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Substantive Due Process in the Twilight Zone: Protecting Property Interests from Arbitrary Land Use Decisions

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COMMENTS

SUBSTANTIVE DUE PROCESS IN THE TWILIGHT ZONE: PROTECTING PROPERTY INTERESTS FROM ARBITRARY LAND USE DECISIONS

Government is no more wise, compassionate, or understanding when it regulates the economic marketplace than when it censors expression. In zoning matters . . . [c]onsiderations fundamental to the purpose of land-use regulation are swept away as the authorities succumb to their own desires and fears as well as [the desires] of those who exert most pressure on them.¹

INTRODUCTION

Historically, federal courts strongly have resisted becoming involved in state and local regulation of land use.² Federal courts have considered zoning and land use issues, however, when these have involved a claim that a local authority has denied substantive due process³ to an aggrieved landowner. This avenue to the federal courts generally has proved unsuccessful for landowners, because many courts have held that a right must be fundamental to be accorded substantive due process protection, and property interests generally are not considered fundamental.⁴ Other courts have

¹ Bernard H. Siegan, Economic Liberties and the Constitution 262 (1980).
² See, e.g., Pomponio v. Fauquier County Bd. of Sup’rs, 21 F.3d 1319, 1327 (4th Cir.) (en banc) (recommending abstention “in practically every instance . . . in cases arising solely out of state or local zoning or land use law”) (citing Burford v. Sun Oil Co., 319 U.S. 315 (1943)), cert. denied, 115 S. Ct. 192 (1994); Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 465-68 (7th Cir. 1988) (holding that substantive due process claim is not stated where zoning decision violates statutes, but only where decision is irrational or violates specific constitutional guarantee).
³ Substantive and procedural due process are distinguished clearly in the context of constitutional torts for state civil rights violations. The Fourteenth Amendment to the United States Constitution provides, in pertinent part: “No State shall . . . deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1. Procedural due process does not forbid a state from depriving a person of a constitutionally protected interest as long as fair procedures are followed, such as notice and a hearing. See Zinermon v. Burch, 494 U.S. 113, 125-26 (1990) (interpreting procedural due process). However, the substantive component of due process also “bars certain arbitrary, wrongful government actions ‘regardless of the fairness of the procedures used to implement them.’” Id. at 125 (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986)).
⁴ See, e.g., McKinney v. Pate, 20 F.3d 1550, 1556-57 (11th Cir. 1994) (explaining inapplicability of substantive due process to non-fundamental interests created by state law, such as employment), cert. denied, 115 S. Ct. 898 (1994); Chesterfield Dev. Corp. v. City of Chesterfield, 963 F.2d 1102, 1104-05 (8th Cir. 1992) (broadly denying substantive due process in land use cases). See David H. Armistead, Note, Substantive Due Process Limits on Public Officials'
characterized the interest at stake in land use cases as the mere denial of a discretionary permit, which implicates no protected property right.\(^5\)

Congress has long attempted to hold state government officials accountable for their wrongful actions in depriving individuals of their civil rights.\(^6\) The United States Supreme Court has recognized property rights as important civil rights.\(^7\) However, the predominant view among the federal courts has denied victims a federal remedy when a discretionary land use decision is tainted by substantive wrongs such as arbitrariness, improper motive, and personal or partisan bias.\(^8\)

Part I of this Comment discusses the Supreme Court’s early substantive due process zoning cases and the questions left open in its recent jurisprudence on that issue. Part II surveys the varied approaches the federal courts have taken in addressing the two principal questions left open by the Supreme Court: (1) the nature of the property interest required to state a substantive due process claim, and (2) the standard by which arbitrary and capricious government conduct is evaluated. Part III examines recent decisions by the United States Courts of Appeals for the Second, Third, and Seventh Circuits that demonstrate very different approaches to both of these questions. Part IV argues that substantive due process protection of the property rights of landowners against arbitrary government decisionmaking is integral to the Due Process Clause of the Fourteenth Amendment, and concludes that under substantive due process, an allegation of arbitrary government conduct should be evaluated under a meaningful standard, rather than the unthinking deference of the rational basis test. The Comment further concludes that the Third Circuit’s strong protection of property rights

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5. See, e.g., Triomphe Investors v. City of Northwood, 49 F.3d 198, 202-03 (6th Cir.) (finding no protectible property interest in permit which zoning body has discretion to deny), cert. denied, 116 S. Ct. 70 (1995); Sylvia Dev. Corp. v. Calvert County, 48 F.3d 810, 826-28 (4th Cir. 1995) (requiring legitimate claim of entitlement to establish protected property right).


   > Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.


8. Courts that do not recognize a protected property interest in zoning disputes need not reach this second stage of the inquiry. See, e.g., Gardner v. City of Baltimore Mayor & City Council, 969 F.2d 63, 69 (4th Cir. 1992) (balancing local autonomy against need for protection from arbitrary abuses).
established in *DeBlasio v. Zoning Board of Adjustment* was a small but significant step in the right direction. Nonetheless, this Comment acknowledges that other courts are unlikely to follow the Third Circuit’s bold decision to protect the property rights of individuals, rather than protecting bureaucrats from accountability.

I. The Supreme Court’s Approach to Substantive Due Process in Zoning Disputes

The appropriate application of substantive due process has generated doubt and dispute among the federal courts in cases dealing with arbitrary and capricious land use restrictions. In this judicial twilight zone, the United States Supreme Court has provided little illumination, leaving lower courts to labor in obscurity to develop a consistent and appropriate rule.  

A. Substantive Due Process for Zoning Decisions

The Supreme Court has accorded significant deference to zoning regulations imposed by state and local authorities. The Court first upheld a comprehensive zoning ordinance in *Village of Euclid v. Ambler Realty Co.* in 1926. Euclid, a suburb of Cleveland, imposed a zoning ordinance that prohibited industrial use of the plaintiff’s land, depriving the plaintiff of at least seventy-five percent of the land’s value. The Court broadly held that zoning ordinances are valid unless “clearly arbitrary and unreasonable,” lacking any substantial relation to the police power reserved to the states. Otherwise, under that power, the states may regulate the “public health, safety, morals, or general welfare.”

The decision in *Euclid*, which placed a heavy burden of proof on the landowner, seems to run contrary to the trend of an era when the Court regularly struck down legislation infringing on economic interests. How-
ever, Justice Sutherland, normally an opponent of such legislation,\textsuperscript{16} justified
defference in the case of zoning. Writing for the \textit{Euclid} majority, Justice Sutherland
offered a compelling analogy to the law of nuisances, which
deters landowners from doing harm to the property interests of their
neighbors.\textsuperscript{17} The majority also asserted the necessity of zoning laws as a response
to changing conditions of urban life, such as automobile traffic.\textsuperscript{18} The \textit{Euclid}
Court suggested that a more exacting scrutiny for arbitrariness and unreason-
ableness might be appropriate when reviewing the application of zoning ordi-
nances to specific cases.\textsuperscript{19}

The Court applied such scrutiny two years later in \textit{Nectow v. City of Cambridge}.\textsuperscript{20} In \textit{Nectow}, a landowner was deprived of much of his land's
value when a hundred-foot strip was zoned residential.\textsuperscript{21} The Supreme
Court held that the zoning ordinance was applied arbitrarily in this case.\textsuperscript{22}
Justice Sutherland cautioned, however, that the Court must not merely substi-
tute its judgment for that of the local authorities. Instead, the Court relied
upon the findings of a master who viewed the area, weighed the character
and natural development of the district against the potential benefits to the
public, and concluded that the zoning decision would not promote any legiti-
mate goal under \textit{Euclid}'s test of a "substantial relation to the public health,
safety, morals, or general welfare."\textsuperscript{23} The Court held that the master's thor-
ough findings of fact were determinative in finding a deprivation of property
without due process of law.\textsuperscript{24} While \textit{Euclid} empowered the states to write
broad zoning legislation, \textit{Nectow} emphasized that the federal courts may in-
tervene when local authorities apply that legislation irrationally in particular
cases.\textsuperscript{25} Although both \textit{Euclid} and \textit{Nectow} remain good law,\textsuperscript{26} the courts

\begin{itemize}
\item \textsuperscript{16} For a critical discussion of Justice George Sutherland's conservative ideology and its
sources, see William M. Randle, \textit{Professors, Reformers, Bureaucrats, and Cronies: The Players in
Euclid v. Ambler, in ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP 31, 49-54 (Charles M. Haar
& Jerold S. Kayden eds., 1989) [hereinafter ZONING & AM. DREAM].
\item \textsuperscript{17} \textit{Euclid}, 272 U.S. at 387-88. Cf \textit{HERBERT SPENCER, SOCIAL STATICS 200 (D. Appleton
& Co. ed. 1892) (1850) (asserting that government properly may act to repress nuisances affect-
ing neighbor's rights). Spencer's advocacy of limited government was highly influential among
the Court's conservative majority. See \textit{Lochner}, 198 U.S. at 75 (Holmes, J., dissenting) (re-
torting that "[t]he 14th Amendment does not enact Mr. Herbert Spencer's \textit{Social Statics}"); Robert
A. Williams, Jr., \textit{Euclid's Lochnerian Legacy, in ZONING & AM. DREAM, supra note 16, at
278, 282 (noting that only zoning legislation founded on common law nuisance doctrine survives
\textit{Lochner}-style judicial scrutiny, while other zoning would be struck down as redistributive).
\item \textsuperscript{18} \textit{Euclid}, 272 U.S. at 387.
\item \textsuperscript{19} Id. at 395.
\item \textsuperscript{20} 277 U.S. 183 (1928).
\item \textsuperscript{21} Id. at 186-87.
\item \textsuperscript{22} Id. at 187-88.
\item \textsuperscript{23} Id. at 186-88 (citing Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926)).
\item \textsuperscript{24} Id. at 187-89.
\item \textsuperscript{25} See Keith R. Denny, Note, \textit{That Old Due Process Magic: Growth Control and the Fed-
general applicability in light of \textit{Nectow}).
\item \textsuperscript{26} See, e.g., \textit{City of Edmonds v. Oxford House, Inc., 115 S. Ct. 1776, 1781 (1995) (citing
\textit{Euclid} to describe aim of land use restrictions); Schad v. Borough of Mount Ephraim, 452 U.S.
have taken little advantage of Nectow’s permission to rein in abuses of the zoning power.

Since the late 1930s, the Supreme Court firmly has repudiated its former practice of using substantive due process to strike down economic legislation. However, the Court has continued to apply substantive due process in some zoning cases, specifically utilizing the doctrine’s contemporary aspect as a constitutional safeguard of “fundamental” rights, especially privacy in family-related matters. For example, in Moore v. City of East Cleveland, the Court struck down a zoning ordinance that limited the occupancy of each home to a single family, where “family” was defined so narrowly as to prevent two young cousins from living with their grandmother. A plurality of four Justices held that the ordinance violated substantive due process by impermissibly impinging upon a protected liberty interest. The concurring opinion asserted that the ordinance failed even the Euclid test of rational relation to the police power. Although carefully repudiating past excesses of judicial intervention, the plurality declined to abandon substantive due process, and found that it applied when family rights were cut off at an “arbitrary boundary.”

B. Due Process for State-Created Property Rights

In recent years, the zoning-related cases considered by the Supreme Court have addressed equal protection claims, takings, and other issues.
Substantive due process protection has been extended to liberty interests in zoning cases. However, no Supreme Court case since 1928 has granted substantive due process protection to a property interest in a case of arbitrary decisionmaking in land use. The lower courts have found it necessary to infer guidance from the Court's due process jurisprudence in other property interests created under state law, such as employment and education.

The Court addressed the property interest required for due process protection in an employment context in *Board of Regents v. Roth*. In *Roth*, an assistant professor was hired for a one-year term at a state university and denied reappointment for the next year. The professor claimed a property interest, protected under the Fourteenth Amendment, in his continued employment. In the context of procedural due process, the Court held that a property interest in a desired or expected benefit must be rooted in a "legitimate claim of entitlement." Such property interests are not created or defined by the Constitution, but by state laws or other independent understandings.

The Court also has considered the property interest in public education asserted against the state by a student. In *Regents of the University of Michigan v. Ewing*, the Court held that the dismissal of a medical student was not an arbitrary decision where the state university reasonably had evaluated the student's academic deficiencies. This substantive due process case, like several others before it, did not consider the question of whether the plaintiff's state-created property interest was worthy of protection, but decided the case assuming that there was a protected right. Justice Powell's influential concurrence, however, asserted that any such property interest created by the

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40. *Id.* at 578.
41. *Id.* at 577.
42. *Id.*
44. *Id.* at 224-25.
state was not a constitutionally protected fundamental interest, but a mere contract right, subject only to procedural due process protection.47

Even when limited to undisputed fundamental rights, substantive due process remains a controversial doctrine on which the Supreme Court is bitterly divided.48 Since 1928, the Court has declined all opportunities to address directly the doctrine's application to property interests in zoning decisions. In 1995, twenty years after sidestepping the related question in Ewing,49 the Court denied certiorari in two contemporaneous zoning cases that represented a deep and mature split among the circuits.50

II. The Federal Courts at Variance on Land Use Decisions

Justice Thurgood Marshall once contended that the role of the Supreme Court "is not and should not to be sit as a zoning board of appeals."51 Some heavily burdened federal courts may have seized upon this dictum with an excess of zeal.52 With few exceptions, the federal courts appear united in their distaste for the application of substantive due process to zoning cases. However, the circuits have differed widely in their approaches to two important inquiries left open by the Supreme Court: (1) the nature of the property interest required to state a substantive due process claim, and (2) the standard by which a zoning decision may be considered arbitrary and capricious. Some courts focus their attention on only one of these questions by establishing a test so strict that the other question is rarely, if ever, reached.53

47. Id. at 229-30. But see Levinson, supra note 10, at 331-32 (discussing problematic reasoning in Justice Powell's Ewing concurrence).

48. For example, in Albright v. Oliver, 114 S. Ct. 807 (1994), the Court produced six opinions, but no majority. Id. at 812-14 (finding no substantive due process violation in § 1983 claim based on arrest without probable cause). See also United States v. Carlton, 114 S. Ct. 2018, 2026-27 (1994) (Scalia, J., concurring in judgment) (labeling substantive due process "an oxymoron," and decrying Court's "picking and choosing" in determining "so-called fundamental rights"); Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 465 (7th Cir. 1988) (concept is "tenacious but embattled").

49. Ewing, 474 U.S. at 223.


52. Since 1985, over 40 federal court opinions have quoted or closely paraphrased Justice Marshall's gatekeeping suggestion. E.g., Pomponio v. Fauquier County Bd. of Sup'ts, 21 F.3d 1319, 1327 (4th Cir.), cert. denied, 115 S. Ct. 192 (1994); Corn v. City of Lauderdale Lakes, 997 F.2d 1369, 1389 (11th Cir. 1993), cert. denied, 114 S. Ct. 1400 (1994); Nestor Colon Medina & Sucesores, Inc. v. Custodio, 964 F.2d 32, 46 (1st Cir. 1992); Chesterfield Dev. Corp. v. City of Chesterfield, 963 F.2d 1102, 1104 (8th Cir. 1992); RRI Realty Corp. v. Incorporated Village of Southampton, 870 F.2d 911, 914 (2d Cir.), cert. denied, 493 U.S. 893 (1989).

53. The Tenth Circuit has admitted to uncertainty about the interest required for substantive due process guarantees and has proceeded directly to the second phase of the inquiry. Ja-
A. Property Interest

The first prong of the substantive due process inquiry requires courts to determine whether a protected property interest exists. This section discusses three of the approaches to this determination in the context of land use cases: (1) the hands-off approach adopted by the First and Seventh Circuits; (2) the strict entitlement test adopted by a majority of the federal courts; and (3) the unique analysis adopted by the Third Circuit.

1. Deference to the Conduct of Local Politics: The First and Seventh Circuits' Approach

Both the First and Seventh Circuits have failed to find a property interest that is either necessary or sufficient to state a substantive due process claim in land use cases. These courts have declined to become involved in what the First Circuit has characterized as "political disputes better left to local governments."54

The Seventh Circuit views land use cases as inherently political and has pointed out that in zoning disputes, politicians commonly yield to pressure from special interests.55 Such capitulation did not impress the court as necessarily arbitrary or irrational, but merely as characteristic of democracy at work.56 Moreover, the Seventh Circuit has prevented many developers from bringing substantive due process claims by holding that corporations may not claim substantive due process protection because corporations have no "fundamental" rights.57

54. Nestor Colon, 964 F.2d at 46.
55. Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 467 (7th Cir. 1988). In Coniston, village trustees allegedly violated state law by turning down a developer's site plan which conformed with all applicable regulations. Id. at 462. The trustees gave no reason for the denial. Id. at 463. The court, speaking through then-Circuit Judge Posner, characterized this case as "so remote from a plausible violation of substantive due process" that there was no need to confront the property interest question. Id. at 466.
56. See id. at 467 (noting that Constitution permits government to yield to "selfish opposition") (citing Rogin v. Bensalem Township, 616 F.2d 680, 687-88 (3d Cir. 1980)).
The First Circuit has accepted the Seventh Circuit’s characterization of zoning as primarily political in nature. Therefore, the First Circuit consistently has rejected substantive due process claims in land use cases, reserving the possibility only for “truly horrendous situations.” In doing so, the court noted that allegations of injustice in planning disputes typically involve matters of routine local politics, better dealt with by state and local tribunals.

2. Legitimate Claim of Entitlement Test: The Majority View

The Second, Fourth, and Sixth Circuits exemplify the prevailing analytical trend by finding a constitutionally protected property interest only where a strict entitlement test is met. These courts apply the Supreme Court’s analysis in Roth, which requires a plaintiff to demonstrate a “legitimate claim of entitlement” to a benefit in order to establish a constitutionally protected property interest. Roth requires the legitimacy of such a claim to be demonstrated by reference to state laws or other understandings independent of the Constitution. For example, to determine whether there is a protected interest in a land use permit, the courts look to state or local law. If an authority has discretion to deny the permit, there can be no “legitimate claim of entitlement.” The court will not estimate the likelihood of a specific decision where discretion exists at the state or local level.

3. Explicit Protection for a Property Interest in Land Ownership: The Third Circuit’s Approach

Contrary to the prevailing trend, the Third Circuit recently has taken a uniquely protective view of property rights. In DeBlasio v. Zoning Board of Adjustment, the court rejected a zoning board’s argument that a landowner must demonstrate a “legitimate claim of entitlement” to a zoning variance

58. Nestor Colon, 964 F.2d at 46 (citing Coniston, 844 F.2d at 467). In Nestor Colon, a planning board allegedly denied special use permits to a landowner in retaliation for political opposition. Id. at 36.
59. Licari v. Ferruzzi, 22 F.3d 344, 350 (1st Cir. 1994) (quoting Nestor Colon, 964 F.2d at 45).
60. Nestor Colon, 964 F.2d at 45-46.
63. Id. at 577.
64. Id.
65. Gardner, 969 F.2d at 68 (citing Roth, 408 U.S. at 577).
66. Zahra, 48 F.3d at 680.
67. Gardner, 969 F.2d at 68 (citing RRI Realty Corp. v. Incorporated Village of Southampton, 870 F.2d 911, 918 (2d Cir.), cert. denied, 493 U.S. 893 (1989)).
68. 53 F.3d 592 (3d Cir.), cert. denied, 116 S. Ct. 352 (1995). In DeBlasio, a landowner alleged that he arbitrarily was denied a zoning variance, and presented evidence of the zoning board’s bias to support his claim. Id. at 593.
denied by the government.69 Instead, the Third Circuit established that the ownership of land, by itself, is a property interest worthy of constitutional protection from arbitrary zoning decisions.70 By recognizing the ownership interest as protected, the court eliminated a significant barrier to substantive due process claims in land use cases.71 In DeBlasio, the Third Circuit embraced an expansive view of civil liberties by holding that a landowner’s full use and enjoyment of property may not be infringed arbitrarily.72

B. Arbitrary Decisionmaking

The second prong of the substantive due process inquiry requires courts to determine whether the government’s action or decision was sufficiently arbitrary or wrongful to constitute a violation. Such an inquiry appears at first blush to be a purely procedural matter. However, procedural due process merely requires the state to provide, where appropriate, notice and a hearing before the deprivation of a protected interest.73 In contrast, substantive due process forbids “certain arbitrary, wrongful government actions ‘regardless of the fairness of the procedures used to implement them.’”74 Some courts require a protected property interest to be established before reaching this inquiry,75 while others have so deferential a test for arbitrariness that they freely assume the property interest.76

In defining the term “arbitrary” in the context of a zoning decision, the circuits have differed considerably as to the required standard. There are three distinctive tests that have emerged as the principal trends in the courts’
definition of “arbitrary”: (1) a conscience-shocking requirement, (2) defer-
ence under any conceivable rational basis, and (3) meaningful analysis under
the rational basis test. There is substantial overlap, and many circuits have
utilized more than one approach, because courts also have stressed different
factors on a case-by-case basis. Therefore, the following overview does not
systematically categorize the approach of each circuit, but attempts to classify
the leading trends.

1. Conscience-Shocking Requirement

The First Circuit has crafted a particularly stringent test, requiring con-
duct by the decisionmaker that is not merely irrational or arbitrary, but
“shocking or violative of universal standards of decency.” The Sixth Circuit
has adopted a similar “shocks the conscience” standard. The Sixth Circuit
also gave no preclusive value to a state court’s determination that a zoning
decision was arbitrary when made without any supporting evidence. The
court held that, under the federal scope of review, nothing more than a ra-
tional basis for the zoning decision was required.

The Seventh Circuit’s standard of arbitrary conduct, for substantive due
process purposes, is defined as “invidious or irrational” government action.
There is uncertainty, however, as to what the court would consider invidious
or irrational, because the court’s only example of “invidious” zoning action is
a decision based on color or race.

2. Deference Under Any Conceivable Rational Basis

The majority of federal courts simply will not interfere with a local zon-
ing decision, as long as the zoning body could have had any legitimate reason
for its decision. In the Seventh Circuit, no action will be considered “irra-
tional” if the court finds even a hypothetically legitimate reason to support
it. The clear trend is toward deference to the zoning body under any con-
ceivable rational basis.

77. Licari v. Ferruzzi, 22 F.3d 344, 350 (1st Cir. 1994) (quoting Amsden v. Moran, 904 F.2d
748, 757 (1st Cir. 1990)).
78. Pearson v. City of Grand Blanc, 961 F.2d 1211, 1222 (6th Cir. 1991) (local zoning action
violates substantive due process only if it “shocks the conscience” by extreme irrationality)
(quoting G.M. Eng’rs & Assoc. v. West Bloomfield Township, 922 F.2d 328, 332 (6th Cir.
1990)).
79. Triomphe Investors v. City of Northwood, 49 F.3d 198, 201-02 (6th Cir.), cert. denied,
116 S. Ct. 70 (1995). In Triomphe, a condominium developer was denied a special use permit
after fulfilling all zoning requirements. Id. at 200.
80. Id. at 202.
81. Pro-Eco, Inc. v. Board of Comm’rs, 57 F.3d 505, 514 (7th Cir.) (citing Coniston Corp. v.
82. Id.; Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 467 (7th Cir. 1988)
(citing Burrell v. City of Kankakee, 815 F.2d 1127, 1129 (7th Cir. 1987)).
83. Pro-Eco, 57 F.3d at 514.
84. For example, the Ninth Circuit has moved to a more deferential standard in recent
cases. Compare Dodd v. Hood River County, 59 F.3d 852, 864 (9th Cir. 1995) (applying rational
Under this approach, even a blatant and willful violation of state law does not constitute arbitrary conduct, provided some rational basis for the decision can be identified. Additionally, the Fourth Circuit noted that such violations should be challenged in state courts, as the availability of state remedies precluded a federal substantive due process claim.

Some courts have applied a more limited rational basis standard when challenging an ordinance as interpreted or applied by a quasi-judicial body, rather than on its face as a legislative enactment. The Tenth and Eleventh Circuits both allow any hypothetical rational basis to support quasi-legislative decisions. However, if a zoning decision is quasi-judicial, the Tenth Circuit makes the distinction that the articulated reason must bear a rational relationship to a legitimate government objective. Similarly, in the Eleventh Circuit, an adjudicative zoning body need only offer a "plausible, arguably legitimate purpose" for its decision, unless a plaintiff can demonstrate that the zoning body could not possibly have relied upon the stated purpose.

The Fifth Circuit has applied a similar test even to legislative actions.
3. Meaningful Analysis Under the Rational Basis Test

While under the standard applied in the preceding analysis a court may invent any conceivable rationale to justify a zoning decision, some courts have undertaken a meaningful evaluation of the evidence. These courts seek to ensure the existence of a rational basis for state action. The rational basis test is often understood to require little analysis or evaluation of evidence, because a court may invent any conceivable or plausible rationale to justify a zoning decision.92 Nevertheless, some courts have undertaken meaningful evaluation of evidence to ensure the existence of a rational basis for state action.

The Second Circuit rarely has reached an “arbitrary and capricious” inquiry. Where a legitimate claim of entitlement exists, however, trial courts in the Second Circuit have undertaken meaningful evaluation of the evidence. The court suggested that a finder of fact reasonably could conclude that there is no rational basis for a zoning decision that is rendered without authority of state law.93 The Second Circuit also upheld a jury verdict on a substantive due process claim where a town official acted with a wrongful motive in attaching unreasonable conditions to a permit.94

In the Eighth Circuit, a contested government action must be “truly irrational,” which the court deems a higher standard than merely “arbitrary, capricious, or in violation of state law.”95 However, this test may not be substantially more difficult to meet, because the court recently suggested that imposing an unreasonable economic burden on a developer may constitute an irrational government action.96

III. SOME RECENT COURTS’ ANALYSES IN LAND USE DISPUTES

The United States Courts of Appeals have demonstrated very different approaches to the principal questions left open by the Supreme Court in sub-

93. Brady v. Town of Colchester, 863 F.2d 205, 212-13 (2d Cir. 1988). In Brady, the owners of a commercial building alleged that their permits had been revoked due to “impermissible political animus.” Id. at 215-16.
94. Walz v. Town of Smithtown, 46 F.3d 162, 167-69 (2d Cir. 1995).
95. Anderson v. Douglas County, 4 F.3d 574, 577 (8th Cir. 1993) (quoting Chesterfield Dev. Corp. v. City of Chesterfield, 963 F.2d 1102, 1104 (8th Cir. 1992) (quoting Lemke v. Cass County, 846 F.2d 469, 470-72 (8th Cir. 1987) (en banc) (Arnold J., concurring))). To illustrate the "truly irrational," the court gives the example of an ordinance applying only to persons with initials in the first half of the alphabet. Id. (citing Chesterfield, 963 F.2d at 1104).
96. Christopher Lake Dev. Co. v. St. Louis County, 35 F.3d 1269, 1274 (8th Cir. 1994). In Christopher Lake, a county forced the first developer in a watershed area to bear the full cost of a new drainage system for the entire area as a condition for approval of development plans. Id. at 1273. The court criticized this condition as an unfair allocation of the burden for a public benefit. Id. at 1275 (citing Dolan v. City of Tigard, 114 S. Ct. 2309, 2322 (1994)). Finding summary judgment inappropriate, the court remanded the case for a hearing on the merits. Id.
stantive due process claims for land use disputes. This part of the Comment examines three recent decisions that exemplify the approaches taken by the Seventh, Second, and Third Circuits.

A. The Seventh Circuit's Analysis: Substantive Due Process Land Use Disputes Have No Place in Federal Court

In Gosnell v. City of Troy, the United States Court of Appeals for the Seventh Circuit reiterated its long-standing assertion that substantive due process provides no constitutional protection against local government interference with land use. The Gosnells began construction of a residential subdivision in 1983. Due to drainage problems, an unplanned lagoon developed among their new homes. The Troy City Council took action to prevent further building and denied water service to the new homes until the lagoon was filled. Despite an apparent state court resolution, twelve years of litigation followed on the theory that the city's action caused the Gosnells' eventual financial downfall. The Gosnells sought damages under § 1983, alleging that the city's actions deprived them of substantive due process.

The Seventh Circuit commenced its analysis by referring to substantive due process as "an oxymoron," pointing out that the doctrine was abolished with the end of the Lochner era. The court distinguished economic substantive due process from "a new doctrine" sharing the same name, which "insulates fundamental rights from governmental intrusion." The court praised the Gosnells for conceding that no fundamental right was at issue. Creating a test for "whimsical state action," the court found that the asserted justifications of the city fell within the conceivable legitimate goals of local government in that "they do not lead us to break out giggling." The court completed its substantive due process analysis by reiterating the

97. 59 F.3d 654 (7th Cir. 1995).
98. Id. at 658 (citing Schroeder v. Chicago, 927 F.2d 957, 961 (7th Cir. 1991)).
99. Id. at 655.
100. Id.
101. Id. at 656. The state court granted the Gosnells the relief they requested and the homes became occupied, despite the continued presence of the lagoon on the property. Id.
102. Id. at 657. A procedural due process claim also was filed, and the defendant was granted summary judgment on all due process claims in the United States District Court for the Northern District of Illinois. Id.
103. Id. (citing Lochner v. New York, 198 U.S. 45 (1905)).
104. Id.
105. Id.
106. Id. at 658 (pointing out that the city's interpretation of state law need not be correct under the Constitution). Judge Easterbrook's dry humor, perhaps tinged with annoyance, may be explained by reference to two of his then-recent opinions in which he addressed similar issues. Mid-American Waste Sys., Inc. v. City of Gary, 49 F.3d 286, 288 (7th Cir. 1995) (involving landfill operator who brought a § 1983 claim against city for interference with air rights); River Park, Inc. v. City of Highland Park, 23 F.3d 164, 165 (7th Cir. 1994) (involving property owner who brought a § 1983 claim for procedural due process violation because of delay in development of housing on golf course). In River Park, Judge Easterbrook despised that his "message,
point that “developers cannot move land-use disputes to federal court by crying ‘substantive due process.’ That doctrine is not ‘a blanket protection against unjustifiable interferences with property. That way *Lochner* lies.”

The Seventh Circuit urged the parties to conclude their dispute in state court.

The court pointed out that state action that deprives property of its value may be challenged under the takings clause or under the rational basis standard in an equal protection claim, neither of which was alleged in this case. In either case, a municipality may be required to pay compensation or damages to a landowner, but it is permitted to act.

In light of the court's findings under the substantive due process claim, it is doubtful that these approaches would have been successful.

**B. The Second Circuit's Analysis: Only a Legitimate Claim of Entitlement Constitutes a Protected Property Interest**

In *Walz v. Town of Smithtown*, the United States Court of Appeals for the Second Circuit applied the “legitimate claim of entitlement” test to find a protected property interest in a permit that already had been granted but unilaterally was revoked by a town official acting with an improper motive. At the trial level, a jury found that the official acted with a wrongful motive in attaching unreasonable conditions to the permit. The court upheld the jury's award of compensatory and punitive damages on a substantive due process claim.

The Walz family home had been supplied with water from a well, but on New Year's Day, 1992, their well was shut down. The Walzes made an emergency application to connect their home to the public water service. On January 17, James Dowling, the town's Superintendent of Highways, signed the permit needed to excavate the street in front of the Walz home. Dowling phoned Mrs. Walz and demanded, as a condition for water
service, that the family give the town a fifteen foot wide strip of their land for use in widening the road.119

In March, the Walzes sought an order from the New York Supreme Court to compel Dowling to issue the excavation permit.120 Dowling then issued a permit with fees of over $2,000 and unusual conditions, which the state court held unreasonable.121 On April 24, Dowling finally complied by issuing an excavation permit for the standard $35 fee.122

The Walzes filed a § 1983 action for damages in the United States District Court for the Eastern District of New York, alleging that Dowling's conduct violated their right to substantive due process.123 The Second Circuit upheld a jury verdict in favor of the Walz family.124

First, the Second Circuit considered the existence of a protected property right.125 The court did not focus on the fact that the permit had been granted and subsequently revoked. Instead, the court's analysis focused on whether the Walzes demonstrated a "clear entitlement to the approval" of the permit, specifically considering the degree of discretion possessed by the granting authority.126 The court required "either a certainty or a very strong likelihood that the application would have been granted" in the absence of the alleged misconduct.127 In determining the amount of discretion it should attribute to Dowling, the court examined the language of the controlling statute. It found that an excavation permit must be granted as long as the application provided all the required information.128 Because the law provided no discretion for Dowling to withhold the permit, the Second Circuit held that the Walzes possessed a property right in an excavation permit.129

Second, the court turned to the question of whether that property right was protected by substantive due process130 by applying an earlier Second Circuit case, Brady v. Town of Colchester.131 In Brady, the Second Circuit established that where the government acted beyond its authority in denying a permit, a claim of entitlement was established for substantive due process

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119. Id. The Walzes refused, and Dowling left the next day for a four-week vacation. Id. The Water Authority confirmed that Dowling knew the Walz family had been without heat and water "since before the holidays." Id.
120. Id.
121. Id.
122. Id. The Walzes were connected to the water main on April 28, 1992. Id.
123. Id.
124. Id. at 164.
125. Id. at 167-68.
126. Id. at 168.
127. Id. (quoting Yale Auto Parts, Inc. v. Johnson, 758 F.2d 54, 59 (2d Cir. 1985)). The Walz court also noted that the due process claim would be defeated if there were any non-arbitrary grounds upon which to deny the permit. Id. (citing RRI Realty Corp. v. Incorporated Village of Southampton, 870 F.2d 911, 918 (2d Cir.), cert. denied, 493 U.S. 893 (1989)).
128. Id. (citing SMITHTOWN, N.Y., CODE ch 245. art. IV, § 245-16).
129. Id.
130. Id.
131. 863 F.2d 205 (2d Cir. 1988).
purposes. Applying Brady to the facts in Walz, the court concluded that the Walzes "surely had a right not to be compelled to convey some of their land in order to obtain utility service." The court emphasized the point by likening Dowling's conduct to an "out-and-out plan of extortion."

In Walz, the Second Circuit established that where a protected property interest was established as a matter of law, a jury's factual findings of improper motive and unreasonable conditions permissibly define a violation of substantive due process.

C. The Third Circuit's Analysis: Strong Constitutional Protection for Property Rights

In DeBlasio v. Zoning Board of Adjustment, the United States Court of Appeals for the Third Circuit held that ownership of land is a property interest worthy of substantive due process protection under the Fourteenth Amendment. The court rejected a requirement that the landowner prove a "legitimate claim of entitlement" to the desired land use, which would establish a protected property interest in the benefit sought from the zoning authority. Instead, the court recognized a broader "right to be free from arbitrary and capricious government action affecting [a landowner's] interest in use and enjoyment of property."

In 1974, Alfred DeBlasio purchased a property that was zoned for residential use, but had been exempted for a pre-existing nonconforming use as an auto body repair shop. In 1979, DeBlasio leased the property to a small battery distribution business, which grew substantially over the following ten years. In response to a neighbor's complaint, the local zoning officer found that the battery business was an expansion of the pre-existing nonconforming use, in violation of the zoning ordinance.

Werner Hoff, the secretary of the Zoning Board of Adjustment for the Township of West Amwell ("ZBA"), held a financial interest in a parcel of

132. Id. at 215-16. In Brady, local authorities compelled the owner of a building to seek a permit authorizing its existing commercial use when the locality argued that the area was zoned residential. Id. at 208. The Second Circuit remanded the case for a factual determination of whether the local authority was acting beyond its authority, concluding that its violation of state law would establish a protected property interest for substantive due process. Id. at 216.
133. Walz, 46 F.3d at 169.
134. Id. (quoting Dolan v. City of Tigard, 114 S. Ct. 2309, 2317 (1994)) (finding extortion where a permit condition lacks essential nexus with legitimate state interest).
135. Id. at 600-01 & n.1 (establishing violation through jury interrogatories).
137. Id. at 600-01.
138. Id. at 600 n.9.
139. Id. at 601.
140. Id. at 594.
142. DeBlasio, 53 F.3d at 595.
property owned by his son.\textsuperscript{143} In 1988, Hoff had approached DeBlasio’s tenant with an informal proposal to rent or sell his son’s property, which would not present the zoning difficulties of DeBlasio’s property.\textsuperscript{144} When the ZBA reviewed DeBlasio’s case in June, 1990, Hoff chose not to participate in the hearing in an attempt to avoid the appearance of a conflict of interest.\textsuperscript{145} However, on DeBlasio’s subsequent appeal and request for a variance, Hoff fully participated in the proceedings, having decided that there was no further appearance of a conflict of interest, despite the fact that one of his sons still owned the property offered to DeBlasio’s tenant and Hoff still maintained a mortgage on that property.\textsuperscript{146} The ZBA formally denied DeBlasio’s request for a variance; Hoff voted against the request.\textsuperscript{147} DeBlasio brought suit in the United States District Court for the District of New Jersey, alleging violations of his Fourteenth Amendment rights to substantive and procedural due process.\textsuperscript{148} On appeal, a divided panel of the Third Circuit reversed the district court’s grant of summary judgment for the defendants on the substantive due process violation.\textsuperscript{149}

The Third Circuit first sought to determine whether a substantive due process claim existed. The court suggested that a property interest must be “fundamental” to be worthy of the implicit protection of the Constitution.\textsuperscript{150} The court affirmed that a property interest of “a particular quality” must be infringed upon to state a substantive due process claim,\textsuperscript{151} and that such interests are created and defined under state and local law.\textsuperscript{152}

The court concluded that “ownership is a property interest worthy of substantive due process protection... Indeed, one would be hard-pressed to find a property interest more worthy of substantive due process protection than ownership.”\textsuperscript{153} To support this conclusion, the court relied heavily upon

\begin{itemize}
  \item\textsuperscript{143} The Hoff property was owned at various times by two sons of Werner Hoff. Hoff’s younger son operated an unsuccessful business on the property, and mortgaged the property to Hoff and the older son in early 1989. \textit{Id.} at 594-95. The Hoff property and the DeBlasio property contained the only two quonset huts (prefabricated semi-cylindrical metal buildings) in the Township of West Amwell. \textit{Id.} at 603 (McKelvie, J., dissenting). \textit{See Petition for Writ of Certiorari at 21 \\& n.6, DeBlasio (No. 95-163) (contending that Third Circuit has taken “an ivory-tower approach to a quonset-hut case”).}
  \item\textsuperscript{144} \textit{DeBlasio}, 53 F.3d at 595.
  \item\textsuperscript{145} \textit{Id.} at 880. Although Hoff did not participate in the decision of the Zoning Board, he attended the meeting and took the minutes in his role as secretary. \textit{Id.} at 595.
  \item\textsuperscript{146} \textit{Id.} at 596. Hoff claimed that there was no further appearance of a conflict of interest after his older son announced an intention to purchase the property from the younger son, thereby resolving the younger son’s financial difficulties related to the property. The sale of the property actually was not consummated until December, 1991, more than a year later. \textit{Id.} at 595. The property remained unoccupied at the time of the ZBA’s decisions. \textit{Id.} at 601.
  \item\textsuperscript{147} \textit{Id.} at 596.
  \item\textsuperscript{148} \textit{Id.}
  \item\textsuperscript{149} \textit{Id.} at 602.
  \item\textsuperscript{150} \textit{Id.} at 599.
  \item\textsuperscript{151} \textit{Id.} at 600.
  \item\textsuperscript{152} \textit{Id.} at 600 \\& n.8 (citing Acierno v. Cloutier, 40 F.3d 597, 616 (3d Cir. 1994) (en banc) (quoting Board of Regents v. Roth, 408 U.S. 564, 577 (1972))).
  \item\textsuperscript{153} \textit{Id.} at 600-01 (citation omitted).
\end{itemize}
Bello v. Walker, in which the landowning plaintiffs were able to state a substantive due process claim with no discussion by the court of whether they possessed a property interest worthy of protection. Because Bello and subsequent cases implicitly found the plaintiff possessed a protected property interest, the court found it consistent to hold explicitly that ownership is a protected property interest for substantive due process purposes.

The court next found that there was a genuine issue of material fact as to whether Hoff's possible improper interference actually influenced the ZBA's decision to deny DeBlasio's request for a use variance. The court held that under Bello, DeBlasio's allegations, if proven, would establish an "arbitrary and capricious government action affecting his interest in use and enjoyment of property." The court, weighing the evidence, held that the proffered evidence was sufficient to withstand the defendant's motion for summary judgment.

In his dissenting opinion, District Judge McKelvie argued that the property interest implicitly protected under Bello was not ownership of the land, but the apparent right to a building permit. To determine which property interests are protected by substantive due process, Judge McKelvie cited language adopting the Supreme Court's Roth standard, which focused not on

154. 840 F.2d 1124 (3d Cir.), cert. denied, 488 U.S. 851 (1988). In Bello, a developer alleged that he was denied a building permit due to pressure on a zoning officer from town council members who were motivated by personal and political animosity. Id. at 1127. The court found merit in the developer's substantive due process claim, holding that "the deliberate and arbitrary abuse of government power violates an individual's right to substantive due process." Id., at 1129.

155. DeBlasio, 53 F.3d at 600.

156. E.g., Neiderhiser v. Borough of Berwick, 840 F.2d 213, 214 (3d Cir.) (involving a video store operator who alleged arbitrary denial of zoning exemption stated substantive due process claim), cert. denied, 488 U.S. 822 (1988); Ersek v. Township of Springfield, 822 F. Supp. 218, 221 n.3 (E.D. Pa. 1993) (interpreting Bello consistently with DeBlasio). Because a property interest less than ownership was sufficient to state a claim in Neiderhiser, the DeBlasio court reasoned that a property owner, a fortiori, has a protected property interest as well. DeBlasio, 53 F.3d at 601 n.10.

157. Id. at 600-01.

158. Id. at 601.

159. Bello, 840 F.2d at 1129-30 (finding that evidence supported allegation that council members, for personal or partisan reasons, improperly interfered with building permit process).

160. DeBlasio, 53 F.3d at 601.

161. Id. at 602.

162. Id. at 604 (McKelvie, J., dissenting). Similarly, the dissent read Neiderhiser to protect implicitly an interest in the right to a special zoning exception after 30 years of prior non-conforming use, rather than the owner or lessor's property interest in the land. Id. (citing Neiderhiser v. Borough of Berwick, 840 F.2d 213, 214 (3d Cir.), cert. denied, 488 U.S. 822 (1988)).

163. Id. (citing Acierno v. Cloutier, 40 F.3d 597, 616 (3d Cir. 1994) (en banc) (quoting Board of Regents v. Roth, 408 U.S. 564, 577 (1972))). The DeBlasio majority pointed out that the substantive due process issue was not considered by the Acierno court sitting en banc, but only by the panel. Id. at 600 n.7.
the interest already possessed, but on the additional benefit sought from the state.164

The dissent further claimed that the majority’s standard was erroneous because it “set the threshold so low as to eradicate all utility” of the standard as a barrier to federal jurisdiction.165 Judge McKelvie professed that because any landowner need only allege arbitrary and deliberate abuse of government power to appeal a routine zoning decision to a federal court, DeBlasio undermined and trivialized the role of the federal courts.166 Finally, Judge McKelvie asserted that the evidence of improper motive or unlawful criteria for the ZBA’s decision was not sufficient to defeat the district court’s grant of summary judgment.167 Accordingly, Judge McKelvie concluded in dissent that the district court’s grant of summary judgment on the violation of substantive due process should have been affirmed.168

IV. PERSONAL ANALYSIS

In land use cases involving substantive due process, two important inquiries left open by the Supreme Court have given rise to significant disputes among the circuits. First, this section addresses the nature of the property interest required to state a substantive due process claim, advocating strong constitutional protection of landowners’ property rights. Second, this section addresses the standard by which a zoning decision may be considered arbitrary and capricious, and urges the courts to undertake meaningful analysis of the evidence in such claims.

A. Federal Courts Should Continue to Provide Leadership in Civil Rights: The Interest in Land Ownership Must Be Constitutionally Protected

The Framers of the Fourteenth Amendment, equating due process with the protection of natural rights, intended to provide a broad substantive guarantee of natural rights against the states.169 Accordingly, the Supreme

164. Id. at 604 (McKelvie, J., dissenting) (citing RRI Realty Corp. v. Incorporated Village of Southampton, 870 F.2d 911, 915 (2d Cir.), cert. denied, 493 U.S. 893 (1989)). Judge McKelvie identified and rejected two possible property interests. Undertaking an entitlement analysis of DeBlasio’s right to continue a nonconforming use of the property, the dissent required “either a certainty or a very strong likelihood” that the outcome would have differed in the absence of the alleged due process violation. Id. at 606 (McKelvie, J., dissenting) (citing Yale Auto Parts, Inc. v. Johnson, 758 F.2d 54, 59 (2d Cir. 1985)). Applying the entitlement analysis to DeBlasio’s right to approval of a use variance, the dissent would find an entitlement only when the issuing agency “lacks all discretion to deny issuance of the permit or approval.” Id. (quoting Gardner v. City of Baltimore Mayor & City Council, 969 F.2d 63, 68 (4th Cir. 1992)).

165. Id. at 605 (McKelvie, J., dissenting).

166. See id. (citing Village of Belle Terre v. Boraas, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting)).

167. Id. at 607 (McKelvie, J., dissenting).

168. Id. at 608-09 (McKelvie, J., dissenting).

Court has taken an expansive approach in defining liberty interests as fundamental for due process purposes. However, the use of substantive due process to protect economic interests from state interference is widely regarded as an infamous part of the Court’s history. In modern times, the selection of specific property interests that may be protected as fundamental has been the subject of much confusion among the lower courts. The Supreme Court cannot continue to ignore the remarkable “lack of uniformity among the circuits in dealing with zoning cases of the ‘arbitrary and capricious substantive due process’ category” for much longer. As a result, the lifespan of the Third Circuit’s DeBlasio analysis of protected property interests may be regrettabl brief.

In broadly defining the property interest at stake in DeBlasio v. Zoning Board of Adjustment, the Third Circuit made a principled decision that existing precedents neither compelled nor precluded. Declining to follow other circuits in constraining substantive due process for land use cases, the Third Circuit charted an independent course that remains faithful to the few relevant precedents of the Supreme Court.

In DeBlasio, the Third Circuit held that ownership of land is akin to a fundamental interest, and as such is sufficient to trigger substantive due process protection when the landowner alleges that an arbitrary or irrational governmental decision limits the owner’s intended use of the property. The court apparently was concerned with protecting individual rights against arbitrary, improperly motivated, or biased acts of bureaucrats and regulators. Therefore, the court declined to construe the landowner’s property interest


170. The word “liberty” in the Due Process Clause has been deemed to incorporate against the states most of the interests enumerated in the Bill of Rights, as well as the non-enumerated right to privacy. Levinson, supra note 10, at 313-14. However, the interest in gainful employment, considered a liberty interest in the Lochner era, generally is regarded as a property interest by modern courts. Id. at 327-28. Compare Lochner v. New York, 198 U.S. 45, 53 (1905) (categorizing bakers’ employment as liberty interest in freedom to contract), overruled by West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391-400 (1937) with Board of Regents v. Roth, 408 U.S. 564, 575 (1972) (rejecting argument that university’s failure to renew teaching contract is deprivation of liberty interest).

171. See supra note 15 for a discussion of Lochner and the era symbolized by that case. However, some modern commentators defend a presumption of liberty that would legitimate “meaningful constitutional scrutiny” of the sort employed by the Lochner court. See Richard A. Epstein, Takings 128-29 (1985) (defending intermediate standard of review like that of Lochner and suggesting courts should defer only where legislature is “likely to be more accurate”); Randy E. Barnett, Getting Normative: The Role of Natural Rights in Constitutional Adjudication, 12 Const. Commentary 93, 114-15 (1995) (arguing that legislative and executive actions merit no blanket presumption of constitutionality or good faith, and that government should bear the reasonable burden of justifying an infringement upon liberty).

172. Levinson, supra note 10, at 345-51 (reviewing decisions showing confusion as to proper scope of substantive due process for property rights).


as a contingent or speculative interest in a zoning variance. The court held
that if DeBlasio could prove his allegations of improper motive, the zoning
board's decision deprived DeBlasio of a larger and more fundamental civil
right.175 This holding affirms what the Framers would have considered obvi-
ous: our civil rights include the full use and enjoyment of the property we
own, free from arbitrary or unreasonable government interference.176

The DeBlasio court stopped short of explicitly holding that the land-
owner's property interest constitutes a fundamental right. The court may
have avoided that commitment because Third Circuit precedents are silent
on the question of what constitutes a protected property interest, and there-
fore provide limited support for the DeBlasio court's holding.177 The court
read one prior case to "suggest that only fundamental property interests are
worthy of such protection."178 Instead of confirming that suggestion, the
court chose such words as "worthy" and "of a particular quality" to describe
the property interest required to state a substantive due process
claim.179 The court thereby reconciled its holding with existing precedent rather than
contradicting it.

The approach of the DeBlasio court is commendable for its recognition
of the importance of property interests. Courts that scrupulously avoid deal-
ing with zoning disputes, such as the Seventh Circuit, give far less credit to
the importance of property interests. Chief Judge Posner—no enemy to eco-
nomic interests—has described real property as "a bundle of rights . . . [that]
the state confers," arguing against federal involvement when the state wrong-
fully takes away some of those rights.180

The Seventh Circuit's approach is flawed primarily in its definition of
which rights are fundamental and which are not. A definition of fundamental
rights that includes life and liberty interests, but excludes property interests
merely because state law defines those interests, is a strained interpretation
of the text of the Fourteenth Amendment.181 If unenumerated rights, such as

175. See Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972) (rejecting dichotomy be-
tween civil rights and property rights).

176. See Siegan, supra note 1, at 31-33 (discussing importance of property rights to Fram-
ers); Mark Cordes, Policing Bias and Conflicts of Interest in Zoning Decisionmaking, 65 N.D. L.
REV. 161, 187-88 (1989) (suggesting that, based on common law origins of property interests,
zoning regulations may not abrogate rights retained by landowners). Cf. Randy E. Barnett, A
Framers' debate on non-enumeration of obvious rights, such as "to wear one's hat or go to bed
when one pleased") (quoting 1 ANNALS OF CONG. 759-60 (Joseph Gales & William Seaton eds.,
1834)).

177. For example, the Midnight Sessions court did not address the issue only because it was
waived by the government in that case. Midnight Sessions, Inc. v. City of Phila., 945 F.2d 667,

178. DeBlasio, 53 F.3d at 599 (emphasis added) (citing Reich v. Beharry, 883 F.2d 239, 244

179. Id. at 600.


181. The fact that "several items in a list share an attribute counsels in favor of interpreting
the other items as possessing that attribute as well." Beecham v. United States, 114 S. Ct. 1669,
privacy, are fundamental, a right that is expressly protected by the text of the Constitution should not be left unguarded. The Supreme Court has recognized property rights as “basic civil rights,” and has lists among the recognized rights of land ownership “the right to unrestricted use and enjoyment.” Furthermore, the universality and utility of property rights serve as independent criteria to determine that those rights are fundamental.

The approach of the Second Circuit, shared by the majority of federal courts, is that property interests in zoning cases are protected only where there is a “legitimate claim of entitlement” to a permit, use, or variance denied by the state. These courts have misapplied the Supreme Court’s test. The entitlement test properly is applied only to benefits sought from the state. The basic freedom to use one’s own property as one pleases should not be considered a benefit sought from the state. That presumption contradicts the axiom, fundamental to our nation’s founders, that civil rights do not descend from the state.

Moreover, by failing to protect the underlying property interest, the Second Circuit approach leaves property owners vulnerable to unchecked

1671 (1994). This time-honored interpretive canon is known as noscitur a sociis. Babbitt v. Sweet Home Chapter of Communities, 115 S. Ct. 2407, 2411 (1995). Applied to the Fourteenth Amendment, it suggests that property interests share the fundamental nature of life and liberty interests, and therefore merit an equal level of protection.

182. Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972) (holding that civil rights include property rights, which are personal rights in property).


187. In Roth, there was no vested interest in real or tangible property. The asserted property interest was a professor’s interest in reappointment to his teaching position after the expiration of his employment contract. Id. at 566. The professor’s interest in continued employment was a benefit sought from the state.

188. The freedom to use one’s property could also be viewed as a liberty interest. Liberty and property rights are interdependent in that a “property right” is meaningless unless it is understood as a personal right to the use and enjoyment of property. See Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972) (rejecting separation of property rights and personal liberties).

189. The Framers agreed that rights flow from the people to the government; they are guaranteed, not granted, by federal and state constitutions and laws. See, e.g., U.S. CONST. amend. IX (recognizing rights retained by people, not granted to them by government); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (recognizing “certain inalienable rights” inherent in humanity and asserting those rights against sovereign state).
The "entitlement" courts correctly recognize that burdensome regulation has become the norm. Their actions, however, promote the oppressive notion that freedom is a special benefit, to be granted or withheld at the whim of state and local government officials.

Civil libertarians and political conservatives alike have expressed their concern that government officials at all levels frequently overreach the scope of their legitimate powers. This position, far from an example of right- or left-wing extremism, is well within the mainstream of public opinion. The federal courts would be wise to constrain government's power to do arbitrary harm by adopting the protected property interest standard the Third Circuit articulated in DeBlasio. Such a decision could be grounded firmly in the Supreme Court's existing substantive due process jurisprudence. The standard is supported by the history and original meaning of due process.
since the Magna Carta,195 and by the Framers' intent to provide strong protection for individual rights in property.196

Despite principled reasons to adopt the Third Circuit's property analysis, pragmatic concerns make it inevitable that other federal courts will reject the revolutionary implications of the DeBlasio standard. The Supreme Court seems equally unlikely to expand the sphere in which substantive due process may be applied. The DeBlasio standard poses several problems, regardless of whether it is broadly applied to all land use decisions, or narrowly limited to appeals from a zoning body. For example, if a substantive due process claim could be stated for any government action that arbitrarily restricted the use of land in any way, the Third Circuit's position might have the effect of opening the federal courts to traditionally unreviewable administrative law decisions of federal and state agencies. Even if the application of the DeBlasio standard remained strictly limited to adjudicative zoning decisions, the Supreme Court likely would be reluctant to encourage the federalization of any area of law in which the state courts provide adequate remedies.197

Moreover, the opposition of the Court's conservative wing to substantive due process will continue to prevent them from adopting the doctrine as their own tool of judicial activism.198 Substantive due process served a conservative economic agenda during the Lochner era, but has been applied to advance a generally liberal agenda in modern decisions regarding privacy and criminal procedure.199 Some conservative jurists have responded by repudi-
ating substantive due process as inherently incompatible with the overriding principle of judicial restraint.200

However, courts that have been generous in recognizing protected property interests have neither failed to exercise judicial self-restraint nor ignored concerns of judicial economy.201 In fact, these courts have been correspondingly deferential to state actors in evaluating arbitrary government misconduct. They have not abused their power by substituting their own judgment for that of the legislature, nor have they been subject to a flood of meritless cases.202

Therefore, Justice Marshall’s concern about expanding the Supreme Court’s role so that it would function as a zoning board of appeals is unwarranted,203 because the federal courts that have elected to protect property interests through substantive due process have not, as Justice Marshall feared, been overwhelmed by a crushing docket of zoning cases.204 Moreover, and most importantly, the federal courts must enforce the guarantees of the Fourteenth Amendment205 even if such enforcement may result in a heavier caseload.

If the courts use substantive due process to protect the full panoply of liberty and property rights secured by the Fourteenth Amendment, they can focus instead on a more appropriate inquiry. Rather than limiting the scope of protected rights, they may evaluate the appropriate level of arbitrary government conduct that triggers substantive due process protection. The next section addresses this question.

B. Due Process Requires Meaningful Protection from Arbitrary Government Action

The essential purpose of due process is “to secure the individual from the arbitrary exercise of the powers of government.”206 When state action

200. See Carlton, 114 S. Ct. at 2027 (Scalia, J., joined by Thomas, J., concurring in judgment) (inveighing against substantive due process); Bork, supra note 15, at 44 (characterizing substantive due process as judicial usurpation of legislative power). However, judicial restraint is an inappropriate response when reviewing administrative or adjudicative decisions, and not legislative acts. See supra notes 240-53 and accompanying text (discussing need for lower level of deference in review of quasi-judicial decisions).


203. See supra notes 51-52 and accompanying text (discussing dictum that Supreme Court’s role “is not and should not be to sit as a zoning board of appeals”).

204. DeBlasio, 53 F.3d at 601 n.11.

205. For a discussion of the Fourteenth Amendment’s protection of property interests, see supra notes 181-84 and accompanying text.

arbitrarily deprives a person of a protected interest, the ordinary citizen might naively expect the protection of the Fourteenth Amendment. That protection is by no means assured. As long as the state reaches its arbitrary or biased decision by procedurally adequate means, the defense of even a protected interest must rely on the poorly defined parameters of substantive due process.

The courts have differed widely in their definition of "arbitrary" in the land use context. Some courts require the decision to be so wrongful as to "shock the conscience," a standard that bars practically every zoning claim. Many courts require the lack of any conceivable rational relationship between the decision and a legitimate government objective. The most sympathetic courts would characterize as arbitrary a decision tainted by improper motive, personal animus, or partisan bias.

1. Wrongful Conduct

Substantive due process bars certain government actions that are either arbitrary or wrongful. Government actions that are improperly motivated by factors such as political bias, personal animus, and conflicts of interest may meet the standard of wrongfulness required by substantive due process. Such factors may not necessarily shock the conscience, as the First Circuit requires. Nevertheless, there are sound reasons for preventing improperly motivated zoning decisions, such as the threat of distorted or inaccurate judgment by biased officials. Instances of bias or improper motive can lead to erosion of public confidence in the legitimacy of local government institutions.

207. See supra note 3 for the text of the Due Process Clause of the Fourteenth Amendment.
208. See supra note 73 and accompanying text for a discussion of procedural due process.
209. See supra note 74 and accompanying text for a discussion of substantive due process.
210. See discussion supra Part II.B for an explanation of the arbitrary requirement and how different circuits define it.
211. Licari v. Ferruzzi, 22 F.3d 344, 350 (1st Cir. 1994). See supra notes 77-78 and accompanying text for a discussion of the "shocks the conscience standard."
212. See supra notes 83-91 and accompanying text for a discussion of courts' application of the rational basis standard.
215. Licari v. Ferruzzi, 22 F.3d 344, 350 (1st Cir. 1994) (finding delay, revocation, and denial of permits are not "conscience-shocking" conduct) (quoting Amsden v. Moran, 904 F.2d 748, 757 (1st Cir. 1990)).
216. Cordes, supra note 176, at 170-72.
Therefore, courts carefully should scrutinize claims of improper motive.

In *DeBlasio*, the court evaluated the consequences of improperly motivated conduct consistently with Third Circuit precedent. The dissent, however, correctly disputed the sufficiency of the evidence as an inference "based solely on mere speculation." The court might have avoided a charge of conclusory reasoning by reviewing New Jersey cases that found improper bias in zoning decisions. Although state law would not be dispositive, such cases provide a workable standard against which the alleged bias may be measured.

The federal courts should not adopt the permissive *DeBlasio* approach in determining whether a potential conflict of interest may constitute arbitrary government conduct. To state a claim under substantive due process, a claimant must be required to allege something more than a potential conflict of interest. In *DeBlasio*, the "mere whiff of bias" sufficed to state a claim, raising legitimate fears of a federal docket crowded with meritless lawsuits.

For purposes of summary judgment, an allegation of personal or political bias, conflict of interest, or other wrongful motive should at least be subject to an outcome-determinative test that would require the court to determine whether the alleged conduct impacted the contested decision. The *DeBlasio* court erred by setting too low a standard of arbitrary conduct, because the alleged bias of one member arguably could not have determined the outcome of the zoning board's decision. Conversely, the Second Circuit in *Walz* correctly determined that the wrongful motive of one official was sufficient, where that official was able to revoke a permit unilaterally.

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217. Id.

218. *DeBlasio*, 53 F.3d at 601-02 (citing *Bello*, 840 F.2d at 1129-30). *Bello* held that interference with the zoning process was arbitrary when undertaken on the basis of political or personal bias, not on the merits of the permit application. *Bello*, 840 F.2d at 1129-30.

219. *DeBlasio*, 53 F.3d at 608 (McKelvie, J., dissenting).


222. *DeBlasio*, 53 F.3d at 608-09 (McKelvie, J., dissenting).

223. See *Walz* v. Town of Smithtown, 46 F.3d 162, 165 (2d Cir. 1995) (reciting conduct of town official in revoking permit after it had been granted).
2. Arbitrary Conduct: Courts Should Apply a Meaningful Standard of Review

Even where no individual officer acts with a wrongful motive, similar abuses may be perpetrated by governmental bodies acting arbitrarily or capriciously. The legitimate limits of the zoning power generally are defined by a rational relationship to a legitimate government objective, such as public health and safety. However, the highly deferential “rational basis” standard of review has proven wholly inadequate to deter arbitrary actions by the states. In lieu of the rational basis standard, courts should apply the United States Supreme Court’s reasoning in Nectow v. City of Cambridge. Only two years after the Euclid court conceded broad zoning power to state and local authorities, the Supreme Court circumscribed the boundaries of that power in Nectow. Unfortunately, few courts have looked to the level of scrutiny employed in Nectow when defining what constitutes an arbitrary and capricious zoning decision.

Nectow and Euclid both call for a “substantial relation,” not merely a rational relationship, to the state’s power to regulate the public health, safety, morals, and welfare. The phrase “substantial relation” suggests a standard of intermediate scrutiny, which requires legislation to bear a substantial relation to an important government goal. The Court’s reasoning in Nectow strongly indicates that some meaningful level of scrutiny would be more appropriate. In Nectow, the finder of fact thoroughly examined the character of the land and district and the asserted benefit to the public, in order to determine whether the zoning decision would actually—not hypothetically—promote a legitimate goal. Similarly, some courts have recently applied meaningful scrutiny under the rubric of a “rational basis” test.

225. See, e.g., Dodd v. Hood River County, 59 F.3d 852, 864-65 (9th Cir. 1995) (allowing county to rezone land for exclusive forest use, despite lack of actual notice, and county’s assurances that plaintiffs could build their home there).
226. 277 U.S. 183 (1928).
227. Id. at 187-89.
228. Id. at 187-88 (quoting Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926)).
230. See Nectow, 277 U.S. at 187 (discussing conclusion of master favorably).
231. See supra notes 93-96 and accompanying text for exemplary recent land use cases in which rational basis test was not fatal to substantive due process claim. In a zoning-related issue, the United States Supreme Court has applied a rational basis test “with teeth” in City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 447-50 (1985) (holding that restriction on
The burden of demonstrating that a zoning decision has no rational basis lies with the plaintiff.\textsuperscript{232} To reach this inquiry, the plaintiff also must demonstrate that the government action has infringed upon a constitutionally protected interest. Arguably, where a court undertakes to balance a known private burden against a purported public benefit, the government should have the burden of establishing that the asserted benefit likely will be promoted.\textsuperscript{233} Popular and indisputably rational policy goals, such as wildlife protection and preservation of open spaces, sometimes are offered as a theoretical benefit.\textsuperscript{234} In practice, however, such goals may be served poorly by granting government an unrestricted veto on the use and enjoyment of land by its nominal owner.\textsuperscript{235}

If the burden of proving the rationality of the asserted benefit were shifted to the government, that burden would be quite easy to meet, at least in routine zoning cases. Decisions that involve open political conflicts among legitimate community interests overwhelmingly are likely to promote some asserted important goal.\textsuperscript{236} Under rational basis scrutiny, government officials benefit from a very strong presumption of good faith and constitutionality.\textsuperscript{237} This should be supplanted by a meaningful judicial inquiry, under which the government must at least show that the asserted benefit probably would be promoted by its behavior.\textsuperscript{238} Such a requirement would police the group homes for mentally retarded fails rational basis test). \textit{Cf.} \textsc{Coyle}, supra note 196, at 256-57 (discussing rationality review incorporating substantive standard).


\textsuperscript{233} Compare id. with \textit{Dolan}, 114 S. Ct. at 2319-21 (1994) (requiring, in takings context, government to show nexus and demonstrate proportionality between public benefit and private burden). \textit{See also} Walz v. Town of Smithtown, 46 F.3d 162, 169 (2d Cir. 1995) (citing \textit{Dolan}, 114 S. Ct. at 2317) (suggesting relevance of \textit{Dolan} standard to arbitrary and capricious substantive due process claim).

\textsuperscript{234} \textit{See} \textsc{Robin P. Malloy}, \textsc{Planning for Servdom} 94 (1991) (arguing that suburbanites use open space zoning restrictions "to achieve financial and discriminatory outcomes"); Peter L. Abeles, \textit{Planning and Zoning}, in \textsc{Zoning & Am. Dream}, \textsc{ supra} note 16, at 122, 150 (suggesting that zoning for open space often is introduced as pretext to protect suburbs from "socially balanced" residential areas). Environmental objectives often are vague and difficult to prove, giving local authorities sufficient discretion to justify virtually any decision, and causing property owners to be uncertain about their rights. Epstein, \textit{ supra} note 184, at 204.

\textsuperscript{235} \textit{See} Epstein, \textit{ supra} note 184, at 201-06 (offering arguments against government control of land use planning). \textit{See also} \textsc{Coyle, supra} note 196, at 253 (requiring landowners to produce extensive studies causes potential government abuse by intentional delays and "de facto moratoria," effectively prohibiting use of property).

\textsuperscript{236} \textit{See supra} notes 54-60 and accompanying text for a review of decisions from the First and Seventh Circuits that treat zoning disputes as political. \textit{Accord} Sylvia Dev. Corp. v. Calvert County, 48 F.3d 810, 828-29 (4th Cir. 1995) (suggesting that federal courts have no business intervening in heated local political battles) (citing \textsc{Gardner v. City of Baltimore Mayor & City Council}, 969 F.2d 63, 67-68 (4th Cir. 1992)).

\textsuperscript{237} \textit{See supra} note 92 and accompanying text for criticism of the rational basis standard of review.

\textsuperscript{238} Some commentators have suggested a stronger version of "meaningful scrutiny." \textit{See} Barnett, \textit{ supra} note 171, at 114-15 (suggesting that meaningful scrutiny should include blanket
behavior of local government officials and provide a safeguard against the abuses of the past.239

3. Unearned Deference

Some courts have recognized that a more searching inquiry is appropriate, even under the rational basis standard, when challenging an ordinance as interpreted or applied by a quasi-judicial body, rather than on its face as a legislative enactment.240 Judicial restraint in striking down legislation typically is prompted by concern over unelected and unaccountable judges thwarting the will of the people expressed through their elected representatives.241 No majoritarian concerns exist, however, when higher courts review the decisions of lower administrative tribunals. Therefore, a substantive due process claim should be more likely to succeed when it challenges the application of a valid ordinance by an adjudicative body such as a zoning board of adjustment that, unlike a legislature, is bound by law.242

Due process challenges to the facial validity of particular zoning ordinances have met with little success in jurisdictions where the government need only show that the legislative action is rationally related to a legitimate governmental objective.243 In the absence of racially biased or exclusionary provisions,244 zoning ordinances generally survive this rational basis test with "presumption of liberty," which government may rebut by showing that "it is really necessary to restrict liberty in order to accomplish a legitimate governmental end, and . . . [the means are] within the appropriate powers of government".

239. See, e.g., Walz v. Town of Smithtown, 46 F.3d 162, 169 (2d Cir. 1995) (likening town official's conduct to "out-and-out plan of extortion") (quoting Dolan v. City of Tigard, 114 S. Ct. 2309, 2317 (1994)).

240. See supra notes 87-91 and accompanying text for a discussion of those courts that distinguish judicial and legislative decisionmaking in land use cases.

241. See Raoul Berger, A Lawyer Lectures a Judge, 18 HARV. J.L. & PUB. POL'Y 851, 855-56 (1995) (quoting Hamilton, Madison, and Jefferson on majority rule as central to democracy). See also Dandridge v. Williams, 397 U.S. 471, 484-85 (1970) (abjuring power to strike down state laws merely because Court finds them unwise or disharmonious); Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (reasserting that Court should not act as "super-legislature" in areas of economics, business, or social conditions); JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 103 (1980) (arguing that, except where Constitution specifically constrains majority rule, appointed judges should override elected representatives only where majority excludes, dilutes, or unequally regulates rights of minorities).


244. Such challenges often have been successful in state courts. See, e.g., BAC, Inc. v. Board of Sup'r's, 633 A.2d 144 (Pa. 1993). In BAC, the court held that a zoning ordinance unconstitutionally inhibits growth if a legitimate use is totally or substantially excluded. Under the state's fair share principle, a locality must meet the "legitimate needs of all categories of people
Some highly deferential federal courts have strained to label zoning decisions as legislative, even where they clearly affect only a single landowner. However, when the challenged action is administrative or quasi-judicial in nature, such as a decision on a building permit or a special use variance, the courts have shown less deference.

Members of zoning boards of adjustment may be subject to a state code of judicial conduct. Nevertheless, they are not judges. For example, the ZBA defendants in DeBlasio consisted of local volunteers. Such tribunals inherently are vulnerable to undue influence and lack strong structural guarantees of impartiality. State courts are, of course, eminently able to render judgment on constitutional issues. However, many plaintiffs recognize that the expertise and impartiality of the federal courts make them the authority best suited to sit in judgment of amateur tribunals such as zoning who may desire to live within its boundaries.” Id. at 146-47 (citation omitted). See also Southern Burlington County NAACP v. Township of Mount Laurel, 456 A.2d 390, 415 (N.J. 1983) (zoning regulations that provide no low or moderate income housing violate substantive due process under state constitution).

245. See Epstein, supra note 92, at 12 (noting that any conceivable or plausible justification serves to render legislation constitutionally invulnerable). However, substantive due process claims in zoning cases have received meaningful scrutiny under a rational basis test in some state courts. E.g., Guimont v. Clarke, 854 P.2d 1, 14 & n.10 (Wash. 1993) (en banc) (regulation violates due process if unduly oppressive upon landowner), cert. denied, 114 S. Ct. 1216 (1994); State v. Baker, 405 A.2d 368, 374-75 (N.J. 1979) (ordinance prohibiting four or more unrelated persons from sharing one housing unit violates due process on state constitutional grounds); Zoning Hearing Bd. v. Lenox Homes, Inc., 439 A.2d 218, 222-23 (Pa. Commw. Ct. 1982) (finding no reasonable relationship between board’s prohibition of home construction within 100 feet of high-water mark and legitimate stated goals).


247. See infra note 253 and accompanying text for a discussion about distinguishing legislation from adjudication in the administrative context. For definitions applicable to ZBA decisions in DeBlasio, see Administrative Procedure Act, N.J. REV. STAT. §§ 52:14B-2(c), (e) (1991) (defining “adjudication” and “rule”).


250. See Cordes, supra note 176, at 195-96 (noting susceptibility to influence due to small size, homogeneity, and potential lack of deliberative process). See also DANIEL R. MANDELKER, THE ZONING DILEMMA 65 (1971) (noting that process of granting variances “is usually considered subversive and is regularly condemned by all observers of the zoning scene”).

boards, when those tribunals are accused of wrongfully infringing a constitutional right.\textsuperscript{252}

To protect individual rights, the courts strictly must apply the standard that a decision is considered legislative in nature only if it establishes a generally applicable policy, and is quasi-judicial if it relates to a contested case involving specific parties.\textsuperscript{253}

\textbf{Conclusion}

In a future term, the Supreme Court undoubtedly will act to resolve the confusion among the federal courts, and it is unlikely that the Court will adopt the DeBlasio analysis of protected property interests. Until that time, the effect of DeBlasio in the Third Circuit will be to deter misconduct by zoning boards and other administrative bodies concerned with property rights,\textsuperscript{254} and to provide a fair remedy when such misconduct occurs. In most other circuits, high barriers to substantive due process will continue to insulate arbitrary zoning claims from judicial review on their merits.

A low threshold standard like that of the Third Circuit admittedly provides no barrier to federal jurisdiction over routine zoning disputes, which could result in a deluge of meritless suits. The most suitable guard against such an overload of claims is an inquiry into arbitrary government misconduct.

Allegations of improper motive on the part of the government should be supported at least by evidence that the alleged conduct affected the outcome of the zoning decision. Where no wrongful motive is established, a meaningful test for arbitrary and capricious conduct would be appropriate. Such a test, suggested by the "substantial relation" language of Euclid and the

\textsuperscript{252} The Supreme Court also has expressed concern that "by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." Monroe v. Pape, 365 U.S. 167, 180 (1961) (holding that § 1983 creates federal remedy despite existence of state tort claim), overruled in part by Monell v. Dep't of Social Servs., 436 U.S. 658, 663 (1978). See Armistead, supra note 4, at 800-01 (reviewing irrelevance of availability of state remedy).


\textsuperscript{254} See, e.g., AMI Affiliates, Inc. v. HUD, No. 94-CV-7194, 1995 WL 611324 (E.D. Pa. Oct. 13, 1995) (mem.). Ruling on federal defendants' motion for summary judgment, the court applied DeBlasio to find a property interest worthy of substantive due process protection, where an audit by HUD led to foreclosure actions against the plaintiff's apartment buildings. Id. at *3-4. The DeBlasio analysis also has been applied to protect a landowner's property interest for purposes of a procedural due process claim. Acierro v. New Castle County, Civ.A. No. 93-579-SLR, 1995 WL 704976, at *17-*18 (D. Del. Nov. 1, 1995).
method applied in *Nectow*,255 must involve more than the unthinking deference of the traditional "rational basis" test.256 The government should have the burden of showing that its articulated purpose is substantially related to an important governmental goal.257 In most zoning cases, that burden will be easy to meet. However, if there is a material issue of fact, the finder of fact must undertake a principled evaluation of the evidence. The Supreme Court upheld such findings in *Nectow*,258 and the Second Circuit recently took a similar approach in *Walz*.259

Local zoning authorities are vested with great discretionary power that is often exercised in an overtly political and apparently capricious fashion.260 The federal courts must provide meaningful protection against significant abuses of government's tremendous power. In so doing, the federal courts will affirm their place as the guardian of our constitutionally protected liberties against overreaching bureaucrats filled with "the insolence of office."261

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256. For a critical discussion of the "rational basis" test, see *supra* notes 231-39 and accompanying text.

257. For a discussion of the placement of the burden of proof in a test of substantial relationship, see *supra* notes 228-39 and accompanying text.

258. *Nectow*, 277 U.S. at 188 (relying upon findings of master to reverse dismissal of substantive due process claim).


260. See, *e.g.*, id. (finding arbitrary and capricious denial of permit, where official sought concession of land in return for permit to which landowner was legitimately entitled); Cordes, *supra* note 176, at 162 (discussing ad hoc nature of zoning deliberations); Jesse Dukeminier, Jr. & Clyde L. Stapleton, *The Zoning Board of Adjustment: A Case Study in Misrule*, 50 Ky. L.J. 273 (1962) (reviewing representative decisions of one zoning board).

261. WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 1 (enumerating life's burdens in soliloquy).