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Criminalizing Property Rights: How Crime-Free Housing Ordinances Violate the Fifth Amendment

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CRIMINALIZING PROPERTY RIGHTS: HOW CRIME-FREE HOUSING ORDINANCES VIOLATE THE FIFTH AMENDMENT

ABSTRACT

Crime-free housing ordinances allow municipalities to force private landlords to evict tenants who have committed crimes or allowed a guest who has committed a crime into their home, regardless of the tenant's knowledge. These ordinances have proliferated throughout the country since the turn of the century and pose interesting questions about landlord and tenant rights under the Constitution. This Comment explores a new strategy for landlords and tenants attempting to confront these ordinances—challenging them under the Fifth Amendment.

The Supreme Court has recognized two types of takings that are due just compensation under the Fifth Amendment: possessory and regulatory takings. This Comment argues that compulsory evictions, as mandated by crime-free housing ordinances, qualify as possessory and regulatory takings for tenants, but not for landlords. While the landlord's property rights have only been circumscribed because he or she has to find a new tenant and has lost the revenue from the original tenant, the tenant loses all of his or her property rights in the tenant's leasehold estate after eviction under a crime-free housing ordinance. Additionally, government actors may engage in physical invasions to effectuate the eviction and "total taking" of the property. The taking is for the public purpose of reducing and preventing crimes, and the tenant is owed just compensation under the Takings Clause. Compulsory evictions under crime-free housing ordinances are unconstitutional without just compensation under the Fifth Amendment.

INTRODUCTION

Jessica Barron and Kenny Wylie lived in their home in Granite City, Illinois, since 2017.[1] They had a rent-to-own contract with their landlord.[2] Their landlord was satisfied with their tenancy and had no desire to evict them.[3] Unfortunately for the landlord, and for Jessica and Kenny, the law of Granite City did not give him a choice.

In the winter and spring of 2019, Jessica and Kenny allowed their teenage son's friend to sleep on their couch.[4] This friend was homeless and said that his mother had died,[5] and winters in that part of Illinois can involve single-digit and negative temperatures.[6] Kenny is a certified foster parent, and he and his wife have always tried to keep their door open to those in need.[7]

Unbeknownst to the couple, on May 21, 2019, Jessica and Kenny's houseguest burglarized a restaurant.[8] When Jessica learned of the burglary and realized the teenager was hiding in her home, she contacted the police and had him arrested.[9] After the arrest, she told the boy not to come back to her house, and he stopped returning.[10] In a perfect illustration of the saying, "No good deed goes unpunished," Jessica and Kenny faced eviction under Granite City's crime-free housing ordinance, which required a landlord to evict any tenant whose guest committed a crime while under that tenant's roof.[11] They challenged the ordinance under the Fifth Amendment as applied to the states by the Fourteenth

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[1] Complaint at 1, Barron v. City of Granite City, No. 3:19-cv-834, 2019 WL 5290218 (S.D. Ill. Aug. 1, 2019).

[2] *Id.* A rent-to-own contract is commonly known as a real estate installment contract, which means the tenants make payments toward the purchase price of the home every month along with their rental payment. *Id.* This practice is an option for those who do not qualify for a regular mortgage. *Id.*

[3] *Id.*

[4] Andrew Wimer, *City Wants to Force Landlord to Evict Family Who Did Nothing Wrong*, FORBES (Aug. 14, 2019, 11:49 AM), https://www.forbes.com/sites/instituteforjustice/2019/08/14/city-wants-to-force-landlord-to-evict-family-who-did-nothing-wrong/#787cdbac3c42.

[5] *Id.*

[6] *See* Rachel Rice, *Polar Vortex to Bring Negative Temperatures to St. Louis Area*, ST. LOUIS POST-DISPATCH (Jan. 29, 2019), https://www.stltoday.com/news/local/illinois/polar-vortex-to-bring-negative-temperatures-to-st louisarea/article_398f98f2-e58c-5749-b05f-6b6ba989502f.html (discussing a weather report from St. Louis, located across the Mississippi River from Granite City).

[7] Complaint, *supra* note 1, at 1.

[8] *Id.* at 12.

[9] Wimer, *supra* note 4.

[10] Complaint, *supra* note 1, at 13.

[11] *See, e.g.*, Lexi Cortes, *A Granite City Family Took In a Teen. Now They Face Eviction Because of his Crime*, BELLEVILLE NEWS-DEMOCRAT (Aug. 3, 2019, 3:21 PM), https://www.bnd.com/news/local/article 233493077.html.

Amendment.[12] Fortunately for Jessica and Kenny, under pressure from the lawsuit, the city repealed the crime-free housing ordinance on December 17, 2019.[13] Future renters in other cities may not be so lucky.

This Comment examines a previously overlooked constitutional challenge to crime-free housing ordinances that the plaintiffs asserted in *Barron v. City of Granite City*—that the ordinances are unconstitutional without just compensation under the Takings Clause of the Fifth Amendment—and argues that suing under the Takings Clause is a viable option for plaintiffs and advocates hoping to challenge crime-free housing ordinances that affect private landowners and govern their interactions with their tenants. This Comment does not consider crime-free housing ordinances as they apply to federal government housing or crime-free lease terms as negotiated in private rental agreements between landlords and tenants.[14] Instead, it focuses on compulsory evictions implemented and enforced by state and local governments against private landlords, an issue that has not yet reached the Supreme Court and is being litigated at the state and federal court levels.

Part I of this Comment explains the evolution of crime-free housing ordinances and the Fifth Amendment. Part II is divided into three main sections. Section A focuses on the property rights of the landlord and tenant, arguing that both have valid property rights that can be subject to takings under crime-free housing ordinances. Section B explores the main question of this Comment: whether there has been a taking. This section demonstrates that while there has not been a traditional possessory or regulatory taking for the landlord, there has been for the tenant. Section C applies the public use and just compensation requirements for a constitutional taking to an eviction under a crime-free housing ordinance.

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[12] Complaint, *supra* note 1, at 27. They also challenged the ordinance under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and under the First Amendment as applied to the states by the Fourteenth Amendment. *Id.* at 19, 21, 28.

[13] The Madison County Record, *Granite City Votes to Repeal Controversial Eviction Ordinance; City Seeks to Dismiss Constitutional Challenges as Moot*, MADISON - ST. CLAIR RECORD (Dec. 31, 2019), https://madisonrecord.com/stories/522658996-granite-city-votes-to-repeal-controversial-eviction-ordinance-city-seeks-to-dismiss-constitutional-challenges-as-moot. The court granted a motion voluntarily dismissing this case in February 2020.

[14] Crime-free housing ordinances as applied to federal government housing have different constitutional implications because the housing itself is being provided by the government. *See* Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 132 (2002) (explaining how different standards apply when the government is acting as a landlord in a public housing project.). Whether a landlord can unilaterally require his or her tenants to remain "crime-free" is a question of contract law between two private parties. *See Lease*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A contract by which a rightful possessor of real property conveys the right to use and occupy the property in exchange for consideration.").

I. CRIME-FREE HOUSING ORDINANCES AND THE FIFTH AMENDMENT

This Comment argues that compulsory evictions under crime-free housing ordinances violate a tenant's Fifth Amendment rights under the Takings Clause. This Part focuses on crime-free housing ordinances and the Fifth Amendment, including types of takings and the public use requirement of a constitutional taking. This background distills the law and the elements required to make viable takings claim for those hoping to challenge crime-free housing ordinances.

A. The Creation and Reception of Crime-free Housing Ordinances

The history and evolution of crime-free housing ordinances as detailed in this section and confirmed by previous legal scholarship suggest an often-overlooked application of the Fifth Amendment.

Municipal crime-free housing ordinances proliferated near the turn of the century.[15] The ordinances copied the federal "one-strike" policy that was instituted by Congress as part of the Anti-Drug Abuse Act of 1988.[16] This policy, codified in 42 U.S.C. § 1437d, requires public housing leases to include a term that allows for immediate eviction of a tenant who commits a crime.[17]

> Each public housing agency shall utilize leases which . . . provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.[18]

The statute was intended to combat the "rampant drug-related crime"[19] in public housing projects in the 1980s.[20] In 2002, the Supreme Court upheld the constitutionality of 42 U.S.C. § 1437(d) and the regulations promulgated by the

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[15] *See* Kathryn V. Ramsey, *One-Strike 2.0: How Local Governments Are Distorting a Flawed Federal Eviction Law*, 65 UCLA L. REV. 1146, 1151 (2018) ("In the wake of the *Rucker* decision, many local governments across the country have enacted CHOs [crime-free housing ordinances].").

[16] Mishan Wroe, *Preemption of Municipal Crime-free Housing Ordinances*, 2 TENN. J. RACE, GENDER & SOC. JUST. 123, 129 (2013) ("The Supreme Court's decision in *Rucker* . . . provided a model for municipalities who wanted to mimic these provisions of the FHA in an attempt to reduce crime related activity in their municipalities.").

[17] *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100–690, § 5101, 102 Stat. 4181, 4300 (codified as amended in 42 U.S.C. § 1437d(l)(6)).

[18] § 1437d(l)(6).

[19] *See* § 5122.

[20] § 1437d(l)(6).

Department of Housing and Urban Development (HUD) that did not require the tenant to know of the criminal behavior to be evicted.[21] The Supreme Court stated that "[t]here are, moreover, no 'serious constitutional doubts' about Congress' affording local *public housing authorities* the discretion to conduct no-fault evictions for drug-related crime."[22] However, that assertion did not say that the Court believed there were no constitutional doubts about the government *requiring private landlords* to evict their tenants for a drug-related crime. Instead, the Court held that the law was not constitutionally questionable as long as *the government* was acting as a landlord.[23] The Court specified, "The government is not attempting to criminally punish or civilly regulate respondents as members of the general populace. It is instead acting as a landlord of property that it owns, invoking a clause in a lease to which respondents have agreed and which Congress has expressly required."[24] The Court explicitly stated that its holding did *not* apply to "civil regulat[ions]" affecting "the general populace."[25] Instead, it applied to the landlord's ability to add a specific requirement to the lease.[26] This Comment does not question the ability of the government, when acting as a landlord, or the ability of any private landlord, to "invoke[] a clause in a lease to which respondents have agreed;"[27] it questions whether the government can *force* a landlord to invoke or insert a clause in a lease that affects property the government does not own.

The decision of the Supreme Court, combined with the efforts of the International Crime Free Association (ICFA),[28] encouraged local governments to adopt their own "one-strike" policies.[29] Cities in 48 states have adopted the crime-free housing ordinance program offered by the ICFA,[30] while Illinois

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21 Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 136 (2002).

22 *Id.* at 135 (emphasis added) (citing Reno v. Flores, 507 U.S. 292, 314 n.9 (1993)).

23 *Id.*

24 *Id.*

25 *Id.*

26 *Id.*

27 *Id.*

28 The International Crime Free Association is a non-profit dedicated to reducing crime by expanding crime-free housing programs to different municipalities. *Crime Free Multi-Housing: Keep Illegal Activity Off Rental Property*, INT'L CRIME FREE ASS'N, http://www.crime-free-association.org/multi-housing.htm (last visited June 8, 2021).

29 *See* Ramsey, *supra* note 15, at 1151; *see also* Deborah N. Archer, *The New Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances*, 118 MICH. L. REV. 173, 188 (2019) ("[T]he work of the ICFA has been to spread the adoption of crime-free ordinances across the United States.").

30 INT'L CRIME FREE ASS'N, *supra* note 28 ("The International Crime Free Multi-Housing Program has spread to nearly 2,000 cities in 48 U.S. States, 5 Canadian Provinces, England, Nigeria, and Puerto Rico, to name a few.").

alone has more than 100 municipalities with some variation of a crime-free housing ordinance.[31]

Though they vary, crime-free housing ordinances usually require tenants to sign an addendum, similar to the language in 42 U.S.C. § 1437d(l)(6), to their lease and require the landlord to evict any violating lessee or face sanctions from local government.[32] For example, returning to the case from the Introduction, *Barron v. City of Granite City*, the Granite City Municipal Code required lessors to obtain a license to rent residential units.[33] Any licensee could be punished through a citation for failure to remove a lessee following notice that the lessee violated the crime-free lease addendum,[34] even if the licensee was renting property under a rent-to-own lease.[35] The citation to the landlord was anywhere from $75 to $750 per occurrence.[36] The crime-free lease addendum was required in every lease signed or renewed after 2010 (when the ordinance was enacted)[37] and was similar to the federal "one-strike" policy, as it prohibited any criminal activity, especially drug activity by any lessee or lessees on or off the property.[38] The Granite City addendum was more specific than the federal provision on which it was modeled, and, in particular, it prohibited acts of violence, drug sale or distribution, unlawful discharge of firearms, or any forcible felony by the lessees or members of the lessee's household that either occurred within the city limits or on or near the property premise.[39] Some crimes, like forcible felonies,

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[31] EMILY WERTH, SARGENT SHRIVER NAT'L CTR. ON POVERTY LAW, THE COST OF BEING "CRIME-FREE": LEGAL AND PRACTICAL CONSEQUENCES OF CRIME FREE RENTAL HOUSING AND NUISANCE PROPERTY ORDINANCES 1 (2013), https://www.povertylaw.org/files/docs/cost-of-being-crime-free.pdf.

[32] *See* Ramsey, *supra* note 15, at 1151. Crime-free housing ordinances can also appear as nuisance ordinances, which allow municipalities to require that landlords remove tenants for making too many 911 calls or engaging in other non-criminal conduct and to sanction landlords who do not follow the proscribed "abatement procedure." Werth, *supra* note 31, at 3–4. However, this Comment focuses on crime-free housing ordinances in the form of statutes and lease addendums that directly require a landlord to evict the tenant if crimes are committed.

[33] GRANITE CITY, ILL., MUN. CODE § 5.142.020 (2010).

[34] GRANITE CITY, ILL., MUN. CODE § 5.142.050(C)(3) (2020).

[35] GRANITE CITY, ILL., MUN. CODE § 5.142.010(B) (2010).

[36] GRANITE CITY, ILL., MUN. CODE § 15.08.020 (2013).

[37] GRANITE CITY, ILL., MUN. CODE § 5.142.060 (2010) (applying the addendum requirement to "[e]very agreement for lease of residential real estate located within the corporate limits of the city of Granite City, executed or renewed").

[38] Granite City, Il., Ordinance 16,043 (An Ordi[n]ance Amending Exhibit B – Lease Addendum for Crime Free Housing of Sections 5.142.050 & 5.142.060 of the Granite City Municipal Code), http://www.granitecity.illinois.gov/docs/CFMH/2.%20Crime%20Free%20Lease%20Addendum%20(00077742).pdf (last visited Sept. 24, 2019) (prohibiting the lessee's guest or anyone under the lessee's control from "engag[ing] in any act intended to facilitate criminal activity, including drug related criminal activity, on or near the property premise, regardless of whether or not the individual . . . is a household member or guest").

[39] *Id.*

need not occur in Granite City at all.[40] In all capital letters, the addendum specified that violation of the lease results in a "material violation" with "good cause for termination of tenancy."[41] The proof of violation was determined by a preponderance of the evidence, and a single violation was sufficient for lease termination.[42]

There is little case law by which to judge the effectiveness of specific constitutional challenges to crime-free housing ordinances.[43] In two cases, one in California[44] and one in Minnesota,[45] plaintiffs successfully argued that their crime-free housing ordinances violated the Due Process Clause of the Fourteenth Amendment because of the city-specific procedural requirements.[46] The decisions both focused on a lack of sufficient notice from the police to the landlord and insufficient time and opportunity to appeal.[47] While the plaintiffs in these cases were successful in striking down the crime-free housing ordinance and winning their cases for lack of procedural due process, the city could always provide more procedures—notice or opportunity to appeal—and the resulting ordinances could be upheld. Therefore, this due process approach may be less helpful in eradicating crime-free housing ordinances nationwide because procedural deficiencies are easily remedied.[48] Challenges on substantive due process or equal protection grounds have not been fruitful; courts have either

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[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *See* Ramsey, *supra* note 15, at 1184 ("To date, there have been relatively few court challenges to CHOs, especially considering the number of ordinances that exist in municipalities across the country.").

[44] Cook v. City of Buena Park, 23 Cal. Rptr. 3d 700, 701 (Cal. App. 4th 2005).

[45] Javinsky-Wenzek v. City of St. Louis Park, 829 F. Supp. 2d 787, 790 (D. Minn. 2011).

[46] *See* Ramsey, *supra* note 15, at 1184–85.

[47] *See id.* at 1185–86; s*ee also* Victor Valley Family Res. Ctr. v. City of Hesperia, No. ED CV 16-00903-AB (SPx), 2016 WL 3647340, at *5, *7 (C.D. Cal. July 1, 2016) (enforcing an injunction against a city being sued for its crime-free housing ordinance in part because the court found that there was no clear way for the tenant to challenge the action before eviction, and "10 business days appear[ed] to be an insufficient amount of time available to the tenant for notice and opportunity to be heard").

[48] *Cf.* City of Peoria v. Danz, 2011 IL App (3d) 100819-U, at *5 (Ill. App. Ct. Nov. 1, 2011) (upholding a crime-free housing ordinance that allowed thirty days for the landlord to take action, give proper notice, and provide the tenant with an opportunity to appeal, which "stays enforcement of the ordinance until the hearing officer determines whether there was sufficient evidence to require abatement or eviction"). This approach has been useful in at least one case in preventing crime-free housing ordinances from affecting domestic violence victims. *See* Ramsey, *supra* note 15, at 1186–87. *See generally* Danielle Panizzi, *A Victim of Domestic Violence a 'Nuisance' to Society?: How Chronic Nuisance Ordinances in Municipalities Impact Victims of Domestic Violence*, 39 WOMEN'S RTS. L. REP. 146, 157 (2018) (describing how "[c]hronic nuisance ordinances often do not provide the tenant faced with eviction the opportunity to object, a fundamental due process right").

decided the case on other grounds[49] or held that the ordinance is not "sufficiently irrational or outrageous to violate substantive due process."[50]

Much of the scholarship on crime-free housing ordinances has mirrored arguments that have been made in the few cases that have reached courts, focusing on violations of due process and equal protection.[51] In addition, recent scholarship has looked at how the Fair Housing Act can be interpreted to apply to private housing through disparate treatment, disparate impact, statutory interpretation, and preemption.[52] These articles have often focused on how compulsory evictions affect minorities[53] and domestic violence victims.[54]

There has been no significant effort to examine the use of the Fifth Amendment to challenge crime-free housing ordinances.[55] Part of the reason for this gap may be due to the traditional "nuisance exception to the [F]ifth [A]mendment just compensation requirement"[56] that evolved in American

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[49] Ramsey, *supra* note 15, at 1189 (citing *Cook*, 23 Cal. Rptr. 3d at 706). Ramsey does note, however, that the concurring opinion indicates the judge's potential receptivity to a substantive due process claim. *Id.* ("I am concerned . . . about its sweeping requirement that *all* occupants of the premises must be evicted . . . its disparate treatment of property owners and renters . . . and the Damoclean substantive due process issue which hangs over this statutory scheme." (quoting *Cook*, 23 Cal. Rptr. 3d at 707) (Bedsworth, P.J., concurring))).

[50] *See id.* (quoting *Javinsky-Wenzek*, 829 F. Supp. 2d at 801).

[51] *See* Salim Katach, *A Tenant's Procedural Due Process Right in Chronic Nuisance Ordinance Jurisdictions*, 43 HOFSTRA L. REV. 875, 907–08 (2015) (arguing in favor of challenging nuisance ordinances on procedural due process grounds); Panizzi*, supra* note 48, at 157 (describing how ordinances can violate Due Process); Ramsey, *supra* note 15, at 1184–91 (describing possible challenges under procedural due process, equal protection, and the Fair Housing Act). For a general discussion on the rise of third-party policing, such as crime-free housing ordinances, see Sarah Swan, *Home Rules*, 64 DUKE L.J. 823, 825 (2015).

[52] *See* Archer, *supra* note 29, at 217; Emily Werth, *Stemming the Tide of Crime-Free Rental Housing and Nuisance-Property Ordinances*, 47 CLEARINGHOUSE REV. J. POVERTY L. & POL'Y. 349, 350–52 (2014) (describing the challenges of making a disparate impact claim under the FHA); Wroe, *supra* note 16, at 124.

[53] *See* Archer, *supra* note 29, at 180; Rachel Smith, *Policing Black Residents as Nuisances: Why Selective Nuisance Law Enforcement Violates the Fair Housing Act*, 34 HARV. J. RACIAL & ETHNIC JUST. 87, 89 (2018). For a discussion of the effects of nuisance ordinances on the disabled, see Alisha Jarwala & Sejal Singh, *When Disability Is a Nuisance: How Chronic Nuisance Ordinances Push Residents with Disabilities Out of Their Homes*, 54 HARV. C.R.-C.L. L. REV. 875, 878 (2019).

[54] *See* Nicole Livanos, *Crime-Free Housing Ordinances: One Call Away from Eviction*, 19 PUB. INT. L. REP. 106, 108–09 (2014); Panizzi*, supra* note 48, at 147; Katherine E. Walz, *Protecting the Person and the Home: Housing Law Responds to the Needs of Survivors of Violence*, 44 CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 199, 199 (2010); Wroe, *supra* note 16, at 124–25; *see also* Werth, *supra* note 31, at 8–12 (analogizing the harm to those who need police protection to domestic violence victims).

[55] Bruce C. Fuchs did write an article examining housing codes, nuisance law, and takings. He argued violations of housing codes that result in destruction of housing units and evictions of the tenants should result in compensation to the tenants in light of the Seventh Circuit's decision in *Devines v. Maier*, 728 F.2d 876 (7th Cir. 1984). *See* Bruce C. Fuchs, *Eviction of the Residential Tenant as a Result of Housing Code Enforcement: A Regulatory Taking Requiring Just Compensation*, 12 CAP. U. L. REV. 481, 482 (1983). However, he did not discuss crime-free housing ordinances as a housing code or otherwise. *See id.*

[56] Fuchs, *supra* note 55, at 481.

common law.[57] Under this rule, any loss or change of property rights caused by the government because of a violation of a nuisance law and a valid exercise of the state's police power could not be compensated under the Fifth Amendment.[58] Therefore, any municipality could argue that because crime-free housing ordinances were implemented to prevent nuisances such as criminal activities, they are exempt from the Fifth Amendment.

However, this nuisance exception has been blurred through the Supreme Court's regulatory takings jurisprudence, like the cases described below[59] such as *Lucas v. South Carolina Coastal Council.*[60] In *Lucas*, the Supreme Court created limits to a category of takings excluding only those nuisances founded in the "background principles" of state law,[61] and noted that only an "objectively reasonable application" of those precedents could exclude compensation for a taking.[62] In doing so, the Supreme Court also changed the rule that all nuisance laws are exempt from the Takings Clause and opened the door for challenges to nuisance-like laws, like crime-free housing ordinances, under the Fifth Amendment.[63]

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[57] *See* Robert L. Glicksman, *Making a Nuisance of Takings Law*, 3 WASH. U. J.L. & POL'Y 149, 152 (2000) ("The notion that regulations restricting uses of property that generate harm to other property or to the public interest do not trigger an obligation to compensate the regulated property owner . . . has deep roots in the Supreme Court's takings jurisprudence."). For more on the evolution of nuisance law and takings law, see Carlos A. Ball, *The Curious Intersection of Nuisance and Takings Law*, 86 B.U. L. REV. 819, 821–22 (2006); Michael J. Davis & Robert L. Glicksman, *To the Promised Land: A Century of Wandering and a Final Homeland for the Due Process and Taking Clauses*, 68 OR. L. REV. 393, 394 (1989); John A. Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 COLUM. J. ENV'T L. 1, 4 (1993).

[58] Transp. Co. v. Chicago, 99 U.S. 635, 642 (1878) ("But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision.").

[59] *See, e.g.*, Pa. Coal v. Mahon, 260 U.S. 393, 395 (1922) (recognizing regulatory takings); Penn Cent. Transp. Co. v. N.Y.C., 438 U.S. 104, 123–25 (1978) (creating a balancing test to determine if a regulatory taking had occurred); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 437–38 (1982) (holding that any permanent physical occupation of property qualifies as a taking, likely even if the law could be categorized as a nuisance law); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 492 (1987) ("[T]he public interest in preventing activities similar to public nuisances is a substantial one, which in many instances has not required compensation.").

[60] Lucas v. S.C. Council, 505 U.S. 1003, 1031–32 (1992).

[61] *Id.* at 1031 ("Instead, as it would be required to do if it sought to restrain Lucas in a common-law action for public nuisance, South Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends . . . .").

[62] *Id.* at 1032 n.18.

[63] Glicksman, *supra* note 57, at 159 ("Apparently dispensing once and for all with a nuisance exception from takings liability, the majority nevertheless, in virtually the same breath, reinjected the nuisance-like character of the regulated property back into the takings equation.").

B. The Fifth Amendment and Takings

The Fifth Amendment was the first amendment from the Bill of Rights to be incorporated under the Fourteenth Amendment.[64] The Amendment contains many guarantees, including rights of criminal procedure, such as the protections against double jeopardy and self-incrimination, and the right to due process.[65] The last clause of the Fifth Amendment is the focus of this Comment. The text of the Takings Clause states, "nor shall private property be taken for public use, without just compensation."[66]

Despite the fact that "property" is mentioned three other times in the Constitution—in the Due Process Clause of the Fifth and Fourteenth Amendments and in the Contracts Clause[67]—"[t]he Takings Clause is the most important protection of property rights in the Constitution."[68] Courts have interpreted the Takings Clause to prevent the government from taking property from one citizen to give it to another.[69] Instead, the Clause should be used to spread losses, so that "[i]f the government takes away a person's property to benefit society, then society should pay," instead of just the landowner.[70]

The types of possessory and regulatory takings and the tests the Supreme Court has created to discern possessory and regulatory takings can be used to determine whether a taking occurs from a compulsory eviction. This subsection

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[64] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 670 (Rachel E. Barkow et al. eds., 5th ed. 2017) (citing Chi., Burlington & Quincy R.R. v. Chicago, 166 U.S. 226 (1897)).

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

[66] *Id.* The elements of a Fifth Amendment Takings Claim are (1) private property, (2) taken (3) for public use, (4) without just compensation. *Id.*

[67] Karl Manheim, *Tenant Eviction Protection and the Takings Clause*, 1989 WIS. L. REV. 925, 937 n.81 (1989).

[68] CHEMERINSKY, *supra* note 64, at 671. In her introduction to a symposium on regulatory takings, Judge Loren A. Smith explained that the Takings Clause has increased in importance because the protections of property that were available from aggressive maintenance of structural separation of powers and enumerated powers have faded, as has the utility of the Contract Clause, the nondelegation doctrine, the Due Process Clauses of the Fourteenth and Fifth Amendments, and the Ninth and Tenth Amendments to protect citizens from government intrusion. Loren A. Smith, *Introduction*, 46 S.C. L. REV. 525, 527 (1995) (introducing an issue focusing on regulatory takings). Those clauses of the Constitution "all have been abandoned by the courts as real or viable limitations on government actions affecting economic relation[s]," and therefore "[o]nly the Fifth Amendment's Taking Clause retains any life." *Id.*

[69] *See* Kelo v. City of New London, 545 U.S. 469, 477 (2005) ("[I]t has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation."); s*ee also* Manheim, *supra* note 67, at 934 ("The [T]akings [C]lause applies most directly to eminent domain, or where the state condemns private property and takes it for public use.").

[70] CHEMERINSKY, *supra* note 64, at 671; *see, e.g.*, Quebedeaux v. United States, 112 Fed. Cl. 317, 320 (2013) ("The Takings Clause is designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960))).

explores the requirements of a constitutional taking: public use and just compensation.

1. Types of Takings: Possessory and Regulatory

There are two main types of takings under the Fifth Amendment: possessory and regulatory takings.[71] A landlord or tenant must make a claim under one of these.[72] Possessory takings are classic government takings that are restricted by the most straightforward reading of the Takings Clause. They involve government seizure of real property.[73] Regulatory takings, however, occur when "the government is claimed to have taken property rights not by outright seizure or occupation, but by regulation."[74] This subsection explains the two types of takings that could apply to evictions under crime-free housing ordinances.

a. Traditional Possessory Takings

In a traditional possessory taking, the government takes possession and title of property for the public benefit.[75] As the Court explained in *Stop the Beach Renourishment v. Florida Department of Environmental Protection*, possessory takings are the "classic" type of taking, in which there "is a transfer of property to the State or to another private party by eminent domain."[76] Possessory takings are confined to this specific scenario of physical appropriation of private[77] or real property by the government[78] and have therefore spawned less controversy than regulatory takings in recent years.[79] Any controversies usually rest on whether the property is being utilized for public use,[80] and whether

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[71] CHEMERINSKY, *supra* note 64, at 671–72.

[72] *Id.*

[73] *See id.* ("A possessory taking occurs when the government confiscates or physically occupies property.").

[74] Smith, *supra* note 68, at 527.

[75] *See* CHEMERINSKY, *supra* note 64, at 672 ("A 'regulatory' taking occurs when the government's regulation leaves no reasonably economically viable use of the property.").

[76] Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702, 713 (2010).

[77] *See* Horne v. Dep't of Agric., 576 U.S. 350, 358 (2015) (holding that the Fifth Amendment applies to personal property as well).

[78] Josh Patashnik, *Physical Takings, Regulatory Takings, and Water Rights*, 51 SANTA CLARA L. REV. 365, 365 (2011).

[79] *See Horne*, 576 U.S. at 358 ("There is no dispute that the 'classic taking [is one] in which the government directly appropriates private property for its own use.'" (quoting Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 324 (2002))).

[80] *See, e.g.*, Kelo v. City of New London, 545 U.S. 469, 477 (2005) (deciding "whether a city's decision to take property for the purpose of economic development satisfies the 'public use' requirement of the Fifth Amendment").

compensation is just.[81] In June 2019, the Court overturned its previous decision in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*[82] and held that plaintiffs do not need to exhaust state procedures before seeking federal relief for an unconstitutional taking.[83] Therefore, a challenger of a crime-free housing ordinance would be able to sue in federal court, as soon as he or she experiences government action.

b. Regulatory Takings

While possessory takings are more straightforward to define, the Court has never established a bright-line test to determine when government regulation of property reaches the level of a regulatory taking.[84] On the most basic level, "[e]conomic regulation in all forms invariably affects property rights."[85] For example, the requirement that a landlord provide habitable living conditions for his or her tenants affects his or her ability to use the property because he or she has to spend time and money complying with government standards. However, the Court has also acknowledged that the government should not have to reimburse property owners for every statute or regulation passed that changes their property's value.[86] The question that has flummoxed courts for almost 100 years since the landmark case *Pennsylvania Coal Co. v. Mahon* is how to determine when the diminution of a person's property caused by state police power crosses over into a regulatory taking.[87]

In *Pennsylvania Coal Co.*, "the progenitor of modern takings jurisprudence,"[88] Justice Oliver Wendell Holmes stated, "The general rule at least is[] that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[89] In that case, the Supreme Court invalidated a statute that prohibited coal mining when it would cause damage to a house because, in doing so, the statute invalidated a deed for mineral rights that contained a waiver of all damages caused on the surface.[90] Instead, the Court

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[81] *See, e.g.*, United States v. Fuller, 409 U.S. 488, 489 (1973) (considering whether the fair market value of condemned lands should include the value of government permits to graze on the land).

[82] 473 U.S. 172 (1985).

[83] Knick v. Twp. of Scott, 139 S. Ct. 2162, 2170 (2019).

[84] *See* CHEMERINSKY, *supra* note 64, at 671.

[85] Manheim, *supra* note 67, at 934.

[86] Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) ("Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.").

[87] *Cf.* A. Dan Tarlock, *Regulatory Takings*, 60 CHI.-KENT L. REV. 23, 24 (1984) ("The question 'what is a taking?' can be more accurately stated as 'when is the exercise of the police power invalid?'").

[88] Manheim, *supra* note 67, at 935.

[89] *Pa. Coal Co.*, 260 U.S. at 415.

[90] *Id.* at 412–14.

held that the regulation resulted in a public taking of purchased mineral rights and would require just compensation to the owner of those rights.[91]

While the Supreme Court has not created a "formula" for assessing when a regulatory taking has occurred, it has created a three different tests.[92] First, in *Loretto v. Teleprompter Manhattan CATV Corp.*, the Court noted that when the government enacts "a permanent physical occupation of property, [the Court's] cases uniformly have found a taking to the extent of the occupation," regardless of any other factors.[93] The Court concluded that whenever a physical occupation occurs by government action, the question is not whether a taking has occurred, but rather what compensation is owed due to the nature of the occupation.[94] It does not matter how small the government intrusion is, so long as there is a physical invasion of the property.[95]

Second, government regulations violate the Fifth Amendment when they prohibit all economic use of the property.[96] However, the Court added a caveat to this per se rule. The prohibited economic use must have been part of the owner's understood rights to begin with and could not have been prohibited by "background principles of nuisance and property law" that "independently restrict the owner's intended use of the property."[97] Once the landowner has established that all economic use has been prohibited by the taking, it is up to the state to prove that it has the authority to institute the regulation through "the land's title or by nuisance law."[98]

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[91] *Id.* at 415.

[92] *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992) (describing the two bright line tests that do not require ad hoc balancing like all other regulatory taking cases).

[93] 458 U.S. 419, 434 (1982); *see Lucas*, 505 U.S. at 1015 ("The first encompasses regulations that compel the property owner to suffer a physical 'invasion' of his property.").

[94] *Loretto*, 458 U.S. at 437.

[95] *Lucas*, 505 U.S. at 1015 (explaining the significance of the Court's ruling in Loretto). Erwin Chemerinsky classifies *Loretto* as an example of a possessory taking, which is not inaccurate as there is some disagreement among sources. CHEMERINSKY, *supra* note 64, at 672; *see also* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702, 713 (2010) ("Similarly, our doctrine of regulatory takings 'aims to identify regulatory actions that are functionally equivalent to the classic taking.'" (citation omitted)); Horne v. Dep't of Agric., 576 U.S. 350, 357 (2015) ("There is no dispute that the 'classic taking [is one] in which the government directly appropriates private property for its own use.'" (citation omitted)). For the sake of clarity, I have chosen to separate the *Loretto*-type takings from traditional possessory takings even though they could also be characterized as a possessory taking.

[96] *See Lucas*, 505 U.S. at 1015; CHEMERINSKY, *supra* note 64, at 679–80; Joseph William Singer, *Justifying Regulatory Takings*, 41 OHIO N. UNIV. L. REV. 601, 632 (2015) (explaining the per se rule against regulations that deprive owners of all economic use of their property).

[97] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538 (2005) (quoting *Lucas*, 505 U.S. at 1026–32).

[98] Terry D. Morgan, *Takings Law: Strategies for Dealing with* Lucas, 45 LAND USE L. & ZONING DIG. 3, 4 (1993).

Finally, the third test applies to any regulation that does not go so far as to take away all economically beneficial use of a property, but still goes "too far."[99] The Court will discern this type of taking through factor balancing, paying special attention to "three factors which have 'particular significance': (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with investment-backed expectations; and (3) the character of the governmental action."[100]

One notable recent case had the potential to change how the Court evaluated regulatory takings, and therefore crime-free housing ordinances, but did not garner enough votes for a majority opinion.[101] While the disposition in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection* rejected a takings claim by shorefront landowners in Florida, four justices joined the plurality and two justices wrote separate concurrences each joined by the other justice.[102] In a plurality opinion written by Justice Antonin Scalia, the Court held that the "Takings Clause bars *the State* from taking private property without paying for it" and, therefore, a taking can be done by any branch of government, including the judicial branch.[103] More relevant to the debate surrounding crime-free housing ordinances, Justice Scalia created a new type of regulatory taking when "states . . . recharacterize as public property what was previously private property."[104] While this new category of regulatory takings drew much attention from scholars,[105] it was in a plurality opinion and therefore holds no precedential weight.[106] The decision might, however, indicate a pending shift in the Court's takings jurisprudence[107] that would likely be very beneficial to tenants and landlords challenging crime-free housing ordinances.[108]

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[99] *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[100] Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 224–25 (1986); s*ee, e.g.*, Penn Cent. Transp. Co. v. N.Y.C., 438 U.S. 104, 123–25 (1978); Singer*, supra* note 96, at 631.

[101] Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702 (2010).

[102] *Id.* at 707, 733, 742. Justice John Paul Stevens did not participate in the decision.

[103] *Id.* at 715.

[104] *Id.* at 713.

[105] *See, e.g.*, Lora A. Lucero et. al., *Stop the Beach Renourishment—Six Perspectives*, 62 PLAN. & ENV'T L. 3, 3 (2010); Singer, *supra* note 96, at 601; Eduardo Peñalver & Lior Strahilevitz, *Judicial Takings or Due Process?* 1 (John M. Olin Program in L. & Econ., Working Paper No. 549, 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1791849.

[106] CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 81 (1987) ("As the plurality opinion in *MITE* did not represent the views of a majority of the Court, we are not bound by its reasoning.").

[107] If the issue was brought up to the Supreme Court again, the result might be different with the current makeup of the Supreme Court and the addition of conservative members.

[108] Beyond establishing the three tests, later cases were significant in establishing how regulatory takings apply to zoning ordinances. *Village of Euclid v. Ambler Realty Co.* was the first case to hold that zoning ordinances that greatly decreased the value of property were not automatically regulatory takings and did not go "too far" under the *Mahon* standard. 272 U.S. 365, 395–97 (1926); *see* Tarlock*, supra* note 87 ("The great case

Because crime-free housing ordinances only developed in the past thirty years,[109] landlords and tenants could argue that the state has engaged in a regulatory taking by recharacterizing their formerly private property right—to transfer their property to whomever they pleased[110]—as a public right for municipal governments to determine through crime-free housing ordinances.

2. The Public Use Requirement

The Fifth Amendment allows possessory and regulatory takings for public use only.[111] Therefore, any municipality attempting to take property under a crime-free housing ordinance would have to show it was for a public purpose. The Supreme Court has held that the government cannot take private property and give it to another person if there is no underlying purpose to benefit the public.[112] The Court seemed to push this requirement to its limit in the controversial case *Kelo v. City of New London*.[113] In that case, the City of New London authorized a private corporation to purchase property or use eminent domain in the city's name for a new factory.[114] The stated public purpose was "economic revitalization."[115] The Court upheld the taking because "promoting economic development is a traditional and long accepted function of government."[116] In doing so, the Court established that it will give great

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of *Village of Euclid v. Ambler Realty Co.* answered the question: is a comprehensive zoning ordinance constitutional?"). The Court held that *reasonable* zoning ordinances are constitutional. *Id.*; *see Euclid*, 272 U.S. at 379 ("[B]efore [a] zoning ordinance can be declared unconstitutional," it must be said that its "provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."). In a later and very famous case, *Penn Central Transportation Co. v. New York City*, the Court upheld a refusal by a zoning commission to allow the company that owned Grand Central Station to build a fifty-story office building on top of the station. 438 U.S. 104, 138 (1978). Because the zoning restriction was "substantially related to the promotion of the general welfare" and "reasonable beneficial use" of the property was still possible without permitting the construction, there was no taking. CHEMERINSKY, *supra* note 64, at 708. The Court noted that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Cent. Transp. Co.*, 438 U.S. at 124. In *Palazzolo v. Rhode Island*, the Court also held that property owners could challenge a regulation under the Fifth Amendment even if the regulation was in place when the property owner bought the property in question. 533 U.S. 606, 628–32 (2001).

109 *See* Ramsey, *supra* note 15.

110 *See infra* note 132 and accompanying text.

111 CHEMERINSKY, *supra* note 64, at 708.

112 *Id.* (citing Thompson v. Consolidated Gas Corp., 300 U.S. 55, 80 (1937)); Cincinnati v. Vester, 281 U.S. 439, 446–47 (1930); Mo. Pac. Ry. v. Nebraska, 164 U.S. 403, 416 (1896)).

113 545 U.S. 469 (2005).

114 *Id.* at 472.

115 *Id.* at 473.

116 *Id.* at 484.

deference to any stated public purpose and that "virtually any taking will meet the requirement [for public use]."[117]

3. The Just Compensation Requirement

If a court held that eviction under a crime-free housing ordinance was a taking for public use, the state municipality would only be able to take the landlord or tenant's property after paying "just compensation."[118] The final two words of the Fifth Amendment embody this requirement.[119] A court determines just compensation based on the loss to the property owner rather than on the value of the property to the government.[120] The loss is measured by the market value of the property at the time of the taking, and it does not include any increase in property value that occurs once the pendency of the government taking is revealed.[121] If the tenant or landlord subject to a crime-free housing ordinance was successful in their constitutional takings claim, the state would owe them just compensation for the entire time the government seized the property, including during the court proceedings.[122]

Crime-free housing ordinances are relatively new regulatory inventions that began proliferating in different parts of the country over the last few decades.[123] Fifth Amendment takings law, however, has been developing since the 1800s and continues to evolve with each new Supreme Court term.[124] The next Part applies the Court's evolving regulatory takings jurisprudence to evictions caused by crime-free housing ordinances.

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117 CHEMERINSKY, *supra* note 64, at 708.

118 *Id.* at 718 ("The Constitution clearly envisions that the government will take private property for public use, but it requires that the government pay for it. The standard of payment is 'just compensation.'").

119 U.S. CONST. amend. V.

120 *See, e.g.*, Brown v. Legal Found., 538 U.S. 216, 235–36 (2003) ("All of the Circuit Judges and District Judges who have confronted the compensation question, both in this case and in *Phillips*, have agreed that the 'just compensation' required by the Fifth Amendment is measured by the property owner's loss rather than the government's gain."); Bos. Chamber of Com. v. Boston, 217 U.S. 189, 195 (1910) ("And the question is what has the owner lost, not what has the taker gained.").

121 *See* CHEMERINSKY *supra* note 64, at 719.

122 *See id.* (citing First Eng. Evangelical Lutheran Church of Glendale v. Cnty. of L.A., 482 U.S. 304 (1987)).

123 Ramsey, *supra* note 15, at 1151.

124 *See, e.g.*, Kohl v. United States, 91 U.S. 367 (1876).

II. COMPULSORY EVICTIONS UNDER CRIME-FREE HOUSING ORDINANCES VIOLATE THE FIFTH AMENDMENT

To establish whether compulsory evictions under crime-free housing ordinances violate the Fifth Amendment, this Part applies the constitutional requirements for a takings claim to the enforcement of a crime-free housing ordinance. A Fifth Amendment takings claim requires private property that is taken for public use, without just compensation.[125] This Part primarily focuses on whether a taking has occurred in the case of a compulsory eviction. In the case of crime-free housing ordinances, there has been no compensation by the government to landlords or tenants, so section C focuses on what just compensation would be if a court held that compulsory evictions were takings.

In compulsory evictions, two parties, the landlord and the tenant, are potentially being deprived of their respective property interests by the government.[126] First, the landlord loses a tenant and a revenue stream and must put the property back on the market for a new renter.[127] The next section examines if the ability to select one's own tenant and transfer property as desired is a constitutionally protected property interest. Second, the tenant loses his or her leasehold interest in the property.[128] The leaseholder has even greater interest in the property if the leasehold includes a real estate installment contract as in *Barron*.[129] This section likewise explores leasehold interests as property in the age of the increasing applicability of contract law to relations between a landlord and tenant.

After establishing that the landlord and tenant have property interests in the land that is subject to crime-free housing ordinances, section B discusses whether property is actually taken during a compulsory eviction from the landlord or the lessee, either through a possessory taking or a regulatory

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125 U.S. CONST. amend. V.

126 *See, e.g.*, Cook v. City of Buena Park, 23 Cal. Rptr. 3d 700, 701 (Cal. App. 4th, 2005) (detailing where the landlord affected by a crime-free housing ordinance sued the city); Complaint, *supra* note 1, at 27 (arguing that the crime-free housing ordinance has deprived the tenants of their Fifth and Fourteenth Amendment rights).

127 *See Cook*, 23 Cal. Rptr. 3d at 704 (noting that the landlord has a property interest "in collecting rent under the lease with the tenant, and in avoiding the lien provision and fines imposed by the ordinance" and is detrimentally affected by having to pay the costs of the "eviction proceedings").

128 *See* Werth, *supra* note 31, at 12 ("Eviction is a highly disruptive event that can have serious detrimental consequences for families.").

129 Complaint, *supra* note 1, at 4; *Contract*, BLACK'S LAW DICTIONARY, *supra* note 14 ("Installment land contract. A contract for the sale of land providing that the buyer will receive immediate possession of the land and pay the purchase price in installments over time, but that the seller will retain legal title until all payments are made.").

taking.[130] It discusses the characteristics of the government action in compulsory evictions under crime-free housing ordinances in light of possessory and regulatory takings doctrines that have been recognized by the Court. Lastly, the third and fourth elements of a taking, the public use and just compensation requirements, are applied to compulsory evictions.

A. The Property Rights of a Landlord and Tenant

For the Fifth Amendment to apply, a plaintiff first must prove that he or she has a compensable property interest.[131] Property "includes every valuable interest which can be enjoyed and recognized as property, including the rights inherent in ownership, the right to possess, use and enjoy, sell or assign, transfer or otherwise dispose of the property, as well as the right to exclude from the property."[132] The Court has specified that "[t]he Constitution protects these essential attributes of property."[133] This section argues that the right of transferability is a property right owned by the landlord and the right to a possess a leasehold is a property right owned by the tenant.

1. The Ability to Lease to Whomever One Chooses Is a Property Right

When a landlord rents out his or her property under common law, the landlord has transferred his or her property interest to the lessor.[134] The ability to transfer, sell, or assign property—the alienability of property—is protected under the Fifth Amendment because it is one of the "valuable interest[s] . . . inherent in ownership."[135] Choosing to whom to transfer the property and for how long is part of the liberty interest of full alienation of property.[136] Alienability is such an important property right that ambiguous

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[130] *See* Hearts Bluff Game Ranch, Inc. v. United States, 669 F.3d 1326, 1329 (Fed. Cir. 2012) ("[I]f the court concludes that a cognizable property interest exists, it [next] determines whether that property interest was 'taken.'").

[131] John Bourdeau, Lonnie E. Griffith, Jr., Alan J. Jacobs, Sonja Larsen, William Lindsley & Paul Steinberg, *Compensable Property and Rights, Generally*, in 29A C.J.S. EMINENT DOMAIN § 72 (2020).

[132] *Id.*

[133] Terrace v. Thompson, 263 U.S. 197, 215 (1923).

[134] *See* In re Caribbean Petroleum Corp., 444 B.R. 263, 270–71 (Bankr. D. Del. 2010) ("A lease is a contract that provides exclusive possession of premises.").

[135] Bourdeau et al., *supra* note 131.

[136] *See, e.g.*, Shvartser v. Lekser, 308 F. Supp. 3d 260, 267 (D.D.C. 2018) ("Inherent in ownership of property is the right to dispose of the property as one chooses."); EZ Pawn Corp. v. City of New York, 390 F. Supp. 3d 403, 422 (E.D.N.Y. 2019) ("An individual's interest in property includes . . . 'the right to exclude others from possessing it, the right to use it and receive income from its use, the right to transmit it to another, and the right to sell, alienate, waste, or even destroy it.'" (quoting Almeida v. Holder, 588 F.3d 778, 788 (2d Cir. 2009))).

statutes are generally read to avoid hindering it.[137] Therefore, a landlord in a crime-free housing jurisdiction has a property right that is subject to a taking under the Fifth Amendment.

2. A Leasehold Is a Property Right Protected Under the Fifth Amendment

A leasehold is a property interest.[138] The original leasehold estate developed from feudal property law in an agrarian society, in which the value of the land was "the land itself,"[139] and the landlord did not guarantee any quality or maintenance of the property during the leasehold.[140] However, beginning in the mid-1900s, judges and scholars started changing how they framed the duties and obligations of landlords and tenants from property law to contract law.[141] Courts started adapting the warranty of merchantability—a principle of contracts[142]—to the property rented by the landlord by enforcing the warrant of habitability[143] and legalizing constructive eviction.[144] Leaseholds have become a combination of contract and property law, as certain rights and obligations are in privity with the estate and run with the land, and others are in privity with the contract and can be assigned by sublease.[145]

Why does the increasing use of contract law to govern leaseholds matter to an examination of the legality of crime-free housing ordinances under the Fifth Amendment? Because if courts completely change their conception of

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137 *See, e.g.*, Armstrong v. Douglass, 14 S.W. 604, 605 (1890) ("The law favors full alienation of property, and abhors perpetuities.").

138 *See* Reese v. Mecklenburg Cnty., 685 S.E.2d 34, 41 (2009) ("A leasehold is an interest in land[.]"); Turntable Fishery & Moorage Corp. v. United States, 52 Fed. Cl. 256, 261 (2002) ("A leasehold interest is a property interest for purposes of the Fifth Amendment.").

139 Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074 (D.C. Cir. 1970).

140 Clarence Clinton Davis Jr., *Recognition of an Implied Covenant of Habitability in Residential Leaseholds:* Kamarath v. Bennett, 32 SW. L.J. 1037, 1037–38 (1978).

141 *See Javins*, 428 F.2d at 1075 n.11 (listing court cases and scholarship about combining contract and property law for modern leaseholds).

142 Watson Quality Ford, Inc. v. Casanova, 999 So. 2d 830, 833 (Miss. 2008) ("The implied warranty of merchantability provides that, '[w]hen a sale of goods is made, there is an implied warranty that the goods are merchantable if the seller is a merchant with respect to goods of that kind.'" (quoting Vince v. Broome, 443 So. 2d 23, 26 (Miss. 1983))).

143 *See Javins*, 428 F.2d at 1076–77.

144 *See id.* at 1078 n.38 (describing cases that adopted a version of constructive eviction).

145 *See* CHRISTINE A. KLEIN, PROPERTY: CASES, PROBLEMS, AND SKILLS 213 (Erwin Chemerinsky et. al. eds., 2016) ("Those who hold consecutive possessory interests in the same property are said to be in *privity of estate* with one another—such as a tenant . . . and a landlord . . . . Landlord and tenant are also in *privity of contract* because both are parties to the lease agreement and are bound by the promises contained therein."); W. F. Woodruff, *Lessor or Lessee: Parties to a Contract or Landlord and Tenant*, 8 UNIV. KAN. CITY L. REV. 35, 46 (1939) ("What is the lease of today? . . . [I]s it an estate in land or is it a contract? The only conclusion that we have been able to reach is that it is neither, but both.").

leaseholds to one of contract and remove the property interest of the lessee from the leasehold, the question of whether there is a taking of a leasehold would be based in contract law rather than property law.[146] However, such a claim might still be governed by the Fifth Amendment.[147]

Freedom of contract has been recognized as a personal liberty and property interest, and "included in the right of personal liberty and the right to private property is the right to make contracts for the acquisition of property."[148] Therefore, if property law was separated from the leasehold estate, a claim against government authority to require a contractual addendum in a leasehold could arise under the Fifth Amendment as an unconstitutional restraint of the right to contract. Unlike the right of property, freedom of contract has not been universally accepted as a fundamental right and is subject to greater regulation.[149] A claim under the Fifth Amendment for a violation of the freedom of contract might be less likely to succeed than a claim for a violation of the right of property.[150]

While the transition to contract rights may become total as modern property law advances, property interests remain in tenant law today.[151] Regardless of whether the right to contract is inherent in the right to property, the law still recognizes a leasehold as a property right.[152] Therefore, a lessee in a crime-free

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146 *Cf.* Davis Jr., *supra* note 140, at 1040 n.32 ("[A] question remains as to how far the courts will eventually go in replacing older, more rigid property law principles with current contract doctrines.").

147 16B AM. JUR. 2D *Constitutional Law* § 640 (2019).

148 *Id.*

149 *Compare* Blount v. Smith, 231 N.E.2d 301, 305 (Ohio 1967) ("The right to contract freely with the expectation that the contract shall endure according to its terms is as fundamental to our society as the right to write and to speak without restraint."); Alford v. Textile Ins. Co., 103 S.E.2d 8, 10 (N.C. 1958) ("In an examination of the 1947 Act . . . we must bear in mind the fundamental rights of free men to contract."); *and* Fla. Accts. Ass'n v. Dandelake, 98 So. 2d 323, 327 (Fla. 1957) ("Nor can we overlook the fundamental right of all citizens to enter into contracts of personal employment."), *with* Chi., Burlington & Quincy R.R. v. McGuire, 219 U.S. 549, 567–68 (1911) ("The right to make contracts is subject to the exercise of the powers granted to Congress for the suitable conduct of matters of national concern; as, for example, the regulation of commerce with foreign nations and among the several states."); Westlake Vinyls, Inc. v. Goodrich Corp., 518 F. Supp. 2d 947, 953 (W.D. Ky. 2007) ("In general, parties have complete freedom to enter into a contract; however, that freedom is limited by public policy reasons."); Phila. Indem. Ins. Co. v. White, 490 S.W.3d 468, 475 (Tex. 2016) ("As a general rule, parties in Texas may contract as they wish so long as the agreement reached does not violate positive law or offend public policy."); *and* State v. Gateway Mortuaries, 87 Mont. 225, 238 (1930) ("The liberty of contract yields readily to any of the acknowledged purposes of the police power, and it differs from fundamental constitutional rights . . . in that it is neither a vested right, nor right of definite content, nor a right protected by special constitutional guarantees." (quoting ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS § 499 (1904))).

150 *See, e.g.*, *Gateway Mortuaries*, 87 Mont. at 238 (quoting FREUND, *supra* note 149).

151 One argument against removing property interests from the leasehold could be that it would remove the constitutional safeguards regarding property rights from leaseholders.

152 *See, e.g.*, Cross Continent Dev., LLC v. Town of Akron, Colo., 742 F. Supp. 2d 1179, 1184 (D. Colo.

housing jurisdiction does have a property interest that is subject to a taking under the Fifth Amendment.

B. There Has Been a Taking for the Tenant, but Not the Landlord, Under a Crime-free Housing Ordinance

This section applies possessory and regulatory takings law to establish whether the landlord or tenant has suffered a taking after enforcement of a crime-free housing ordinance. To determine if there is a traditional possessory taking, this section examines whether the government has transferred the property from a private person to itself or a different private person.[153] To determine if there is a regulatory taking, this section applies the three tests described in Supreme Court precedent.[154] If the taking (1) includes a "physical invasion" onto the property or (2) forbids all economic use of the land (keeping in mind the *Lucas* caveat),[155] it is a per se regulatory taking.[156] If the taking does not fall into either of these categories, the Court engages in (3) an ad hoc balancing test, including the three factors of significance,[157] to determine if the regulation went "too far" and became a taking.[158] The analysis argues that there has been both a possessory and regulatory taking for the tenant after a compulsory eviction under a crime-free housing ordinance.

1. Compulsory Eviction Under Crime-free Housing Ordinances Qualifies as a Possessory Taking for the Tenant but Not for the Landlord

In the case of a compulsory eviction, there is no possessory taking for the landlord because the landlord still retains control over his or her property. However, there is a possessory taking for the tenant because the tenant is stripped of all his or her property rights in the leasehold estate after eviction under a crime-free housing ordinance.

2010) ("As a general proposition, a leasehold interest is property, the taking of which entitles the leaseholder to just compensation for value thereof." (quoting Sun Oil Co. v. United States, 572 F.2d 786, 818 (1978))).

153 Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702, 713 (2010).

154 *See supra* Part I.B.1.b.

155 Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992).

156 *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434 (1982); Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538 (quoting *Lucas*, 505 U.S. at 1026–1032).

157 Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 224–25 (1986).

158 Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

a. The Landlord's Property Has Not Been Taken

The question of whether there has been a traditional possessory taking for the landlord is easier to answer than for the tenant. The Court has defined a possessory taking as transferring property from one party and giving it to another.[159] Eminent domain—when the government takes property from a private individual—"resemble[s] forced sales by which property title actually passes to the government"[160] and has roots in traditional common law.[161] What is encompassed in property title? According to *Black's Law Dictionary*, "title" is "[t]he union of all elements (as ownership, possession, and custody) constituting the legal right to control and dispose of property."[162] Possession and title are different, "although whoever has title either has possession or has a right that is superior to the person who has possession (such as the title of the landlord and the possession of the tenant)."[163]

There is no traditional possessory taking when a landlord is forced to evict his or her tenant because the landlord does not have to transfer his or her title to the government.[164] During a compulsory eviction under a crime-free housing ordinance, the municipality forces a transfer of the tenant's current possessory property rights back to the landlord[165] through compulsory eviction of the tenant.[166] The landlord's own interest in the land is not transferred to someone else.[167] When the landlord has a tenant in place, he or she has a reversionary interest after the end of the leasehold.[168] The landlord still owns his or her land, but after a tenant violates the crime-free housing ordinance, the government forces the landlord to evict his or her tenant.[169] The landlord's interest may have

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159 Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702, 713 (2010).

160 KLEIN, *supra* note 145, at 688.

161 *See id.*

162 *Title*, BLACK'S LAW DICTIONARY, *supra* note 14.

163 *Title*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY (2012).

164 *See* KLEIN, *supra* note 145, at 688 (defining eminent domain as the transfer of property title to the government).

165 *See id.* at 192 (discussing how leaseholds are "a nonfreehold present estate that could be followed by a reversion in the grantor").

166 *Eviction*, BLACK'S LAW DICTIONARY, *supra* note 14 ("The act or process of legally dispossessing a person of land or rental property.") If the tenant is legally dispossessed of the rental property, the property returns to the landlord.

167 *Cf.* Werth, *supra* note 31, at 4 (describing how "crime free rental housing ordinances impose a series of mandatory actions and accompanying penalties for non-compliance on landlords" but do involve government takeover of the landlord's property).

168 Klein, *supra* note 145, at 192 ("[T]he tenant has a present right to present possession, and the landlord holds a present right to future possession (a reversion) that takes effect upon the termination of the leasehold.").

169 *Cf.* Werth, *supra* note 31, at 3 (describing how crime-free housing ordinances usually require the landlord to evict the tenant or apply strong incentives to encourage the landlord to do so).

changed because the landlord no longer has a reversionary interest, and instead has a present interest, but the landlord's physical property has not been transferred to someone else. While in previous cases courts have held that landlords are entitled to compensation for lost payments for leaseholds when the government takes the landlord's land,[170] those cases are distinguishable. In such possessory takings cases, the landlord lost all property title and rights to his or her property and could not find another tenant because the government became either the leaseholder or the permanent owner.[171] Under a crime-free housing ordinance eviction, after the landlord evicts the tenant, the landlord can still find another tenant to occupy his or her land (as long as the landlord has not lost his or her license).[172]

b. The Tenant's Property Has Been Taken

If eminent domain solely applies to takings in which actual property title is passed to the government, tenants evicted under crime-free housing ordinances would be unable to recover under a traditional possessory takings theory because they are not property title owners.[173] After a compulsory eviction under a crime-free housing ordinance, the tenant's current possessory rights, not the property title, are returned to the landlord.[174]

However, the courts have not limited their understanding of eminent domain to property title alone.[175] Courts do award compensation to leaseholders who lose their interest in land after the government takes it through eminent

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[170] *See, e.g.*, Alamo Land & Cattle Co. v. Arizona, 424 U.S. 295, 303 (1976) (holding that the government must compensate for "the fair rental value of the possessory interest transferred by the lease" and the "full value of the reversionary interest that is subject to the outstanding lease, *plus, of course, the value of the rental rights under the lease*" (emphasis added)).

[171] *Cf.* United States v. Petty Motor Co., 327 U.S. 372, 374 (1946) (reciting where a landlord arranged for the government to gain access to the "totality of [the] property" during the government's forced leasehold); Phelps v. United States, 274 U.S. 341, 342 (1927) (describing a government requisition and creation of a leasehold in which the government maintained full control of the property).

[172] Loss of license is a common penalty for failure to heed the ordinance. Werth, *supra* note 31, at 4.

[173] *See Title*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY, *supra* note 163; *see also Tenancy*, BLACK'S LAW DICTIONARY, *supra* note 14 ("1. The possession or occupancy of land under a lease; a leasehold interest in real estate. 2. The period of such possession or occupancy.").

[174] *See Title*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY, *supra* note 163 (explaining that because the tenant does not have property title and the landlord does, the landlord has a superior right to the property).

[175] *See Petty Motor Co.*, 327 U.S. at 380 ("Upon a new trial, each tenant . . . should be permitted to prove damages for the condemnation of its rights for any remainder of its term which existed after its ouster by the order of possession but not costs of moving or relocation."); United States v. Gen. Motors Corp., 323 U.S. 373, 384 (1945) ("[T]he tenant whose occupancy is taken is entitled to compensation for destruction, damage or depreciation in value.").

domain.[176] As long as there has been no waiver of all rights to compensation upon condemnation,[177] "a tenant occupying property under a written lease for a definite and unexpired term, acquired prior to the commencement of the condemnation proceedings, is entitled to treatment as an 'owner' whose interests in the property are to be protected under applicable constitutional and statutory provisions."[178] The Supreme Court has held that after a taking of a leasehold interest, the tenant must be reimbursed for the fair market value of the use of the property for the rest of the leasehold and the "value of the right to renew" minus the "agreed rent which the tenant would pay for such use and occupancy."[179]

After a tenant violates a crime-free housing ordinance, the tenant must leave his or her property and forfeit his or her current possessory rights to the property.[180] The tenant's property is not being confiscated by the government because it is evidence or has been paid for through the proceeds of the tenant's crime, as occurs legally through civil asset forfeiture.[181] As noted in *Barron*, the tenants themselves may not have committed a crime at all.[182] Instead, the eviction is a government taking.

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[176] *See* Alamo Land & Cattle Co. v. Arizona, 424 U.S. 295, 303 (1976) ("It has long been established that the holder of an unexpired leasehold interest in land is entitled, under the Fifth Amendment, to just compensation for the value of that interest when it is taken upon condemnation by the United States."); A. W. Duckett & Co. v. United States, 266 U.S. 149, 151 (1924) (holding that the government was required to compensate a lessee who had a leasehold in the condemned property); *In re* Ames Dep't Stores, Inc. 287 B.R. 112, 120 (Bankr. S.D.N.Y. 2002) ("[T]he Supreme Court has recognized the basic economic point, and ruled as a consequence that a tenant's interest in the economic value of a lease is property capable of being protected under the Fifth Amendment to the Constitution."); *see also* Alan N. Polasky, *The Condemnation of Leasehold Interests*, 48 VA. L. REV. 477, 479 (1962) ("The heart of any examination of condemnation involving a leasehold interest centers around the determination of the total compensation to be awarded for the fragmented interests and the methods for determining the respective interests of lessor and lessee.").

[177] Leases can have clauses that clarify the lessee's right if there is a possessory taking by the government under eminent domain. *See Petty Motor Co.*, 327 U.S. at 376 ("The Tool Company had contracted away any rights that it might otherwise have had. . . . With this type of clause . . . the tenant has no right which persists beyond the taking and can be entitled to nothing."); Polasky, *supra* note 176, at 481 ("Of somewhat greater importance is the effect of a clause in the lease modifying the lessee's rights to participate in the proceeding and in any award."). Without such a provision, the lessee "is still regarded as an 'owner' with correlative rights of notice, opportunity for appropriate participation in the proceeding . . . and . . . for determination of his separate interest." *Id.* at 481–82.

[178] *See* Polasky, *supra* note 176, at 479; *see also id.* at 479 n.12 (finding other cases supporting this idea).

[179] *See Petty Motor Co.*, 327 U.S. at 380–81.

[180] *See Eviction*, BLACK'S LAW DICTIONARY, *supra* note 14 ("The act or process of legally dispossessing a person of land or rental property."); Ramsey, *supra* note 15, at 1149 ("[T]he result of a violation is usually either an eviction action against the tenant or fines levied against the landlord.").

[181] Ellen Zimiles & Rachel Sazanowicz, *Defending Clients in Forfeiture Actions*, *in* DEFENDING CORPORATIONS & INDIVIDUALS IN GOVERNMENT INVESTIGATIONS § 17.2 (Daniel J. Fetterman & Mark P. Goodman eds., 2020).

[182] Complaint, *supra* note 1, at 12.

Eviction after the violation of a crime-free housing ordinance differs from a normal leasehold condemnation proceeding. The land does not transfer from the tenant to the government.[183] Instead, the government forces the *landlord* to take private property from the tenant through compulsory eviction.[184] The land title does not exchange hands.[185] In past cases involving government takings of property for a specific amount of time, the government completely took the property for a term of years and the landlord did not retain title like in a normal leasehold between private persons.[186]

However, this difference between traditional leasehold takings and compulsory evictions under crime-free housing ordinances can be reconciled through the state action doctrine. "State action" is defined as "[a]nything done by a government; esp., in constitutional law, an intrusion on a person's rights (esp. civil rights) either by a governmental entity or by a private requirement that can be enforced only by governmental action (such as a racially restrictive covenant, which requires judicial action for enforcement)."[187] Here, crime-free housing ordinances are private requirements that are enforced through the government action of penalties. While state action questions usually arise in due process and equal protection cases,[188] the very definition of a taking[189]—and its later incorporation[190]—means that state action is required to successfully sue under the Fifth Amendment.[191]

The Second Circuit has emphasized, "To establish a Fifth Amendment violation, a plaintiff must demonstrate 'that in denying the plaintiff's constitutional rights, the defendant's conduct constituted state action.'"[192] While

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183 *Contra* Phelps v. United States, 274 U.S. 341, 342 (1927) (reciting where the government requisitioned property for a specific term of years to utilize during wartime and the land was transferred from the tenant to the government).

184 *See id.*

185 *Cf.* Werth, *supra* note 31, at 4 (describing how crime-free housing ordinances require the landlord to evict the tenant or face civil fines, revocation of a rental license, or an injunction against renting).

186 *See, e.g.*, United States v. Petty Motor Co., 327 U.S. 372, 374 (1946).

187 *State Action*, BLACK'S LAW DICTIONARY, *supra* note 14.

188 *See* Colorado v. Connelly, 479 U.S. 157, 165 (1986) ("Our 'involuntary confession' jurisprudence is entirely consistent with the settled law requiring some sort of 'state action' to support a claim of violation of the Due Process Clause of the Fourteenth Amendment."); *State Action*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY, *supra* note 163 (focusing on the Civil Rights Cases and 42 U.S.C. § 1983).

189 *See* U.S. CONST. amend. XIV; CHEMERINSKY, *supra* note 64, at 670 (defining eminent domain as "the authority to take private property when necessary for government activities").

190 *See* Chi., Burlington & Quincy. R.R. v. Chicago, 166 U.S. 226, 241 (1897) (incorporating the Fifth Amendment through the Due Process Clause of the Fourteenth Amendment).

191 *See* U.S. CONST. amend. XIV.

192 D. L. Cromwell Invs., Inc. v. NASD Regul., Inc., 279 F.3d 155, 161 (2d Cir. 2002) (quoting Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc., 191 F.3d 198, 206 (2d Cir. 1999))).

"the fact that a business entity is subject to 'extensive and detailed' state regulation does not convert that organization's actions into those of the state,"[193] federal courts have also acknowledged that private actions can be classified as state action if they are "fairly attributable" to the state.[194] The Supreme Court has established a test to determine when a private action can be considered a state action.[195] There has to be a "close nexus" between the state and the action in question, "so that the action of the latter may be fairly treated as that of the State itself."[196] The state must have exerted so much power over the private party "or provided such significant encouragement, overt or covert, that the choice must in law be deemed to be that of the State."[197]

The eviction of a party under a crime-free housing ordinance is "fairly attributable"[198] to the state. While the landlord is the party implementing the eviction, the state itself is responsible for the eviction because it forces the landlord to strip the tenant of his or her property rights. In some cases, like *Barron*,[199] the landlord may not want to evict his or her tenant for a violation of a mandatory lease addendum but may be forced to by the state. In other cases, the police will deliver a letter by hand to the landlord demanding that the landlord evict his or her tenants.[200] If the state is serving eviction notices or forcing compliance through fines and penalties,[201] the state is responsible for the

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193 Desiderio, 191 F.3d at 206 (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 350 (1974))).

194 *Id.* (quoting Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982)).

195 *See* Blum v. Yaretsky, 457 U.S. 991, 1003–04 (1982).

196 *Id.* (quoting *Jackson*, 457 U.S. at 351); *see also* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001) ("Thus, we say that state action may be found if, though only if, there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'" (quoting *Jackson*, 419 U.S. at 351))).

197 *Blum*, 457 U.S. at 1004. The Court also identifies a third factor that may indicate the existence of the "required nexus" between the private and state actor—if the "'private entity has exercised powers that are traditionally the exclusive prerogative of the State.'" *Id.* at 1005. However, this third factor is not present for crime-free housing ordinances as evictions were not traditionally carried out by the state alone and is not dispositive. *See Brentwood Acad.*, 531 U.S. at 295–96 ("From the range of circumstances that could point toward the State behind an individual face, no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient.").

198 *Desiderio*, 191 F.3d at 206 (quoting Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982))).

199 *See* J. Justin Wilson, *Illinois Family Sues to End Law Threatening Them with Compulsory Eviction for a Crime They Did Not Commit*, INST. JUST. (Aug. 1, 2019), https://ij.org/press-release/illinois-family-sues-to-end-law-threatening-them-with-compulsory-eviction-for-a-crime-they-did-not-commit/.

200 J. Justin Wilson, *First Round Victory in Challenge to Compulsory-Eviction Law*, INST. JUST. (Oct. 24, 2019), https://ij.org/press-release/first-round-victory-in-challenge-to-compulsory-eviction-law/ ("Three officers personally served their landlord with a formal demand 'that an eviction notice be served and the eviction process initiated.' And last week, the city served yet another notice, again ordering that their landlord 'must begin eviction proceedings.'").

201 *See* Werth, *supra* note 31, at 4 ("Common penalties include civil fines and injunctions against renting out the property.").

private party action.[202] That same state behavior fulfills the requirement to prove a "close nexus" between the state and public action because the state has provided sufficient encouragement and power over the private property through fines and threats of legal action that the "choice . . . in law"[203] belongs to the state.[204] Eviction under crime-free housing ordinances stands in contrast to other private party action that the Supreme Court has not regarded as state action[205] because the landlord's hand is being forced by the state, and he or she is unable to act according to his or her own independent judgment.[206]

Even though property is not transferred directly to the government after an eviction under a crime-free housing ordinance, the transfer of property from the tenant to the landlord would still qualify as a government taking. In *Kelo v. City of New London*, the Supreme Court held that other entities could exert the state's eminent domain power.[207] The Court's 2005 decision upheld the delegation of eminent domain power from a municipality to a private nonprofit.[208] That private nonprofit then exercised that power to take property from one person to give the property to another private person.[209] The government is doing something similar by enforcing crime-free housing ordinances. It delegates takings power to the landlord to carry out its mandatory evictions and then requires the landlord to retake the tenant's property rights, so the landlord can then rent, transfer, or

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[202] *See, e.g.*, Complaint at 25, Brumit v. City of Granite, No. 3:19-cv-1090 (S.D. Ill. Oct. 7, 2019) ("Because Clayton Baker would not terminate Debi and Andy's lease at 7 Briarcliff Drive but for Granite City's command that he do so, Granite City's command will be the sole cause of the destruction of Debi and Andy's property interest in 7 Briarcliff Drive.").

[203] *Desiderio*, 191 F.3d at 206 (quoting Blum v. Yaretsky, 457 U.S. 991, 1004–05 (1982)); *see also Blum*, 457 U.S. at 1004 ("[A] State normally can be held responsible for a private decision only when it has exercised coercive power . . . .").

[204] *See Blum*, 457 U.S. at 1004.

[205] *Id.* at 1005 (holding that nurses and doctors using their independent judgment to change a patient's Medicare-funded treatment does not qualify as state action); Polk Cnty. v. Dodson, 454 U.S. 312, 318–19 (1981) (holding that the actions of a public defender appointed by the state are not state actions).

[206] *Dodson*, 454 U.S. at 321.

[207] 545 U.S. 469, 472–75 (2005); *see also* Pennsylvania v. Susquehanna Area Reg'l Airport Auth., 423 F. Supp. 2d 472, 483 (M.D. Pa 2006) ("Eminent domain is a power unique to the government . . . . A state legislature may choose to exercise this power directly or indirectly, as in the instant matter, by delegating it." (citations omitted)).

[208] *See Kelo*, 545 U.S. at 473 ("[R]espondent New London Development Corporation (NLDC), a private nonprofit entity . . . was reactivated."); *id.* at 475 ("The city council also authorized the NLDC to purchase property or to acquire property by exercising eminent domain in the City's name."); *see also* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 299 (2001) (holding that a non-profit organization composed of representatives from public and private schools was a state actor because the public schools had delegated their policymaking decisions to the organization).

[209] *See Kelo*, 545 U.S. at 478 ("[T]his is not a case in which the City is planning to open the condemned land—at least not in its entirety—to use by the general public.").

sell those rights to someone else.[210] As a result, the implementation of crime-free housing ordinances qualifies as a possessory taking under the eminent domain powers upheld in *Kelo*.[211]

Accordingly, the tenant's property has been subject to a traditional possessory taking because (1) eminent domain applies to rental properties[212] and has been recognized by the Supreme Court as a compensable interest,[213] and (2) the state is enforcing crime-free housing ordinances through either delegation or actions that are "fairly attributable"[214] to the state.

2. *Compulsory Eviction Under Crime-free Housing Ordinances Qualifies as a Regulatory Taking for the Tenant but Not for the Landlord*

There are three ways a government regulation can become a regulatory taking.[215] The first is when the government physically invades the property,[216] which is a per se regulatory taking. The second is when the regulations prohibit all economic use of the property,[217] and that economic use would not normally be prohibited by commonplace nuisance and property law.[218] This type of regulation also qualifies as a per se regulatory taking.[219] Finally, if a regulation does not fit into either of those categories, the court will conduct a multifactor "factual" analysis, paying special attention to three factors: (1) the economic effect on the citizen, (2) the degree of interference in the citizen's expectations of his or her ability to use the property, and (3) the character of the regulation.[220] The first subsection demonstrates that eviction under crime-free housing

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[210] *See* Ramsey, *supra* note 15, at 1149 ("Both the federal one-strike policy and CHOs authorize, encourage, or require landlords to evict tenants for a single instance of actual or alleged criminal conduct.").

[211] *Kelo*, 545 U.S. at 489–90.

[212] *See* Alamo Land & Cattle Co. v. Ariz., 424 U.S. 295, 303 (1976) ("It has long been established that the holder of an unexpired leasehold interest in land is entitled, under the Fifth Amendment, to just compensation for the value of that interest when it is taken upon condemnation by the United States.").

[213] *See* United States v. Petty Motor Co., 327 U.S. 372, 380 (1946).

[214] Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc., 191 F.3d 198, 206 (2d Cir. 1999) (quoting Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982)).

[215] *See supra* Part I.B.1.b.

[216] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (quoting Penn Cent. Transp. Co. v. N.Y.C., 438 U.S. 104, 124 (1978)).

[217] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538 (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992)).

[218] *See* Werth, *supra* note 31, at 4 ("Further, ordinances that include a landlord licensing scheme typically also impose suspension and/or revocation of the license to rent out property as a penalty for violating the ordinance or other municipal code provisions, including property maintenance standards.").

[219] *See Lucas*, 505 U.S. at 1015–16; CHEMERINSKY, *supra* note 64, at 679–80; Singer, *supra* note 96, at 632 (explaining the per se rule against regulations that deprive owners of all economic use of their property).

[220] Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 224–25 (1986); Singer, *supra* note 96, at 631.

ordinances is not a regulatory taking for the landlord, while the following subsection shows that eviction is a regulatory taking for the tenant under all three tests.

a. There Has Not Been a Regulatory Taking for the Landlord

Crime-free housing ordinances regulate landlord and tenant interaction.[221] Clearly, they qualify as a regulation because they govern the landlord's commercial relationship with his or her tenant.[222] Crime-free housing ordinances do not, however, mandate a physical invasion of the landlord's property. In *Loretto*, the case in which the Court established that a physical invasion constitutes a regulatory taking, a New York City ordinance required a landlord to allow a cable company to install physical cables and cable boxes on the roof of rental properties without compensation beyond that apportioned by the statute.[223] In that case, there was a "permanent physical occupation."[224] In contrast, a crime-free housing ordinance controls what is required in a landlord-tenant contract, what types of people the landlord can retain as a tenant, and what actions the landlord must take upon violation of a lease addendum.[225] There is no physical occupation or physical invasion of the landlord's property.

The second way enforcement of a crime-free housing ordinance could be a per se regulatory taking is if enforcement prevents all possible economic use of the property, and the regulation does not prohibit something that would normally be barred by the "background principles of nuisance and property law."[226] Therefore, in any case in which the regulation arguably prohibits all economic use of the property, any analysis has to include a discussion of the nuisance and property law of the particular state in which the takings occur.[227] In the case of

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[221] *See* Ramsey, *supra* note 15, at 1149 ("These crime-free housing ordinances for rental property—a category of local laws that I have labeled CHOs—are modeled after a federal statute known as the 'one-strike policy' that has been in place for federally subsidized public housing tenants since the late 1980s.").

[222] *See Regulation*, BLACK'S LAW DICTIONARY, *supra* note 14 ("Control over something by rule or restriction").

[223] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 423 (1982).

[224] *Id.* at 426.

[225] *See* Werth, *supra* note 31, 2–3 (listing the general characteristics of crime-free housing ordinances and the requirements they make of landlords).

[226] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992).

[227] John M. Armentano, *Introduction: Regulatory Takings After* Lucas v. South Carolina Coastal Council, 5 HOFSTRA PROP. L.J. 1, 9 (1992) ("[B]oth the majority and Justice Kennedy in concurrence, seem to go out of their way to set forth factual inquires [sic], which should be made at the trial court level, concerning the basis for the so-called reasonable expectations of property owners."); *see also Lucas*, 505 U.S. at 1029 ("Any limitation . . . must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership.").

crime-free housing ordinances from the landlord's position, however, there is no need to delve far into local law because the ordinances do not prohibit all possible economic use of the property.[228] When the landlord evicts a particular tenant, the landlord can rent the property to someone else.[229] Therefore, the landlord is not deprived of all economic use of the property, just the economic option of renting to someone who may violate or associate with those who commit a crime. If the landlord did choose to disobey the ordinance and his or her license to rent the property was revoked, the landlord might have a stronger case that all economic use of the property has been squashed by the state taking. However, the standards for depriving the property owner of all economic uses are stringent, and the Supreme Court has repeatedly emphasized that it examines the "parcel as a whole," and "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking."[230] Because the rescission of a rental license would only occur on certain occasions where the landlord chose to violate an ordinance that provided for other viable economic uses (rental to other tenants) for his or her property, the federal courts would likely reject the notion that the regulation left the landlord without any way to utilize the land.[231]

Finally, as Justice Scalia reaffirmed in *Lucas*,[232] if the enforcement of a regulation does not fit into either of the two per se categories, the courts will engage in factor balancing to determine if the regulation goes "too far."[233] While any court could consider a number of factors particular to the specific crime-free housing ordinance application and challenge, this analysis focuses on the factors

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[228] The Court has narrowly applied the total-taking test. *See, e.g.*, Tahoe-Sierra Pres. Council v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 332 (2002) (holding that a multi-year building moratorium did not qualify as a total taking). In a majority opinion written by Justice Anthony Kennedy, the Court emphasized that the holding in *Lucas* "was limited to 'the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted,'" and therefore the Court should proceed under *Penn Central* factor balancing. *Id.* at 330, 332 (quoting *Lucas*, 505 U.S. at 1017).

[229] This is unless, of course, the landlord has delayed in evicting the tenant and has lost his or her license to rent the property. *See* Werth, *supra* note 31, at 4 ("Further, ordinances that include a landlord licensing scheme typically also impose suspension and/or revocation of the license to rent out property as a penalty for violating the ordinance or other municipal code provisions, including property maintenance standards.").

[230] *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 327 (citation omitted).

[231] *Cf. id.* ("This requirement that 'the aggregate must be viewed in its entirety' explains . . . why restrictions on the use of only limited portions of the parcel, such as setback ordinances . . . were not considered regulatory takings.") (internal citations omitted).

[232] *Lucas*, 505 U.S. at 1015 (describing the two categorical rules for regulatory takings as exceptions to the general "ad hoc" inquiry of the courts); *see also Tahoe-Sierra Pres. Council*, 535 U.S. at 321 ("Resisting 'the temptation to adopt what amount to per se rules in either direction,' we conclude that the circumstances in this case are best analyzed within the *Penn Central* framework." (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring))).

[233] Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

of significance that any court would have to consider under Supreme Court precedent.[234] These factors were created in *Penn Central*,[235] and refined in later cases.[236]

First, the court would examine the economic impact of the crime-free housing ordinance on the landlord.[237] If a landlord is forced to evict a tenant he or she would not otherwise evict because of a crime-free housing ordinance, the landlord would lose the future rent payments from that tenant.[238] Unless the landlord has a specific provision in the contract providing that the tenant must continue to pay rent for the full term of the lease after eviction,[239] the landlord would be unable to collect rent payments until he or she finds another tenant. The fact that the landlord loses rent payments from the tenant until he or she finds a new tenant—a loss that could be indefinite—would seem to point to a large economic impact on the landlord. However, because the landlord has the option to prevent this cost by providing for lessee continuance of payment after forced eviction,[240] a court may hold that the economic impact on the landlord is minimal.

The second—and more complicated—factor a court would consider is how the regulations have changed "investment-backed expectations."[241] "Investment-backed expectations" has been interpreted to mean "'an objective, but fact-specific inquiry into what, under all the circumstances, the [landowner] should have anticipated.'"[242] The test is an objective one and is most concerned with whether the regulatory regime in question was in place when the property owner purchased the property.[243] The success of the landlord's claim for this

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234 Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 224–25 (1986).

235 Penn Cent. Transp. Co. v. N.Y.C., 438 U.S. 104, 124 (1978).

236 *See Connolly*, 475 U.S. at 224–25 (describing the three factors).

237 *Id.* at 225.

238 49 AM. JUR. 2D *Landlord and Tenant* § 575 (2020) ("The general rule is that when a landlord evicts a tenant and takes possession of the premises, the lease is terminated and the right to claim rent which accrues after eviction is extinguished.").

239 *Id.* ("[T]he parties to a lease may contract to hold the tenant liable for posteviction rent.").

240 *Id.* § 575 n.2 ("[W]here a lease provides that a landlord is under no duty to mitigate damages after its reentry by virtue of its successful prosecution of a summary proceeding, and that the tenant remains liable for damages, the tenant remains liable for all monetary obligations arising under the lease." (quoting L'Aquila Realty, LLC v. Jalyng Food Corp., 50 N.Y.S.3d 128, 131 (N.Y. App. Div. 2017))).

241 *Connolly*, 475 U.S. at 225.

242 Res. Invs., Inc. v. United States, 85 Fed. Cl. 447, 511 (2009) (quoting Cienega Gardens v. United States, 331 F.3d 1319, 1346 (Fed. Cir. 2003)).

243 *See id.* ("[T]he regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations." (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 633 (2001))); *Cienega Gardens*, 331 F.3d at 1345–46 ("The purpose of consideration of plaintiffs' investment-backed expectations is to limit recoveries to property owners who can demonstrate that 'they bought their

factor may depend on whether the crime-free housing ordinance regime was in place when he or she started renting the property and was therefore required to be included in the lease,[244] or if the ordinance was found to apply retroactively or once the lease was renewed.[245] If the landlord purchased his or her property after the statute had been passed requiring all landlords to have crime-free ordinances in their leases, the landlord would have a much harder time arguing that the ordinance interfered with his or her reasonable expectations because the landlord should have known the law before renting property[246] and the law should have shaped his or her expectations. However, if the ordinance was applied to the landlord's lease retroactively, or solely because the landlord renewed an existing lease, the landlord would have a better argument that the regulation drastically changed the landlord's investment-backed expectations of who could be the lessee. Even if a landlord did enter into a leasehold agreement with a crime-free housing ordinance provision, the landlord could try to argue that the recency of crime-free housing ordinances in his or her community (depending on when the ordinance was enacted) and the recency of the proliferation of the ordinances as a whole[247] changed the investment-backed expectations of years of landlord-tenant common law.[248] This argument may be weaker, especially considering the changes in property law that have advanced so quickly in the twentieth century.[249]

The third factor a court would examine is the "character of the government action."[250] In *Connolly*, the Court noted that the regulation in question did not allow the government to "physically invade or permanently appropriate any of the employer's assets," and instead "adjust[ed] the benefits and burdens of economic life to promote the common good."[251] The character of the government's actions, a mandated payment to ERISA,[252] did not point to a

property in reliance on a state of affairs that did not include the challenged regulatory regime.'" (quoting Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1177 (Fed. Cir. 1994))).

244 *See* Ramsey, *supra* note 15, at 1151 ("While most CHOs vary in their language and measures," one common feature is "the requirement that landlords make tenants sign a crime-free lease addendum as a condition of the tenancy, which contains language similar to federal public housing leases.").

245 S*ee, e.g.*, GRANITE CITY MUN. CODE § 5.142.060 (2016).

246 *See generally* Bryan v. United States, 524 U.S. 184, 196 (1998) (stating "the traditional rule that ignorance of the law is no excuse").

247 Ramsey, *supra* note 15, at 1153; Wroe, *supra* note 16, at 133.

248 KLEIN, *supra* note 145, at 192 (describing how leaseholds date back to "feudal times").

249 *Id.* (describing how "courts and legislatures began to promote reform . . . to expand the rights of residential tenants" as urbanization proceeded).

250 Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 225 (1986).

251 *Id.*

252 *Id.* at 219 ("[The] trustees argued that if the Plan was subject to the provisions of ERISA requiring premium payments and imposing contingent termination liability, the statute was unconstitutional, as it deprived

regulatory taking.[253] A required eviction of a tenant under a crime-free housing ordinance also does not involve a physical invasion for the landlord[254] and does not involve a permanent appropriation of the landlord assets. While the ordinance may permanently affect the landlord's ability to exercise one of his or her property rights—to lease and transfer the property to whomever the landlord chooses—it is not an appropriation of the property itself.[255] In applying the third factor in *Esposito v. South Carolina*,[256] the Fourth Circuit noted that the regulation allowed the "plaintiffs to continue their existing use of their property and dwellings in the same manner that they could have used the property prior to its enactment," and retained the "fundamental incidents of ownership" with only a decrease in "their discretion to rebuild a structure."[257] Similarly, the landlord can continue to rent out his or her property with a crime-free housing addendum on the lease, though the landlord has less discretion to retain the tenants of his or her choice.[258]

Because the landlord can contract around the economic impact of a crime-free housing ordinance and the character of the government action does not resemble a taking, courts would likely hold that an eviction under a crime-free housing ordinance is not a regulatory taking for the landlord, regardless of the impact on the landlord's expectations. Because the landlord does not endure a physical invasion or the destruction of all economically beneficial uses of his or her property and a regulatory taking is not established by the three-factor test,[259] courts would likely hold that a regulatory taking has not occurred.

b. There Has Been a Regulatory Taking for the Tenant

Proceeding under the same regulatory taking framework, the first test to determine if a tenant evicted under a crime-free housing ordinance has experienced a regulatory taking is the physical invasion test.[260] Depending on the requirements of the municipality,[261] the tenant may be able to argue that the

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the Trustees, the employers, and the plan participants of property without due process and without proper compensation.").

253 *Id.* at 225.

254 *See supra* Part II.B.1.a.

255 *See* Werth, *supra* note 31, at 4.

256 939 F.2d 165, 170 (4th Cir. 1991).

257 *Id.*

258 *See* Werth, *supra* note 31, at 3 (describing the landlord's duties under a crime-free housing ordinance).

259 *See Connolly*, 475 U.S. at 225–27.

260 Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992) ("In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation.").

261 Werth, *supra* note 31, at 2.

municipal government has "physically invaded" the tenant's home. If the police knocked on the door and served the tenants or landlord with compulsory eviction demands,[262] the tenants would have a strong argument that the government was physically invading—by coming onto their property to forcibly remove them from their home. Additionally, if the tenants' landlord physically invaded the home to force the tenant to move, the landlord would be serving as a state actor, and the physical invasion test would also be met.[263] The government can force the tenants to leave by filing injunctions against the landlord or rescinding the landlord's rental license;[264] if the tenants stay on the property, the landlord would be breaking the law. With such an injunction, the government permanently physically displaces the tenants and forces them to move from the property, destroying all the tenants' property rights.[265] The tenants would likely be successful in arguing that their own physical displacement[266]—especially if the police came to their property to remove them—qualifies as a physical invasion by the government.

Unlike the landlord, the tenant's eviction does pass the second test[267] for identifying per se regulatory takings. Enforcement of a crime-free housing ordinances against a tenant denies him or her "all economically beneficial or productive use of land"[268] because the tenant loses all leasehold property rights to the land after being evicted.[269] After a taking due to a crime-free housing ordinance, the tenant cannot sublet the property or assign it in exchange for value and cannot use the land as a home.[270]

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[262] *See, e.g.*, Complaint, *supra* note 1, at 2 ("On two occasions, officers have even pounded on Jessica and Kenny's door to serve compulsory-eviction demands.").

[263] *See supra* Part II.B.2.b.

[264] Werth, *supra* note 31, at 4.

[265] *Cf.* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982) ("Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it.' To the extent that the government permanently occupies physical property, it effectively destroys each of these rights." (quoting United States v. General Motors Corp., 323 U.S. 373, 378 (1945))).

[266] Ramsey, *supra* note 15, at 1151 ("Most significantly, CHOs either explicitly require landlords to evict tenants who are accused of criminal conduct . . . .").

[267] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992) ("The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land.").

[268] *Id.*

[269] *See Loretto*, 458 U.S. at 435; *cf.* Tahoe-Sierra Pres. Council v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 331–32 (2002) (holding that a temporary moratorium on building does not qualify as a total taking under *Lucas*). Unlike a temporary taking, a compulsory eviction under a crime-free housing ordinance would be a total taking for the tenant.

[270] Ramsey, *supra* note 15, at 1151–52 ("[M]any private-market tenants are at risk of losing their homes.").

To prevent the crime-free housing ordinance from being struck down under the Fifth Amendment, the state would have to prove that the ordinances have their roots in state property and nuisance laws.[271] In the case of crime-free housing ordinances, if the "regulated activity"—housing someone who has committed a crime—"is some form of nuisance or noxious use subject to regulation by common law," then the municipality would not have to compensate the property owners.[272] While nuisance and property law are defined by the states,[273] and therefore differ throughout the common law system, the Restatement (Second) of Torts definitions may be helpful in determining the majority rules prevalent in the states.[274] The Restatement defines public nuisance[275] as conduct that interferes with the rights of the general public.[276] Section 821B says,

> (1) A public nuisance is an unreasonable interference with a right common to the general public.
> (2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:
> (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
> (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or

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271 *Lucas*, 505 U.S. at 1031–32 ("[A]s it would be required to do if it sought to restrain Lucas in a common-law action for public nuisance, South Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found."); Henry N. Butler, *Regulatory Takings After* Lucas, 16 REGUL. 76, 80 (1993) ("The negative implication of this position is that if the activity was previously permitted under relevant property and nuisance principles, then the prohibition of the activity would be a total regulatory taking that must be compensated.").

272 Butler, *supra* note 271, at 80.

273 *Lucas*, 505 U.S. at 1030 ("In light of our traditional resort to 'existing rules or understandings that stem from an independent source such as state law' to define the range of interests that qualify for protection as 'property' under the Fifth and Fourteenth Amendments, this recognition that the Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by those 'existing rules or understandings' is surely unexceptional." (citation omitted)).

274 *See* Restatement (Second) of Torts § 826 rep's note (AM. L. INST. 1979) (listing cases adopting the position of the Restatement including Alabama, Connecticut, Florida, Georgia, Indiana, Iowa, Louisiana, Mississippi, and Missouri). The *Lucas* opinion itself specifically cites five different sections in the Restatement as examples of factors to be considered in a nuisance analysis. *Lucas*, 505 U.S. at 1030–31 (specifically mentioning §§ 826, 827, 828(a) and (b), 831, and 830).

275 Because crime-free housing ordinances are enforced by the state through the landlord and do not involve a nuisance case between the tenant and the landlord or another private party alone, they would most likely be evaluated through the public nuisance doctrine. *See infra* text accompanying note 277.

276 Restatement (Second) of Torts § 826 rep's note (AM. L. INST. 1979).

> (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.[277]

Lucas specifies that to determine whether there has been a "total taking" under the new nuisance requirements, a court should look at a number of factors, including harm caused by the activity to neighboring "public lands and resources, or adjacent private property," the "social value" of the plaintiff's activities that are being prohibited by the state, the "suitability" of those activities to "the locality in question," and "the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government."[278]

Here, the harm to neighboring public or private lands likely does not qualify as a public nuisance under the Restatement definition or under the factors identified by the Supreme Court in *Lucas.* First, under Restatement § 821B(1) and (2)(c), housing someone who has committed a crime and rents a home likely does not qualify as "an unreasonable interference with a right common to the general public," or a "significant effect upon the public right," because a public right to restrict housing for those who associate with criminals does not exist.[279] Even if a state was successful in arguing that it exists now that crime-free housing ordinances have been implemented, there is likely no "background" of such a right in the common law, since the right would have been created rather recently with the proliferation of crime-free housing ordinances in the early 2000s.[280] Crime-free housing ordinances are also unlikely to qualify as public nuisances under Restatement § 821B(2)(a) because merely housing a person who committed a crime likely does not create a "significant interference with . . . public safety" or the "public peace" that has long been recognized in

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[277] *Id.* § 821B.

[278] *Lucas*, 505 U.S. at 1030–31.

[279] Restatement (Second) of Torts § 821B cmt. b. (AM. L. INST. 1979). ("At common law public nuisance came to cover a large, miscellaneous and diversified group of minor criminal offenses, all of which involved some interference with the interests of the community at large—interests that were recognized as rights of the general public entitled to protection."). Crime-free housing ordinances do not protect a public right that is directly harmed by the tenant's action, such as harm to a neighbor's property through pollution or obstruction. Instead, crime-free housing ordinances protect against a speculative crime that could be caused by a tenant housing a criminal. The ability to evict someone merely for committing a crime or housing a guest who committed one is not a broad and tangible public disturbance like those listed in the Restatement. Such a sweeping use of government eviction power is also in conflict with the common law respect for privacy of the home and freedom of association. *Cf.* Lucas v. S.C. Coastal Council, 424 S.E.2d 484, 486 (S.C. 1992) (holding that there is no background principle of common law that creates a total ban on all construction on private property).

[280] Ramsey, *supra* note 15, at 1148; Wroe, *supra* note 16, at 133.

the common law.[281] In later years, public nuisance doctrine developed to include statutory crimes as well as common law crimes.[282] While there is likely no common law right to prohibit a person who committed a crime from receiving housing, state or local governments could argue that the crime-free housing ordinances are recognizable and enforceable as statutorily created public nuisance laws.[283] However, almost ten years after *Lucas*, the Supreme Court rejected the idea that "a regulation that otherwise would be unconstitutional absent compensation" can be "transformed into a background principle of the State's law by mere virtue of the passage of title."[284] Therefore, simply having passed a crime-free housing ordinance would not be sufficient to create a "background principle of the State's Law."[285] The recent implementation[286] of crime-free housing ordinances stands in contrast to background principles upheld in the lower courts.[287] Additionally, the *Palazzolo v. Rhode Island* opinion notes that "[a] regulation or common-law rule cannot be a background principle for some owners but not for others."[288] Crime-free housing ordinances only apply to renters, and therefore only apply to some property owners and not others.

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[281] *Cf.* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702, 732 (2010) ("The Takings Clause only protects property rights as they are established under state law, not as they might have been established or ought to have been established."); Am. Pelagic Fishing Co. v. United States, 379 F.3d 1363, 1377 (Fed. Cir. 2004) ("[T]here is a distinction between simply not being disturbed in the particular use of one's property and having the right to that use of the property. . . . [F]or there to be a cognizable property interest sufficient to support a takings claim, the latter must be true.").

[282] Restatement (Second) of Torts § 821B cmt. b. (AM. L. INST. 1979) ("Many states no longer recognize common law crimes, treating the criminal law as entirely statutory.").

[283] *See id.* § 821B cmt. c. ("[G]eneral statutes have been adopted in most of the states to provide criminal penalties for public nuisances . . . . These statutes uniformly have been construed to include the interferences with the rights of the public that were public nuisances at common law.").

[284] Palazzolo v. Rhode Island, 533 U.S. 606, 629–30 (2001).

[285] *See id.* at 630 ("A law does not become a background principle for subsequent owners by enactment itself."); Bridge Aina Le'a, LLC v. State of Hawaii Land Use Comm'n, No. 11-00414 SOM-BMK, 2016 WL 797567, at *9 (D. Haw. Feb. 29, 2016) (holding that the statutory requirement of obtaining an environmental impact survey before development was not in Hawaii's background principles of nuisance law).

[286] Ramsey, *supra* note 15, at 1148; Wroe, *supra* note 16, 133.

[287] *See* Esplanade Props., LLC v. City of Seattle, 307 F.3d 978, 985 (2002) (upholding a state prohibition on development because (1) the state's public trust doctrine qualified as a background principle of nuisance law, and (2) the public trust doctrine is embodied in the Washington Constitution and in statute and has a long history in the state); *In re* Davis, 539 B.R. 334, 349 (Bankr. S.D. Ohio 2015) (holding that the Homestead Exemption in Ohio is a background principle of state law because it has been enforced for over 160 years); Stevens v. City of Cannon Beach, 854 P.2d 449, 454, 456 (Or. 1993) (upholding public control over Oregon's ocean shores as a "notorious . . . common law doctrine of custom" for over 80 years).

[288] *Palazzolo*, 533 U.S. at 630.

Under the "total-taking" analysis[289] of "objective factors"[290] described in *Lucas*, crime-free housing ordinances also fail to qualify as part of the background principles of public nuisance law. There is no direct harm to neighboring "public lands" or "adjacent private property," and the "social value" of the tenants' activity—the ability to associate with whom they desire and keep their property as long as the landlord is satisfied with their tenancy—would likely be regarded as retaining strong social value for the Court, especially because of the common law respect for privacy and property interests in the home.[291] There is no question of the "suitability"[292] of the tenant's activities to the property in question because the only activities in question are the tenant's ability to remain in the property he or she rented and to associate with whomever he or she chooses. Additionally, the Court would likely not accept that there is a "relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government,"[293] and would instead view the ordinances as major interferences with the property rights of tenants. The *Lucas* Court also notes that "[t]he fact that a particular use has long been engaged in by similarly situated owners" and "the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant" both indicate "a lack of any common-law prohibition."[294] Both of these factors apply to municipalities with crime-free housing ordinances, as the regulations are fairly new limitations on tenant's property rights that don't apply to other landowners, i.e., non-renters.[295] Therefore, it is likely that compulsory evictions are regulatory takings because the evictions prohibit the tenants from engaging in all economic use of the property and the regulations do not prohibit something that would normally be prohibited in the "background principles of nuisance and property law."[296]

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289 Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030 (1992).

290 *Palazzolo*, 533 U.S. at 630.

291 *See, e.g.*, Weeks v. United States, 232 U.S. 383, 390 (1914) ("Resistance to these practices had established the principle which was enacted into the fundamental law in the Fourth Amendment, that a man's house was his castle and not to be invaded by any general authority."). Crime-free housing ordinances also stand in contrast to the examples the Court gave as takings that would be permitted under a state's background principles of nuisance. *See Lucas*, 505 U.S. at 1029 ("The owner of a lakebed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others' land.").

292 *Lucas*, 505 U.S. at 1031.

293 *Id.*

294 *Id.* at 1031 ("The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition . . . . So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant." (citations omitted)).

295 Ramsey, *supra* note 15, at 1151.

296 *Lucas*, 505 U.S. at 1029.

Finally, if the Court held that a compulsory eviction did not qualify as a physical invasion or a total taking against the tenant, the Court would determine if the government action qualified as a regulatory taking under the third and final test, the ad hoc factual inquiry test.[297] Under the *Penn Central* factors, the Court would consider the economic impact of the taking on the tenant.[298] Then, the Court would look at how the regulations have altered "investment-backed expectations."[299] Lastly, the Court would look at the third factor, the "character of the government action."[300] After considering the circumstances, Court would likely decide that compulsory evictions are regulatory takings for the tenants.

First, the economic impact on the tenant is significant. When the tenant is evicted, the tenant loses the right to reside in his or her home for the term of the lease.[301] The tenant may even be forced, through the terms of the lease, to continue paying rent,[302] thereby doubling the tenant's housing costs (as the tenant has to pay for new housing and the old). Eviction can cause homelessness and poverty for the tenant.[303] If, such as in *Barron*,[304] the tenant has a rent-to-own contract, the tenant would also lose the larger, permanent interest in the home for which he or she had already paid.

Under the second factor, the objective investment-backed expectations of the property owner, the Court would analyze whether a tenant "should have anticipated" the forced eviction.[305] The analysis for the tenant would be similar to the analysis conducted for the landowner[306] and would depend on whether the crime-free housing ordinance was in place before the tenant entered into the lease.[307] If the statute was applied retroactively, or enacted after the tenant

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297 *Id.* at 1015 (describing the two categorical rules for regulatory takings as exceptions to the general "ad hoc" inquiry of the courts).

298 *See* Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 225 (1986).

299 *Id.* While such a requirement is created through legal bargaining between the landlord and the tenant, and therefore could in theory be avoided by the tenant, bargaining power between lessees and lessors is often not equal. *See* Charles A. Heckman, *Article 2A of the Uniform Commercial Code: Government of the Lessor, by the Lessor, and for the Lessor*, 36 ST. LOUIS U. L.J. 309, 309 (1992).

300 *Connolly*, 475 U.S. at 225.

301 *Eviction*, BLACK'S LAW DICTIONARY, *supra* note 14.

302 *See* 49 AM. JUR. 2D *Landlord and Tenant* § 575 (2020)

303 Ramsey, *supra* note 15, at 1178 ("For a long time, eviction has been viewed as a consequence of poverty, but only recently have social scientists begun to consider eviction as a driver of poverty. . . . [E]viction leads to a number of social problems, including negative health outcomes, homelessness, deeper poverty, and neighborhood destabilization.").

304 Complaint, *supra* note 1, at 11.

305 Res. Invs., Inc. v. United States, 85 Fed. Cl. 447, 511 (2009) (quoting Cienega Gardens v. United States, 331 F.3d 1319, 1346 (Fed. Cir. 2003)).

306 *See supra* Part II.B.2.a.

307 *See Res. Invs., Inc*., 85 Fed. Cl. at 511 ("[T]he regulatory regime in place at the time the claimant

entered into the lease, the tenant would likely be successful in arguing that the regulatory taking interrupted his or her investment-backed expectations.[308] However, if the ordinance was in place before the lease began, the tenant could try to argue that the recency of the use of crime-free housing ordinances meant that investment-backed expectations remain unaltered by their implementation.[309] In this scenario, the factor may go against finding a regulatory taking.

Unlike in the landlord analysis, the third and final factor—the "character of the government action"[310] taken against the tenant—would likely fall in favor of a regulatory taking designation. Instead of altering the "benefits and burdens of economic life,"[311] compulsory evictions are "permanent" appropriations of the tenant's property and may involve physical invasions, as noted above, even if the land does not transfer directly to the government.[312] Unlike the plaintiffs subject to the regulation in *Esposito*, the tenants evicted for violating a crime-free housing ordinance cannot continue to use the property in the same manner they did before the regulation, as an evicted tenant has lost all of his or her property rights through eviction.[313] Because the government has removed all of "the fundamental incidents of ownership" from the tenant, the Court would likely find that the third factor indicates that a compulsory eviction has occurred.[314]

Because two of the three major factors the Court uses to engage in ad hoc balancing under the third regulatory taking framework indicate that a regulatory taking has occurred after a compulsory eviction, the Court would likely hold that a regulatory taking has occurred under the third regulatory takings test as well.

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acquires the property at issue helps to shape the reasonableness of those expectations." (citation omitted)); *Cienega Gardens*, 331 F.3d at 1345–46 ("The purpose of consideration of plaintiffs' investment-backed expectations is to limit recoveries to property owners who can demonstrate that they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime." (quoting Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1177 (1994))).

[308] *Res. Invs., Inc.*, 85 Fed. Cl. at 511 (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 633 (2001)).

[309] *See id.*

[310] Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 225 (1986).

[311] *Id.*

[312] *Id.* However, lack of transfer directly to the government is not determinative because the eviction is "fairly attributable" to the state. *See supra* Part II.B.1.b.

[313] Esposito v. S.C. Coastal Council, 939 F.2d 165, 170 (4th Cir. 1991) ("We find that the Act permitted the Esposito plaintiffs to continue their existing use of their property and dwellings in the same manner that they could have used the property prior to its enactment.").

[314] *Id.*

C. The Taking Was for Public Use and Requires Just Compensation

The final element the tenant would have to prove is that the taking was for public use. Once established, the only question remaining would be the amount of compensation owed to the tenant.

Because the Supreme Court has expanded its definition of public use so that "virtually any taking will meet the requirement,"[315] it is likely the Court would hold that the regulatory taking of a tenant's property during the enforcement of a crime-free housing ordinance is for public use. The Court has upheld takings to diversify property rights,[316] to preserve the environment,[317] and to increase property values and remove blight.[318] Even though the government itself is not using the property after the taking, an allocation between private property owners to improve "an economically distressed city"[319]—like that which was upheld in *Kelo*[320]—is similar to an allocation between private property owners in a neighborhood distressed with crime, or a forced allocation from someone who is a greater risk of inviting crime into the neighborhood (because he or she housed someone who committed a crime) to someone who is not. The original crime-free housing ordinance that applied to federal housing under the Anti-Drug Abuse Act of 1988 was created to keep "criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants" out of public housing.[321] Local governments that copied the federal "one-strike policy" did so for the same public purpose.[322]

The tenant is owed just compensation because the government has engaged in a regulatory taking from the tenant.[323] Just compensation is determined by

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315 CHEMERINSKY, *supra* note 64, at 708.

316 Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 231–32 (1989) (holding that the public use requirement does not "prohibit[] the State of Hawaii from taking, with just compensation, title . . . in order to reduce the concentration of ownership of fees simple in the State").

317 Tahoe-Sierra Pres. Council v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 306 (2002) ("This case actually involves two moratoria ordered by respondent Tahoe Regional Planning Agency (TRPA) to maintain the status quo while studying the impact of development on Lake Tahoe and designing a strategy for environmentally sound growth.").

318 Kelo v. City of New London, 545 U.S. 469, 472 (2005) ("In 2000, the city of New London approved a development plan that, in the words of the Supreme Court of Connecticut, was 'projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas.'" (citation omitted)).

319 *Id.*

320 *Id.* at 489–90.

321 42 U.S.C. § 1437d(l)(6).

322 Ramsey, *supra* note 15, at 1194; Wroe, *supra* note 16, at 129.

323 CHEMERINSKY, *supra* note 64, at 718 ("The Constitution clearly envisions that the government will take private property for public use, but it requires that the government pay for it. The standard of payment is

calculating the loss to the property owner rather than the value of the taking by the government.[324] The tenant would be entitled to the market value of the remainder of his or her lease minus the value of the rent the tenant would have paid.[325] Unfortunately for the tenant, the market value of the lease may not be equal to the original terms of the lease, and the tenant may be paid back less than he or she would have paid to remain on the property.[326] Regardless, any tenant subject to eviction under a crime-free housing ordinance could file an inverse condemnation suit, which permits a citizen to sue the government for compensation after a taking has been made.[327] Through that suit, the tenant would likely be able to recover the market value for the remainder of the tenant's lease and the value of any lost option to renew or buy minus the amount of rent that remained for the lease term.[328]

CONCLUSION

Crime-free housing ordinances are problematic in numerous ways. They intrude on a tenant's right to privacy, freedom of association, and property rights. Despite the large number of crime-free housing ordinances enacted and enforced across the country, the ordinances have generally evaded the public's attention and have rarely been challenged. Going forward, advocates should consider all the arguments possibly in their favor before entering the courtroom to make their case. If the *Barron* case had gone forward, the Fifth Amendment argument may have prevailed, which would have allowed Jessica and Kenny, the tenants from the Introduction, to strike down the crime-free housing ordinance without relying on the legislature to act.

'just compensation.'").

[324] *See, e.g.*, Brown v. Legal Found. of Wash., 538 U.S. 216, 235–36 (2003) ("All of the Circuit Judges and District Judges who have confronted the compensation question, both in this case and in *Phillips*, have agreed that the 'just compensation' required by the Fifth Amendment is measured by the property owner's loss rather than the government's gain."); Bos. Chamber of Com. v. Boston, 217 U.S. 189, 195 (1910) ("And the question is what has the owner lost, not what has the taker gained.").

[325] *See* United States v. Petty Motor Co., 327 U.S. 372, 381 (1946); *see also* Comm. on Leases, Am. Bar Ass'n, *Condemnation of Leasehold Interests*, 3 REAL PROP., PROB. & TR. J. 226, 299 (1968) ("Where the government condemns the tenant's entire leasehold estate, the tenant is entitled to lump sum compensation for the value of the term taken less the value of the rent which the tenant would have been required to pay.").

[326] *Fair Market Value*, BLACK'S LAW DICTIONARY, *supra* note 14 ("The price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's-length transaction; the point at which supply and demand intersect.").

[327] CHEMERINSKY, *supra* note 64, at 719 ("One form of action is an 'inverse condemnation suit,' where an individual claims that a government action constitutes a taking.").

[328] *Petty Motor Co*., 327 U.S. at 380–81.

The Fifth Amendment provides a strong constitutional case against crime-free housing ordinances that could be valuable to those concerned with the increasing number of ordinances[329] and those being prosecuted under them. If the Fifth Amendment can be used by tenants to challenge compulsory eviction, they may have a better shot at success than through an equal protection[330] or freedom of association argument, especially if their city gives them adequate procedures to survive a procedural due process challenge.[331] After the decisions in *Lucas*[332] and the plurality opinion in *Stop the Beach Renourishment*,[333] it seems that the Supreme Court may be open to recognizing a wider range of state action as regulatory takings. Additionally, by challenging crime-free housing ordinances through a property rights approach, plaintiffs may be able to win over conservative judges that might not have been as sympathetic to an equal protection or First Amendment appeal. Tenants and advocates should utilize the momentum and current makeup of the Supreme Court to challenge crime-free housing ordinances on Fifth Amendment grounds.

LAURA FLINT*

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329 Cinnamon Janzer, *Crime-Free Housing Ordinances Are Spreading, but Some Groups Are Fighting Back*, NEXT CITY (Jan. 2, 2020), https://nextcity.org/daily/entry/crime-free-housing-ordinances-spreading-but-some-groups-are-fighting-back.

330 *See supra* notes 49, 50 and accompanying text.

331 *See supra* note 48 and accompanying text.

332 Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1004 (1992).

333 Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702, 713 (2010).

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