Washington Law Review

Volume 77 | Number 1

1-1-2002

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DOES THE GHOST OF *LOCHNER* HAUNT *MISSION SPRINGS*? RUMINATIONS ON § 1983 DUE PROCESS CLAIMS IN LIGHT OF *MISSION SPRINGS, INC. V. CITY OF SPOKANE*

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Abstract: The last time the Washington Supreme Court applied substantive due process in a land use case was in *Mission Springs, Inc. v. City of Spokane* in 1998. Since then, the *Washington Law Review* has published four commentaries that address substantive due process in Washington land use, all of which characterize Washington's substantive due process law as producing undesirable results. However, none of the available commentary takes into consideration that there are two types of substantive due process cases in Washington land use. In one type, courts strike down local ordinances, while in the other they enforce the lawful application of ordinances by executive decisionmakers. This Comment argues that the Washington Supreme Court should apply procedural due process analysis to cases involving executive decisionmaking, such as *Mission Springs*, because these cases are procedural in nature. This Comment also argues that commentators are misguided when they compare the evils of *Lochner*-era substantive due process to executive decisionmaking cases. Applying a procedural due process analysis would encourage beneficial outcomes, while escaping the stigma associated with substantive due process.

The last time the Washington Supreme Court applied substantive due process in a land use case was in 1998, when the court authored *Mission Springs, Inc. v. City of Spokane*.[1] Mission Springs had received approval from the Spokane hearing examiner for a planned unit development (PUD) consisting of 790 apartment units.[2] The hearing examiner issued a favorable decision on November 25, 1991, and the city council gave final approval for the project on August 31, 1992.[3] At that point, the developer's legal right to build a PUD vested for five years.[4] Two years later, Mission Springs requested a grading permit for this development.[5] Because the hearing examiner had approved the PUD in its entirety, the grading permit was non-discretionary and the city should have issued it immediately. However, the city council met and deliberated about whether it should issue the permit.[6] Mission Springs did not receive

1. 134 Wash. 2d 947, 954 P.2d 250 (1998).
2. *Id.* at 952, 954 P.2d at 252.
3. *Id.* at 952–53, 954 P.2d at 252.
4. *Id.* at 953, 954 P.2d at 252.
5. *Id.*
6. *Id.* at 954, 954 P.2d at 253.

notice of this meeting and had no representative present.[7] At the meeting, the council voted unanimously not to issue the permit and to investigate the traffic impact of the proposal, even though the city attorney advised the council that this would be a charter violation, a violation of the applicant's vested rights, and a violation of due process.[8] In response, Mission Springs filed a complaint pursuant to section 64.40.020 of the Revised Code of Washington[9] and 42 U.S.C. § 1983,[10] naming the City of Spokane and the members of the city council and their spouses as defendants.[11] The Washington Supreme Court held that the actions of the city council were arbitrary and violated substantive due process under § 1983.[12] The court did not strike down a law or ordinance; rather, it overturned the unlawful decision of the city council.[13]

This Comment argues that *Mission Springs*, and similar cases, rest on procedural due process principles that the Washington Supreme Court has inaccurately characterized as substantive due process. Procedural due process is the correct legal doctrine in such cases, and the Washington Supreme Court should apply it for two reasons: to remain intellectually honest and to avoid unwarranted criticism from commentators. Commentators decry the outcome of all Washington substantive due process land use cases as a return to *Lochner*-era judicial excesses. However, these commentators fail to recognize the procedural nature of the *Mission Springs* line of cases, which have a beneficial outcome because they enforce lawful conduct. To correct this mischaracterization, the Washington Supreme Court should utilize procedural due process in land use cases that involve the type of executive decisionmaking at issue in *Mission Springs*.

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7. *Id.*

8. *Id.* at 955, 954 P.2d at 253–54.

9. WASH. REV. CODE § 64.40.020 (2000) reads in part: "Owners of a property interest who have filed an application for a permit have an action for damages to obtain relief from acts of an agency which are arbitrary, capricious, unlawful, or exceed lawful authority . . . ."

10. Section 1983 reads in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof 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.

42 U.S.C. § 1983 (1994).

11. *Mission Springs*, 134 Wash. 2d at 957–58, 954 P.2d at 254–55.

12. *Id.* at 972, 954 P.2d at 262.

13. *Id.*

Part I of this Comment describes § 1983, the federal statute used to bring due process claims, and traces federal limitations on claims against local governments. Part II explains procedural due process and examines the boundaries of bringing procedural claims within the context of United States Supreme Court precedent. Part II also describes basic principles of substantive due process and gives an overview of the *Lochner* era. Part III discusses the parallel, but distinct, Washington substantive due process law, starting with cases before *Mission Springs*, then revisiting *Mission Springs*, and lastly giving a brief survey of available commentary. Part IV encourages the Washington Supreme Court to apply procedural due process analysis in those land use cases that are similar to *Mission Springs*. This Comment concludes that, by applying procedural due process in cases involving executive decisionmaking, the Washington Supreme Court would utilize the proper legal doctrine and quiet the fears of commentators.

I. SECTION 1983, A TOOL FOR ENFORCING CONSTITUTIONAL RIGHTS

A federal statute, 42 U.S.C. § 1983, underlies all of Washington's substantive due process doctrine and places important limitations on the Washington Supreme Court. The statute serves as a tool for enforcing constitutional rights, and parties have utilized it in all substantive due process land use challenges brought before the Washington Supreme Court in the last ten years. However, the United States Supreme Court has imposed certain limitations in litigating § 1983 claims against local governments.

When a government actor violates a person's constitutional rights, § 1983 allows the person to bring suit.[14] A cause of action will arise if the defendant acted "under color of" state law and if the defendant's conduct deprived the person of rights protected by the Constitution or laws of the United States.[15] Section 1983 allows redress for government violations of any part of the federal Constitution.[16] In the land use field, actions can be

14. 42 U.S.C. § 1983; *see also, e.g.*, Monroe v. Pape, 365 U.S. 167, 172–88 (1965).

15. *See Monroe*, 365 U.S. at 172–88.

16. *See* Steven Cushman, *Municipal Liability Under § 1983: Toward a New Definition of Municipal Policymaker*, 34 B.C. L. REV. 693, 694–95 (1993). A cause of action for either a constitutional violation or a violation of a federal law can be brought under § 1983. 42 U.S.C. § 1983 (1994). This Comment deals exclusively with constitutional claims and does not address enforcement of federal statutes through § 1983.

brought under the takings clause of the Fifth Amendment for taking of property without just compensation and under the due process clause of either the Fifth or Fourteenth Amendments for unconstitutional deprivations of property.[17]

Section 1983 is a "private attorney general statute" that encourages individuals to seek vindication of constitutional rights through monetary incentives.[18] These incentives include the recovery of punitive damages[19] and attorney's fees,[20] as well as the right to a jury trial.[21] Comparable state law remedies do not provide these economic motivations.[22] But because of these incentives, the United States Supreme Court has been careful to limit the usage of § 1983 against local governments for fear that it would otherwise supplant state tort law.[23]

In *Monell v. Department of Social Services*,[24] the Court found that § 1983 claims may be brought against local governments only when an official policy or longstanding custom causes the constitutional violation.[25] *Monell* involved an action brought by female employees of

17. *See* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 707–10 (1999) (analyzing § 1983 takings claim); *see also* Eric Jenkins, Comment, *Challenging Land Use Actions Under Section 1983: Washington Law After* Mission Springs, Inc. v. City of Spokane, 74 WASH. L. REV. 853, 856 (1999) (explaining how due process claims may be brought under § 1983). *See generally* Richard H. Seamon, *The Asymmetry of State Sovereign Immunity*, 76 WASH. L. REV. 1067 (2001) (discussing just compensation and the due process clause).

18. *See* Evans v. Jeff, 475 U.S. 717, 746 (1986) (Brennan, J., dissenting) (describing § 1983 as "private attorney general" statute and explaining that attorney's fees are legal incentive designed to foster § 1983 claims).

19. Punitive damages are not available in suits against the government. City of Newport v. Fact Concerts, 453 U.S. 247, 271 (1981). Generally, punitive damages are available against individual public officers when certain tests are met. Smith v. Wade, 461 U.S. 30, 34–37 (1983). However, the government may indemnify an individual official. Cornwell v. City of Riverside, 896 F.2d 398, 399–400 (9th Cir. 1990).

20. 42 U.S.C. § 1988 (1994).

21. *See City of Monterey*, 526 U.S. at 710 (holding that Seventh Amendment grants jury trial to determine if taking has occurred under Fifth Amendment). In City of Monterey, the appellants sought damages under § 1983 and the Court held "that a § 1983 suit seeking legal relief is an action at law within the meaning of the Seventh Amendment." *Id.* at 708.

22. *See, e.g.*, WASH. REV. CODE § 64.40.020 (2000) (awarding only economic damages).

23. *See generally* Michael G. Collins, Symposium, *"Economic Rights," Implied Constitutional Actions, and the Scope of Section 1983*, 77 GEO. L.J. 1493 (1989) (discussing why limitations are placed on § 1983 claims and discussing various problems with these limitations); *see also* Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 693–94 (1987) (concluding from empirical data that constitutional tort litigation is well constrained by law and not out of control).

24. 436 U.S. 658 (1978).

25. *Id.* at 694.

the City of New York who were required to take unpaid leaves of absence while pregnant.[26] Without explanation, the Court conclusively ruled that an official policy was involved, thereby allowing the § 1983 claim.[27]

Three subsequent United States Supreme Court cases clarify what the *Monell* Court meant by "official policy or longstanding custom." In *Tuttle v. City of Oklahoma City*,[28] the Court ruled that a single random constitutional violation by a low-level official does not establish municipal liability and that, for liability to inure, the policymaker has to select a course of action from multiple alternatives.[29] In *Pembaur v. City of Cincinnati*,[30] the Court established the "final authority doctrine."[31] The Court stated that only persons with final authority could set policy.[32] In *City of St. Louis v. Praprotnik*,[33] the Court held that when the *Tuttle* and *Pembaur* clarifications of the *Monell* test are not sufficient, courts should look to state law to determine where policymaking power lies.[34] Only if a violation involves "official policy" as defined by these cases may a party bring a § 1983 claim against local government.[35] This federal requirement for claims against municipalities is an underlying limitation placed on the Washington Supreme Court in interpreting § 1983 due process claims.

II. DUE PROCESS

The United States Supreme Court recognizes constitutional protections for both procedural due process and substantive due process

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26. *Id.* at 660–61.

27. *Id.* at 694.

28. 471 U.S. 808 (1985).

29. *Id.* at 823–24.

30. 475 U.S. 469 (1986).

31. *Id.* at 484–86; *see also* Cushman, *supra* note 16, at 705–06.

32. *Pembaur*, 475 U.S. at 481–83.

33. 485 U.S. 112 (1988).

34. *Id.* at 131.

35. There is considerable controversy regarding immunity of government actors in the context of § 1983 litigation. Generally, legislators and judges are absolutely immune, whereas a body or individual acting in an administrative capacity is not absolutely immune, though planning and zoning officials may enjoy qualified good faith immunity. *See* DANIEL MANDELKER ET AL., PLANNING AND CONTROL OF LAND DEVELOPMENT 187–89 (4th ed. 1995). The *Mission Springs* court thoroughly discussed immunity, but that discussion is beyond the scope of this Comment. *See* Mission Springs, Inc. v. City of Spokane, 134 Wash. 2d 947, 969–70, 954 P.2d 250, 260–61 (1998).

under the Fifth and Fourteenth Amendments.[36] Both amendments dictate that no person shall be deprived of life, liberty, or property without due process of law.[37] Procedural due process requires a government to apply its laws fairly,[38] while substantive due process requires that the laws themselves are fair and reasonable.[39]

A. Procedural Due Process

Procedural due process guarantees fair procedures when a government applies its laws to individuals.[40] For example, procedural due process requires that the state not execute, imprison, or fine a defendant without a fair trial, nor may a state take property without proper procedural safeguards.[41] There are multiple hurdles to bringing a procedural due process claim. First, the text of the Constitution imposes constraints. Then, courts must use a balancing test to determine the exact nature of the procedure that is due. In addition, a government actor must cause the deprivation in an adjudicative setting. Finally, if an adequate state remedy exists for the violation, a three-factor test determines whether a federal § 1983 claim can proceed.

1. The Test for Determining a Due Process Violation Derives from the Text of the Constitution

The test for determining a due process violation derives directly from the text of the Constitution.[42] The first phrase of each due process clause

36. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law."); U.S. CONST. amend. XIV ("No state shall . . . deprive any person of life, liberty, or property, without due process of law."); *see also* Edward Corwin, *The Doctrine of Due Process of Law Before the Civil War* (pt. 1), 24 HARV. L. REV. 366, 372–73 (1911).

37. U.S. CONST. amend. V; U.S. CONST. amend. XIV.

38. *See* Wisconsin v. Constantineau, 400 U.S. 433, 436 (1971) (holding that Wisconsin statute that allowed, without hearing, public ridicule of individuals to whom liquor could not be sold violated liberty under due process). The court observed that "it is procedure that marks much of the difference between rule by law and rule by fiat." *Id.*

39. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW, 402–03 (6th ed. 2000).

40. *See* Corwin, *supra* note 36, at 368–70 (explaining that due process clauses were derived from the Magna Carta with intent that they limit power and actions of government).

41. Daniels v. Williams, 474 U.S. 327, 337 (1986) (Stevens, J., concurring).

42. "We must examine the constitution itself, to see whether this process be in conflict with any of its provisions." Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 277 (1856).

describes the trio of protected interests: life, liberty, and property.[43] The second phrase describes the kind of protection provided, namely due process of law.[44] Thus, if an interest does not constitute life, liberty, or property, due process does not apply.[45] If an interest does constitute an element of life, liberty, or property, the government can deprive a person of that interest, but, to be constitutional, the deprivation must occur through a defined process.[46]

The text of the Constitution does not define the terms of art used in due process analysis, such as "deprivation," "defined process," and "life, liberty, and property." Courts have therefore clarified the meaning of such terms through judicial interpretation. Justice Frankfurter's 1951 description of procedural due process sheds light on the complexity of the terms. He described procedural due process as a doctrine which has evolved through the centuries, making it a "living principle not confined to past instances."[47] He also thought that procedural due process expresses "respect enforced by law for that feeling of just treatment which has been evolved through centuries."[48] The broad standards that Justice Frankfurter announced give courts leeway in the interpretation of procedural due process.

2. *Procedural Protection Afforded to Property Is at Issue in Washington's Substantive Due Process Land Use Law*

In the context of *Mission Springs* and Washington due process land use law, "property" is the protected interest at issue.[49] State law defines property for due process purposes,[50] and that definition generally extends

43. *See* U.S. CONST. amend. V; U.S. CONST. amend. XIV.

44. *See* U.S. CONST. amend. V; U.S. CONST. amend. XIV.

45. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985).

46. Ky. Dep't of Corr. v. Thompson, 490 U.S. 454, 460 (1989).

47. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 174 (1951).

48. *Id.* at 162.

49. *Mission Springs* explicitly stated that the deprivation at issue was "property." Mission Springs, Inc. v. City of Spokane, 134 Wash. 2d 947, 962, 954 P.2d 250, 257 (1998). Other Washington cases also address an underlying property right, but never explicitly discuss it. *See generally, e.g.*, Hayes v. City of Seattle, 131 Wash. 2d 706, 934 P.2d 1179 (1997) (addressing request for building permit when all decision criteria had been met); Lutheran Day Care v. Snohomish County, 119 Wash. 2d 91, 829 P.2d 746 (1992) (discussing hearing examiner who ignored conditional use permit criteria).

50. "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent

beyond the mere ownership of real estate or money.[51] Furthermore, the United States Supreme Court has stated that to have a property interest, one must have a legitimate entitlement to it, not a mere "unilateral expectation."[52]

Once a court establishes that the government deprived a person of property, the question remains whether the government used proper process in executing the deprivation. The murkiness of due process law arises from the fact that the Constitution does not describe the processes that should be applied.[53] As a result, the "process that is due" is a court-made doctrine that varies depending on which area of law is involved and also varies among jurisdictions.[54] The United States Supreme Court has announced a general three-factor test that attempts to balance the private interest affected, the risk of an erroneous deprivation of the private interest, and the government's burden in fulfilling procedural requirements.[55] This test enables courts to establish due process requirements for every situation.

As the above test shows, the procedure due under the Constitution depends on the circumstances. In the land use context, several commentators have set forth a proposed list of procedural due process requirements.[56] The Harvard Law Review noted that "procedural requirements [in land use should] . . . include the right to notice and a hearing, and the right to an impartial decisionmaker which renders its

source such as state law." Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972) (holding that non-tenured college professor did not have liberty interest in hearing before termination).

51. *Id.* at 571–72.

52. *Id.* at 577.

53. *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276–77 (1856).

54. "A procedural rule that may satisfy due process in one context may not necessarily satisfy procedural due process in every case. Thus, procedures adequate to determine a welfare claim may not suffice to try a felony charge." Bell v. Burson, 402 U.S. 535, 540 (1971) (assessing whether state may suspend driver's license without hearing). The United States Supreme Court has also stressed that "due process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972); *see also* Hannah v. Larche, 363 U.S. 420, 442 (1960) (explaining that due process is undefinable because its content depends on specific factual contexts).

55. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

56. *See Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1523 (1978). *See generally* James Kahn, *In Accordance with a Constitutional Plan: Procedural Due Process and Zoning Decisions*, 6 HASTINGS CONST. L.Q. 1011 (1979) (giving overview of due process requirements utilized in zoning cases).

decision with reference to articulable standards."[57] For general application, the United States Supreme Court has recognized that the right to a hearing is a "fundamental requisite of due process law."[58] This hearing must be held at a meaningful time and in a meaningful manner.[59] Additionally, the right to a hearing is not useful without further procedural requirements that establish a fair decisionmaking process.[60] Therefore, taking United States Supreme Court precedent into account, commentators on land use have stressed the importance of neutral and detached decisionmakers who explain their rulings and base their decisions on clearly articulated standards and requirements.[61]

3. *Procedural Due Process Applies to Governmental Adjudicatory Functions*

Procedural due process is applicable when state actors engage in adjudicatory functions.[62] However, the due process clause does not impose procedural requirements when a decision is made in a legislative capacity.[63] The reason for this is that the legislative process allows for input from the public and that input is deemed a proper safeguard.[64] Legislative acts are deemed to contain due process implicit in their definition, whereas adjudicative functions do not contain the same protections.[65] In the land use context, decisions are classified as either judicial or legislative in nature, depending on the number of people affected and state law presumptions.[66]

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57. *Developments in the Law—Zoning*, *supra* note 56, at 1502–03.

58. Grannis v. Ordean, 234 U.S. 385, 394 (1914).

59. Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

60. *Developments in the Law—Zoning*, *supra* note 56, at 1526.

61. *Id.* at 1524–28. *See generally* Kahn, *supra* note 56, at 1060 (concluding that courts should "rigorously enforce" due process in zoning).

62. *See* Bi-Metallic Inv. Co. v. State Bd. of Equalization of Colo., 239 U.S. 441, 445–46 (1915); Londoner v. City and County of Denver, 210 U.S. 373, 385–86 (1908).

63. *See Bi-Metallic*, 239 U.S. at 445–46; *Londoner*, 210 U.S. at 385–86.

64. *See* Munn v. Illinois, 94 U.S. 113, 134 (1876) ("For protection against abuses by legislatures the people must resort to the polls, not to the courts.").

65. *See Bi-Metallic*, 239 U.S. at 445–46; *Londoner*, 210 U.S. at 385–86.

66. The executive branch of local government makes land use decisions that are properly classified as "quasi-judicial" or "quasi-legislative." Thus, they are neither purely judicial nor purely legislative. *See, e.g.*, Barrie v. Kitsap County, 93 Wash. 2d 843, 851-52, 613 P.2d 11480, 1153-54 (1980); Parkridge v. City of Seattle, 89 Wash. 2d 454, 461–64, 573 P.2d 359, 363–65 (1978) (adopting what is known as "*Fasano*" position of quasi-judicial land use decisionmaking), *aff'd on*

4. Procedural Protections Are Available Even When an Adequate State Remedy Exists

In the past, § 1983 procedural due process claims were not available when an adequate state remedy existed. This rule originated in *Parratt v. Taylor*,[67] in which state prison officials negligently failed to follow prison procedure and lost an inmate's hobby kit.[68] The United States Supreme Court agreed that the officials deprived the prisoner of property; however, they did not extend federal jurisdiction over the due process claim because state tort remedies provided a means of redress that satisfied the requirements of procedural due process.[69] The Court justified this conclusion by stating that "the Fourteenth Amendment protects only against deprivations 'without due process of law,'"[70] and that, because state law allowed for a remedy, procedural due process was satisfied.[71]

However, in *Zinermon v. Burch*,[72] the United States Supreme Court established a three-factor test for allowing procedural due process claims even though an adequate state remedy exists.[73] That case carves out an exception to the *Parratt* holding.[74] In *Zinermon*, the plaintiff sued on the grounds that his admission to a state mental health hospital against his will violated procedural due process.[75] The Court held that the *Parratt* bar is not absolute and allowed the § 1983 procedural due process claim to go forward, even though a state remedy was available.[76] The Court decided that *Parratt* did not control *Zinermon* because of the following three factors: (1) the deprivation of liberty was predictable; (2) the

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other grounds sub nom. Pleas v. Seattle, 112 Wash. 2d 794, 809-10, 774 P.2d 1158, 1166 (1989). Land use decisions are quasi-judicial as long as their application is limited to a small group of people. *Id. Fasano* refers to Fasano v. Board of County Commissioners, the decision that established the concept of quasi-judicial zoning bodies. *See* Fasano v. Bd. of County Comm'rs, 507 P.2d 23 (Or. 1973); *see also* Carol Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 839, 845 n.18 (1983).

67. Parratt v. Taylor, 451 U.S. 527, 543 (1981).

68. *Id.* at 529.

69. *Id.* at 543.

70. *Id.* at 537 (quoting Baker v. McCollan, 443 U.S. 137, 145 (1979)).

71. *Id.* at 543.

72. 494 U.S. 113 (1990).

73. *Id.* at 136–39.

74. *Id.* at 136.

75. *Id.* at 115.

76. *Id.* at 138–39.

creation of pre-deprivation process was not impossible; and (3) the deprivation was the result of an official's "abuse of his position" and therefore was not "random and unauthorized." When all three factors are met, a procedural due process claim will survive summary judgment even when a comparable state remedy exists.[77]

The Ninth Circuit interpreted the first *Zinermon* factor, whether a deprivation is predictable, in *Honey v. Distelrath.*[78] The court ruled that, when decisionmakers are in a position with substantial discretionary power and are responsible for the due process violation, "the deprivation was foreseeable because it was their intent for it to occur."[79] The court equated "foreseeable" with "predictable" and ruled that Honey's deprivation of liberty was predictable and therefore met the first factor of the *Zinermon* test.[80] Intentional acts by those with discretionary power may satisfy the first factor.

The Ninth Circuit further interpreted factor one in *Armendariz v. Penman.*[81] In that case, the city attorney, mayor, and planning directors of San Bernardino, California, designed and implemented sweeps of low-income housing units.[82] These sweeps were deemed to be authorized and predictable under the first *Zinermon* factor because the defendants were those very people who had broad authority to interpret and enforce housing and fire codes.[83] The broad grant of authority, combined with abuse of that authority, resulted in a deprivation that the Ninth Circuit found "predictable."[84]

The second factor of the *Zinermon* test, that a pre-deprivation process to prevent harm is not impossible, is not an issue when dealing with state officials. As the Court saw it in *Zinermon*: "[I]t would indeed be strange to allow state officials to escape § 1983 liability for failing to provide constitutionally required procedural protections by assuming that those procedures would be futile because the same state officials would find a

77. *Id.* at 136–39.

78. 195 F.3d 531 (9th Cir. 1999).

79. *Id.* at 534.

80. *Id.*

81. Armendariz v. Penman, 31 F.3d 860, 866 (9th Cir. 1994), *rev'd in part on other grounds*, 75 F.3d 1311 (9th Cir. 1996).

82. *Id.* at 863.

83. *Id.* at 866.

84. *Id.*

way to subvert them."[85] Though the procedures in place in *Zinermon* failed, the Court did not find that state officials would attempt to circumvent all procedural protections. From the little guidance that the United States Supreme Court has given, it appears that any case dealing with state officials satisfies the second *Zinermon* factor.

The third *Zinermon* factor requires an "abuse of position" by a government actor,[86] which clarifies the previous United States Supreme Court rulings in *Hudson v Palmer*[87] and *Daniels v. Williams*.[88] In *Hudson*, the Court disallowed a procedural claim where government actors intentionally deprived people of their rights.[89] The Court reasoned that the intentional conduct of the government officials was "random and unauthorized" and therefore procedural requirements were "impracticable."[90] In *Daniels*, the Court found that procedural due process is not violated if a government actor causes a deprivation through negligence.[91] The Court found that negligent acts were unpredictable and therefore impractical to procedurally safeguard.[92] Because *Hudson* barred procedural claims for intentional acts and *Daniels* barred claims for negligent acts, it would seem that the United States Supreme Court had foreclosed all procedural due process remedies against the government. However, the third factor of the *Zinermon* test expanded the procedural due process doctrine and clarified that a party may bring a procedural claim when there is an "abuse of position."[93] *Zinermon* demonstrated that a government official's "abuse of position" is not the same as a "random and unauthorized" act.[94]

B. Substantive Due Process

The general principle of substantive due process is that the doctrine is not concerned with procedural protections, but rather requires that the

85. Zinermon v. Burch, 494 U.S. 113, 137–38 (1990).
86. *Id.* at 138.
87. 468 U.S. 517 (1984).
88. 474 U.S. 327 (1986).
89. *Id.* at 335–36; *Hudson*, 468 U.S. at 533.
90. *Hudson*, 468 U.S. at 533.
91. *Daniels*, 474 U.S. at 332–33.
92. *Id.*
93. Zinermon v. Burch, 494 U.S. 113, 138 (1990).
94. *Id.* at 136.

underlying law be fair and reasonable.[95] Thus, an adequate justification must exist for every law aside from procedural precautions. For example, *Euclid v. Ambler Realty Co.*[96] was the first constitutional challenge to zoning to reach the United States Supreme Court. The issue presented was whether the property owner was deprived of property by unreasonable and confiscatory means.[97] The zoning ordinance withstood the substantive due process inquiry, and thereby initiated the land use system that exists today.[98] The Court announced that to be unconstitutional, land use regulations must be "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[99] However, this test is only one of several methods for applying substantive due process.[100]

Courts have produced a wide variety of tests that make it difficult to predict violations of substantive due process. The *Lochner* era illustrates the problems that can result from such vague standards. In that period, the United States Supreme Court broadly construed substantive due process, and utilized it to strike down legislation at whim. Many commentators have criticized substantive due process because of the *Lochner* era.

1. Courts Have Produced a Plethora of Substantive Due Process Theories and Tests

Due to the sheer multitude of theories and general confusion in the area of substantive due process, it is not possible to isolate a single coherent legal standard.[101] The particular wording of the test to determine whether a law is substantively defective depends on the court, the circuit, and the subject matter.[102] In the land use context, the federal courts use a

95. *See* NOWAK & ROTUNDA, *supra* note 39, at 402–03.

96. 272 U.S. 365 (1926).

97. *Id.* at 386.

98. *See* Richard Haar, Symposium, *The Twilight of Land-Use Controls: A Paradigm Shift?*, 30 U. RICH. L. REV. 1011, 1011–14 (1996).

99. *See* Michael J. Phillips, *The Slow Return of Economic Substantive Due Process*, 49 SYRACUSE L. REV. 917, 927 (1999) (citing *Euclid*, 272 U.S. at 395) (emphasis omitted).

100. *See infra* Part II.B.1.

101. In regard to substantive due process in land use, "the Supreme Court . . . has never laid down definitive standards of review." Pearson v. City of Grand Blanc, 961 F.2d 1211, 1217 (6th Cir. 1992). *Pearson* also elucidates the substantive due process standard for each federal circuit, concluding that each is developing its own doctrine. *See id.* at 1217–19.

102. *See id.*; *see also* Jenkins, *supra* note 17, at 857–64.

variety of standards.[103] The Ninth and Second Circuits narrowly tailor the definition of property rights to exclude such items as development rights.[104] The First Circuit finds a substantive violation only if the infringement of due process is "shocking or violative of universal standards of decency."[105] The Seventh Circuit refuses to extend substantive due process violations to land use unless a decision is "irrational."[106] The remaining circuits find that land use decisions do not violate the Constitution unless they are "shocking to the conscience" or "truly irrational."[107] Unlike the federal circuits, in Washington, the state supreme court invoked the "arbitrary interference" standard for determining whether a due process violation had occurred.[108]

In addition, substantive due process tests change depending on the area of law involved.[109] In the 1930s, the courts decreed that economic interests warranted a different level of scrutiny than liberty interests.[110] Now courts often evaluate property and economic interests, such as the freedom to contract, under the rational basis test, which presumes that a law affecting commercial transactions is valid if it rests upon a rational

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103. *See* Jenkins, *supra* note 17, at 857–63.

104. *See id.* at 858–59. In *Mission Springs*, Justice Talmadge argued that the Ninth Circuit no longer recognizes substantive due process and therefore Washington courts should not recognize substantive due process. Mission Springs, Inc. v. City of Spokane, 134 Wash. 2d 947, 990, 954 P.2d 250, 271 (1998) (Talmadge, J., dissenting). However, the case that Justice Talmadge cites as vanquishing substantive due process did allow a procedural due process claim. Armendariz v. Penman, 31 F.3d 860, 866 (9th Cir. 1994), *rev'd in part on other grounds*, 75 F.3d 1311 (9th Cir. 1996).

105. Amsden v. Moran, 904 F.2d 748, 757 (1st Cir. 1990) (internal quotations omitted).

106. *See* Consiton Corp. v. Village of Hoffman Estates, 844 F.2d 461, 467 (7th Cir. 1988).

107. *See Pearson*, 961 F.2d at 1221 (noting that "arbitrary and capricious" in constitutional sense has entirely different meaning than in state administrative law context); G.M. Eng'rs & Assocs. v. W. Bloomfield Township, 922 F.2d 328, 332 (6th Cir. 1990); Jenkins, *supra* note 17, at 857.

108. *Mission Springs*, 134 Wash. 2d at 964, 954 P.2d at 258. Whether Washington uses only the arbitrary interference test is unclear. Justice Talmadge, in his *Mission Springs* dissent, reminds the majority that it forgot to apply Washington's substantive due process balancing test. *See id.* at 987–88, 954 P.2d at 270 (Talmadge, J., dissenting). This test asks (1) whether the regulation has a public purpose; (2) whether it uses reasonable means to achieve that purpose; and (3) whether it is unduly oppressive on the property owner. *Id.*; *see also* Susan Boyd, Comment, *A Doctrine Adrift: Land Use Regulation and the Substantive Due Process of* Lawton v. Steele *in the Supreme Court of Washington*, 74 WASH. L. REV. 69, 70 (1999).

109. *See* Phillips, *supra* note 99, at 923–49 (describing application of substantive due process in several different fields).

110. *See id.* (explaining how substantive due process applied to economic deprivations has been severely limited since 1930s, whereas courts continue to afford more substantive due process protections to liberty interests).

basis within the knowledge and experience of legislators.[111] In some of the federal courts there has been a resurgence of economic substantive due process in which the courts apply the previously mentioned standards.[112] However, modern courts mostly apply substantive due process law in those cases dealing with personal liberties, such as the right to an abortion.[113] Due to the multitude of tests and lack of any coherent federal standard, individual courts have developed their own substantive due process tests.[114]

2. *The* Lochner *Era Was a Misapplication of Substantive Due Process*

Substantive due process is commonly associated with courts striking down laws.[115] The period in which such invalidation routinely took place is known as the "*Lochner* era."[116] During the *Lochner* era, from the 1890s through the 1930s, the United States Supreme Court struck down legislation that inhibited freedom of contract and other economic rights under the guise of due process.[117] The Court defined the freedom to contract as an inherent right within "liberty and property," protected by the due process clause of the Fourteenth Amendment.[118] This definition enabled the United States Supreme Court to strike down progressive laws, such as minimum wage regulations for women.[119] The justices invalidated legislation at will, thereby arguably violating the fundamental constitutional separation of powers.[120] Over the course of forty years, the *Lochner* Court invalidated approximately 200 laws.[121]

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111. United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938).

112. *See* Phillips, *supra* note 99, at 925–27.

113. *See id.* at 925–26.

114. *See* Pearson v. City of Grand Blanc, 961 F.2d 1211, 1217 (6th Cir. 1992); *see also* Jenkins, *supra* note 17, at 863–71.

115. *See* Phillips, *supra* note 99, at 920–21.

116. *Id.*

117. *Id.*

118. *Id.* at 924.

119. *See* Adkins v. Childrens Hosp., 261 U.S. 525, 553 (1923).

120. *See* Phillips, *supra* note 99, at 922. Many cases typify the *Lochner* era. *See, e.g.*, Lochner v. New York, 198 U.S. 45, 61 (1905) (overturning law that restricted number of hours bakers could work); *see also Adkins*, 261 U.S. at 549 (striking down minimum wage laws for women); Adair v. United States, 208 U.S. 161, 174–75 (1908) (striking down federal law that prohibited railroad workers from joining unions).

121. *See* Phillips, *supra* note 99, at 921.

Numerous scholars and justices have decried the days of *Lochner*, and local commentators have expressed fear about its continued presence in and influence on Washington law.[122] One commentator described the era as "shorthand in constitutional law for the worst sins of subjective judicial activism."[123] In Washington, after *Mission Springs* allowed a § 1983 land use action to go forward, Justice Talmadge made blanket accusations that the Washington Supreme Court had returned to the *Lochner* era of due process interpretation.[124] He stated that "[t]he ideologically driven views of modern-day property-rights advocates . . . would effectively undercut the police power by elevating policy disputes to constitutional dimensions. . . . They would turn back the clock to the days of *Lochner v. New York*."[125] Justice Talmadge also opined that "[substantive due process] finds its most extreme expression in Washington land use cases, involving a formulation that virtually encourages the judiciary to legislate without restraint any time it disagrees with a legislative enactment."[126] Thus, in Washington, and in general, substantive due process receives much criticism.

III. WASHINGTON SUBSTANTIVE DUE PROCESS LAW

The Washington Supreme Court has relied exclusively upon substantive due process in deciding § 1983 land use cases that preceded *Mission Springs*. However, there are in fact two distinct types of cases in this context. One type deals with the invalidation of a statute or ordinance itself, while the other involves overturning an executive decision. *Mission Springs* falls into the line of cases in which the court overturned an executive decision. Since the court decided *Mission Springs*, four commentators have criticized Washington's use of substantive due process in land use cases.

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122. Michael J. Phillips collected quotes on the *Lochner* era from numerous scholars and justices. Among them are Justice Rehnquist, who stated that during the *Lochner* era "[it] was common practice for this Court to strike down economic regulations adopted by a state." *Id.* (internal citations omitted). Robert Bork called the accusation of *Lochner*-ism "the ultimate malediction of legal debate," while Justice Souter has remarked on the "disastrous mistakes" of the *Lochner* era. *Id.* (internal citations omitted).

123. Aviam Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1881–1921*, 5 LAW & HIST. REV. 249, 250 (1987).

124. *See generally* Justice Philip A. Talmadge, *The Myth of Property Absolutism and Modern Government: The Interaction of Police Power and Property Rights*, 75 WASH L. REV. 857 (2000).

125. *Id.* at 858.

126. *Id.* at 895.

A. *Before* Mission Springs, *the Washington Supreme Court Applied Substantive Due Process Analysis to Two Types of Cases*

Washington substantive due process law has developed along two lines of cases. One deals with a traditional form of substantive due process, where the Washington Supreme Court has invalidated laws because they were arbitrary and capricious. The other deals with failure by administrative and executive personnel to follow local ordinances in executive decisionmaking ("executive decisionmaking cases"). The traditional form of substantive due process is found in *Sintra, Inc. v. City of Seattle*,[127] while an example of executive decisionmaking is found in *Lutheran Day Care v. Snohomish County*.[128] The Washington Supreme Court decided both of these cases on May 14, 1992, emphasizing the disparate development of Washington's substantive due process law.[129] In a 1997 case involving executive decisionmaking, Justice Talmadge recognized that these cases were procedural in nature and that procedural rather than substantive due process should apply.

1. Sintra *Illustrates Substantive Due Process Cases in Which the Washington Supreme Court Struck Down an Ordinance*

Sintra exemplifies the type of traditional substantive due process land use case where the court strikes down an ordinance or law. In *Sintra*, the appellant owned a hotel that was not profitable because of an adult entertainment business located next door.[130] Therefore, Sintra desired to convert the hotel into a mini-storage business.[131] Under authority of a Housing Preservation Ordinance (HPO),[132] the city informed Sintra that it would require $219,480 as a change of use fee.[133] The Washington Supreme Court held that the HPO violated substantive due process; the court also struck down the ordinance and allowed Sintra's § 1983 claim

127. 119 Wash. 2d 1, 829 P.2d 765 (1992).

128. 119 Wash. 2d 91, 829 P.2d 746 (1992).

129. *See Sintra*, 119 Wash. 2d 1, 829 P.2d 765; *Lutheran Day Care*, 119 Wash. 2d 91, 829 P.2d 746.

130. *Sintra*, 119 Wash. 2d at 6, 829 P.2d at 768.

131. *Id.* at 7, 829 P.2d at 768.

132. The HPO required developers to replace low-income housing that they destroyed, or to pay a fee into a housing replacement fund. *Id.* at 11 n.1, 829 P.2d at 768 n.1.

133. *Id.* at 8, 829 P.2d at 768.

to progress.[134] The court stated that the federal due process clause "is a limit on a state's ability to pass unreasonable or irrational laws which deprive individuals of property rights."[135] *Sintra* thus represents substantive due process cases in which the court struck down an ordinance. In all there are five Washington Supreme Court decisions dealing with this type of substantive due process in the land use context.[136]

2. Lutheran Day Care *Illustrates Substantive Due Process Cases in Which the Washington Supreme Court Overturned a Land Use Decision Rather Than Invalidated an Ordinance*

In contrast to *Sintra* stands *Lutheran Day Care*, which represents substantive due process cases that consider the validity of an executive decision. Both the Snohomish County hearing examiner and the county council denied the appellant, Lutheran Day Care, a conditional use permit (CUP) to build a rest home on its property.[137] Lutheran Day Care appealed that decision to the Superior Court, which found no factual basis for the hearing examiner's conclusions and remanded the CUP to the examiner.[138] Without holding a new hearing, the examiner filed supplemental findings and conclusions denying the request.[139] The Washington Supreme Court deemed this subsequent action by the examiner unreasonable, arbitrary, and capricious; however, the court found that the examiner did not invalidate any ordinance or law.[140] The court allowed a substantive due process § 1983 claim because the hearing examiner had unlawfully rendered his decision without

134. *Id.* at 29, 829 P.2d at 780–81.

135. *Id.* at 21, 829 P.2d at 776 (citing Presbytery of Seattle v. King County, 114 Wash. 2d 320, 330, 787 P.2d 907, 912 (1990)); *see also* Lawton v. Steele, 152 U.S. 133, 142–43 (1894).

136. *See* Margola Assocs. v. City of Seattle, 121 Wash. 2d 625, 650, 854 P.2d 23, 37 (1993) (holding that registration fee ordinance did not violate substantive due process); Guimont v. Clarke, 121 Wash. 2d 586, 613, 854 P.2d 1, 16 (1993) (invalidating mobile home relocation law); *Sintra*, 119 Wash. 2d at 29, 829 P.2d at 780–81; Robinson v. City of Seattle, 119 Wash. 2d 34, 54, 830 P.2d 318, 330 (1992) (invalidating another version of HPO discussed in *Sintra*); W. Main Assocs. v. City of Bellevue, 106 Wash. 2d 47, 53, 720 P.2d 782, 786 (1986) (striking down Bellevue land use ordinance).

137. Lutheran Day Care v. Snohomish County, 119 Wash. 2d 91, 96, 829 P.2d 746, 748 (1992).

138. *Id.*

139. *Id.* at 97, 829 P.2d at 748.

140. *Id.*

considering or applying local ordinances.[141] In all there are four Washington Supreme Court cases of this type that considered overturning an executive land use decision.[142]

In *Lutheran Day Care*, the court also held that § 1983 claims are only permissible when a government actor makes a deliberate choice to follow a course of action from various alternatives.[143] Washington follows United States Supreme Court precedent in § 1983 threshold determination. The state high court used *Pembaur* to guide its definition of the word "policy," as used in the *Monell* test, and found that in Washington, "[section] 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question."[144] Having established this test, the court found that the Snohomish County Council, which had ratified the hearing examiner's decision, was a final policymaking body.[145] The court held that because the appellant had satisfied the prerequisites of a § 1983 claim, it was entitled to relief.[146] In accordance with *Praprotnik*,[147] Washington looks to state law to determine where policy making power lies when *Tuttle* and *Pembaur* do not provide sufficient guidance.[148]

3. *In* Hayes v. City of Seattle, *a Dissenting Justice Recognized the Procedural Nature of the Case*

In *Hayes v. City of Seattle*,[149] another executive decisionmaking case, the Washington Supreme Court failed to apply § 1983 substantive due

141. *Id.* at 125, 829 P.2d at 763.

142. *See* Mission Springs, Inc. v. City of Spokane, 134 Wash. 2d 947, 972, 954 P.2d 250, 262 (1998); Hayes v. City of Seattle, 131 Wash. 2d 706, 717, 934 P.2d 1179, 1185 (1997) (holding that city council arbitrarily imposed building regulations); Christianson v. Snohomish Health Dist., 133 Wash. 2d 647, 667, 964 P.2d 768, 777 (1997) (holding that hearing examiner's decision followed local regulations and was not violation of substantive due process); *Lutheran Day Care*, 119 Wash. 2d at 97, 829 P.2d at 748.

143. *Lutheran Day Care*, 119 Wash. 2d at 120–21, 829 P.2d at 760–61 (citing Pembaur v. City of Cincinnati, 475 U.S. 469, 483–84 (1986)).

144. *Id.*

145. *Id.* at 121, 829 P.2d at 761.

146. *Id.* at 128, 829 P.2d at 764.

147. City of St. Louis v. Praprotnik, 485 U.S. 112 (1988).

148. *See id.* at 126–27, 829 P.2d at 763–64; *see supra* notes 25–34 and accompanying text.

149. 131 Wash. 2d 706, 934 P.2d 1179 (1997).

process because there was a state law claim.[150] In *Hayes*, the appellant applied to the Seattle Department of Construction and Land Use (DCLU) for a master use permit to replace a single-family home with a three-story, mixed-use apartment building with a footprint 80 feet long and 40 feet wide.[151] DCLU and the Seattle City Council approved the permit, subject to the condition that the building be no more than 65 feet in length, without any explanation for the restriction.[152] In fact, the project met or exceeded all land use code regulations.[153] Thus, Hayes commenced action seeking damages, costs, and attorney's fees pursuant to section 64.40.020 of the Revised Code of Washington and § 1983.[154] The Washington Supreme Court concluded that the city council had acted in an arbitrary and capricious manner by imposing a condition without justification.[155] However, the court declined to render judgment on the § 1983 claim because it determined that Hayes could recover under state law.[156]

In his dissent, Justice Talmadge criticized the *Hayes* majority for not adequately addressing the issue of due process in the context of § 1983, stating that "[b]y declining to address . . . substantive due process and 42 U.S.C. § 1983, the majority also leaves in place an erroneous analysis of the constitutional tort in land use cases, contributing to further confusion in an area of law already made nearly unintelligible."[157] With these words, Justice Talmadge challenged the court to clarify § 1983 due process law. *Mission Springs* was the court's response.[158]

Talmadge's dissent in *Hayes* is the only opinion in which a Washington Supreme Court justice distinguished between procedural and substantive due process violations in a § 1983 land use case.[159] Talmadge clearly stated that *Hayes*, a case involving executive decisionmaking, is a

150. *Id.* at 718, 934 P.2d at 1185.

151. *Id.* at 709, 934 P.2d at 1180.

152. *Id.*

153. *Id.* at 709 n.1, 934 P.2d at 1180 n.1.

154. *Id.* at 710, 934 P.2d at 1181.

155. *Id.* at 717, 934 P.2d at 1185.

156. *Id.* at 718, 934 P.2d at 1185.

157. *Id.* at 724, 934 P.2d at 1188 (Talmadge, J., dissenting).

158. Following the *Hayes* court's rejection of the § 1983 claim, *Mission Springs, Inc. v. City of Spokane*, 134 Wash. 2d 947, 954 P.2d 250 (1998), was the next time the Washington Supreme Court allowed a § 1983 substantive due process claim in land use.

159. *Hayes*, 131 Wash. 2d at 737, 934 P.2d at 1194 (Talmadge, J., dissenting).

procedural, not substantive, due process case.[160] Relying on *Parratt*, He also stated that "if the challenged action was a violation of procedural due process, there is no deprivation of a constitutional right if state law provides an adequate postdeprivation remedy."[161] Thus, Talmadge believed that Hayes had a procedural claim, but that the claim could not be heard because of *Parratt*.

B. Mission Springs *Revisited*

Following *Lutheran Day Care*, *Sintra*, and *Hayes*, *Mission Springs* was the most recent decision in which the Washington Supreme Court applied substantive due process in the land use context. In *Mission Springs*, a developer had a vested right to build a 790 unit PUD.[162] After the right vested, the Spokane City Council voted unanimously not to issue a non-discretionary grading permit, even though the city attorney advised the council that this would be a violation of Mission Springs' vested rights and due process rights.[163] In response, Mission Springs filed a complaint alleging both a violation of state land use law and a § 1983 Fourteenth Amendment due process deprivation.[164] The Washington Supreme Court found that the city council had no authority to act on the permit and that it acted contrary to law when it interfered in the issuance of the permit.[165] Furthermore, the court stated that the developer had a property right under state law, noting that "development rights are beyond question a valuable right in property."[166] Having made these findings, the court held that the city council's decision was invalid under substantive due process, but the court did not strike down any ordinances.[167]

160. *Id.*

161. *Id.* at 743, 934 P.2d at 1198 (Talmadge, J., dissenting).

162. *Mission Springs*, 134 Wash. 2d at 952, 954 P.2d at 252.

163. *Id.* at 955, 954 P.2d at 253–54.

164. *Id.* at 961–63, 954 P.2d at 257.

165. *Id.* at 972, 954 P.2d at 262.

166. *Id.* at 963, 954 P.2d at 257.

167. *Id.* at 966–67, 954 P.2d at 259.

1. *The* Mission Springs *Court Stated That Procedural Rights Were at Issue*

The *Mission Springs* court announced that a procedural violation had occurred. The majority stated that "*procedural* rights respecting permit issuance create property rights"[168] and that "[c]ity council members who improperly interfere with the *process* by which a municipality issues permits deprive the permit applicant of his property absent that *process* which is due."[169] The court also stated "[n]or do we here consider a delay occasioned by foot dragging or inefficiency. Rather this claim puts at issue a purposeful abrogation of *mandatory process* which would otherwise result in permit issuance."[170] The council had failed to follow city code provisions that precluded it from interfering in the ministerial act of issuing the grading permit. Thus, the council failed to give Mission Springs the procedural process it was due.

2. *The* Mission Springs *Court Concluded That It Was Barred by Ninth Circuit Precedent from Invoking Procedural Due Process*

Despite the court's recognition of the procedural nature of the council's violation, it felt compelled by a Ninth Circuit case, *Bateson v. Geisse*,[171] to apply a substantive rather than procedural due process analysis.[172] In *Bateson*, a contractor submitted a building permit application to the city of Billings, Montana, that facially complied with all ordinance requirements.[173] The city council then intentionally initiated a zoning amendment to prevent Bateson from obtaining his permit.[174] Bateson alleged both substantive and procedural due process claims under § 1983.[175] The Ninth Circuit dismissed his procedural claim because of the lack of significant substantive restrictions on the city council's powers.[176] Under Montana law, Bateson did not have an entitlement or property interest in the permit. Instead of allowing the

168. *Id.* at 963, 954 P.2d at 257 (emphasis added).

169. *Id.* at 965, 954 P.2d at 258 (emphasis added).

170. *Id.* at 966, 954 P.2d at 259 (emphasis added).

171. 857 F.2d 1300 (9th Cir. 1988).

172. *Mission Springs*, 134 Wash. 2d at 966, 954 P.2d at 259.

173. *Bateson*, 857 F.2d at 1302.

174. *Id.*

175. *Id.* at 1303, 1305.

176. *Id.* at 1305.

procedural claim, the court found the violation to be so egregious as to constitute an arbitrary and capricious decision that violated substantive due process.[177] In *Mission Springs*, the court announced that federal precedent controls the application of federal law when there are similar facts.[178] The court proceeded to follow *Bateson*.[179] As a consequence, in Washington, when administrative or executive personnel fail to observe legal entitlements in executive decisionmaking and plaintiffs invoke procedural due process under § 1983, courts will dismiss the claim and the only recourse will be substantive due process.

C. *Since* Mission Springs, *Four* Washington Law Review *Publications Have Criticized Washington's Substantive Due Process Doctrine*

Four commentaries published by the *Washington Law Review* since the *Mission Springs* decision all portray Washington's entire substantive due process doctrine in a negative light. Professor Hugh Spitzer's article focuses on Washington police powers and characterizes the emergence of substantive due process as peculiar.[180] Eric Jenkins' Note on *Mission Springs* argues that the failure of the court to adopt a strict § 1983 due process test results in a broad and confused standard.[181] Jenkins especially laments the broad range of conduct that will subject government actors to substantive due process suits.[182] Susan Boyd explains in her Comment that the Washington Supreme Court applies substantive due process in a fashion that inappropriately permits courts to become policymaking bodies.[183] Lastly, Justice Talmadge's article vehemently attacks Washington's substantive due process doctrine as an "extreme interpretation" without authority in federal law.[184] He also

177. *Id.* at 1303–04.

178. *Mission Springs*, 134 Wash. 2d at 968, 954 P.2d at 260.

179. *Id.* at 366, 954 P.2d at 259. However, this is an odd result because the Washington Supreme Court announced early on that it would not be bound by the decisions of any federal court except the United States Supreme Court. Noble v. Dibble, 119 Wash. 509, 511, 205 P. 1049, 1049 (1922). The Washington Supreme Court has held that the opinions of circuit courts deciding issues of federal law are highly persuasive and not mandatory. Home Ins. Co. of N.Y. v. N. Pac. Ry., 18 Wash. 2d 798, 808, 140 P.2d 507, 511 (1943).

180. Hugh Spitzer, *Municipal Police Power in Washington State*, 75 WASH. L. REV. 495, 511 (2000).

181. *See* Jenkins, *supra* note 17, at 870.

182. *Id.*

183. *See* Boyd, *supra* note 108, at 92.

184. Talmadge, *supra* note 124, at 901.

explicitly warns that Washington is returning to the *Lochner* era of judicial excesses.[185] Justice Talmadge concludes that the substantive due process doctrine should be reined in so that community interests in property triumph over individualistic notions of property rights.[186] None of the four commentaries mention the distinction between the two lines of substantive due process cases.[187] Rather, Washington's substantive due process law is categorically characterized as having an undesirable and unjust effect.

IV. WASHINGTON CASES INVOLVING DUE PROCESS CHALLENGES TO EXECUTIVE DECISIONMAKING SHOULD BE DECIDED ON PROCEDURAL GROUNDS

The Washington Supreme Court should decide cases that are similar to *Mission Springs* on procedural grounds. There are two types of due process land use cases in Washington. Executive decisionmaking cases are procedural, and, contrary to the court's perception, federal precedent does not bar the application of procedural due process analysis. The Washington Supreme Court must recognize these procedural cases for what they are and apply the correct legal reasoning. Using procedural due process in these types of cases does not threaten a return to the *Lochner* era. Rather, these cases result in the beneficial enforcement of existing laws. Utilization of the proper legal doctrine would remove any *Lochner* stigma from Washington land use law.

A. The Washington Supreme Court Should Use a Procedural Due Process Analysis in Executive Decisionmaking Cases Because They Are Procedural in Nature

The Washington Supreme Court has mixed procedural due process with substantive due process. The court should disentangle the two types of cases by applying procedural due process in cases involving executive decisionmaking. Though the court feels barred by federal precedent, *Bateson* and *Parratt* do not prevent a procedural due process claim in cases similar to *Mission Springs*.

185. *Id.* at 894–901.

186. *Id.* at 908.

187. *See generally* Spitzer, *supra* note 180; Talmadge, *supra* note 124; Boyd, *supra* note 108; Jenkins, *supra* note 17.

1. *There Are Two Intertwined Types of Due Process Cases in Washington Land Use*

As shown earlier, Washington's substantive due process case law in land use consists of two separate types of cases.[188] In one type, as in the *Lochner* era, the court has evaluated the constitutionality of a particular law or ordinance.[189] If the facts met a particular due process test, such as the arbitrary or capricious standard, the court struck down the law or ordinance.[190] In contrast stands Washington's other line of substantive due process cases, in which the Washington Supreme Court has used substantive due process to attack the unlawful implementation of land use regulations without invalidating legislation in a *Lochner*-esque fashion.[191] Both *Lutheran Day Care* and *Mission Springs* fall into the line of executive decisionmaking cases because they deal with the problem of executive decisionmakers who refuse to follow existing land use regulations.

2. *Executive Decisionmaking Cases Are Procedural in Nature*

The Washington Supreme Court should recognize executive decisionmaking cases for what they are and apply procedural due process as a proper cause of action. Because these cases are procedural in nature, as the court itself recognized in *Mission Springs*, procedural due process is the correct form of legal analysis.

Mission Springs illustrates how cases involving executive decisionmaking are procedural in nature. First, the facts of *Mission Springs* meet all the requirements of a procedural due process claim. The city council deprived the land use applicant of a protected due process interest, namely property, because the court held that the vested right to build was a property right under state law.[192] Because a city council is an arm of government, the government actor requirement was satisfied.[193] Additionally, the city council made its decision in an adjudicative

188. *See supra* Part III.A.

189. *See supra* Parts III.A, B.2.

190. *See supra* Part II.B.1.

191. *See supra* Part III.A.2.

192. Mission Springs, Inc. v. City of Spokane, 134 Wash. 2d 947, 964, 954 P.2d 250, 258 (1998).

193. *See supra* Part II.A.3.

capacity.[194] The city council also failed to give Mission Springs the process it was due because the developer did not receive notice of the meeting.[195] Lastly, the council did not follow local ordinances, though the city attorney had clearly articulated them.[196]

Second, in *Mission Springs* the court did not evaluate whether an underlying law or ordinance was just, as is done in a traditional substantive due process analysis.[197] The *Mission Springs* court did not reach that question because the council ignored its own local code,[198] and the court therefore overturned the unlawful decision of the city council.[199] Thus, *Mission Springs* and other executive decisionmaking cases do not conform to a traditional notion of substantive due process.

Third, the court itself stated that procedural due process was at issue. In *Mission Springs*, the majority acknowledged that the issue was a procedural one, stating the claim "puts at issue a purposeful abrogation of *mandatory process*."[200] Additionally, Justice Talmadge clearly stated that *Hayes*, another executive decisionmaking case, involved procedural due process and not substantive due process.[201] Thus, the court has recognized that executive decisionmaking cases revolve around procedural due process, yet it has not applied that analysis.

Fourth, the Washington Supreme Court may have rested its opinion in *Mission Springs* on substantive due process grounds because it felt that federal precedent barred the use of procedural due process. The court stated that it was bound by *Bateson* and chose to apply substantive due process—and not procedural due process—when confronted with a

194. Washington has held zoning decisions to be quasi-judicial. *See* Parkridge v. City of Seattle, 89 Wash. 2d 454, 463–64, 537 P.2d 359, 365 (1978), *aff'd on other grounds sub nom.* Pleas v. Seattle, 112 Wash. 2d 794, 809–10, 774 P.2d 1158, 1166 (1989). Because Mission Springs' planned unit development was for the benefit of one applicant and had an impact on a limited number of people, the council's decision was judicial in nature. *See supra* note 66 and accompanying text.

195. *Mission Springs*, 134 Wash. 2d at 954, 954 P.2d at 253.

196. *Id.* at 955, 954 P.2d at 253–54.

197. *See* NOWAK & ROTUNDA, *supra* note 39, at 402–03; *see supra* notes 95–99 and accompanying text.

198. *Mission Springs*, 134 Wash. 2d at 955, 954 P.2d at 253–54.

199. *Id.* at 972, 954 P.2d at 262.

200. *Id.* at 966, 954 P.2d at 259 (emphasis added). This is only one of the many instances in which the court described *Mission Springs* as involving procedural problems. *See infra* Part III.B.1.

201. Hayes v. City of Seattle, 131 Wash. 2d 706, 737, 934 P.2d 1179, 1194 (1997) (Talmadge, J., dissenting).

similar fact pattern.[202] Additionally, in his dissent, Justice Talmadge was reluctant to allow procedural due process claims because of *Parratt*, a United States Supreme Court case that did not allow a procedural due process claim when there was an adequate state remedy.[203] However, as the following section discusses, executive decisionmaking cases are distinguishable from *Bateson* and *Parratt*, and thus there is no bar to the Washington Supreme Court's use of procedural due process.

3. *Federal Precedent Does Not Bar the Washington Supreme Court from Applying Procedural Due Process Analysis in Executive Decisionmaking Cases*

Washington State is not compelled to adopt the reasoning of the Ninth Circuit in *Bateson*. *Bateson* is distinguishable from *Mission Springs* because Bateson had no reasonable expectation of receiving a subdivision plat.[204] The court's denial of Bateson's procedural due process claim rests on the fact that he did not have an entitlement to approval of his plat.[205] *Mission Springs*, in contrast, states that the developer had a recognizable property interest in his vested building application.[206] Consequently, Mission Springs had a legitimate claim of entitlement for development of its PUD. What defines property is a question of state law, and in *Mission Springs*, the Washington Supreme Court found that a property right existed in a vested grading permit.[207] The developer in *Mission Springs* had a property right that gave it an expectation and entitlement that the city council could not interfere with; Bateson had no such right.

The facts of *Bateson* and *Mission Springs* may seem similar, but the underlying assumptions of state law must come from Washington State and not from the Ninth Circuit adjudicating a Montana case. For example, the fact that *Bateson* did not have a property right in the permit issuance is a matter of state law.[208] Also, the degree of discretion granted

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202. *Mission Springs*, 134 Wash. 2d at 968, 954 P.2d at 260; *see also supra* notes 171–179 and accompanying text.

203. *Hayes*, 131 Wash. 2d at 743, 934 P.2d at 1198 (Talmadge, J., dissenting).

204. Bateson v. Geisse, 857 F.2d 1300, 1305 (9th Cir. 1988).

205. *Id.*

206. *Mission Springs*, 134 Wash. 2d at 965, 954 P.2d at 258.

207. *Id.*; *see supra* notes 49–52 and accompanying text.

208. *See* Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972); *see also supra* notes 49–52 and accompanying text.

to a land use decisionmaking body is a matter of state law.[209] In general, courts construe zoning principles under state law.[210] As a result, the Washington Supreme Court can easily distinguish *Bateson* because Washington law redefines the underlying assumptions.

Additionally, *Parratt* does not prohibit Washington courts from applying procedural due process in executive decisionmaking cases. Justice Talmadge incorrectly propagates the theory that *Parratt* bars Washington from utilizing procedural due process when an adequate state remedy exists. Justice Talmadge, in his *Hayes* dissent, stated that as soon as a party invokes procedural due process, a § 1983 claim can only be raised if there is no proper state redress.[211] For example, in *Mission Springs*, the plaintiff alleged violations under both section 64.40.020 of the Revised Code of Washington and § 1983.[212] If the court had recognized the city council action as a procedural violation, it would likely have dismissed the § 1983 claim, reasoning that procedural justice is done whenever there is an alternate state-law method of pursuing the claim.[213] However, a close examination of United States Supreme Court precedent indicates that the Washington courts would not have to dismiss the § 1983 claim.

By applying the *Zinermon* test to the facts of *Mission Springs*, one sees that the Washington Supreme Court could have allowed a procedural claim.[214] The Spokane city council had great discretionary power.[215] The city attorney warned the council members of their imminent constitutional violation,[216] and therefore the court could have

209. *See supra* notes 49–52 and accompanying text.

210. *See supra* notes 49–52 and accompanying text.

211. Hayes v. City of Seattle, 131 Wash. 2d 706, 743, 934 P.2d 1179, 1197 (1997) (Talmadge, J., dissenting).

212. *Mission Springs*, 134 Wash. 2d at 951, 954 P.2d at 252.

213. *See* Parratt v. Taylor, 451 U.S. 527, 537 (1981). Section 64.40.020 of the Revised Code of Washington provides a land use applicant a cause of action for arbitrary, capricious, or unlawful decisions similar to § 1983 substantive due process claims. Justice Talmadge argued that § 64.40.020 was an adequate state remedy under *Parratt*, but he never analyzed the procedural adequacy of the statute. *See Hayes*, 131 Wash. 2d at 724–46, 934 P.2d at 1188–99 (Talmadge, J., dissenting).

214. The three *Zinermon* factors ask whether (1) the deprivation of liberty was predictable; (2) the creation of pre-deprivation process was not impossible; and (3) the deprivation was the result of an official's abuse of position. Zinermon v. Burch, 494 U.S. 113, 136–39 (1990).

215. The city council voted unanimously not to issue the grading permit after the city attorney informed them that their action would be a violation of due process. *Mission Springs*, 134 Wash. 2d at 957, 954 P.2d at 254.

216. *Id.*

concluded that it was the council's intent that this deprivation occur. The court could have found, as the Ninth Circuit did in *Honey v. Distelrath*,[217] that the council acted in a "deliberate, considered, planned" manner.[218] Additionally, following the reasoning of *Zinermon*, pre-deprivation process was not impossible.[219] Lastly, the court would have to have found that the council abused its position. This is not a difficult conclusion, since the court determined that the council's decision was an arbitrary interference.[220] Thus, all three factors of the *Zinermon* test could have been met in *Mission Springs*. Although *Zinermon* has never been applied in Washington land use, application of the three-factor test is reasonable. Its application would allow the court to remain intellectually honest by applying the proper legal doctrine—procedural due process—to executive decisionmaking cases.

B. *The Washington Supreme Court Should Use a Procedural Due Process Analysis in Executive Decisionmaking Cases To Enforce Lawful Conduct and Avoid the Stigma of* Lochner

By defining a misapplication of local land use code as substantive due process, the Washington Supreme Court has opened the door to the criticism that it is returning to the *Lochner* era. *Lochner* embodies the traditional form of substantive due process and is not associated with procedural due process.[221] Although commentators label all of Washington substantive due process law as undesirable and *Lochner*-ian, both the Washington Supreme Court and legal commentators have failed to differentiate executive decisionmaking cases as procedural in nature.[222] Despite these assertions by commentators, Washington courts are not experiencing a return to *Lochner* with cases such as *Mission Springs* for two reasons. First, in executive decisionmaking cases the courts enforce lawful conduct rather than striking down laws. Second, federal § 1983 limitations, specifically *Monell v. Department of Social Services*,[223] prohibit § 1983 from replacing state tort claims and thus limit

217. 195 F.3d 531 (9th Cir. 1999).

218. *Id.* at 534.

219. *Zinermon*, 494 U.S. at 137–38.

220. *Mission Springs*, 134 Wash. 2d at 970, 954 P.2d at 261.

221. *See supra* notes 115–121 and accompanying text.

222. *See supra* notes 124–126 and accompanying text.

223. 436 U.S. 658, 694 (1978).

the application of this constitutional tort. Procedural due process may be open to other criticism, but it is the proper doctrine to apply in executive decisionmaking cases.

1. *Executive Decisionmaking Cases Are Beneficial and Not a Return to* Lochner *Because the Court Is Enforcing Laws, Not Striking Them Down*

Requiring that procedural due process be followed in executive decisionmaking cases upholds legal entitlements and therefore does not threaten a return to *Lochner*.[224] The *Lochner* era is characterized by courts striking down laws arbitrarily. *Mission Springs* does not bring with it this problem, but rather brings the benefit of a land use process that requires final decisionmakers to follow local regulations. Using due process to require the lawful application of laws and ordinances is different and more beneficial than *Lochner* era invalidation of laws and ordinances. This is true because, when the courts apply procedural due process, they are holding local governments accountable to their own regulations.

2. *Courts Are Prevented by § 1983 Law from Returning to Excessive Judicial Activism in Executive Decisionmaking Cases*

Federal limitations on bringing § 1983 claims against municipalities restrict the Washington Supreme Court in granting relief and thereby protect against a return to the excessive judicial activism of the *Lochner* era. Municipal liability, which is most often at stake in § 1983 land use claims, can only be established through a narrow application of *Monell*.[225] A party can only bring an action when a constitutional right has been violated by an official policy or custom.[226] This means that the challenged policy may not be set by a low-level employee, but rather must be made by the final decisionmaker and that decisionmaker must have selected a course of action from multiple alternatives.[227] The Washington Supreme Court reiterated its adherence to this test in

224. Justice Talmadge alleges that *Mission Springs* threatens a return to *Lochner*. *See* Talmadge, *supra* note 124, at 894–901.

225. *See supra* notes 25–34 and accompanying text.

226. *See supra* note 25 and accompanying text.

227. *See supra* notes 28–34 and accompanying text.

Lutheran Day Care.[228] Before a court applies due process analysis, a party must overcome these hurdles, and, as a result, courts recognize protections that ensure that local governments cannot be held liable for every and any act under § 1983. The *Lochner* era is characterized by the unbridled discretion of the judiciary; in § 1983 litigation, the United States Supreme Court has created safeguards to prevent courts from returning to the excesses of that era.[229]

3. *Procedural Due Process Is Open to Criticism, but It Is the Proper Doctrine for Executive Decisionmaking Cases*

Theoretically, procedural due process is subject to some of the same criticisms as substantive due process. Local ordinances could be so broad that the reviewing court could decree at its whim whether the local decisionmaking body applied them correctly. In that situation, procedural due process would allow courts to haphazardly strike down individual land use decisions. This situation, though problematic, is not a return to *Lochner*. *Lochner* dealt with constitutional separation of power problems.[230] In striking down individual land use decisions, courts are not interfering in the realm of the legislature, but rather are reviewing decisions that are judicial in nature, which is an entirely appropriate role for courts.

Nonetheless, providing procedural due process rights to aggrieved land use applicants is the proper way to expand what is currently a form of substantive due process in Washington land use. The United States Supreme Court allows procedural due process to be molded to every area of law.[231] Justice Frankfurter stated that "[d]ue process is perhaps the most majestic concept in our whole constitutional system. While it contains the garnered wisdom of the past in assuring fundamental justice, it is also a living principle not confined to past instances."[232] As noted by the Harvard Law Review, procedural due process in land use hearings

228. *See supra* notes 143–148 and accompanying text.

229. Any constitutional claim can be brought under § 1983. *See* 42 U.S.C. § 1983 (2000); City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 707–10 (1999) (analyzing application of § 1983 to constitutional claims). Thus, these protections apply to all constitutional claims, not only those involving procedural due process.

230. *See supra* notes 115–121 and accompanying text.

231. *See supra* notes 56–61 and accompanying text.

232. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 174 (Frankfurter, J., concurring) (1951).

should require the right to notice, a hearing, and an impartial decisionmaker that renders its decision with reference to articulable standards.[233] Cases such as *Mission Springs* currently enforce these safeguards through substantive due process and not procedural due process. The Washington Supreme Court should modify its jurisprudence to disentangle the two types of due process. Not only would the Washington Supreme Court be consistent with United States Supreme Court precedent, it would remain intellectually honest by applying the proper doctrine and it would encourage lower courts to utilize constitutional claims in land use because there would no longer be a substantive due process stigma attached to their decisions.[234]

V. CONCLUSION

Mission Springs and other executive decisionmaking cases do not represent claims in land use law that are out of control; rather, their version of due process applies only in those instances where local government violates its own regulations. Because no distinction has been made between the two types of due process in Washington land use cases, Washington law would benefit from the emergence of procedural due process in § 1983 claims. Procedural due process would not be open to the attack that the court is returning to *Lochner*, because it is only utilized in those instances where the final policy maker fails to abide by its own code. When procedural due process is recognized as distinct from *Lochner*-style judicial excess, it will find greater acceptance in the legal community.

233. *Developments in the Law—Zoning*, *supra* note 56, at 1502; *see also supra* notes 56–61 and accompanying text.

234. There is only one published case in which the court based its decision on the holding of *Mission Springs*. Brower v. Pierce County, 96 Wash. App. 559, 564–65, 984 P.2d 1036, 1039 (1999) (holding that *Mission Springs* is not applicable when permit has not vested). Considering that *Mission Springs* was decided more than three years ago, its application has not been widespread.