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Realizing Judicial Substantive Due Process in Land Use Claims: The Role of Land Use Statutory Schemes

Nisha Ramachandran*

In Crown Point Development, Inc. v. City of Sun Valley, the Ninth Circuit removed a bar to bringing substantive due process land use claims before the court. Despite this development, substantive due process claims in the land use context remain largely unavailable at the federal level. This Note examines the historical and continued resistance to substantive due process at the federal level and argues that two major obstacles facilitate deference to local government decision making. Given trends of a decreasing scrutiny of such claims at the state level, this Note argues that statutory changes could strengthen safeguards against arbitrary and irrational decision making in land use decisions.

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INTRODUCTION

Land use and growth management has been the purview of state and local governments since the 1920s. Localities have numerous regulatory measures at their disposal. Along with zoning, which remains the most commonly used instrument to control land use, state and local governments have powers to regulate land subdivisions, enforce building code requirements, designate historical districts, as well as encourage desired land use patterns through tax incentives. Despite these vast powers, courts have been reluctant to engage in substantive review of local government land use decisions, invalidating regulations only if they lack a relationship to the "general welfare." Courts require a more thorough review only if a "fundamental right" is implicated. This posture is driven by two policy justifications: first, localities are better situated to make decisions about their communities than judges, and second, federal courts could become overwhelmed with run-of-the-mill zoning challenges.

On the other hand, critics argue that this deference is blindly applied, allowing localities to make politically-motivated and biased decisions. Of particular concern are the smallest local governments and independent agencies

2. Id.
3. Village of Euclid v. Ambler Realty, 272 U.S. 365, 395 (1926). Village of Euclid established that zoning was a legitimate exercise of police power but must be exercised only in pursuit of the general welfare. Id. The case is discussed in more detail below.
4. These "fundamental" rights include the right to marry, to raise one's children as he or she wishes, and to choose whether or not to terminate a pregnancy. See generally Turner v. Safley, 482 U.S. 78 (1987); Loving v. Virginia, 388 U.S. 1 (1967); Meyer v. Nebraska, 262 U.S. 390 (1923); Roe v. Wade, 410 U.S. 113 (1973).
which have little incentive to consider adverse effects beyond their reach, as compared to more politically accountable bodies such as state legislatures.\textsuperscript{6} Increased scrutiny of local government actions is especially necessary in light of the issues that arise in the land use and planning context, including loss of open space, decline in air quality and natural resources, and social and environmental justice concerns.\textsuperscript{7} Solutions to these concerns require coordinated action, rather than localized decisions that fail to take into consideration the impacts those decisions might have on the greater community.

Yet judicial deference is unlikely to be changed in the near future. In particular, land use substantive due process claims will likely continue to be deflected at the federal level. Although the Supreme Court in \textit{Lingle v. Chevron U.S.A., Inc.} hinted at the possibility of increased viability of such claims,\textsuperscript{8} the effect of \textit{Lingle} has been marginal on lower federal courts. In \textit{Lingle}, the Supreme Court clarified constitutional limits on land use regulations, doctrinally separating substantive due process from regulatory takings.\textsuperscript{9} Previous Supreme Court decisions, notably \textit{Agins v. City of Tiburon}, had suggested an either-or approach to takings under the Fifth Amendment: if a government regulation either did not “substantially advance” a legitimate state interest, or denied an owner an economically viable use of his land, then an unconstitutional taking had occurred and compensation was required.\textsuperscript{10} \textit{Lingle} rejected this approach, finding the “substantially advance” test to be rooted in substantive due process and not appropriate for a Fifth Amendment takings analysis.\textsuperscript{11} Instead, the Court divorced due process questions over the propriety of a government regulation, or substantive due process, from the takings analysis of whether the regulation was actually an appropriation of private property.\textsuperscript{12}

While \textit{Lingle} brought clarity to takings jurisprudence, the decision only discussed substantive due process to exclude it from the takings analysis. But Justice Kennedy’s \textit{Lingle} concurrence hinted at a presumed viability of substantive due process claims: “Today’s decision does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process.”\textsuperscript{13} This acknowledgement of the existence of a substantive due process claim went no further; as with the majority opinion, Kennedy’s concurrence left open the standard of judgment in such an inquiry.\textsuperscript{14}

\textsuperscript{6} \textit{Id.} at 331.
\textsuperscript{7} RUTHERFORD H. PLATT, LAND USE AND SOCIETY 291 (2004).
\textsuperscript{9} \textit{Id.} at 545.
\textsuperscript{10} \textit{Agins v. City of Tiburon}, 447 U.S. 255, 260 (1980).
\textsuperscript{11} \textit{Lingle}, 544 U.S. at 542.
\textsuperscript{12} \textit{Id.} at 542.
\textsuperscript{13} \textit{Id.} at 548.
\textsuperscript{14} \textit{Id.} It is important to note that Justice Kennedy has long favored a \textit{Lochner}-like review in defense of property rights. See Sarah B. Nelson, \textit{Case Comment: Lingle v. Chevron USA, Inc.}, 30
This Note examines the effect of Lingle since its passage, finding that courts have continued their historical resistance to due process claims. Part I examines Lingle's impact on lower federal courts, concluding that, with the exception of procedural changes to substantive due process claims in the Ninth Circuit, Lingle has had no impact on lower federal courts. Part II examines its effect on state courts in California, New York, and Illinois, and suggests that state courts may be abandoning a traditionally robust review of substantive due process claims in the land use context for a more deferential one. In light of these findings, Part III argues that state statutory reform may mitigate harm from the lack of judicial protection for land use substantive due process cases.

1. BACKGROUND AND LEGAL ANALYSIS OF SUBSTANTIVE DUE PROCESS

Two sections of the U.S. Constitution protect due process in land use decision making. First, substantive due process claims may be brought under the Fourteenth Amendment, which bars any government action that deprives "any person of . . . life, liberty or property without due process of law."\(^\text{15}\) Second, the Fifth Amendment contains a due process clause, though instead it prohibits the taking of private property for public use without just compensation.\(^\text{16}\) The Takings Clause has been made applicable to actions by state and local governments through the Fourteenth Amendment.\(^\text{17}\)

Historically, substantive due process land use claims have fared poorly. Two issues, discussed in turn below, have complicated substantive due process with respect to land use claims: first, the standard of deference as applied to non-fundamental rights and second, the historical commingling of due process and takings jurisprudence.

A. Substantive Due Process and Economic Rights: Deference to Legislatures

Substantive due process asks whether the government had sufficient justification for depriving a person of life, liberty, or property. This review takes two forms, depending on the interest at stake: courts apply heightened scrutiny for so-called "fundamental interests,"\(^\text{18}\) which are protected absent a "compelling" government interest,\(^\text{19}\) and they apply more deferential review for

\(^{\text{15}}\) U.S. CONST. amend. XIV, § 1.

\(^{\text{16}}\) U.S. CONST. amend. V.


\(^{\text{18}}\) These "fundamental" rights include the right to marry, to raise one's children as he or she wishes, and to choose whether or not to terminate a pregnancy. See generally Turner v. Safley, 482 U.S. 78 (1987); Loving v. Virginia, 388 U.S. 1 (1967); Meyer v. Nebraska, 262 U.S. 390 (1923); Roe v. Wade, 410 U.S. 113 (1973).

non-fundamental interests.\textsuperscript{20} Property rights fall into the latter category, and therefore may be impinged upon unless government action is irrational and arbitrary.\textsuperscript{21}

Judicial scrutiny of non-fundamental rights has varied considerably over time. From the twentieth century until the Great Depression, courts were more willing to inquire into alleged property rights violations.\textsuperscript{22} \textit{Lochner v. New York} set the standard for substantive due process cases at that time, holding that Congress and the states could limit property rights to protect safety, health, and morals only if they proved such legislation was a "fair, reasonable and appropriate exercise of the . . . power of the state."\textsuperscript{23} Under these criteria, the Court struck down statutes which constrained economic liberty: statutes establishing work hour ceilings, minimum wages, and others in this vein were frequently invalidated.\textsuperscript{24} The Great Depression created pressure on the Court to change its approach to substantive due process review. \textit{West Coast Hotel Co. v. Parrish} in 1937 signaled the demise of \textit{Lochner} and has largely set the standard for substantive due process review of non-fundamental interests: deference to legislative judgment unless that judgment can be classified as "arbitrary or capricious."\textsuperscript{25} This has become a firmly established principle and continues today.\textsuperscript{26}

Judicial review of property interests under substantive due process remains deferential to legislative choice and judgment today.\textsuperscript{27} Further, Justice O'Conner's opinion in \textit{Lingle} signaled that the court is unlikely to move to a new standard anytime soon: "[W]e have long eschewed such heightened scrutiny when addressing substantive due process challenges to government regulation. The reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions, are by now well established, and we think they are no less applicable here."\textsuperscript{28}

\textbf{B. Takings Jurisprudence and Substantive Due Process}

Takings jurisprudence further complicated substantive due process as it was applied to land use claims. Traditionally, the Takings Clause applied only

\begin{itemize}
  \item \textsuperscript{20} See generally Ronald J. Krotoszynski, \textit{Fundamental Property Rights}, 85 GEO. L.J. 555 (1997).
  \item \textsuperscript{21} Id. at 557.
  \item \textsuperscript{22} William A. Fischel, \textit{Regulatory Takings} 109 (1995).
  \item \textsuperscript{23} \textit{Lochner} v. New York, 198 U.S. 45, 65 (1905).
  \item \textsuperscript{24} James W. Ely, Jr. \textit{The Enigmatic Place of Property Rights in Modern Constitutional Theory, in The Bill of Rights in Modern America} 108, 110 (David J. Bodenhamer & James W. Ely, Jr. eds., rev. 2008).
  \item \textsuperscript{25} \textit{West Coast Hotel Co. v. Parrish}, 300 U.S. 379, 399 (1937).
  \item \textsuperscript{27} See Ronald J. Krotoszynski, \textit{Fundamental Property Rights}, 85 GEO. L.J. 555, 561 (1997).
  \item \textsuperscript{28} \textit{Lingle v. Chevron U.S.A.}, Inc., 544 U.S. 528, 545 (2005).
\end{itemize}
to a physical deprivation of land. Over time, this doctrine has been extended to include the effects of regulations on property. Such “regulatory takings” cover situations when a property owner is not deprived of land per se, but cannot receive the full benefits of his or her property because of a regulatory restriction. When a taking occurs, the owner is entitled to “just compensation.” The Supreme Court has struggled to define the contours of regulatory takings. Two cases, *Penn Central Transportation Co. v. New York City* and *Agins v. Tiburon*, sent conflicting messages to lower courts on how to analyze regulatory takings challenges. This confusion lasted until *Lingle*, which clarified regulatory takings doctrine.

*Penn Central* established guidelines to determine whether a regulatory taking occurred. In *Penn Central*, the Court considered a takings challenge by Penn Central Transportation Co., the owner of Grand Central Terminal in New York. As a historically designated landmark, alterations to Grand Central required approval from the Landmarks Preservation Commission. Penn Central filed an application for permission to construct a five story office high-rise building in the air space over Grand Central. The city commission rejected the application and Penn Central filed an action that the landmark law was a taking without just compensation, in violation of the Fifth and Fourteenth Amendments. The Court rejected this claim on grounds that Penn Central could still make a “reasonable return” on it investment, despite the regulation and that the restrictions were “substantially related to the promotion of the general welfare and . . . permit reasonable beneficial use of the landmark site.” The court identified several factors (later known as the *Penn Central* factors) relevant in this determination: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment backed expectations and (3) the character of the governmental action.

Whatever clarity *Penn Central* provided proved to be short lived. Two years later, the Supreme Court introduced another standard for regulatory takings. In *Agins v. Tiburon*, the Court created an either-or approach to takings: if a government regulation either did not “substantially advance a legitimate

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30. *Id.*
31. *Id.*
32. *Id.*
36. *Penn Central*, 438 U.S. at 115
37. *Id.* at 115.
38. *Id.* at 116.
39. *Id.* at 119.
40. *Id.* at 136, 138.
41. *Id.*
state interest” (“substantially advances” approach), or denied an owner all economically viable use of his land (as was held in *Penn Central*), then a taking occurred and compensation was required under the Fifth Amendment. The issue in *Agins* was whether zoning changes that limited plaintiff’s use of five acres to building between one and five single-family residences on the land constituted a taking. Plaintiff’s brought suit on Fifth Amendment grounds that rezoning “forever prevented [its] development for residential use ... and completely destroyed the value of [plaintiff’s] property for any purpose or use whatsoever.”

The *Agins* Court relied on two early zoning cases, *Village of Euclid v. Ambler Realty Co.* and *Nectow v. City of Cambridge*, to develop the “substantially advances” doctrine. While these two cases dealt with substantive due process claims, the language and reasoning from these cases seeped into takings doctrine through *Agins*. In particular, the Court examined *Euclid*, a 1926 zoning case in which the Court held that a zoning ordinance would survive a substantive due process challenge unless it was “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.” *Nectow* reiterated this standard of substantive due process in land use cases. The *Agins* Court applied *Euclid’s* substantial due process language, finding that the zoning ordinance at issue substantially advanced a legitimate government goal—to curb urbanization and protect open space—and therefore was not a taking.

*Penn Central* and *Agins* left lower courts with two standards to evaluate regulatory takings. Without further guidance from the Supreme Court, lower courts had to choose whether to evaluate regulatory takings claims under the *Penn Central* balancing test or instead under *Agins’* “substantially advances” doctrine.

43. *Id.* at 258.
44. *Id.* at 258.
45. 272 U.S. 365 (1926).
46. 277 U.S. 183 (1928).
48. *Nectow*, 277 U.S. at 188. *Nectow* also concerned a zoning ordinance, dividing the City of Cambridge into three districts: residential, business, and unrestricted. *Id.* at 185. The Court in *Nectow* found that the ordinance in question violated the Fourteenth Amendment, as “the health, safety, convenience, and general welfare of the inhabitants of the part of the city affected will not be promoted.” *Id.* at 188. After *Nectow*, the Supreme Court declined to hear another zoning case for another half century.
50. *Agins* was used in a number of cases prior to *Lingle* although the *Lingle* Court was careful to distinguish between its use of *Agins* and the “substantially advances” test, and reliance on the doctrine. In particular, Justice O’Connor in *Lingle* highlighted the use of *Agins* in the Court’s decisions in *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). *Lingle* v. Chevron U.S.A., Inc., 544 U.S. 528, 546 (2005) (“while the Court drew upon the language of *Agins* in these cases, it did not apply the ‘substantially advances’ test.”). In essence, the Court indicated
This confusion clouded takings jurisprudence until *Lingle*, which clarified the doctrine by firmly relegating *Agins' "substantially advances"* test to an inquiry of substantive due process, not one of takings.51 In *Lingle*, the Court considered whether a Hawaiian regulation limiting the rent oil companies could charge lessees of their service stations was an unconstitutional taking of property.52 Plaintiff Chevron challenged the regulation, on grounds that the regulation amounted to a taking of its property under the Fifth and Fourth Amendments.53 Chevron then moved for summary judgment on this claims, contending that "the rent cap [did] not 'substantially advance' any legitimate government interest."54 The Ninth Circuit granted summary judgment.55 The Supreme Court held on appeal that the *Agins' "substantially advances"* test was an inquiry in due process and did not belong in takings jurisprudence.56 Accordingly Chevron was not entitled to summary judgment on that claim. The judgment was reversed and the case remanded for further proceedings.57

Writing for the majority, Justice O'Connor distinguished between regulatory takings and the "substantially advances" inquiry on the premise that the former helps identify regulations with effects comparable to a physical taking.58 Takings tests "[aim] to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights."59 In contrast, the "substantially advances" test does not help identify regulations with effects tantamount to a physical takings. It does not reveal anything about the "magnitude or character of the burden" of a regulatory action nor identify how "any regulatory burden is distributed among property owners."60 Rather, the "substantially advances" formula:

asks, in essence, whether a regulation of private property is *effective* in achieving some legitimate public purpose. An inquiry of this nature has some logic in the context of a due process challenge, for a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause.61

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52. *Id.* at 532.
53. *Id.* at 534.
54. *Id.* at 534.
57. *Id.* at 548.
58. *Id.* at 539.
59. *Id.* at 539.
60. *Id.* at 542 (emphasis omitted).
61. *Id.* at 542.
As such, the Court held that the "substantially advances" test did not belong in takings jurisprudence. 62

The Court in Lingle identified three categories of takings for Fifth Amendment purposes, including: (1) a permanent, physical taking of property by the government; (2) an owner is deprived of all economic benefit by a regulation and (3) the Penn Central regulatory takings factors are met. 63 If the alleged conduct does not fall within these classifications, then it cannot constitute a taking. 64 While the majority opinion brought much needed clarity to takings doctrine, it narrowed the role of substantive due process claims in the land use context. Justice Kennedy's concurrence argued that there still was a place for substantive due process in the land use context, 65 but the majority opinion ultimately weakened the doctrine to the point where these claims are no longer viable.

II. SUBSTANTIVE DUE PROCESS IN LAND USE CLAIMS, BEFORE AND AFTER LINGLE

Lower federal courts have traditionally been hesitant to entertain substantive due process land use claims. 66 This resistance continues post-Lingle. Neither the clearer line drawn between takings and due process in Lingle's majority opinion, nor Justice Kennedy's concurrence have swayed the lower courts to review such claims with increased vigor. 67 Only the Ninth Circuit was directly affected by Lingle: prior to the decision, due process claims in the Ninth Circuit were precluded by takings law. 68 After Lingle, the Ninth Circuit removed this bar in Crown Point Development, Inc. v. City of Sun Valley. 69 In this Part, I review lower federal courts' response, or lack thereof, to Lingle.

A. Ninth Circuit: Opening the Door for Substantive Due Process

Prior to Lingle, the Ninth Circuit followed Agins and held that land use regulations that did not substantively advance a legitimate public purpose fell into the category of takings claims, instead of substantive due process. 70 As such, the court held that the Fifth Amendment Takings Clause preempted substantive due process claims in cases of land use regulations. 71 Following the

62. Id. at 545.
63. Id. at 538.
64. Id.
65. "[T]oday's decision does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process." Id. at 548 (Kennedy, J., concurring).
67. See Byrne, supra note 35, at 480. Byrne argues that despite Kennedy's concurrence in Lingle, very little of the majority's opinion will sway lower federal courts to reconsider a favorable approach to substantive due process claims. Id.
68. See, e.g., Squaw Valley Dev. Co. v. Goldberg, 357 F.3d 936, 950 (9th Cir. 2004).
69. 506 F.3d 851, 856 (9th Cir. 2007).
70. Crown Point Dev. v. City of Sun Valley, 506 F.3d 851, 854 (9th Cir. 2007).
71. See Marci v. King County, 126 F.3d 1125, 1129 (9th Cir. 1997).
Supreme Court’s decision in Lingle, the Ninth Circuit in Crown Point overturned its bar on substantive due process claims for land use regulations, holding instead that the Fifth Amendment does not preclude due process claims in cases of impermissible or arbitrary land use regulations.72

In Crown Point, the Ninth Circuit considered a developer’s substantive due process claim for the “alleged arbitrary and irrational denial of a permit application.”73 Crown Point Development, LLC (Crown Point) was required by the City of Sun Valley, Idaho to meet a minimum density standard within its proposed subdivision development, requiring a total of thirty-nine units.74 The Sun Valley Planning and Zoning Commission approved Crown Point’s application but the City Council denied the proposal after a homeowner complained, precluding Crown Point from building its proposed project.75

Crown Point subsequently filed an action under 42 U.S.C. § 1983,76 alleging a substantive due process violation.77 Crown Point alleged that Sun Valley had arbitrarily and capriciously interfered with its property rights by denying its revised application.78 In turn, Sun City moved to dismiss on grounds that the Ninth Circuit barred substantive due process claims for real property interests.79

Prior to Lingle, the Ninth Circuit maintained that the Fifth Amendment’s Takings Clause subsumes or “preempts” substantive due process claims from property owners.80 This position originated in the Ninth Circuit’s opinion Armendariz v. Penman and was based on Agins. Armendariz limited substantive due process claims if the Constitution explicitly protected the alleged right in another amendment.81 Armendariz concerned a group of property owners of low income housing units who brought a substantive due process action challenging a series of housing code enforcement sweeps by the City of San Bernardino.82 The City closed ninety-five buildings as a result of

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72. Crown Point Dev., Inc. v. City of Sun Valley, 506 F.3d 851, 855 (9th Cir. 2007).
73. Id. at 852.
74. Id. at 853.
75. Id.
77. Id.
78. Id. at 853.
79. Id.
80. Id. at 854.
81. Armendariz v. Penman. 75 F.3d 1311, 1319 (9th Cir. 1996). The Armendariz Court followed the Supreme Court’s decision in Graham v. Conor, 490 U.S. 386, 395 (1994). In Graham, the plaintiff alleged that the law enforcement agents used excessive force during an investigatory stop. Graham, 490 U.S. at 388. The plaintiff alleged a violation of his Fourteenth Amendment substantive due process rights, Id. at 390. The Court held that the Fourth Amendment governed claims of excessive force based on unreasonable seizure and as such, “because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of ‘substantive due process,’ must be the guide for analyzing these claims.” Id. at 394, 395.
82. Armendariz, 75 F.3d at 1313.
the sweeps, evicting tenants in the process.\textsuperscript{83} Plaintiffs challenged the use of the City’s emergency powers to conduct the sweeps as arbitrary and capricious, violating plaintiffs Fourteenth Amendment substantive due process rights.\textsuperscript{84} The \textit{Armendariz} court held that other constitutional claims, specifically under the Fifth Amendment, preempted the plaintiffs’ substantive due process claim.\textsuperscript{85} As the Takings Clause “provides an explicit textual source of constitutional protection” against “private takings,” rather than notions of substantive due process, the Takings Clause controls with respect to such claims.\textsuperscript{86} Combined with the logic of \textit{Agins}—a regulation that did not “substantially advance a legitimate state interest” \textsuperscript{87} is a taking—the pre-\textit{Lingle} Ninth Circuit barred due process claims based on arbitrary or unreasonable conduct.\textsuperscript{88} On these grounds, the District Court accordingly dismissed Crown Point’s due process claim.\textsuperscript{89}

On appeal, the Ninth Circuit reversed, holding that the Supreme Court decision in \textit{Lingle} repudiated \textit{Armendariz}’s prohibition against substantive due process land use claims based on arbitrary or unreasonable conduct.\textsuperscript{90} First, the court emphasized that the “substantially advances test” is not rooted in the Fifth Amendment and therefore, \textit{Armendariz} could not control in situations of arbitrary land use regulations. “As the [Supreme Court] made clear, there is no specific textual source in the Fifth Amendment for protecting a property owner from conduct that furthers no legitimate government purpose.”\textsuperscript{91} Second, the Ninth Circuit dismissed Sun Valley’s contention that a claim that involves a deprivation of property is controlled by the Takings Clause, regardless of whether or not that deprivation is considered a taking.\textsuperscript{92} The court held that a claim of arbitrary action does not fall under the Takings Clause, because “a regulation that fails to serve any legitimate government objective may be so arbitrary or irrational that it runs afoul of the \textit{Due Process Clause}.”\textsuperscript{93} While the Ninth Circuit ultimately concluded that the Fifth Amendment did not inevitably preempt a due process claim for an allegedly arbitrary and impermissible land use decision, the court reserved further opinion on Crown Point’s section 1983 claim. Instead, the court remanded the complaint back to the district court, noting only that the due process claim was not precluded entirely.\textsuperscript{94}

\textsuperscript{83} \textit{Id.} at 1313.
\textsuperscript{84} \textit{Id.} at 1315.
\textsuperscript{85} \textit{Id.} at 1315, 1320.
\textsuperscript{87} \textit{Agins} v. \textit{Tiburon}, 447 U.S. 255, 260 (1980).
\textsuperscript{88} \textit{Crown Point Dev. v. City of Sun Valley}, 506 F.3d 851, 854 (9th Cir. 2007).
\textsuperscript{90} \textit{Crown Point Dev.}, 506 F.3d at 854.
\textsuperscript{91} \textit{Id.} at 854.
\textsuperscript{92} \textit{Id.}
\textsuperscript{93} \textit{Id.} at 855 (quoting \textit{Lingle} v. \textit{Chevron U.S.A., Inc.}, 544 U.S. 528, 549 (2005)).
\textsuperscript{94} \textit{Id.} at 857.
B. Impossibility of Substantive Due Process at the Federal Courts

Despite the Ninth's Circuit's holding in Crown Point, the remaining circuits continue to resist substantive due process land use claims post-Lingle. In general, almost all the lower courts have imposed barriers to substantive due process land use claims. The obstacles vary widely from circuit to circuit. Some require that a land use decision meet a "shocks the conscience" test, a more stringent standard requiring a demonstration of bad faith, harassment, or improper motive. Others eschew this test but require that behavior be "irrational," something more than arbitrary or capricious or a violation of state law. Still other circuits refuse to hear a substantive due process land use claim if the plaintiff does not have a clear entitlement to a land benefit, such as an expectation to a building permit or zoning decision. The barriers to substantive due process land use claims can be categorized into two primary obstacles: first, the standard that the court applies to determine if a land use decision is arbitrary or irrational, and second, how the court determines if the plaintiff has a property right in the first place.

1. What Qualifies as Arbitrary and Unreasonable Conduct?

The Supreme Court has offered little guidance on what it considers unreasonable conduct in the land use context. Lower courts have therefore applied different standards. On one extreme are circuits that follow the "shock the conscience" standard. Others apply a seemingly more lenient standard. Despite the different standards, land use claims rarely receive substantive due process protection.

a. The "Shocks the Conscience" Standard

The Supreme Court has done little to clarify what it considers arbitrary and irrational conduct, only adding to the confusion with its decision in County of Sacramento v. Lewis. While County of Sacramento was not a land use case, the First and Third Circuit have applied its holding in the context of

95. See Amsden v. Moran, 904 F.2d 748, 757 (1st Cir. 1990).
96. See Cloutier v. Town of Epping, 714 F.2d 1184, 1190 (1st Cir. 1983).
98. Anderson v. Douglas County, 4 F.3d 574, 577 (8th Cir. 1993).
99. See RRI Realty Corp. v. Inc. Vill. of Southampton, 870 F.2d 911, 918 (2d Cir. 1989); Norton v. Village of Corrales, 103 F.3d 928, 932 (10th Cir. 1996).
100. Byrne, supra note 35, at 477, 478.
102. County of Sacramento focused on whether a police officer who causes death through deliberate or reckless indifference to life in a high speed automobile chase violated Fourteenth Amendment substantive due process. Id. at 837, 838.
the Court held that the arbitrary and irrational test applies to a substantive due process review of legislative action, while courts must apply a "shocks the conscience" test when considering an action taken by an executive official.\textsuperscript{104}

It is unclear if the Supreme Court intended this standard to apply in land use cases; as a result, some circuits follow this holding while others do not.\textsuperscript{105} Because the distinction between legislative and executive action is not well defined, courts have struggled in trying to determine what local actions qualify as executive for purposes of \textit{County of Sacramento}. Some view city council actions as legislative, but administrative body actions, such as a local board of adjustments, as executive action.\textsuperscript{106} But as the Sixth Circuit notes: "even this is not a hard and fast rule."\textsuperscript{107}

The "shocks the conscience" test limits the type of government behavior that would merit a substantive due process land use claim. Previous decisions indicate that only the most egregious or truly horrendous of actions would qualify under this standard, excluding those actions that exhibit only improper motive, but no more.\textsuperscript{108} For example, First Circuit precedent has established that even a "bad faith violation of state law"\textsuperscript{109} or "harassing actions"\textsuperscript{110} do not constitute behavior which "shocks the conscience." Political interference with a permitting process also does not meet this standard.\textsuperscript{111}

In \textit{United Artists Theatre Circuit}, the Third Circuit held that the "shocks the conscience" standard applied to land use claims because "there is no good reason why land use claims should be treated differently."\textsuperscript{112} Prior to \textit{United Artist}, the Third Circuit had held that a municipal land use decision violated substantive due process if it was made for any reason "unrelated to the merits" or with an "improper motive."\textsuperscript{113} After \textit{County of Sacramento v. Lewis}, the Third Circuit decided its standard could not be reconciled with the Supreme Court's "shock the conscience" standard. The Third Circuit already applied the standard in a variety of contexts and decided to bring land use claims in line

\begin{itemize}
  \item \textsuperscript{103} See Nestor Colon Medina & Sucesores, Inc. v. Custodio, 964 F.2d 32 (1st Cir. 1992); Amsden v. Moran, 904 F.2d 748 (1st Cir. 1990); Cloutier v. Town of Epping, 714 F.2d 1184 (1st Cir. 1983); United Artists Theatre Circuit, 316 F.3d at 400 (citing County of Sacramento v. Lewis, 523 U.S. 833 (1989)).
  \item \textsuperscript{104} County of Sacramento v. Lewis, 523 U.S. 833 (1989).
  \item \textsuperscript{105} In particular, the First and Third Circuit follow this test. See Nestor Colon Medina & Sucesores, Inc. v. Custodio, 964 F.2d 32 (1st Cir. 1992); see also United Artists Theatre Circuit, Inc. v. Twp. of Warrington, 316 F.3d 392 (3d Cir. 2003).
  \item \textsuperscript{106} Pearson v. City of Grand Blanc, 961 F.2d 1211, 1220 (6th Cir. 1992).
  \item \textsuperscript{107} Id.
  \item \textsuperscript{108} Id. (citing County of Sacramento v. Lewis, 523 U.S. 833, 846 (1989)); Torromeo v. Town of Fremont, 438 F.3d 113, 118 (1st Cir. 2006)).
  \item \textsuperscript{109} See Amsden v. Moran, 904 F.2d 748, 757 (1st Cir. 1990).
  \item \textsuperscript{110} See Cloutier v. Town of Epping, 714 F.2d 1184, 1190 (1st Cir. 1983).
  \item \textsuperscript{111} Nestor Colon Medina & Sucesores, Inc. v. Custodio, 964 F.2d 32, 46 (1st Cir. 1992).
  \item \textsuperscript{112} \textit{United Artists Theatre Circuit}, 316 F.3d at 400.
  \item \textsuperscript{113} See Bello v. Walker, 840 F.2d 1124, 1129–30 (3d Cir. 1988).
\end{itemize}
with these cases. The "improper motive" review in particular was far "less demanding" than the County of Sacramento standard, which encompassed "only the most egregious official conduct."

The test limits the type of government behavior that would merit a substantive due process land use claim. Previous decisions indicate that only the most egregious or truly horrendous of actions would qualify under this standard, excluding those actions that exhibit only improper motive, but no more. For example, First Circuit precedent has established that even a "bad faith violation of state law," or "harassing actions" does not constitute behavior which "shocks the conscience." Political interference with a permitting process also does not meet this standard. In Nestor Colon Medina & Sucesores, Inc. v. Custodia, the First Circuit considered denial of three permits by the Puerto Rico Planning Board. The appellant alleged a substantive due process violation on the ground that the denials were based on retaliations for appellant’s political views. The court held that allowing due process claims of political manipulation would establish a precedent that would require federal courts to sit as "zoning board of appeals" and "that drawing the line between political interference prohibited by the Constitution and that of a lesser magnitude would involve courts in virtually impossible line drawing."

b. Other Standards

The exact wording from circuit to circuit varies, but the remaining lower courts all require a higher level of arbitrariness than the failure to advance a legitimate government interest. In Coniston Corp. v. Village of Hoffman Estate, the Seventh Circuit considered a landowner's due process land use claim against a village, after the landowner's permit application was denied without explanation. The court held that this particular action did not meet the court's "invidious or irrational" standard and instead categorized the action as simply:

a garden-variety zoning dispute . . . [s]omething more is necessary than dissatisfaction with the rejection of a site plan to turn a zoning case into a federal case; and it should go without saying that the something more

114. Id. at 400.
115. United Artists Theatre Circuit, 316 F.3d at 400 (citing County of Sacramento v. Lewis, 523 U.S. 833, 846 (1989)).
116. Id. (citing County of Sacramento v. Lewis, 523 U.S. 833, 846 (1989)); Torromeo v. Town of Fremont, 438 F.3d 113, 118 (1st Cir. 2006).
117. See Amsden v. Moran, 904 F.2d 748, 757 (1st Cir. 1990).
118. See Cloutier v. Town of Epping, 714 F.2d 1184, 1190 (1st Cir. 1983).
120. Id.
121. Id. at 36.
122. Id. at 46.
123. Byrne, supra note 35, at 477.
124. 844 F.2d 461 (7th Cir. 1988).
cannot be merely a violation of state (or local) law. A violation of state law is not a denial of due process of law.\footnote{Id. at 467.}

Also, in \textit{Chesterfield Development Corp. v. City of Chesterfield}, the Eight Circuit cited a zoning ordinance that only applied to persons whose names began with a letter in the first half of the alphabet as an example of an action that might qualify as irrational under this standard.\footnote{963 F.2d 1102, 1104 (8th Cir. 1992) (citing Lemke v. Cass County, Nebraska, 846 F.2d 469, 470–71 (8th Cir. 1987)).} The Eighth Circuits maintains a similar standard to the Seventh Circuit.\footnote{Anderson v. Douglas County, 4 F.3d 574, 577 (8th Cir. 1993). (Requiring that substantive due process land use claims be "truly irrational" or more precisely, "something more than . . . arbitrary, capricious, or in violation of state law.").}

2. \textit{What Constitutes a Protected Property Right?}

Another obstacle at the federal level for substantive due process land use claims revolves around whether the plaintiff has a protected property right. Both the Second and Tenth Circuits currently employ the entitlement test to determine whether a property interest exists, before turning to substantive due process review.\footnote{See RRI Realty Corp. v. Inc. Vill. of Southampton, 870 F.2d 911, 918 (2d Cir. 1989); Norton v. Village of Corrales, 103 F.3d 928, 932 (10th Cir. 1996).} The entitlement test in land use cases evolved in part from the Supreme Court decision in \textit{Board of Regents of State Colleges v. Roth}.\footnote{408 U.S. 564 (1972).} In \textit{Roth}, the Supreme Court considered whether a university’s refusal to renew a professor’s employment contract was a deprivation of liberty or property under the Fourteenth Amendment.\footnote{Id. at 568.} While the Court recognized that there were many forms of "property" interests, an individual could only have a protected property interest if he had "a legitimate claim of entitlement" to that interest.\footnote{Id. at 577.} The Court decided that Professor Roth did not have such a legitimate claim, as the untenured professor could not have an expectation of continued employment.\footnote{Id. at 578.}

Pursuant to \textit{Roth}, the Second Circuit employs a stringent entitlement test to evaluate alleged property interests protected under the Fourteenth Amendment.\footnote{Zahra v. Town of Southold, 48 F.3d 674, 680 (2d Cir. 1995).} Once a cognizable property right is determined, a plaintiff must also show that a defendant infringed their property right in an arbitrary or irrational manner.\footnote{Id.} The Second Circuit focuses on whether "there is either a certainly or very strong likelihood" that land use application (such as a permit) would have been granted.\footnote{Yale Auto Parts, Inc. v. Johnson, 758 F.2d 54, 59 (2d Cir. 1985).} Determining "certainty" depends on the degree of
discretion enjoyed by the issuing authority of the land use application, not the chance an application will be accepted. "Even if in a particular case, objective observers would estimate that the probability of issuance was extremely high, the opportunity of the local agency to deny issuance suffices to defeat the existence of a federally protected property interest." 136

This approach affects land use decisions based on applications, such as zoning or building permits. In *RRI Realty Corp. v. Incorporated Village of Southampton*, RRI argued that city officials wrongfully denied RRI's application for a building permit. 137 The Second Circuit found that communications between RRI and village official's suggested the application would be approved. However, because the issuing authority had a high degree of discretionary power, the court held that RRI did not have a protected property right. 138

3. Shutting Out Substantive Due Process in Land Use Claims

Both the "shocks the conscience" and entitlement tests result in an effective bar on substantive due process land use claims in the circuits which employ these tests. While federal courts are not and should not become "zoning boards of appeals," 139 these two standards raise the level of deference to a point where such claims are rarely viable.

In particular, the "shocks the conscience" standard ignores the difference between a land use decision and a high-speed police chase, for example. Land use decisions do not involve the same set of emotions and risk of human injury as a high-speed police chase, and are less likely to rise to a conscience-shocking level. 140 Some deference at the federal level is necessary to address concerns of overwhelming federal courts with substantive due process claims, but the effect of this standard is to "leave the door ajar for intentional and flagrant abuses of authority by those who hold the sacred trust of local public office to go unchecked." 141

The entitlement test operates with similar effect. Paradoxically, the entitlement test protects those decisions least susceptible to abuse and dismisses those in need of a more stringent review. If the issuing authority has a *high* degree of discretion in granting or denying the application, then the plaintiff does not have a protected property right and the decision is not subject to

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136. *RRI Realty Corp. v. Inc. Vill. of Southampton*, 870 F.2d 911, 918 (2d Cir. 1989).
137. *Id.* at 912.
138. *Id.*
139. See *RRI Realty Corp. v. Inc. Vill. of Southampton*, 870 F.2d 911, 918 (2nd Cir. 1989); *Creative Env'ts., Inc. v. Estabrook*, 680 F.2d 822, 833 (1st Cir. 1982) (quoting *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 13, 39(1974)).
141. *Id.*
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Yet as the degree of discretion increases, so does potential for abuse. As noted earlier, it is precisely the “ad hoc” nature of zoning that makes such decisions subject to unfairness and abuse. The entitlement test effectively shuts the door to those decisions which may require the most scrutiny after all.

III. SUBSTANTIVE DUE PROCESS AND STATE COURTS

Given the historical hesitancy at the federal level, state courts have developed procedures to review claims under the substantive due process provisions of state constitutions. One of the reasons for increased activity in this area is the increased availability of textual support for such review in state constitutions as opposed to the federal Constitution. While the federal Constitution does not explicitly define the property interest protected by the Due Process Clause, a majority of state constitutions protect the “inalienable right of acquiring, possessing and protecting property.” State constitutions also sometimes offer more widespread protection of those property rights. Colorado, for example, has nine other provisions in its constitution dealing with property, in addition to general due process protection.

This Part reviews the developments in state review of land use claims and examines the remaining need for federal review in this context. State substantive due process review in the land use context varies considerably and not all states provide for exhaustive review. This Part examines substantive due process review in three geographically diverse states, California, New York, and Illinois, and the effect of Lingle on each of them.

A. California: Potential Revival of Substantive Due Process?

In California, substantive due process review has been largely untouched post-Lingle, with courts reviewing land use claims either on the basis of their rational relationship to public health, safety, morals, or the general welfare or under the so-called “arbitrary and irrational” standard. While California state

142. RRI Realty Corp., 870 F.2d at 918.
146. Id. at 311.
147. Byrne, supra note 35, at 481.
courts leaned in the direction of outright barring substantive due process on the basis of *Armendariz*,\(^{149}\) they never conclusively held that takings claims subsumed due process ones. Yet the state courts have also not definitively rejected *Armendariz* post-*Lingle*, following the footsteps of the Ninth Circuit.

1. **Substantive Due Process Pre-*Lingle***

   Historically, California’s approach to substantive due process claims in land use revolved around two issues: first, following the U.S. Supreme Court in *Euclid*, California courts have upheld that a government action may violate substantive due process if it is not substantially related to the public health, safety, morals, or general welfare (welfare doctrine).\(^ {150}\) Under the welfare doctrine, the court may consider the public welfare of those both within and outside the jurisdiction of the government entity’s action.\(^ {151}\) Legislative deference is still paramount when deciding whether a challenged ordinance reasonably relates to the public welfare. Even if the courts question the necessity or propriety of the legislation, so long as it remains a “question upon which reasonable minds might differ,” judicial interference is barred.\(^ {152}\)

   Second, California courts have found that government action violates substantive due process on grounds that the action was arbitrary and discriminatory.\(^ {153}\) California has traditionally followed the “arbitrary and capricious” standard of the federal courts or sometimes an “arbitrary and irrational” test.\(^ {154}\)

2. **After *Armendariz*: The Retreat from Substantive Due Process***

   After *Armendariz*, California state courts hinted at a retreat from substantive due process land use claims. While California courts did not exclusively apply *Armendariz*, some courts used the holding to preclude substantive due process claims. For example, in *Clark v City of Hermosa Beach*, the court considered the denial of a permit approval for a condominium.\(^ {155}\) Although the condominium was just within the 35-foot height restriction, other citizens challenged the building and the city council denied the permit.\(^ {156}\) In considering the owner’s claim that its substantive due process

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150. See e.g. Associated Home Builders of the Greater Eastbay, Inc. v City of Livermore, 18 Cal. 3d 582, 601 (1976); Ector v City of Torrance, 10 Cal. 3d 129, 135 (1973).
152. Clemens v. City of Los Angeles, 222 P.2d 439, 441 (Cal. 1950).
156. Id. at 1160, 1164.
rights were violated, the court cited dicta from *Armendariz* that the "use of substantive due process to extend constitutional protection to economic and property rights has been largely discredited."¹⁵⁷ Given the *Armendariz* holding, the court noted, "there is some question as to whether substantive due process even applies."¹⁵⁸ Despite its reservations, the court reviewed the substantive due process claim, finding that the plaintiffs failed to establish a valid property interest in their requested permits.¹⁵⁹

3. **Substantive Due Process: After Lingle**

While neither the California Supreme Court nor the California Courts of Appeals formally adopted *Armendariz’s* holding, neither has firmly rejected it after *Lingle* was decided. California state courts appear to still turn to *Clark* post-*Lingle* as the guiding case on substantive due process in land use cases, though *Clark* is silent about the extent to which it relied on *Armendariz*.¹⁶⁰ Nevertheless, California state courts appear to be deferential to legislative judgments and uphold regulatory action so long as it is not arbitrary or irrational. In *Stardust Mobile Estates v. City of San Buenaventura*, the court considered the application of a mobile home rent ordinance, restricting the allowable annual increase in rent.¹⁶¹ The court considered a due process challenge to the rent control provision, noting that such regulations were permitted "within a broad zone of reasonableness" as long as enterprises were not permitted from "operating successfully."¹⁶² This position of "reasonableness" is consistent with earlier cases upholding an "arbitrary and irrational" standard in substantive due process land use cases.¹⁶³

**B. Illinois: A Move to Rational Basis**

Since the 1950s, Illinois developed a reputation for invasive judicial review of substantive due process claims.¹⁶⁴ However the Illinois state courts have made a recent move toward more deferential rational basis review, firmly precluding heightened scrutiny in substantive due process land use cases. The impetus for the change is unclear, though it comes only two years after *Lingle*.

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¹⁵⁷. *Id.* at 242–43 (emphasis omitted) (quoting *Armendariz v. Penman*, 75 F.3d 1311, 1318–19 (9th Cir. 1996)).

¹⁵⁸. *Id.* at 243.

¹⁵⁹. *Id.*


¹⁶¹. 55 Cal. Rptr. 3d 218 (Cal. Ct. App. 2007).

¹⁶². *Id.* at 230 (quoting *Galland v. City of Clovis*, 24 Cal. 4th 1003, 1021–22 (2001)).


La Salle National Bank of Chicago v. Cook County established the precedent for a more searching judicial review in the Illinois court system.\textsuperscript{165} In LaSalle, the court considered the rezoning of a parcel of land to single family residential use.\textsuperscript{166} Plaintiff and owner of the land, who wished to build a gas station, challenged the zoning ordinance on due process grounds.\textsuperscript{167} At the trial court, the plaintiff's expert witnesses testified that the land would be valued around thirty to forty thousand dollars if used for business purposes, as opposed to eight to ten thousand dollars if used for residential housing.\textsuperscript{168} Defendant's expert, the city planner, argued that commercial use would generally be detrimental to the surrounding area, creating more traffic and a different environment.\textsuperscript{169} An independent report found that the neighborhood was mixed use, and that there would be little gain to the public and steep loss to the plaintiff if the zoning ordinance was upheld.\textsuperscript{170} In considering the defendant's appeal, the court noted the role of municipal bodies in determining the use and purpose of property to be paramount: "it is neither the province nor the duty of the courts to interfere with the discretion with which such bodies are vested unless the legislative action of the municipality is shown to be arbitrary, capricious or unrelated to the public health, safety and morals."\textsuperscript{171} However, a zoning ordinance may be held void if the restrictions in question had "no real and substantial relation to the public health, safety, morals . . . and general welfare."\textsuperscript{172} Despite the presumption of validity afforded a zoning ordinance, this presumption could be overcome with clear and convincing evidence. Certain factors could be taken into consideration, with no one factor controlling, in judging the validity of a zoning ordinance:

1. the existing uses and zoning of nearby property; 2. the extent to which a particular zoning restriction diminishes property values; 3. the extent to which diminishing the plaintiff's property values promotes the health, safety, morals, or general welfare of the public; 4. the relative gain to the public as compared to the hardship imposed upon the individual property owner; 5. the suitability of the subject property for the zoned purpose; 6. the length of time the subject property has been vacant as zoned in the context of land development in the vicinity; 7. the community's need for the proposed use; and 8. the care with which the community has undertaken to plan its land use development.\textsuperscript{173}

La Salle remains the framework for assessing substantive due process land use claims in Illinois, although a 2008 case stressed that the level of scrutiny under

\begin{itemize}
  \item \textsuperscript{165} 145 N.E.2d 65 (1957).
  \item \textsuperscript{166} Id. at 44.
  \item \textsuperscript{167} Id. at 67.
  \item \textsuperscript{168} Id. at 68.
  \item \textsuperscript{169} Id.
  \item \textsuperscript{170} Id.
  \item \textsuperscript{171} Id.
  \item \textsuperscript{172} Id. at 69.
  \item \textsuperscript{173} Id. at 69.
\end{itemize}
La Salle was that of rational basis and not one of heightened scrutiny. In Napleton v. Village of Hinsdale, the court clarified that the La Salle standard, "no real and substantial relation," had its roots in rational basis, despite a later Supreme Court case which used the terminology to imply a more stringent level of review.\textsuperscript{174}

Further, the Napleton court reiterated that the LaSalle test only applied in cases of an as-applied zoning challenge, in which the owner asks the court to consider the zoning ordinance effect on his or her specific parcel and not in facial zoning challenges.\textsuperscript{175}

\textit{C. New York: The Entitlement Test}

New York's approach to substantive due process review of land use claims mirrors stricter tests employed at the federal level. Pre- and post-Lingle, New York courts require prospective plaintiffs to show a cognizable property interest (like the federal entitlement test) before being heard on a substantive due process claim.\textsuperscript{176} New York's entitlement test constricts the ability of claimants to bring a substantive due process claim in a manner similar to the Second and Tenth Circuit; as a preliminary matter, claimants must establish a cognizable property interest. It is not enough to have a "mere expectation or hope to retain [a] permit" but rather, claimants must demonstrate that "pursuant to State or local law, they had a legitimate claim of entitlement to continue [their actions]."\textsuperscript{177} This determination is also to be applied "with considerable rigor."\textsuperscript{178} For example, an individual will have an entitlement to a permit only if there is a strong likelihood it will be issued.\textsuperscript{179} If the issuing body retains discretion to authorize or deny a permit, then the claimant can show entitlement only when that discretion "is so narrowly circumscribed that approval of a proper application is virtually assured."\textsuperscript{180} This test raises the bar for substantive due process claims, especially disputes over issuances of permits because permitting processes are often discretionary.

\textsuperscript{174} 891 N.E.2d 839, 850 (Ill. 2008); see Craig v. Boren, 429 U.S. 190, 197 (1976) (intermediate scrutiny involves examination of whether a government interest is "substantially related" to the achievement of that goal).
\textsuperscript{175} Napleton, 891 N.E.2d at 852.
\textsuperscript{177} Bower Associates v. Town of Pleasant Valley, 2 N.Y.3d 617, 627 (N.Y. 2004) (quoting Town of Orangetown v Magee, 88 N.Y.2d 41, 52 (1996)).
\textsuperscript{178} Id. at 628 (quoting RRI Reality Corp. v. Inc. Vill. of Southampton, 870 F.2d 911, 918 (2d Cir. 1989)).
\textsuperscript{179} Id.
\textsuperscript{180} Id. (quoting Villager Pond, Inc. v Town of Darien, 56 F.3d 375, 378 (2d Cir 1995)).
Once a cognizable property interest is recognized, plaintiffs must still show that the government action was improper.\textsuperscript{181} Under this prong, New York again mimics the federal standard for determining whether a government action is improper, with extreme deference to government action. "[O]nly the most egregious official conduct can be said to be arbitrary in the constitutional sense."\textsuperscript{182} State interests such as "traffic, safety, crime, community pride or noise" may all constitute legitimate reasons for government action.\textsuperscript{183}

D. The Loss of Robust State Substantive Due Process?

Although a small sample, the three states surveyed above demonstrate a range of approaches to substantive due process protection of land use claims at the state level. A troubling aspect of this small sample is that it suggests a move to a more rigid, deferential standard of review for substantive due process claims at the state courts. If trends in Illinois are suggestive, previously robust state substantive due process may be replaced with less rigorous versions similar to the federal review process.

The loss of a robust state review would close another avenue to substantive due process in land use claims. As noted above, the highly discretionary character of land use decisions often allows for localities to make politically-motivated and biased decisions.\textsuperscript{184} In particular, local governments and independent agencies often have little incentive to consider adverse effects outside their borders.\textsuperscript{185} State courts have been cited as the best forum to oversee such decisions, given proximity to potential disputes.\textsuperscript{186}

On this premise, some scholars have argued for a more robust state substantive due process review in land use claims. One suggested reform is "presumption shifting," or removing the presumption of constitutionality in certain types of land use law.\textsuperscript{187} Mandeleker and Tarlock argue for heightened judicial review in state courts of land use decisions by shifting the presumption of constitutionality away from local governments when the political process has malfunctioned. Local governments under this model would be required to provide more than simply a plausible rational for their actions to be held constitutional; they would be responsible for proving the constitutionality of the regulation.\textsuperscript{188} In particular, Mandeleker and Tarlock identify the need for presumption shifting in cases involving vulnerable groups that have been

\textsuperscript{181.} Id. at 627.
\textsuperscript{182.} Id. at 628 (quoting City of Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found., 538 U.S. 188, 198 (2003)).
\textsuperscript{183.} Id.
\textsuperscript{184.} WILLIAM A. FISCHEL, REGULATORY TAKINGS 329 (1995).
\textsuperscript{185.} Id. at 331.
\textsuperscript{186.} See Byrne, supra note 35, at 480.
\textsuperscript{188.} Id. at 25.
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subject to a history of discrimination in land use decisions, and in communities where the bargaining process is not open to all interest groups. Courts would need to make the determination of whether a group qualifies for presumption shifting.

Unfortunately, the survey of state courts above indicates an unwillingness to engage in such a searching review, leaving the burden of identifying circumstances in need of heightened judicial scrutiny on the legislature. The next Part explores statutory reform as an option for strengthening substantive due process.

IV. STRENGTHENING SUBSTANTIVE DUE PROCESS PROTECTIONS IN LAND USE CLAIMS THROUGH STATUTORY REFORM

Although federal courts have proven unwilling to thoroughly review land use decisions challenged on substantive due process grounds, and state courts may be heading in a similar direction, statutory schemes offer endless opportunities for strengthening such protection. This Part proposes a role for statutory reform to strengthen safeguards against arbitrary and irrational decision making in land use decisions.

The judicial role in enforcing substantive due process in land use claims, as established in Euclid, is to ensure that regulations and ordinances have a reasonable relation to the health, safety, and general welfare of the community. Yet pursuit of this goal from the bench is compounded by the difficulties in balancing competing uses of land and the varying public interests at stake. The U.S. Supreme Court has noted: “[a] general matter, the Court has always been reluctant to expand the concept of substantive due process because the guideposts for responsible decision-making in this uncharted area are scarce and open-ended.” Statutory reform promises to address precisely this concern by providing the baseline against which to judge a “reasonable relation.”

The opportunities for statutory reform are endless. State zoning enabling acts, which provide zoning authority to local governments, are largely outdated and out of touch with modern land use concerns. Although states have made some amendments to zoning acts over time, most are still modeled after the Standard Zoning Enabling Act (SZEA). The SZEA was first developed in the 1920s, as zoning gained in popularity and granted broad authority to local governments to use zoning “for the purpose of promoting health, safety, morals, or the general welfare of the community.” The SZEA also called on local governments to develop “comprehensive plans” to address concerns of the

189. Id. at 39–42.


193. Id.
time—lessening congestion, improving fire safety, and generally promoting the general health and welfare.\textsuperscript{194} Despite the SZEA’s call for each local government to have a master plan, zoning ordinances often came before the plan rather than after, if at all.\textsuperscript{195}

One area for statutory reform is promoting cooperative planning efforts among localities when making land use decisions, as opposed to isolated decision making. Reform to this end may hold the typically myopic land use bodies accountable to the larger community. Under the current system, judicial deference is afforded to all legislative bodies, regardless of size or public accountability. Yet decisions by smaller, less accountable local governments should warrant closer inspection.\textsuperscript{196} While state legislatures serve a number of constituents with numerous needs, smaller local governments often are faced with decisions involving singular interests.\textsuperscript{197} Effects outside this narrow focus are often not considered in the decision making process, so that the decision often benefits one rather than all or works to the exclusion of underrepresented parties.\textsuperscript{198}

Statutory reform across the states could address this issue, holding smaller and more independent bodies accountable for external effects. As noted earlier, the SZEA requires localities’ zoning plans be “in accordance with a comprehensive plan.” However, the meaning of a “comprehensive plan” has been defined differently from one jurisdiction to another.\textsuperscript{199} In many cases, the plan for zoning has driven the overall plan, rather than the other way around.\textsuperscript{200}

Mandatory comprehensive planning can improve the decision making process, encouraging localities to review more information and effects outside the immediate, localized concerns that arise in more individualized decisions.\textsuperscript{201} When states require comprehensive planning, “plans have more substantive factual underpinning, goals tend to be stated more clearly and [in some states] . . . there is a strong emphasis on implementation that substantially strengthens the role of planners and other policy makers and the planning function.”\textsuperscript{202}

\textsuperscript{194} Id.
\textsuperscript{195} Id. at 31.
\textsuperscript{196} See Mandeleker & Tarlock, supra note 187, at 32. Mandeleker and Tarlock note several differences between local and federal government such as a greater risk of exclusion in the former. Id.
\textsuperscript{197} FISCHEL, supra note 5.
\textsuperscript{198} Id.
\textsuperscript{199} Id.
\textsuperscript{200} Id.
\textsuperscript{202} Raymond J. Burby, et al., \textit{Is State-Mandated Planning Effective?}, LAND USE LAW & ZONING DIGEST, October 1993, at 3, 10.
CONCLUSION

Although the Supreme Court’s decision in *Lingle* hinted at the potential use of substantive due process in land use, three years after the decision, federal courts have largely maintained their historic resistance in entertaining such claims. The only notable exception has been in the Ninth Circuit, which in *Crown Point Development* removed its prohibition on substantive due process claims when a takings claim was available instead.\(^{203}\) *Lingle* appears also to have no substantial impact on state courts. However, state substantive due process may be moving independently to a more deferential standard of review. This is most notable in Illinois, which despite a previously searching inquiry, recently established a rational basis test for substantive due process claims.\(^{204}\) A more thorough examination of state substantive due process in land use claims is necessary to confirm this preliminary thesis. While courts may be reluctant, or in some cases unable, to reform substantive due process, statutory reform offers outside hope for strengthening this review. State zoning acts in particular offer one potential vehicle for reform.

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204. *Napleton*, 891 N.E.2d at 852.

*We welcome responses to this Note. If you are interested in submitting a response for our online companion journal, *Ecology Law Currents*, please contact ecologylawcurrents@boalt.org. Responses to articles may be viewed at our website, http://www.boalt.org/elq.*