rather, the Court has remained steadfast with its approach to actions that impact land development or environmental regulations. Thus, one way to conceptualize a home-centric Takings Clause in harmony with the rest of the Bill of Rights is to find a happy-medium doctrine amidst the dizzying array of available takings doctrines to limit regulations that affect homes or require greater than fair market value in compensation for the taking.

1. Means-End Public Use Inquiry

One such alteration to takings doctrine would be for the Court, in limited circumstances, to embrace Lochner-like searching scrutiny by applying its exactions tests as a special doctrine solely for takings that expropriate title or affect the economic value of core property interests, such as homes. The exactions heightened scrutiny test would be applied only where the economic value of a core property interest, such as homeownership, is diminished, destroyed, or expropriated by the governmental action. In other words, where homes are subject to a taking, the Court’s exactions heightened scrutiny tests would “carry over to other portions of the takings clause,” including eminent domain and regulatory taking to create a special homebound limitation under the Takings Clause. This would give rise to the Court adopting and applying a special means-end test as a homebound limitation doctrine.

Indeed, adopting a special limitation for taking homes requires the Court to abandon, in limited circumstances, its post-Lochner deferential standard of review and, instead, requires the government to connect the means for which it achieves the end when taking homes. Richard Epstein and Nicole Garnett have raised the prospect of exactions doctrine seeping into public use doctrine. Such a doctrinal move would arguably threaten prior rulings, such as Midkiff or Kelo. This would fit with the narrative that the Court, as a matter of concordance and coherence with its other homebound amendments, desert post-Lochner deference by abandoning rational basis and instead mandating governments show a rational connection between the means of condemning homes and the public use end. Such a test would require a showing that the taking of homes is “reasonably necessary” to advance the public purpose proposed, such as economic development.

344 Epstein, supra note 342, at 491–92.
345 Garnett, supra note 343, at 938.
346 Id. at 939.
As with most exactions inquiries, this is a difficult heightened standard for governments to meet. It requires extensive studies and data, including factual evidence, to show direct and rational connections between the condemnation of homes and the ultimate public purpose. Drawing upon public use challenges by homeowners might offer a more “narrowly focused and judicially manageable inquiry” in takings involving houses.\(^{347}\) If the Court had given the Nollan’s bungalow searching judicial protection, then perhaps the cross-pollination argument of exaction jurisprudence into public use to provide a homebound limitation would be strengthened. Even under the Court’s regulatory takings doctrine, it would seem that “courts would protect one’s home to a far greater extent than one’s commercial plans, even if the result, in purely monetary terms, seems irrational.”\(^{348}\) Some scholars have raised the broader normative point that where property interests in dispute are “personal” or give rise to “personhood,” there should be available a “prima facie case that [such a] right should be protected to some extent against invasion by government.”\(^{349}\) Indeed, the Court’s exactions doctrine is perhaps the most potent area of takings that could give rise to special homestead protections.

For example, the Court’s longstanding deferential treatment to its public use inquiry from Berman to Kelo would require governments to connect the “means by which it acquires land to the particular purpose” when condemning homes.\(^{350}\) Indeed, the Supreme Court would “put the government to its proof—requiring a demonstrated connection between” the taking of homes and the specific purpose used to justify the taking.\(^{351}\)

2. Penn Central Ad Hoc Test

Under a normative homebound takings doctrine, the Court’s Penn Central ad hoc balancing test would place the burden on the government, rather than the challenger, to show the regulation did not affect the investment-backed expectations of the homeowner. Indeed, had Penn Central been a homeowner, then the “character” of the governmental action would be given searching scrutiny by the Court. Perhaps more important would be the investment-backed expectations of the home. Homeowners, unlike developers, do not necessarily view their immovable structure as a strong fungible asset, because most Americans are single-family homeowners and rarely own more than one home.\(^{352}\) Thus, the investment-backed expectation would arguably exceed that

\(^{347}\) Merrill, supra note 342, at 67.

\(^{348}\) Radin, supra note 1, at 1007.

\(^{349}\) Id. at 1014–15.

\(^{350}\) Garnett, supra note 343, at 938 (emphasis omitted).

\(^{351}\) Id. at 936.

\(^{352}\) See U.S. CENSUS BUREAU, QUARTERLY RESIDENTIAL VACANCIES AND HOMEOWNERSHIP (July 2019), https://www.census.gov/housing/hvs/files/currenthvspre ss.pdf [https://perma.cc/47GB-4CGJ] (demonstrating more Americans are single-family homeowners); see also U.S. DEP’T OF HOUS. & URBAN DEV., HOW MANY SECOND HOMES
of the typical developer-landowner. Regulations that impede on the economic value of the home in even the slightest of cases should be construed as enjoying special protection from the regulation in dispute, whether invalidation or compensation formulas that offers more than fair market value.

One could conceive of a doctrine that limits the taking of homes by requiring greater compensation, particularly in tests such as Penn Central.353 Indeed, a “homeowner’s emotional attachment to her home merits special respect, either in the compensation formula or in some other appropriate way.”354 Given the Court’s focus on homes elsewhere in the Bill of Rights, it makes sense, then, for vigilance in protecting private dwellings.355 Not giving special preference for or protections to investors whose property is taken might make sense, but as for those homeowners “displaced from [their] homestead[s], the matter seems different” because houses “are not merely fungible investments,” but rather they entail personhood—elements that cannot be quantified.356

This would require a very different calculation of just compensation when considering seizing homes where personal history, loved ones, and people’s lives are intertwined in the fabric of the property.357 In other words, government would be required to engage in a “very different kind of calculus” when seeking to condemn a home by giving a “bonus above fair market value in setting the rate of just compensation.”358 While investors could potentially abuse this “bonus,” it is still an arguably necessary recalculation of the traditional just compensation rate because homeowners assets are not fungible, but instead involve elements of personhood unlikely to be considered in a typical fair market valuation.359 A typical homeowner values his property very differently than the market,360 and thus the market value does not “compensate landowners completely.”361 In other words, the government simply cannot capture person’s interests in memories, community, friends, family, stability, and comfort into fair market value, because these “elements are far more valuable than the marketable elements of property.”362 These considerations are sharply different than considerations of a business owner’s fair market value when facing condemnation, and these differences impact appraisals.364 One could imagine

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353 See Amar, America’s Lived Constitution, supra note 26, at 1777.
354 See id.
355 See id. at 1776.
356 Id.; see Radin, supra note 1, at 1006.
357 Amar, America’s Lived Constitution, supra note 26, at 1776.
358 Id.
359 See id.
360 See Fee, supra note 27, at 790.
362 See Fee, supra note 27, at 791.
363 See, e.g., id. at 793.
the government being required to pay an additional “bonus” or fee when condemning homes to mitigate any hint of unfairness or inefficiency in *Penn Central* challenges that show some governmental interference with investment-backed expectations.\(^{364}\)

### 3. Less than All Economically Viable Use

The Court’s *Lucas* test, likewise, would be strengthened by either invalidating a regulation altogether or requiring above-market compensation when the regulation has reduced the market value of the home by twenty-five percent (or some other decisional percentage), instead of the constitutional baseline of “all economically viable use” of the home.\(^{365}\) In other words, homes would enjoy a test that would invalidate a regulation or require above market compensation where the regulation deprived the homeowner of less than all economically viable use of the property, while all other forms of private property would be subject to the traditional test of all economically viable use. The *Lucas* case, in and of itself, presented a missed opportunity to embark on this kind of test, but Justice Blackmun’s dissent offers a homebound roadmap.

David Lucas was seeking a permit to build single-family homes on his undeveloped land.\(^{367}\) Justice Blackmun’s dissent engages with the trial court record, noting that the appraised value of Lucas’s undeveloped land was determined “based on the fact that the ‘highest and best use’” was “luxury” single-family detached homes.\(^{368}\) This suggested the value was determined only based on its best use, and anything less than the best use rendered the undeveloped land valueless.\(^{369}\) Further, Justice Blackmun chastised the majority for disposing of a doctrine that looks at each case and its particular circumstances to determine whether a regulation renders the need for just compensation to a property owner.\(^{370}\) Of course, a less than all economically viable use test may threaten such a home-centric claim because local

\(^{364}\) See *Amar, America’s Lived Constitution*, supra note 26, at 1776–77.  
\(^{365}\) There are states that have enacted greater protections to property interests affected by regulatory takings, some of which are specifically carved out for residential property or homeowners. See Tex. Gov’t Code Ann. § 2007.002(5)(B)(ii) (West 2017) (legislation permitting property owners to attack governmental action that causes “a reduction of at least 25 percent in the market value of the affected private real property”); see also Ariz. Rev. Stat. Ann. § 12-1134(A)–(B)(1) (2018) (legislation noting that property owners are entitled to just compensation when regulation “reduces the fair market value of the property”); Or. Rev. Stat. Ann. § 195.305(1) (West 2018) (legislation providing that “[i]f a public entity enacts one or more land use regulations that restrict the residential use of private real property . . . and that reduce the fair market value of the property, then the owner of the property shall be entitled to just compensation”).  
\(^{367}\) *Id.* at 1044 (Blackmun, J., dissenting).  
\(^{368}\) *Id.*  
\(^{369}\) *Id.* at 1047.
governments could, conceivably, simply argue that the regulation is nothing more than exercise of their police power untethered to a takings claim.

Notably, Justice Stevens’s dissent raises the prospect that Lucas may not have even met a “temporary takings” claim entitled to just compensation because it is unclear when Lucas planned to build and to what extent the statute “temporarily” frustrated his building plans. Justice Stevens notes that under the majority’s per se rule, Lucas would lose nearly all his land value if—say 95%—were deprived, whereas a similarly situated landowner would be entitled to just compensation if 100% were deprived. It would seem that where homes are in dispute, the opposite would be true. The home would be elevated above all other property interests. A regulation that diminishes 100% or less of value of the home would require just compensation for the homeowner, whereas commercial or industrial property would be subject to the traditional per se test of all economically viable use.

4. Temporary Physical Invasion

Likewise, the Court’s Loretto test would also be stricter where the challenger is a homeowner. For example, it would be enough for the homeowner to mount a challenge under a home-centric regulatory takings challenge when the “character of the governmental action” is a temporary, rather than permanent, physical occupation or invasion of the home, regardless of the public purpose or benefit of the regulation. Broadening the scope of the Loretto test is important for purposes of conceptualizing a harmonious and congruent home-centric Bill of Rights—it offers seamless thematic and doctrinal associations across adjoining and non-adjoining Bill of Rights doctrines that protect the home. Historically, the Court has only entertained permanent physical occupations as subject to the Takings Clause. However, the Court’s lackluster reasoning in Loretto (why permanent occupation rather than temporary invasion?) left the door open for the Court to entertain challenges where the governmental action temporarily invades or occupies the home.

5. Class of One Homeowner Protections

Recall Carolene Products. Footnote four suggested that discrete and insular groups may enjoy a “more searching judicial inquiry” or “exacting judicial scrutiny” than economic regulations and social legislation. This approach would offer strict scrutiny to fundamental rights, but leave economic and social

370 id. at 1061–62 (Stevens, J., dissenting).
371 See id. at 1064.
373 See supra Part III.
374 See Loretto, 458 U.S. at 426.
legislation to rational basis review.\textsuperscript{377} To effectively bring the home into the ambit of the homebound pronouncements made regarding smut, guns, soldiers, searches, and self-incrimination, the Court would need to remove itself from the ghost of post-\textit{Lochner} era deference. One way to do this is to entertain the Equal Protection Clause as a vehicle to allow the Court to engage in searching inquiries of a discrete and insular group, such as homeowners. Justice Thomas, in his \textit{Kelo} dissent, likewise noted that “intrusive judicial review” was necessary to protect “discrete and insular minorities” from takings.\textsuperscript{377} One might argue that this implied that minority homeowners, specifically, were threatened by a deferential takings standard, since they are traditionally a politically underrepresented group. Thus, governments will be incentivized to target minority homeowners because such takings would be the path of least resistance. Some scholars have called for eminent domain that seizes homes from low-income people as impermissible due to inadequate representation of minority groups in the political process.\textsuperscript{378} This would arguably mitigate the number of poor people forced to lose their homes “simply because they are poor.”\textsuperscript{379}

The Court’s ruling in \textit{Village of Willowbrook v. Olech} perhaps provides a strong doctrinal candidate for a homebound limitation in takings, or at the very least, a cross-pollinated example of finding greater protections from within constitutional standards.\textsuperscript{381} There, the Court held that homeowners were permitted to sue under Equal Protection as a “class of one” in the context of zoning.\textsuperscript{382} However, some argued that such an argument could be used in the eminent domain context. If a group of homeowners, as opposed to other landowners, were singled out for condemnation, then it is possible that a homeowner could “bring suit to challenge the arbitrariness of the decision to take the property” in violation of Equal Protection.\textsuperscript{383} This argument is predicated on Equal Protection and enforced by Section 1983 causes of action that allege government agencies and officers intentionally treated homeowners differently than other similarly situated landowners.\textsuperscript{384} Such an argument is pronounced when race is considered.\textsuperscript{385}

\textsuperscript{376} See id. at 152.
\textsuperscript{379} \textit{id.} at 6.
\textsuperscript{381} \textit{Olech}, 528 U.S. at 564.
\textsuperscript{382} Blackman, supra note 377, at 700.
\textsuperscript{383} \textit{id.} at 727.
\textsuperscript{384} \textit{id.} at 730.
For example, “if all homeowners in a group targeted for eminent domain were black,” and similarly situated landowners not threatened by condemnation were white, then a discrete and insular minority group would essentially be treated differently in violation of Equal Protection. The essence of the “class of one” theory is that it does not ask whether eminent domain is “necessary to achieve a certain public purpose, but rather scrutinizes the decision to take the particular plot of property.” However, it is important to note here that such a homebound protection exists outside the Takings Clause, since a “class of one” theory has only been applied under Equal Protection challenges. Indeed, the Takings Clause protects property rights and does not search for or find discrimination. The Takings Clause in and of itself, therefore, is unlikely to be the venue for remedying discrimination against minority homeowners. Nonetheless, given the nature of the doctrinalism used by the Court in its home-centric doctrines involving smut or soldiers, the “class of one” theory may offer a legitimate homebound limitation in takings under Equal Protection.

V. CONCLUSION

This Article explored the fundamental puzzle of the Bill of Rights’ distinctive textual and doctrinal protections to the home. Indeed, the Court’s jurisprudence involving smut, guns, soldiers, searches, and self-incrimination extends protections to the home, but inexplicably does not in takings. The reason, it seems, is that the former doctrines have proven immune to post-Lochner era judicial deference to economic regulation, largely as a result of the Court acknowledging those protections as fundamental, whether enumerated or unenumerated, particularly privacy protections. Yet, the Court can bring harmony to the homebound Bill of Rights by, among other proposals, adjusting several of its public use and regulatory takings tests.

The importance of connecting all the homebound dots and then reorienting all the pieces of the puzzle cannot be overstated. The Court’s home-centric doctrines are mostly atextual. Doctrinalism has pushed the Court’s Justices, whether liberal or conservative, to adhere to a purposivist or precedent-based interpretive methodology where homes are central to a dispute, even if the home is not textually explicit in a particular Amendment. What we find by applying an interpretive methodology of doctrinalism to the Takings Clause is clarity, coherence, and consistency in protections to the home. This extension of the home-centric doctrinal thread to the Takings Clause offers scholars and jurists a theoretical justification for homebound coherence across the Bill of Rights.

385 Id. (emphasis omitted).
386 Id. at 734 (emphasis omitted).
387 See id. at 713.