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WRONG OR (FUNDAMENTAL) RIGHT?: SUBSTANTIVE DUE PROCESS AND THE RIGHT TO EXCLUDE

Jack May*

Abstract: Substantive due process provides heightened protection from government interference with enumerated constitutional rights and unenumerated—but nevertheless “fundamental”—rights. To date, the United States Supreme Court has never recognized any property right as a fundamental right for substantive due process purposes. But in *Yim v. City of Seattle*, a case recently decided by the Ninth Circuit, landlords and tenant screening companies argued that the right to exclude from one’s property should be a fundamental right. *Yim* involved a challenge to Seattle’s Fair Chance Housing Ordinance, which, among other things, prohibits landlords and tenant screening companies from inquiring about or considering a rental applicant’s criminal history when making tenancy decisions. The plaintiffs contended that the Ordinance deprived them of their right to exclude by restricting a highly relevant consideration for tenancy decisions.

This Comment argues against the existence of a fundamental right to exclude in the substantive due process context, at least as far as commercial property is concerned. At its core, property is a thing—a resource. When property is used commercially, whether as an apartment or office building or something else, its owner’s power to limit access becomes the power to affect others engaged in the marketplace. This broad power over the public brings commercial property within the concern of the community. So, when the government places limits on the power to exclude from commercial property, it is regulating the marketplace and ensuring access is not being improperly denied to certain persons. Protecting the ability of its citizens to get by is inherently an exercise of legitimate government authority. As such, placing heightened substantive due process limits on the government’s power over the right to exclude would have dramatic consequences for the operation of government and for some individuals’ capacities to access shelter. It would seriously misapply and disfigure the law of substantive due process. The costs of recognizing a fundamental right to exclude from commercial property simply are not justified.

*“[I]f the large property owner is viewed, as he ought to be, as a wielder of power over the lives of his fellow citizens, the law should not hesitate to develop a doctrine as to his positive duties in the public interest.”*¹

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1. Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 26 (1927).

INTRODUCTION

The Due Process Clauses of the Fifth and Fourteenth Amendments² to the United States Constitution forbid the federal government and the states, respectively, from “depriv[ing]” any person of life, liberty, or property “without due process of law.”³ The text of the Due Process Clause expressly ensures fair procedures⁴: prior notice of the government’s intent to deprive one of life, liberty, or property, and a chance to be heard before such deprivation.⁵ This is known as “procedural due process.”⁶

But the Due Process Clause guarantees more than that.⁷ It serves two additional, related functions under what is known as “substantive due process.” First, it ensures as a baseline that the government only deprives individuals of life, liberty, or property with a “valid public purpose.”⁸ That is, the deprivation cannot be arbitrary, irrational, or capricious.⁹ Second, it provides increased protection against government interference with most rights enumerated in the Bill of Rights as well as with unenumerated

2. Although both Amendments have their own Due Process Clause, they are functionally indistinguishable except as to which government they limit. The Fifth Amendment’s Due Process Clause limits the federal government, while the Fourteenth Amendment’s Due Process Clause limits state and local governments. *See* U.S. CONST. amends. V, XIV. This Comment refers to the Clauses in the singular for simplicity and because the Fifth Amendment’s Due Process Clause is not relevant to the discussion.

3. *Id.* amends. V, XIV.

4. *See, e.g.,* *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (noting that the government has a “basic” duty “to follow a fair process of decisionmaking when it acts to deprive a person of his possessions”).

5. *Id.* *See generally* Henry J. Friendly, “*Some Kind of Hearing*,” 123 U. PA. L. REV. 1267, 1279–95 (cataloging eleven potential bases for procedural due process violations).

6. *Fuentes*, 407 U.S. at 80.

7. *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). *But cf. McDonald v. City of Chicago*, 561 U.S. 742, 811 (2010) (Thomas, J., concurring in part and in the judgment) (criticizing as “a legal fiction” that “strains credulity for even the most casual user of words” the “notion that a constitutional provision that guarantees only ‘process’ before a person is deprived of life, liberty, or property could define the substance of those rights”).

8. *See, e.g.,* *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005) (implying that due process is a test of whether “government has acted in pursuit of a valid public purpose”); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937) (“[R]egulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.”); Erwin Chemerinsky, *Substantive Due Process*, 15 *TOURO L. REV.* 1501, 1501 (1999) (“Substantive due process asks . . . whether the government’s deprivation of a person’s life, liberty or property is justified by a sufficient purpose.”).

9. *E.g., City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 676 (1976) (quoting *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926)); *see also* *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (“[The Due Process Clause] protects individual liberty against ‘certain government actions regardless of the fairness of the procedures used to implement them.’” (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986))). *See generally* *Capricious*, *BLACK’S LAW DICTIONARY* (11th ed. 2019) (defining “capricious” as “contrary to the evidence or established rules of law”).

“fundamental rights,” such as the rights to marry, to direct the education and upbringing of one’s children, and to use contraception.¹⁰ The rights just listed fall under the Due Process Clause’s liberty prong.¹¹ But the Supreme Court never has classified any property right¹² as fundamental for substantive due process purposes—despite the express language protecting property in the Due Process Clause. So while the government may only deprive individuals of property with a sufficiently valid public purpose under the baseline protection substantive due process affords, no property right has received the heightened protections that come with being a fundamental right—at least, not yet.

The lack of fundamental property rights is brought into further relief by the rise of the “absolutist” property rights movement.¹³ This movement believes that the government has let property rights atrophy from their stature at the time of the nation’s founding and that strong property rights are essential to liberty and, more generally, a well-ordered society.¹⁴ In light of this movement’s ascendance, it is reasonable to believe that strong efforts will be made to persuade the Supreme Court to recognize one or more property rights as fundamental for substantive due process purposes. In a case recently decided by the Court of Appeals for the Ninth Circuit,

10. See *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. ___, 142 S. Ct. 2228, 2246 (2022); *Glucksberg*, 521 U.S. at 720 (cataloging numerous “fundamental rights and liberty interests”).

11. *Glucksberg*, 521 U.S. at 720.

12. The general consensus is that there is no all-encompassing, monolithic “property right”; rather, one’s property rights are considered to be like a “bundle of sticks” comprised of a variety of subsidiary rights, such as the rights to use, transfer, and exclude. *E.g.*, JESSE DUKEMINIER, JAMES E. KRIER, GREGORY S. ALEXANDER, MICHAEL H. SCHILL & LIOR JACOB STRAHILEVITZ, *PROPERTY: CONCISE EDITION* 37–39, 45 (2nd ed. 2017). *But cf.* Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998) (calling the right to exclude the “*sine qua non*” of property). *See generally Sine Qua Non*, 3 WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2123 (1986) [hereinafter WEBSTER’S] (defining “*sine qua non*” as “the one thing that is absolutely essential”).

13. Steven J. Eagle, *The Birth of the Property Rights Movement*, CATO INST. POL’Y ANALYSIS, Dec. 15, 2005, at 1, 3, <https://www.cato.org/sites/cato.org/files/pubs/pdf/pa558.pdf> [<https://perma.cc/2NV4-SZ5G>] (“Across the nation, dozens of grassroots advocacy groups have formed in recent years to defend private property rights from assault by officials at all levels of government.”).

14. Ilya Somin, *America’s Weak Property Rights Are Harming Those Most in Need*, ATLANTIC (Mar. 24, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/weak-property-rights/608476/> (last visited Oct. 3, 2023); BERNARD H. SIEGAN, *PROPERTY RIGHTS: FROM MAGNA CARTA TO THE FOURTEENTH AMENDMENT* 3 (2001) (“World history has shown that the protection of property rights is essential to maintain human liberty as well as political and economic viability and stability.”). *See generally* Hon. Philip A. Talmadge, *The Myth of Property Absolutism and Modern Government: The Interaction of Police Power and Property Rights*, 75 WASH. L. REV. 857, 858 (2000) (“Modern property absolutists contend the police power may not extend to *any* ‘use’ of property.” (emphasis added)). For more on the police power, see *infra* section I.B.

the plaintiffs attempted to do just that. In *Yim v. City of Seattle*,¹⁵ landlords and tenant screening companies argued that the right to exclude is, in fact, a fundamental right under the Due Process Clauses of the Fourteenth Amendment and the Washington State Constitution.¹⁶

The right to exclude is the right to prohibit others from using a particular resource, either in full or in part.¹⁷ In the context of real property, it is the right to prevent (or not prevent) other persons from entering onto the owner's land or structure—in other words, it is a right against trespass.¹⁸ The right to exclude also entails the rights to refuse

15. *Yim v. City of Seattle (Yim II)*, No. C18-0736, 2021 WL 2805377 (W.D. Wash. July 6, 2021), *rev'd in part on other grounds*, 63 F.4th 783 (9th Cir. 2023). This Comment cites three decisions in the procedural history of *Yim v. City of Seattle*. I refer to them as *Yim I*, *Yim II*, and *Yim III* based on their chronology. *Yim II* is the 2021 federal district court ruling cited above. *Yim I* is the Washington State Supreme Court's response to certain certified questions from the federal district court; it was decided in 2019. *See Yim v. City of Seattle (Yim I)*, 194 Wash. 2d 682, 451 P.3d 694 (2019). *Yim III* is the Ninth Circuit Court of Appeals' 2023 decision that upheld the federal district court's judgment as to the *Yim* plaintiffs' substantive due process claims (but not as to their First Amendment claim). *See Yim v. City of Seattle (Yim III)*, 63 F.4th 783 (9th Cir. 2023).

16. *See infra* notes 157–158 and accompanying text. *See generally* WASH. CONST. art. I, § 3 (“No person shall be deprived of life, liberty, or property, without due process of law.”). The *Yim* plaintiffs have caught the attention of, and have received legal support from, multiple public interest groups that reasonably can be identified with the “absolutist” property rights movement introduced above. *See* Brief Amicus Curiae of Goldwater Institute in Support of Petitioners at 1, *Yim III*, 63 F.4th 783 (No. 23-329) (“The Goldwater Institute (‘GI’) is a public policy foundation devoted to individual freedom and limited government. . . . Among GI’s foremost priorities is the protection of the rights of property owners, including landlords who offer property on the rental market.”); Brief of the Manhattan Institute as *Amicus Curiae* Supporting Petitioners at 1, *Yim III*, 63 F.4th 783 (No. 23-329) (“This case interests *amicus* because it involves a law that impinges on landlords’ liberty. [That law] deprives landlords of their freedom to rent private property to whom they choose and to exclude violent felons from their property, in violation of the Fourteenth Amendment. [It] is an arbitrary exercise of power that contravenes originalist notions of substantive due process.”); Brief of Citizen Action Defense Fund and Washington Business Properties Association as *Amici Curiae* in Support of Petitioners at 2, *Yim III*, 63 F.4th 783 (No. 23-329) (“*Amici* have a strong interest in the outcome of this case as they are committed to the protection of property rights in Washington State and throughout the United States. Specifically, *amici* worry that if the lower court’s opinion in this case stands, it will incentivize other state and local governments to further erode the fundamental protections constitutionally afforded to private property.”); Brief Amicus Curiae of the Buckeye Institute in Support of Petitioners at 1, *Yim III*, 63 F.4th 783 (No. 23-329) (“The Buckeye Institute works to protect property rights, preserve the structure and provisions of the Constitution, and ensure that the judiciary fulfills its responsibility to follow the Constitution.”).

17. James Y. Stern, *What Is the Right to Exclude and Why Does It Matter?*, in *PROPERTY THEORY: LEGAL AND POLITICAL PERSPECTIVES* 38, 39 (James Penner & Michael Otsuka eds., 2018) (defining “the right to exclude” as “the right to prohibit one or more persons from using a particular resource, either at all or in some category of ways”).

18. *See, e.g.,* *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 159 (Wis. 1997) (equating trespass with a violation of the right to exclude).

permission for others to use one's property¹⁹ and to refuse to enter into a contract for access to that property.²⁰ And the right to exclude was central to Blackstone's (in)famous definition of property rights as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."²¹

Yim involves a challenge to Seattle's Fair Chance Housing and Eviction Records Ordinance²² (commonly referred to as the Fair Chance Housing Ordinance),²³ which, among other things, prohibits landlords and tenant screening companies from inquiring about a rental applicant's criminal history or considering such history when making tenancy decisions.²⁴ The plaintiffs contend that the Ordinance deprives them of their right to exclude by restricting a highly relevant consideration for tenancy decisions.²⁵ In advancing this argument, they have seized on recent language by the Supreme Court

19. See, e.g., Cohen, *supra* note 1, at 12 ("[T]he law of property helps me . . . to exclude others from using the things which it assigns to me. If then somebody else wants to use the food, the house, the land, or the plow which the law calls mine, he has to get my consent."); see also, e.g., Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453, S454–55 (2002) ("In exclusion, decisions about resource use are delegated to an owner who, as gatekeeper, is responsible for deciding on and monitoring specific activities with respect to the resource.").

20. See, e.g., Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 389 (2001) ("People generally . . . know that, unless special regulations or private contracts carve out some specific use rights, the bright-line rules of trespass apply [when they approach a piece of property they do not own].").

21. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *2 (1766). But see WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY § 9.1 (3d ed. 2000) ("These famous words by Blackstone are not true today and were not true when written. . . . Of course he knew well, as we know today, that there are many legal limitations upon the actual use and enjoyment of property rights in land. . . . Most of what we call the 'law of property' limits the ways in which persons may use and deal with land.").

22. SEATTLE, WASH., MUN. CODE § 14.09 (2020); e.g., *Yim v. City of Seattle (Yim II)*, No. C18-0736, 2021 WL 2805377 (W.D. Wash. July 6, 2021), *rev'd in part on other grounds*, 63 F.4th 783 (9th Cir. 2023).

23. The ordinance was renamed to be the Fair Chance Housing and Eviction Records Ordinance during the COVID-19 pandemic. See SEATTLE, WASH., MUN. CODE § 14.09.005 (2020). The changes included prohibiting landlords from taking adverse actions based on evictions occurring during or shortly after the state of emergency caused by the pandemic. See *id.* § 14.09.026. In the interest of brevity and because only the criminal history provisions were at issue, see *Yim v. City of Seattle (Yim II)*, No. C18-0736, 2021 WL 2805377 (W.D. Wash. July 6, 2021), *rev'd in part on other grounds*, 63 F.4th 783 (9th Cir. 2023), this Comment uses the ordinance's title at the time *Yim* was filed.

24. See SEATTLE, WASH., MUN. CODE § 14.09.025(A)(2) (2018).

25. See *infra* Part II.

describing the right to exclude as a fundamental property right in contexts outside of substantive due process.²⁶

Shortly before this Comment was published, the *Yim* plaintiffs filed a petition for a writ of certiorari, seeking Supreme Court review of their federal substantive due process claim.²⁷ The Court had not yet decided on the petition by the time of this Comment's publication. Given the current Court's strong language in favor of both the right to exclude and property rights generally,²⁸ it is plausible that the Supreme Court could be receptive to the *Yim* plaintiffs' arguments. Or, in the case that the Court denies review, it is nevertheless still possible that at some point the Court could hear a claim similar to that of the *Yim* plaintiffs. This Comment is intended to address either situation and counsel the Court to maintain the status quo regarding substantive due process in the property context.

To that end, this Comment argues against the existence of a fundamental right to exclude in the substantive due process context, at least as far as commercial property is concerned.²⁹ There are four main reasons for this conclusion. First, there is a long history of permissible government regulation of private property.³⁰ Second, commercial property is properly a concern of the community.³¹ This makes it a legitimate subject of regulation. Third, property rights in the commercial context—even the right to exclude—are economic rights, a long-dead category of substantive due process the Supreme Court is loath to revive.³² Finally, respect for federalism and the separation of powers counsels against constitutionalizing property regulation because property rights are almost exclusively creatures of state and local government.³³

This Comment proceeds as follows. Part I provides an introduction to substantive due process and surveys the relevant jurisprudence as it relates to property and economics since the mid-nineteenth century. Part II

26. See *infra* section IV.A.

27. Petition for Writ of Certiorari, *Yim v. City of Seattle (Yim III)*, 63 F.4th 783 (9th Cir. 2023) (No. 23-329).

28. See *infra* section IV.A.

29. It is unlikely the Court would address the “right to exclude” generally, rather than in the specific context of commercial use as was present in *Yim*. This is because the Court requires a “careful description” of the right alleged to be fundamental, and this careful description depends heavily on the facts of the case before the Court. See *infra* notes 45–46 and accompanying text. But cf. *Obergefell v. Hodges*, 576 U.S. 644, 671 (2015) (suggesting that some liberties, like the right to marry, are expressed generally because “[i]f rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied”).

30. See *infra* section I.B.

31. See *infra* Part III.

32. See *infra* section IV.B.

33. See *infra* section IV.C.

frames the federal and state substantive due process claims in *Yim* against this background. Part III explains how the “commercial” nature of commercial property gives the community an interest in the property that justifies its regulation. Finally, Part IV argues that the right to exclude should not be a fundamental right because it is an economic liberty and doing so would upset federalism and the separation of powers.

Before proceeding, it is necessary to define two key terms: “commercial property” and “residential property.” Commercial property is property used for business activities,³⁴ such as an office building or mall. Residential property is property used for private dwelling purposes,³⁵ like a house or apartment. As a matter of definitions, there can be overlap—somebody may operate a business out of their home, for example. Therefore, any property leased as a residence qualifies under both definitions. This Comment is concerned with any property that can be defined as commercial property, regardless of whether it is also used as residential property. As such, this Comment does not consider whether there should be a fundamental right to exclude from exclusively residential property.

I. THE HISTORY OF SUBSTANTIVE DUE PROCESS IN THE PROPERTY CONTEXT

This Part discusses substantive due process as a general matter and in the context of property. Section I.A lays out the general framework for substantive due process. Section I.B surveys the historical development of substantive due process as it relates to property and economics more broadly. Section I.C complements section I.B by discussing two cases in the context of the Fifth Amendment’s Takings Clause³⁶ that nevertheless discuss, and thus bear on, substantive due process in the property context.

A. Boilerplate Substantive Due Process

As noted above, substantive due process serves two objectives. It ensures that the government only deprives individuals of life, liberty, or

34. E.g., James Chen, *What Is Commercial Property? Definition and How It Yields Profit*, INVESTOPEDIA (Feb. 28, 2021) [hereinafter Chen, *Commercial Property*], <https://www.investopedia.com/terms/c/commercial-property.asp> [<https://perma.cc/3RNU-RBCN>] (“Commercial property is real estate that is used for business activities.”).

35. E.g., James Chen, *Residential Rental Property Definition, Tax Pros & Cons*, INVESTOPEDIA (May 15, 2022), <https://www.investopedia.com/terms/r/residentialrentalproperty.asp> [<https://perma.cc/WA2X-KULN>] (“Residential property is property zoned specifically for living or dwelling for individuals or households . . .”).

36. U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

property with a valid public purpose.³⁷ That is, a deprivation of life or *any* liberty or property³⁸ right may not be arbitrary, irrational, or capricious.³⁹ It also “provides heightened protection against government interference with certain fundamental rights and liberty interests.”⁴⁰

Not every right receives heightened protection under substantive due process.⁴¹ Generally, only “fundamental” rights and those that are enumerated in the Bill of Rights⁴² are specially protected; most others are not.⁴³ Fundamental rights are those that are “objectively, deeply rooted in this Nation’s history and tradition, . . . and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.”⁴⁴ Moreover, each fundamental right requires a “careful description”⁴⁵—essentially, a narrow construction actually implicated by the factual dispute in a given case.⁴⁶

The “careful description” requirement is not a mere formality. It derives from the idea of judicial restraint: “[I]n deciding ‘a question of such magnitude and importance [as whether to recognize a fundamental right,] . . . it is the [better] part of wisdom not to attempt, by any general statement, to cover every possible phase of the subject.’”⁴⁷ The touchstone

37. See *supra* note 8 and accompanying text.

38. I do not discuss due process in the context of “life” in this Comment, so I omit discussion of it here and throughout for brevity.

39. *City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 676 (1976) (citing *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926)).

40. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

41. See *id.* at 722. Of course, all liberties and property rights receive *some* measure of substantive due process protection. See U.S. CONST. amends. V, XIV; *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. ___, 142 S. Ct. 2228, 2246 (2022) (noting that even those rights that are neither enumerated in the first eight Amendments nor included in “a select list of [unenumerated] fundamental rights” may still only be regulated for “legitimate reasons”).

42. *Dobbs*, 142 S. Ct. at 2246.

43. See *Glucksberg*, 521 U.S. at 720–21.

44. *Id.* (quotation marks omitted) (citations omitted) (first quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion); and then quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)).

45. *Id.* at 721 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

46. For example, in *Kerry v. Din*, 576 U.S. 86 (2015), the Supreme Court criticized both its occasional “propensity for grandiloquence when reviewing the scope of implied rights,” 576 U.S. at 93, as well as the plaintiff’s efforts “to abstract from [prior substantive due process] cases some liberty interest that might be implicated by [a] visa denial,” *id.* at 94.

47. *Cruzan v. Director, Mo. Dep’t of Health*, 497 U.S. 261, 277–78 (1990) (first alteration added) (quoting *Twin City Nat. Bank of New Brighton v. Nebeker*, 167 U.S. 196, 202 (1897)). For example, in *301, 712, 2103 and 3151 LLC v. City of Minneapolis*, 27 F.4th 1377 (8th Cir. 2022), the plaintiffs challenged an ordinance requiring landlords either to forego rejecting tenancy applicants based on criminal, credit, or rental history, or to accept and consider all supplemental materials submitted to explain such history. 27 F.4th at 1380. The court noted that a “careful description” of the right claimed

of this requirement, therefore, is what is actually at issue in a given case based on its facts.⁴⁸ For example, in *Reno v. Flores*,⁴⁹ non-citizen children who were arrested and held in custody by Immigration and Naturalization Services argued that the Due Process Clause required that they be released into the custody of “responsible adults.”⁵⁰ The juveniles argued they had a fundamental substantive due process right to “freedom from physical restraint.”⁵¹ A majority of the Court vehemently disagreed.⁵² The Court held that the right actually claimed was the “alleged right of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a willing-and-able private custodian rather than of a government-operated or government-selected child-care institution.”⁵³ The takeaway here is that the Supreme Court is especially loath to recognize rights broader than those that are at issue in a case before it, so it will (generally) construe the alleged fundamental right as narrowly as possible.⁵⁴

A right receives stronger protections when the government is required to satisfy more difficult criteria to interfere with that right. To be upheld, restrictions on non-fundamental rights—for example, the rights to be free from government regulation or to use a septic tank⁵⁵—generally require merely “a reasonable relation to . . . legitimate state interest[s].”⁵⁶ This “rational basis review” is highly deferential to the government because it places the burden of proof on a law’s challenger to show the law either could not serve *any* conceivable, legitimate purpose or is an unreasonable way to attain such a purpose.⁵⁷

Fundamental rights, however, cannot be infringed unless such infringement is “narrowly tailored to serve a compelling state

was “the right to exclude others from property without following tenant-screening procedures like considering supplemental materials and providing a written explanation.” *Id.* at 1385.

48. *See Flores*, 507 U.S. at 302.

49. 507 U.S. 292 (1993).

50. *Id.* at 294.

51. *Id.* at 299.

52. *Id.* at 302.

53. *Id.*

54. *But see Obergefell v. Hodges*, 576 U.S. 644, 671 (2015) (suggesting such a narrow construction does not apply in situations where a general right has been denied to certain classes, such as denying same-sex couples the right to marry, and that the Supreme Court has treated these fundamental rights more “comprehensive[ly]”).

55. *Keller v. Los Osos Cmty. Servs. Dist.*, 39 F. App’x 581, 583 (9th Cir. 2002).

56. *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997).

57. *See FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313–15 (1993).

interest”⁵⁸—that is, the infringement must meet “strict scrutiny.”⁵⁹ To be narrowly tailored, a law must actually further its stated interest, be the least restrictive means available, and be neither underinclusive nor overinclusive.⁶⁰ The Supreme Court has never clearly delineated how compelling state interests are determined.⁶¹ But the analysis—to the extent it occurs—usually focuses on either the action’s alignment with the Constitution, the common law, or “traditional notions about the proper functions and operation of the state,” *or* on intuitive, “unelaborated social or moral value judgments.”⁶² Strict scrutiny⁶³ is far easier for plaintiffs to satisfy.⁶⁴

The upshot is that the determination of whether a right is fundamental for substantive due process purposes can have significant consequences. If the right is not fundamental, the government can regulate it almost without question. But if the right *is* fundamental, the government needs extremely strong reasons to regulate it and must be extremely careful in limiting the infringement of that right to only what is necessary to achieve the desired ends.

58. *Glucksberg*, 521 U.S. at 721 (quoting *Flores*, 507 U.S. at 302).

59. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 589 (6th ed. 2019).

60. Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2422–23 (1996).

61. See, e.g., Note, *Let the End Be Legitimate: Questioning the Value of Heightened Scrutiny's Compelling- and Important-Interest Inquiries*, 129 HARV. L. REV. 1406, 1408–09 (2016) (“[N]o watershed opinion has set out a clear method for determining whether any given interest is compelling, important, or merely legitimate.”).

62. *Id.* at 1410.

63. This Comment assumes for the sake of argument that strict scrutiny applies for restrictions or regulations of fundamental rights. This is because the Court has generally used strict scrutiny for deprivations of fundamental rights, but there are some exceptions. See CHEMERINSKY, *supra* note 59, at 856 n.2 (providing examples). But cf. *Glucksberg*, 521 U.S. at 721 (“[T]he Fourteenth Amendment ‘forbids the government to infringe . . . “fundamental” liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.” (emphasis in original) (quoting *Flores*, 507 U.S. at 302)).

64. See Gerald Gunther, Foreword, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (arguing that modern strict scrutiny is “‘strict’ in theory and fatal in fact”); CHEMERINSKY, *supra* note 59, at 589 (“Under strict scrutiny, the government has the burden of proof. That is, the law will be struck down unless the government can show that the law is necessary to accomplish a compelling government purpose. . . . [L]aws are generally declared unconstitutional when [strict scrutiny] is applied.” (footnotes omitted)); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 455 (2002) (Souter, J., dissenting) (“[S]trict scrutiny leaves few survivors.”). But see Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 795–96 (2006) (noting that thirty percent of all decisions published by federal courts between 1990 and 2003 applying strict scrutiny resulted in the challenged law being upheld).

B. Substantive Due Process in the Property Context: Rarely Touched and in Stasis

Substantive due process jurisprudence in the context of property regulations has undergone surprisingly little development over the last 175 years. This largely is because the Supreme Court has considered claims in this area only infrequently.⁶⁵ But even more so, it is because the Court has never recognized any property right as fundamental for substantive due process purposes. This section traces the history of substantive due process challenges to property regulations, beginning with *Commonwealth v. Alger*,⁶⁶ a critical case in the development of the “police power.”⁶⁷ It then covers *Mugler v. Kansas*,⁶⁸ which expanded the scope of substantive due process as to property.⁶⁹ Next, it turns to the landmark case *Village of Euclid v. Ambler Realty Co.*,⁷⁰ which established the modern substantive due process framework applied today to challenges to property regulations.⁷¹ Finally, it reviews the most recent Supreme Court case involving a substantive due process challenge to property regulations, 1978’s *Exxon Corp. v. Governor of Maryland*,⁷² which put to work the modern regime adopted in *Euclid*.⁷³

1. Distinguishing Police Power Regulations from Takings: Commonwealth v. Alger

The first step in recognizing due process claims for property regulations required distinguishing exercises of the “police power” to regulate property from “takings” of such property. The police power is the ability of states and municipalities to enact regulations in the interest of public health, safety, morality, or the general welfare.⁷⁴ A taking, meanwhile, occurs when the government appropriates property in one of three ways: physical occupation, regulation to the point of depriving an owner of “all economically beneficial us[e]” of their property, or by

65. See *infra* sections I.B.1–I.B.4.

66. 61 Mass. (7 Cush.) 53 (1851).

67. See *infra* section I.B.1.

68. 123 U.S. 623 (1887).

69. See *infra* section I.B.2.

70. 272 U.S. 365 (1926).

71. See *infra* section I.B.3.

72. 437 U.S. 117 (1978).

73. See *infra* section I.B.4.

74. See *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 588 U.S. ___, 139 S. Ct. 2449, 2464 (2019); *Euclid*, 272 U.S. at 395.

regulation that goes “too far.”⁷⁵ The Takings Clause of the Fifth Amendment provides that when the government “take[s]” private property for public use, “just compensation” must be provided to the deprived owner.⁷⁶ As opposed to the Due Process Clause, which renders impermissible certain legislative actions, the Takings Clause “is designed not to limit . . . governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.”⁷⁷

The Supreme Judicial Court of Massachusetts distinguished these two concepts in the 1851 case *Commonwealth v. Alger*.⁷⁸ In *Alger*, Massachusetts enacted a statute demarcating an invisible line in Boston Harbor past which individuals could not build.⁷⁹ The defendant Cyrus Alger was convicted for violating this statute by building a wharf that extended past the invisible line.⁸⁰ Timing was important in Alger’s challenge to the conviction. The statute at issue was enacted in 1847.⁸¹ Alger began building the wharf in 1843, but did not finish constructing it until after the statute’s enactment.⁸² But, in 1647, the Colony of Massachusetts Bay had provided that owners of waterfront property owned all adjoining land above the mean low water mark and within 100 rods⁸³ of the shoreline and that they could build on this land.⁸⁴ The 1847 statute effectively abrogated the 1647 Act’s grant of property rights to the extent those rights exceeded geographically beyond the line established in the 1847 statute.⁸⁵

A central question before the *Alger* Court was whether the 1847 statute constituted a taking of Alger’s land.⁸⁶ It answered in the negative, holding

75. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537–38 (2005) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992)); *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

76. U.S. CONST. amend. V.

77. *First Eng. Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304, 315 (1987) (emphasis in original).

78. *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53 (1851).

79. *Id.* at 83–84.

80. *Id.* at 56–57, 103.

81. *Id.* at 84.

82. *Id.* at 56.

83. A rod measures 16.5 feet. *Rod*, 2 WEBSTER’S, *supra* note 12, at 1967.

84. *See Alger*, 61 Mass. (7 Cush.) at 77–78.

85. *See id.* at 102.

86. *See id.* at 85. The court framed the animating issues as the following:

First, What are the rights of owners of land, bounding on salt water, whom it is convenient to designate as riparian proprietors, to the flats over which the tide ebbs and flows, as such rights are settled and established by the laws of Massachusetts; and,

that the 1847 statute was a constitutionally permissible exercise of the State's police power.⁸⁷ In a central passage, Chief Justice Lemuel Shaw wrote that

[a]ll property . . . is derived directly or indirectly from the government, and held subject to those general regulations, which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment, *as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient.*⁸⁸

Preventing “injurious” exercises of property rights is the hallmark of nuisance laws.⁸⁹ In numerous cases preceding the landmark *Euclid*, the government's police power to control “private” rights (and especially property rights) was described as limited to preventing nuisance in a broad sense.⁹⁰ Yet, critically, the *Alger* Court described this power as also extending to any law within a legislature's power that it “may think necessary and expedient” to enact.⁹¹ To be sure, this rule does not allow a legislature to regulate any and everything it deems necessary and

Second, What are the just powers of the legislature to limit, control, or regulate the exercise and enjoyment of these rights.

Id. at 65.

87. *Id.* at 85.

88. *Id.* (emphasis added).

89. See, e.g., *DUKEMINIER ET AL.*, *supra* note 12, at 471 (“The guiding principle [of nuisance] is an ancient maxim: *Sic utere tuo ut alienum non laedas*, meaning that one should use one's own property in such a way as not to injure the property of another.”).

90. See, e.g., *Munn v. Illinois*, 94 U.S. 113, 124–25 (1876) (“‘A body politic,’ as aptly defined in the preamble of the Constitution of Massachusetts, ‘is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.’ This does not confer power upon the whole people to control rights which are purely and exclusively private; but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim *sic utere tuo ut alienum non laedas*.” (citation omitted)); *Camfield v. United States*, 167 U.S. 518, 522 (1897) (“There is no doubt of the general proposition that a man may do what he will with his own, but that right is subordinate to another, which finds expression in the familiar maxim: *Sic utere tuo ut alienum non laedas*. His right to erect what he pleases upon his own land will not justify him in maintaining a nuisance, or in carrying on a business or trade that is offensive to his neighbors.”); *Atl. Coast Line R.R. Co. v. City of Goldsboro*, 232 U.S. 548, 558 (1914) (justifying Goldsboro's regulation of a railroad running through the town because the operations were “necessarily a source of danger to the public,” such that Goldsboro, “in the exercise of the police power, [could] legitimately extend the application of the principle that underlies the maxim *sic utere tuo ut alienum non laedas*, so far as [was] requisite for the protection of the public”).

91. *Alger*, 61 Mass. (7 Cush.) at 85.

expedient to regulate; the legislature is confined to issues concerning the common good and general welfare.⁹² But the rule *does* signify that legislatures have very broad authority to regulate conduct affecting those interests.

Alger also recognized other limits on the police power vis-à-vis private property.⁹³ Legislatures must act

under a high sense of duty to the public and to individuals, with a sacred regard to the rights of property . . . and to impose no larger restraints upon the use and enjoyment of private property, than are in their judgment strictly necessary to preserve and protect the rights of others.⁹⁴

Given this rule's attention to the fit between the infringement of an individual's rights and the public interest to be served by such infringement, this was, effectively, an early version of a substantive due process test.

The "strictly necessary" language might appear at first glance to be a precursor to the requirements of strict scrutiny. But *Alger* did not scrutinize the 1847 Act under such a standard, so it is unclear whether the Court intended this part of the rule to be taken literally.⁹⁵ And, notably, later courts were not nearly so demanding.⁹⁶

Chief Justice Shaw distinguished the police power—again, the power to regulate conduct affecting the common good or general welfare—from the power of eminent domain. Shaw defined the latter as "the right of a government to take and appropriate private property to public use, whenever the public exigency requires it; which can be done only on condition of providing a reasonable compensation therefor."⁹⁷ The "prohibition of [a] noxious use of property, a prohibition imposed because such use would be injurious to the public," does not effect a taking because it is not "an appropriation [for] public use."⁹⁸ As a result, the Court held that the 1847 statute was a valid exercise of the police power.⁹⁹ Both that statute and the 1647 Act forbade property owners from creating a public nuisance despite an otherwise lawful use of their submerged

92. See *supra* text accompanying note 88.

93. See *Alger*, 61 Mass. (7 Cush.) at 102–03.

94. *Id.*

95. See *id.* at 102–04.

96. See *infra* sections II.B–II.D.

97. *Alger*, 61 Mass. (7 Cush.) at 85.

98. *Id.* at 86.

99. See *id.* at 104.

land.¹⁰⁰ As such, the 1847 Act was a lawful exercise of the State's police power right to prevent "injurious"¹⁰¹ exercises of property rights¹⁰² and did not effect a taking of Alger's property merely because it diminished the geographic scope of Alger's property rights.¹⁰³

Ultimately, *Alger* expanded and reconceived the extent of States' legitimate exercises of regulatory authority,¹⁰⁴ even over property.¹⁰⁵ As a result, it is credited as a landmark in the "evolution from community-based common law regulation toward the modern regulatory state."¹⁰⁶

2. *Expanding Substantive Due Process: Mugler v. Kansas*

The next critical case, 1887's *Mugler v. Kansas*, expanded substantive due process jurisprudence in the property context on two fronts. First, it connected substantive due process to property regulations under the police power. Second, it elaborated on the nexus required between the government's interests and the regulations it adopts to achieve them.

Mugler involved a substantive due process challenge to a Kansas law prohibiting the manufacture and sale of alcohol.¹⁰⁷ Peter Mugler's challenge contended that the prohibition amounted to a property deprivation implicating the Due Process Clause.¹⁰⁸ Mugler argued that manufacturing alcohol for personal use without "endangering or affecting the rights of others" was effectively a use of Mugler's property over which the community, acting through government, should have no concern.¹⁰⁹

100. *Id.* at 78 (noting that properties built over the water were forbidden from "impair[ing] the public right of passing over the water in boats and other vessels"); *id.* at 84 (observing that interrupting public passage over the water constituted a public nuisance).

101. *See supra* notes 88–89 and accompanying text (connecting nuisance law to uses of property that harm others).

102. *See Alger*, 61 Mass. (7 Cush.) at 104.

103. *See id.*

104. *See* D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 U. MIA. L. REV. 471, 479 (2004); *id.* at 482 ("The traditional account of the importance of Shaw's opinion to the development of the police power describes *Alger* as a major innovation, breaking with a *laissez-faire* tradition and ushering in an era of positivist regulation.").

105. LEONARD W. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* 248 (1957) ("In a broad sense, Shaw established the authority of the legislature to control the use of private property in the interests of the general welfare.").

106. Barros, *supra* note 104, at 472; *see also id.* at 479 ("Shaw's biographer . . . does not exaggerate when he calls *Alger* 'one of the most influential and frequently cited [opinions] in constitutional law.'" (alteration in original) (quoting LEVY, *supra* note 105, at 248)).

107. *Mugler v. Kansas*, 123 U.S. 623, 653 (1887). *Mugler* also involved a takings claim not relevant here. *See id.* at 664.

108. *See id.* at 660.

109. *Id.*

In evaluating Kansas's prohibition, the United States Supreme Court announced an updated test for substantive due process.¹¹⁰ It held that where "a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or *substantial relation* to those objects, . . . it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."¹¹¹ The "substantial relation" test was the cornerstone of substantive due process claims in the property context for the next forty years.¹¹² But there is some indication within *Mugler* itself that the "substantial relation" language may have had more bark than bite. Notably, in again describing the nexus between a government regulation of property and its underlying interest, the Court stated that legislation cannot "come within the Fourteenth Amendment, . . . unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive [an] owner of his liberty and property, without due process of law."¹¹³ Elsewhere, the Court described the requirement as being merely "fairly adapted" to the government's objective.¹¹⁴ These clarifications afforded the government significant leeway to meet its burden, neutering the strength of the requirement the word "substantial" otherwise connotes. Ultimately, therefore, the Court held that Kansas's prohibition survived the standards it had laid out for property regulations.¹¹⁵

3. *The Modern Substantive Due Process Regime for Property:*
Village of Euclid v. Ambler Realty Co.

The landmark 1926 case *Village of Euclid v. Ambler Realty Co.* introduced the modern scheme for substantive due process challenges to property regulations. It involved a challenge to the Village of Euclid's zoning ordinance.¹¹⁶ Ambler Realty owned land that was zoned under three different use classes, impeding Ambler's ability to develop the land for industrial purposes.¹¹⁷ Ambler challenged Euclid's zoning ordinance, arguing, among other things, that the zoning violated its substantive due

110. *See id.* at 661.

111. *Id.* (emphasis added).

112. *See Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

113. *Mugler*, 123 U.S. at 669.

114. *Id.* at 662.

115. *Id.* at 657.

116. *See Euclid*, 272 U.S. at 384.

117. *See id.* at 382–85.

process rights.¹¹⁸ The United States Supreme Court held that there was no due process violation.¹¹⁹

The Court's analysis noted that the police power had to grow in breadth (but not substance) to meet the changing nature of urban conditions.¹²⁰ It began by noting that present and future population increases would require development in restrictions on the use of private property in urban spaces.¹²¹ It then contextualized these changes within the Constitution's "elasticity," noting that the application of constitutional guarantees must adapt to changing conditions even if the underlying meaning of those guarantees never changes.¹²² Consequently, the police power would expand to address ever more issues at ever greater depth, even though the underlying limits on that power remained consistent: "With the growth and development of the State[,] the police power necessarily develops" because "[t]he segregation of industries[,] commercial pursuits[,] and dwellings to particular districts in a city, when exercised reasonably, may bear a rational relation to the health, morals, safety[,] and general welfare of the community."¹²³

As a result, the Court appeared very concerned with preserving states' and municipalities' abilities to manage enormous numbers of people and physical structures. Apparently to provide these governments with the flexibility to address such conditions, the Court therefore limited dramatically the requirements for property regulations facing substantive due process challenges.¹²⁴ The Court noted that

[t]he inclusion of a reasonable margin to insure effective enforcement, will not put upon a law, otherwise valid, the stamp of invalidity [I]n some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation. In the

118. *See id.* at 384.

119. *See id.* at 389.

120. *See id.* at 387 ("[W]hile the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise. But although a degree of elasticity is thus imparted, not to the meaning, but to the application of constitutional principles, [those] statutes and ordinances, which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course, must fall." (emphasis omitted)).

121. *Id.* at 386–87.

122. *Id.* at 387.

123. *Id.* at 392 (quoting *City of Aurora v. Burns*, 149 N.E. 784, 788 (Ill. 1925)); *see also* Barros, *supra* note 104, at 479 ("Although its practical scope has evolved over time, the police power itself has not. The police power, by definition, has always been the residuary sovereign power of the states.").

124. *See Euclid*, 272 U.S. at 395.

light of these considerations, we are not prepared to say that the end in view was not sufficient to justify the general rule of the ordinance, although some industries of an innocent character might fall within the proscribed class.¹²⁵

Consequently, in upholding *Euclid*'s zoning ordinance,¹²⁶ the Court ruled that zoning ordinances would be declared unconstitutional under substantive due process only when "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."¹²⁷ And although "substantial" normally requires a strong showing in the law,¹²⁸ the *Euclid* rule seems to be an exception. Instead, the focus both in and since *Euclid* has been on whether the challenged government action was arbitrary, irrational, or capricious, a hallmark of rational basis review.¹²⁹

4. *Property and the Due Process Clause Today*

The last time the Supreme Court fully entertained a substantive due process challenge to property regulations *at all* was in *Exxon Corp. v.*

125. *Id.* at 388–89.

126. *See id.* at 389.

127. *Id.* at 395.

128. *See, e.g., Yim v. City of Seattle (Yim I)*, 194 Wash. 2d 682, 697, 451 P.3d 694, 702 (2019) (recognizing the association of "substantial" with heightened scrutiny but nonetheless rejecting a heightened scrutiny requirement because "the United States Supreme Court does not interpret the 'substantial relation' test as requiring heightened scrutiny").

129. *See supra* note 9 and accompanying text; *Euclid*, 272 U.S. at 388 ("If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.").

Governor of Maryland in 1978.¹³⁰ There, the Court quickly disposed¹³¹ of Exxon's substantive due process challenge to a Maryland statute forbidding producers and refiners of petroleum products from operating any retail service stations within the State.¹³²

Maryland's statute was a response to evidence that oil producers and refiners were favoring company-operated gasoline stations during the 1973 petroleum shortage and would eventually decrease the market's competitiveness.¹³³ The Court noted first that, despite evidence "cast[ing] some doubt on the wisdom of the statute," by then it was "absolutely clear that the Due Process Clause does not empower the judiciary 'to sit as a "superlegislature to weigh the wisdom of legislation.'""¹³⁴ When Exxon critiqued the statute's rationality for frustrating Maryland's goal of enhancing competition, the Court rebuked this argument for the same reason: "[Exxon's] argument rests simply on an evaluation of the economic wisdom of the statute."¹³⁵ The Court also held that, in any event, such irrationality—if any—could not "override the State's authority 'to legislate against what are found to be injurious practices in [its] internal commercial and business affairs.'"¹³⁶ But the most valuable line is the

130. However, the Court has come very close in a few cases since then. *See City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 198 (2003) (holding that a city's submission of a referendum regarding whether to repeal a site-plan ordinance authorizing the plaintiff to construct a low-income housing complex did not amount to "egregious or arbitrary government conduct" and therefore could not violate substantive due process, and refusing to reach the question of whether the plaintiff had a property right in the building permits); *E. Enters. v. Apfel*, 524 U.S. 498 (1998) (plurality opinion) (holding that health care benefits for coal industry retirees and their dependents, which were funded by payments mandated of the retirees' employers under the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act), violated the employers' rights under the Takings Clause, and therefore refusing to reach a substantive due process challenge to the mandatory payments); *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985) (holding that a medical school's unenrollment of a student in a dual undergraduate-medical degree program who failed a standardized test was not actionable, and refusing to decide whether the student's enrollment in the program was a property interest of which the student was deprived by such unenrollment). In a partial dissent in *Eastern Enterprises*, Justice Kennedy would have held that the Coal Act violated substantive due process, notwithstanding the fact that it was "economic legislation," 524 U.S. at 547 (Kennedy, J., concurring in the judgment and dissenting in part), because the Coal Act's retroactive effect caused the health care benefits to "bear[] no legitimate relation" to the government's asserted interests. *See id.* at 549. Justice Kennedy reached this conclusion even while reiterating that "economic legislation . . . may be invalidated on due process grounds only under the most egregious of circumstances." *Id.* at 550.

131. *Exxon Corp.*, 437 U.S. at 124 ("[Exxon's] substantive due process argument requires little discussion.").

132. *See id.* at 117.

133. *Id.* at 117, 124.

134. *Id.* at 124 (quoting *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963)).

135. *Id.*

136. *Id.* (quoting *Lincoln Fed. Lab. Union v. Nw. Iron & Metal Co.*, 335 U.S. 525, 536 (1949)).

Court's holding, which confirms that property regulations are subjected to rational basis review when challenged on substantive due process grounds: "[W]e have no hesitancy in concluding that [Maryland's statute] bears a reasonable relation to the State's legitimate purpose in controlling the gasoline retail market."¹³⁷

This brief history shows that, beginning with *Euclid*, the Court has consistently held that property regulations of all sorts are proper exercises of states' and municipalities' legislative power. As a result, these regulations are subject to rational basis review because the legislature, not the courts, is able to weigh the socioeconomic wisdom of finetuning the rights that make up the bundle of sticks.¹³⁸

C. *Contemporary Takings Cases and Their Discussion of Substantive Due Process*

Although the Supreme Court has not fully considered a substantive due process challenge to property regulations since *Exxon Corp.* in 1978, it did engage with the topic in two recent cases. The first was the 2005 Takings Clause case *Lingle v. Chevron U.S.A. Inc.*¹³⁹ There, Hawai'i enacted a rent-control statute limiting the rents gasoline wholesalers could charge independent vendors for the operation of gasoline service stations that the wholesalers owned.¹⁴⁰ Chevron challenged the statute as a taking without compensation,¹⁴¹ relying on *Agins v. City of Tiburon*¹⁴² for the proposition that "government regulation of private property 'effects a taking if [such regulation] does not *substantially advance legitimate state interests*.'"¹⁴³ But the Court observed that "the 'substantially advances' formula . . . prescribes an inquiry in the nature of a due process, not a takings, test."¹⁴⁴

The Court distinguished the purposes of the Takings and Due Process Clauses. The Takings Clause, it noted, "focuses directly upon the severity of the burden that government imposes upon private property rights."¹⁴⁵ Of particular concern is "the *magnitude or character of the burden* a particular regulation imposes," or "how any regulatory

137. *Id.* at 125.

138. For an explanation of the "bundle of sticks" concept, see *supra* note 12.

139. 544 U.S. 528 (2005).

140. *Id.* at 533.

141. See *id.* at 533–34.

142. 447 U.S. 255 (1980).

143. *Lingle*, 544 U.S. at 531 (emphasis added) (quoting *Agins*, 447 U.S. at 260).

144. *Id.* at 540.

145. *Id.* at 539.

burden is *distributed* among property owners.”¹⁴⁶ In contrast, the Due Process Clause is a “means-ends test” that effectively asks “whether a regulation of private property is *effective* in achieving some legitimate public purpose.”¹⁴⁷ Harkening back to the prototypical rational basis test for substantive due process described in section I.A, the Court noted that “a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause.”¹⁴⁸ Continuing the distinction, the Court noted that the “‘substantially advances’ inquiry probes [a] regulation’s underlying validity” and that this “inquiry is logically prior to[,] and distinct from[,] the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose.”¹⁴⁹

But even more important is the Court’s discussion of the impracticality of the “substantially advances” test for property regulations. The Court noted that

[t]he *Agins* formula can be read to demand heightened means-end review of virtually any regulation of private property. If so interpreted, it would require courts to scrutinize the efficacy of a vast array of state and federal regulations—a task for which courts are not well suited. Moreover, it would empower—and might often require—courts to substitute their predictive judgment for those of elected legislatures and expert agencies.¹⁵⁰

Unfortunately, the Court was not clear about whether this was an indictment of the “substantially advances” test generally or only as it is applied in the context of takings. Indeed, the quote above is prefaced with the observation that “the ‘substantially advances’ formula is not only *doctrinally* untenable as a takings test—its application as such would also present practical difficulties.”¹⁵¹ This confusion likely can be resolved for two reasons. First, the practicality concerns raised by the Court would not disappear were this test to be applied in the substantive due process context instead. Second—and critically—the Court observed shortly thereafter that it “ha[s] long eschewed such heightened scrutiny when addressing substantive due process challenges to government regulation.”¹⁵² *Lingle* was a case about takings, but its discussion of how

146. *Id.* at 542 (emphasis in original).

147. *Id.* (emphasis in original).

148. *Id.*

149. *Id.* at 543.

150. *Id.* at 544.

151. *Id.* (emphasis in original).

152. *Id.* at 545.

courts should approach property regulations generally—through rational basis review—strongly supports the view that it would be untenable to recognize a property right as fundamental.

The Supreme Court's most recent guidance on substantive due process in the context of takings came in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*.¹⁵³ Although the relevant discussion there was dicta, *Stop the Beach Renourishment* is useful to the discussion here simply because it reflects a contemporary unwillingness to revive the “economic due process” typified by “the *Lochner* era.”¹⁵⁴ In particular, *Stop the Beach Renourishment* reiterated that “the ‘liberties’ protected by substantive due process do not include economic liberties.”¹⁵⁵ As a creature of economics, then, property may be rationally and non-arbitrarily regulated.¹⁵⁶

Notably, the right to exclude is absent from all of the cases discussed in this Part. The Supreme Court has never determined whether that right is fundamental for substantive due process purposes.¹⁵⁷ Nor has it determined whether any property right is fundamental for substantive due process purposes. But the Court's decisions *do* speak to property regulations as a whole and, in particular, the fact that such regulations are not subject to heightened scrutiny for substantive due process purposes because they involve socioeconomics. And because the right to exclude is subsumed within the bundle of sticks comprising the spectrum of property rights, the right to exclude is similarly situated to other property rights.

Moreover, this section supports the view that the right to exclude is not a fundamental right for two reasons. *Lingle* demonstrates that heightened scrutiny is not well-suited to property regulations. Meanwhile, *Stop the Beach Renourishment* indicates the Court's unwillingness to revive economic due process. Looking ahead, section IV.B follows up on *Stop the Beach Renourishment* by arguing that property rights are economic rights and, therefore, are subject to rational basis review.

153. 560 U.S. 702 (2010).

154. *Id.* at 721. *See generally* *Lochner v. New York*, 198 U.S. 45 (1905) (holding that a maximum hours provision violated workers' right to freedom of contract under “economic” due process). For a discussion of *Lochner*, see *infra* section IV.B.

155. *Stop the Beach Renourishment*, 560 U.S. at 721. For a discussion of how property rights are economic rights, see *infra* section IV.B.

156. *See, e.g.*, *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) (noting that rational basis review applies to “social or economic policy”).

157. *Yim v. City of Seattle (Yim III)*, 63 F.4th 783, 798 (9th Cir. 2023).

II. THE SUBSTANTIVE DUE PROCESS CLAIMS IN *YIM V. CITY OF SEATTLE*

In 2017, the plaintiffs in *Yim v. City of Seattle* challenged Seattle’s Fair Chance Housing Ordinance (FCHO) on state and federal substantive due process and free speech grounds.¹⁵⁸ The “core” of the FCHO prohibits landlords both from inquiring about prospective or current tenants’ criminal or arrest history and from taking adverse action against them based on that information.¹⁵⁹ For purposes of the FCHO, “adverse action” is defined as refusing to rent to a person, evicting them, or charging higher rent, among other things.¹⁶⁰

The *Yim* plaintiffs claimed that the FCHO deprived them of their fundamental right to exclude in violation of the Due Process Clause.¹⁶¹ The Yims themselves, for example, recounted in their briefs how they live in one unit of a triplex they own and rent out the other two units as well as a separate duplex.¹⁶² They protested that the FCHO effectively forced them to let a dangerous criminal into their own home.¹⁶³ But the Yims did not own just their one unit—they owned the other two and the duplex.¹⁶⁴ They do not live in the other units.¹⁶⁵ Nor do their friends or family rent the other units privately.¹⁶⁶ Instead, the Yims take applications from the

158. *Yim v. City of Seattle (Yim II)*, No. C18-0736, 2021 WL 2805377, at *1 (W.D. Wash. July 6, 2021). The plaintiffs were three landlords and the Rental Housing Association of Washington, a trade group providing tenant screening services and comprised of over 5,300 landlord members. *Id.*; see also *Yim v. City of Seattle (Yim I)*, 194 Wash. 2d 682, 687, 451 P.3d 694, 697 (2019) (clarifying the name and details of the Rental Housing Association of Washington).

159. *Yim II*, 2021 WL 2805377, at *1.

160. See SEATTLE, WASH., MUN. CODE § 14.09.010 (2020); *Yim II*, 2021 WL 2805377, at *1 n.2.

161. E.g., Appellants’ Opening Brief at 45, *Yim v. City of Seattle (Yim III)*, 63 F.4th 783 (9th Cir. 2023) (No. 21-35567).

162. *Id.* at 11.

163. Cf. Plaintiffs’ Opposition to City’s Cross-Motion for Summary Judgment and Reply in Support of Motion for Summary Judgment at 1, *Yim II*, 2021 WL 2805377 (No. 2:18-cv-00736) (“As a result of the Fair Chance Housing Ordinance, . . . Chong and MariLyn Yim cannot check the criminal background of applicants who will live as roommates with their current tenants or who will share a triplex and a yard with the Yims and their children. . . . The City has a panoply of tools at its disposal to address the challenges faced by individuals with a criminal history. It cannot thrust the burden of solving this social problem onto the shoulders of individual landlords.”); Brief of the Cato Institute as *Amicus Curiae* in Support of Plaintiffs-Appellants at 1–2, *Yim III*, 63 F.4th 783 (No. 21-35567) (“Seattle’s Fair Chance Housing Ordinance . . . prevent[s] landlords from inquiring into the criminal background of lease applicants, potentially exposing them to dangerous tenants, and forcing them to host unwelcome guests.”).

164. See *supra* note 162 and accompanying text.

165. See *supra* note 162 and accompanying text.

166. Cf. Appellants’ Opening Brief at 11, *Yim III*, 63 F.4th 783 (No. 21-35567) (noting that the Yims “rent out” the other units and that their tenants “occasionally need to find new roommates,” without any indication that the Yims rent to family or friends).

general public.¹⁶⁷ This makes their triplex and duplex commercial property,¹⁶⁸ which, as I argue in Parts III and IV, makes their regulation a legitimate exercise of government power that should be subject to rational basis review.

This Part discusses three opinions in *Yim*'s procedural history.¹⁶⁹ Doing so presents a challenge for easily distinguishing the three. I have provided them with short names that reflect their chronology. *Yim I* is the Washington State Supreme Court's 2019 response to certain certified questions from the federal district court hearing the main case. This "main case" before the federal district court is *Yim II*, which was decided in 2021. *Yim II* is discussed here first in section II.A, however, both because it was the main case and also to provide context for the state law issues in *Yim I* that were essential to *Yim II*'s ultimate disposition. Section II.B then discusses the state law issues in *Yim I* before briefly applying the answers to the certified questions to *Yim II*'s state law dispute. Finally, *Yim III* is the 2023 decision of the Ninth Circuit Court of Appeals discussed in section II.C. When unadorned, *Yim* refers to the underlying dispute in its entirety and not to any of the decisions in particular.

A. *The Federal Substantive Due Process Challenge in Yim II*

The basis of the *Yim* plaintiffs' substantive due process claims was the FCHO's "adverse action provision," which prohibits "any person" from "tak[ing] an adverse action against a prospective occupant, a tenant, or a member of their household, based on any arrest record, conviction record, or criminal history."¹⁷⁰ The plaintiffs argued this provision deprived them of their "right to rent their property to whom they choose, . . . subject to reasonable anti-discrimination measures."¹⁷¹ In support of this proposition, the plaintiffs cited the 1923 case *Terrace v. Thompson*,¹⁷² in which the Supreme Court upheld against a due process challenge a since-repealed provision of Washington State's Constitution that forbade non-citizens from owning land within the state with certain exceptions.¹⁷³ The

167. Cf. *supra* note 166 and accompanying text noting that the Yims rent their units out privately.

168. See Chen, *Commercial Property*, *supra* note 34.

169. Although *Yim* also involved a First Amendment claim, only the substantive due process claims are considered in this Comment—except as to the issue of Seattle's burden of proof. See *infra* notes 185–192 and accompanying text.

170. SEATTLE, WASH., MUN. CODE § 14.09.025(A)(2) (2018).

171. *Yim II*, No. C18-0736, 2021 WL 2805377, at *2 (W.D. Wash. July 6, 2021).

172. 263 U.S. 197 (1923).

173. *Id.* at 212–13, 218; see also WASH. CONST. art. II, § 33 (repealed 1966) (forbidding "aliens" from owning real property as a general rule).

plaintiffs also relied on *Cedar Point Nursery v. Hassid*,¹⁷⁴ a case “decided well after [the plaintiffs] filed their complaint,”¹⁷⁵ in which the United States Supreme Court held that a physical taking occurred where a California agricultural labor law allowed union organizers onto agricultural employers’ property up to three hours per day, 120 days per year.¹⁷⁶

The district court in *Yim II* assumed without deciding that the FCHO deprived the plaintiffs of the right claimed.¹⁷⁷ The court did not expressly state whether the “right to rent [one’s] property to whom [one] choose[s]” is fundamental for substantive due process purposes.¹⁷⁸ But it did invoke the Supreme Court’s “clear” guidance that “[p]roperty interests *are not created by the Constitution*, ‘they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.’”¹⁷⁹ In moving to the next point of analysis, the proper standard of review, the court cited a now-familiar line of cases challenging property regulations: *Euclid*, *Exxon Corp.*, and *Lingle*.¹⁸⁰ In so doing, it restated the rational basis test for substantive due process challenges to property regulations: “[A] municipal ordinance does not violate a property owner’s substantive due process rights unless it is ‘clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals[,] or general welfare.’”¹⁸¹ As mentioned, rights that are neither fundamental nor enumerated are protected only by rational basis review when regulated.¹⁸² Under the framework above, the district court easily determined that the plaintiffs’ claimed right was not fundamental for substantive due process purposes.¹⁸³

The district court ruled on summary judgment that the FCHO comfortably survived rational basis review.¹⁸⁴ This ruling relied on the plaintiffs’ additional challenge to the FCHO’s “inquiry provision” on free

174. 594 U.S. ___, 141 S. Ct. 2063 (2021).

175. *Yim II*, 2021 WL 2805377, at *2.

176. *Cedar Point Nursery*, 141 S. Ct. at 2069, 2077. *Cedar Point* is discussed further *infra* in section IV.A.

177. *Yim II*, 2021 WL 2805377, at *2.

178. *Id.*

179. *Id.* (emphasis added) (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)). Of course, fundamental rights—as opposed to enumerated rights—are not created by the Constitution by definition. See *supra* note 42–44 and accompanying text.

180. *Yim II*, 2021 WL 2805377, at *3.

181. *Id.* (quoting *Vill. of Euclid v. Ambler Realty Corp.*, 272 U.S. 365, 395 (1926)).

182. See *supra* notes 39–43 and accompanying text.

183. Cf. *Yim II*, 2021 WL 2805377, at *3 (concluding that rational basis review applied and rejecting the plaintiffs’ argument to apply heightened scrutiny).

184. *Id.* at *1, *3.

speech grounds.¹⁸⁵ The inquiry provision prohibited “any person” from “inquir[ing] about” the arrest record, conviction record, or criminal history of any prospective occupant or tenant or a member of their household, even if responding to such inquiry was not otherwise required.¹⁸⁶ Although analysis of such a claim is beyond the scope of this Comment, the burden of proof this claim required of Seattle *is* relevant. In short, the district court ruled that the inquiry provision regulated the plaintiffs’ commercial speech.¹⁸⁷ To survive judicial review, such a regulation had to satisfy a three-part test: “First, the government must assert a substantial interest in support of the regulation; second, the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and third, the regulation must be narrowly drawn.”¹⁸⁸ This is an intermediate scrutiny test,¹⁸⁹ essentially a cognate to heightened scrutiny.¹⁹⁰ Anything that survives heightened or intermediate scrutiny necessarily would also survive the less exacting rational basis test.¹⁹¹ The court ruled that by meeting the free speech claim’s intermediate scrutiny test, the FCHO also survived the substantive due process claims’ rational basis review.¹⁹²

In other words, the district court ruled that the interests underlying the adverse action and inquiry provisions were “directly advance[d]” by both.¹⁹³ These interests were “reduc[ing] the barriers to housing faced by people with criminal records and . . . lessen[ing] the use of criminal history as a proxy to discriminate against people of color disproportionately represented in the criminal justice system.”¹⁹⁴ Oddly, the court never *directly* considered the efficacy of the adverse action provision, but instead found that the FCHO supported these interests as a

185. *See id.* at *3.

186. *Id.* at *4 (quoting SEATTLE, WASH., MUN. CODE § 14.09.025(A)(2) (2018)). The inquiry provision was struck down in *Yim III* on First Amendment grounds. *See Yim v. City of Seattle (Yim III)*, 63 F.4th 783, 787 (9th Cir. 2023).

187. *Yim II*, 2021 WL 2805377, at *7.

188. *Id.* (quotation marks omitted) (citing *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618, 624 (1995)).

189. *Id.* at *5.

190. *Intermediate Scrutiny*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/intermediate_scrutiny [<https://perma.cc/F93Z-ZNKV>].

191. *See, e.g., Yim II*, 2021 WL 2805377, at *3 (noting that because restrictions on rights survive rational basis review when they can “advance any legitimate government purpose,” rational basis is necessarily satisfied where such regulations “directly advance[] those legitimate purposes” by surviving intermediate scrutiny).

192. *Id.*

193. *Id.*

194. *Id.* at *8; *see also id.* at *8 n.13 (recognizing Seattle’s third, unargued interest in “counteracting the disparate impact the use of criminal history in housing decisions has on people of color, even absent intentional discrimination”).

whole after evaluating the inquiry provision.¹⁹⁵ Presumably, the court concluded that the FCHO's various provisions complementarily achieved the same purpose of preventing landlords making rental decisions from using criminal history either on its own terms or as a proxy for race.¹⁹⁶ Indeed, prohibiting the actual use of such information to deny applicants or commence eviction proceedings against tenants achieves the same ends as prohibiting access to that information in the first place: preventing such history from being a basis for denying rental opportunities.

Ultimately, the court did not even need to demonstrate how the adverse action provision directly supported Seattle's interests: in the due process context, the "actual effectiveness" of property regulations in achieving their stated purpose or purposes is "not relevant."¹⁹⁷ The court could determine that the adverse action provision "directly advance[d]" Seattle's interests without explaining that conclusion due to both the provision's consonance with the broader FCHO's effectiveness and the requirement that such provision only have a "reasonable relation" to Seattle's interests.¹⁹⁸ In other words, because the adverse action and inquiry provisions' effects were so similar—preventing the use of criminal history in rental decisions—the fact that the latter provision directly advanced that interest supported the view that the former was at least reasonably related to that interest as well.

Because the FCHO directly advanced the public health, safety, morals, or general welfare, the district court ruled that the plaintiffs' federal substantive due process challenge failed.¹⁹⁹

B. The Substantive Due Process Challenge Under Washington Law in Yim I

The analysis up to this point has been based on federal substantive due process jurisprudence in the property context.²⁰⁰ But recall that the *Yim* plaintiffs also challenged the FCHO under Washington's Due Process Clause. This section begins by using *Presbytery of Seattle v.*

195. *Id.* at *3.

196. *Cf. id.* at *11, *13 (ruling that Seattle reasonably concluded that prohibiting inquiries into criminal history would reduce barriers to housing for people with such history and implemented reasonable means for achieving its goal of combatting the use of criminal history as a pretext for racial discrimination).

197. *Id.* at *3 (noting that the standard is "whether the Ordinance could advance any legitimate . . . purpose").

198. *Id.*

199. *Id.*

200. *See supra* section II.A.

King County,²⁰¹ a 1990 decision by the Washington State Supreme Court, as a case study for the heightened scrutiny previously used in substantive due process challenges to property regulations under Washington State's Constitution. The discussion then turns to *Yim I* to examine how the Washington State Supreme Court held that rational basis review applied to the plaintiffs' substantive due process challenge to the FCHO under Washington law.

In the course of litigation, the federal district court certified questions to the Washington State Supreme Court regarding Washington's standard for substantive due process challenges to property regulations.²⁰² In *Yim I*, the Court answered these questions by holding that, at present, "state substantive due process claims are subject to the same standards as federal substantive due process claims"²⁰³ and that rational basis review applied to the plaintiffs' due process challenge to the FCHO under Washington law.²⁰⁴

But the path to this holding required abrogating at least sixty-one cases decided over 129 years.²⁰⁵ Prior to the decision in *Yim I*, the plaintiffs undeniably had a strong precedential basis for the proposition that Washington's Due Process Clause required some form of heightened scrutiny—in the form of the "substantially advances," "substantial

201. 114 Wash. 2d 320, 787 P.2d 907 (1990).

202. See *Yim v. City of Seattle (Yim I)*, 194 Wash. 2d 682, 686, 451 P.3d 694, 696 (2019).

203. *Id.* But see *id.* (holding that such congruence will be maintained "[u]nless and until [the Court] adopts heightened protections as a matter of independent state law").

204. *Id.*; see also WASH. CONST. art. I, § 3 ("No person shall be deprived of life, liberty, or property, without due process of law."). The text of Washington's Due Process Clause directly mirrors the text of the Due Process Clauses in the Constitution of the United States. See *supra* notes 2–3 and accompanying text.

205. See *Yim I*, 194 Wash. 2d at 702–04, 451 P.3d at 704–06.

relation,”²⁰⁶ and “unduly oppressive”²⁰⁷ tests—for regulations of property.²⁰⁸ These tests are explained below.

The Washington State Supreme Court most thoroughly fleshed out the heightened scrutiny that applied in substantive due process challenges to property regulations pre-*Yim I* in *Presbytery*. *Presbytery* involved a challenge to a 1986 King County ordinance that prohibited the development of wetlands and provided for buffer zones surrounding those wetlands.²⁰⁹ The Presbytery of Seattle had bought a parcel of land in 1978 on which it intended to build a church.²¹⁰ The Presbytery challenged the ordinance on the basis that it rendered unusable three or four of the five lots allowed under the County’s zoning code.²¹¹ The County argued that the Presbytery nevertheless could construct both a church and parking lot on the premises.²¹² The trial court granted the County’s motion to dismiss on the basis that, at the time of its challenge, the Presbytery had never actually applied for a building permit for the church and therefore did not exhaust its administrative remedies.²¹³ The court of appeals affirmed the trial court’s dismissal.²¹⁴

The Washington State Supreme Court could not fully evaluate the merits of the Presbytery’s substantive due process challenge because the Presbytery’s failure to exhaust administrative remedies left an

206. The Court noted that it has “occasionally suggested that a ‘substantial relation’ test applies and that this test requires *heightened scrutiny* by asking whether police power regulations bear a ‘real or substantial relation’ (as opposed to a merely rational relation) to legitimate government purposes.” *Id.* at 691, 451 P.3d at 698 (emphasis added) (quoting *State ex rel. Brislawn v. Meath*, 84 Wash. 302, 313, 147 P. 11, 15 (1915)). See generally *id.* at 696–98, 451 P.3d at 701–02 (treating the “substantially advances” and “substantial relation” tests as synonymous and indicating that the “substantially advances” test derived from the “substantial relation” test). However, the Court also noted that the “substantially advances” test has been rejected and that the “substantial relation” test is no longer understood to require heightened scrutiny. *Id.* at 696, 451 P.3d at 701.

207. Similarly,

[w]e recognize that in a number of cases, this court has recited the “unduly oppressive” test, which appears to exceed rational basis review by asking “(1) whether the regulation is aimed at achieving a legitimate public purpose; (2) whether it uses means that are reasonably necessary to achieve that purpose; and (3) whether it is unduly oppressive on the landowner.”

Id. at 690, 451 P.3d at 698 (emphasis added) (citing *Presbytery of Seattle v. King County*, 114 Wash. 2d 320, 330, 787 P.2d 907, 913 (1990)).

208. See *id.* at 700 n.6, 451 P.3d at 703 n.6 (listing dozens of cases cited by the plaintiffs); *id.* at 693–94, 451 P.3d at 700 (recategorizing the “substantially advances” and “unduly oppressive” tests as requiring rational basis review).

209. *Presbytery*, 114 Wash. 2d at 323–24, 787 P.2d at 909–10.

210. *Id.* at 323, 787 P.2d at 909.

211. See *id.* at 325, 787 P.2d at 910.

212. *Id.* at 326, 787 P.2d at 910.

213. *Id.*

214. *Id.* at 326, 787 P.2d at 911.

underdeveloped record.²¹⁵ However, in reaching this determination, the Court provided the test for substantive due process challenges to property regulations that controlled until *Presbytery* was abrogated by *Yim II*. Specifically, to determine whether a property regulation violated a property owner's substantive due process rights, Washington courts had to consider "(1) whether the regulation [was] aimed at achieving a legitimate public purpose; (2) whether it use[d] means that [were] reasonably necessary to achieve that purpose; and (3) whether it [was] unduly oppressive on the land owner."²¹⁶ The Court added that the "unduly oppressive" inquiry entailed balancing the public interest against the landowner's interests—specifically, "the nature of the harm sought to be avoided; the availability and effectiveness of less drastic protective measures; and the economic loss suffered by the property owner."²¹⁷ And, most tellingly, the Court noted that the "unduly oppressive" factor was usually difficult because it involved a fact-intensive balancing of the public's interests with those of the affected landowners.²¹⁸ Compared to the lenience of rational basis review, the test outlined in *Presbytery* demonstrates that property owners received stronger due process protections under the Washington Constitution than under the federal Constitution—at least, until *Yim I* was decided.

The basis for the *Yim I* Court's shift was that the "legal underpinnings" for heightened scrutiny under the "substantially advances" and "unduly oppressive" tests had "disappeared."²¹⁹ This is one basis for abrogating precedent in Washington.²²⁰ Likely because Washington's Due Process Clause mirrors the Due Process Clauses in the Fifth and Fourteenth Amendments,²²¹ Washington's substantive due process jurisprudence tracks federal substantive due process jurisprudence—albeit with *Yim I*'s added caveat that Washington could adopt "heightened protections as a matter of independent state law."²²² Consequently, the Court could say it had "never before required heightened scrutiny in

215. *Id.* at 337, 787 P.2d at 916.

216. *Id.* at 330, 787 P.2d at 913.

217. *Id.* at 331, 787 P.2d at 913.

218. *See id.*

219. *Yim v. City of Seattle (Yim I)*, 194 Wash. 2d 682, 690, 451 P.3d 694, 698 (2019).

220. *See id.* at 692, 451 P.3d at 699 (citing *W.G. Clark Constr. Co. v. Pac. Nw. Reg'l Council of Carpenters*, 180 Wash. 2d 54, 66, 322 P.3d 1207, 1212 (2014)).

221. *See supra* note 204 and accompanying text.

222. *Yim I*, 194 Wash. 2d at 686, 451 P.3d at 696.

substantive due process challenges to laws regulating the use of property as a matter of independent state law” without contradicting itself.²²³

The Court traced the genesis of the three heightened scrutiny tests to federal case law: *Lawton v. Steele*²²⁴ and *Goldblatt v. Town of Hempstead*²²⁵ for the “unduly oppressive” test;²²⁶ *Mugler v. Kansas* for the “substantial relation” test;²²⁷ and *Agins v. City of Tiburon*, *Nectow v. City of Cambridge*,²²⁸ and *Village of Euclid v. Ambler Realty Co.* for the “substantially advances” test.²²⁹ But the Court also noted that neither the “unduly oppressive” nor the “substantial relation” test are “interpreted as requiring heightened scrutiny” post-*Lingle*, and that the “substantially advances” test “has been explicitly rejected.”²³⁰ Consequently, the Court concluded that “a law that regulates the use of property violates substantive due process,” under current federal constitutional jurisprudence, “only if it ‘fails to serve any legitimate governmental objective,’ making it ‘arbitrary or irrational.’”²³¹ This is classic rational basis review as applied to substantive due process claims.²³²

Of course, it is not enough that these tests have been abandoned in federal substantive due process law for regulations of property. The Court also had to determine whether the use of property is a fundamental right for substantive due process purposes.²³³ It answered in the negative.²³⁴ A central point here addressed the plaintiffs’ citation of numerous cases, mostly from the takings context, that discuss the importance of property rights.²³⁵ The Court responded: “We do not question that property rights are important. However, . . . the United States Supreme Court has also made it clear that takings claims and substantive due process claims are

223. *Id.* at 690, 451 P.3d at 698 (emphasis omitted). The right claimed by plaintiffs—or, at least, as the various courts have cast it—has varied over the course of litigation. Compare *Yim v. City of Seattle (Yim II)*, No. C18-0736, 2021 WL 2805377 (W.D. Wash. July 6, 2021) (right to “rent [one’s] property to whom [one] choose[s], . . . subject to reasonable anti-discrimination measures”), with *Yim I*, 194 Wash. 2d 682, 451 P.3d 694 (right to use property), and Appellants’ Opening Brief at 3–4, 45–50, *Yim v. City of Seattle (Yim III)*, 63 F.4th 783 (9th Cir. 2023) (No. 21-35567) (right to exclude).

224. 152 U.S. 133, 137 (1894).

225. 369 U.S. 590, 594–95 (1962).

226. *Yim I*, 194 Wash. 2d at 691, 451 P.3d at 699.

227. *Id.*

228. 277 U.S. 183, 188 (1928).

229. *Yim I*, 194 Wash. 2d at 697, 451 P.3d at 701.

230. *Id.* at 693–94, 451 P.3d at 700.

231. *Id.* at 698, 451 P.3d at 702 (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005)).

232. *Id.*

233. See *id.* at 699, 451 P.3d at 702.

234. See *id.* at 701, 451 P.3d at 704.

235. See *id.* at 699–700 n.5, 451 P.3d at 703 n.5.

different matters involving different considerations.”²³⁶ Critically, none of the cases the plaintiffs cited held that the right to use property (let alone the right to exclude) is a fundamental right for substantive due process purposes.²³⁷

The Court also relied on two other points to conclude that the right to use property is not a fundamental right for substantive due process purposes. First, it quoted *Olympic Stewardship Foundation v. Environmental & Land Use Hearings Office*,²³⁸ a Washington Court of Appeals decision that held that the right to use one’s property is not a fundamental right for due process purposes.²³⁹ Notably, both the Washington State Supreme Court and the United States Supreme Court declined to review *Olympic Stewardship Foundation*.²⁴⁰ Second, the Court also rejected the plaintiffs’ reliance on numerous state and federal cases applying the “substantial relation” and “unduly oppressive” tests for the proposition that the right to use property is a fundamental right.²⁴¹ The Washington State Supreme Court noted that such cases could not be read to sustain that conclusion for the very reasons noted previously: “[B]oth tests are now interpreted as deferential standards corresponding to rational basis review.”²⁴²

Ultimately, in *Yim I* the Washington State Supreme Court held that rational basis review applies to substantive due process challenges to property regulations under Washington law.²⁴³ This is because federal law does not impose heightened scrutiny on such regulations and because the right to use property is not a fundamental right for substantive due process purposes.²⁴⁴ And, critically, the *Yim I* Court also held that state substantive due process claims “are subject to the same standards” as their federal counterparts “[u]nless and until th[e] court recognizes a principled basis

236. *Id.* at 700, 451 P.3d at 703 (citing *Lingle*, 544 U.S. at 541–42). For a discussion of how the importance of property rights does not translate into their fundamentality for substantive due process purposes, see *infra* section IV.D. For a critique of the plaintiffs’ continued reliance on takings jurisprudence, see *infra* section IV.A.

237. *Yim I*, 194 Wash. 2d at 700, 451 P.3d at 703.

238. 199 Wash. App. 668, 399 P.3d 562 (2017), *review denied*, 189 Wash. 2d 1040, 409 P.3d 1066 (2018), *cert. denied*, ___ U.S. ___, 139 S. Ct. 81 (2018).

239. *Yim I*, 194 Wash. 2d at 699, 451 P.3d at 703 (quoting *Olympic Stewardship Found.*, 199 Wash. App. at 720–21, 399 P.3d at 586).

240. For the subsequent history noted for *Olympic Stewardship Foundation*, see *supra* note 238.

241. *Yim I*, 194 Wash. 2d at 701, 451 P.3d at 703.

242. *Id.* at 701, 451 P.3d at 704.

243. *Id.* at 701–02, 451 P.3d at 704.

244. *Id.* at 701, 451 P.3d at 704.

for adopting heightened protections as [a] matter of independent state law.”²⁴⁵

Therefore, due to the facts that *Yim I* was a certified question from the federal district court hearing *Yim II* and that the standards for federal substantive due process challenges to property regulations apply to their Washington counterparts, the federal district court in *Yim II* ruled that its analysis of the plaintiffs’ federal and state substantive due process clause claims “merge[d]” under a rational basis review standard.²⁴⁶ Because the plaintiffs did not survive summary judgment on their federal substantive due process claim, they likewise could not survive it on their claim under Washington State’s Constitution.²⁴⁷

C. *The Ninth Circuit’s Consideration of Yim III*

On appeal, the Ninth Circuit rejected the *Yim* plaintiffs’ substantive due process arguments in quick order.²⁴⁸ First, it observed that the plaintiffs argued the court should apply strict scrutiny.²⁴⁹ The court rejected this argument, noting that “the Supreme Court has never recognized the right to exclude as a ‘fundamental’ right in the context of the Due Process Clause.”²⁵⁰ It went a step further and added that the “right to use property as one wishes is also not a fundamental right.”²⁵¹ Thus, the court held that rational basis review applied.²⁵²

The court then had to address the plaintiffs’ alternative argument that under *Lingle v. Chevron U.S.A. Inc.*, a “slightly heightened form of scrutiny” applied to their challenge to the FCHO.²⁵³ This argument raised the familiar “substantially advances” test.²⁵⁴ But the court rejected this argument as well: “While *Lingle* rejected a form of heightened scrutiny in

245. *Id.* at 686, 451 P.3d at 696.

246. *Yim v. City of Seattle (Yim II)*, No. C18-0736, 2021 WL 2805377, at *2 (W.D. Wash. July 6, 2021), *rev’d in part on other grounds*, 63 F.4th 783 (9th Cir. 2023).

247. *See id.* at *2–3 (granting the City of Seattle’s motion for summary judgment on the plaintiffs’ “merged” substantive due process claims).

248. The court spent four paragraphs—just over one page of its thirteen-page majority opinion—discussing the substantive due process claims. *See Yim v. City of Seattle (Yim III)*, 63 F.4th 783 (9th Cir. 2023). The court did reverse on the commercial speech claim. *Id.* at 798.

249. *Id.*

250. *Id.* The Ninth Circuit did, however, cite a line of Takings Clause cases that have discussed the right to exclude as “fundamental”; the first citation there was *Cedar Point Nursery v. Hassid*, 594 U.S. ___, 141 S. Ct. 2063 (2021). *Yim III*, 63 F.4th at 798.

251. *Id.* at 798 (quoting *Slidewaters LLC v. Wash. Dep’t of Lab. & Indus.*, 4 F.4th 747, 758 (9th Cir. 2021)).

252. *Id.*

253. *See id.*

254. *See id.*

Takings Clause challenges, it did not address or change the standard for substantive due process challenges.”²⁵⁵ As a result, the court noted that it continues to apply rational basis review for substantive due process challenges concerning property rights that are not fundamental for substantive due process purposes.²⁵⁶

Finally, the court applied rational basis review to the FCHO.²⁵⁷ To satisfy this level of scrutiny, the City of Seattle had to offer a “‘legitimate reason’ for passing the ordinance.”²⁵⁸ The court held that the City met this burden because it offered two legitimate rationales for the adverse action provision: reducing barriers to housing faced by persons with criminal records and lessening the use of criminal history as a proxy for racial discrimination.²⁵⁹ The court held that the plaintiffs failed to “seriously challenge the obvious conclusion” that the adverse action provision was legitimately related to accomplishing those goals.²⁶⁰ Therefore, the court found that adverse action provision “easily” survived rational basis review.²⁶¹

Thus, over the course of three opinions the *Yim* plaintiffs’ substantive due process arguments lost three times. But this was essentially a result of precedent, and precedent can be overturned.²⁶² This risk is all the more real for two reasons: the current Supreme Court’s strong language in favor of both the right to exclude and property rights generally,²⁶³ and the fact that the Court may hear *Yim* in its upcoming term or, perhaps, a similar case in the near future before the Court’s composition changes. In the remaining Parts of this Comment, I provide reasons why the right to exclude (and property rights more generally) should not be recognized as fundamental for substantive due process purposes. In other words, I outline why the Supreme Court should not overturn its long history of applying rational basis review to property regulations.

255. *Id.* at 798.

256. *Id.* at 798–99 (first citing *Samson v. City of Bainbridge Island*, 683 F.3d 1051, 1058 (9th Cir. 2012); and then citing *Shanks v. Dressel*, 540 F.3d 1082, 1088–89 (9th Cir. 2008)).

257. *See id.* at 799.

258. *Id.* (quoting *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1234 (9th Cir. 1994)).

259. *Id.*

260. *Id.*

261. *Id.*

262. *See, e.g., Yim v. City of Seattle (Yim I)*, 194 Wash. 2d 682, 693 n.3, app., 451 P.3d 694, 699 n.3, app. (2019) (overturning the use of heightened scrutiny as “no longer good law” in dozens of Washington cases entertaining substantive due process challenges to property regulations); *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. ___, 142 S. Ct. 2228 (2022) (overturning *Roe v. Wade*, 410 U.S. 113 (1973), *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), and other cases spanning nearly half a century that recognized a constitutional right to have an abortion).

263. *See infra* section IV.A.

III. COMMERCIAL PROPERTY IS PROPERLY A SUBJECT OF COMMUNITY CONCERN AND REGULATION

Rational basis review is the proper tier of scrutiny for property regulations because such regulations are properly within the sphere of legitimate community concern and control. This Part furnishes the conceptual link between the community's heightened stake in commercial property and an underrecognized, longstanding conception of property centering the general welfare.²⁶⁴ The effects of commercial use on people other than the property's owner or possessor are greater in reach and scope than when property is used purely for residential purposes. This heightens the community's stake in regulating the uses of commercial property to prevent harm to the general welfare.

The traditional, American view of property sees it as an institution controlled exclusively by the individual according to their personal preferences.²⁶⁵ That is, private property marks one boundary between legitimate government regulation and private liberty free from government coercion or control.²⁶⁶ One property scholar, Gregory S. Alexander, understands this "preference-satisfying conception" of property to render it a market commodity.²⁶⁷ This is because "[p]roperty satisfies individual preferences most effectively through the process of market exchange."²⁶⁸ Alexander short-hands this understanding of property as the "commodity theory of property."²⁶⁹ This theory remains popular in the public imagination as well as in the political and legal spheres.²⁷⁰

But this view, although dominant throughout American history,²⁷¹ has always been in competition with another view about the purpose of property.²⁷² This other view, which Alexander terms "proprietary," sees

264. Gregory S. Alexander argues that two main understandings of property have predominated throughout the history of American legal thought. GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776–1970* (1997). The conception noted here has historically been the less dominant of the two. *See id.* The other view is described *infra* notes 265–270 and accompanying text.

265. *See id.* at 1.

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. *See id.* at 379; *see also, e.g.*, Milton Friedman, *Private Property*, NAT'L REV., Nov. 5, 1990, 55, 56 ("Private property means the right to use the income generated by your property as you wish It means also the right to transfer the property to someone else at mutually agreeable terms.").

271. *See* ALEXANDER, *supra* note 264, at 5.

272. *Id.* at 1.

property as the “material foundation for creating and maintaining the proper social order, the private basis for the public good.”²⁷³ The proprietarian tradition, Alexander argues, understands individuals as “inherently social being[s]” who inevitably depend on others “not only to thrive but even just to survive. This irreducible interdependency means that individuals owe one another obligations, not by virtue of consent alone but as an inherent incident of the human condition.”²⁷⁴

The basis for community regulation of property used for commercial purposes is that commerce is central to our livelihoods. We depend on commerce for the necessities of life: food, shelter, clothing, and the like. In our country, these necessities almost invariably come not from the government, but from private vendors. These vendors take on a government-like role by limiting the rights of others to access to necessities they offer. Of course, in a market society there is always the chance that one vendor’s refusal to engage with a given patron or class of patrons is another vendor’s business opportunity. But this does not apply in cases of monopolies. When a utility monopoly refuses to deal with a given person, for example, the person is forced to access the utility by some other means. Taken to its extreme, vendors’ right to control access to the necessities they provide is a chance to deny certain people what they need to survive.²⁷⁵

Where the right to control access to a given good or service is abused, the private sphere is doing the opposite of what the proprietarian view of property expects it to do by undermining the public sphere. Is the community just supposed to submit to the personal preferences of those lucky enough to be in a position to control access to the necessities of life? An affirmative answer would deny communities the full breadth of their police powers to regulate in the interest of the public welfare.²⁷⁶

The United States Supreme Court has taken this view. In *Marsh v. Alabama*,²⁷⁷ for example, the Court noted that “[o]wnership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of

273. *Id.*

274. *Id.* at 1–2.

275. *Cf.* Cohen, *supra* note 1, at 13 (“[D]ominion over things is also *imperium* over our fellow human beings.”).

276. *Cf. id.* at 21 (“The state . . . must interfere in order that individual rights should become effective and not degenerate into public nuisances. . . . To be really effective, therefore, the right of property must be supported by restrictions or positive duties on the part of owners, enforced by the state as much as the right to exclude others . . .”).

277. 326 U.S. 501 (1946).

those who use it.”²⁷⁸ And in *Berman v. Parker*,²⁷⁹ the Court made explicit the link between exercises of the police power in the interest of the public welfare and some regulation of private property:

Public safety, public health, morality, peace and quiet, law and order . . . merely illustrate the scope of the [police] power and do not delimit it. Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. . . .

We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.²⁸⁰

The situation is different for residential property. Residential property inherently does not affect others’ access to the necessities of life. When someone denies a potential visitor entry to their home, they do not inherently deny the visitor access to shelter because the visitor may have their own. But when someone denies a potential tenant, they have denied the person access to at least that particular shelter.

The upshot is that when a state or municipality exerts control over the right to exclude from commercial property, it is acting in the interest of public welfare by structuring the terms of commerce and deciding which reasons are valid to refuse to engage with a potential patron. Throughout the *Yim* litigation, this has manifested as preventing landlords from being major structural barriers to shelter for people with criminal histories. Access to shelter for these persons is a proven way to reduce recidivism.²⁸¹ Allowing Seattle to regulate landlords’ ability to deny people with criminal histories in turn allows the city to mitigate the social harms that can arise from recidivism. The principle to be gleaned, therefore, is that

278. *Id.* at 506.

279. 348 U.S. 26 (1954).

280. *Id.* at 32–33 (citations omitted).

281. See, e.g., JOCELYN FONTAINE & JENNIFER BIESS, WHAT WORKS COLLABORATIVE, HOUSING AS A PLATFORM FOR FORMERLY INCARCERATED PERSONS 1 (2012), <https://www.urban.org/sites/default/files/publication/25321/412552-Housing-as-a-Platform-for-Formerly-Incarcerated-Persons.PDF> [<https://perma.cc/E3B2-WTF5>] (“While housing for formerly incarcerated persons is a source of necessary shelter and residential stability, it can also serve as the literal and figurative foundation for successful reentry and reintegration for released adults.” (emphasis omitted)).

communities have legitimate public welfare concerns that justify regulating the right to exclude from commercial property.

IV. THE RIGHT TO EXCLUDE FROM COMMERCIAL PROPERTY IS NOT A FUNDAMENTAL RIGHT

This Part argues that the right to exclude is not a fundamental right, at least as far as commercial property is concerned. Section IV.A explores the recent takings case *Cedar Point Nursery v. Hassid*, on which the *Yim* plaintiffs have relied,²⁸² and, in particular, the especially strong language the majority opinion used about the right to exclude being “a fundamental element of the property right.”²⁸³ This section argues that the mere fact that the *Cedar Point Nursery* Court used the language of fundamental rights does not provide persuasive support for the argument that the right to exclude is also a fundamental right for substantive due process purposes. Section IV.B argues that classifying the right to exclude as a fundamental right warranting strict scrutiny would revive the *Lochner* era because the right to exclude is fundamentally an economic right rather than a liberty as such. Section IV.C argues that a decision rolling back the ability of states and municipalities to regulate property by subjecting certain property regulations to strict scrutiny would create chaos in the ordered management of the nation’s cities and towns. Section IV.D ends with the humble recognition that denying that the right to exclude is a fundamental right for substantive due process purposes does not mean that the right to exclude is not an important property right worth protecting vigorously.

A. General Constitutional Protection of a Right Does Not Guarantee It Strict Scrutiny Protection Under Substantive Due Process

Cedar Point Nursery—cited heavily by the plaintiffs in *Yim II*²⁸⁴ (the federal district court case) and *Yim III*²⁸⁵ (the Ninth Circuit case) and their

282. See *infra* notes 284–286 and accompanying text.

283. *Cedar Point Nursery v. Hassid*, 594 U.S. ___, 141 S. Ct. 2063, 2072 (2021) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)). The Court used similar language in another case in the same term. See *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 594 U.S. ___, 141 S. Ct. 2485, 2489 (2021) (“[P]reventing [landlords] from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude.”).

284. See Plaintiffs’ Third Notice of Supplemental Authority at 1, *Yim v. City of Seattle (Yim II)*, 2021 WL 2805377 (W.D. Wash. July 6, 2021) (No. 2:18-cv-00736).

285. Appellants’ Opening Brief at 3–4, 45–46, *Yim v. City of Seattle (Yim III)*, 63 F.4th 783 (9th Cir. 2023) (No. 21-35567).

petition for a writ of certiorari²⁸⁶—involved a takings claim against a California law providing labor organizers a right of access to agricultural employers’ property up to three hours per day, 120 days per year, in order to solicit support for unionization.²⁸⁷ The Court held that the law appropriated the employers’ right to exclude and thereby constituted a per se taking.²⁸⁸ But the significance of *Cedar Point Nursery* for this Comment is in its dicta²⁸⁹—and more specifically, in its discussion of the right to exclude.

The opinion opened with a philosophical exposition of the importance of property rights generally. It cited the Founders’ recognition “that the protection of private property is indispensable to the promotion of individual freedom.”²⁹⁰ Put another way, “[p]roperty must be secured, or liberty cannot exist.”²⁹¹ The Court then cited its own recent proclamation: “[P]rotection of property rights is ‘necessary to preserve freedom’ and ‘empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them.’”²⁹²

After a brief discussion of the framework for takings claims, the opinion addressed the importance of the right to exclude. It cited

286. Petition for Writ of Certiorari at 4, 17, 19, 26, 31, *Yim v. City of Seattle* (Sept. 26, 2023) (No. 23-329).

287. *Cedar Point Nursery*, 141 S. Ct. at 2069.

288. *Id.* at 2072, 2074. The stereotypical “physical” taking is one in which the government physically takes possession of one’s property without acquiring legal title to it, occupies the property, or uses the eminent domain power to formally condemn it. *Id.* at 2071. A per se taking, however, is one in which government regulation results in the physical appropriation of one’s property, *id.* at 2072, or “completely deprive[s] an owner of ‘all economically beneficial use[s]’ of their property.” *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) (second alteration in original) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992) (emphasis in original)). According to the majority opinion in *Cedar Point Nursery*, the California law at issue constituted a per se taking because it “appropriate[d] for the enjoyment of third parties the owners’ right to exclude” by providing union organizers “a right to physically enter and occupy” agricultural employers’ property up to three hours per day, 120 days per year. 141 S. Ct. at 2072. In any event, however, the difference between a per se taking and a physical taking is irrelevant to the analysis here.

289. *See generally Dicta*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/dicta> [<https://perma.cc/H2TV-5WWN>] (last updated Nov. 2022) (“Dicta in law refers to a comment, suggestion, or observation made by a judge in an opinion that is not necessary to resolve the case, and as such, it is not legally binding on other courts but may still be cited as persuasive authority in future litigation.”). This section discusses the Court’s framing of the right to exclude as a fundamental right in the Takings Clause context. Whether a right is a fundamental right in this context is irrelevant to whether a taking has occurred; for descriptions of the various takings tests—descriptions that notably lack any reference to whether a property right is fundamental—see *Cedar Point Nursery*, 141 S. Ct. at 2071–72.

290. *Cedar Point Nursery*, 141 S. Ct. at 2071.

291. *Id.* (quotation marks omitted) (quoting JOHN ADAMS, *Discourses on Davila, a Series of Papers on Political History*, reprinted in 6 THE WORKS OF JOHN ADAMS 223, 280 (Charles Francis Adams ed., 1851)).

292. *Id.* (citing *Murr v. Wisconsin*, 582 U.S. 383, 394 (2017)).

Blackstone's "exuberant" admonition that "property entails 'that sole and despotic dominion which one man claims and exercises over the external things of the world.'"²⁹³ It cited one scholar's influential assertion²⁹⁴ that the right to exclude is the "*sine qua non*" of property.²⁹⁵ And finally, the Court again cited itself for its central proposition that "the right to exclude is 'universally held to be a fundamental element of the property right.'"²⁹⁶

Cedar Point Nursery's final discussion of the right to exclude is in its rejoinder to the dissent. The dissent asserted that a "flexible" balancing test applies to regulations allowing physical invasions onto private property because such "latitude toward temporary invasions is a practical necessity for governing in our complex modern world."²⁹⁷ The majority strongly disagreed.²⁹⁸ It noted that it "cannot agree that the right to exclude is an empty formality, subject to modification at the government's pleasure."²⁹⁹ It also reiterated that the right to exclude is a fundamental property right "that cannot be balanced away."³⁰⁰ "With regard to the complexities of modern society," the majority added, such complexities "only reinforce the importance of safeguarding the basic property rights that help preserve individual liberty, as the Founders explained."³⁰¹ The majority's response to the dissent concluded by contextualizing it pejoratively within a long line of "permissive" approaches to property rights.³⁰²

In their appeal to the Ninth Circuit, the *Yim* plaintiffs seized on the language in *Cedar Point Nursery* to argue that this right is a fundamental right for substantive due process purposes.³⁰³ In a brief and curious line of

293. *Id.* at 2072 (quoting BLACKSTONE, *supra* note 21, at *2).

294. *See* Stern, *supra* note 17, at 60 (analyzing Thomas W. Merrill's "influential essay" *Property and the Right to Exclude*).

295. *Cedar Point Nursery*, 141 S. Ct. at 2073 (quoting Merrill, *supra* note 12, at 730). *See generally* 3 WEBSTER'S, *supra* note 12, at 2123 (defining "*sine qua non*" as "the one thing that is absolutely essential").

296. *Cedar Point Nursery*, 141 S. Ct. at 2072.

297. *Id.* at 2086–87.

298. *See id.* at 2077 ("[O]ur own understanding of the role of property rights in our constitutional order is markedly different.").

299. *Id.*

300. *Id.*

301. *Id.* at 2078.

302. *See id.* (first quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 455 (1982) (Blackmun, J., dissenting) ("[T]oday's decision . . . represents an archaic judicial response to a modern social problem."); and then quoting *United States v. Causby*, 328 U.S. 256, 275 (1946) (Black, J., dissenting) ("Today's opinion is, I fear, an opening wedge for an unwarranted judicial interference with the power of Congress to develop solutions for new and vital national problems.")).

303. *See* Appellants' Opening Brief at 45–46, *Yim v. City of Seattle (Yim III)*, 63 F.4th 783 (9th Cir. Oct. 29, 2021) (No. 21-35567).

argumentation, the plaintiffs attempted to overcome Seattle’s observation that the support for this assertion comes from takings cases by pointing out that Seattle “cites no authority for the idea that a right can be fundamental with respect to one constitutional provision but not another.”³⁰⁴ They contended that the idea that the right to exclude is fundamental in the Fifth Amendment’s Takings Clause but not the Fourteenth Amendment’s Due Process Clause violates both the canons of construction and common sense.³⁰⁵ In support of this contention, they cited the use of the word “property” in both clauses and the rule that “there is a natural *presumption* that identical words used in different parts of the same *act* are intended to have the same meaning.”³⁰⁶

The problem with this argument is that even if “property” means the same thing in both the Takings Clause and the Due Process Clause, that sameness is irrelevant to the protections each Clause affords. If the two Clauses did provide the same protections, then one of the two would be superfluous. It would also violate the principle of judicial restraint for the Supreme Court to have declared a fundamental right for both Takings Clause and Due Process Clause purposes in a case that did not involve the latter.³⁰⁷

It is also worth considering the textual meaning of both Clauses. Both contemplate that government may regulate or otherwise control private property. As noted above, the Takings Clause “does not bar government from interfering with property rights, but rather requires compensation ‘in the event of *otherwise proper interference* amounting to a taking.’”³⁰⁸ The Due Process Clause allows the government to regulate property as a general matter, provided that such regulation comports with due process.³⁰⁹ As the *Lingle* Court noted, due process conditions property regulations on the “pursuit of a valid public purpose.”³¹⁰ Hence, the

304. Appellants’ Reply Brief at 19, *Yim III*, 63 F.4th 783 (9th Cir. Feb. 18, 2022) (No. 21-35567).

305. *Id.*

306. *Id.* (emphasis added) (quoting *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932)).

307. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) (noting that it would violate judicial restraint for a court to “formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied” (quoting *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring))).

308. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005) (emphasis in original) (quoting *First Eng. Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304, 315 (1987)).

309. *See supra* section I.A.

310. *Lingle*, 544 U.S. at 543.

baseline protection due process affords is immunity from government action that is arbitrary or capricious.³¹¹

In sum, the right to exclude is not fundamental in the substantive due process context merely because the Supreme Court has called it fundamental in the takings context. Citations to Takings Clause jurisprudence to make such an argument rely on law that is irrelevant to the due process context.

B. The Right to Exclude from Commercial Property Is Economic and Unfit for Strict Scrutiny

The right to exclude from commercial property is an economic liberty, which means that, under a mountain of precedent, it would be subject to rational basis review.³¹² The starting point for this section is the distinction between liberties and property rights—the two (relevant)³¹³ prongs of the Due Process Clause. This Comment is not concerned with the philosophical distinctions or gray areas between the two. However, it suffices to say as a general matter that liberties are freedoms or rights that belong to individuals as such.³¹⁴ And, again as a general matter, property rights require an object to which they can attach and structure the rights or duties between individuals.³¹⁵ The freedom of movement, for example, is a product of an individual's physical capacity to move. But the right to, say, drive a car depends on the prior act of legally acquiring some right to possess and use that car, whether by ownership, rental, loan, bailment,³¹⁶ or some other means of legal control.

311. *E.g.*, *City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 676 (1976) (quoting *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926)).

312. *See, e.g.*, *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (“The doctrine that prevailed in *Lochner* . . . has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.”).

313. Of course, the Due Process Clause also protects the right to life. *See* U.S. CONST. amends. V, XIV. But, as mentioned, this right is not considered in this Comment. *See supra* note 38 and accompanying text.

314. *E.g.*, *Individual Liberty*, 2 WEBSTER’S *supra* note 12, at 1152 (defining individual liberty as “the liberty of those persons who are free from external restraint in the exercise of those rights which are considered to be outside the province of a government to control”).

315. *See, e.g.*, Christopher M. Newman, *Using Things, Defining Property*, in PROPERTY THEORY, *supra* note 17, at 69, 69–70 (“Property is born when someone is recognized as having an interest in using a thing that others are obliged to take into account in some fashion.”).

316. “Bailment” is an umbrella term referring to the general act of delivering one person’s personal property to another, who holds it for a certain, agreed-upon purpose. *See Bailment*, BLACK’S LAW, *supra* note 9.

The substantive due process protection of “economic rights” emblemized by *Lochner v. New York*³¹⁷ fits into the liberty prong of the Due Process Clause.³¹⁸ *Lochner* involved a criminal law sanctioning employers who required or permitted bakery employees to work more than sixty hours per week or ten hours per day.³¹⁹ The Court defined the right at issue there as the “right to purchase or to sell labor”³²⁰ and the right “to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family.”³²¹ The Court held that to interfere with these rights was to interfere with one’s liberties, activating the Due Process Clause.³²² In such a case, courts had to determine whether a given regulation was

a fair, reasonable and appropriate exercise of the police power of the State, or . . . an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family[.]³²³

When hearing economic due process challenges in the resulting *Lochner* era, it became a “common practice” for courts to strike down economic regulations based on the courts’ views of the most appropriate means for states to implement their policies.³²⁴

But with *West Coast Hotel v. Parrish*,³²⁵ in which the United States Supreme Court upheld a statute establishing a minimum wage that applied only to women,³²⁶ the Court ended the *Lochner* era and the idea of economic due process simultaneously.³²⁷ This case, like *Lochner*, involved regulation of employers’ and employees’ right of contract.³²⁸ The *West Coast Hotel* Court again tied the right of contract to liberty—even while reversing on whether that right would receive anything more

317. 198 U.S. 45 (1905).

318. *See id.* at 56 (classifying the right to contract under the Due Process Clause’s liberty prong).

319. *See id.* at 46, 52.

320. *Id.* at 53.

321. *Id.* at 56.

322. *See id.* at 56–57.

323. *Id.* at 56.

324. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 589 (1980) (Rehnquist, J., dissenting).

325. 300 U.S. 379 (1937).

326. *Id.* at 386, 400.

327. *See, e.g.*, CHEMERINSKY, *supra* note 59, at 681 (“[S]ince [*Lochner* was overruled by *West Coast Hotel* in] 1937 economic substantive due process has been unavailable to challenge government economic and social welfare laws and regulations.”).

328. *See W. Coast Hotel*, 300 U.S. at 386, 388.

than rational basis review and whether “liberty,” within the meaning of the Due Process Clause, protected that right.³²⁹ The Court noted that “[t]he community is not bound to provide what is in effect a subsidy for unconscionable employers. The community may direct its law-making power to correct the abuse which springs from their selfish disregard of the public interest.”³³⁰ And in *Exxon Corp. v. Governor of Maryland*, for example, the right to operate retail service stations from which Exxon could sell its petroleum was once again implicitly defined as a liberty right, despite its direct impact on the use of Exxon’s property.³³¹ The Court characterized the issue as one of “injurious practices”³³² and operations within Maryland’s “internal commercial and business affairs.”³³³

When the possessor of commercial property exercises the right to exclude, they are exercising an economic liberty just as much as they are exercising a property right. These possessors generally elect to let certain people onto their property with the expectation of profiting from the encounter. And if the possessor abuses that elective power, such as by discriminating against certain patrons, then an exercise of the possessor’s property rights is also an economic choice and allows the possessor to exercise control over the patrons’ right to engage in commercial transactions. But the point here is that the right to exclude from commercial property is an economic liberty. After *West Coast Hotel*, classification as an economic liberty is enough to bring the right to exclude within the sphere of legitimate community control.³³⁴ When a state or municipality regulates the right to exclude from commercial property, it is regulating the market. And that is a sphere of decision-making, factfinding, and interest balancing protected by rational basis review against most judicial scrutiny.³³⁵

329. *See id.* at 391, 398.

330. *Id.* at 399–400.

331. *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 124 (1978); *see also id.* at 125 (focusing on whether the regulation had a “reasonable relation to the State’s legitimate purpose in controlling the gasoline retail market”—the rational basis review test applied to regulations of economic rights since the end of the *Lochner* era). *See generally* *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 545 (2005) (“[W]e have long eschewed . . . heightened scrutiny when addressing substantive due process challenges to government regulation.”).

332. *Exxon Corp.*, 437 U.S. at 124 (quoting *Lincoln Fed. Lab. Union v. Nw. Iron & Metal Co.*, 335 U.S. 525, 536 (1949)).

333. *Id.* (quoting *Lincoln Fed. Lab. Union*, 335 U.S. at 536).

334. *See, e.g.,* *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (“We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. . . . Legislative bodies have broad scope to experiment with economic problems . . .”).

335. *See supra* sections II.C–II.D.

C. *Recognizing a Fundamental Property Right Would Wreak Havoc on Governance*

Recognizing a fundamental property right would be irresponsible and dangerous as a policy matter. Doing so would dramatically alter how the government operates. This section lays out how this would impact federalism³³⁶ and the separation of powers.³³⁷

Property law is mostly a creature of state- and local-level governance.³³⁸ This reflects the fact that local conditions may bear quite heavily on the feasibility or necessities of certain rules of property.³³⁹ As a corollary, it also stems from states' and municipalities' markedly greater familiarity with the peculiarities of their local conditions relative to the federal government.³⁴⁰ But the fact that property law is mostly a creature of state and local law also reflects the fact that certain communities may wish to move the balance between individuals' rights and the community's needs in one direction or another.³⁴¹ Constitutionalizing

336. "Federalism" refers to the balance of governmental powers between the federal government, on one hand, and state and local governments, on another. *See Federalism*, BLACK'S LAW, *supra* note 9.

337. "Separation of powers" refers to the balance of governmental powers between the three branches of government. *See Separation of Powers*, BLACK'S LAW, *supra* note 9.

338. *See, e.g.*, *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972) ("Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."). *See generally* STOEBCUK & WHITMAN, *supra* note 21, §§ 9.2, 9.13 (explaining that zoning is mostly carried on by local governments under police power authority delegated by state governments).

339. *See, e.g.*, OECD, THE GOVERNANCE OF LAND USE 7 (2017), <https://www.oecd.org/cfe/regionaldevelopment/governance-of-land-use-policy-highlights.pdf> [<https://perma.cc/XCN4-MY2Y>] ("Land use planning is mostly the purview of local governments . . . [It] is place-based by definition and highly context-specific. For instance, rural communities face very different issues than urban ones. As a consequence, land use planning requires a high level of information on local conditions. Higher levels of government often do not have this information to the degree that local governments do.").

340. *See id.*

341. Some states may tilt the balance in favor of the public interest. For example, Washington State's Growth Management Act places limits on property development with the intent to make the most out of the State's finite lands; while this policy may frustrate individual projects, the underlying theory is that the majority of development will be benefitted over time by such restraints. *See* WASH. REV. CODE § 36.70A.010 (1990) ("The legislature finds that uncoordinated and unplanned growth, together with a lack of common goals expressing the public's interest in the conservation and the wise use of our lands, pose a threat to the environment, sustainable economic development, and the health, safety, and high quality of life enjoyed by residents of this state. *It is in the public interest that citizens, communities, local governments, and the private sector cooperate and coordinate with one another in comprehensive land use planning.*" (emphasis added)). Other states may prioritize the individual over the collective. For example, Texas recently enacted an eighteen-billion-dollar tax cut on property taxes, the majority of which had funded local schools' maintenance and operations costs. *See* S.B. 2,

property rights would interfere with all of these relationships by imposing nationwide standards on property regulations, local interests and conditions notwithstanding. In other words, it would interfere with the federalism baked into the regulation of property.

Constitutionalizing property rights would also interfere severely with the separation of powers. Managing property regulations is very much a legislative function. Legislative bodies have the power to make independent findings,³⁴² to respond to particular community interests,³⁴³ and to balance the economic effects of a given regulation with the regulation's effects on individuals.³⁴⁴ Judges, on the other hand, are bound by existing law, lack expertise in economic judgments,³⁴⁵ have limited independent factfinding power,³⁴⁶ and can only shape the law once parties bring forth a case or controversy.³⁴⁷ So even though legislatures are in a much better place to make the considerations necessary to effectively regulate property, "fundamental" federal property rights would transfer much of that duty to courts that are unable to effectively weigh all the competing interests such regulation requires.

Applying heightened scrutiny to property regulations would also severely burden the judiciary. Courts would be forced to engage

Property Tax Relief Act (2023 Tex. Sess.); Charlotte Scott, *Gov. Abbott Wants to End Property Taxes, but Is That Realistic?*, SPECTRUM NEWS 1 (July 13, 2023, 6:30 AM CT), <https://spectrumlocalnews.com/tx/south-texas-el-paso/politics/2023/07/13/gov--abbott-wants-to-end-property-taxes--but-is-that-realistic-> [<https://perma.cc/X2JV-5T5G>] (discussing Texas's property tax cut). Texas Representative Brian Harrison's comments about the tax cut exemplify this idea: "This system of never-ending property taxes . . . is unethical. It's inconsistent with private property rights. . . . If you've really paid off your home, if you've been responsible, you may call yourself a homeowner. But you're really just a renter. The government is your landlord." Scott, *supra*.

342. *Cf.*, e.g., Jarrod Shobe, *Enacted Legislative Findings and Purposes*, 86 U. CHI. L. REV. 669, 680 (2019) (noting that legislative findings use factual determinations to justify the need for legislation).

343. *See*, e.g., *How Legislators Make Decisions*, NAT'L COUNCIL FOR THE SOC. STUD., <https://www.socialstudies.org/advocacy/how-legislators-make-decisions> [<https://perma.cc/9GCX-Q352>] (noting that legislators consider their constituents' interests in making legislative decisions).

344. *See* *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 545 (2005) (implying that legislatures are well-suited to determine "the need for, and likely effectiveness of, regulatory actions").

345. *See*, e.g., Robert J. Miller, *Tribal Sovereignty and Economic Efficiency Versus the Courts*, 97 WASH. L. REV. 775, 806–07 (2022) (arguing that courts "stray[] outside their areas of expertise and authority" when they substitute their economic judgments for those of Indigenous communities engaged in the self-determination of governance practices and business management); *Lingle*, 544 U.S. at 544 (stating that "courts are not well suited" for "scrutiniz[ing] the efficacy of . . . regulations").

346. *See*, e.g., FED. R. EVID. 201 (circumscribing when courts may, of their own volition, take "judicial notice" of evidentiary facts).

347. U.S. CONST. art. III, § 2; *The Judicial Branch*, THE WHITE HOUSE, <https://www.whitehouse.gov/about-the-white-house/our-government/the-judicial-branch/> [<https://perma.cc/NVP2-G3FN>].

frequently in means-end testing.³⁴⁸ This would result from an onslaught of challenges brought by property owners annoyed by any conceivable burden on their property rights. Recognizing a fundamental property right would also impose burdens on legislatures to spend more time and effort focusing on carefully crafting legislation to ensure it would satisfy the considerable demands of heightened scrutiny.

Finally, there is the inevitable consequence that recognizing fundamental property rights would dramatically upset the ability of states and municipalities to govern the minutiae that require attention in urban and suburban governance. Rather than increasing the security of property rights, this would unsettle those rights. This is especially the case because lower courts may improperly extend the holding from one property right to another, causing disruptions to urban and suburban governance that may have short effects in the legal sense but intolerably long effects on actual persons.

There are certainly other effects that constitutionalizing property rights would have on governance; this section has merely shown the deleterious effects doing so would have on federalism and the separation of powers. These consequences are not worth the marginal gains property possessors would obtain from the recognition of fundamental property rights.

D. Social Fundamentality Does Not Necessarily Translate into Fundamentality for Substantive Due Process Purposes

As a final matter, it bears mentioning that due process does not give a particular right the importance we might otherwise ascribe to that right as a social matter. Due process's primary concern is due process, *not* validating or hierarchizing certain constitutional or fundamental values above others.³⁴⁹ Due process is, in other words, inherently about ensuring that the government acts properly when it deprives an individual of life, liberty, or property.³⁵⁰ In the procedural due process context, this requires sufficiently fair procedures before such deprivations occur.³⁵¹ In the substantive due process context, this means that the government must act with a sufficiently valid purpose when it imposes such deprivations.³⁵²

Perhaps the key source of this confusion is the terminology of fundamentality. When one fails to keep the test for determining fundamental rights in mind, it is easy to focus on the layperson's definition

348. See *supra* section I.A.

349. See *supra* section I.A.

350. See *supra* section I.A.

351. See *supra* notes 4–5 and accompanying text.

352. See *supra* notes 7–8 and accompanying text.

of “fundamental.” But the Supreme Court has reiterated time and again that fundamental rights are not determined by their social import but by their *constitutional* import.³⁵³ In *Washington v. Glucksberg*,³⁵⁴ for example, the Court held as unwarranted the “sweeping conclusion that any and all important, intimate, and personal decisions are . . . protected” as fundamental rights merely because they “sound in personal autonomy.”³⁵⁵ Fundamental rights in the substantive due process context, however, are *exclusively* those rights that are “explicitly or implicitly guaranteed by the Constitution.”³⁵⁶

For this reason, declining to recognize the right to exclude, or any other right, as a fundamental right for substantive due process purposes does not determine the social importance of that right. The Constitution is entirely distinct from the abstract valuation of our social rights. For this reason, it cannot be that a right is deemed fundamental merely because it is socially important. It is fundamentally a sociological issue to provide rights that are not fundamental in the substantive due process context with the amount of respect they are assigned socially.³⁵⁷

CONCLUSION

In the interest of the general welfare, regulating the terms of commerce has long been a concern of the government.³⁵⁸ This regulation has also long been a matter of policy—a careful balancing of interests achieved by the machinery of legislation rather than judicial fiat.³⁵⁹ And this regulation has long been a concern of states and municipalities, which best know their local conditions and can fine-tune legislation to those conditions.³⁶⁰ All of this bespeaks why property rights have never been constitutionalized under the Due Process Clause. It is fundamentally a

353. See *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973) (“[T]he key to discovering whether [a given right] is ‘fundamental’ is not to be found in comparisons of the relative societal significance of [that right] as opposed to [another].”).

354. 521 U.S. 702 (1997).

355. *Id.* at 727.

356. *Rodriguez*, 411 U.S. at 33–34.

357. See *id.* at 36.

358. See, e.g., *supra* section II.B.2 (discussing *Mugler v. Kansas*, 123 U.S. 623 (1887), in which the United States Supreme Court upheld Kansas’s prohibition of the manufacture and sale of alcohol against a substantive due process challenge); see also, e.g., U.S. CONST. art. I, § 8, cl. 3 (giving Congress the power to regulate commerce with foreign nations, among the states, and with Indigenous communities).

359. See *supra* sections I.C–I.D; *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 545 (2005) (“The reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established.”).

360. See *supra* section IV.C.

valid exercise of power for state and local governments to regulate property reasonably in the interest of the general welfare. This regulation achieves “ordered liberty”—a balance of individual interests with the public’s needs.³⁶¹ Indeed, as one scholar noted in 1914, the mediation of individual interests and social needs protects private property as an institution from destruction because property’s existence depends on the welfare of society as a whole.³⁶²

The reasons abound to not constitutionalize the right to exclude from commercial property. In the case of commercial property, ordered liberty is achieved by limiting property owners’ ability to discriminate against potential tenants via the right to exclude. This is simply a variant of the government’s ability to regulate commerce. It also reflects the community’s genuine interest in ensuring all its people can make ends meet. This makes property regulation a proper concern for the community to address as it sees fit. Moreover, it is fundamentally a concern for state and municipal policymakers to decide which bases of discrimination may be so harmful as to merit restriction. Constitutionalizing the right to exclude would upset all of these interests. Also, recognizing the right to exclude as a fundamental right for substantive due process purposes would require reviving the long-dead realm of economic due process—something the United States Supreme Court has been loath to do.³⁶³

All this is to say that the weakness of the *Yim* plaintiffs’ substantive due process argument lies in their underlying claim: that the right to exclude should be a fundamental right for substantive due process purposes.³⁶⁴ However, they spoke not as owners of purely residential property, but as the owners of commercial property.³⁶⁵ And as I have argued here, recognizing a fundamental right to exclude from commercial property would be an irresponsible and dangerous move and is not grounded in the law of substantive due process. The costs of doing so are not justified.

361. *Cf. Dobbs v. Jackson Women’s Health Org.*, 597 U.S. ___, 142 S. Ct. 2228, 2257 (2022) (“Ordered liberty sets limits and defines the boundary between competing interests.”).

362. *See* ALEXANDER, *supra* note 264, at 325 (discussing RICHARD T. ELY, PROPERTY AND CONTRACT IN THEIR RELATIONS TO THE DISTRIBUTION OF WEALTH (1914)).

363. *See, e.g., Dobbs*, 142 S. Ct. at 2248 (criticizing *Lochner*’s economic due process as “freewheeling judicial policymaking” and observing that the case is “discredited”); *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (“The doctrine that prevailed in *Lochner* . . . and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded.”).

364. *E.g., supra* note 161 and accompanying text.

365. *See supra* notes 162–168 and accompanying text.

