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THE NINTH CIRCUIT REDISCOVERS SUBSTANTIVE DUE PROCESS IN LAND USE CASES

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Substantive due process asserted as a claim for relief has a whiff of danger about it. After all, a plaintiff claiming a violation of substantive due process is asking a court to override the judgment of the political branches and invalidate an ordinance, statute, or an administrative determination because the action is somehow *illegitimate*.[1] After the demise of *Lochner*,[2] courts are understandably reluctant to be seen as second-guessing the policy choices made by the elected branches of government, and a suggestion that a court is "*Lochner*ing"—legislating from the bench by invalidating economic regulations based on a judge's contrary economic or social beliefs—can be the equivalent of judicial kryptonite.[3]

In part because land use actions can be characterized as economic regulation, until recently, many courts preferred to resolve constitutional challenges under the Takings Clause, which seemed to provide a more defined analytical framework, at least when compared to the more generalized standards applicable to substantive due process challenges. The Ninth Circuit, for example, forced property owners to challenge land use regulations exclusively as regulatory takings under the Fifth Amendment.[4] When regulatory takings analysis under the two-part *Agins v. City of Tiburon*[5] standard included both legitimacy and diminution of value components, this forced election of remedies had at least a semblance of intellectual consistency since a landowner could challenge an action as illegitimate under the "substantially advance" test—at least theoretically—and was not limited to seeking compensation under the second part.[6] The two-part test, however, did not survive the Supreme Court's unanimous ruling in *Lingle v. Chevron, U.S.A.*,[7] at least as one of *takings*. *Lingle* clarified that the "substantially advance" prong of *Agins* was not a "takings" test and that courts should review the legitimacy of land use regulations under the Due Process clause.

After *Lingle*, the Ninth Circuit revisited its forced election of remedies requirement and expressly overruled it.[8] This article summarizes the Ninth Circuit's post-*Lingle* cases which reinvigorated substantive due

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process as a vehicle for reviewing land use regulations, and suggests several areas for further inquiry when asserting the claim in land use and property cases.

Herrington: Substantive Due Process

The Due Process Clause contains both procedural and substantive requirements, and substantive due process bars "certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'"[9] Among other things, substantive due process prohibits a local government from denying land use permits arbitrarily—meaning without a basis in law or the record.[10] The two elements of a substantive due process claim are the existence of a protected interest, and proof the government arbitrarily or capriciously interfered with that interest.[11] The remedies for violations of substantive due process include declaratory and injunctive relief, and also give rise to damage remedies under federal civil rights statutes.[12] Just compensation is not a remedy for substantive due process violations.

Herrington v. County of Sonoma,[13] is the leading Ninth Circuit case applying substantive due process principles to a land use dispute. The county rejected the Herringtons' subdivision application, and subsequently downzoned their property and the surrounding land. The landowners brought regulatory takings, procedural due process, equal protection, and substantive due process claims.[14] The substantive due process claim alleged the county's determination that subdivision of the land was inconsistent with the county general plan, and the downzoning were "irrational, arbitrary, and capricious because the decisions were unsupported by the evidence."[15]

The Ninth Circuit held that the substantive due process claims were ripe, and affirmed the jury's finding of liability.[16] The court recognized the "fundamental difference" between a regulatory takings claim and a substantive due process claim:[17]

> In contrast, the Herringtons' due process and equal protection claims do not require proof that *all use* of their property has been denied. Unlike the developer in *MacDonald*, the Herringtons argue that the County *necessarily* had to approve their *original* development proposal (at the consistency determination stage) in order to avoid a constitutional violation. ... Taking claims and substantive due process claims

are not fungible. We note at least three major distinctions between the two approaches. First, both taking claims and substantive due process claims may involve an assessment of whether the contested action was a reasonable and proper exercise of the police power. However, the test for reasonableness under taking doctrine is arguably less deferential to the government's decision-making authority than the test for reasonableness under substantive due process. We acknowledge that the *Agins* reasonableness test quoted above is derived from an older substantive due process case. Nevertheless, the Supreme Court has suggested that the *Agins* taking test is less deferential than the current substantive due process test.

Second, even if the government's action is a legitimate exercise of the police power, it is not insulated from a taking challenge. Proof that a regulatory decision "goes too far" does not require a showing that the decision is arbitrary or irrational. In contrast, to prove that a zoning decision violates substantive due process, the property owner must show that the government "could have had no legitimate reason for its decision." The burden on a landowner to prove that a land use decision is arbitrary or irrational is an extraordinarily heavy one.

Third, the appropriate damages award may be lower under a substantive due process claim than under a taking claim for inverse condemnation, because the property owner may not be able to obtain compensation for denial of all use of the property during the period of the violation.[18]

Agins and Regulatory Takings

"Regulatory taking" is an expression of the notion that government's police power to enact regulation affecting private property operates on a continuum, and when it crosses a mostly indeterminate line—goes "too far"—it matters not what label is attached to the exercise of power, what matters is its impact on property.[19] If the regulation has the same effect as a seizure by an affirmative exercise of eminent domain and is a "taking," the government has the choice of either backing off regulation, or, if it desires to continue to regulate, pay just compensation.[20] Under the *Agins* test, a regulation violated the Takings Clause when it either failed to "substantially advance a legitimate state interest" or deprived the owner of use. Although commonly referred to as the "*Agins*" test, the two-part standard appeared in *Penn Central*,[21] and even earlier:

> a use restriction on real property may constitute a "taking" if not reasonably necessary to the effectuation of a substantial public purpose, or perhaps if it has an unduly harsh impact upon the owner's use of the property.[22]

The first *Agins* standard was also labeled the "takings due process" test since it so closely resembled the standard utilized to analyze whether a regulation comported with substantive due process. Decisions of the Supreme Court after *Agins* repeated the test, which seemed to confirm its viability.[23] The two-part standard probably remained a part of the regulatory takings lexicon for so long probably because it shared an analytical symmetry with legal challenges to exercises of the eminent domain power, which are usually classified as questions of legitimacy (public use), and impact on property (just compensation).[24]

Amendariz: Forced Election of Takings Remedy

In *Armendariz v. Penman*,[25] the Ninth Circuit ignored the differences between regulatory takings and substantive due process, and held that when challenging a land use regulation's validity, the property owner *must* rely on a takings theory, even when the claim is that the government's actions are not a legitimate exercise of the police power and violate due process. After San Bernardino, California officials began vigorously enforcing the city's housing code by boarding-up low income units in high crime areas, evicting suspected gang members from public housing, and by revoking business licenses and certificates of occupancy, several property owners sued, alleging violations of substantive due process. The plaintiffs claimed the city's actions were "pretextual" and summarily invoked:

> [T]he city summarily closed 95 buildings over a six-month period, evicting the tenants and driving them to other parts of the city.
>
> The City didn't notify affected property owners in advance that the sweeps would occur, didn't inform owners at the time of the closures why

> their buildings were being shut down, and didn't identify the specific code violations they found until well after the sweeps had been completed and the buildings closed. In some cases, as many as six weeks passed before the owners were informed why their properties had been closed, leaving them without guidance as to what they needed to do to reopen units or how they could challenge the City's action. When the closure notices did arrive, they either were worded so vaguely as to be unhelpful or cited seemingly minor, easily repairable violations. For example, some notices cited "general dilapidation" as a reason for the closures. Others cited more specific, but no more compelling, reasons, such as holes in firewalls, which could be patched in a matter of hours, or air conditioning units in the windows, which could be removed in minutes. In conjunction with these evictions, the City revoked the plaintiffs' business licenses and certificates of occupancy, also without notice or an opportunity to be heard.[26]

Although the city claimed its enforcement crackdown was to abate urban blight, the property owners asserted the city's real intent was to force them to clean up the neighborhood and to depress land values to allow a commercial developer to buy land cheaply for a shopping center. The plaintiffs claimed the blight and housing code violations were pretextual, and asserted claims for procedural due process, substantive due process, equal protection, and violations of the federal Fair Housing Act. They did not seek just compensation.

The Ninth Circuit determined the defendants were immune from the substantive due process claims even if the plaintiffs had proven all of their allegations because the claim was "preempted." Relying on a case involving the use of excessive force by police officers,[27] the court held "the use of substantive due process to extend constitutional protection to economic and property rights has been largely discredited,"[28] and limited substantive due process protections only to liberty interests not grounded in the text of the bill of rights such as the freedom to marry, procreate, and education.[29]

The court held that rights with "an express textual source of constitutional protection" should be analyzed exclusively under the textual source, not under substantive due process.[30] The court held that the plaintiffs' "pretext" claim that the city's sweeps were not truly for their stated purpose of blight abatement were analogous to claims of a lack of public use in eminent domain cases, and the takings clause was therefore the only means to analyze such claims.[31] While paying lip service to the idea that government actions can infringe on more than a single right, the court held the Fourth and Fifth Amendments were the only sources of protection against deprivations of the right to be secure in property.[32] The court relied upon classic "public use" cases such as *Berman v. Parker*[33] and *Hawaii Housing Authority v. Midkiff*[34] to conclude the Takings Clause was sufficiently express in its text to serve as the only standard to measure the constitutionality of the city's conduct. *Armendariz* did not explain why, if a property owner was limited to rights with "an express textual source of constitutional protection" in the Fifth Amendment, those rights are limited to the Takings Clause of the Fifth Amendment, since it also contains a Due Process Clause expressly protecting property.[35]

The court cited the oft-quoted maxim 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."[36] The Ninth Circuit apparently concluded that the Public Use Clause restricted the city's exercise of the police power even though the city had not condemned any property, or offered or paid any compensation.[37]

Amendariz was a decision perhaps more compelled by the court's practical desire to avoid deciding land use cases, than by a consistent theory. The most glaring evidence is the court's statement that requiring property owners utilize a regulatory takings theory would prevent them from "escaping" the *Williamson County*[38] ripeness rules applicable to such cases, as if property owners asserted due process claims only as pleading sleight-of-hand.[39] Even though it made no sense to require a plaintiff who does not seek just compensation to first pursue it in state court, *Armendariz* forced property owners challenging land use actions as arbitrary or irrational to litigate exclusively in state courts. If the decision did nothing else, it virtually wiped out the Ninth Circuit's land use docket.

Lingle: A Change Of Address For "Substantially Advance"

In *Lingle v. Chevron, U.S.A.*,[40] a unanimous Supreme Court issued a rare *mea culpa*, and held that

a regulation that does not "substantially advance a legitimate state interest" does not violate the Takings Clause, and the Court's earlier contrary recitations were simply mistakes. The Court did not, however, hold that property owners have no constitutional claim when a regulation does not substantially advance a legitimate state interest:

> Instead of addressing a challenged regulation's effect on private property, the "substantially advances" inquiry probes the regulation's underlying validity.[41]

Also, in a terse concurring opinion, Justice Kennedy, as he had been asserting for some time, noted that such claims are more properly analyzed under the Due Process Clause.[42]

Thus, after *Lingle*, if a property owner asserts a regulation interferes with economically beneficial uses—either in whole or in part—it is a takings claim. If, however, the claim is that government's action is arbitrary and does not substantially advance a legitimate public interest, it is a substantive due process claim. This conclusion wiped out *Amendariz*'s rationale, and breathed new life into *Herrington*. After *Lingle*, the Ninth Circuit revisited the issue in several cases.

Crown Point: Landowner May Assert Both Takings and Due Process Claims

In *Crown Point Development, Inc. v. City of Sun Valley*,[43] the Ninth Circuit held a property owner challenging land use regulation may assert claims under both the Takings and the Due Process Clauses. Sun Valley rejected Crown Point's development application, and after pursuing relief in state court, Crown Point filed a federal civil rights action in federal court, alleging that Sun Valley's denial of the permit was arbitrary. The district court dismissed, relying on *Armendariz*. The rule of forced election of remedies could not have survived *Lingle,* yet the Ninth Circuit had not expressly revisited the issue in the two years since the Supreme Court's decision.[44] The Ninth Circuit reversed:

> Accordingly, it is no longer possible in light of *Lingle* and *Lewis* to read *Armendariz* as imposing a blanket obstacle to all substantive due process challenges to land use regulation.[45]

The court compared takings claims and substantive due process claims in the land use context. When a property owner claims a per se taking under *Loretto*[46] or *Lucas*,[47] or an ad hoc taking under *Penn Central*,[48] the claim is analyzed under the Fifth Amendment. If, on the other hand, the property owner asserts as did Crown Point that the government has acted illegitimately, it is a due process claim.[49]

In several post-*Crown Point* cases, the Ninth Circuit confirmed *Armendariz* was truly dead.

"*Lingle* Pulled The Rug Out From Under *Armendariz*"

In *Action Apartment Association v. Santa Monica Rent Control Board*,[50] the court sustained Santa Monica, California's 2002 amendments to its rent control ordinance against a takings and due process challenge. The district court rejected the substantive due process claim on the basis of *Armendariz*, but the Ninth Circuit affirmed *Crown Point* overruled that case. The *Action Apartment* court recognized the viability of the substantive due process claim, but the landowner lost anyway, since the court held the statute of limitations had expired because it was not brought within two years of the initial enactment of the rent control ordinance in 1979.

Any doubts about whether other Ninth Circuit panels would accept *Crown Point* as circuit precedent (*Armendariz* is an en banc decision) were erased in *North Pacifica LLC v. City of Pacifica*,[51] where the landowner claimed the city's delays in processing a condominium permit violated its substantive due process and equal protection rights. The Ninth Circuit dismissed both of the claims, but reaffirmed that *Armendariz* is a dead letter:

> In *Lingle,* however, the Supreme Court concluded that a challenge to land use regulation may state a substantive due process claim, so long as the regulation serves no legitimate governmental purpose. In a recent decision we said that "*Lingle* pull[ed] the rug out from under" *Armendariz* and we recognized possible bases for a substantive due process claim. The irreducible minimum of a substantive due process claim challenging land use regulation is failure to advance any governmental purpose. We said there is a due process claim where a "land use action lacks any substantial relation to the public health, safety, or general welfare." Such a claim cannot be remedied under the Takings Clause.[52]

The district court dismissed North Pacifica's substantive due process claims because it had not shown that it had sought and been denied compensation through available state remedies, including a decision from the California courts.[53] The Ninth Circuit held the district court was wrong because after *Lingle* and *Crown Point*, an owner alleging substantive due process need not pursue state compensation remedies. However, the court affirmed the dismissal of the claim because the facts alleged in North Pacifica's complaint did amount to a due process violation.[54]

In *Shanks v. Dressel*,[55] the court held a municipality's failure to enforce its zoning laws was not a substantive due process violation. In that case, developers who converted homes into student residences apparently did not obtain all of the appropriate permits from the city to remodel a portion of a house in a historic district. The city issued a building permit, but the zoning code required additional permissions when historic landmarks are involved, and the developers did not seek or obtain a "certificate of appropriateness" or an "administrative special permit" from the city's Historic Landmark Commission. The city did not object, and took no steps to require the permits. A group of neighbors and community organizations sued the property owners and the city, alleging the city's failure to enforce the zoning code was a violation of their property rights. Relying on *Armendariz*, the city asserted the substantive due process claim was preempted by the Takings Clause, and the plaintiffs' claims the city's inaction caused a diminution in the value of the plaintiffs' property was a takings claim. The Ninth Circuit rejected the argument:

> Expressly repudiating *Squaw Valley*'s[56] suggestion that a "substantive due process challenge brought in the context of regulating use of real property might not be viable," we recently held that "the *Armendariz* line of cases can no longer be understood to create a blanket prohibition of all property-related substantive due process claims."[57]

What Next?—Substantive Due Process Claims After *Crown Point*

None of the post-*Crown Point* reported cases say anything more than substantive due process is again a viable claim in the Ninth Circuit for property owners to challenge land use regulation. *Crown Point* was an appeal from a motion to dismiss for failure to state a claim, and the case was remanded to the district court to determine whether the plaintiff had alleged enough to go forward.[58] The *Action Apartment* and *North Pacifica* plaintiffs both lost on other grounds,[59] as did the plaintiff in *Shanks*.[60] It therefore remains to be seen whether courts in the Ninth Circuit—and state and local governments—will view substantive due process as a genuine limitation on land use police power. Even lacking definitive answers, however, the Ninth Circuit's rediscovery of substantive due process opens up at least three areas for inquiry.

First, a substantive due process claim may be an advantage over regulatory takings claim because it avoids the *Williamson County* two-step ripeness trap. There is no reason why a property owner should be forced to pursue state compensation remedies when the relief she seeks is not just compensation under the Takings Clause. The remedies for substantive due process violations include declaratory and injunctive relief, and damages.[61] When just compensation is not the requested remedy, the rationale supporting a *Williamson County* ripeness claim falls apart.[62] Nor are multiple applications required, since a property owner's remaining beneficial uses are not relevant. Property owners are no longer categorically barred, or caught in *Williamson County*'s game of ripeness and claim preclusion "gotcha."[63] Substantive due process plaintiffs should be able to proceed directly in federal court.[64]

Second, courts should not shy away from considering substantive due process claims if a defendant cries "*Lochner.*" Meaningful judicial review of government's land use action is vastly different from a court substituting its own judgment for that of the political branches on economic legislation. As the Supreme Court reminded, a government action should not be immune from judicial review if it impacts a person's property rights simply because it is labeled an "economic" regulation, as land use regulations often are:

> But simply denominating a governmental measure as a "business regulation" does not immunize it from constitutional challenge on the ground that it violates a provision of the Bill of Rights. ... We see no reasons why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights and the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.[65]

Lochner is not germane since the liberty interest claimed to be at stake in economic substantive due process cases is different from the property interests at stake in a land use case. Classic *Lochner* substantive due process involves voiding regulations which intrude upon extra-textual "economic liberty" interests which can only be defined by reliance on a court's value preferences.[66] A plaintiff seeking relief for a violation of a substantive due process in the land use context, however, must first demonstrate that she possesses a legitimate claim of entitlement to property,[67] not merely that she has some unrealized economic expectations that have been thwarted by regulation.

A property owner can prove violations of substantive due process in at least two ways, as illustrated by the Second Circuit case *Cine SK8, Inc. v. Town of Henrietta*.[68] That case held a town's revocation of a permit on which the landowner relied would be a substantive due process violation if the plaintiff could show the revocation was the result either of improper motive (in that case, racial animus), or an extrajurisdictional procedure (the town's permit procedures did not provide for a revocation process).

Further, the Supreme Court addressed the concern of judicial second-guessing in *City of Monterey v. Del Monte Dunes at Monterey.*[69] In that case, a jury found the government's repeated denials of development permits did not substantially advance a legitimate state interest.[70] The city asserted the trial court should not have permitted the jury to review the city's actions under the substantially advance standard, since the city was entitled to deference.[71] The Court noted first the jury charge was "consistent with our previous general discussions of regulatory takings liability," then rejected the city's argument that the substantially advance standard opened up legislative determinations to unwarranted judicial scrutiny.

Third, the "substantially advance a legitimate government interest" test is not gone. *Lingle* did not overrule it, the Court simply relocated it from the Takings Clause to the Due Process Clause.[72] The Court concluded "this formula prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in our takings jurisprudence,"[73] but it pointedly did not repudiate the test itself. Thus, there may be some justification for heightened substantive due process standards for land use regulations. The specter of *Lochner* is not present because heightened judicial scrutiny in this context, as *Nollan*[74] and *Dolan*[75] make clear, only applies to the means used by government to achieve its goals, not the goals themselves, which should be reviewed under a more deferential standard. *Herrington* also noted the substantially advance standard is more rigorous than minimum rationality.[76]

Conclusion

With *Armendariz* rightfully and finally discredited, property owners, land use attorneys, and judges in the Ninth Circuit need to dust off their copies of *Herrington*—substantive due process is back.

NOTES

1. *See*, *e.g.*, Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 502, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977) (substantive due process "has at times been a treacherous field").
2. Lochner v. New York, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905) (overruled in part by, Day-Brite Lighting Inc. v. State of Mo., 342 U.S. 421, 72 S. Ct. 405, 96 L. Ed. 469 (1952) and overruled in part by, Ferguson v. Skrupa, 372 U.S. 726, 83 S. Ct. 1028, 10 L. Ed. 2d 93, 95 A.L.R.2d 1347 (1963)).
3. *See*, *e.g.*, Armendariz v. Penman, 75 F.3d 1311, 1318 (9th Cir. 1996) (en banc) ("The Supreme Court's opinion in Lochner v. New York, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905) (overruled in part by, Day-Brite Lighting Inc. v. State of Mo., 342 U.S. 421, 72 S. Ct. 405, 96 L. Ed. 469 (1952) and overruled in part by, Ferguson v. Skrupa, 372 U.S. 726, 83 S. Ct. 1028, 10 L. Ed. 2d 93, 95 A.L.R.2d 1347 (1963)), now symbolizes an era in which the Court, invalidating economic legislation, engaged in a level of judicial activism which was unprecedented in its time and unmatched since. In an effort to scale back what had become an apparently unbounded source of judicial authority, the Supreme Court in recent decades has restricted the scope of substantive due process.").
4. Armendariz v. Penman, 75 F.3d 1311, 1325, (9th Cir. 1996) (en banc); Squaw Valley Development Co. v. Goldberg, 375 F.3d 936, 949, 58 Env't. Rep. Cas. (BNA) 2013, 34 Envtl. L. Rep. 20051 (9th Cir. 2004) ("We have held that substantive due process claims based on governmental interference with property rights are foreclosed by the Fifth Amendment's Takings Clause. ... Since deciding *Armendariz*, we have consistently precluded substantive due process claims based on a deprivation of property addressed by the Takings Clause. The blanket prohibition applies even to a disguised takings claim.") (citing Madison v. Graham, 316 F.3d 867, 870-871, 33 Envtl. L. Rep. 20142 (9th Cir. 2002)).
5. Agins v. City of Tiburon, 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106, 14 Env't. Rep. Cas. (BNA) 1555, 10 Envtl. L. Rep. 20361 (1980) (abrogated

by, Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876, 35 Envtl. L. Rep. 20106 (2005)).

6. Under *Agins*, a regulation violated the Takings Clause when it either did not "substantially advance a legitimate state interest" or deprived the owner of beneficial use.
7. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876, 35 Envtl. L. Rep. 20106 (2005).
8. Crown Point Development, Inc. v. City of Sun Valley, 506 F.3d 851 (9th Cir. 2007).
9. Zinermon v. Burch, 494 U.S. 113, 125, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990) (quoting Daniels v. Williams, 474 U.S. 327, 331, 106 S. Ct. 677, 88 L. Ed. 2d 662 (1986)).
10. *See*, *e.g.*, Cine SK8, Inc. v. Town of Henrietta, 507 F.3d 778 (2d Cir. 2007) (substantive due process implicated when town alleged to have revoked permit because of racial animus and when town alleged to have acted beyond its jurisdiction); Brady v. Town of Colchester, 863 F.2d 205 (2d Cir. 1988) (refusal to issue site plan); TLC Development, Inc. v. Town of Branford, 855 F. Supp. 555 (D. Conn. 1994) (municipality wrongfully rejected site plan that complied with zoning).
11. Action Apartment Ass'n, Inc. v. Santa Monica Rent Control Bd., 509 F.3d 1020, 1025 (9th Cir. 2007). There is a divergence of authority regarding whether a party alleging a substantive due process claim must first possess a protected property interest, as is required in a procedural due process claim. *Compare* County of Sacramento v. Lewis, 523 U.S. 833, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998) (no property or liberty interest alleged in substantive due process claim) *with* Shanks v. Dressel, 540 F.3d 1082, 1087 (9th Cir. 2008) ("To state a substantive due process claim, the plaintiff must show as a threshold matter that a state actor deprived it of a constitutionally protected life, liberty or property interest.").
12. 42 U.S.C.A. § 1983 (2006). *See* Lynch v. Household Finance Corp., 405 U.S. 538, 92 S. Ct. 1113, 31 L. Ed. 2d 424 (1972) (constitutional property claims are actionable under section 1983).
13. Herrington v. Sonoma County, 834 F.2d 1488, 10 Fed. R. Serv. 3d 693 (9th Cir. 1987), opinion amended on denial of reh'g, 857 F.2d 567 (9th Cir. 1988), cert. denied, 489 U.S. 1090, 109 S.Ct. 1557, 103 L.Ed.2d 860).
14. Herrington v. Sonoma County, 834 F.2d 1488, 1493, 10 Fed. R. Serv. 3d 693 (9th Cir. 1987), opinion amended on denial of reh'g, 857 F.2d 567 (9th Cir. 1988).
15. Herrington v. Sonoma County, 834 F.2d 1488, 1493, 10 Fed. R. Serv. 3d 693 (9th Cir. 1987), opinion amended on denial of reh'g, 857 F.2d 567 (9th Cir. 1988).
16. Herrington v. Sonoma County, 834 F.2d 1488, 1496, 10 Fed. R. Serv. 3d 693 (9th Cir. 1987), opinion amended on denial of reh'g, 857 F.2d 567 (9th Cir. 1988).
17. Herrington v. Sonoma County, 834 F.2d 1488, 1497, 10 Fed. R. Serv. 3d 693 (9th Cir. 1987), opinion amended on denial of reh'g, 857 F.2d 567 (9th Cir. 1988). The court recognized that a takings claim deals with the impact of government's action on the use of property. Herrington, 834 F.2d at 1987 (citing First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal., 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250, 26 Env't. Rep. Cas. (BNA) 1001, 17 Envtl. L. Rep. 20787 (1987)).
18. Herrington v. Sonoma County, 834 F.2d 1488, 1498, note 7, 10 Fed. R. Serv. 3d 693 (9th Cir. 1987), opinion amended on denial of reh'g, 857 F.2d 567 (9th Cir. 1988) (citations omitted).
19. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413, 43 S. Ct. 158, 67 L. Ed. 322, 28 A.L.R. 1321 (1922) (Kohler Act enacted pursuant to state's police power went "too far"); Andrus v. Allard, 444 U.S. 51, 64, 100 S. Ct. 318, 62 L. Ed. 2d 210, 13 Env't. Rep. Cas. (BNA) 2057, 9 Envtl. L. Rep. 20791 (1979) (federal power to protect endangered species measured against Takings Clause; "there is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate"); First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal., 482 U.S. 304, 316, 107 S. Ct. 2378, 96 L. Ed. 2d 250, 26 Env't. Rep. Cas. (BNA) 1001, 17 Envtl. L. Rep. 20787 (1987) ("While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings."). Similar analysis is applied to other limitations on government power that protect fundamental rights, and these limitations do not depend on the power the government claims to be exercising. For example, police power regulations are reviewed with strict scrutiny if the regulation is alleged to impact free speech rights, even if the regulation does not appear to be affirmative government censorship. *See*, *e.g.*, Boos v. Barry, 485 U.S. 312, 108 S. Ct. 1157, 99 L. Ed. 2d 333 (1988) (invalidating law restricting placement of signs within 500 feet of embassy because it was not narrowly tailored).
20. First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal., 482 U.S. 304, 316, 107 S. Ct. 2378, 96 L. Ed. 2d 250, 26 Env't. Rep. Cas. (BNA) 1001, 17 Envtl. L. Rep. 20787 (1987) (Fifth Amendment requires both invalidation and just compensation remedies for police power regulations that violate Takings Clause); Kaiser Aetna v. U. S., 444 U.S. 164, 172, 100 S. Ct. 383, 62 L. Ed. 2d 332, 13 Env't. Rep. Cas. (BNA) 1929, 2000 A.M.C. 2495, 10 Envtl. L. Rep. 20042 (1979) (imposition of a navigational servitude pursuant to the federal commerce power would be an invalid taking). *See also* Herrington v. Sonoma County, 834 F.2d 1488, 1497-1498, 10 Fed. R. Serv. 3d 693 (9th Cir. 1987),

opinion amended on denial of reh'g, 857 F.2d 567 (9th Cir. 1988) (When regulation "goes too far" it is a taking, and it "goes too far when it 'becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession.'") (citing Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 199, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985)).

21. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 127, 98 S. Ct. 2646, 57 L. Ed. 2d 631, 11 Env't. Rep. Cas. (BNA) 1801, 8 Envtl. L. Rep. 20528 (1978).
22. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 127, 98 S. Ct. 2646, 57 L. Ed. 2d 631, 11 Env't. Rep. Cas. (BNA) 1801, 8 Envtl. L. Rep. 20528 (1978) (citing Goldblatt v. Town of Hempstead, N. Y., 369 U.S. 590, 82 S. Ct. 987, 8 L. Ed. 2d 130 (1962); Nectow v. City of Cambridge, 277 U.S. 183, 48 S. Ct. 447, 72 L. Ed. 842 (1928)).
23. The Court referred to the test as a takings standard as recently as Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 333-334, 122 S. Ct. 1465, 152 L. Ed. 2d 517, 54 Env't. Rep. Cas. (BNA) 1129, 32 Envtl. L. Rep. 20627, 10 A.L.R. Fed. 2d 681 (2002). In takings cases between *Penn Central* and *Tahoe-Sierra*, the Court invoked the substantially advance test many times, although never as the rule of decision. *See*, *e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016, 112 S. Ct. 2886, 120 L. Ed. 2d 798, 34 Env't. Rep. Cas. (BNA) 1897, 22 Envtl. L. Rep. 21104 (1992) ("As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests'"); City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 704, 119 S. Ct. 1624, 143 L. Ed. 2d 882, 48 Env't. Rep. Cas. (BNA) 1513, 29 Envtl. L. Rep. 21133 (1999) ("requirement that a regulation substantially advance legitimate public interests").
24. The Court's equating of the police power with the eminent domain power did not help in distinguishing regulatory takings from affirmative takings. *See* Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 240, 104 S. Ct. 2321, 81 L. Ed. 2d 186, 14 Envtl. L. Rep. 20549 (1984) ("The 'public use' requirement is thus coterminous with the scope of a sovereign's police powers.").
25. Armendariz v. Penman, 75 F.3d 1311, 1325 (9th Cir. 1996) (en banc).
26. Armendariz v. Penman, 75 F.3d 1311, 1314-1315 (9th Cir. 1996) (en banc).
27. Graham v. Connor, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). In *Graham*, the Supreme Court held that claims of excessive force brought under section 1983 must be analyzed under the explicit textual sources of constitutional protection found in the Fourth and Eighth Amendments, not the more subjective standard of substantive due process. Graham v. Connor, 490 U.S. 386, 394-395, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989).
28. Armendariz v. Penman, 75 F.3d 1311, 1318-1319 (9th Cir. 1996) (Gunther, Constitutional Law at 432-465 (12th ed. 1991)).
29. Armendariz v. Penman, 75 F.3d 1311, 1319 (9th Cir. 1996) (en banc) (citing Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 851, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992); Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967); Griswold v. Connecticut, 381 U.S. 479, 485, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965); Rochin v. California, 342 U.S. 165, 172, 72 S. Ct. 205, 96 L. Ed. 183, 25 A.L.R.2d 1396 (1952); Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 534, 45 S. Ct. 571, 69 L. Ed. 1070, 39 A.L.R. 468 (1925)).
30. Armendariz v. Penman, 75 F.3d 1311, 1319 (9th Cir. 1996) (citing Albright v. Oliver, 510 U.S. 266, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994); Graham v. Connor, 490 U.S. 386, 395, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989); Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 502, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977).
31. Armendariz v. Penman, 75 F.3d 1311, 1319 (9th Cir. 1996) (en banc).
32. Armendariz v. Penman, 75 F.3d 1311, 1320 (9th Cir. 1996) (en banc) (citing Soldal v. Cook County, Ill., 506 U.S. 56, 69, 113 S. Ct. 538, 121 L. Ed. 2d 450 (1992); U.S. v. James Daniel Good Real Property, 510 U.S. 43, 114 S. Ct. 492, 126 L. Ed. 2d 490 (1993)).
33. Berman v. Parker, 348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954).
34. Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 104 S. Ct. 2321, 81 L. Ed. 2d 186, 14 Envtl. L. Rep. 20549 (1984).
35. As the Court reminded in Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304, 38 Env't. Rep. Cas. (BNA) 1769, 24 Envtl. L. Rep. 21083 (1994), both the Takings Clause as well as the Due Process Clause restrict government power, so there seems to be no good reason to make a property owner choose one. Dolan v. City of Tigard, 512 U.S. 374, 384, 114 S. Ct. 2309, 129 L. Ed. 2d 304, 38 Env't. Rep. Cas. (BNA) 1769, 24 Envtl. L. Rep. 21083 (1994). The Court rejected Justice Stevens' argument that the case was not a takings case, but was a substantive due process case. Dolan v. City of Tigard, 512 U.S. 374, 384, 114 S. Ct. 2309, 129 L. Ed. 2d 304, 38 Env't. Rep. Cas. (BNA) 1769, 24 Envtl. L. Rep. 21083 (1994).
36. Armendariz v. Penman, 75 F.3d 1311, 1320-1321 (9th Cir. 1996) (en banc) (quoting Thompson v. Consolidated Gas Utilities Corp., 300 U.S. 55, 80, 57 S. Ct. 364, 81 L. Ed. 510 (1937)).
37. Armendariz v. Penman, 75 F.3d 1311, 1321 (9th Cir. 1996) (en banc) ("If the plaintiffs can prove their allegations, the defendants' actions would consti-

tute a taking of the property. Such a taking, if the allegations are true, would seem not to have been for a "public use" as the Fifth Amendment requires but rather for the use of another private person, the shopping-center developer.").

38. Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985).
39. Armendariz v. Penman, 75 F.3d 1311, 1325 (9th Cir. 1996) (en banc) ("The plaintiffs were able to present what was essentially a takings claim without exhausting their state remedies, thereby escaping a critical prerequisite to ordinary Fifth Amendment takings claims.") (citing Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985)). In federal courts and most state courts, multiple legal claims stemming from the same actions are common, and alternative pleading is allowed. *See*, *e.g.*, Fed. R. Civ. P. 8(a) (in a federal complaint "[r]elief in the alternative or of several different types may be demanded")).
40. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876, 35 Envtl. L. Rep. 20106 (2005).
41. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 540, 125 S. Ct. 2074, 161 L. Ed. 2d 876, 35 Envtl. L. Rep. 20106 (2005) ("There is no question that the "substantially advances" formula was derived from due process, not takings, precedents.").
42. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 543, 125 S. Ct. 2074, 161 L. Ed. 2d 876, 35 Envtl. L. Rep. 20106 (2005). *See also* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 548-549, 125 S. Ct. 2074, 161 L. Ed. 2d 876, 35 Envtl. L. Rep. 20106 (2005) (Kennedy, J., concurring) ("This separate writing is to note that today's decision does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process.") (citing Eastern Enterprises v. Apfel, 524 U.S. 498, 539, 118 S. Ct. 2131, 141 L. Ed. 2d 451, 22 Employee Benefits Cas. (BNA) 1225 (1998) (Kennedy, J., concurring in judgment and dissenting in part)).
43. Crown Point Development, Inc. v. City of Sun Valley, 506 F.3d 851 (9th Cir. 2007).
44. The court had implicitly rejected *Armendariz* but had not expressly overruled it. *See*, *e.g.*, Equity Lifestyle Properties, Inc. v. County of San Luis Obispo, 505 F.3d 860, 870 n.16 (9th Cir. 2007) (considering and rejecting both a regulatory takings and substantive due process challenge to a rent control ordinance); Spoklie v. Montana, 411 F.3d 1051, 1057, 35 Envtl. L. Rep. 20116 (9th Cir. 2005) (considering and rejecting takings and due process claims).
45. Crown Point Development, Inc. v. City of Sun Valley, 506 F.3d 851, 856 (9th Cir. 2007) (citing County of Sacramento v. Lewis, 523 U.S. 833, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998)). The court's use of the term "blanket obstacle" expressly repudiated Squaw Valley Development Co. v. Goldberg, 375 F.3d 936, 949, 58 Env't. Rep. Cas. (BNA) 2013, 34 Envtl. L. Rep. 20051 (9th Cir. 2004), which asserted a "blanket prohibition" on substantive due process claims based on a deprivation of property.
46. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868, 8 Media L. Rep. (BNA) 1849 (1982) (physical invasion).
47. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798, 34 Env't. Rep. Cas. (BNA) 1897, 22 Envtl. L. Rep. 21104 (1992) (deprivation of economically beneficial uses of property).
48. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631, 11 Env't. Rep. Cas. (BNA) 1801, 8 Envtl. L. Rep. 20528 (1978) (ad hoc three-part regulatory takings test).
49. Crown Point Development, Inc. v. City of Sun Valley, 506 F.3d 851, 856 (9th Cir. 2007).
50. Action Apartment Ass'n, Inc. v. Santa Monica Rent Control Bd., 509 F.3d 1020 (9th Cir. 2007).
51. North Pacifica LLC v. City of Pacifica, 526 F.3d 478 (9th Cir. 2008).
52. North Pacifica LLC v. City of Pacifica, 526 F.3d 478, 484 (9th Cir. 2008) (citing Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 542, 125 S. Ct. 2074, 161 L. Ed. 2d 876, 35 Envtl. L. Rep. 20106 (2005) "[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."); Crown Point Development, Inc. v. City of Sun Valley, 506 F.3d 851, 855-856 (9th Cir. 2007)).
53. North Pacifica LLC v. City of Pacifica, 526 F.3d 478, 485 (9th Cir. 2008).
54. North Pacifica LLC v. City of Pacifica, 526 F.3d 478, 485 (9th Cir. 2008).
55. Shanks v. Dressel, 540 F.3d 1082, 1087 (9th Cir. 2008).
56. Squaw Valley Development Co. v. Goldberg, 375 F.3d 936, 949, 58 Env't. Rep. Cas. (BNA) 2013, 34 Envtl. L. Rep. 20051 (9th Cir. 2004).
57. Shanks v. Dressel, 540 F.3d 1082, 1087 (9th Cir. 2008) (citing Action Apartment Ass'n, Inc. v. Santa Monica Rent Control Bd., 509 F.3d 1020, 1025 (9th Cir. 2007)).
58. Crown Point Development, Inc. v. City of Sun Valley, 506 F.3d 851, 857 (9th Cir. 2007).
59. *See* Action Apartment Ass'n, Inc. v. Santa Monica Rent Control Bd., 509 F.3d 1020, 1024 (9th Cir. 2007) ("We also affirm the district court's dismissal of the Landlords' substantive due process claims, but we again affirm on different grounds than the district court stated. Although in light of recent Circuit authority we must disagree with the district court's conclusion that the Fifth Amendment preempts the Landlords' substantive due process claims, we conclude that Action's facial claim is time-barred and that Millen's as applied claim is unripe."); North Pacifica LLC v. City of Pacifica, 526 F.3d 478, 485 (9th Cir. 2008) ("The district court's conclusion, that the claim should be dismissed, may nevertheless

be upheld if the complaint failed adequately to allege a denial of substantive due process.").

60. Shanks v. Dressel, 540 F.3d 1082, 1088-1089 (9th Cir. 2008) (private developer was not acting under color of state law).

61. Herrington v. Sonoma County, 834 F.2d 1488, 1490, 10 Fed. R. Serv. 3d 693 (9th Cir. 1987), opinion amended on denial of reh'g, 857 F.2d 567 (9th Cir. 1988).

62. *Williamson County* requires property owners alleging a state or local government violated the Takings Clause show the government denied just compensation as a substantive element of the claim. This requirement, the Court held, stemmed from the language of the Takings Clause itself which does not make regulatory takings unconstitutional, only *uncompensated* regulatory takings. Thus, property owners asserting a regulatory takings claim are required to first seek—and be denied—just compensation in state court, including exhausting all appeals through the state's judicial system. The Due Process Clause contains no such requirement, so presumably the second prong ripeness requirement of *Williamson County* is utterly inapplicable, and cannot be used to keep a property owner from filing her claim in federal court in the first instance.

63. *See*, *e.g.*, San Remo Hotel, L.P. v. City and County of San Francisco, Cal., 545 U.S. 323, 125 S. Ct. 2491, 162 L. Ed. 2d 315 (2005) (property owner who followed *Williamson County* and pursued state compensation remedies was barred by collateral estoppel from subsequently raising claim in federal court).

64. The question arises whether a property owner's state regulatory takings claim can be considered together with the original federal jurisdiction substantive due process claim, pursuant to a federal court's supplemental jurisdiction to hear state law claims arising from the same set of facts as a federal claim.

65. Dolan v. City of Tigard, 512 U.S. 374, 392, 114 S. Ct. 2309, 129 L. Ed. 2d 304, 38 Env't. Rep. Cas. (BNA) 1769, 24 Envtl. L. Rep. 21083 (1994) (citing Marshall v. Barlow's, Inc., 436 U.S. 307, 98 S. Ct. 1816, 56 L. Ed. 2d 305, 6 O.S.H. Cas. (BNA) 1571, 1978 O.S.H. Dec. (CCH) P 22735, 8 Envtl. L. Rep. 20434 (1978); Air Pollution Variance Bd. of Colorado v. Western Alfalfa Corp., 416 U.S. 861, 94 S. Ct. 2114, 40 L. Ed. 2d 607, 6 Env't. Rep. Cas. (BNA) 1571, 4 Envtl. L. Rep. 20491 (1974); New York v. Burger, 482 U.S. 691, 107 S. Ct. 2636, 96 L. Ed. 2d 601 (1987); Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341, 6 Media L. Rep. (BNA) 1497, 34 Pub. Util. Rep. 4th (PUR) 178 (1980)).

66. *See*, *e.g.*, Poe v. Ullman, 367 U.S. 497, 516-517, 81 S. Ct. 1752, 6 L. Ed. 2d 989 (1961) (Douglas, J., dissenting) (in addition to fair procedures, due process includes the right to travel, the right to marry, and the right to privacy).

67. Shanks v. Dressel, 540 F.3d 1082, 1087 (9th Cir. 2008) ("To state a substantive due process claim, the plaintiff must show as a threshold matter that a state actor deprived it of a constitutionally protected life, liberty or property interest.").

68. Cine SK8, Inc. v. Town of Henrietta, 507 F.3d 778 (2d Cir. 2007).

69. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 704, 119 S. Ct. 1624, 143 L. Ed. 2d 882, 48 Env't. Rep. Cas. (BNA) 1513, 29 Envtl. L. Rep. 21133 (1999). In that case, the Court also held that a jury can determine whether a governmental land use action substantially advances a legitimate governmental interest.

70. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 703-704, 119 S. Ct. 1624, 143 L. Ed. 2d 882, 48 Env't. Rep. Cas. (BNA) 1513, 29 Envtl. L. Rep. 21133 (1999).

71. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 704, 119 S. Ct. 1624, 143 L. Ed. 2d 882, 48 Env't. Rep. Cas. (BNA) 1513, 29 Envtl. L. Rep. 21133 (1999) ("[T]he city maintains that the Court of Appeals adopted a legal standard for regulatory takings liability that allows juries to second-guess public land-use policy.").

72. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 543, 125 S. Ct. 2074, 161 L. Ed. 2d 876, 35 Envtl. L. Rep. 20106 (2005) ("Instead of addressing a challenged regulation's effect on private property, the "substantially advances" inquiry probes the regulation's underlying validity.").

73. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 540, 125 S. Ct. 2074, 161 L. Ed. 2d 876, 35 Envtl. L. Rep. 20106 (2005).

74. Nollan v. California Coastal Com'n, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677, 26 Env't. Rep. Cas. (BNA) 1073, 17 Envtl. L. Rep. 20918 (1987).

75. Dolan v. City of Tigard, 512 U.S. 374, 392, 114 S. Ct. 2309, 129 L. Ed. 2d 304, 38 Env't. Rep. Cas. (BNA) 1769, 24 Envtl. L. Rep. 21083 (1994).

76. Herrington v. Sonoma County, 834 F.2d 1488, 1498, note 7, 10 Fed. R. Serv. 3d 693 (9th Cir. 1987), opinion amended on denial of reh'g, 857 F.2d 567 (9th Cir. 1988) (In their 1987 decision, the 9th Circuit stated, "[T]he test for reasonableness under [*Agins*] is arguably less deferential to the government's decision-making authority than the test for reasonableness under substantive due process. We acknowledge that the *Agins* reasonableness test quoted above is derived from an older substantive due process case. Nevertheless, the Supreme Court has suggested that the *Agins* taking test is less deferential than the current substantive due process test.").