ANTIDISCRIMINATION LAWS ARE NOT TAKINGS

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Following the Supreme Court's decision in Cedar Point Nursery v. Hassid, litigants and scholars have begun to argue that laws meant to prevent housing discrimination are takings under the Fifth Amendment. This theory of property law, if recognized by the courts, would provide expansive and unprecedented power to private property owners to discriminate against others and hamstring the government's power to protect its citizens. Plaintiffs in a recent lawsuit, Yim v. City of Seattle*, advanced this very argument in protest of Seattle's renter protection laws. While their petition for certiorari was denied in 2024, Yim may be a harbinger of future legal actions that seek to allow discriminatory behavior under the veil of Fifth Amendment protections. This Note makes four arguments as to why such an interpretation of the Takings Clause is inappropriate. First, there is a powerful originalist case against regulatory takings that suggests the Court erred when expanding regulatory takings in cases like Cedar Point and Penn Central Transportation. Second, existing doctrine is clear that antidiscrimination legislation is distinguished from physical takings and does not amount to regulatory takings requiring compensation. Third, Heart of Atlanta Motel remains good law and supports the argument that takings cannot be used to reward a property owner's prejudiced or discriminatory practices when they advertise their property to the public. Finally, the extension of the takings doctrine contemplated here is contrary to the goals of government and the constraints of living in a multicultural society. The rights of property owners are not absolute, and the choice to rent property to the public necessarily comes with restrictions. The Note concludes that antidiscrimination housing regulations are not takings under the law as it exists now, nor is it desirable to change the interpretation of the takings doctrine to reward discriminatory housing practices.*

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Introduction

Backlash to progress can take creative forms. As some state legislatures create protections against housing and rental discrimination, conservative activists have responded by making use of the "takings doctrine" in innovative ways. The Takings Clause of the Fifth Amendment is a protection against government appropriation of private property without just compensation.[1] The doctrine and its application have undergone episodes of transformation since the Founding, such that some have described the takings doctrine as eluding a precise meaning.[2] The perceived lack of precision in the doctrine has opened the door for legal activists to attempt to expand the meaning and usage of the Takings Clause incorrectly. Perhaps emboldened by the recent Supreme Court decision in *Cedar Point Nursery v. Hassid*, activists and landlords have argued that protections for potential tenants constitute a taking that requires compensation because of the restrictions that these regulations place on landlord usage of property. Recent litigation by these actors raises an interesting set of questions: can legislation meant to prevent discrimination be considered a taking? If so, what are the conditions under which this is the case?

In the housing law context, antidiscrimination laws cannot and should not be considered a taking that requires compensation. This Note makes four arguments that build on existing scholarship about why such an interpretation of the Takings Clause is inappropriate.[3] First, there exists a powerful originalist case against regulatory takings

1. U.S. Const. amend. V.

2. Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. Cal. L. Rev. 561, 561 (1984).

3. *See generally* Amy Liang, *Property Versus Antidiscrimination: Examining the Impacts of Cedar Point Nursery v. Hassid on the Fair Housing Act*, 89 U. Chi. L. Rev. 1793 (2022) (arguing that the Fair Housing Act should be excluded from the current takings doctrine under the "open to the public" exception. Liang argues that residential rentals should be considered as falling under the common law innkeeper's rule. In contrast, this Note argues that no such change in legal interpretation (of either takings law or common law) is necessary to find that laws like the FHA are not takings).

that suggests the Court erred by expanding regulatory takings in cases like *Cedar Point* and *Penn Central Transportation*. Second, existing case law is clear that antidiscrimination legislation is distinguished from physical takings and is also not a regulatory taking requiring compensation. Third, there is existing precedent that takings cannot be used to reward a property owner's racist or discriminatory practices when they advertise their property out to the public. *Heart of Atlanta Motel* remains good law and speaks to this issue. Finally, the extension of the takings doctrine contemplated here is contrary to the goals of government and the necessary constraints of living in a multicultural society. Antidiscrimination housing regulations are not takings under the law as it exists now, nor is it desirable to interpret the takings doctrine to reward discriminatory housing practices.

This Note starts with a snapshot of the state of the takings doctrine, focusing on the recent development of the regulatory takings doctrine. It then considers a motivating case study, *Yim v. City of Seattle*, and the decision of the Washington Supreme Court. The second part examines the case for considering antidiscrimination housing law a taking and then shows why such arguments fail for the four reasons listed above. The Note concludes by noting that libertarian arguments for deregulation that seem to be *en vogue* with the current Court[4] have their limits. It is vital that laws allowing minority groups some protection in their daily lives be understood as minimum thresholds for living as equals, rather than as burdensome regulation or market inefficiency.

I. The Takings Doctrine

The takings doctrine is generally used as a protection against the power of eminent domain. The Takings Clause of the Fifth Amendment states: "[N]or shall private property be taken for public use, without just compensation."[5] While the government is understood to have the power of eminent domain, using private land for a public purpose, the Takings Clause is intended to compensate private property owners and protect against the eminent domain power. Traditionally, the government has exercised its eminent domain power to physically take privately held land for the creation of facilities like highways and airports.[6] For example,

4. Nina Totenberg, *The Supreme Court Conservative*, NPR (July 5, 2022), https://www.npr.org/2022/07/05/1109444617/the-supreme-court-conservative [https://perma.cc/A56V-D9UL].

5. U.S. Const. amend. V.

6. Daniel B. Kelly, *The Public Use Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 Cornell L. Rev. 1, 3 (2006).

the Supreme Court affirmed the creation of the post office using the eminent domain power in *Kohl v. United* States.[7] In *Kohl*, the Court affirmed that federal and state governments have the right to exercise eminent domain, and that eminent domain is the "offspring of political necessity" and "inseparable from sovereignty."[8] Having established the government's ability to exercise the eminent domain power, the issue then became defining what exactly constituted eminent domain. The takings doctrine was initially defined by discussions surrounding physical takings, or tangible intrusions onto property. The Court in *Loretto* noted that even a "minor but permanent physical occupation of an owner's property authorized by government" constitutes a taking for which just compensation is due.[9] In *Loretto*, the intrusion was a cable box that appeared unlikely to create damage to the property owner, but nevertheless was considered a physical taking that required just compensation.

In addition to considering even minor physical intrusions to be takings, the Court has also been expansive in defining what a public use is. The Court has interpreted the Fifth Amendment to only require takings be for a "public purpose," even if the government itself does not directly take the land. In *Kelo v. City of New London*, the Court held that taking private property from one party to transfer to another could be considered rationally connected to a public purpose if the government can demonstrate some potential communal benefit from the takings action.[10] Here, the city of New London had authorized a private development company to purchase property or to exercise eminent domain on its behalf to acquire land from private owners. The Court in *Kelo* deferred to the City's judgment that the existing land was "sufficiently distressed to justify a program of economic rejuvenation" and upheld the transfer of land between private parties as a justified taking.

In practice, the eminent domain power has often been wielded to the detriment of under-resourced communities, generally without adequate compensation. In cases like *Berman v. Parker*, the Court allowed for the condemnation of land in Washington, D.C. because the government determined it was blighted, despite property owners in the area contesting this designation.[11] The area being condemned was also majority Black, and inadequate programs were created to ensure that

7. Kohl v. United States, 91 U.S. 367 (1875).
8. *Id.* at 372.
9. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421 (1982).
10. Kelo v. City of New London, 545 U.S. 469, 483 (2005).
11. Berman v. Parker, 348 U.S. 26, 31 (1954).

residents displaced by the ruling in *Berman* would have housing options or a right to return after redevelopment.[12] In many ways, *Berman* gave a green light to government programs that would subsequently use the eminent power to displace communities and people across the country in the name of "urban renewal," often discriminating on the basis of race and socioeconomic class. Consider: over 1,000 members of the majority Black community of the 15th ward in Syracuse, NY were forcibly displaced under the eminent domain power for the creation of the I-81 highway in the 1960s.[13] These residents often found relocation incredibly difficult due to local housing discrimination, and those who were not displaced faced increased health risks because of their proximity to the highway. Syracuse is just one history that reveals that just compensation often depends on the color of one's skin. Some scholars have argued that even fair market value compensation often fails to capture economic losses fully, subjective value of property, and dignitary harms.[14]

A. Regulatory Takings

As the courts have expanded the ability of the government to exercise its eminent domain power, seen most clearly in *Kelo*, they have also expanded the kinds of government action considered takings. In the 1900s, the Court began recognizing that government regulation might still be a taking even absent a physical appropriation of land. *Pennsylvania Coal Co. v. Mahon* is considered the first case in regulatory takings jurisprudence.[15] Writing for the Court, Justice Holmes claimed that "while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking."[16] The decision to recognize regulatory takings marked a significant departure in the traditional understanding of what constitutes government action. However, the creation of regulatory takings also came with limits. Despite acknowledging that the facts in the case allow a mining regulation to be considered a regulatory taking, Holmes noted that certain kinds of government actions cannot be considered takings. He

12. *E.g.*, for "Area B" of the condemned area, the redevelopment plan specified a maximum of 3,600 residents after development. Before development, Area B housed over 5,000 people and was 97.5% Black. Amy Lavine, *Urban Renewal and the Story of Berman v. Parker*, 42 URB. LAW. 423, 448 (2010).

13. *The I-81 Story*, N.Y. CIV. LIBERTIES UNION, https://www.nyclu.org/en/campaigns/i-81-story [https://perma.cc/2ZCF-ZSPS].

14. Nicole S. Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 106–10 (2006).

15. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415–16 (1922).

16. *Id.* at 415.

writes in *Pennsylvania Coal* that "government hardly could go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation, and must yield to the police power."[17] In short, landowners cannot invoke the takings doctrine simply because a government act affects property value in some way. To stretch the takings doctrine in this manner would hamstring the potency of the government. Further, Holmes suggests that certain values and traditional types of government actions are protected from the takings doctrine.

Over 50 years after establishing the possibility of non-physical regulatory takings, the Court in *Penn Central Transp. Co. v. New York City*[18] provided a three-part test for determining if a government action is a regulatory taking. At issue in *Penn Central* was New York City's Landmarks Preservation Law, intended to place protections on historic city landmarks by regulating changes or construction to designated buildings. After the city's Landmarks Preservation Commission denied Penn Central Transportation Company's plan to build an office building over the terminal, citing the preservation law, the company brought suit. Plaintiffs claimed that they had suffered an uncompensated taking through the Landmarks Preservation Law, which limited their ability to use their property as desired. The "Penn Central Balancing Test" sets forth three factors to consider if a regulatory taking has occurred:

1. The economic impact of the regulation on the claimant;
2. The extent to which the regulation has interfered with distinct investment-backed expectations and;
3. The character of the governmental action[.]

Justice Brennan clarifies the meaning of the character of government action, distinguishing physical invasion by the government from cases in which "interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[19] Here, he refers back to *Mahon*, noting that it would be impractical for the government to pay property owners for every loss in value that a given regulation might cause. He continues, saying: "More importantly for the present case, in instances in which a state tribunal reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely

17. *Id.* at 413.
18. Pa. Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).
19. *Id.* at 124.

affected recognized real property interests."[20] Brennan cites zoning laws as examples of regulation that restrict land for particular uses, but are considered reasonable prohibitions that are not classified as takings.

Brennan also references *Miller v. Schoene*, in which the Court unanimously upheld a Virginia statute that authorized the cutting of red cedar trees infected by cedar rust.[21] The state enacted the statute to prevent the spread of cedar rust to local apple orchards, and the Court held that the state did not need to provide compensation for the value of the trees cut or for the resulting decrease in marketing value of the properties containing the diseased trees.[22] The *Miller* court justified the choice to uphold the statute, writing that:

> "the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public. It will not do to say that the case is merely one of a conflict of two private interests and that the misfortune of apple growers may not be shifted to cedar owners by ordering the destruction of their property; for it is obvious that there may be, and that here there is, a preponderant public concern in the preservation of the one interest over the other."[23]

From *Penn* and *Miller*, we learn that state action reasonably created to promote "morals or general welfare" is not a taking that requires just compensation, especially if there is "preponderant public concern" in that state action. This is true even if there is some economic loss caused by the state regulation, as was the case for the red cedar owners.

The Court has also set a fairly high bar for what type of negative economic impact might qualify a regulation as a taking. In *Lucas v. South Carolina Coastal Council*, the Court suggests that "there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."[24] It is important to note that the emphasis on *all* comes from Justice Scalia, indicating the Court's acknowledgment that almost any government action will have some effect on property value, but many of these effects are not takings. Without a physical invasion, an aggrieved property owner must

20. *Id.* at 125.
21. Miller v. Schoene, 276 U.S. 272 (1928).
22. *Id.* at 277, 279–80. Note that the Supreme Court affirmed the lower court's award of $100 to cover the cost of removing cedars from owner property but did not provide for compensation of the value of the trees themselves.
23. *Id.* at 279.
24. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992).

demonstrate a near-total loss of economic value resulting from the regulation.

The most recent development in the takings doctrine comes from *Cedar Point Nursery v. Hassid*.[25] At issue in *Cedar Point* was a California regulation that allowed labor organizations a right to access the property of agricultural employers for up to three hours a day, 120 days per year. The Court considered this regulation a per se physical taking that required compensation from the government, even if access was limited and intermittent. At first blush, *Cedar Point* seems to directly suggest that laws restricting owner discretion (or discrimination) in how their property is used constitute a physical taking. But for the regulation, the owner would not have allowed the labor organizers onto their property. However, it may be more accurate to interpret *Cedar Point* narrowly. The case can be distinguished because it involves a distinct set of facts. *Cedar Point* is not directly about housing; the parties deemed to be physically invading the property were third-party advocates rather than the farmworker tenants of the landowner.

The Court explicitly notes several exceptions to its holding in *Cedar Point.* It concludes that a regulation that allows for physical entry onto private property will be a taking unless a "traditional background principle of property law" requires it.[26] The Court writes that "as we explained in *Lucas* v. *South Carolina Coastal Council*, the government does not take a property interest when it merely asserts a 'pre-existing limitation upon the land owner's title.'"[27] These background principles of property law are not clearly defined, resulting in an unhelpful ambiguity that subsequent cases will have to discover. However, the court does provide some guideposts. For example, law enforcement searches or health inspections are cited as government actions that are not takings. The Court observes that "the government owes a landowner no compensation for requiring him to abate a nuisance on his property, because he never had a right to engage in the nuisance in the first place."[28] It also distinguishes *Cedar Point* from *Penn Central*, because "the regulation appropriates for the enjoyment of third parties (here union organizers) the owners' right to exclude."[29] The Court also distinguishes the type of property and related rights of access in *Cedar Point* from the property interests at stake in *PruneYard Shopping Center v. Robbins*, 447 U.S. 74 (1980), writing that: "limitations on

25. Cedar Point Nursery v. Hassid, 594 U.S. 139 (2021).
26. *Id.* at 162.
27. *Id.* at 160.
28. *Id.*
29. *Id.* at 140.

how a business generally open to the public may treat individuals on the premises are readily distinguishable from regulations granting a right to invade property closed to the public."[30]

So, what is the state of the takings doctrine?

For physical takings, *Cedar Point* clearly leaves room for land to be appropriated when there are "pre-existing limitations" on land usage embedded in the background principles of property law. *Cedar Point*, in conversation with *PruneYard*, also clearly distinguishes between limitations on properties closed to the public and those holding themselves open to the public. So, a government policy authorizing a third person to enter private premises against the will of the owner is different from a business in which the owner actively solicits members of the public to enter the property.

For regulatory takings, there are the three *Penn* factors: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the government action. *Lucas* developed the first prong of this test further, noting that only regulations that completely deprive a property owner of economic value should be considered a regulatory taking. Justice Brennan in *Penn* also provided a reminder that there are types of regulation by the government that may impact property owners, but that nevertheless do not need to be compensated. These include regulations that are reasonably tied to health, safety, morals, or general welfare. As in the case of *Miller*, where there is a "predominant public concern" in the preservation of the interest of one group over another, there may be reason to take property. *Miller* had to do with tree infections, determining that the public interest in apple tree health was more important than the interest of cedar tree owners who were mandated by Virginia law to remove infected cedars. This Note makes an argument that is far more important than apples and cedars: regulation designed to promote access to housing and prevent discrimination may justifiably impinge on the rights of landowners without compensation.

II. Takings and Housing Regulations, Yim v. City of Seattle

In 2016, the City of Seattle passed a "First in Time" rule for housing ("FIT"), which requires landlords in Seattle to screen and offer tenancy to applicants based upon the chronological order of applications received. Under FIT, landlords must create and publish requirements

30. *Id.* at 157.

for prospective tenants and must accept the first completed application that meets those requirements. Accepted tenants have 48 hours to confirm the acceptance, after which the landlord can move to the next qualified tenant in chronological order. Implemented in 2017, the law was intended as a corrective against implicit and explicit landlord bias.[31] It was followed by the "Fair Chance Housing and Eviction Record Ordinance" that initially banned a landlord from inquiring about a tenant or applicant's criminal history, requiring a tenant or applicant to disclosing their criminal history, or taking adverse action based on criminal history.[32] Without the FIT law, landlords might pick and choose among qualified applicants based upon their own discriminatory beliefs about who would be a good tenant. The FIT rule aims to protect renters from implicit bias by forcing landlords to accept the first application that meets public criteria and also makes it difficult for explicitly biased landlords to find a pretextual non-discriminatory reason to deny a rental application. Notably, the FIT rule allows owners to break chronological order in limited cases where the owner "a) is legally obligated to set aside the available unit to serve specific vulnerable populations" or b) "voluntarily agrees to set aside the available unit to serve specific vulnerable populations, including but not limited to homeless persons, survivors of domestic violence, persons with low income, and persons referred to the owner by non-profit organizations or social service agencies."[33]

The First in Time rule is by no means a panacea for housing discrimination. However, it does provide a significant protection that existing laws like the Fair Housing Act do not. The Fair Housing Act ("FHA") prohibits discrimination in the sale or rental of housing on the basis of race, color, national origin, religion, sex, familial status, and disability.[34] The FHA, at least on paper, serves to protect tenants

31. Eilís O'Neill, *Landlords must rent first-come, first-served, Washington state high court says*, KUOW (Nov. 15, 2019, 3:45 PM), https://www.kuow.org/stories/landlords-must-rent-first-come-first-served [https://perma.cc/L4T2-L9YP].

32. While law originally banned landlords from inquiring about criminal history altogether, following the 2023 Ninth Circuit Court of Appeals ruling, the City decided not to enforce this provision. Effectively, Seattle's FIT law prohibits landlords from requiring disclosure or acting adversely on the knowledge of criminal history. *See* Yim v. City of Seattle, 63 F.4th 783 (9th Cir. 2023); *Criminal History Protections June 2023 Update: Fair Chance Housing Ordinance*, Seattle Office for Civil Rights (June 6, 2023), https://www.seattle.gov/civilrights/housing-rights/criminal-history-protections [https://perma.cc/BB26-HNLX].

33. Seattle, Wash., Mun. Code § 14.08.050.A.4.a–.b (2021), https://library.municode.com/wa/seattle/codes/municipal_code?nodeId=TIT14HURICH14.08UNHOPR_14.08.050FI-T [https://perma.cc/CD5C-DX6L].

34. 42 U.S.C. §§ 3601–19.

from blatant forms of discrimination. For example, landlords cannot refuse to rent to specific minorities or steer certain groups of people toward specific neighborhoods. Landlords might also act differently to potential tenants based on their race, and a pattern of such behavior might establish a violation of FHA. However, savvy landlords can exploit laws like the FHA to discriminate against protected classes. Faced with many applicants, a landlord could treat all applicants the same (at least externally) throughout the application process and then use seemingly race-neutral reasons to distinguish their preferred candidate over others. FIT does not allow a landlord this option, making the housing application processes both simpler and more restrictive for landlords.

FIT was almost immediately challenged in Seattle. Local landlords, working with the Pacific Legal Foundation, filed a complaint stating that the FIT rule violated their right to substantive due process rights and free speech. More relevant to this Note, the plaintiffs argued that the FIT rule constituted a taking because it took away landlord control over property. The King County Superior Court (the "trial court") in Washington agreed, writing that the ability to rent or even to negotiate rent, was just as fundamental to property ownership as the ability to sell property outright. The trial court held that "choosing a tenant is a fundamental attribute of property ownership. Like a sale of a fee interest, a lease is a disposition of a property interest."[35] In so ruling, the trial court drew a comparison to a previous case, *Manufactured Housing Communities of Washington v. State*, where the right to sell fee title was at stake.[36] The court's decision is noteworthy because it conflates property ownership with property usage, even though the latter involves and relies on inquiry (and habitation) from members of the public. In other words, the trial court seems to give excessive protection to landlords seeking to put properties on the market rather than making them play by the rules of the city they seek to rent in.

However, in 2019, the Washington Supreme Court ("the *Yim* court") overturned the trial court and held that FIT was not a taking.[37] The court in *Yim v. City of Seattle* found that FIT was neither a physical nor a regulatory taking, noting that the owners do not suffer a permanent physical invasion of their property and still retain economically beneficial usage of it.[38] The court also addressed plaintiff's claim that one category of per se regulatory takings are those regulations that

35. Yim v. City of Seattle, 2018 WL 10140201, at *4 (Wash. Super. Mar. 28, 2018).
36. Manufactured Hous. Cmtys. of Wash. v. Washington, 13 P.3d 183 (Wash. 2000).
37. Yim v. City of Seattle, 451 P.3d 675, 681 (Wash. 2019).
38. *Id.* at 690.

destroy "one or more of the fundamental attributes of ownership (the right to possess, exclude others and to dispose of property)."[39] This claim relied on the notion that the right to choose who will rent one's property is a fundamental attribute of property ownership. The court in *Yim* flatly denies this idea: "if that were so, every antidiscrimination law that prohibits a landlord from rejecting a tenant based on protected characteristics would be a per se regulatory taking requiring either compensation or invalidation."[40] Citing a 2002 decision by the Supreme Court, the *Yim* court observes that "*Tahoe-Sierra* would likely not allow such a holding because it 'would render routine government processes prohibitively expensive,' if not impossible."[41]

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, decided by the Supreme Court in 2002, is helpful both to the *Yim* court's decision and to the thesis of this Note. As discussed in Part I, the Court in *Tahoe-Sierra* distinguished physical and regulatory takings, writing that "physical appropriations are relatively rare, easily identified, and usually represent a greater affront to individual property rights."[42] Exploring the issue of regulatory takings, the Court noted that there is no mathematical formula to decide if a government action is a regulatory taking requiring compensation. The Court also presents a conception of property rights that is directly at odds with that of the trial court's ruling in *Yim*. The Supreme Court in *Tahoe-Sierra* evaluated a line of property cases[43] and found that "in each of these cases, we affirmed that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking."[44] By applying the Supreme Court's decision in *Tahoe-Sierra* to Seattle's First in Time rule, the *Yim* court rejected the lower court's interpretation of all property rights as being equally inviolable and covered by the protection of the takings doctrine.

The *Yim* court noted that plaintiffs and other landlords did not suffer any permanent physical invasion of their property. Owners are free *not* to rent, and the court suggests that if owners choose to participate in the rental market, they must comply with the city's choices about what is acceptable treatment of tenants. The court also did not find that plaintiffs

39. *Manufactured Hous. Cmtys.*, 13 P.3d at 187.
40. *Yim*, 451 P.3d at 688.
41. *Id.* (citing Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 335 (2002)).
42. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 324 (2002).
43. *Id.* at 327 (citing Andrus v. Allard, 444 U.S. 51, 66 (1979); Gorieb v. Fox, 274 U.S. 603 (1927); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. at 498).
44. *Id.* (quoting *Andrus*, 444 U.S. at 65–66).

suffered a clear economic loss. The court notes that "plaintiffs do not contend that the FIT rule deprives them of *any* economically beneficial uses of their properties, let alone *every* economically beneficial use."[45] Owners subject to FIT still benefit from the opportunity to rent and collect revenue. While owners may find some tenants undesirable, this does not affect their economic prospects. If a tenant fails to pay rent, this might constitute an acceptable ground for eviction and economic recovery by the landlord. While the city government places some restrictions on landlord behavior, the court found, these restrictions cannot be classified as takings that require compensation.

Following the Washington Supreme Court's decision to uphold the First in Time rule, the U.S. Supreme Court declined to hear an appeal. While Seattle's housing protections appear safe for now, *Yim* is a troubling example of how legal entrepreneurs are attempting to use property law principles to stymie governments from protecting their most vulnerable citizens. The plaintiffs in *Yim* present an intensely libertarian view of property law that, if accepted by future courts, threatens to enshrine even minor property rights at the cost of civil liberties and government efficacy. The case represents the latest in creative attempts to attack anti-discrimination laws using a conception of property law that diverges from Supreme Court precedent. This framing of property law contends that the government cannot or should not impinge on property rights, even when the government is doing so for the benefit of the community or vulnerable members within. For example, Professor Richard Epstein argues that "*all* rent control statutes, regardless of their peculiar features and structures, are per se unconstitutional under the Takings Clause of the Constitution."[46]

Yim is also noteworthy as it parallels recent Supreme Court cases that have framed economically and socially privileged individuals as scrappy underdogs facing persecution. Professor Melissa Murray has noted that "the Court's apparent desire to remedy injuries done to Christian conservatives, working-class whites, and, more generally, white people" using the language of racial repair and remedy has led to the overturning of protections for women and racial minorities.[47] While the Supreme Court did not hear *Yim*, there is potential for similar cases to be brought that allege that freedom from regulations on individual

45. *Yim*, 451 P.3d at 690.

46. Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 Brooklyn L. Rev. 741, 742 (1988).

47. Melissa Murray, *Stare Decisis and Remedy*, 73 Duke L. J. 1501, 1502, 1523–26 (2024).

use of property are more important than the ability for individuals to find housing.

In *303 Creative LLC v. Elenis*, the Court recently held that a website designer cannot be made to create designs expressing messages that she disagrees with, including designs supporting marriage equality, under the First Amendment.[48] In *303 Creative*, the Court construed the Colorado law at issue as unlawfully compelling the designer to create messages, and not as requiring the designer to engage with customers of a certain identity. Lawyers like David Cole argue that:

> "the decision should have minimal impact on the enforcement of public accommodations and antidiscrimination laws, because it recognizes a First Amendment right only where: (1) a business objects only to expressing a particular message for anyone, not where it objects to serving certain customers because of their identity; and (2) the state's interest in requiring the business to provide the service is the suppression of disfavored ideas."[49]

However, it is also possible to view *303 Creative* as just the beginning of a movement towards encroachment against many of the recently won protections for minority groups. The current Court has also revealed a willingness to hamstring the ability of other political actors to enact protections, from environmental regulations to civil liberties.[50] It is quite conceivable that conservative activists will soon seek to add the Fifth Amendment to their arsenal of arguments against regulation. Plaintiffs like those in *Yim* might argue that, just like the First Amendment protections that the *303 Creative* Court granted to a small business owner, control over one's property is so important that even discriminatory uses of the property must be allowed. It is critical to address these arguments at their infancy before they can find more solid footing and legitimacy in the current political and judicial climate.

III. Why Antidiscrimination Law is Not a Regulatory Takings

The final section of this Note presents four arguments for why anti-discrimination housing laws like the one at issue in *Yim* should not be considered a taking. First, there is an originalist understanding that regulation should not be considered takings, as a matter of principle.

48. 303 Creative v. Elenis, 600 U.S. 570, 597 (2023).

49. David Cole, *"We Do No Such Thing":* 303 Creative v. Elenis *and the Future of First Amendment Challenges to Public Accommodations Laws*, 133 Yale L.J. F. 499, 501 (2024).

50. Mark A. Lemley, *The Imperial Supreme Court*, 136 Harv. L. Rev. 97, 97 (2018). Professor Lemley notes: "the Court has begun to implement the policy preferences of its conservative majority in a new and troubling way: by simultaneously stripping power from every political entity except the Supreme Court itself." *Id.*

This perspective deserves some consideration, especially as it exposes the connection between the takings doctrine and legalized slavery. Second, the Note demonstrates that housing regulation meant to reduce discrimination already fit into the exceptions in the current takings doctrine, as highlighted by the courts in *Cedar Point* and *Yim*. Third, issues of permissible government regulation on public businesses have already been litigated in cases like *Heart of Atlanta*, in which the right to exclude on the basis of race was unanimously rejected by the Court. Legal precedent supports the notion that some property rights can be infringed upon in order to prevent harmful discriminatory behavior without being a taking. Finally, it is important to consider the broader government interest in passing and enforcing anti-discrimination laws. As a matter of public policy, an expansive regulatory takings doctrine would handicap the government's ability to strive for an equal society.

A. The Originalist Argument Against Regulatory Takings

Under an originalist approach, it is possible that regulatory takings should not be considered takings at all. In its 1871 decision on the *Legal Tender Cases*, the Supreme Court was clear that the Takings Clause:

> [H]as always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon or to inhibit laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a draft, or a war may inevitably bring upon individuals great losses—may indeed render valuable property almost valueless. They may destroy the worth of contracts. But whoever supposed that because of this, a tariff could not be changed, or a nonintercourse act or an embargo be enacted, or a war be declared.[51]

Even regulations, like the acts of Congress in the Legal Tender Act of 1862, that cause a complete economic wipeout were not initially considered takings by the Court. Shortly after the *Legal Tender Cases*, the Court held in *Mugler v. Kansas* that a Kansas prohibition law that affected the livelihood of Mugler was not a taking that required compensation.[52]

Scholars like William Treanor have argued that if the Supreme Court is choosing to apply originalist interpretive methods to make its decisions, it must reconsider the underlying rationale behind the

51. Legal Tender Cases, 79 U.S. 457, 551 (1870).
52. Mugler v. Kansas, 123 U.S. 623, 668–69 (1887).

Takings Clause. Treanor writes that "the original understanding of the Takings Clause of the Fifth Amendment was clear on two points. The clause required compensation when the federal government physically took private property, but not when government regulations limited the ways in which property could be used."[53] Elsewhere, he notes that even physical takings represented a departure from traditional understandings of land use and regulation. The Takings Clause was a fairly radical shift from colonial law, which "imposed affirmative obligations on residents to use their property for some specific purpose to advance the overall interests of the community. A Plymouth colony ordinance required those with rights in valuable minerals to exploit their rights or forfeit them."[54] John Hart has noted that advocates of regulatory takings have incorrectly relied on a false historical belief that minimizing government regulation of land use has been a deep historical tradition in America.[55]

To interpret takings as extending beyond physical takings would be a misunderstanding of the language of the clause and how the founders viewed the protections of the Fifth Amendment. Andrew Schwartz argues that "[i]n the Fifth Amendment, the framers expressly distinguished between 'liberty' and 'property,' affording due process protection for deprivations of both liberty and property…requiring compensation only for takings of property."[56] Schwartz argues that complete economic independence over usage of property was considered neither a fundamental liberty nor property itself. James Madison, who proposed and defended the Takings Clause, seemed to primarily understand the law as applying to physical property. While Madison expressed a desire that government interference with property be minimized, he was also clear that only physical appropriation by the government was unconstitutional. Treanor notes that "Madison did not want a compensation requirement that would extend to any government action that affected the value of property. He believed that government, in pursuit of the commonwealth, necessarily employed tax policies and regulations that consequentially hurt some economic interests."[57] Madison also expressed support for policy proposals by Jefferson and

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

54. William Michael Treanor, The Original Understanding of the Takings Clause, Geo. Env't L. & Pol'y Inst. Papers & Reports, 4 (1998), https://scholarship.law.georgetown.edu/gelpi_papers/2/.

55. John F. Hart, *Colonial Land Use Law and its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1299 (1996).

56. Andrew W. Schwartz, *No Competing Theory of Constitutional Interpretation Justifies Regulatory Takings Ideology*, 34 STAN. ENV'T L. J. 247, 271 (2015).

57. Treanor, *supra* note 53, at 844.

others that would have a redistributive effect on wealth for the benefit of poor citizens, not perceiving these regulations as government takings.[58]

James Madison's writing also suggests that the Takings Clause was motivated in part to prevent majoritarian factions from seizing and redistributing land equitably, and to protect the property interests in enslaved peoples held by slaveowners. In letters, Madison argued that emancipation must include "a provision in the plan for compensating a loss of what [the slaveowner] held as property guaranteed by the laws, and recognised by the Constitution."[59] He explicitly argued that legal emancipation by the government would require "just" compensation under the Constitution because he viewed enslaved individuals as physical property. Madison was right to fear this, as takings arguments advanced by former confederates after the U.S. Civil War fell flat. The post-emancipation Congress decided that the property interest in slavery did not need to be recognized with fiscal compensation.[60] The property interest in another human being was not considered a physical taking because it was not a legitimate property interest, and the economic loss of the Emancipation Proclamation was not considered a taking that must be compensated under the Takings Clause.

Under an originalist understanding of the Takings Clause, which is itself infused with the racism of Madison and his contemporaries, only physical takings are considered constitutionally valid. Through the late 1800s, this remained the understanding of the Fifth Amendment as both the Supreme Court and the post-Emancipation government refused to recognize non-physical appropriation of property (or individuals incorrectly defined as property) as a taking. While regulatory takings might be justified outside of an originalist framework, it is still important to understand the history of the Takings Clause. The legitimacy of regulatory takings is shaky, considering that the regulatory takings idea is relatively new and is contrary to over a century of established understanding that only physical takings are constitutionally recognized.[61] Courts and advocates should be hesitant to extend upon

58. Irving Brant, James Madison: Father of the Constitution, 1787-1800 175 (1950).

59. Letter from James Madison to Robert Evans (June 15, 1819), *in* The Mind of the Founder: Sources of the Political Thought of James Madison 315 (Marvin Meyers ed., 1981).

60. *Balance of Freedom: Abolishing Property Rights of Slaves after Emancipation*, MacMillan Ctr. for Int'l & Area Studies at Yale (Apr. 13, 2020), https://macmillan.yale.edu/stories/balance-freedom-abolishing-property-rights-slaves-after-emancipation [https://perma.cc/Q8X9-TDWK].

61. Bethany R. Berger, *Eliding Original Understanding in* Cedar Point Nursery v. Hassid, 33 Yale J.L. & Human. 307 (2022) (discussing the failure of the Court to

regulatory takings arguments given this unstable foundation. Further, as the Court seeks to roll back recent precedent in its decisions on abortion and affirmative action, it should not be assumed that the similarly recent development of regulatory takings is safe.

B. Exceptions in Current Takings Doctrine

Taking the state of takings doctrine as-is, it is clear that antidiscrimination housing laws fit into the existing exceptions for what constitutes a taking and therefore should not be considered regulatory takings requiring compensation. Some have argued that housing policies like rent regulation fit into the background principles of property law that *Cedar Point* excepts from the takings doctrine.[62] This Note asserts that antidiscrimination laws are not takings even if they do not fit into *Cedar Point* exceptions. First, we can distinguish laws designed to prevent housing discrimination from the law found to be a taking in *Cedar Point*. The law at issue in *Cedar Point* was ultimately found to effectively allow a physical invasion of the landowner's property, even against their will. While housing regulations do touch on a landlord's ability to rent their property, they do not force landlords to suffer physical invasion in the same way. In this way, most housing regulations are distinguished from the California regulation in *Cedar Point*. Unlike the landowners in *Cedar Point*, landlords like those in *Yim* have chosen to invite individuals to apply for a lease and thus to enter the property. They hold their property out to the public as a business. Regulations like the Seattle FIT policy regulate the act of being a public-facing business and impose restrictions on how such business can be conducted, and they do not affect what can be done on the owner's property post-transaction. Were a regulation passed allowing non-governmental actors access to a tenant's apartment against a landlord's will, then the restrictions of *Cedar Point* would likely apply. However, simply regulating a landlord's transactions with prospective clients/tenants is not a physical invasion like in *Cedar Point*.[63]

Now, consider the existing test for regulatory takings. *Penn* lays out three factors: (1) the economic impact of the regulation on

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adhere to originalism in recent takings decisions, departing from the historical public right to enter private property).

62. *See* Abigail K. Flanigan, *Rent Regulations After* Cedar Point, 123 COLUM. L. REV. 475 (2023) (arguing for a minimalist approach that would harmonize the takings doctrine with antidiscrimination laws through *Cedar Point* exceptions).

63. *See* Yee v. City of Escondido, 503 U.S. 519 (1992) (upholding rent control law relating to residents of a mobile home park as only regulations on land use and not a physical invasion of land).

the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the government action. Looking at (1) and (2), it is not clear how antidiscrimination housing laws like the First in Time rule in *Yim* will have a significant adverse economic impact on a claimant. Regulations that require nondiscrimination among potential housing applicants do not restrict the rental market and do not prevent landlords from profiting from renting their property. In fact, it is the opposite. Landlords feel they are being made to rent to individuals they find undesirable, but this does not stop them from receiving rent payments. Landlords might be relying on discriminatory stereotypes about which tenants are "good" and which are not, but these are not relevant to the economic impact of regulation. In the case that tenants are indeed poor, for example by damaging property or failing to pay rent, landlords have legal recourse to evict the tenant and/or recoup the losses. This is far from the economic wipeout that the *Lucas* court found important for evaluating if a government action was indeed a regulatory taking.

Turning to prong 3, the character of government action, it seems that antidiscrimination housing laws are protected types of government action. Even if a regulatory takings claim were to survive the first two prongs of *Penn*, a plaintiff would have to show that the laws are not reasonably tied to health, safety, morals, or general welfare. Laws that seek to increase access to housing and protect individuals from discrimination when applying for housing are certainly reasonably connected to the general welfare. Further, a government might legitimately argue that issues of housing equity are issues of safety and morals as well. Preventing bias from having a legitimate place in one's ability to find permanent shelter is a reasonable moral decision for a government, elected and entrusted by its constituents, to make. There is an established history of the Court allowing governments to decide that some interests are more important than others, especially where there is a "predominant public concern." As discussed above, in *Miller*, the Court allowed the government of Virginia to mandate physical changes to property to benefit the apple tree industry. Preventing discrimination in housing is a public concern that should usurp the desires of individual landlords to engage in discriminatory or biased behavior.

Returning to the earlier case of *Kansas v. Mugler*, Justice Harlan provides helpful guidance on what types of behavior States may impose prohibitions on without penalty. Harlan noted:

> The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the

> existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.[64]

Like Justice Brennan, Harlan argues that States cannot be burdened with compensation when seeking to limit behavior that is harmful to the health, morals, or the safety of the public. Harlan's opinion is helpful in providing a reason for this protection of state action: that it would be perverse to compensate property owners who "inflict injury upon the community" through noxious use. Harlan makes clear that we must consider the imposition of property owner's land usage upon the community just as seriously as we consider the State's counter-imposition in response. At issue in *Mugler* was the notion that the sale of alcohol was actively inflicting injury upon the community and was therefore noxious. While alcohol sales are generally considered acceptable in the present, we have our own ideas about what is legally required to have baseline protection of morality and community. If we consider laws like the FIT rule in *Yim*, we might argue that discrimination in housing (and clever attempts to exploit loopholes in existing housing laws) are actively injurious to the community. Denial of housing despite meeting listed criteria creates housing instability and also clogs up the rental market. As will be explored in the final section, this usage of land is harmful to the community while not clearly benefitting landowners, aside from satisfying discriminatory preferences.

C. Heart of Atlanta and Resisting Backsliding

Applying regulatory takings arguments is also contrary to well-established principles about how businesses can be regulated, especially when they hold themselves out to the public. In *Heart of Atlanta Motel v. United States*,[65] motel owner Moreton Rolleston argued that Title II of the Civil Rights Act of 1964 exceeded Congress's power under the Commerce Clause. Title II prohibits discrimination on the basis of race, religion, or national origin in places of public accommodation. Rolleston also argued that Title II was a Fifth Amendment taking and also violated the Thirteenth Amendment by forcing him to conduct his business in a certain way. The Court ruled against Rolleston. It decisively found that his takings argument was unmerited and that Title II was within the ability of Congress to control commerce, writing: "[T]he only questions

64. Kansas v. Mugler, 123 U.S. at 668–69.
65. Heart of Atlanta Motel v. United States, 379 U.S. 241, 243–44 (1964).

are: (1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate."[66] Further, it rejected the idea that Rolleston was subject to involuntary servitude (in violation of the Thirteenth Amendment) by being made to accommodate racial minorities in his business. While apartments are not obviously public accommodations like the hotel at issue in *Heart of Atlanta*, the Court provides several important insights that should not be forgotten. First, if a government can find a rational connection between one of its clearly allocated responsibilities and discriminatory behavior, it may take reasonable and appropriate action to fulfill its responsibilities by stopping the discriminatory behavior. Second, the Court rejected Rolleston's rather libertarian argument based on the Thirteenth Amendment. Being made to accommodate people of diverse backgrounds, even if it violates one's personal or business preferences, is different from servitude. Conservative activists in the present would do well to remember that antidiscrimination laws are often prerequisites to living in a diverse society, not unconstitutional overreach by a Big Brother government. It is the discriminatory actions of activists that are illegal, not government efforts to prevent these actions.

Some sources of public accommodation have begun to adopt potentially discriminatory practices that seem to violate the holding of *Heart of Atlanta*. For example, "Crime-Free" Hotel and Motel programs have spread in certain parts of the country. These programs encourage participants to, among other things, scrutinize guests for potential "criminal behavior" during check-in, report "excessive foot traffic" to specific rooms to the police, and ask guests to sign a "Crime Free Addendum" when checking in. The Reno, Nevada Crime Free Hotel and Motel program also encourages heightened scrutiny over local residents paying cash for a room, claiming that "a person with a credit card is more likely to follow the rules and not want to ruin their credit."[67] This type of program opens up a door for discriminatory enforcement driven by racism, classism, and other bias in a public accommodation.

Consider this hypothetical: a hotel, named Plaintiff A here, engaging in a "Crime Free Hotel and Motel" program. Plaintiff A is in State B. State B passes a law banning this program or similar policies used to discriminate amongst potential guests. Plaintiff A

66. *Id.* at 258–59.

67. Reno Police Department, *Crime Free Hotel & Motel* (2018), https://www.renopd.com/formAdmin/content/pdfs_lib/CFHM_2_9_2018.pdf [https://perma.cc/32WU-HDR3].

might bring a regulatory takings action against State B, arguing that B has unconstitutionally imposed upon the business practices of A without just compensation. A might argue that accepting unscrupulous tenants will lead to a financial loss that requires payment from B. While hypothetical, such a lawsuit is well within the realm of possibility, as California recently placed a ban on Crime Free Housing Programs and landlords in Illinois have experimented with takings claims to challenge Crime Free programs.[68] *Heart of Atlanta* is still good law and is a much-needed reminder that discrimination in places of public accommodation is unacceptable.

D. Public Policy and Acceptable Limitations on Individual Preference

Justice Cardozo declared that "the final cause of law is the welfare of society."[69] It is important to remember that the welfare of society and the enactment of policy always come with tradeoffs. As a matter of public policy, it is important to understand antidiscrimination laws as valid constraints upon individual behavior and preference. Such laws might restrict individual bad actors in some ways, but these restrictions should be considered acceptable if they enable others to exercise their basic liberties without interference from bad actors. Antidiscrimination laws might be essential enough to be considered background principles of law excepted under *Cedar Point*, although some scholars disagree.[70] Regardless, the right to use property in an absolute manner is certainly not a right grounded in historical practice. Andrew Schwartz observes that "[t]he right to use property for economic gain is generally not essential to liberty, and enjoys no specific protection under the Constitution."[71] He continues, noting that regulation on business has occurred throughout the nation's history and is considered acceptable in order to allow societal functioning: "Congress long ago adopted

68. Inst. for Just., *Granite City Compulsory Evictions*, https://ij.org/case/granite-city-compulsory-evictions/ [https://perma.cc/78PY-RNFJ]; Assembly Bill 1418 (Calif. 2023).

69. Benjamin N. Cardozo, The Nature of the Judicial Process 66 (1921).

70. *See* Lee Anne Fennell, *Escape Room: Implicit Takings After Cedar Point Nursery*, 17 Duke J. Const. Law & Pub. Pol'y 22–23 (2022) ("Could longstanding statutory regimes like antidiscrimination law be treated as background principles? Going this route would establish that modern statutes can count as background principles—a proposition the Court might find difficult to cabin. A statute's longevity alone might not provide the Court with a stopping point that it would find satisfactory… Moreover, declaring the whole of civil rights law a background principle might preclude the Court from using Penn Central as a backstop in this area.").

71. Schwartz, *supra* note 56, at 270.

anti-trust laws, price controls, and banking regulations to protect consumers and foster economic diversity."[72]

In housing law, there has also been the development of the warranty of habitability, first recognized in *Javins v. First National Realty Corporation*.[73] Judge Skelly Wright set forth the warranty of habitability as implied and unable to be removed by contract, requiring that landlords keep rental properties in a state suitable for occupation. In justifying this imposition upon landlords, Judge Wright observed that there is often great inequality in bargaining power between tenants and landlords, writing that "tenants have very little leverage to enforce demands for better housing. Various impediments to competition in the rental housing market, such as racial and class discrimination and standardized form leases, mean that landlords place tenants in a take it or leave it situation."[74] The warranty of habitability, although restrictive to landlords, was considered permissible because the restriction was tied directly to preventing a harm that the restricted party would otherwise cause. The idea of a free market has limits when it allows for suffering by the vulnerable and indigent. Wright also notes that "findings by various studies of the social impact of bad housing has led to the realization that poor housing is detrimental to the whole society, not merely to the unlucky ones who must suffer the daily indignity of living in a slum."[75] The warranty of habitability is also justified because housing insecurity and inhumane housing conditions are contrary to the public interest. From a public policy standpoint, limitations on business interests (created in Congress or even by courts) are common and often desirable.

A landlord might cry out "Ah! But what about *my* liberties?" The libertarian argument that government policy is unjustly interfering with individual choices about how to live and conduct business must be addressed. Schwartz writes that "the Reagan Revolution and the contemporary trend toward a 'radical individualism' and their counterpart, a shrinking of government involvement in economic affairs, have closely paralleled the expansion of regulatory takings."[76] Requiring

72. *Id.* at 315 (citing Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010); Banking Act of 1933 (Glass-Steagall Act), Pub. L. No. 73-66, 48 Stat. 162 (1933); Sherman Antitrust Act of 1890, ch. 647, 26 Stat. 209; Clayton Antitrust Act of 1914, Pub. L. 63-212, 38 Stat. 730; Natural Gas Act, Pub. L. No. 75-688, 52 Stat. 821 (1938)).

73. Javins v. First National Realty Corporation, 428 F.2d 1071, 1072–73 (D.C. Cir. 1970).

74. *Id.* at 1079.

75. *Id.* at 1079–80.

76. Schwartz, *supra* note 56, at 273.

protections for minorities or other oppressed groups are not meaningful harms to society or individuals, and we must resist such a framing. Civil rights protections and legislation intended to enable individuals to obtain basic goods like housing are fundamental rules establishing fairness in society. They are liberty-enhancing, only punishing those who seek to diminish the liberty of others by acting on discriminatory beliefs. As we have seen, it is not unconstitutional to impose some limitations on discrimination. Landlords can always decide not to rent a unit at all if the idea of being regulated in a certain way is so unpleasant. The rules of the playground apply to the rules of the rental market: if you aren't willing to play nicely, take your ball and go home. Further, some landlords may welcome antidiscrimination laws. In the case of the FIT rule in Seattle, some landlords may appreciate the rule because of its goal of reducing discrimination. Others might appreciate the simplicity of a clear and expedited rental process. The complaints of some landlords against antidiscrimination laws are not clearly applicable to all or even most landlords. If FIT were to be overturned, it isn't obvious that other landlords would benefit. They may even lose business.

Landlords are not without remedy. As noted, if a harm occurs because of a particular tenant, a landlord has a plethora of remedies to rectify their situation and recover any economic loss. Rules like FIT do not preclude landlords from evicting or refusing to rent to individuals or seeking damages for repairs. Landlords simply must have a non-discriminatory reason for taking these actions. The FIT rule is powerful because it forces landlords to publicly list criteria for potential applicants, which cannot be discriminatory, and then be responsible for these criteria. For example, a landlord cannot claim to only care about ability to pay rent and criminal history when considering applicants, but secretly use race or gender as additional screening criteria. Neither should the government be obligated to compensate landlords because they are being limited in their ability to act upon these secret criteria, especially as a public-facing business.

The courts have also recognized that there is a limit to what governments can enforce upon landlords. In *Levin v. City and County of San Francisco*, the district court found a 2014 ordinance passed by the City and County of San Francisco to be an unconstitutional taking. The ordinance required property owners seeking to withdraw rent-controlled properties from the rental market to pay displaced tenants "the greater of a relocation payment due under a 2005 Ordinance or the new, 'enhanced' amount: twenty-four times the difference between the units' current monthly rate and an amount that purports to be the fair market value of a comparable unit in San Francisco, as calculated by

a schedule developed by the Controller's Office."[77] While intended to help residents of San Francisco find new housing amidst soaring prices, the ordinance "contains no means or need test for the tenant, such that a tenant is entitled to the payout irrespective of income."[78] This formulation was found to be a taking because it conditioned the right to change the use of one's property "on a monetary exaction not sufficiently related to the impact of the withdrawal."[79] The court did not consider if the exaction in the ordinance was normatively desirable or arbitrary or unfair. Instead, it found that the policy goals of the ordinance lacked "an essential nexus and rough proportionality to the effects of a property owner withdrawing a unit from the rental market."[80] In summary, the court did not believe that charging a property owner (often exorbitant) fees to withdraw their property from the rental market was sufficiently connected to the broader government goal of improving San Francisco's housing crisis. Landlords were being excessively punished for a larger economic and social problem that was beyond their control, although they may have played a role.

Levin was brought by the Pacific Legal Foundation, the same organization that brought the *Yim* case to court. The Pacific Legal Foundation is a fine example of an activist group seeking to enforce conservative, libertarian, and discriminatory values through impact litigation related to takings. However, we can learn from their failures and successes. The takings claim being accepted in *Levin*, while rejected in *Yim*, is instructive to understanding the Takings Clause. *Levin* is distinguishable from *Yim* because the San Francisco ordinance in *Levin* places an economic burden on landlords based on housing market prices outside of their control. In doing so, it places hefty restrictions on the ability to exit the rental market. The Seattle ordinance in *Yim* is intended to reduce bias in rental applications by individual landlords, and the remedy it provides (the First in Time rule) is tailored to address this bias. The *Yim* ordinance does not necessarily affect the asking price landlords can seek, or other lease terms like length. Further, *Yim* places some restrictions on how landlords can use their property, given that they have chosen to rent. It does not affect the more fundamental property right to choose to put a property on the rental market, as the *Levin* ordinance does.

77. Levin v. City & Cnty. of S.F., 71 F. Supp. 3d 1072, 1074 (N.D. Cal. 2014).
78. *Id.* at 1078.
79. *Id.* at 1074.
80. *Id.* at 1083.

Looking at concerns of public policy, these two cases make it clear that regulation intended to prevent discrimination by individual landlords is acceptable, especially if the regulation is reasonably connected to this goal. Such a regulation would not be a taking. In contrast, extreme economic restrictions on business (like controlling exit from a market) that are not reasonably connected to the impact of a landlord's actions are likely unacceptable. The remedy must be connected and proportional to the harm it addresses. Additionally, the permissible reach of government regulations appears much greater for enforcing the basic social and moral issues considered necessary for a healthy community, like antidiscrimination, than purely economic issues.

Conclusion

Laws that protect the right of citizens to seek housing without facing discrimination are not takings. This Note has examined the history of the takings doctrine and considered the ways that plaintiffs are seeking to develop the doctrine in ways that would hamstring government attempts to protect against discrimination. The case study of *Yim v. City of Seattle* illustrates the extreme view of property rights that conservative activists and landlords are seeking to validate in the courts. Such a view would treat regulations of property, even for good reason, as government takings requiring just compensation. Extending the metaphor from *Miller*, this viewpoint would protect diseased trees from destruction at the cost of the entire forest.

The rights of property owners are not absolute, and the choice to rent property to the public necessarily comes with restrictions. Public policy and government efficacy require the ability to set some restrictions on bad behavior like racial profiling or discrimination, without having to pay a fee to do so. Legal precedent supports this fundamental requirement of public policy. Despite the changes in the takings doctrine over time, the Court's history of cases is consistent that the Takings Clause is not intended to force the government to reimburse property owners for any and all infringements on use. Even without a significant return to an originalist view of takings, it is clear that even regulatory takings were not intended to stretch as far as the plaintiffs in *Yim* desired. While conservative activists have enjoyed success in shifting the interpretation of the First Amendment to allow discriminatory behavior contrary to public policy, this Note argues that they will have less luck with the Fifth Amendment. The existing doctrine and the baseline requirements of a diverse and tolerant society make clear that antidiscrimination laws cannot be considered takings.