

GREEN NEW APPEAL?: THE DUE PROCESS CLAUSE AS A DEFENSE AGAINST STATE PREEMPTION OF MUNICIPAL ENVIRONMENTAL LAWS

Abstract: As action to combat climate change stalls on the federal level, cities and towns have taken the lead in passing environmentally friendly legislation. Nevertheless, as political polarization continues, states have increasingly employed preemption ceilings to curb municipal legislative efforts. Many state constitutions are structured in a manner that explicitly enable states to preempt local legislation. Because municipalities historically had no power to pass legislation without express approval from their state of incorporation, and despite their increased authority under home rule, municipalities have had no way to combat preemptive laws. In 2013, in *Robinson Township v. Commonwealth*, Justice Baer of the Pennsylvania Supreme Court, writing in concurrence, offered one possible solution: the Due Process Clause. This Note argues that municipalities, advancing the argument of Justice Baer's concurrence, can use the Due Process Clause to overcome state preemption in environmental law.

INTRODUCTION

When Boston Mayor Michelle Wu introduced her plan for a municipal Green New Deal, she declared that cities have the power to lead the fight against climate change.¹ Mayor Wu claimed that municipalities, as the closest level of government to people, possess unique abilities to innovate, act quickly, and earn community trust that can make legislative momentum on the national level possible.² Mayor Wu's proposal comes as advocates for progressive climate change policy stress dangers that younger generations could inherit from an increasingly hot planet.³

¹ OFF. OF BOS. CITY COUNCILOR MICHELLE WU, PLAN FOR A BOSTON GREEN NEW DEAL & JUST RECOVERY 1, 2–3 (2020) [hereinafter BOSTON GREEN NEW DEAL], <https://assets.ctfassets.net/1hf11j69ure4/B6NLxIOVxTVMNbHEvFaQE/700f4762bae92990f91327a7e01e2f09/Boston-Green-New-Deal-August-2020-FINAL.pdf> [<https://perma.cc/LH2F-4X9A>].

² John Nichols, *Michelle Wu: Cities Must Lead for the Green New Deal*, THE NATION (Dec. 14, 2021), <https://www.thenation.com/article/politics/qa-michelle-wu/> [<https://perma.cc/CH82-GJ3Y>].

³ See Jack Lyons & Kate Lusignan, 'We Have So Much to Lose': Realities of Climate Change Have Galvanized These Massachusetts Teens to Fight for Their Future, BOS. GLOBE, <https://www.bostonglobe.com/2021/08/11/metro/we-have-so-much-lose-realities-climate-change-have-galvanized-these-massachusetts-teens-fight-their-future/> [<https://perma.cc/33FZ-72NW>] (Aug. 11, 2021) (interviewing climate advocates calling for environmental policy changes); Cara Murez, *Weak Action on Climate Change Is Stressing Young People Worldwide*, U.S. NEWS (Dec. 29, 2021), <https://www.usnews.com/news/health-news/articles/2021-12-29/weak-action-on-climate-change-is-stressing-young->

Boston's version of the Green New Deal includes plans to rezone the city to improve density, construct affordable housing, and create green spaces.⁴ With growing support for governmental action on climate change, other cities have embraced similar environmentally conscious legislation.⁵ For example, in California, over fifty local governments have adopted all-electric building codes that either reduce or eliminate the use of natural gas in new buildings.⁶

people-worldwide [<https://web.archive.org/web/20220101151813/https://www.usnews.com/news/health-news/articles/2021-12-29/weak-action-on-climate-change-is-stressing-young-people-worldwide>] (discussing climate anxiety among people between the ages of sixteen and twenty-five). *See generally* CLIMATE CHANGE 2021: THE PHYSICAL SCIENCE BASIS, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (2021), https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_Full_Report.pdf [https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_Full_Report.pdf] (reporting on current scientific research modeling potential climate change impacts).

⁴ Alexander C. Kaufman, *Boston Lawmaker, Eying a Mayoral Run, Maps Out a Nordic-Style Climate Haven*, HUFFPOST, https://www.huffpost.com/entry/boston-climate-michelle-wu_n_5f3715f9c5b6959911e48e07 [<https://perma.cc/Y6WH-6SYA>] (Aug. 17, 2020). Green space is the colloquial name for publicly accessible land, such as a park or community garden, which is covered, at least partly, with grass, trees, or vegetation. *Green Streets and Community Open Space*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/G3/green-streets-and-community-open-space> [<https://perma.cc/8VKH-YNBS>].

⁵ *E.g.*, PHILA., PA., CODE § 9-4902 (2019) (prohibiting retail establishments from giving customers single-use plastic bags); *see* Rob Tornoe, *Philadelphia's Ban on Plastic Bags Begins This Week*, PHILA. INQUIRER (June 23, 2021), <https://www.inquirer.com/news/philadelphia/philadelphia-plastic-bag-ban-date-20210623.html> [<https://perma.cc/8VG4-VJDM>] (discussing the environmental motives for the plastic bag ban in Philadelphia); YALE PROGRAM ON CLIMATE CHANGE COMM'C'N & GEO. MASON UNIV. CTR. FOR CLIMATE CHANGE COMM'C'N, PUBLIC SUPPORT FOR INTERNATIONAL CLIMATE ACTION 4 (2021), <https://climatecommunication.yale.edu/wp-content/uploads/2021/04/public-support-international-climate-action-march-2021.pdf> [<https://perma.cc/4VKW-YFNX>] (surveying Americans and finding that sixty-five percent of registered voters want the United States government to do more to address climate change).

⁶ *E.g.*, BERKELEY, CAL. CODE § 12.80 (2019) (banning the installation of gas stoves in new building developments); *see also* Soumya Karlamangla, *How the Gas-Stove Debate Has Played Out in California*, N.Y. TIMES (Jan. 18, 2023), <https://www.nytimes.com/2023/01/18/us/gas-stove-debate-california.html> [<https://perma.cc/Z386-8MJF>] (discussing state level conversations about gas stove bans in California); Jessica Gable, *California's Cities Lead the Way on Pollution-Free Homes and Buildings*, SIERRA CLUB, <https://www.sierraclub.org/articles/2021/07/californias-cities-lead-way-gas-free-future> [<https://perma.cc/S7J4-RKV7>] (Feb. 14, 2023) (discussing legislative efforts by California municipalities to ban gas hookups in buildings). Advocates of gas-free building legislation claim that such ordinances are motivated by climate change among other factors. *See* Gable, *supra* (stating that municipalities are motivated by climate change, air pollution, gas prices, and potential dangers of gas). The natural gas used in homes may come from fracking, which has been linked to climate change. *See* David Roberts, *Fracking May Be a Bigger Climate Problem Than We Thought*, VOX, <https://www.vox.com/energy-and-environment/2019/8/15/20805136/climate-change-fracking-methane-emissions> [<https://perma.cc/E688-2NNX>] (Aug. 29, 2019) (discussing a link between fracking and climate change). Early in 2023, U.S. Consumer Product Safety Commissioner Richard Trumka, Jr., suggested that the federal government should ban gas stoves. Elena Shao & Lisa Friedman, *Ban Gas Stoves? Just the Idea Gets Some in Washington Boiling*, N.Y. TIMES, <https://www.nytimes.com/2023/01/11/climate/gas-stoves-biden-administration.html> [<https://perma.cc/8ZKM-NJBG>] (Jan. 12, 2023). In proposing a ban, Commissioner Trumka pointed to studies linking the air pollutants such as nitrogen dioxide and carbon monoxide from gas stoves with childhood asthma and cancer. *Id.*; *see also* Elena Shao, *Researchers Find Benzene and Other Dangers in Gas Piped to California Homes*, N.Y.

There is one caveat to Mayor Wu's sweeping proposal: state law limits the flexibility of cities to act.⁷ As creatures of state law, municipalities only have the limited authority delegated to them by their state of incorporation.⁸ States, either by statute or through their constitutions, often grant the authority to govern local matters—also known as “home rule”—to municipalities.⁹ Nevertheless, states reserve the right to preempt municipalities where a municipal law would conflict with state law.¹⁰

Sometimes, states use their preemption authority to actively prevent municipalities from regulating.¹¹ As such, Boston is free to advance climate change policies only so far as the Commonwealth of Massachusetts allows.¹² Additionally, New Hampshire's government, in contrast to the aforementioned policy that California adopted, passed a law preventing its municipalities from adopting any policy that prohibits the installation of gas hookups in buildings.¹³

TIMES (Oct. 20, 2022), <https://www.nytimes.com/2022/10/20/climate/gas-stove-benzene-california.html> [<https://perma.cc/T4HD-7RDB>] (discussing studies showing that gas stoves can leak benzene, a carcinogenic chemical). See generally Talor Gruenwald, Brady A. Seals, Luke D. Knibbs & H. Dean Hosgood III, *Population Attributable Fraction of Gas Stoves and Childhood Asthma in the United States*, J. ENV'T RSCH. & PUB. HEALTH, Dec. 21, 2022, at 1 (finding that 12.7% of childhood asthmas in the United States can be traced to pollutants from gas stoves).

⁷ See BOSTON GREEN NEW DEAL, *supra* note 1, at 16 (explaining that states delegate power to cities and that city-controlled power levers are immediate).

⁸ Paul S. Weiland, *Preemption of Local Efforts to Protect the Environment: Implications for Local Government Officials*, 18 VA. ENV'T L.J. 467, 472 (1999).

⁹ Weiland, *supra* note 8, at 472; see *Home Rule*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining home rule as a state act providing a measure of conditional authority to municipal governments).

¹⁰ See *Preemption*, BLACK'S LAW DICTIONARY, *supra* note 9 (defining preemption as a doctrine in which federal law can supersede conflicting state law); Weiland, *supra* note 8, at 472 (stating that the concept of preemption applies to state and municipal government relations); MCQUILLIN: L. MUN. CORPS. § 15:18 (3d ed. 2021) [hereinafter MCQUILLIN] (stating that because municipal laws are inferior to state laws, state law prevails in any conflict); see also David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2257, 2261 (2003) (discussing state preemption in relation to municipal home rule).

¹¹ See, e.g., N.H. REV. STAT. ANN. § 155-A:2 (2021) (preempting municipalities from banning natural gas hookups in new buildings).

¹² See DAVID J. BARRON, GERALD E. FRUG & RICK T. SU, *DISPELLING THE MYTH OF HOME RULE: LOCAL POWER IN GREATER BOSTON* 1 (2004) (explaining home rule structure, history, and purpose in Massachusetts); see also Weiland, *supra* note 8, at 468 (discussing the history of local government in environmental regulations in the twentieth century). In Massachusetts, the state grants municipalities home rule by statute and constitutional amendment. BARRON et al., *supra*, at 1. See generally MASS. CONST. art. LXXXIX (amended 1966) (granting municipalities authority to govern on local matters); MASS. GEN. LAWS ch. 43B, § 13 (2022) (granting municipalities authority to govern on local matters consistent with Article LXXXIX of the state constitution).

¹³ Lisa Prevost, *New Hampshire Gas Law Handcuffs Local Government on Climate-Friendly Construction*, ENERGY NEWS NETWORK (Sept. 27, 2021), <https://energynews.us/2021/09/27/new-hampshire-gas-law-handcuffs-local-government-on-climate-friendly-construction/> [<https://perma.cc/LR4G-R9D3>]. See generally N.H. REV. STAT. ANN. § 155-A:2 (2021) (preempting municipalities from banning natural gas hookups in new buildings). The New Hampshire law more broadly prevents municipalities from adopting policies that ban any safe and commercially available energy system. Prevost, *supra*. Arizona was the first state to pass this kind of legislation, preventing municipalities

State governments can therefore serve as a significant roadblock to municipalities looking to pass climate change motivated legislation.¹⁴ States may have a number of motivations to implement “ceiling preemption”, preventing municipalities from enacting environmental ordinances that are stricter than those allowed by state laws.¹⁵ First, states may have an interest in promoting a specific industry.¹⁶ Alternatively, a state may want to keep certain regulations consistent across the state.¹⁷ Furthermore, partisan interests may even motivate a state to implement ideological values in its cities.¹⁸

from imposing any requirement that restricts a utility company’s authority to serve customers. See Emma Coleman, *One State Becomes First in the Nation to Preempt City Natural Gas Bans*, ROUTE FIFTY (Feb. 25, 2020), <https://www.route-fifty.com/management/2020/02/arizona-preemption-natural-gas/163322/> [<https://perma.cc/Q3NQ-YGM9>] (describing Arizona’s gas-free preemption law); see also 2020 Ariz. Sess. Laws 10 (barring municipalities from restricting the use of natural gas hookups in new buildings). After Arizona, nineteen other states followed suit in preempting municipalities from banning natural gas hookups in homes. Ella Nilsen, *Cities Tried to Cut Natural Gas from New Homes. The GOP and Gas Lobby Preemptively Quashed Their Effort*, CNN (Feb. 17, 2022), <https://www.cnn.com/2022/02/17/politics/natural-gas-ban-preemptive-laws-gop-climate/index.html> [<https://perma.cc/YJ93-QPFM>].

¹⁴ See Weiland, *supra* note 8, at 472 (discussing state preemption on environmental regulations); Prevost, *supra* note 13 (same).

¹⁵ See William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1552 (2007) (describing federal ceiling preemption of state and local laws); Brian T. Burgess, *Limiting Preemption in Environmental Law: An Analysis of the Cost-Externalization Argument and California Assembly Bill 1493*, 84 N.Y.U. L. REV. 258, 259 (2009) (describing the growing risk of ceiling preemption of environmental regulations). Ceiling preemption precludes state and local policies that create stricter requirements than those created by the federal government. Buzbee, *supra*, at 1552.

¹⁶ See Burgess, *supra* note 15, at 259–60 (stating business groups often seek ceiling preemption).

¹⁷ See *id.* at 275–76 (discussing a federal interest in preventing states from adopting stringent standards that cause externalities elsewhere).

¹⁸ See Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 1997–98 (2018) (arguing that preemption can be motivated by conflicting political ideologies between state governments and municipalities). In the case of gas stoves, the majority of states that have implemented such prohibitions are those that are commonly considered “red states.” Shao & Friedman, *supra* note 6 (reporting that twenty states with Republican majority legislatures have implemented gas stove preemption laws). This is the case despite the fact that electric stoves are more commonly used in many Republican-controlled states, whereas gas stoves are heavily used in some Democratic-controlled states like California and New Jersey. See *id.* (stating that households in red states tend to rely primarily on electric kitchen stoves); In 2020, *Most U.S. Households Prepared at Least One Hot Meal a Day at Home*, U.S. ENERGY INFO. ADMIN., <https://www.eia.gov/todayinenergy/detail.php?id=53439> [<https://perma.cc/2DCY-Y5G4>] (Aug. 15, 2022) (reporting that although thirty-eight percent of U.S. households use gas stoves, usage in California and New Jersey reach seventy percent and sixty-nine percent respectively). When Commissioner Trumka discussed the possibility of a federal gas stove ban, many Republican, and some Democratic, politicians responded with outrage. Shao & Friedman, *supra* note 6. Additionally, conservative media figures such as Tucker Carlson joined in on criticizing the suggested ban. See *id.* (discussing an interview Tucker Carlson conducted with a restaurateur); Tucker Carlson Tonight, *A Gas Stove Ban Would Destroy Our Industry: Restaurant Owner Stratis Morfogen*, FOX NEWS (Jan. 11, 2023), <https://www.foxnews.com/video/6318485569112> [<https://perma.cc/YZZ9-B738>] (interviewing a restaurateur chastising the federal government for suggesting gas stove bans). In response to criticism, Commissioner Trumka tweeted his opposition to a ban, and a spokesperson for President Joseph R. Biden denied support from the White House. Shao

If states can preempt policy goals of municipalities, then are climate-conscious cities at the whim of their states?¹⁹ Perhaps not, as one battle waged by a municipality against the Commonwealth of Pennsylvania illustrates.²⁰ Specifically, in 2013, in *Robinson Township v. Commonwealth*, a concurring opinion from the Supreme Court of Pennsylvania provides a roadmap for how municipalities can employ the Due Process Clause of the Fourteenth Amendment to contest state preemption.²¹ In *Robinson Township*, Justice Max Baer concurred and asserted that a state statute preempting municipal zoning laws unconstitutionally interfered with the substantive due process rights of Pennsylvanians to quiet enjoyment of land.²² In making this contention, Justice Baer opened the door for municipalities to claim violations of substantive due process where state preemptive laws overreach in environmental law contexts.²³ This Note gives special attention to the asserted right of quiet enjoyment of land as explored in *Robinson Township*.²⁴ Moreover, the implications of *Robinson Township* could also potentially extend to other cognizable liberty interests that a state allows private citizens to impede through preemption of local laws.²⁵

Overall, this Note argues that municipalities should use the Due Process Clause, as mapped in *Robinson Township*, as a shield against state preemption in the context of environmental legislation.²⁶ Part I of this Note provides the historical background and legal jurisprudence for the aspects of preemption, the Due Process Clause, and zoning relevant in *Robinson Township*.²⁷ Part II

& Friedman, *supra* note 6; see Richard Trumka (@TrumkaCPSC), TWITTER (Jan. 9, 2023, 3:54 PM), <https://twitter.com/TrumkaCPSC/status/1612553459462721536?s=20&t=8e9Mzjlf2fm4PqLogOxtDdw> [<https://perma.cc/8GZN-JN7X>] (stating that the federal government is not trying to remove gas stoves).

¹⁹ See, e.g., Prevost, *supra* note 13 (discussing state preemption in New Hampshire); Coleman, *supra* note 13 (discussing state preemption in Arizona).

²⁰ See *Robinson Township v. Commonwealth*, 83 A.3d 901, 1001, 1006 (Pa. 2013) (Baer, J., concurring) (arguing that a state preemption measure in a zoning case was prohibited by the Due Process Clause of the Fourteenth Amendment).

²¹ See *id.* at 1008 (arguing that a state preemption measure in a zoning case violates substantive due process rights).

²² *Id.* at 1001.

²³ See *id.* (asserting that the Due Process Clause could prevent a state from preempting the ability of municipalities to zone in the best interest of their communities). This argument works best in the context of environmental law because it often involves state action that intentionally allows private citizens to contribute towards pollution or climate change. See *id.* (claiming that the Due Process Clause protects citizens from state action that allows private citizens to interfere with their quiet enjoyment of property).

²⁴ See *id.* (claiming that quiet enjoyment of land is a fundamental right protected by the Due Process Clause); see also *infra* notes 30–291 and accompanying text (analyzing the recognition of a fundamental right to quiet enjoyment of land to shield against state preemption that allows private citizens to impede on the fundamental rights of their neighbors).

²⁵ See *Robinson Township*, 83 A.3d at 1001 (using quiet enjoyment of land as a fundamental right triggering due process protection).

²⁶ See *infra* notes 30–291 and accompanying text.

²⁷ See *infra* notes 30–208 and accompanying text.

discusses the potential uses for the Due Process Clause argument in intrastate preemption cases and the potential implications on state or local authority.²⁸ Part III argues that municipalities should bring due process claims as a shield against state preemption efforts attempting to stifle environmental legislation.²⁹

I. STATE AND MUNICIPAL POLICE POWER: KEEPING THE PIG OUT OF THE PARLOR

In 2013, in *Robinson Township v. Commonwealth*, the Supreme Court of Pennsylvania decided a case regarding issues of preemption, the Due Process Clause, and zoning.³⁰ In his concurrence, Justice Baer connected the converging issues to argue that the Due Process Clause should serve as protection for the municipality against a state preemption law targeting zoning.³¹ Section A of this Part discusses intrastate preemption affecting municipalities and distinguishes relevant types of preemption.³² Section B examines Due Process Clause jurisprudence.³³ Section C explores the intersection of police powers and zoning.³⁴ Section D discusses the facts of *Robinson Township* as well as Justice Baer's concurrence.³⁵

A. "Intrastate" Preemption

Under the doctrine of preemption, when laws at different layers of government clash, the law from the higher level of government will supersede the law from the lower level of government.³⁶ The Supremacy Clause of the Constitution gives effect to preemption at the federal level.³⁷ Nevertheless, the same principle generally applies at the state to local level.³⁸ In each case,

²⁸ See *infra* notes 210–271 and accompanying text.

²⁹ See *infra* notes 272–291 and accompanying text.

³⁰ *Robinson Township v. Commonwealth*, 83 A.3d 901, 915–16 (Pa. 2013).

³¹ *Id.* at 1001 (Baer, J., concurring); see also *infra* notes 272–291 and accompanying text (discussing substantive due process as a shield against preemption).

³² See *infra* notes 36–78 and accompanying text.

³³ See *infra* notes 79–116 and accompanying text.

³⁴ See *infra* notes 117–183 and accompanying text.

³⁵ See *infra* notes 184–206 and accompanying text.

³⁶ MCQUILLIN, *supra* note 10, § 15:18. When preempted, the lower-level law will be considered invalid. *Id.* § 15:19.

³⁷ Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 234 (2000); see U.S. CONST. art. VI, cl. 2 (stating that the Constitution and United States laws and treaties are supreme); see also *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152–53 (1982) (stating that preemption stems from the Constitution and referring to Article IV, clause two of the Constitution as the Supremacy Clause); Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 767 (1994) (stating that it is “well established” that Congress can supersede state laws (quoting *PG & E v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203 (1983))).

³⁸ See Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1122 (2007) (stating that preemption only occurs when different layers of government are working in the same area).

preemption occurs because two levels of government are attempting to operate in the same space.³⁹ The purpose of preemption is therefore to prioritize legislation that comes from the higher level of government.⁴⁰

In a home rule system, municipalities have flexibility to legislate and exercise police power.⁴¹ Given that flexibility, the test for preemption is to determine whether the state intended to prevent municipalities from legislating on a certain subject.⁴² Subsection 1 of this Section will provide a brief history of intrastate preemption.⁴³ Subsection 2 will distinguish the various types of preemption, giving special attention to express preemption and ceiling preemption.⁴⁴

1. History of “Intrastate” Preemption

Early in United States history, municipalities had little authority to act as independent decisionmakers.⁴⁵ Although the federal government and states are considered sovereign entities, municipalities are merely subdivisions of their state of incorporation.⁴⁶ In the traditional view, under a doctrine called Dillon’s Rule, courts construed the power of municipalities strictly and narrowly.⁴⁷

Under a system of Dillon’s Rule, a municipality merely has the following powers: (1) those that the state expressly grants to it; (2) those powers incidental to the expressly established powers; and (3) those that are indispensable to

³⁹ *Id.*

⁴⁰ MCQUILLIN, *supra* note 10, § 15:18; Colo. Mining Ass’n v. Bd. of Cnty. Comm’rs of Summit Cnty., 199 P.3d 718, 723 (Colo. 2009). It is well established that municipal laws are inferior to state laws. MCQUILLIN, *supra* note 10, § 15:18.

⁴¹ Barron, *supra* note 10, at 2292; see *Police Power*, BLACK’S LAW DICTIONARY, *supra* note 9 (defining police power as the “inherent and plenary” authority of a government to make laws in the interest of “public security, health, morality, and justice”). Under a “home rule” system, a state constitution provides municipalities with the authority to govern local or municipal affairs subject to limits set forth in the state’s general laws. Barron, *supra* note 10, at 2292.

⁴² MCQUILLIN, *supra* note 10, § 15:19.

⁴³ See *infra* notes 45–62 and accompanying text.

⁴⁴ See *infra* notes 63–78 and accompanying text.

⁴⁵ See Diller, *supra* note 38, at 1122 (stating that municipal authority was narrow for many years in America’s history); Barron, *supra* note 10, at 2282–83 (stating that cities in the nineteenth century operated more like corporate bodies with the purpose of coordinating local citizens than they did a local government). For example, nineteenth century cities often funded projects through self-assessed taxes from property owners rather than through a general collection of revenue. Barron, *supra* note 10, at 2282–83. In contrast, in the years where municipalities had narrow authority, state power was almost boundless. Diller, *supra* note 38, at 1122.

⁴⁶ Weiland, *supra* note 8, at 472; see *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178–79 (1907) (stating that municipalities are subdivisions of states who maintain absolute power over their cities).

⁴⁷ Diller, *supra* note 38, at 1122; see *S. Constructors, Inc. v. Loudon Cnty. Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001) (stating that Dillon’s Rule calls for a “strict and narrow construction of local government authority”). In 1868, in *Merriam v. Moody’s Executors*, Judge John Dillon theorized that municipalities have no inherent legislative authority. See 25 Iowa 163, 170 (1868) (discussing the narrow scope of municipal power); Diller, *supra* note 38, at 1122 (discussing the origin of “Dillon’s Rule”). “Dillon’s Rule” derives its name from this theory. Diller, *supra* note 38, at 1122; Weiland, *supra* note 8, at 472.

the municipality's functioning.⁴⁸ Any question as to whether a municipality has power should be decided against the municipality.⁴⁹ Essentially, under Dillon's Rule, local governments have no inherent rights as sovereign governments.⁵⁰

At the beginning of the twentieth century, as cities grew larger and more complex, states began to turn over more legislative authority to municipalities under the doctrine of home rule.⁵¹ Rather than relying on express grants of power from state legislatures, municipalities gained a degree of legislative authority beyond the narrow power of Dillon's Rule.⁵² Under home rule, a municipality can appoint officers and develop a charter that grants itself powers.⁵³

At first, home rule only granted municipalities legislative authority over local matters.⁵⁴ States even granted limited immunity to municipalities from

⁴⁸ See *Merriam*, 25 Iowa at 170 (holding that municipalities only have authority under limited circumstances); Barron, *supra* note 10, at 2285 (discussing Dillon's Rule).

⁴⁹ *Merriam*, 25 Iowa at 170.

⁵⁰ See *S. Constructors*, at 58 S.W.3d at 712 (discussing the application of Dillon's Rule in Tennessee).

⁵¹ Diller, *supra* note 38, at 1124. See Barron, *supra* note 10, at 2288–90 (discussing the expansion of home rule). Missouri was the first state to grant home rule through its state constitution in 1875. Barron, *supra* note 10, at 2289–90. Missouri granted St. Louis the ability to make a charter that set forth its powers to govern. *Id.* at 2290. The charter would then take the place of an incorporation act made by the state directed at St. Louis. *Id.* The power of home rule can include insulation from a state's intrusion into the city's ability to create and enforce certain laws. See *City of New Orleans v. Bd. of Comm'rs*, 93-0690 (La. 7/5/94), 640 So. 2d 237, 241 (holding that the state constitution's grant of zoning authority to the City of New Orleans and its protection against state preemption in carrying out that power prevented the State of Louisiana from violating the city's zoning ordinance in the process of carrying out a state function).

⁵² Diller, *supra* note 38, at 1124. Home rule grants a permanent authority to municipalities to govern themselves beyond the scope of Dillon's Rule. *Id.*

⁵³ Barron, *supra* note 10, at 2290; see also George D. Vaubel, *Democratic Government and Municipal Home Rule*, 19 STETSON L. REV. 813, 813 (1990) (stating that a defining characteristic of home rule is a vertical allocation of authority from the state to a municipality to govern itself autonomously). Home rule authority includes police powers to regulate for the well-being of the community. Briffault, *supra* note 18, at 2022.

⁵⁴ Diller, *supra* note 38, at 1124. Municipalities have broad authority within the scope of local matters. PUB. HEALTH L. CTR., DILLON'S RULE, HOME RULE, AND PREEMPTION 5–6 (2020), <https://publichealthlawcenter.org/sites/default/files/resources/Dillons-Rule-Home-Rule-Preemption.pdf> [<https://perma.cc/55ZT-854T>]. In some cases, litigants can use home rule as a defense against preemption where state legislators do not make clear an intent to preempt local authority. *Id.* at 6. The typical case using home rule to defend against preemption argues for expanding local authority although conceding the state's authority to preempt the law. Briffault, *supra* note 18, at 2012. Many courts defer to the local law and avoid finding state preemption where there is a realistic possibility that the state did not attempt to preempt the field. *Id.* For example, in *Topeka, Kansas*, the local government raised the minimum age to sell tobacco from eighteen to twenty-one years old. *Dwagfys Mfg., Inc. v. City of Topeka*, 443 P.3d 1052, 1055 (Kan. 2019); see PUB. HEALTH L. CTR., *supra*, at 6 (discussing *Dwagfys Manufacturing, Inc. v. City of Topeka*). A challenger to the ordinance claimed that state law setting the minimum age at eighteen preempted the field of tobacco sales. *Dwagfys Mfg., Inc.*, 443 P.3d at 1057. In upholding the city's ordinance, the Kansas Supreme Court stated that municipalities have the authority to govern local matters under home rule absent a clear intent from state legislators to preempt the subject. *Id.* at 1060.

preemption within the realm of local concerns.⁵⁵ Home rule authority began to grow further in the twentieth century, expanding the legislative abilities of municipalities to a more general police power and to cover areas typically reserved for states.⁵⁶ This expansion of power was led by advocates arguing for a system where municipal power expanded beyond local matters, but where states had an almost unlimited preemption power.⁵⁷

By expanding powers of municipalities, states created an opportunity for state law to preempt municipal law in ways that previously did not exist when home rule was limited to purely local concerns.⁵⁸ Municipal authority thus became conditional on passing regulations that did not conflict with state law.⁵⁹

As it stands, states generally grant home rule to their municipalities, but explicitly condition this authority on the state's power to preempt inconsistent legislation.⁶⁰ For example, the Pennsylvania state constitution grants municipalities with a home rule charter the authority to use any power not proscribed

⁵⁵ Barron, *supra* note 10, at 2290; *see City of New Orleans*, 93-0690 (La. 7/5/94), 640 So. 2d at 248 (discussing immunity of home rule governments under the state constitution). *See generally* LA. CONST. art. VI, § 4 (granting home rule to municipalities). Immunity for local matters meant that states could not preempt municipalities on these matters even by express decree. Barron, *supra* note 10, at 2290.

⁵⁶ Diller, *supra* note 38, at 1125–26. Critics argued that a strict distinction between local matters and state matters would destroy home rule. Barron, *supra* note 10, at 2325–26. They contended that because too many matters would affect people outside of the municipality, these matters could be designated state concerns to the point where the scope of local matters would be non-existent. *Id.* at 2326.

⁵⁷ Barron, *supra* note 10, at 2326 (discussing the role of the model home rule provision from the American Municipal Association in changing policies and reshaping the view of home rule). *See generally* JEFFERSON B. FORDHAM, MODEL CONSTITUTIONAL PROVISIONS FOR MUNICIPAL HOME RULE, AM. MUN. ASS'N (1953), available at https://collections.lib.utah.edu/details?id=729071&page=4&facet_format_t=%22application%2Fpdf%22&facet_setname_s=%22uu_law_clp%22&rows=200&sort=modified_tdt+asc [<https://perma.cc/WB8P-GKAQ>] (providing model legislation expanding home rule). The model home rule provision from the American Municipal Association plan called for powers including but not limited to the ability to tax commuters from out of the city, regulate beyond a city's territories, and annex outside unclaimed territory. Barron, *supra* note 10, at 2327; *see* Fordham, *supra*, at 13, 19 (providing suggestions for home rule powers).

⁵⁸ Diller, *supra* note 38, at 1126. Because the question was no longer whether a matter was “local” or not, the issue turned to whether a municipal law conflicted with state law. *Id.*

⁵⁹ *Id.* Previously the issue was whether the matter was local or not. *Id.* at 1124. By granting municipalities limited police powers, local authority could overlap with state authority. *Id.* A locality may thus exercise police powers unless it interferes with state law or some other constitutional issue. *Id.*

⁶⁰ *See* MCQUILLIN *supra* note 10, § 15:19 (discussing preemption under state constitutional laws); *see, e.g.,* MASS. CONST. art. LXXXIX, § 6 (amended 1966) (granting home rule authority to Massachusetts municipalities and establishing that local laws shall not conflict with state law).

by the state constitution, its charter, or the state legislature.⁶¹ This type of provision provides the state with multiple ways to preempt municipal laws.⁶²

2. “Express” and “Ceiling” Preemption in Environmental Law

There are several categories of preemption worth noting.⁶³ The first distinction is between express and implied preemption.⁶⁴ In express preemption, the legislature includes a clause in a statute that explicitly denies municipalities from governing in a certain area.⁶⁵ Implied preemption can occur in two ways: (1) through conflict preemption, which is when a state law irreconcilably conflicts with a municipal law; or (2) through field preemption, which is when an inference can be drawn from the state’s law that the state aims to occupy the entire area of law and leave no room for municipal ordinances.⁶⁶

In environmental law, another important and growing distinction is between floor preemption and ceiling preemption.⁶⁷ Floor preemption establishes regulatory minimums that prevent states or municipalities from adopting less

⁶¹ PA. CONST. art. IX, § 2. A 1972 Pennsylvania statute first granted municipalities with the option to create a home rule charter. 1972 Pa. Laws 184. Pennsylvania municipalities with a home rule charter can carry out any function that is not prohibited by the state constitution, state statute, or its own home rule charter. 53 PA. CONST. STAT. § 2961 (2022).

⁶² See PA. CONST. art. IX, § 2 (stating that municipal laws are subject to denial by state law); MCQUILLIN, *supra* note 10, § 15:19 (stating that Florida recognizes both express and implied preemption).

⁶³ See MCQUILLIN, *supra* note 10, § 15:19 (discussing different types of preemption in state and local relations).

⁶⁴ *Id.*

⁶⁵ *Id.*; see, e.g., PPL Elec. Utils. Corp. v. City of Lancaster, 214 A.3d 639, 648 (Pa. 2019) (explaining preemption can occur when the state legislature expressly states that it is superseding local authorities). Express preemption requires a clear declaration from the legislature stating that it intends to displace local law. MCQUILLIN, *supra* note 10, § 15:19. Consequently, courts cannot infer express preemption. *Id.* Chapter Eight of the West Virginia Code governing municipal corporations provides an example of an express preemption provision for local firearms laws. W. VA. CODE § 8–12–5a (2020). The code states that:

Neither a municipality nor the governing body of any municipality may, by ordinance or otherwise, limit the right of any person to purchase, possess, transfer, own, carry, transport, sell, or store any deadly weapon, or pepper spray, or any ammunition . . . in any manner inconsistent with or in conflict with state law.

Id.

⁶⁶ MCQUILLIN, *supra* note 10, § 15:19. Thus, a legislature need not expressly state its intention to supersede a local law to invalidate the law. *Id.* The test for implied preemption is to examine the entirety of a law, including its goals and purpose, to determine if the laws can exist in harmony. *Id.* Implied preemption is beyond the scope of this Note. See generally BRYAN L. ADKINS, JAY B. SYKES & ALEXANDER H. PEPPER, CONG. RSCH. SERV., R45825, FEDERAL PREEMPTION: A LEGAL PRIMER 17 (2023) (discussing implied preemption).

⁶⁷ See Burgess, *supra* note 15, at 259 (stating that although environmental law typically sets regulatory floors for preemption purposes, discussion of ceiling preemption has become more common).

stringent laws but allows the enactment of more stringent regulations.⁶⁸ Ceiling preemption, conversely, prevents state and local governments from enacting stricter regulations than the preemptive law.⁶⁹ Ceiling preemption serves to effectively eliminate state or local control of regulation on a matter.⁷⁰ In doing so, it also effectively eliminates diversity in local regulations and decentralized regulation.⁷¹ Some state governments have discussed barring municipalities from passing certain regulations entirely.⁷²

As the use of ceiling preemption has grown in the past few decades, the motivating factors for its use have diversified.⁷³ For instance, ceiling preemption is often promoted by industries seeking to limit unfavorable regulations.⁷⁴ Industry groups may instead look to the federal or state government to establish more favorable regulations that preempt state or local governments' attempts to establish their own more stringent standards.⁷⁵ This motive for preemption has become particularly relevant as municipalities have taken the lead on passing

⁶⁸ See, e.g., 29 U.S.C. § 206 (setting a federal minimum wage); see Buzbee, *supra* note 15, at 1554 (labeling a federal regulatory floor as floor preemption). Scholars have called this system where the federal government creates a regulatory floor and allows for states to develop their own standards “iterative federalism.” Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 66 (2011) (quoting Ann Carlson, *Iterative Federalism and Climate Change*, 103 NW. U. L. REV. 1097, 1099 (2009)).

⁶⁹ See Buzbee, *supra* note 15, at 1554. Missouri law governing bank regulation provides an example of ceiling preemption, requiring that “any order or ordinance by any political subdivision . . . be consistent with and not more restrictive than state law . . .” MO. REV. STAT. § 362.109 (2008); see PUB. HEALTH L. CTR., PREEMPTION BY ANY OTHER NAME I (2010), <https://publichealthlawcenter.org/sites/default/files/resources/nplan-fs-preemption-2010.pdf> [<https://perma.cc/N4AV-PQ4V>] (discussing the Missouri statute).

⁷⁰ See Buzbee, *supra* note 15, at 1554 (stating that only the ceiling standard matters when there is a conflict).

⁷¹ See *id.* (stating that maintaining a diversity of approaches to regulations across state and local governments becomes impossible when ceiling preemption is implicated); Burgess, *supra* note 15, at 260 (discussing critics of ceiling preemption that argue it undermines favorable, decentralized environmental policy).

⁷² Briffault, *supra* note 18, at 2007. In Oklahoma, the state legislature discussed a bill that would preempt all local laws relating to matters regulated by the state unless given statutory authorization. *Id.* (citing S. 1289, 55th Leg., 2d Sess. § 1 (Okla. 2016)).

⁷³ See Burgess, *supra* note 15, at 259 (stating that the use of ceiling preemption has become more popular and that one common motivation for ceiling preemption is industry support).

⁷⁴ See *id.* (stating that industry groups often support ceiling preemption); Robert L. Glicksman & Richard E. Levy, *A Collective Action Perspective on Ceiling Preemption by Federal Environmental Regulation: The Case of Global Climate Change*, 102 NW. U. L. REV. 579, 597 (2008) (stating that states have incentives to lower environmental standards in order to attract companies to operate there).

⁷⁵ See Eric Lipton & Gardiner Harris, *In Turnaround, Industries Seek U.S. Regulations*, N.Y. TIMES (Sept. 16, 2007), <https://www.nytimes.com/2007/09/16/washington/16regulate.html> [<https://perma.cc/8BTC-LCXR>] (discussing business community efforts to use preemption to prevent local minimum wage increases, paid sick leave, and other progressive policy initiatives); Briffault, *supra* note 18, at 1999 (discussing the trend of industry groups seeking preemption laws).

environmental regulations.⁷⁶ Political polarization has also contributed to the popularity of ceiling preemption as state legislatures may try to impose their conflicting values onto their urban or rural municipalities.⁷⁷ Nevertheless, preemptive laws, as is the case for any other law, must be constitutionally permissible under the Due Process Clause.⁷⁸

B. The Due Process Clause

The Due Process Clauses of the Fifth and Fourteenth Amendments protect a citizen's right to due process before depriving a person of life, liberty, or property.⁷⁹ The Clause provides a limit on government power to guard against government abuse.⁸⁰ This Section first provides an overview of the Due Process Clause's protection of fundamental liberty interests and then illustrates the Court's approach to substantive due process analysis through an examination of its jurisprudence.⁸¹ In providing an illustration of the Court's approach to substantive due process analysis, this Section introduces the relevant factors and demonstrates how the Court would reason through a case claiming quiet enjoyment of land as a fundamental right.⁸²

Despite the name of the clause, due process does more than guarantee a person's right to fair procedure.⁸³ Liberty also means more than protecting a person from physical restraint.⁸⁴ Rather, the Fourteenth Amendment Due Process Clause prevents state governments from intruding on much of the Bill of Rights along with certain other "fundamental rights and libert[ies]" not enumerated in the Constitution.⁸⁵ This aspect of the Due Process Clause, known as

⁷⁶ See Briffault, *supra* note 18, at 1999–2021 (discussing how local governments lead on labor and environmental legislation while also battling state preemptive measures supported by business groups).

⁷⁷ *Id.* at 1997.

⁷⁸ *Robinson Township v. Commonwealth*, 83 A.3d 901, 1002 (Pa. 2013) (Baer, J., concurring) (stating that preemption must be constitutionally permissible).

⁷⁹ U.S. CONST. amend. V; *id.* amend. XIV, cl. 2.

⁸⁰ *Collins v. City of Harker Heights*, 503 U.S. 115, 126 (1992) (quoting *Davidson v. Cannon*, 474 U.S. 344, 348 (1986)); see also *Barbier v. Connolly*, 113 U.S. 27, 31 (1884) (stating the purview of the Fourteenth Amendment's Due Process Clause is broad and comprehensive and discusses the intentions of its Framers).

⁸¹ See *infra* notes 83–116 and accompanying text.

⁸² See *infra* notes 83–116 and accompanying text; *Robinson Township*, 83 A.3d at 1001 (Baer, J., concurring) (asserting quiet enjoyment of land as a fundamental right without conducting a substantive due process analysis).

⁸³ *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). Procedural due process ensures that the government administers any deprivation of life, liberty, or property in a just manner. *United States v. Salerno*, 481 U.S. 739, 746 (1987) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

⁸⁴ *Glucksberg*, 521 U.S. at 720. The Court used the word "liberty" to prohibit government interference with certain rights. *Id.*

⁸⁵ *Id.*; *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2246 (2022); Erwin Chemerinsky, *Substantive Due Process*, 15 *TOURO L. REV.* 1501, 1509 (1999). Specifically, the Court uses the

substantive due process, requires the government to have a sufficient purpose for depriving a person of life, liberty, or property.⁸⁶ Government action that infringes on these rights or otherwise “shocks the conscience” violates due process.⁸⁷

In 1997, in *Washington v. Glucksberg*, the U.S. Supreme Court set forward a substantive due process analysis that consists of two steps.⁸⁸ First, the Court must carefully describe the suggested fundamental liberty interest.⁸⁹ Second, the Court must examine whether the fundamental liberty interest is (1) “deeply rooted” in the country’s legal history and traditions, or (2) implicit in the idea of liberty such that losing the right or liberty would eliminate the concept of liberty and justice.⁹⁰ Because the word “liberty” is vague, the Court uses a historical approach to understand which rights fall within the scope of

Fourteenth Amendment Due Process Clause to enforce many of the substantive rights from the first eight Amendments in addition to some unenumerated rights. *Dobbs*, 142 S. Ct. at 2246. In *Washington v. Glucksberg*, the Court listed the unenumerated rights it had already deemed fundamental, including the rights: “to marry; to have children; to direct the education and upbringing of one’s children; to marital privacy; to use contraception; to bodily integrity; and to abortion.” 521 U.S. at 720 (internal citations omitted) (first citing *Loving v. Virginia*, 388 U.S. 1 (1967); then citing *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); then citing *Meyer v. Nebraska*, 262 U.S. 390 (1923); then citing *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925); *Griswold v. Connecticut*, 381 U.S. 479 (1965); then citing *Eisenstadt v. Baird*, 405 U.S. 438 (1972); then citing *Rochin v. California*, 342 U.S. 165 (1952); and then citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), *overruled by Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022)). Some other examples not listed in *Glucksberg* include the right to marriage for same-sex couples and the right to travel interstate. *See* 521 U.S. at 720 (failing to include every fundamental right available); *Obergefell v. Hodges*, 576 U.S. 644, 675–76 (2015) (guaranteeing a right to same-sex marriage after *Glucksberg*); *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969) (guaranteeing a fundamental right to travel interstate), *overruled in part by Edelman v. Jordan*, 415 U.S. 651 (1974). Recently, in 2022, in *Dobbs v. Jackson Women’s Health Organization*, the Court removed the constitutional protection of abortion as a fundamental right. 142 S. Ct. at 2242. Writing in concurrence, Justice Clarence Thomas suggested that the Court should consider removing the doctrine of substantive due process and consequently other unenumerated fundamental rights as well. *Id.* at 2301 (Thomas, J., concurring).

⁸⁶ *Chemerinsky*, *supra* note 85, at 1501. This rule applies to *any* occasion in which the government deprives a person of property. *Id.* at 1509. For example, the Court held that excessive punitive damages violate substantive due process because they take property without sufficient justification. *Id.* (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996)).

⁸⁷ *Salerno*, 481 U.S. at 746 (citing *Rochin*, 342 U.S. at 172). Cases where conduct “shock[s] the conscience” generally relate to police behavior where the government acted in an “arbitrary or capricious manner.” *Chemerinsky*, *supra* note 85, at 1522. For example, in 1952, in *Rochin v. California*, the Court heard a case where police officers attempted to force pills out of an inmate’s mouth and then subsequently pumped his stomach to retrieve the pills. 342 U.S. at 166; *see Chemerinsky*, *supra* note 85, at 1522 (discussing the facts of *Rochin*). The behavior by the police (1) shocked the conscience, violating substantive due process, and (2) was arbitrary, thereby violating the Due Process Clause. *Rochin*, 342 U.S. at 172–73; *see Chemerinsky*, *supra* note 85, at 1522–23 (discussing the holding of *Rochin*).

⁸⁸ *Glucksberg*, 521 U.S. at 720–21.

⁸⁹ *Id.*

⁹⁰ *Id.* (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled by Benton v. Maryland*, 395 U.S. 784 (1969)).

its protection.⁹¹ The Court uses this analysis in order to responsibly direct and restrain the scope of substantive due process protection.⁹² For example, the Court restricted the Due Process Clause to merely protect an individual from a state deprivation of their life, liberty, and property interests rather than deprivations by another private person.⁹³ Significantly, if the court deems a liberty interest to be fundamental, then generally the government may not interfere with that right at all, unless the government satisfies strict scrutiny.⁹⁴ Through *Glucksberg* and several other cases, the Court has stated that a liberty interest is fundamental if it is founded in our nation's legal history and traditions.⁹⁵

In *Glucksberg*, the Supreme Court decided if the Due Process Clause guarantees a right to practice physician-assisted suicide.⁹⁶ Plaintiffs were doctors in Washington that treated end-stage illness patients seeking to end their lives with the assistance of their doctors.⁹⁷ The Court conducted a substantive due process analysis to conclude that the Constitution does not protect such a right.⁹⁸ The Court first examined whether the right to commit or assist in committing suicide is a fundamental liberty interest.⁹⁹ Next, the Court examined whether the nation's history and legal traditions include a right to commit suicide.¹⁰⁰ Ruling against the plaintiffs, the Court determined that the nation's

⁹¹ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2247 (2022).

⁹² *Glucksberg*, 521 U.S. at 721. The Court has gone further to state that it is reluctant to expand substantive due process because it is limitlessly open-ended. *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992).

⁹³ *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989); see *Collins*, 503 U.S. at 130 (holding that the Due Process Clause provides no affirmative obligation to provide a safe work place).

⁹⁴ *Glucksberg*, 521 U.S. at 721 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)); see *Strict Scrutiny*, BLACK'S LAW DICTIONARY, *supra* note 9 (defining strict scrutiny as the standard courts use in conducting due process analysis for laws that apply to suspect classes or interfere with fundamental rights). But see *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 876–79 (1992) (establishing an undue burden standard, rather than strict scrutiny, for abortion regulations), *overruled by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). When the Court applies strict scrutiny, the law must be “narrowly tailored to serve a compelling interest.” *Glucksberg*, 521 U.S. at 721; see Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1273 (2007) (discussing strict scrutiny). The Court created the strict scrutiny test, as it appears nowhere in the Constitution. Fallon, *supra* at 1268. The alternative is a “highly deferential” rational basis test. *Id.* at 1270.

⁹⁵ See *Glucksberg*, 521 U.S. at 728 (holding that the right to commit suicide is not fundamental); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 279 (1990) (discussing in dicta that a competent person likely has a fundamental right to refuse medical treatment); *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969) (holding that the right to travel interstate is fundamental), *overruled in part by Edelman v. Jordan*, 415 U.S. 651 (1974).

⁹⁶ *Glucksberg*, 521 U.S. at 709.

⁹⁷ *Id.* at 707.

⁹⁸ *Id.* at 728.

⁹⁹ *Id.* at 723. The Court drew this proposed right from the challenged Washington state statute which “prohibits ‘aid[ing] another person to attempt suicide.’” *Id.* (quoting WASH. REV. CODE § 9A.36.060 (1994)). The Court noted and rejected several suggested labels for the liberty interest in question, including “the right to choose a humane, dignified death,” and “the liberty to shape death.” *Id.* at 722.

¹⁰⁰ *Id.* at 723.

history and the policy choices of nearly every state indicated a universal rejection of a right to commit suicide.¹⁰¹ In light of this finding, the Court determined that the right to commit suicide is not a fundamental liberty interest protected by substantive due process.¹⁰²

In 1990, in *Cruzan v. Director, Missouri Department of Health*, the U.S. Supreme Court provided a roadmap for relevant factors in determining whether a liberty interest is fundamental.¹⁰³ In *Cruzan*, the Court determined whether the Due Process Clause protects a fundamental liberty interest in refusing life-saving medical treatment.¹⁰⁴ In looking to the nation's history and legal traditions, the Court first noted that the common law rule for battery prohibited a person from even touching another without permission.¹⁰⁵ Next, the Court noted that tort law additionally requires informed consent before receiving medical treatment.¹⁰⁶ In dicta, the Court considered a preliminary question of whether a competent person can refuse medical treatment and stated that the Constitution likely protects such a liberty interest.¹⁰⁷ The Court concluded that

¹⁰¹ *Id.* The Court noted a long history of the criminalization of suicide and assisting in suicide dating back to the English common law, which nearly all states in the United States continued by passing statutes codifying its illegality. *Id.* at 710–12.

¹⁰² *Id.* at 728.

¹⁰³ See *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 261–79 (1990) (discussing the implications of the historical background of the right to decline medical treatment in the law).

¹⁰⁴ *Id.* at 280. In the case, the parents of a car crash victim that was placed in a persistent vegetative state sought to terminate hydration and nutrition treatment that were keeping the victim alive in order to cause the victim's death. *Id.* at 267–68.

¹⁰⁵ *Id.* at 269 (citing W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON LAW OF TORTS § 9, at 39–42 (5th ed. 1984)).

¹⁰⁶ *Id.* The Court also examined jurisprudence from various states in its exploration of the right's place in the nation's legal history. *Id.* at 270–77. The Court discussed the principle of informed consent as an example of law's commitment to bodily integrity. *Id.* The Court then discussed a line of cases covering the right to refuse medical treatment, many of which based their decisions on the informed consent or the constitutional right to privacy. *Id.* at 270–75 (citing *In re Quinlan*, 355 A.2d 647 (N.J. 1976); *Superintendent of Belchertown State Sch. v. Saikewicz*, 370 N.E.2d 417 (Mass. 1977); *In re Storar*, 420 N.E.2d 64 (N.Y. 1981); *In re Conroy*, 486 A.2d 1209 (N.J. 1985); *In re Westchester Cnty. Med. Ctr.*, 72 N.Y.2d 517, 522, 531 N.E.2d 607, 608 (1988)). The Court then discussed cases where state law permitted a guardian to refuse treatment for a person deemed incompetent under the law. *Id.* at 275–77 (first citing *Conservatorship of Drabick*, 245 Cal. Rptr. 840 (Ct. App. 1988); and then citing *In re Est. of Longeway*, 549 N.E.2d 292, 293 (Ill. 1989)). The Court concluded that these lines of cases demonstrated that the right to informed consent generally includes the right to refuse medical treatment. *Id.* at 277. The Court also noted that each state has its own individual sources of law that either protect or reject the right to refuse treatment. *Id.* The Court thus stated an intention to avoid too sweeping of generalizations and narrowed its focus to whether the Constitution prevents Missouri from rejecting the right to refuse medical treatment. *Id.* at 277–78.

¹⁰⁷ *Id.* at 279. The Court ultimately concluded that in the case at hand, the victim's condition and lack of competency rendered her unable to exercise such a right to decline medical treatment. *Id.* at 280. The Court did not hold that the Constitution protects a competent person's right to decline life-saving medical care. See *id.* at 279 (stating that the magnitude of the consequences of refusing lifesaving medical treatment would need to be weighed against any reasoning in favor of protecting such a liberty interest); *Legally Incompetent Person*, BLACK'S LAW DICTIONARY, *supra* note 9 (defining a

the Due Process Clause does not protect such a right for an incompetent person.¹⁰⁸ Nevertheless, *Cruzan* demonstrates that the Court will look to common law and state traditions when establishing a fundamental right.¹⁰⁹

Lastly, in 1969, in *Shapiro v. Thompson*, the Supreme Court relied on court jurisprudence to decide that the Due Process Clause protects a fundamental right to travel interstate.¹¹⁰ In *Shapiro*, plaintiffs challenged a statutory waiting period that the State of Connecticut required for certain welfare applicants.¹¹¹ In overturning the statute, the Court used its precedent to conclude that interstate travel is a fundamental right.¹¹² First, the Court looked to its decision, in 1849, in *Smith v. Turner*, where the Court stated that citizens of the United States must be able to travel freely between states.¹¹³ Next, the Court cited its decision in 1966, in *United States v. Guest*, where the Court stated that traveling between states is fundamental to citizenry in the nation.¹¹⁴ Although the Constitution does not mention a right to travel between states, the Court reasoned that the right is so elementary that it was implied in the concept of a union of states.¹¹⁵ The Court used this conclusion and contributed the Court's precedent to its substantive due process analysis to acknowledge a right to travel.¹¹⁶

legally incompetent person as someone at an age of majority who lacks the ability to make responsible personal choices because of mental impairment, illness, injury, or disability). Nevertheless, the Court made the theoretical assumption that the Constitution protects the right for a competent person to decline lifesaving medical treatment in order to address whether the Constitution protects such a right for an incompetent person such as the victim in the case. *Cruzan*, 497 U.S. at 279. In *Glucksberg*, the Court stated that in *Cruzan*, it assumed, and strongly suggested, that a competent person has such a right. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citing *Cruzan*, 497 U.S. at 278–79).

¹⁰⁸ *Cruzan*, 497 U.S. at 280. The Court concluded that an incompetent person is not able to exercise his or her “right” to refuse medical treatment. *Id.* Because a surrogate must communicate that decision, the state of Missouri required that the incompetent person must have communicated his or her desire to terminate lifesaving hydration and nutrition by clear and convincing evidence. *Id.* The Court held that such a requirement did not violate the Constitution. *Id.*

¹⁰⁹ *See id.* at 261–79 (discussing the implications of the historical background of the right to decline medical treatment in the law).

¹¹⁰ *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969), *overruled in part by* *Edelman v. Jordan*, 415 U.S. 651 (1974).

¹¹¹ *Id.* at 622.

¹¹² *See id.* at 629–31 (using precedent from *Smith v. Turner* and *United States v. Guest*); *see also* *Smith v. Turner*, 48 U.S. 283, 492 (1849) (stating that citizens must be able to pass freely through states); *United States v. Guest*, 383 U.S. 745, 757 (1966) (stating that the right to travel between states is fundamental).

¹¹³ *Shapiro*, 394 U.S. at 629–30 (citing *Turner*, 48 U.S. at 492).

¹¹⁴ *Id.* at 630 (citing *Guest*, 383 U.S. at 757).

¹¹⁵ *Id.* at 630–31 (quoting *Guest*, 383 U.S. at 757).

¹¹⁶ *See id.* (concluding that the Court and Framers have long recognized a fundamental right to travel).

C. Zoning

The Due Process Clause serves as a limitation on state and local exercises of police powers that deprive an individual of life, liberty, or property.¹¹⁷ Nevertheless, courts sometimes justify exercises of police powers that interfere with such rights as a means to protect the general welfare of a community.¹¹⁸ Municipal zoning ordinances provide a prominent example, but such ordinances must always find their limit in the Constitution.¹¹⁹ Subsection 1 of this Section discusses “sic utere tuo ut alienum non laedas” as the rationale for police power.¹²⁰ Subsection 2 explains the right of quiet enjoyment of land.¹²¹ Subsection 3 provides a background of zoning as an exercise of police power.¹²² Subsection 4 then examines the Court’s approach to zoning challenges.¹²³

1. “Sic Utere Tuo Ut Alienum Non Laedas”

The use of “sic utere tuo ut alienum non laedas” as a guide to police power plays an important role in due process challenges to zoning ordinances.¹²⁴ The maxim means to use one’s property in a way that does not injure others.¹²⁵ State or local government can deprive an individual of liberty or property if the action comes within the purview of a legitimate use of police power.¹²⁶ In the United States, police power is broadly the range of legislative authority not given to the federal government and thus reserved for states.¹²⁷ More specifically, police power grants states the authority to pass legislation securing the public welfare along with its “health, safety, and morals.”¹²⁸ Although coined

¹¹⁷ *Collins v. City of Harker Heights*, 503 U.S. 115, 126 (1992) (quoting *Davidson v. Cannon*, 474 U.S. 344, 348 (1986)).

¹¹⁸ *See, e.g., Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926) (upholding a zoning law).

¹¹⁹ *See id.* (discussing the scope of constitutionally valid zoning ordinances).

¹²⁰ *See infra* notes 124–135 and accompanying text.

¹²¹ *See infra* notes 136–152 and accompanying text.

¹²² *See infra* notes 153–161 and accompanying text.

¹²³ *See infra* notes 162–182 and accompanying text.

¹²⁴ *See Village of Euclid*, 272 U.S. at 387 (employing “sic utere tuo ut alienum non laedas” when deciding the constitutionality of zoning ordinances).

¹²⁵ *Camfield v. United States*, 167 U.S. 518, 522 (1897).

¹²⁶ *See Chi., Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 252 (1897) (holding government taking of property without due process is constitutional if it is for ensuring health, safety and morals for public); *Barbier v. Connolly*, 113 U.S. 27, 31 (1884) (stating that no constitutional amendment impedes a legitimate use of state police power); *see also* Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745, 789 (2007) (stating that *Barbier v. Connolly* confirmed that the passage of the Fourteenth Amendment did not affect traditional role of police power).

¹²⁷ Legarre, *supra* note 126, at 747–48; *see also* U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

¹²⁸ *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991).

in 1827 by the Supreme Court, in *Brown v. Maryland*, police power in the United States has its roots before the Constitution.¹²⁹

Some posit that police power derives its constitutional authority from the Tenth Amendment.¹³⁰ But the driving principle of police power comes from the common law doctrine that a person's right to use his or her property is subordinate to his or her neighbors.¹³¹ "Sic utere tuo ut alienum non laedas" captures this doctrine.¹³² Although courts sometimes treat the maxim as a rule of law, the maxim more accurately serves as a guiding principle through which courts interpret the law.¹³³ Courts use the maxim as a supporting tool to provide validation to police powers and to define their scope.¹³⁴ State actions that interfere with a fundamental right may implicate due process.¹³⁵

2. The Covenant of Quiet Enjoyment

Early in American common law, courts established that property owners could not use their property in a way that disturbed another's quiet enjoyment of land.¹³⁶ The covenant of quiet enjoyment subsequently grew roots in both

¹²⁹ See Legarre, *supra* note 126, at 745, 777 (discussing ideas in *The Federalist* papers that were essentially conceptions of police power).

¹³⁰ *Id.* at 778; see U.S. CONST. amend. X (granting power withheld from the federal government to the states). Article I, Section 8 also serves to provide states with police power. See U.S. CONST. art. I, § 8 (enumerating powers granted to Congress); Legarre, *supra* note 126, at 778; *United States v. Lopez*, 514 U.S. 549, 566 (1995) (stating that Article I, Section 8 of the Constitution withholds a broad police power from Congress).

¹³¹ See Elmer E. Smead, *Sic Utere Tuo Ut Alienum Non Laedas: A Basis of the State Police Power*, 21 CORNELL L.Q. 276, 276 (1936) (discussing United States Supreme Court jurisprudence relating to the doctrine of "sic utere tuo ut alienum non laedas"); *Richmond, Fredericksburg, & Potomac R.R. Co. v. City of Richmond*, 96 U.S. 521, 528 (1877) (stating that "sic utere tuo ut alienum non laedas" is the basis for police power under the Tenth Amendment). The maxim originated at the turn of the seventeenth century to apply a name to a principle that existed in common law for centuries. Smead, *supra*, at 277. Providing a Latin name gave the principle authority and made it more convenient for courts to use. *Id.* Although the maxim refers to literal property, in 1916, in *Hitchman Coal & Coke Co. v. Mitchell*, the United States Supreme Court expanded the meaning as far as to include any time an exercise of a right conflicts with others' rights. See 245 U.S. 229, 254 (1916) (holding that "sic utere tuo ut alienum non laedas" is not merely limited to the use of real property); Smead, *supra*, at 277 (discussing the expanding meaning of the maxim).

¹³² *Camfield v. United States*, 167 U.S. 518, 522 (1897).

¹³³ Smead, *supra* note 131, at 283.

¹³⁴ *Id.* at 290; see, e.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926) (stating that courts should use "sic utere tuo alienum non laedas" as a tool to define the scope of zoning ordinances).

¹³⁵ Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings "Muddle"*, 90 MINN. L. REV. 826, 841 (2006).

¹³⁶ Sara C. Bronin & Dwight H. Merriam, *Land Use Regulation Before Zoning*, in RATHKOPF'S THE LAW OF ZONING AND PLANNING § 1:1 (4th ed. 2021); see *Covenant for Quiet Enjoyment*, BLACK'S LAW DICTIONARY, *supra* note 9 (defining covenant of quiet enjoyment as a covenant protecting a lessee from disturbance by the holder of a superior title).

tenant and nuisance law.¹³⁷ In tenant law, the covenant of quiet enjoyment prevents a landlord from substantially interfering with a tenant's use and possession of the premises.¹³⁸ Historically, the only duty a landlord owed a tenant was a covenant of quiet enjoyment.¹³⁹ Additionally, the right to quiet enjoyment only ensured that the tenant was free from actual eviction.¹⁴⁰ As tenant law evolved to meet the needs of urbanization and modern society, the duties of landlords increased.¹⁴¹ The covenant of quiet enjoyment today imposes a duty on landlords of multi-tenant buildings to provide necessary services, such as heat, water, power, and clean air.¹⁴² Further, the covenant now restricts landlords from interfering with a tenant's peaceful possession of the premises through external conditions.¹⁴³ As an example, loud construction on a tenant's building that substantially interferes with a tenant's quiet enjoyment violates the covenant.¹⁴⁴ Additionally, lease agreements often include provisions tasking landlords of multi-unit apartment buildings with ensuring that their tenants do not interfere with the peace or safety of other tenants.¹⁴⁵ The scope of the

¹³⁷ See Eugene L. Grant, *Disturbing Concepts: Quiet Enjoyment and Constructive Eviction in the Modern Commercial Lease*, 35 REAL PROP. PROB. & TR. J. 57, 60 (2000) (discussing the covenant of quiet enjoyment in tenant law); Robert Haskell Abrams, *Broadening Narrow Perspectives and Nuisance Law: Protecting Ecosystem Services in the ACF Basin*, 22 J. LAND USE & ENV'T L. 243, 274 (2007) (discussing the covenant of quiet enjoyment in nuisance law).

¹³⁸ Richard Link, *Cause of Action for Breach of Covenant of Quiet Enjoyment of Leased Premises*, in 29 CAUSES OF ACTION 2D, § 2 (2005); see *Landlord*, BLACK'S LAW DICTIONARY, *supra* note 9 (defining landlord as a person who leases a room or building to others); *Tenant*, BLACK'S LAW DICTIONARY, *supra* note 9 (defining tenant as a person who pays rent to temporarily occupy and use another's land by agreement); *Enjoyment*, BLACK'S LAW DICTIONARY, *supra* note 9 (defining enjoyment as the right to possess and use property).

¹³⁹ *Housing and Land Use*—Lindsey v. Normet: *A Supreme Court Refusal to Federalize Oregon's Landlord-Tenant Procedure*, 1973 URB. L. ANN. 309, 311 [hereinafter *Housing and Land Use*]. At first, the right to quiet enjoyment only prevented the landlord from actually evicting the tenant during the term of the lease. *Id.*

¹⁴⁰ Grant, *supra* note 137, at 60; see *Actual Eviction*, BLACK'S LAW DICTIONARY, *supra* note 9 (defining actual eviction as physically expelling a tenant from a leased property).

¹⁴¹ Grant, *supra* note 137, at 60.

¹⁴² *Housing and Land Use*, *supra* note 139, at 311; see, e.g., MASS. GEN. LAWS ch. 186, § 14 (2022) (requiring landlords to provide water, heat, power, gas, and other services needed to allow for proper occupation of the building). The covenant today is sometimes used interchangeably with the covenant of warranty. *Covenant for Quiet Enjoyment*, BLACK'S LAW DICTIONARY, *supra* note 9.

¹⁴³ Grant, *supra* note 137, at 62.

¹⁴⁴ *Id.* at 63. Loud construction could violate the covenant by distracting the tenant or preventing a tenant from conducting business. *Id.*

¹⁴⁵ *Id.* A claim arising from a lease agreement that includes a clause about interference from other tenants is distinct from a claim involving the covenant of quiet enjoyment. *Id.* at 65. Rather, lease agreements involving quiet enjoyment provisions supersede common law covenant claims. *Id.* That means that a tenant can only raise a quiet enjoyment claim where the lease agreement does not include or is ambiguous about the landlord's quiet enjoyment duties. *Id.* Nevertheless, the development of leases presented alongside the development of the covenant of quiet enjoyment illustrates the trend towards broadening the duties of a landlord to provide quiet enjoyment of a premises. See *id.* at 60 (discussing the development of the scope of the covenant of quiet enjoyment).

covenant of quiet enjoyment of real property in tenant law has thus increased from protecting a tenant from actual eviction to placing a duty on landlords to provide peaceful and habitable premises.¹⁴⁶ Synonymous with the expansion of the covenant, many states have codified quiet enjoyment through statute.¹⁴⁷

In addition to its place in tenant law, quiet enjoyment is a fundamental principle in nuisance law.¹⁴⁸ Early in American common law, a nuisance claim sought relief for a neighbor's interference with another's quiet enjoyment of land.¹⁴⁹ Nuisance law thus provided a claim of action for a violation of "sic utere tuo ut alienum non laedas."¹⁵⁰ The fundamental principle in private nuisance actions remains the same in modern jurisprudence.¹⁵¹ Nevertheless, zoning ordinances and other regulatory actions have decreased the amount of nuisance litigation.¹⁵²

3. Zoning in the United States

Early in American history when states overwhelmingly used Dillon's Rule, zoning ordinances in the United States were relatively uncommon.¹⁵³ An early initial driver of zoning included attempts to codify race segregation.¹⁵⁴ In

¹⁴⁶ See *id.* at 60–62 (discussing the development of the covenant of quiet enjoyment); *Housing and Land Use*, *supra* note 139, at 311 (discussing the history of the covenant of quiet enjoyment).

¹⁴⁷ See, e.g., MASS. GEN. LAWS ch. 186, § 14 (requiring landlords to provide a covenant of quiet enjoyment); N.Y. REAL PROP. LAW § 235 (McKinney 2022) (criminalizing a landlord interfering with a tenant's quiet enjoyment of a leased premises).

¹⁴⁸ See Abrams, *supra* note 137, at 274 (stating that the "gravamen" of a nuisance claim is a violation of another's quiet enjoyment of land); Bronin & Merriam, *supra* note 136, § 1:1 (stating that common law nuisance litigation redressed an interference with another's quiet enjoyment of land); *Nuisance*, BLACK'S LAW DICTIONARY, *supra* note 9 (defining nuisance as a condition that interferes with another's enjoyment of property).

¹⁴⁹ Bronin & Merriam, *supra* note 136, § 1:1.

¹⁵⁰ See *id.* (stating that courts use the principle interchangeably with "sic utere tuo ut alienum non laedas").

¹⁵¹ *Id.*; see *Private Nuisance*, BLACK'S LAW DICTIONARY, *supra* note 9 (defining a private nuisance as a condition impeding a person's private enjoyment of property); see also *Public Nuisance*, BLACK'S LAW DICTIONARY, *supra* note 9 (defining a public nuisance a condition violating the public order such as polluting common air or water).

¹⁵² Bronin & Merriam, *supra* note 136, § 1:1; see *Zoning*, BLACK'S LAW DICTIONARY, *supra* note 9 (defining zoning as the legislative division of a municipality to establish different regulations in each district).

¹⁵³ See John M. Quigley & Larry A. Rosenthal, *The Effects of Land Use Regulation on the Price of Housing: What Do We Know? What Can We Learn?*, 8 CITYSCAPE 71 (2005) (explaining that municipalities only have the authority which their state expressly granted to them). Under Dillon's Rule, for a municipality to create a zoning scheme, the state would have to expressly grant that right. See *id.* (explaining that modern zoning laws came about in the twentieth century). During the time when Dillon's Rule was the predominate source of legal authority, few states would have granted the express authority to zone. See *id.* (explaining that municipalities did not begin enacting zoning schemes until the 1920s).

¹⁵⁴ Christopher Serkin, *A Case for Zoning*, 96 NOTRE DAME L. REV. 749, 754 (2020). Before the Court sanctioned the zoning scheme of Euclid, Ohio in 1926, in *Village of Euclid v. Ambler Realty*

1917, in *Buchanan v. Warley*, the United States Supreme Court struck down these explicitly race-based zoning plans as violations of the Equal Protection Clause.¹⁵⁵

Residential developers, often looking to remove industrial and commercial obstacles that prevented them from building residential properties, were another source of support for the first wave of zoning.¹⁵⁶ The Department of Commerce, responding to rapidly industrialized urban areas and the early zoning attempts of major cities, released the Standard State Zoning Enabling Act (SZEa) in 1922.¹⁵⁷ The SZEa provided states following Dillon's Rule with model legislation to grant municipalities the authority to implement zoning ordinances.¹⁵⁸ The purpose of the SZEa's model was to separate different types of land uses—namely, residential or commercial—into different areas.¹⁵⁹

With municipalities increasingly employing zoning ordinances, developers began to bring claims of unconstitutional takings under the Fifth Amendment and violations of substantive due process under the Fourteenth Amendment, arguing that the municipalities had damaged the value of their proper-

Co., cities such as Louisville and Baltimore used zoning ordinances to exclude Black families from certain neighborhoods. *Id.* at 754–55.

¹⁵⁵ *Id.* at 755; *Buchanan v. Warley*, 245 U.S. 60, 82 (1917). The zoning ordinance prevented any person of color from purchasing a house on a block where the majority of residents were white. *Buchanan*, 245 U.S. at 70.

¹⁵⁶ Quigley & Rosenthal, *supra* note 153, at 71. Developers sought zoning ordinances from municipalities to circumvent the common law “coming to the nuisance” doctrine in property law. *Id.* “Coming to the nuisance” means that courts consider the order in which litigants moved to their respective premises in a nuisance tort case. Roy E. Cordato, *Time Passage and the Economics of Coming to the Nuisance: Reassessing the Coasean Perspective*, 20 CAMPBELL L. REV. 273, 273 (1998). For example, a railroad creating sparks and setting fire to crops is not a nuisance if the adjacent farmer planted the crops next to the existing railroad. *Id.* In such a case, the farmer has come to the nuisance. *Id.* Zoning ordinances provided a legislative means for developers to clear out existing uses of lands and avoid “coming to the nuisance.” Quigley & Rosenthal, *supra* note 153, at 71.

¹⁵⁷ Quigley & Rosenthal, *supra* note 153, at 71. *See generally* U.S. DEP'T OF COM., A STANDARD STATE ZONING ENABLING ACT UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS (1922) (providing a standard zoning scheme for states to adopt). Developers argued that zoning laws impaired the value of their property to such a degree that it constituted a taking or even a breach of substantive due process. Quigley & Rosenthal, *supra* note 153, at 71. A zoning ordinance violates substantive due process when it is “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.” *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). This is because one of the intentions of the Due Process Clause is to protect against government use of power without a legitimate objective. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005) (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998)).

¹⁵⁸ Serkin, *supra* note 154, at 755.

¹⁵⁹ *Id.* at 756.

ty.¹⁶⁰ These challenges set the stage for the Supreme Court to determine the validity of zoning ordinances.¹⁶¹

4. Zoning Jurisprudence

In a series of cases, the Supreme Court subsequently upheld the authority of municipalities to zone and pass laws in the interest of its residents against constitutional challenges.¹⁶² First, in 1926, in *Village of Euclid v. Ambler Realty Co.*, the Supreme Court supported the constitutionality of zoning ordinances against a due process challenge.¹⁶³ In 1922, the Village of Euclid implemented a zoning ordinance establishing regulations and restrictions on the types of uses allowed in certain locations and the dimensions of buildings.¹⁶⁴ The plaintiff and appellee in the case owned property in the Village of Euclid and claimed that the zoning ordinance deprived him of his liberty and property rights without due process.¹⁶⁵

The Court began by noting that the scope of constitutional guarantees can change as the world does.¹⁶⁶ As cities become more complex, the constitutional oppressiveness of certain regulations decreases.¹⁶⁷ The Court also noted that

¹⁶⁰ Quigley & Rosenthal, *supra* note 153, at 71; see *Constitutional Taking*, BLACK'S LAW DICTIONARY, *supra* note 9 (defining a taking as the government's physical or effective acquisition of land by either expelling the owner or substantially impairing its utility).

¹⁶¹ See Quigley & Rosenthal, *supra* note 153, at 71 (stating that lower courts quickly dismissed many Takings Clause and substantive due process suits).

¹⁶² *Village of Euclid*, 272 U.S. at 397; *Berman v. Parker*, 348 U.S. 26, 28, 31, 36 (1954); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

¹⁶³ *Village of Euclid*, 272 U.S. at 397.

¹⁶⁴ *Id.* at 379–80. The Village of Euclid is a municipality in Ohio and a suburb of Cleveland. *Id.* at 379. The town had a population estimated at roughly 5,000 to 10,000 people. *Id.* The area of the town is between twelve to fourteen square miles. *Id.* Specifically, the ordinance created six categories of use districts, three classifications of height districts, and four classifications of area districts. *Id.* at 380–82. The height classes separated districts by allowable stories or feet in height. *Id.* at 381. The use districts were classed U-1 through U-6. *Id.* at 380. U-1 permitted single-family homes, parks, and several other non-commercial uses. *Id.* A single-family home is defined by the ordinance as having a basement and no fewer than three rooms plus a bathroom. *Id.* at 382. U-2 permitted two-family homes. *Id.* at 380. U-3 permitted apartments, schools, hospitals, hotels, museums, and other public institutional as well as small commercial uses. *Id.* The allowable uses escalated where U-6 allowed industrial sites, sewage disposals, and cemeteries among others. *Id.* at 381. The uses also escalated cumulatively: for example, U-2 allowed single family homes and U-6 allowed all enumerated uses in U-1 through U-5. *Id.*

¹⁶⁵ *Id.* at 382, 384. Plaintiff also claimed that the ordinance was an unjust taking without compensation and violated Ohio state law. *Id.* at 384. Because the questions presented by both the U.S. Constitution and Ohio state law were the same, the Court determined it was not necessary to discuss Ohio state law. *Id.* at 386. Plaintiff sought injunctive relief. *Id.* at 384. Plaintiff's primary claim was that the zoning ordinance diminished the value of his property. *Id.* at 384–85.

¹⁶⁶ *Id.* at 387. The Court clarified that there is no inconsistency in constitutional guarantees. *Id.* Rather, their scope merely changes to expand or contract according to the needs of society. *Id.*

¹⁶⁷ *Id.* The Court provided an example of traffic regulations for automobiles. *Id.* Where they may have at one time seemed unreasonable, increasing complexity of technology now necessitates their existence. *Id.*

the ordinance would have to originate from a police power possessed by the municipality.¹⁶⁸ As a guiding light, the Court looked to “sic utere tuo ut alienum non laedas.”¹⁶⁹ The Court determined that this principle could help resolve any questions about the constitutionality of zoning regulations.¹⁷⁰ The Court further stated that the questions should be resolved in a practical manner that takes the local circumstances into account.¹⁷¹

The Court next discussed the authority of the Village of Euclid to establish zoning regulations that could diminish the value and limit the uses of its residents’ properties.¹⁷² The Court recognized the Village of Euclid’s authority as a distinct locality with discretion to operate as it chooses within the limits of its power.¹⁷³

As to the constitutionality of zoning laws, the Court concluded that separating uses bore a “substantial relation” to the “health, safety, morals, or general welfare” of the municipality.¹⁷⁴ The Court cited investigative reports finding that use-districts improved overall safety and created a more favorable space to raise children.¹⁷⁵ The Court thus concluded that the Due Process Clause did not bar the zoning ordinance the Village of Euclid adopted because it was a valid use of police power.¹⁷⁶

¹⁶⁸ *Id.* The Court stated that there is no precise line that distinguishes legitimate versus illegitimate uses of police power and that such a calculation is sensitive to the conditions and circumstances of the locality. *Id.*

¹⁶⁹ *Id.* The Court also noted that nuisance laws in general can provide a helpful aid in determining the scope of power. *Id.* at 387–88.

¹⁷⁰ *Id.*; see Smead, *supra* note 131, at 290 (stating that the Supreme Court has used “sic utere tuo ut alienum non laedas” to define the scope of police power). The Court clarified that this use of nuisance law is not controlling but is rather meant as an aid to determine the constitutionally permissible scope of police power. *Village of Euclid*, 272 U.S. at 387–88.

¹⁷¹ *Village of Euclid*, 272 U.S. at 388. The Court deems a legislative decision for a zoning classification legitimate if its validity is “fairly debatable.” *Id.*

¹⁷² *Id.* at 389. The Court concluded that the actions of the municipality presumably represented the will of most of its people. *Id.*

¹⁷³ *Id.* The Court followed by stating that there could be cases where the public concern would heavily outweigh the municipality’s interest in zoning to the point where the municipality’s police power would be invalid. *Id.* at 390. One article titles this caveat the “*Euclid* proviso” and argues that it should be used to combat cases of exclusionary zoning. See generally Ezra Rosser, *The Euclid Proviso*, 96 WASH. L. REV. 811, 823 (2021) (arguing that *Village of Euclid* provides a limit on zoning that goes against the public interest).

¹⁷⁴ *Village of Euclid*, 272 U.S. at 395, 397.

¹⁷⁵ *Id.* at 394. The Court also gave particular preference to single-family homes as opposed to multi-unit dwellings. See *id.* (stating that single-family home districts reduce traffic accidents as well as noise and that multi-unit dwellings disrupt the benefits of single family housing districts). The Court stated that the introduction of multi-unit dwellings into a residential neighborhood would disrupt the benefits of detached homes and would increase rapidly in numbers like a “parasite.” *Id.* The Court stated that developers built apartment dwellings to take advantage of the open space and scenery that residential districts provide. *Id.* The Court also stated that the introduction of multi-unit dwellings slows the growth of detached home construction. *Id.*

¹⁷⁶ *Id.* at 397. The Court limited its holding to the circumstances of the zoning scheme established by the Village of Euclid. *Id.*

The Supreme Court continued its support for municipal authority developing zoning schemes in subsequent cases.¹⁷⁷ In 1954, in *Berman v. Parker*, the Supreme Court upheld an urban land use project against a claimed Due Process Clause violation.¹⁷⁸ The Court rejected the litigant's claim that the government could not use eminent domain for the mere purpose of creating a more appealing community.¹⁷⁹ The Court concluded that creating a beautiful, healthy, spacious, clean, and balanced community was a valid exercise of police power.¹⁸⁰

Later, in 1974, in *Village of Belle Terre v. Boraas*, in upholding a zoning ordinance, the Supreme Court further stated that establishing zones to harbor family values and clean air was a valid use of police powers.¹⁸¹ Through these cases, the Supreme Court has allowed and legitimized municipal exercises of police powers to the extent that they do not reach beyond constitutional limits.¹⁸² At the same time, state supreme courts have tackled similar issues of zoning and its limits.¹⁸³

¹⁷⁷ See *Berman v. Parker*, 348 U.S. 26, 28, 31, 36 (1954) (upholding a zoning scheme with the purpose of creating a more appealing community); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974) (upholding a zoning ordinance with the purpose of enforcing family values).

¹⁷⁸ *Berman*, 348 U.S. at 28, 31, 36. Congress passed the District of Columbia Redevelopment Act of 1945 to eliminate housing conditions that the government believed blighted the city and were harmful to the community's health, safety, and welfare. *Id.* at 28. The government created a plan that would redevelop certain neighborhoods using eminent domain. *Id.* at 29–31. Appellants owned a lot that contained a department store subject to government taking. *Id.* at 31.

¹⁷⁹ *Id.* at 31, 36; see *Eminent Domain*, BLACK'S LAW DICTIONARY, *supra* note 9 (defining eminent domain as the power of the government to take private land and redevelop it to public use in exchange for reasonable compensation). Appellants brought claims regarding the Takings Clause and Due Process Clause. *Berman*, 348 U.S. at 31.

¹⁸⁰ *Berman*, 348 U.S. at 33. The appellant claimed that, as a commercial premise, his lot should not be subject to a plan to clear houses injurious to the public. *Id.* at 31. The Court clarified that it is not the role of a court to determine whether a particular site will contribute to the well-being of the community. *Id.* at 33.

¹⁸¹ *Village of Belle Terre*, 416 U.S. at 9. In *Village of Belle Terre v. Boraas*, appellants challenged a municipal zoning regulation that set limitations on the meaning of "family" in a single-family district. *Id.* at 2–3. Appellants claimed that the law disrupted the right to travel. *Id.* at 7. The Court concluded that the zoning scheme was not designed to impede travel and thus the law infringed on no fundamental right. *Id.* The Court accordingly concluded that the government's purpose was permissible. *Id.* at 9. The Court additionally stated that police power was not restricted to eliminating unhealthy and injurious places. *Id.*

¹⁸² See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395, 397 (1926) (holding that a municipal zoning plan did not violate the Due Process Clause); *Berman*, 348 U.S. at 28, 31, 36 (upholding a land use project with the purpose of making a more appealing community); *Village of Belle Terre*, 416 U.S. at 2, 9 (upholding a zoning plan setting restrictions on the definition of family).

¹⁸³ E.g., *Robinson Township v. Commonwealth*, 83 A.3d 901, 913 (Pa. 2013).

D. Justice Baer's Concurrence in Robinson Township

Municipal zoning power remains subject to state authority even when there is a constitutional element.¹⁸⁴ In 2013, in *Robinson Township*, the Supreme Court of Pennsylvania heard a case intersecting municipal, state, and constitutional sources of authority as they pertain to zoning.¹⁸⁵ In 2012, the Pennsylvania state government amended the state code in a statute known as “Act 13,” which established state-wide fracking standards.¹⁸⁶ In establishing state-wide standards, the law expressly preempted municipalities from regulating gas and oil operations or creating zoning ordinances affecting fracking operations different from the state plan.¹⁸⁷

Robinson Township, in Allegheny County, and Washington County, amongst others, brought suit alleging that the state’s preemption law violated the Due Process Clause of the Fourteenth Amendment and the Pennsylvania Constitution.¹⁸⁸ Specifically, plaintiffs alleged that the preemption law was an improper exercise of state police power because it did not protect the public health, safety, and welfare of the community.¹⁸⁹

In support of their claim, plaintiffs claimed that Act 13 handcuffed their capacity to make ordinances best suited for their community and created irrational districts that permit industrial zoning in residentially zoned neighborhoods.¹⁹⁰ Plaintiffs argued that “sic utere tuo ut alienum non laedas” and Su-

¹⁸⁴ *Id.* at 1002 (Baer, J., concurring).

¹⁸⁵ *See id.* (discussing the constitutional limits of state preemption of municipal zoning ordinances).

¹⁸⁶ 2012 PA. LAWS 87; *Robinson Township*, 83 A.3d at 915; *Robinson Township v. Commonwealth (Commonwealth Court Decision)*, 52 A.3d 463, 468 (Pa. Commw. Ct. 2012), *aff’d in part, rev’d in part* *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013); *see* Reid R. Frazier, *The Fracking of Act 13: How the Supreme Court Torpedoed Marcellus Law*, ALLEGHENY FRONT (Jan. 10, 2014), <http://archive.alleghenyfront.org/story/fracking-act-13-how-supreme-court-torpedoed-marcellus-law.html> [<https://perma.cc/5WQK-23T3>] (describing the preemption function of the law). *See generally* 58 PA. CONS. STAT. §§ 2301–3504 (2012) (regulating oil and gas in Pennsylvania). The fracking industry in Pennsylvania relies primarily on the Marcellus Shale Formation, sedentary rock running through the state that contains natural gas extractable through fracking. Kathryn Susko, *Fracking in Pennsylvania: History, Geopolitics, and Public Health* 7–8 (May 2017) (B.A. thesis, Fordham University), https://fordham.bepress.com/environ_2015/44 [<https://perma.cc/P2D8-C9MG>]. Fracking is the process of pumping pressurized water and proppants deep into a rock formation to release natural gas held within the formation. *Id.* at 7.

¹⁸⁷ *See* 58 PA. CONS. STAT. §§ 3303–3304 (2012) (prohibiting municipal regulation of oil and gas regulation and requiring adherence to the state-wide zoning plan with respect to fracking).

¹⁸⁸ *Commonwealth Court Decision*, 52 A.3d at 469–70. Plaintiffs brought twelve counts, with most claims directed to Pennsylvania state law. *Id.* Some of the other claims alleged that the law was unconstitutionally vague and violated separation of powers. *Id.* Although the Commonwealth challenged the standing of the municipalities to sue, the Commonwealth Court concluded that the parties had standing because Act 13 imposes obligations that affect the municipalities’ government functions. *Id.* at 475.

¹⁸⁹ *Id.* at 469.

¹⁹⁰ *Id.* at 480–81.

preme Court jurisprudence imposed a constitutional obligation on municipalities to secure zones that harbor family values and clean air.¹⁹¹

In *Robinson Township*, a plurality of the Supreme Court of Pennsylvania held that Act 13 violated the state constitution.¹⁹² Specifically, the court concluded that the Environmental Rights Amendment in the state constitution created a public trust that the law violated.¹⁹³

Additionally, Justice Baer concurred but concluded that the preemption provision of Act 13 violated the due process rights of plaintiffs.¹⁹⁴ Justice Baer noted that the state provides municipalities the power to enact zoning ordinances by statute.¹⁹⁵ Because municipalities derive their zoning authority from the state, Justice Baer recognized that the state also has the power to remove said authority, where constitutionally permissible.¹⁹⁶

Although zoning ordinances create an impediment to a citizen's right to use his or her property as typically protected by the Due Process Clause, Justice Baer noted that zoning serves within the regulatory scope of "sic utere tuo ut alienum non laedas."¹⁹⁷

¹⁹¹ *Robinson Township*, 83 A.3d at 1004 (Baer, J., concurring) (first citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926); and then quoting *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 732–33 (1995)). Plaintiffs argue that urban communities cannot develop in orderly fashion without zoning ordinances. *Id.* Thus, municipalities have a constitutional duty to establish zoning in accordance with *Village of Euclid* and *City of Edmonds v. Oxford House, Inc.* *Id.*

¹⁹² *Robinson Township*, 83 A.3d at 913. The court held that Sections 3215(b)(4) and (d), 3303, and 3304 are violations of the state constitution. *Id.* at 985. Concluding that the provisions violated the state constitution, the court declined to address the plaintiffs' remaining claims, including the Due Process Clause claim. *Id.*

¹⁹³ *Id.* at 984; see PA. CONST. art. I, § 27 (making the commonwealth a trustee of the public natural resources for the people of the commonwealth); see *Trust*, BLACK'S LAW DICTIONARY, *supra* note 9 (defining trust as a property interest held by a party for the benefit of another); *Public Trust*, BLACK'S LAW DICTIONARY, *supra* note 9 (defining public trust as a trust reserved for the general public). The Court interpreted that the amendment created a public trust of Pennsylvania's public natural resources where the Commonwealth is the trustee and the citizens are the beneficiaries. *Robinson Township*, 83 A.3d at 955–56. The court stated that, as trustee, the Commonwealth has the duty to (1) deal with beneficiaries impartially and (2) balance the interests of current and future beneficiaries. *Id.* at 959. The court noted that municipalities maintained zoning ordinances before the enactment of the amendment and citizens could rely on those measures. *Id.* at 977. Thus, the court concluded that by preempting municipalities in Act 13, the general assembly was interfering with municipalities from conducting their duties as trustees. *Id.* at 977–78.

¹⁹⁴ *Robinson Township*, 83 A.3d at 1002–03 (Baer, J., concurring).

¹⁹⁵ *Id.* at 1002. See generally 53 PA. CONS. STAT. §§ 10101–11202 (2021) (codifying the Pennsylvania Municipalities Planning Code). Justice Baer noted the unique situation here where a municipality brings a zoning-related suit against its Commonwealth. *Robinson*, 83 A.3d at 1004 (Baer, J., concurring). In a typical zoning case, a landowning citizen challenges a municipality's ordinance as being violative of the individual's due process right to property. *Id.*; see, e.g., *Village of Euclid*, 272 U.S. at 387 (deciding a case where a landowner in the village brought suit against the municipality).

¹⁹⁶ *Robinson Township*, 83 A.3d at 1002 (Baer, J. concurring).

¹⁹⁷ *Id.* at 1004. Because zoning ordinances interfere with one's use of property, the ordinance must have a substantial relationship to the general welfare of the community. *Village of Euclid*, 272 U.S. at 395; see *Hopewell Twp. Bd. of Supervisors v. Golla*, 452 A.2d 1337, 1341 (Pa. 1982) (quoting

Justice Baer proceeded to state that in, *Robinson Township*, the situation was reversed.¹⁹⁸ Act 13 expanded a property owner's rights to use their property by preventing municipalities from setting restrictions on fracking.¹⁹⁹ Thus, Justice Baer argued, a property owner's use of his or her property to frack in a residential zone instead runs afoul of "sic utere tuo ut alienum non laedas."²⁰⁰ The individual thus being harmed by the Commonwealth's preemption is the neighbor of the fracking property owner.²⁰¹

Justice Baer framed the question as whether the Commonwealth may take from localities the authority to secure the substantive due process rights of its landowning citizens—in this case, the substantive right at issue being a neighboring landowner's right to quiet enjoyment.²⁰²

Justice Baer discussed whether the maxim and U.S. Supreme Court jurisprudence on zoning creates a constitutional duty for municipalities to preserve the public health, safety, and security of the community.²⁰³ The Justice concluded that once the state grants its municipalities, the power to pass zoning

Surrick v. Zoning Hearing Bd., 382 A.2d 105, 108 (Pa. 1977)) (discussing the principle under Pennsylvania law). Otherwise, a zoning ordinance violates the Due Process Clause. *Robinson Township*, 83 A.3d at 1004–05 (Baer, J., concurring) (citing *Hopewell Twp.*, 452 A.2d at 1341).

¹⁹⁸ *Robinson Township*, 83 A.3d at 1005 (Baer, K., concurring). Justice Baer stated that this was not a common case of governmental intrusion via a zoning ordinance. *Id.*

¹⁹⁹ *Id.* Justice Baer stated that the Commonwealth was forcing municipalities to establish zoning schemes that violated "sic utere tuo ut alienum non laedas." *Id.*

²⁰⁰ *Id.* In invoking the maxim, Justice Baer noted the blasting of rocks, sound of diesel engines, traffic, storage of dangerous materials, lights at night, and threat of injuries from explosions. *Id.*

²⁰¹ *Id.* At the individual level, the harm is to the neighbor of the person who begins fracking on their property. *Id.*

²⁰² *Id.* at 1001; see *Quiet Enjoyment*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/quiet_enjoyment [<https://perma.cc/4BYA-ZWAZ>] (defining quiet enjoyment as a property owner's right to property without disruption). In Pennsylvania, courts use a substantive due process analysis using the Fourteenth Amendment of United States Constitution to determine whether a zoning ordinance bears a relationship to the welfare of a community. *Hopewell Twp. Bd. of Supervisors v. Golla*, 452 A.2d 1337, 1341 (Pa. 1982) (quoting *Surrick v. Zoning Hearing Bd.*, 382 A.2d 105, 108 (Pa. 1977)). In 1982, in *Hopewell Township Board of Supervisors v. Golla*, the Supreme Court of Pennsylvania held that a substantive due process analysis balancing the rights of property owners affected by the zoning ordinance against the welfare of the community must give deference to the rights of adjoining property owners using "sic utere tuo ut alienum non laedas" as guidance. *Id.* Justice Baer did not cite a source for his claim that quiet enjoyment of real property is a substantive due process right. See *Robinson Township*, 83 A.3d at 1001 (Baer, J., concurring) (stating that quiet enjoyment of real property is an acknowledged substantive due process right). Justice Baer's claim likely referred to the substantive due process analysis the court conducted in *Hopewell Township* and its reliance on "sic utere tuo ut alienum non laedas." See *Hopewell Twp.*, 452 A.2d at 1341 (stating that substantive due process analysis of zoning ordinances must give deference to the rights of adjoining property owners).

²⁰³ See *Robinson Township*, 83 A.3d at 1004 (Baer, J. concurring) (discussing plaintiffs' arguments that municipalities have a constitutional duty to use their police power to provide for the community).

ordinances for the public interest of their communities, and municipalities rely on that authority, the state cannot take that power away.²⁰⁴

Ultimately, Justice Baer determined that the preemption clauses in Act 13 established regulations that lack sufficient consideration of “sic utere tuo ut alienum non laedas.”²⁰⁵ The absolute standards set by the preemption law thus unconstitutionally prevent municipalities from vindicating the substantive due process rights of its citizens.²⁰⁶

Justice Baer’s concurrence took the stance that property owners possess a fundamental right to quiet enjoyment of property and that municipalities are better suited to protect that constitutional right than states.²⁰⁷ Nevertheless, an inquiry into this assertion is proper.²⁰⁸

II. THE RIGHT TO QUIET ENJOYMENT AND THE ROLE OF MUNICIPALITIES

In 2013, in *Robinson Township v. Commonwealth*, Justice Baer’s concurrence relied on two key assertions.²⁰⁹ First, Justice Baer asserted that the Constitution protects a substantive due process right to quiet enjoyment of real property.²¹⁰ Second, he asserted that municipalities are the best equipped institution to defend that constitutional right.²¹¹ A municipality’s potential argument to combat intrastate preemption in environmental law thus depends on whether a court will recognize quiet enjoyment of land as a fundamental right.²¹² Further, to counter the inherent authority of a state to preempt the municipality, a court must also agree that municipalities are better suited to defend that right than states.²¹³ This Part first explores the validity of Justice Baer’s assertions through an examination of the applicability of substantive due process to quiet

²⁰⁴ *Id.* at 1006. Justice Baer added that this is still the case even when the state has a compelling reason to remove municipal authority. *Id.* In this case, the Justice noted that the state provided a compelling reason in its interest in economic development. *Id.*

²⁰⁵ *Id.* at 1008.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 1001, 1006.

²⁰⁸ See *infra* notes 210–271 and accompanying text (discussing the legal history and traditions of the right to quiet enjoyment of property and the roles that municipalities versus states could play in protecting that right).

²⁰⁹ See *Robinson Township*, 83 A.3d at 1001, 1006 (Baer, J., concurring) (claiming that Act 13 violated a substantive due process right to quiet enjoyment of land and that municipalities are better equipped to defend that right than states).

²¹⁰ *Id.* at 1001.

²¹¹ See *id.* at 1001, 1006 (stating that zoning decisions require flexibility for each municipality). Thus, once a state grants a municipality the authority to establish zoning regulations for the benefit of its community, it should not be able to take that authority away. *Id.* at 1006.

²¹² See *id.* at 1006 (stating that a violation of the right to quiet enjoyment of property would bar a state preemption law).

²¹³ See *id.* (claiming that municipalities should maintain the right to zone for their communities).

enjoyment of land.²¹⁴ This Part then discusses the role of municipalities in administering substantive due process rights as compared to states.²¹⁵

A. Quiet Enjoyment of Land as a Substantive Due Process Right

Although the Supreme Court has never addressed quiet enjoyment of land as a fundamental right worthy of substantive due process protection, some federal district courts have.²¹⁶ For example, in 2018, in *Dennis v. Brevard County*, the U.S. District Court for the Middle District of Florida decided whether a county maintaining a gun range in a residentially zoned district violated a resident's alleged due process right to quiet enjoyment of land.²¹⁷ The *Dennis* court held that quiet enjoyment is not a fundamental right.²¹⁸ The court came to this conclusion by reasoning that: (1) under Eleventh Circuit precedent, property rights are state-defined and cannot be fundamental rights; (2) there is no authority supporting quiet enjoyment as a fundamental right; and (3) the Su-

²¹⁴ See *infra* notes 216–250 and accompanying text.

²¹⁵ See *infra* notes 251–271 and accompanying text.

²¹⁶ See, e.g., *Dennis v. Brevard County*, No. 6:17-cv-1971-Orl-37GJK, 2018 WL 1939490, at *3 (M.D. Fla. Mar. 23, 2018) (declining to extend substantive due process to include quiet enjoyment of real property), *R. & R. adopted*, No. 6:17-cv-1971-Orl-37GJK, 2018 WL 1933686 (M.D. Fla. Apr. 24, 2018); *Ooley v. Citrus Heights Police Dep't*, No. 2:12-CV-00095-JAM, 2012 WL 1910264, at *4 (E.D. Cal. May 25, 2012) (declining to extend substantive due process to include quiet enjoyment of real property in the absence of supporting authority), *aff'd*, 603 F. App'x 628 (9th Cir. 2015) (affirming the court's due process decision because the alleged acts did not constitute state action). Several federal district courts have discussed the question of quiet enjoyment as a fundamental right. E.g., *Dennis*, 2018 WL 1939490, at *3; *Ooley*, 2012 WL 1910264, at *4; *Krlich v. Taaffe*, No. 4:17CV0379, 2018 WL 4537196, at *2 (N.D. Ohio Sept. 19, 2018); *Levin v. Upper Makefield Township*, No. CIV.A. 99-CV-5313, 2003 WL 21652301, at *5 (E.D. Pa. Feb. 25, 2003), *aff'd sub nom. Levin v. Upper Makefield Township*, Bucks County, Pa., 90 F. App'x 653 (3d Cir. 2004). In 2012, in *Ooley v. Citrus Heights Police Department*, the U.S. District Court for the Eastern District of California decided whether a plaintiff's claim that a police department engaged in a campaign of harassment against her on her property violated her alleged due process right to quiet enjoyment. 2012 WL 1910264, at *1. The court dismissed this claim stating that: (1) the Fourteenth Amendment is not a tool for torts cases and (2) the Supreme Court is hesitant to expand fundamental rights. *Id.* at *3–4. Coupling these considerations, the court concluded that no such fundamental right existed in light of an absence of supporting authority. *Id.* at *4. Additionally, in 2010, in *Dedman v. City of Harrodsburg*, the U.S. District Court for the Eastern District of Kentucky rejected a claim that a municipality violated a plaintiff's due process rights by failing to impede acts by a third party that impeded the plaintiff's right to quiet enjoyment. No. CIV.A 509CV256KSF, 2010 WL 1141261, at *3 (E.D. Ky. Mar. 22, 2010). The court in *Dedman* clarified that the Due Process Clause protects individuals against infringements from the government rather than from other individuals. *Id.* (citing *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989)).

²¹⁷ *Dennis*, 2018 WL 1939490, at *1. Local political groups requested that the county commissioner reduce the noise level of the gun range. *Id.* Plaintiff sued due to the county's lack of action to reduce the noise. *Id.* Plaintiff proceeded pro se and sought an injunction on the gun range as a result. *Id.* Plaintiff also claimed that the county's failure to remove the gun range violated the Eighth Amendment as a cruel and unusual punishment. *Id.*

²¹⁸ *Id.* at *3. The Court also considered whether the defendants violated plaintiff's procedural due process rights and similarly held in the negative. *Id.* at *4.

preme Court is hesitant to expand the umbrella of fundamental rights.²¹⁹ Even giving consideration to the holding in *Dennis*, an analysis using the test from the 1997 U.S. Supreme Court decision in *Washington v. Glucksberg* and the factors the Court has deemed relevant in its substantive due process jurisprudence, leaves the question open.²²⁰

As a preliminary step in conducting a substantive due process analysis, it is first necessary to clearly state the suggested fundamental liberty interest.²²¹ Despite the fact that the U.S. Supreme Court has sometimes narrowed the suggested liberty interest to the facts of a given case, this Note will follow the suggestion in *Robinson Township* and explore whether the right to quiet enjoyment of real property is a fundamental liberty interest.²²²

Having established the liberty interest in question, the Supreme Court next examines whether the asserted liberty interest is “deeply rooted in this [n]ation’s history and tradition.”²²³ In 1990, in *Cruzan v. Director, Missouri Department of Health*, the Supreme Court began its analysis by examining the common law history of the proposed fundamental right.²²⁴ In 1969, in *Shapiro v. Thompson*, the Court began by examining the proposed fundamental right in Supreme Court jurisprudence.²²⁵ Similar to the right to decline medical treatment and the right to interstate travel, the right to quiet enjoyment of land has roots in the common law and in Supreme Court jurisprudence.²²⁶

²¹⁹ *Id.* at *3. The court in *Dennis v. Brevard County* cited support from the holding of the Eleventh Circuit in 2009, in *Busse v. Lee County* where the Circuit held that state-defined property rights are not fundamental rights. *Id.* at 2–3 (citing *Busse v. Lee County*, 317 F. App’x 968, 973 (11th Cir. 2009)).

²²⁰ See *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (providing a framework for substantive due process analysis); *Dennis*, 2018 WL 1939490, at *3 (holding that quiet enjoyment is not a fundamental right).

²²¹ See *Glucksberg*, 521 U.S. at 721–22 (stating that the first step in a substantive due process analysis is clearly identifying the liberty interest).

²²² See *Robinson Township v. Commonwealth*, 83 A.3d 901, 1001 (Pa. 2013) (Baer, J., concurring) (asserting a substantive due process right to quiet enjoyment of real property); see, e.g., *Glucksberg*, 521 U.S. at 722–23 (rejecting a broader liberty interest of a right to determine the time and manner of death, or a right to die, in favor of a right to commit suicide); *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 279 (1990) (rejecting a broader liberty interest of a right to die with a narrower interest of a right to refuse lifesaving hydration and nutrition).

²²³ *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977); see *Glucksberg*, 521 U.S. at 721–22 (setting forth substantive due process analysis).

²²⁴ See *Cruzan*, 497 U.S. at 269 (examining the common law history of the right to refuse medical treatment).

²²⁵ See *Shapiro v. Thompson*, 394 U.S. 618, 629–31 (1969) (examining the right to travel interstate in Supreme Court jurisprudence), *overruled in part by* *Edelman v. Jordan*, 415 U.S. 651 (1974).

²²⁶ Compare *Grant*, *supra* note 137, at 60 (discussing quiet enjoyment in tenant common law), and *Abrams*, *supra* note 137, at 274 (2007) (discussing quiet enjoyment in nuisance common law), and *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387–88 (1926) (using nuisance law as a guide when deciding the constitutionality of zoning ordinances), with *Cruzan*, 497 U.S. at 269 (discussing common law history of consent to medical treatment), and *Shapiro*, 394 U.S. at 629–31 (discussing Court jurisprudence on the right to travel between states).

As discussed, quiet enjoyment of real property has roots deep in the English and American common law.²²⁷ As our nation's municipalities have grown more complex, the scope of quiet enjoyment has simultaneously expanded.²²⁸ While quiet enjoyment has expanded, states have further anchored the covenant by codifying its principles in statutes.²²⁹ Just as the Supreme Court concluded that the right to decline medical treatment is entrenched in American tort law, the right to quiet enjoyment of land is firmly established in American tenant and nuisance law.²³⁰

The Supreme Court has also embraced the principles of the covenant of quiet enjoyment through its reliance on “sic utere tuo ut alienum non laedas.”²³¹ For example, in 1897, in *Camfield v. United States*, the Supreme Court declared that the right to use one's property is subordinate to the rights of another.²³² The Supreme Court declared that “sic utere tuo ut alienum non laedas” expressed the common law rule that a person may not maintain a nuisance on his or her property or conduct business in a manner that interferes with others.²³³ Next, in 1926, in *Village of Euclid v. Ambler Realty Co.*, the Court placed significant reliance on the maxim as a means to measure the scope of zoning ordinances.²³⁴ In *Village of Euclid*, the Court stated that the maxim should determine the scope of a zoning plan where doubts emerged about an ordinance's appropriateness.²³⁵ In 1989, in *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, the Court discussed the instructions from *Vil-*

²²⁷ See Grant, *supra* note 137, at 60 (discussing quiet enjoyment in tenant common law); Abrams, *supra* note 137, at 274 (discussing quiet enjoyment in nuisance common law).

²²⁸ See *Housing and Land Use*, *supra* note 139, at 311 (discussing the expansion of the covenant of quiet enjoyment in tenant law).

²²⁹ See, e.g., MASS. GEN. LAWS ch. 186, § 14 (2022) (codifying the covenant of quiet enjoyment in tenant law); N.Y. REAL PROP. LAW § 235 (McKinney 2022) (same).

²³⁰ Compare Grant, *supra* note 137, at 60 (discussing the covenant of quiet enjoyment in tenant law), and Abrams, *supra* note 137, at 274 (discussing the covenant of quiet enjoyment in nuisance law), with *Cruzan*, 497 U.S. at 269 (discussing the common law treatment of unwanted medical treatment).

²³¹ See, e.g., *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 492 n.22 (1987) (discussing whether a policy aligned with “sic utere tuo ut alienum non laedas”); *Village of Euclid*, 272 U.S. at 387 (using “sic utere tuo ut alienum non laedas” to decide the permissible scope of a zoning ordinance); *Munn v. Illinois*, 94 U.S. 113, 124–25 (1876) (stating that “sic utere tuo ut alienum non laedas” is the foundation of police power).

²³² *Camfield v. United States*, 167 U.S. 518, 522 (1897). In *Camfield v. United States*, the United States sued defendants for building a fence on their property that enclosed public land owned by the government. *Id.* at 519. The government claimed that defendants built this fence in violation of federal law that prohibited such enclosures of public land. *Id.* at 521. Defendants claimed that such a law as applied to a fence on private property is unconstitutional. *Id.* at 522.

²³³ *Id.* at 522. In invoking “sic utere tuo ut alienum non laedas,” the Court noted that a person's right to use his property as he pleases does not justify building a fence that creates a nuisance. *Id.* The Court upheld the federal law, concluding that the law merely protected public land from nuisances on private property. *Id.* at 528.

²³⁴ *Village of Euclid*, 272 U.S. at 387.

²³⁵ *Id.*

lage of *Euclid* that the maxim should guide a decision on zoning.²³⁶ The Court in *Brendale* embraced the logic of *Village of Euclid* that the authority to zone parallels common law nuisance.²³⁷

An exploration of American common law coupled with a survey of Supreme Court jurisprudence thus supports the conclusion that quiet enjoyment has roots in the nation's legal history and traditions.²³⁸ Similar to the right to decline medical treatment for a competent person in *Cruzan*, quiet enjoyment has deep roots in the common law.²³⁹ Likewise, the Court's recognition of a right to travel between states is similar to the Court's continued use of "sic utere tuo ut alienum non laedas" and consequently the right to quiet enjoyment of real property.²⁴⁰ Different from the right to commit suicide in *Glucksberg*, states have embraced the doctrine of quiet enjoyment and many have codified it into statute.²⁴¹

Nevertheless, as illustrated in *Dennis*, there are several significant barriers impeding the Court from recognizing quiet enjoyment as a fundamental liberty interest.²⁴² First, the Supreme Court is cautious when expanding substantive due process.²⁴³ The Court reasons that there are few markers for responsible

²³⁶ *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 433–34 (1989). In *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, the Court decided whether the Yakima Indian Nation had the authority to zone land owned by non-members of the tribe within the Yakima Indian Nation's borders. *Id.* at 414. The Court held that the Yakima Indian Nation may zone the territory owned by a non-member within the Nation's borders. *Id.* at 444.

²³⁷ *Id.* at 433–34. The Court noted that zoning questions invoke "sic utere tuo ut alienum non laedas" because zoning law parallels nuisance law. *Id.* The Court concluded that the Yakima Indian Nation had the authority to define the character of its land. *Id.* at 434.

²³⁸ See Grant, *supra* note 137, at 60 (discussing quiet enjoyment in tenant common law); Abrams, *supra* note 137, at 274 (discussing quiet enjoyment in nuisance common law); *Village of Euclid*, 272 U.S. at 387 (using nuisance law doctrine to solve a zoning case).

²³⁹ See Grant, *supra* note 137, at 60 (discussing the roots of quiet enjoyment in tenant law); Abrams, *supra* note 137, at 274 (discussing the roots of quiet enjoyment in nuisance law); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 269 (1990) (exploring the common law roots of the right to refuse medical treatment).

²⁴⁰ See *Shapiro v. Thompson*, 394 U.S. 618, 629–31 (1969), *overruled in part by Edelman v. Jordan*, 415 U.S. 651 (1974); *Camfield v. United States*, 167 U.S. 518, 522 (1897) (stating that another's enjoyment of property supersedes the right to use property in an offensive manner).

²⁴¹ See *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997) (discussing the near universal rejection of the right to commit suicide in state laws); see, e.g., MASS. GEN. LAWS ch. 186, § 14 (2022) (requiring landlords to provide a covenant of quiet enjoyment); N.Y. REAL PROP. LAW § 235 (McKinney 2022) (same).

²⁴² See *infra* notes 243–250 and accompanying text; *Dennis v. Brevard County*, No. 6:17-cv-1971-Orl-37GJK, 2018 WL 1939490, at *3 (M.D. Fla. Mar. 23, 2018) (declining to conclude that quiet enjoyment is a fundamental right), *R. & R. adopted*, No. 6:17-cv-1971-Orl-37GJK, 2018 WL 1933686 (M.D. Fla. Apr. 24, 2018).

²⁴³ See *Glucksberg*, 521 U.S. at 720, 722 (stating that the Court's substantive due process analysis serves to restrain and carefully guide the expansion of the Due Process Clause); *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2247 (2022) (stating that in granting fundamental rights the Court should look to what the Constitution preserves rather than what the Court views as a right);

decisions in a field of law as broad as substantive due process.²⁴⁴ Further, the Court has acted more recently to remove a fundamental right than to grant one.²⁴⁵ Next, substantive due process generally restricts government action that “shocks the conscience.”²⁴⁶ It thus would likely take a case with significant consequences for the Court to consider expanding substantive due process to quiet enjoyment.²⁴⁷ Finally, fundamental liberty interests originate from the Constitution.²⁴⁸ Property interests, on the other hand, originate from state law.²⁴⁹ Therefore, there must be some aspect of the right to quiet enjoyment of real property that goes beyond the mere property interest.²⁵⁰

B. Municipalities as Guardians of Due Process Rights

In 2013, in *Robinson Township*, Justice Baer stated, in concurrence, that only local government can meaningfully protect an adjoining landowner’s substantive due process right to quiet enjoyment of real property.²⁵¹ The municipality must be the best protector of that right in order to bar a state from preempting a municipality on substantive due process grounds.²⁵² This Section looks to the overall history of state and local relations to illuminate that, in the

Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992) (stating that the Court is reluctant to expand substantive due process).

²⁴⁴ *Collins*, 503 U.S. at 125; *Dobbs*, 142 S. Ct. at 2248.

²⁴⁵ See *Dobbs*, 142 S. Ct. at 2242 (overruling *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) and *Roe v. Wade*, 410 U.S. 113 (1973) to remove abortion as a fundamental right); see also *id.* at 2301 (Thomas, J., concurring) (arguing for reversal of substantive due process doctrine and removing previously identified fundamental rights).

²⁴⁶ *United States v. Salerno*, 481 U.S. 739, 746 (1987) (citing *Rochin v. California*, 342 U.S. 165, 172 (1952)).

²⁴⁷ See *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 279 (1990) (deciding whether a person has the right to refuse lifesaving hydration and nutrition); *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969) (deciding whether the right to travel interstate is fundamental), *overruled in part by* *Edelman v. Jordan*, 415 U.S. 651 (1974); cf. *Robinson Township v. Commonwealth*, 83 A.3d 901, 915 (Pa. 2013) (deciding whether the Commonwealth of Pennsylvania may preempt municipalities from enacting zoning ordinances restricting fracking in residential neighborhoods).

²⁴⁸ See *Greenbriar Village, L.L.C. v. Mountain Brook*, 345 F.3d 1258, 1262 (11th Cir. 2003) (citing *DeKalb Stone, Inc. v. County of DeKalb*, 106 F.3d 956, 959 n.6 (11th Cir. 1997)) (stating that liberty interests come from the Constitution). A state may create a liberty interest through state law that ensures procedural due process protection. *Vitek v. Jones*, 445 U.S. 480, 488 (1980). For example, parole is not a right guaranteed in the Constitution, but the Due Process Clause provides protection in parole revocation procedures. *Id.*

²⁴⁹ *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972).

²⁵⁰ See *id.* (stating that property interests do not originate from the Constitution).

²⁵¹ *Robinson Township*, 83 A.3d at 1001 (Baer, J., concurring) Justice Baer qualifies this point by stating that Pennsylvania is an especially large and diverse state. *Id.* at 1006.

²⁵² See *id.* at 1006 (stating that once a state has entrusted a municipality with creating zoning plans, it cannot take it away).

current political landscape, municipalities are better equipped to protect the fundamental rights of its residents in environmental contexts.²⁵³

A brief look at the history of zoning leads to the conclusion that municipalities have not always been best suited to protect due process rights.²⁵⁴ Early in the history of zoning, municipalities often enacted zoning plans to codify racial segregation.²⁵⁵ The Court's holding in 1917, in *Buchanan v. Warley*, that Louisville's race-based zoning plan violated the Due Process Clause, illustrates the argument against municipalities as guardians of due process rights.²⁵⁶ Further, in 1926, in *Village of Euclid*, the Court described the existence of multi-family dwellings in residential neighborhoods as not only a nuisance, but also a "parasite."²⁵⁷ Thus, the premise upon which the Court in *Village of Euclid* made its decision rests on classist and racist assumptions manifested in zoning plans.²⁵⁸ States can play a meaningful role in attacking these types of exclusionary zoning practices through preemption.²⁵⁹ For example, in 2019, the state of Oregon used preemption to effectively restrict single-family zoning in an effort to combat "Not In My Backyard" (NIMBY) sentiments in the wake of an affordable housing crisis in the state.²⁶⁰ Thus, state preemption may sometimes serve as a remedy to municipal violations of the Fourteenth Amendment.²⁶¹

²⁵³ See *id.* (stating that municipalities are better suited to protect quiet enjoyment in the Commonwealth of Pennsylvania).

²⁵⁴ See Serkin, *supra* note 154, at 754 (discussing race-based and exclusionary zoning practices); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394 (1926) (referring to multi-unit apartment buildings as "parasite[s]").

²⁵⁵ Serkin, *supra* note 154, at 754. The earliest uses of zoning in the United States involved race-based ordinances used to exclude Black people from specified neighborhoods. *Id.* at 754–55.

²⁵⁶ See *Buchanan v. Warley*, 245 U.S. 60, 82 (1917) (striking down a Louisville race-based zoning ordinance). The zoning ordinance prevented any person of color from purchasing a house on a block where the majority of residences were white. *Id.* at 70–71.

²⁵⁷ *Village of Euclid*, 272 U.S. at 394.

²⁵⁸ Serkin, *supra* note 154, at 757–58.

²⁵⁹ See Rosser, *supra* note 173, at 858–59 (discussing state interjection into exclusionary zoning practices through preemption).

²⁶⁰ *Id.* (citing Jeff Andrews, *Oregon Just Effectively Banned Single-Family Zoning*, CURBED (July 1, 2019), <https://archive.curbed.com/2019/7/1/20677502/oregon-yimby-single-family-zoning-nimby-rent-control> [<https://perma.cc/RMC4-XMWS>]). A single-family zone restricts the use of a land plot to a detached building housing a single family. Andrews, *supra*; see *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 728 (1995) (discussing a zoning ordinance defining "family" in a single-family zone to persons related by genetic relationship, marriage, or adoption without regard to number, or a group of no more than five unrelated individuals). Single-family zoning is often regarded as a "Not In My Backyard" (NIMBY) practice. Andrews, *supra*. Critics assail single-family zoning as an impediment to building more housing amidst rising housing costs stemming from a nationwide shortage of housing. *Id.*

²⁶¹ See Rosser, *supra* note 173, at 858–59 (discussing the role of states in combatting exclusionary zoning); Eric E. Stern, *A Federal Builder's Remedy for Exclusionary Zoning*, 129 YALE L.J. 1516, 1528–1529 (2020) (stating that a lack of state preemption allows exclusionary zoning practices to continue).

On the other hand, states have used preemption to maintain policies that arbitrarily impose values and restrict the ability of localities to combat the COVID-19 pandemic.²⁶² For example, in 2020, Mississippi barred municipalities from enacting social distancing protocols stricter than the standards established by the state.²⁶³

Such policies align with the larger trend of conservative states using preemption to impose cultural values on their more progressive cities.²⁶⁴ Concerned by local leadership in progressive policies, business groups have also often found it easier to lobby state legislatures to limit local authorities' ability to strengthen workers' rights and environmental restrictions.²⁶⁵ These preemption efforts are a response to activist municipalities seeking to improve the quality of life for their residents.²⁶⁶ State leaders have acted especially aggressively in the area of environmental law.²⁶⁷ For example, Arizona acted as the first state to preempt municipalities from banning gas stoves despite the fact that no localities in the state had instituted such a ban.²⁶⁸ Following suit, twenty states implemented a similar ban despite the fact that gas stove usage remains generally low in the states with such bans.²⁶⁹ This pattern tends to demonstrate a reactionary style of politics aligned with news outlets encouraging outrage.²⁷⁰

²⁶² See HUNTER BLAIR, DAVID COOPER, JULIA WOLFE & JAIMIE WORKER, ECON. POL'Y INST., *PREEMPTING PROGRESS: STATE INTERFERENCE IN LOCAL POLICYMAKING PREVENTS PEOPLE OF COLOR, WOMEN, AND LOW-INCOME WORKERS FROM MAKING ENDS MEET IN THE SOUTH* 27 (2020), <https://files.epi.org/pdf/206974.pdf> [<https://perma.cc/VRX9-SYMZ>] (discussing state preemption used to limit local authority to react to the COVID-19 pandemic).

²⁶³ *Id.*; STATE OF MISS.: OFFICE OF THE GOVERNOR, EXECUTIVE ORDER NO. 1463 (Mar. 24, 2020), <https://www.sos.ms.gov/content/executiveorders/ExecutiveOrders/1463.pdf> [<https://perma.cc/N3XY-UD7E>]. The Governor's executive order also barred business closures which were stricter than the state's standard. BLAIR ET AL., *supra* note 262, at 27.

²⁶⁴ See BLAIR ET AL., *supra* note 262, at 6, 27 (discussing state preemption in statue statutes and social distancing protocols); Briffault, *supra* note 18, at 1997–98 (discussing conservative states' use of preemption to impose political ideologies on liberal cities).

²⁶⁵ Briffault, *supra* note 18, at 1999–2000.

²⁶⁶ *Id.* See generally BOSTON GREEN NEW DEAL, *supra* note 1, at 1 (outlining Mayor Wu's Green New Deal proposal); Edward Wyatt, *Communities Fight State Laws That Can Divide Broadband Access*, N.Y. TIMES (Nov. 9, 2014), <https://www.nytimes.com/2014/11/10/technology/in-rural-america-challenging-a-roadblock-to-high-speed-internet.html> [<https://perma.cc/8B5E-S5PQ>] (discussing local government efforts to change state law that limits broadband access in rural communities).

²⁶⁷ See, e.g., N.H. REV. STAT. ANN. § 155-A:2 (2021) (preventing municipalities from outlawing any safe and commercially available energy source in new developments).

²⁶⁸ Coleman, *supra* note 13; see 2020 Ariz. Sess. Laws 10 (preempting municipalities from preventing natural gas hookups in new buildings despite no municipalities in Arizona enforcing such a ban at the time).

²⁶⁹ Nilsen, *supra* note 13.

²⁷⁰ See *id.* (explaining the conservative movement to preempt natural gas hookups despite its relatively limited usage); see, e.g., Clark Corbin, *Idaho Legislature Introduces Bill to Ban Local Governments from Restricting Natural Gas*, IDAHO CAP. SUN (Feb. 8, 2023), <https://idahocapitalsun.com/2023/02/08/idaho-legislature-introduces-bill-to-ban-local-governments-from-restricting-natural-gas/> [<https://perma.cc/XYA7-7Y74>] (detailing new Idaho legislation following the lead of other states preempting natural gas stove bans).

This modern form of preemption that focuses on imposing values, rather than establishing smart policy, calls into question the responsibility of states to protect due process rights.²⁷¹

III. MUNICIPALITIES SHOULD PROTECT A DUE PROCESS RIGHT TO QUIET ENJOYMENT

When it comes to police powers, states may grant power and also take it away—at least in the typical case.²⁷² But preemption statutes, just like any other state statute, must meet their limit at the boundaries of the Constitution.²⁷³ Thus, where municipal control is the only means by which a constitutional right may be protected, states must give way to municipalities.²⁷⁴

In today's political and legal climate, municipalities are best served to protect quiet enjoyment as a substantive due process right.²⁷⁵ As states increase their

²⁷¹ See Briffault, *supra* note 18, at 1997–98 (discussing state use of preemption to impose values on its cities). Compare BOSTON GREEN NEW DEAL, *supra* note 1, at 1 (stating that cities have the power to lead on climate change), Tornoe, *supra* note 5 (discussing Philadelphia's plastic bag ban), and Gable, *supra* note 6 (discussing gas stove bans from California cities), with Prevost, *supra* note 13 (discussing New Hampshire's gas stove preemption bill), and Robinson Township v. Commonwealth, 83 A.3d 901, 931 (Pa. 2013) (describing Pennsylvania's Act 13 which would permit fracking in residential neighborhoods).

²⁷² See Robinson Township v. Commonwealth, 83 A.3d 901, 1002 (Pa. 2013) (Baer, J., concurring) (stating that because the state of Pennsylvania gave municipalities the power to zone, it can also take that power away where constitutionally permissible).

²⁷³ See *id.* (stating that preemption is valid only where Constitutionally permissible); Chemerinsky, *supra* note 85, at 1509 (stating that the substantive aspect of the Due Process Clause requires the government to have sufficient reason for enacting laws that deprive a person of life, liberty, or property).

²⁷⁴ See Robinson Township, 83 A.3d at 1006 (Baer, J., concurring) (arguing that once a state delegates zoning authority to a municipality and people rely on those ordinances, then the state may not take it away). In 2013, in Robinson Township, Justice Baer argued that municipalities are best positioned to protect a person's substantive due process right to quiet enjoyment of land. *Id.* at 1001. Therefore, a state may not take away the municipality's means to protect the substantive due process right once it has granted it. See *id.* at 1002–03 (stating that it is unlikely that states will be able to adequately protect substantive due process rights with respect to zoning's constitutional underpinnings). Justice Baer also argued that Act 13 would force municipalities to create zoning schemes that affronted “sic utere tuo ut alienum non laedas” by allowing fracking in residential areas. *Id.* at 1008. Although a slightly different argument, the Due Process Clause bars the preempting statute in either case. Compare *id.* (stating Act 13 violates the Due Process Clause because it forces municipalities to draw zoning schemes that permit nuisances), with *id.* at 1006 (stating that once a state grants a municipality zoning authority and its people come to rely on those zoning schemes that it cannot be taken away).

²⁷⁵ See Briffault, *supra* note 18, 1997–98 (discussing ideologically based preemption). Compare BOSTON GREEN NEW DEAL, *supra* note 1, at 1 (stating that cities have the power to lead on climate change), and Tornoe, *supra* note 5 (discussing Philadelphia's plastic bag ban), and Gable, *supra* note 6 (discussing gas stove bans from California cities), with Prevost, *supra* note 13 (discussing New Hampshire's gas stove preemption law), and Robinson Township, 83 A.3d at 931 (describing Pennsylvania's Act 13 which would permit fracking in residential neighborhoods). Quiet enjoyment of land and its related maxim “sic utere tuo ut alienum non laedas” are deeply rooted in this nation's

use of ceiling preemption, municipalities are increasingly limited in their ability to respond to environmental issues invoking the right to quiet enjoyment.²⁷⁶

Nevertheless, the Supreme Court is slow to expand substantive due process rights.²⁷⁷ Concurrently, quiet enjoyment has characteristics that make it unlikely for the Court to take up the case.²⁷⁸ Yet, as states continue to wage preemption battles on municipalities, perhaps that could change.²⁷⁹

Where then does a state's use of preemption interfere with a municipality's duty to protect a person's right to quiet enjoyment of land?²⁸⁰ The maxim

legal history and traditions. See Grant, *supra* note 137, at 60 (discussing quiet enjoyment in tenant common law); Abrams, *supra* note 137, at 274 (discussing quiet enjoyment in nuisance common law); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926) (employing “sic utere tuo ut alienum non laedas”). Its roots in the common law have taken root in state statutes. See Grant, *supra* note 227, at 60 (exploring the history of quiet enjoyment in tenant common law); see, e.g., MASS. GEN. LAWS ch. 186, § 14 (2022) (codifying the covenant of quiet enjoyment); N.Y. REAL PROP. LAW § 235 (McKinney 2022) (same). The Supreme Court acknowledged its importance through various cases such as the 1926 case of *Village of Euclid*. See, e.g., 272 U.S. at 387 (using “sic utere tuo ut alienum non laedas”); Camfield v. United States, 167 U.S. 518, 522 (1897) (stating that the right to use one's property is subordinate to the rights of others); Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408, 433–34 (1989) (stating that “sic utere tuo ut alienum non laedas,” as used in *Village of Euclid*, should guide zoning decisions). Quiet enjoyment has many similar roots to other rights that the Court has deemed fundamental. Compare Abrams, *supra* note 137, at 274 (discussing the history of quiet enjoyment in the common law), and *Village of Euclid*, 272 U.S. at 387 (implying some right to quiet enjoyment through the maxim “sic utere tuo ut alienum non laedas”), with Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 269 (1990) (discussing the common law treatment of unwanted medical treatment), and Shapiro v. Thompson, 394 U.S. 618, 630 (1969) (exploring Supreme Court jurisprudence to hold that interstate travel is deeply rooted in the nation's legal history and traditions), overruled in part by Edelman v. Jordan, 415 U.S. 618, 629–31 (1974).

²⁷⁶ See Briffault, *supra* note 18, at 1999–2000 (discussing the rise of ceiling preemption); Weiland, *supra* note 8, at 473 (discussing the effect of state preemption on environmental regulation). Although quiet enjoyment of land does not seem to call attention to itself as a right whose interference would shock the conscience, the facts of *Robinson Township* prove otherwise. See 83 A.3d at 931 (discussing the Commonwealth Court's findings that Act 13 would allow fracking and storage of explosive devices in residential neighborhoods). In *Robinson Township*, the Pennsylvania Supreme Court faced the proposition that fracking companies could set up sites fissuring the ground in residential neighborhoods. *Id.* This threat led the Pennsylvania Supreme Court to strike down Act 13's preemption clause. See *id.* at 978 (holding that Act 13's preemption clause overstepped the state's authority and violated the public trust doctrine). It also led Justice Baer to conclude that this type of preemption violated the Due Process Clause. *Id.* at 1008 (Baer, J., concurring).

²⁷⁷ See *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (stating that the Court is hesitant to expand substantive due process).

²⁷⁸ See *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972) (stating that property interests do not come from the Constitution); *Greenbriar Village, L.L.C. v. Mountain Brook*, 345 F.3d 1258, 1262 (11th Cir. 2003) (stating that liberty interests come from the Constitution); see also *Dennis v. Brevard County*, No. 6:17-cv-1971-Orl-37GJK, 2018 WL 1939490, at *3 (M.D. Fla. Mar. 23, 2018) (holding that quiet enjoyment is not a fundamental right because it is a state given property right), *R. & R. adopted*, No. 6:17-cv-1971-Orl-37GJK, 2018 WL 1933686 (M.D. Fla. Apr. 24, 2018).

²⁷⁹ See BLAIR ET AL., *supra* note 262, at 27 (discussing state preemption during the COVID-19 pandemic); Briffault, *supra* note 18, at 1997–98 (discussing states' use of preemption to impose political ideologies).

²⁸⁰ See *Robinson Township*, 83 A.3d at 1001 (Baer, J., concurring) (stating that municipalities are best suited to protect the right to quiet enjoyment). If the Court uses strict scrutiny analysis, then the

“sic utere tuo ut alienum non laedas” as employed in *Village of Euclid v. Ambler Realty Co.* and *Robinson Township v. Commonwealth* can aid in providing an answer.²⁸¹ In *Robinson Township*, the potential consequences of fracking in neighborhoods caused a nuisance that shocked the conscience enough to trigger due process protection.²⁸² Following the roadmap set out in Justice Baer’s concurrence, a municipality could allege a due process violation where a preemptive law significantly encroaches on a municipality’s ability to carry out its essential obligations to its residents even outside of the context of zoning.²⁸³ The potentially drastic consequences of climate change could push courts to expand classical understandings of nuisances and quiet enjoyment of property.²⁸⁴ For example, in Texas, state legislators recently proposed a bill that would preempt the entire field of agriculture covered in the state code.²⁸⁵ The bill could prevent municipalities from maintaining ordinances that restrict water usage during droughts.²⁸⁶ Following the concurrence, a city could argue that ensuring all residents have sufficient access to water requires municipalities to keep the power to enforce limitations.²⁸⁷

As things stand, climate change has likely not reached a point where state laws preempting municipalities from restricting water or banning gas stove hookups would reach the level of interfering with the right to quiet enjoyment.²⁸⁸ As the Court noted in *Village of Euclid*, the standard is sensitive to the

government must provide a compelling state interest justifying its interference with the right. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)). In his concurrence in *Robinson Township*, Justice Baer noted that the state’s reasoning for preemption could not survive judicial scrutiny. 83 A.3d at 1008 (Baer, J., concurring).

²⁸¹ *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926) (using “sic utere tuo ut alienum non laedas” as a measure for the scope of appropriate zoning ordinances); *Robinson Township*, 83 A.3d at 1008 (Baer, J., concurring) (stating that Act 13 forced municipalities to violate “sic utere tuo ut alienum non laedas”).

²⁸² See *Robinson Township*, 83 A.3d at 1008 (Baer, J., concurring) (concluding that the Due Process Clause barred the Act 13 preemption clause); *United States v. Salerno*, 481 U.S. 739, 746 (1987) (citing *Rochin v. California*, 342 U.S. 165, 172 (1952)) (stating substantive due process protects against state action that shocks the conscience).

²⁸³ See *Robinson Township*, 83 A.3d at 1006 (Baer, J., concurring) (discussing the duty of municipalities to zone in the best interests of their communities, which states should not impede).

²⁸⁴ See *id.* at 1008 (using the right to quiet enjoyment of land to conclude that a statewide zoning standard for fracking violates substantive due process). See generally CLIMATE CHANGE 2021: THE PHYSICAL SCIENCE BASIS, *supra* note 3 (modeling climate change impacts).

²⁸⁵ H.B. 2127, 88th Leg. (Tex. 2023).

²⁸⁶ See *id.* (expressly preempting the field of agriculture law in Texas); Allie Morris, *Texas GOP Push to Limit City Ordinances Could Target Rules from Droughts to Beekeeping*, DALL. MORNING NEWS (Mar. 8, 2023), <https://www.dallasnews.com/news/politics/2023/03/08/texas-gop-push-to-limit-city-ordinances-could-undo-local-rules-from-droughts-to-beekeeping/> [<https://perma.cc/M7WV-Q5DJ>] (discussing the potential implications of the Texas agricultural preemption bill).

²⁸⁷ See *Robinson Township*, 83 A.3d at 1008 (Baer, J., concurring) (concluding that an intrastate preemption law could violate substantive due process rights).

²⁸⁸ Compare Prevost, *supra* note 13 (discussing gas stove hookup preemption law in New Hampshire), and Coleman, *supra* note 13 (discussing gas stove hookup preemption law in Nevada), with

circumstances of the municipality.²⁸⁹ Where the Court once concluded that a nuisance may be an alright thing in the wrong place, courts may need to take into account the rising challenges associated with climate change.²⁹⁰ Thus, where installing a gas stove now may cause less injury to others, as climate change progresses, the standard may require strict scrutiny.²⁹¹

CONCLUSION

As Americans continue to grow anxious about federal and state inaction on climate change, many municipal leaders have stepped up to lead the charge on environmental policies. Municipalities are nevertheless limited because of their status as political subdivisions with no inherent police power. State governments with different ideological values or economic goals thus often turn to preemption to curtail municipal authority. Although municipalities may claim home rule, that defense is generally restricted when the state has expressed an explicit intent to override its localities.

In some circumstances, the Due Process Clause could be a tool used to aid municipalities challenging preemption laws. As discussed in *Robinson Township v. Commonwealth*, where municipal control is the only means to ensure the protection of a substantive due process right, then the Due Process Clause may bar an express preemption law. Such a defense nonetheless has limits. Although courts have recognized a cognizable liberty interest in quiet enjoyment of land, such an interest is highly sensitive to the circumstances. Thus, only some ceiling preemption measures will infringe such a right. As states continue to use preemption to impose ceiling standards that limit the ability for municipalities to effectively respond to health and environmental challenges, the type and degree of preemptive measures should accordingly expand.

JOHN LANDZERT

Robinson Township, 83 A.3d at 931 (discussing Act 13 which could allow fracking in residential neighborhoods).

²⁸⁹ See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926) (stating that the determination of a nuisance should consider the real circumstances of the locality).

²⁹⁰ *Id.* See generally CLIMATE CHANGE 2021: THE PHYSICAL SCIENCE BASIS, *supra* note 3 (looking ahead to potential future harms from climate change).

²⁹¹ See *Village of Euclid*, 272 U.S. at 388 (discussing the fact-sensitive nature of zoning laws); *Robinson Township*, 83 A.3d at 1008 (Baer, J., concurring) (stating that Act 13 violates substantive due process).

