Environmental Law & Property Rights

Property Rights in the Ninth Circuit, and Beyond

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Under modern constitutional law, rights in real property are protected principally by the Just Compensation Clause of the Fifth Amendment (incorporated as against the states by the Fourteenth Amendment's Due Process Clause) and the substantive component of the Fifth and Fourteenth Amendment's Due Process Clauses. For the past several decades, however, these rights have been disfavored in the federal courts. Even as there was a renaissance for constitutional protection of property rights in the late 1980s and early 1990s, property owners were losing the ability to vindicate these rights in federal courts. By 1997, property owners in the Ninth Circuit could invoke neither the protections of the Takings Clause or the substantive component of due process when faced with objectionable land use regulation.

Under-girding this situation is the Supreme Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*.[1] There, the Court held that plaintiffs who contend that a state or municipality has taken their property without just compensation must litigate in state court to ripen a suit in federal court. In combination with res judicata barriers, this rule swallowed federal review of takings claims. Then, when the Ninth Circuit held in *Armendariz v. Penman* and progeny that a substantive due process property rights claim is treated as a takings claim, it swallowed substantive due process claims.[2] This law persisted for more than a decade, converting property owners into a pariah in the federal courts of the Ninth Circuit.

The landscape has changed radically, however, with the Ninth Circuit's recent decision in *Crown Point Development, LLC v. City of Sun Valley*. Relying on the Supreme Court's 2005 decision in *Lingle v. Chevron U.S.A., Inc.*, which rejected takings tests that focus on the rationality of regulation, the property owner in *Crown Point* successfully attacked the rationale of *Armendariz* and reopened the door to substantive due process in the Ninth Circuit.[3] The decision is worthy of consideration not only because it clarifies a confused area of property rights jurisdiction and represents a significant turn for property owners in the Ninth Circuit but also because it exposes a continuing problem in federal protection of constitutional property rights.

I. The Demise of Takings Protections in the Ninth Circuit and Rise of the Due Process Alternative

A. Federal Takings Law and the Williamson County Ripeness Barrier

The Takings Clause forbids the taking of private property for a public use without the payment of just compensation.[4] The government has a constitutional duty to compensate a property owner when it physically invades property regardless of the purpose of the invasion or its extent.[5] A taking can also occur by land use regulation when it either deprives the owner of all economically viable use of the property [6] or severely impacts the economic value of the property and interferes with the owner's reasonable expectations.[7] A regulatory taking may also occur when the government requires a land use applicant to dedicate property to the government in return for a permit if there is (1) no direct connection between the demand and the impact of the development,[8] or (2) the condition is disproportionate to the impacts caused by the development.[9]

Between 1981 and 2005, an additional category of regulatory takings liability existed for regulations that failed to "substantially advance a legitimate state interest."[10] However, this test was rejected as a legitimate takings standard in the 2005 *Lingle* decision, where a unanimous Supreme Court concluded that it was grounded in substantive due process concepts, not takings doctrine.[11]

Although the foregoing principles were largely developed in federal courts, they have all but disappeared from that system in the past twenty-five years. This situation arises from the Court's1985 *Williamson County* decision, a ruling that has only become more mystifying with the passage of time. Departing from past practice, the *Williamson County* Court held that a federal takings claim cannot be raised as an initial matter in a federal court. Rather, such a claim would ripen for federal review only after the claimant unsuccessfully sought just compensation in state procedures.[12] The Court articulated this rule after already deciding that the regulatory takings claim at hand was unripe due to the lack of a final administrative decision, and without any serious briefing on the issue of whether state compensation procedures are a proper ripeness predicate.

Putting aside logical and precedential critiques,[13] *Williamson County* at least seemed to anticipate federal judicial review of a federal takings claim after unsuccessful state compensation procedures.[14] Yet the decision has never functioned this way. Instead, it has operated as a total bar to federal vindication of physical and regulatory takings claims.[15] The primary reason for this is that any requirement that a takings claimant use state judicial procedures before seeking federal review conflicts with settled rules—such as res judicata and collateral estoppel—which bar federal courts from second-guessing prior state court decision.[16] Thus, when a property owner goes to federal court after unsuccessfully seeking state law remedies for the alleged taking, he is often told that the claim is barred, rather than ripened. This means that most federal takings plaintiffs are totally shut out of federal court: they cannot go there in the first instance under *Williamson County* because the claim is not "ripe," and they cannot file in federal court after it is ripe due to res judicata-type barriers to relitigation of previously prosecuted claims.[17]

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The Ninth Circuit is among those circuits that have consistently applied *Williamson County* rules to bar federal takings claims.[18] In 2004, that circuit was asked to loosen res judicata to allow takings claims in federal court when ripened in compliance with *Williamson County*. But the Ninth Circuit refused, and this decision was subsequently upheld by the Supreme Court in *San Remo Hotel v. City and County of San Francisco*.[19] Although four Supreme Court justices opined in *San Remo* that *Williamson County* should be reconsidered due to its questionable origin and its unanticipated effect on federal takings jurisdiction,[20] *San Remo* failed to alter *Williamson County*.[21] Accordingly, federal courts continue to tell takings claimants that, under *Williamson County,* their claims are not ripe for federal review until they have completed state court procedures, while at same time declaring that such procedures will trigger a permanent res judicata barrier.[22] Thus, the application of the Fifth Amendment is left solely in the hands of state courts, a circumstance the Supreme Court long ago scoffed at as irreconcilable with federal jurisdictional principles.[23]

B. The Substantive Due Process Option

With most federal takings claims shut out of federal courts under *Williamson County***,** property owners' only hope for federal protection from onerous land use regulation rested on the Due Process Clause of the Fourteenth Amendment.[24] Substantive due process theory seems to offer a potential way around Williamson County and a path into federal court because due process claims do not hinge on "just compensation," and therefore should not be subject to a state compensation predicate. In a series of post-*Williamson County* cases, the Ninth Circuit agreed that substantive process land use claims are immune from *Williamson County*'s state compensation requirement for takings claims, and therefore could be directly raised under 42 U.S.C § 1983 in the federal courts.[25]

Thus, freed from the shackles of *Williamson County*, substantive due process became a regular item on the Ninth Circuit's docket during the late 1980s and early 1990s. While the rational basis or arbitrariness review available for such claims could hardly be said to provide a high measure of protection, it was not toothless. In a number of Ninth Circuit cases, these substantive due process standards proved sufficient for property owners to head off suspect land-use actions.[26]

II. The Decline and Resurrection of Substantive Due Process in The Ninth Circuit: from *Armendariz* to *Crown Point*

The Ninth Circuit's substantive due process moment came to an abrupt halt with the court's mid-1990s decisions *Armendariz v. Penman*[27] and *Macri v. King County*.[28] As shown below, these decisions indirectly subjected substantive due process claims to *Williamson County*'s state compensation ripeness predicate, and thus to the aforementioned res judicata barriers.

A. Armendariz and Macri Subsume Due Process Claims in Unripe Takings Guarantees

In *Armendariz*, the en banc Ninth Circuit court considered whether property owners could prosecute a substantive due process claim arising out of allegations that a local government had closed their apartment buildings to drive down the value as part of a plan to transfer the property to a private party. The *Armendariz* court was particularly impressed by two Supreme Court decisions considering substantive due process claims against alleged police abuse: *Graham v. Connor*[29] and *Albright v. Oliver*.[30] In *Graham*, the Supreme Court held that a claim alleging excessive force by law enforcement officers during an investigatory stop "is most properly characterized as one invoking the [seizure] protections of the Fourth Amendment" and had to be raised under this Fourth Amendment vehicle, rather than through the concept of substantive due process.[31] *Albright* reached similar conclusions in a similar context.[32] From this precedent, the *Armendariz* court divined a general rule for subsuming due process claims in other constitutional protections: "[w]here a particular [constitutional] amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.'"[33]

Turning to the property rights claims at hand, the Ninth Circuit characterized the *Armenedariz* plaintiffs' claim as a challenge to a taking of property for a private purpose. The *Armendariz* court stressed that Fifth Amendment takings law clearly held that "one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid."[34] Based on this view, the court applied *Graham*, explaining that "because the conduct that the plaintiffs are alleging is a type of government action that the Fourth and Fifth Amendments regulate, *Graham* precludes their substantive due process claim."[35]

A year later, in *Macri v. King County*, the Ninth Circuit applied *Armendariz*'s rationale to bar a substantive due process claim against allegedly irrational land use regulation.[36] The plaintiffs there argued that the denial of a subdivision plan did not advance a legitimate state interest, and therefore violated their due process rights.[37] The *Macri* court disagreed, holding that such a claim arose exclusively under the Takings Clause because the Supreme Court had repeatedly held that a regulation that does not "substantially advance a legitimate state interest" causes an unconstitutional taking.[38] The *Macri* court relied on *Armendariz* in concluding that "[s]ince the Takings Clause 'provides an explicit source of constitutional protection' against the challenged [irrational] government conduct," the plaintiffs' substantive due process claim was subsumed by takings law.[39]

Macri therefore confirmed that *Armendariz*'s "due process claims subsumed in the takings clause" rule extended to typical substantive due process claims against allegedly arbitrary or irrational land use regulations. This ruling was significant not because it relabeled substantive due process claims as takings; without more, this changed nothing but the plaintiff's pleading requirements. But in connection with *Williamson County* the decision had a profound effect. As *Macri* acknowledged, treating a due process claim as a takings claim means that it will be considered unripe for federal review until state compensation procedures are completed, and this of course meant such claims would never make it to federal court.[40] For the first time since the Ninth Circuit was established, real property owners had no meaningful ability to vindicate their rights in federal courts.

B. Lingle: The Beginning of the End for Armendariz

The *Armendariz* /*Macri* barrier to property-based substantive due process claims was repeatedly reaffirmed and showed no signs of weakening until the Supreme Court's 2005 decision in *Lingle*. There, a unanimous Supreme Court repudiated the idea—originally articulated in *Agins v. City of Tiburon*—that a taking will occur when a regulation does not "substantially advance legitimate state interests."[41]

According to *Lingle*, regulatory takings standards focus "directly upon the severity of the burden that government imposes upon private property rights," not the manner in which it occurs.[42] Since the "substantially advances" test "reveals nothing about the magnitude or character of the burden a particular regulation imposes upon private property rights," but instead considers whether a regulation effectively is valid or achieves a legitimate purpose, it was not a proper takings test.[43] This conclusion was reinforced by the origin of the "substantially advances" test in due process concepts: 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."[44] But, the *Lingle* Court concluded, it "does not help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property; it is tethered neither to the text of the Takings Clause nor to the basic justification for allowing regulatory actions to be challenged under the Clause."[45]

C. Crown Point Uses Lingle to Eviscerate Armendariz

While *Lingle* narrowed the protections available to property owners under the Takings Clause, it seemed to offer an important silver lining: if the "substantially advances" test was not part of takings law, and that law generally did not consider the legitimacy of land use regulation, subsuming substantive due process in takings law under the *Graham/Armendariz* rationale was tenuous. Thus, in its aftermath, commentators opined that *Lingle* opened the door for a return of substantive due process in the Ninth Circuit.[46] This sentiment would find judicial expression in *Crown Point*.

1. Background of Crown Point

Crown Point is the developer of a partially completed thirty-nine unit residential subdivision, known as Crown Ranch, on 9.76 acres of land in Sun Valley, Idaho, for which the City of Sun Valley ("City") refused to issue final permits.[47] Prior to December, 2002, the City did approve phases one through four on six and a half acres.[48] This left 3.29 acres for approval and construction as the final portion—phase five.

Under the City code, property within an RM-2 zone (like Crown Point's) *must* be developed at an average of four units per acre.[49] This meant Crown Point had to put a total of thirty-nine units on its 9.76 acres of land to develop it. When it got through phase four, the City had approved twenty-six of these units, a number Crown Point considered too few.[50] Due to the lower number, Crown Point was forced to apply for thirteen homes in phase five to meet the code's demand for four homes/per acre (thirty-nine units).[51]

When Crown Point submitted its application to build thirteen homes on phase five, it was approved by the Planning Commission, but then appealed to the City Council by people already owning homes in Crown Ranch.[52] They complained that thirteen units was too large a number. Although the City had put Crown Point in the position of having to apply for thirteen units, it agreed with the existing homeowners that thirteen was too many, and reversed the Commission's approval.[53] In so doing, it relied on negative personal opinions as to the impacts of the development while neglecting record evidence produced during the first four phases that contradicted the opposition's subjective beliefs.

After attempts at compromise failed, Crown Point filed a state law complaint in state court. Eventually, the state court concluded that the City's actions lacked substantial evidence and were arbitrary.[54] Crown Point then filed a substantive due process challenge in federal court. The City moved to dismiss on the basis that real property substantive due process claims were barred in the Ninth Circuit under *Armendariz* and progeny. The district court granted the City's motion.[55]

2. The Ninth Circuit's Decision

On appeal, Crown Point argued that its substantive due process claim challenging the City's denial as irrational and arbitrary could not be subsumed in takings law under *Armendariz* rule after *Lingle* ended the "substantially advances" takings test.[56] The Ninth Circuit agreed, stating that "*Armendariz* has been undermined to the limited extent that a claim for wholly illegitimate land use regulation is not foreclosed."[57] The court explained that because there "is no specific textual source in the Fifth Amendment for protecting a property owner from conduct that furthers no legitimate government purpose [after *Lingle*]... the *Graham* rationale no longer applies to claims that a municipality's actions were arbitrary and unreasonable, lacking any substantial relation to the public health, safety, or general welfare." In short, "*Lingle* pulls the rug out from under our rationale [in *Armendariz*] for totally precluding substantive due process claims based on arbitrary or unreasonable conduct."[58]

Although the City argued that substantive due process property rights claims should still be litigated under those takings guarantees remaining after *Lingle*,[59] the *Crown Point* court found this to be irreconcilable with *Lewis v. County of Sacramento*.[60] As the court explained, "Applying the *Lewis* rule to land use, the Fifth Amendment would preclude a due process challenge only if the alleged conduct is *actually covered* by the Takings Clause. *Lingle* indicates that a claim of arbitrary action is not such a challenge."[61] Recognizing that an intervening Supreme Court opinion allows a panel to repudiate a prior en banc opinion, the *Crown Point* panel declared that "it is no longer possible in light of *Lingle* and *Lewis* to read [the en banc] Armendariz decision as imposing a blanket obstacle to all substantive due process challenges to land use regulation."[62] The court summarized: "[w]e now explicitly hold that the Fifth Amendment does not invariably preempt a claim that land use action lacks any substantial relation to the public health, safety, or general welfare."[63] Since *Armendariz* was the only basis for the district court's dismissal, the conclusion that *Lingle* undercut *Armendariz* required the reversal of the lower court's decision. In this way, *Crown Point* ended *Armendariz*'s decade-old reign over substantive due process in the courts of

the Ninth Circuit, a conclusion soon confirmed by another Ninth Circuit opinion, *Action Apartment Association, Inc. v. Santa Monica Rent Control Board.*[64]

CONCLUSION

Crown Point will be seen as an important decision helping to restore constitutional property rights in the federal courts. By divorcing substantive due process claims from takings law, claims against arbitrary and irrational land use regulation are once again free of *Armendariz*, and thus, free of *Williamson County*'s "state compensation" ripeness barrier designed for federal takings claims. Although *Armendariz/Graham* might still conceivably apply to the rare substantive due process claims against private takings and other conduct still covered by the Takings Clause after *Lingle*, it is dead letter with respect to the most common and successful substantive due process property claims: those asserting that "land use action lacks any substantial relation to the public health, safety, or general welfare."[65] The due process rights of property owners again stand as an independent cause of action against irrational and arbitrary land use regulations, thus putting property owners on equal footing with other plaintiffs in the federal courts when it comes to the Due Process Clause.

Despite this progress, problems remain. This is because *Crown Point* did not address the root of the decline in federal protection of real property: *Williamson County*. While there is no longer any *Armendariz*-like vehicle by which that decision can inhibit substantive due process claims, it continues to burden takings claimants. The Constitution guarantees just compensation for takings, and in the *Federalist* Alexander Hamilton considered it unquestionable that federal courts would have jurisdiction over issues arising under the explicit provisions of the Constitution.[66] Yet *Williamson County* continues to banish takings claimants from the federal courts on the theory they must litigate in state courts for ripeness. This rule is as outdated and untenable as *Armendariz* was after *Lingle*, and should be abandoned as soon as possible. Only then will the rights of property owners be fully restored in federal courts and landowners no longer treated as second class plaintiffs. In the meantime, *Crown Point* at least ensures that irrational or arbitrary land use regulation once again gives rise to federal damages in the federal courts of the Ninth Circuit.

Endnotes

1 473 U.S. 172 (1985).

2 75 F.3d 1311 (9th Cir. 1996).

3 544 U.S. 528 (2005).

4 *See* U.S. Const. amend. V.

5 Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538 (2005).

6 Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992). The limited exception to the *Lucas* "categorical takings" rule is where the regulation enforces "background principles" of a state's property law. *See id.* at 1026-32.

7 Penn. Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

8 Nollan v. California Coastal Comm'n, 483 U.S. 825, 834-837 (1987).

9 Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

10 Agins v. City of Tiburon, 447 U.S. 255, 261-262 (1980).

11 *See Lingle*, 544 U.S. at 548.

12 473 U.S. at 194-96.

13 *See* J. David Breemer, *You Can Check Out But You Can Never Leave: The Story of San Remo Hotel--The Supreme Court Relegates Federal Takings Claims to State Courts Under a Rule Intended to Ripen the Claims for Federal Review*, 33 B.C. Envtl. Aff. L. Rev. 247, 291-300 (2006).

14 DLX Inc. v. Kentucky, 381 F.3d 511, 519-21 (6th Cir. 2004).

15 For a thorough discussion of the cases, see Breemer, *supra* note 13, at 253-65.

16 *Id.*; *see also,* Wilkinson v. Pitkin County Bd. of County Com'rs, 142 F.3d 1319 (10th Cir. 1998).

17 Fields v. Sarasota Manatee Airport Auth., 953 F.2d 1299 (11th Cir. 1992) (citations omitted).

18 *See* Palamar Mobilehome Park Assn. v. City of San Marcos, 989 F.2d 362, 364-65 (9th Cir. 1993).

19 545 U.S. 323, 330-31 (2005).

20 *See id*. at 350-51 (Rehnquist, C.J., concurring in the judgment).

21 *Id.* at 337-38.

22 *See, e.g.,* Rockstead v. City of Crystal Lake, 486 F.3d 963 (7th Cir. 2007) (requiring takings claimant to litigate in state cort under *Williamson County* "ripeness" rules, but recognizing that this would permanently bar federal review due to res judicata).

23 *See* Home Tel. & Tel. Co. v. Los Angeles, 227 U.S. 278, 285 (1913).

24 To state a claim for a violation of the substantive component of due process, a property owner must have a constitutionally protected property interest. Amazingly, there is some debate in the federal courts as to whether the ownership and use of real property is a protected due process property interest. But when it is clear that the requisite interest exists, the property owner must establish that a deprivation of that interest occurred in violation of "substantive due process." The traditional test for gauging land-use regulation is arbitrary or has no reasonable relationship to a legitimate state interest In recent years, a few federal courts have injected the subjective "shocks the conscience" standard from police abuse cases into the land-use context and a majority of the circuit courts continue apply a less demanding rational basis test.

25 *See e.g.,* Bateson v. Geisse, 857 F.2d 1300, 1303 (9th Cir. 1988) (plaintiff "was not required to seek 'just compensation' from state entities before bringing this substantive due process claim, and therefore this claim is ripe for adjudication.").

26 *Id.* (holding that a local government's refusal to issue a building permit after all the applicable regulations had been met was "arbitrary administration of the local regulations, which singles out one individual to be treated discriminatorily, [that] amounts to a violation of that individual's substantive due process rights."); *see, e.g.,* Herrington v. Sonoma County, 834 F.2d 1488, 1501 (9th Cir. 1987) (misrepresentation of evidence gave rise to substantive due process violation); Lockary v. Kayfetz, 917 F.2d 1150, 1156 (9th Cir. 1990) (landowners asserted facts showing that denial of water permits was "arbitrary or even malicious conduct prohibited by due process."); Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 920 F.2d 1496, 1508 (9th Cir. 1990) (finding that property owners denied a land use permit after multiple applications asserted facts supporting the conclusion that the City's actions were "motivated, not by legitimate regulatory concerns, but by political pressure from neighbors and other residents of the city to preserve the property as open space," and thus, were arbitrary in violation of due process).

27 75 F.3d 1311 (1996) (en banc).

28 126 F.3d 1125 (1997).

29 490 U.S. 386 (1989).

30 510 U.S. 266 (1994).

31 *Graham*, 490 U.S. at 354-95.

32 *Albright*, 510 U.S. at 268.

33 Armendariz v. Penman, 75 F.3d 1311, 1319 (9th Cir. 1996) (en banc) (quoting *Graham*, 490 U.S. at 395).

34 *Armendariz*, 75 F.3d at 1320 (quoting Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 241 (1984)).

35 *Armendariz*, 75 F.3d at 1324.

36 126 F.3d 1125 (1997).

37 *Id*. at 1129.

38 *Id*.

39 *Id*.

40 *Macri*, 126 F.3d at 1129.

41 447 U.S. 255 (1980).

42 Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 540 (2005).

43 *Id*.

44 *Id*. at 542.

45 *Id*. at 545.

46 *See, e.g.,* Michael Berger, Regulatory Takings Update, SL049 ALI-ABA 661, 664 American Law Institute-American Bar Association (2006).

47 Crown Point Development, Inc. v. City of Sun Valley, 506 F.3d 851, 853 (9th Cir. 2007).

48 *Id*.

49 *Id*.

50 *Id*.

51 *Id*.

52 *Id*.

53 *Id*.

54 *Id*. at 853 (citing Crown Point Development, Inc. v. City of Sun Valley, 156 P.3d 573, 579 (Idaho 2007))

55 *Crown Point*, 506 F.3d at 853.

56 *Id*. at 852.

57 *Id*. at 852-53.

58 *Id*.

59 *Id*.

60 523 U.S. 833 (1998).

61 *Crown Point*, 506 F.3d at 855.

62 *Id*. at 856.

63 *Id*.

64 2007 WL 4225774 (9th Cir. Dec. 3, 2007).

65 *See Crown Point*, 506 F.3d at 866.

66 *See* The Federalist No. 80.