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Subdued Process: *Onyx Properties LLC v. Board of County Commissioners of Elbert County* and the Removal of “Property” from the Due Process Clause

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NOTES

Subdued Process: *Onyx Properties LLC v. Board of County Commissioners of Elbert County* and the Removal of “Property” from the Due Process Clause

In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights. Where an excess of power prevails, property of no sort is duly respected.

—James Madison¹

I. The Bronze Medalist of the Due Process Clause Trio

Since its inception in 1868, the Due Process Clause of the Fourteenth Amendment has served the American people as a guardian against unfair action by the states.² Although not at first,³ the United States Supreme Court quickly discovered the clause to be fertile ground on which to cultivate numerous landmark opinions, notably in the areas of criminal procedure⁴ and civil rights.⁵ Most of these well-known and well-studied cases elaborate on the meaning of the Clause’s words “life” and “liberty.” But what about the meaning of “property” in the Due Process Clause? It is understandable that courts would appraise property rights as less important than rights concerning life and liberty, and therefore require that property-

1. James Madison, *Property*, NAT’L GAZETTE, Mar. 27, 1792, reprinted in 14 THE PAPERS OF JAMES MADISON 266, 266 (Robert A. Rutland et al. eds., 1983).

2. See, e.g., *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (“We have emphasized time and time again that “[t]he touchstone of due process is protection of the individual against arbitrary action of government.” (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) (alteration in original)).

3. See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 49, 77-78 (1873) (holding, as the first case interpreting the Fourteenth Amendment in its entirety, that the amendment merely guarantees rights of United States citizenship such as the freedom to traverse rivers and run for federal office).

4. See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 654-55 (1961) (holding that evidence obtained through an unconstitutional search by the state violated the defendant’s right to privacy guaranteed through the Due Process Clause of the Fourteenth Amendment); see also *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963) (finding that the Sixth Amendment’s guarantee of effective assistance of counsel applies to the states through the Due Process Clause).

5. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604-05 (2015) (holding that there is a fundamental right to homosexual marriage guaranteed by the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment).

based claims be subjected to a higher standard to find a violation of federal due process.⁶ This hierarchal organization of constitutional rights has long resided within the heart of American legal philosophy.⁷ But property rights must certainly enjoy some sort of heightened protection, otherwise the amendment's framers would not have included a guarantee against their infringement by the states among such lofty and fundamental interests as "life" and "liberty."

In 2016, the Tenth Circuit Court of Appeals handed down its decision in *Onyx Properties LLC v. Board of County Commissioners of Elbert County*. After the County Board secretly enacted a zoning ordinance, a group of Colorado landowners filed suit alleging that this improper infringement of their real property rights amounted to a violation of federal due process.⁸ Ruling in favor of Elbert County and against its own precedent,⁹ the Tenth Circuit set the bar staggeringly high for successfully challenging a state's interference with a citizen's real property interests, essentially making due process claims on these grounds infeasible.¹⁰ To compound these difficulties, the Supreme Court has long held the view that the Due Process Clause does not apply to a legislative body when it enacts legislation, including the enactment of general zoning regulations.¹¹ Simply put, in answering how much process is due before state or local legislatures can deprive citizens of their real property interests, the *Onyx* court responded quizzically: "What process?"

6. For further reading concerning the difficulty in claiming a due process violation for property rights compared to those rights that are currently considered fundamental, see generally Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 GEO. L.J. 555 (1997).

7. See RESTATEMENT (FIRST) OF TORTS § 85 cmt. a (AM. LAW INST. 1934) ("The value of human life . . . outweighs the interest of a possessor of land . . ."); see also *Katko v. Briney*, 183 N.W.2d 657, 659, 662 (Iowa 1971) (holding that a trespasser's interest in his life outweighs a landowner's interest in the security of his property).

8. *Onyx Props. LLC v. Bd. of Cty. Comm'rs*, 838 F.3d 1039, 1042 (10th Cir. 2016), *cert. denied*, 137 S. Ct. 1815 (2017).

9. See *Jordan-Arapahoe, LLP v. Bd. of Cty. Comm'rs*, 633 F.3d 1022, 1026 (10th Cir. 2011) ("[T]he right to use property is fully protected by the Due Process Clauses of the federal and state constitutions . . ." (quoting *Eason v. Bd. of Cty. Comm'rs*, 70 P.3d 600, 605 (Colo. App. 2003) (alteration in original))).

10. *Onyx*, 838 F.3d at 1049 (stating that to bring a due process violation against a state, the state's conduct must be arbitrarily extreme or "conscience shocking"); accord *Restigouche, Inc. v. Town of Jupiter*, 59 F.3d 1208, 1214 (11th Cir. 1995) (analyzing a substantive due process claim involving a zoning ordinance under the "rational basis" level of scrutiny).

11. See *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915).

This Note will use the Tenth Circuit’s analysis in *Onyx* to illustrate the profound difficulties for plaintiffs challenging improper state interference with real property interests in federal court, and how these difficulties effectively erase “Property” from the Due Process Clause. Part II will describe the general requirements for bringing a due process challenge against a state in federal court and how legislatures are immune from such challenges if they act within the scope of their official legislative duties—such as adopting zoning regulations. Part II will also highlight the specific obstacles that arise when bringing a property-based due process challenge as an individual or as a class in federal court. Parts III and IV will describe the factual background of *Onyx* and the decision of the Tenth Circuit. In Part V, this Note will scrutinize the reasoning behind the *Onyx* opinion and expound upon two possible attack strategies for successfully bringing property-based federal due process challenges against state and local governments in the future.

II. The Crossroads of Federal Due Process and State Property Law

The text of the Due Process Clause declares that no state shall “deprive any person of life, liberty, or property, without due process of law.”¹² But, as Justice Harlan acknowledged in his dissent in *Poe v. Ullman*, the meaning of the clause is rife with vagueness,¹³ with its historical context providing little guidance.¹⁴ As a consequence, the unenviable and unending task of determining what exactly falls under the purview of the Due Process Clause has fallen to the federal courts.

A. Does the Due Process Clause Protect Property Rights?

The landmark Supreme Court case *Mullane v. Central Hanover Bank & Trust Co.* established that the minimal requirements of the Due Process Clause are derived from balancing the states’ interests in efficient governance and the private citizen’s “opportunity to be heard.”¹⁵ While the balancing of these interests will shift the amount of process that is due on a case-by-case basis, the *Mullane* Court held that “there can be no doubt” that procedural due process demands, at the very least, some form of notice and the opportunity for an aggrieved party to request a hearing.¹⁶ However,

12. U.S. CONST. amend. XIV, § 1.

13. 367 U.S. 497, 540 (1961) (Harlan, J., dissenting) (“It is but a truism to say that this provision . . . is not self-explanatory.”).

14. *Id.*

15. 339 U.S. 306, 314 (1950) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)).

16. *Id.* at 313.

Mullane did not provide any guidance on when due process requires additional safeguards. It was not until *Mathews v. Eldridge*, a quarter century after *Mullane*, that the Supreme Court proffered three factors for determining and weighing case-by-case due process requirements: (1) the private citizen's interest affected by the state action; (2) the risk that the state action will wrongfully infringe upon the citizen's interest and the value of additional safeguards against infringement; and (3) the state's interest in economic and governmental efficiency that would be hindered by the additional safeguards.¹⁷ Perhaps Justice Harlan put it best when he stated that due process is the balance of two competing interests: "the liberty of the individual . . . and the demands of organized society."¹⁸

There is also a substantive aspect to the Due Process Clause in addition to its procedural element. This aspect is concerned with the inherent fairness of a law and whether that law infringes upon a fundamental right as opposed to whether the law was enacted using fair procedures.¹⁹ Through a series of decisions reaching back to 1897,²⁰ the Supreme Court has determined that most of the provisions of the Bill of Rights contain fundamental rights, and that these rights, formerly only enforced at the federal level,²¹ were now applicable to the states.²² The mechanism by which the Supreme Court selectively applied these fundamental constitutional provisions to the states was the Due Process Clause of the Fourteenth Amendment, through the process we know of today as

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

18. *Poe*, 367 U.S. at 542 (Harlan, J., dissenting).

19. *See* *Chi. Burlington & Quincy R.R. v. City of Chicago*, 166 U.S. 226, 235 (1897) ("In determining what is due process of law, regard must be had to substance, not to form.").

20. *Id.* at 241 (holding, as the first Supreme Court case that incorporated a provision of the Bill of Rights into the Fourteenth Amendment's Due Process Clause, that the Takings Clause of the Fifth Amendment is applicable to the states).

21. *Compare* *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833) ("These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them."), *with* *Palko v. Connecticut*, 302 U.S. 319, 326 (1937) ("These in their origin were effective against the federal government alone.").

22. *See* *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010) (holding that the Second Amendment, one of the last remaining unincorporated provisions of the Bill of Rights, incorporates through the Fourteenth Amendment); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (finding that the rights guaranteed by the First Amendment are "among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment").

“selective incorporation.”²³ In his opinion for the 1937 Supreme Court case *Palko v. Connecticut*, Justice Cardozo wrote that only those rights that were “of the very essence of a scheme of ordered liberty” could be considered fundamental and therefore incorporated into the Fourteenth Amendment’s due process guarantees.²⁴ These rights were such that “neither liberty nor justice would exist if they were sacrificed.”²⁵ In short, if a right is recognized as sufficiently important to the liberty of the people, it is constitutionally protected at the federal level in addition to being “valid as against the states.”²⁶

Recognized as important rights in the common law, real property interests have historically enjoyed the protection of the Due Process Clause.²⁷ Decades after *Palko*, in *Board of Regents of State Colleges v. Roth*, the Supreme Court clarified that property interests protected by procedural due process “may take many forms.”²⁸ These forms include abstract concepts like one’s interest in continued state employment,²⁹ or even the receipt of welfare checks.³⁰ In *Roth*, the Court examined whether the firing of an assistant professor at Wisconsin State University violated his Fourteenth Amendment guarantee of due process.³¹ Although the Court ultimately found that Mr. Roth possessed no property interest in something so ephemeral and abstract as the mere possibility of having a renewed

23. See *Duncan v. Louisiana*, 391 U.S. 145, 171 (1968) (Black, J., concurring) (“[T]he selective incorporation process has the virtue of having already worked to make most of the Bill of Rights’ protections applicable to the States.”).

24. 302 U.S. at 325.

25. *Id.* at 326.

26. *Id.* at 325.

27. See, e.g., *Mugger v. Kansas*, 123 U.S. 623 (1887) (noting that, while the state had the power to destroy property it deems a public nuisance, when “unoffending property is taken away from an innocent owner,” it constitutes a deprivation of a person’s “property without due process”); see also Gregory S. Alexander, *Property as a Fundamental Constitutional Right? The German Example*, 88 CORNELL L. REV. 733, 736 (2003) (“Property once enjoyed an exalted status in American constitutional law. During the notorious *Lochner* era, the Supreme Court used the Due Process Clause of the Fourteenth Amendment to protect not only liberty of contract but property interests as well.”).

28. 408 U.S. 564, 576 (1972).

29. See *Wieman v. Updegraff*, 344 U.S. 183, 191 (1952) (holding that an Oklahoma statute requiring state employees to submit to an oath of loyalty under the threat of withheld salaries infringed upon a property interest protected by constitutional due process).

30. See *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970) (“It may be realistic today to regard welfare entitlements as more like ‘property’ than a ‘gratuity.’”).

31. *Roth*, 408 U.S. at 566, 568.

employment contract,³² the Court stressed that this determination did not affect the guarantee of procedural due process for the types of property interests recognized at common law: the “ownership of real estate, chattels, or money.”³³ These classical and historically acknowledged categories of property interests are granted the protections of the Due Process Clause largely due to their concrete, non-abstract quality.³⁴

Although it must be admitted that real property interests are mostly created and defined by state law, it is a federal question as to whether the created interest is protected by the Fourteenth Amendment.³⁵ Therefore, real property interests can be viewed as a hybrid of state law, which creates the interests, and federal law, which wards against their unjust infringement through the guarantees of the Due Process Clause.³⁶

B. *A Constitutional Headache*

In federal court, proving a lack of notice or hearing is not the greatest challenge a plaintiff faces when seeking relief for a violation of the Due Process Clause. Rather, the difficulties stem from a series of Supreme Court decisions that have restricted the applicability of the clause to only cases evincing the most flagrant abuses of state or local governmental authority.³⁷ When the alleged violation of federal due process specifically involves state-created real property interests, there are substantial requirements that must be met to avoid having the claim dismissed at the outset.

It has been well settled that if a state fails to comply with its own established procedures, it does not automatically foster a violation of

32. *Id.* at 578.

33. *Id.* at 571-72.

34. *Rochin v. California*, 342 U.S. 165, 174 (1952) (“[T]he Constitution is ‘intended to preserve practical and substantial rights, not to maintain theories.’” (quoting *Davis v. Mills*, 194 U.S. 451, 457 (1904))); *Brotherton v. Cleveland*, 923 F.2d 477, 480 (6th Cir. 1991) (citing *Roth*, 408 U.S. at 577).

35. *Waeschle v. Dragovic*, 576 F.3d 539, 544-45 (6th Cir. 2009).

36. *See, e.g., Albrecht v. Treon*, 617 F.3d 890, 896 (6th Cir. 2010) (holding that “the states define property,” but “[w]hether that ‘property interest’ is constitutionally ‘protected’ . . . is a matter of federal law” (quoting *Waeschle*, 576 F.3d at 544-45)).

37. *See, e.g., Azam v. City of Columbia Heights*, 865 F.3d 980, 986 (8th Cir. 2017) (emphasizing “the high burden facing a person who claims a violation of his or her Fourteenth Amendment rights” (quoting *Entergy, Ark., Inc. v. Nebraska*, 241 F.3d 979, 991 (8th Cir. 2001))); *Doe v. Heil*, 533 F. App’x 831, 843 (10th Cir. 2013) (“We have held that ‘[a] high level of outrageousness is required’ to establish a substantive due process violation.” (quoting *Klen v. City of Loveland*, 661 F.3d 498, 513 (10th Cir. 2011))).

federal due process.³⁸ The reasoning behind this concept has less to do with the tenets of federalism or sovereign immunity, as one might first suspect, and more to do with the weight of paperwork. For over a century, federal courts have professed that they would be overburdened by the sheer caseload should individual plaintiffs be allowed to bring any federal due process challenge against a state when it breaks its own rules.³⁹

Even if a claim were successful in avoiding immediate dismissal, the Tenth Circuit stated that it will only rule against a state in a property due process case if the government action “shocks the conscience of federal judges.”⁴⁰ The Tenth Circuit bolstered this position in *Klen v. City of Loveland*, where it held that 42 U.S.C. § 1983 should “not replace state tort law,” and that “deference to local policymaking” is a necessity.⁴¹ As a result, the federal circuit courts have consistently ruled in favor of state or local governments when deciding due process cases concerning real property and zoning issues, often remarking that the “federal courts are not to be turned into zoning boards of appeals”⁴² and that “the Due Process Clause of the Fourteenth Amendment does not authorize the federal judiciary to sit as a superlegislature.”⁴³ And yet, federal court policy is not

38. See, e.g., *Rozman v. City of Columbia Heights*, 268 F.3d 588, 593 (8th Cir. 2001) (en banc) (citing *Collins v. City of Harker Heights*, 503 U.S. 115, 129 (1992)); *Mangels v. Pena*, 789 F.2d 836, 838 (10th Cir. 1986) (“A failure to comply with state or local procedural requirements does not necessarily constitute a denial of due process . . .”).

39. See, e.g., *Gryger v. Burke*, 334 U.S. 728, 731 (1948) (“We cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question.”); *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) (“Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption.”); *Johnson v. Rosemeyer*, 117 F.3d 104, 110 (3d Cir. 1997) (holding that merely “citing the Due Process Clause” is insufficient to transform a state issue into a federal issue); *Hope Baptist Church v. City of Bellefontaine Neighbors*, 655 F. Supp. 1216, 1219 (E.D. Mo. 1987) (“To allow the loser of each zoning decision . . . to sue in federal court . . . would significantly burden both federal courts and local zoning decisionmakers.”).

40. *Camuglia v. City of Albuquerque*, 448 F.3d 1214, 1222 (10th Cir. 2006) (quoting *Moore v. Guthrie*, 438 F.3d 1036, 1040 (10th Cir. 2006)).

41. 661 F.3d 498, 513 (10th Cir. 2011); see 42 U.S.C. § 1983 (2012).

42. *Natale v. Town of Ridgefield*, 170 F.3d 258, 263 (2d Cir. 1999) (citing *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J. dissenting)).

43. *FM Props. Operating Co. v. City of Austin*, 93 F.3d 167, 175 (5th Cir. 1996); see also 2 PATRICIA E. SALKIN, *AMERICAN LAW OF ZONING* § 15:3 (5th ed.), Westlaw (database updated May 2018) (describing the conditions and procedure by which federal courts review due process challenges).

the only legal principle that protects state and local governments against real property due process challenges.

1. Legislative Immunity for Due Process Claims

Over a century ago, the Supreme Court's decision in *Bi-Metallic Investment Co. v. State Board of Equalization* established that a legislative body enacting legislation cannot be subject to procedural due process challenges.⁴⁴ In *Bi-Metallic*, the Supreme Court chose to adopt a policy that valued efficiency and alleviating the federal courts' caseloads over guaranteeing individual citizens a right to sue their state if the challenged legislation had a blanket and non-targeted effect.⁴⁵ However, the line of cases stemming from *Bi-Metallic* conceded that hearings and notices should be given when legislation targets individuals and small groups.⁴⁶

In 1998, the Supreme Court decided *Bogan v. Scott-Harris*, which clarified that legislative immunity extends to state legislatures and all the way down to the local level.⁴⁷ This protection from due process challenges is absolute, but only in the context of "legislative" acts as opposed to those that are "administrative" in nature.⁴⁸ The difference between the two labels can be ambiguous.⁴⁹ A good rule of thumb is that "legislative" acts are those that seek to create new policies, while actions that merely enforce pre-existing laws are "administrative."⁵⁰ If an act of the legislature affects only a small portion of the general population, however, the act may be considered more administrative than legislative.⁵¹ Some federal circuit courts harbor the opinion that improperly enacted legislation, either through

44. 239 U.S. 441, 445 (1915).

45. *Id.* ("There must be a limit to individual argument in such matters if government is to go on.").

46. *See* *Ind. Land. Co. v. City of Greenwood*, 378 F.3d 705, 712 (7th Cir. 2004) (listing line of cases in which legislators possessed such "illegitimate motives").

47. 523 U.S. 44, 49 (1998).

48. SALKIN, *supra* note 43, § 46:5 ("Legislative immunity may be available for local legislators, but it is available only for legislative activities. It will not be extended to legislators for the performance of functions more properly characterized as administrative."); *see also* BRIAN W. BLAESSER & ALAN C. WEINSTEIN, *FEDERAL LAND USE LAW & LITIGATION* § 2:25, Westlaw (database updated Oct. 2017) ("The initial question in determining whether decision making in the land use regulatory process violates procedural due process requirements is whether the process is legislative or administrative.").

49. SALKIN, *supra* note 43, § 46:5 ("The distinction between legislative and administrative functions is essential, although it is not always clear.").

50. *Crymes v. DeKalb Cty.*, 923 F.2d 1482, 1485 (11th Cir. 1991).

51. *Id.*

negligence or malevolence, will still be considered a “legislative act” for the purposes of legislative immunity.⁵²

2. *Are Zoning Regulations Legislative or Administrative Acts?*

Generally, the enactment of a comprehensive zoning regulation is considered a legislative act.⁵³ Courts have compiled several factors, derived from the *Bi-Metallic* directive, to aid in determining whether the adoption of zoning regulations by a legislative body is characteristically administrative. Courts will consider a number of factors, including: (1) whether the action targeted small and specific groups of people;⁵⁴ (2) whether additional procedural due process protections were appropriate due to the lack of political remedies available to small groups;⁵⁵ and (3) if the adoption of additional safeguards by the state would be unduly burdensome.⁵⁶ The factors for this exception were designed to allow relatively small groups or individuals an opportunity to request a hearing when their marginal political presence would otherwise not afford them an opportunity.⁵⁷

3. *Class Status for Plaintiffs in Real Property Due Process Cases*

Not only are plaintiffs individually barred from bringing real property due process challenges against a state, but they are also practically prohibited from forming a class to pursue their claims. Class action suits are designed to “make civil claims marketable that otherwise would not be brought on an individual basis.”⁵⁸ Under the Federal Rules of Civil Procedure, a class may be formed in the federal system only if: (1) joinder of the parties and claims would be unduly cumbersome; (2) there are common legal or factual questions between members of the putative class; (3) the representative members of the class would possess claims that are indicative of the entire class; and (4) the representatives will fairly and

52. See, e.g., *Bryan v. City of Madison*, 213 F.3d 267, 274 (5th Cir. 2000) (finding that an action of a city government was legislative in nature solely because it “involved a rezoning provision” and was therefore immune from § 1983 challenges).

53. See, e.g., *Calvert v. Safranek*, 209 F. App’x. 816, 819 (10th Cir. 2006); see also *BLAESSER & WEINSTEIN*, *supra* note 48, § 2:25 (“The federal courts have treated zoning and rezoning as legislative.”).

54. See *Londoner v. City & Cty. of Denver*, 210 U.S. 373, 384-85 (1908).

55. See *Ind. Land Co. v. City of Greenwood*, 378 F.3d 705, 710 (7th Cir. 2004).

56. See *Kaahumanu v. Cty. of Maui*, 315 F.3d 1215, 1220-21 (9th Cir. 2003).

57. *Ind. Land Co.*, 378 F.3d at 710.

58. Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 99 (2009).

adequately pursue those claims.⁵⁹ The class may then sue if “adjudications with respect to individual class members . . . would be dispositive of the interests of the other members”⁶⁰ or if “questions of law or fact common to class members” are greater than claims unique to individual class members.⁶¹ This issue of commonality, specifically in regards to the harm suffered, is critical for plaintiffs to successfully obtain class certification.⁶² However, federal courts have long recognized that real property rights are, by their very nature, considered unique, and that it is therefore difficult, if not impossible, to form a class on such grounds due to an inherent deficiency in the commonality of injury.⁶³ For example, a court will not recognize an entire neighborhood if it should, as a class, challenge an erroneously-enacted city ordinance. Instead, the court will, absent evidence indicating otherwise, treat the neighborhood as individual plaintiffs, each with a unique real property interest and a harm that is unique to that interest, rather than as a possible class formed merely due to lines drawn on a map.⁶⁴ Ultimately, the grant of class certification resides within the sole discretion of the trial court, which is given substantial weight on appeal.⁶⁵

59. FED. R. CIV. P. 23(a)(1)-(4).

60. FED. R. CIV. P. 23(b)(1)(B).

61. FED. R. CIV. P. 23(b)(3).

62. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (stating that the commonality required to obtain class certification pertains to a common sustained injury, not necessarily that the same substantive law was violated).

63. Every federal circuit recognizes, to varying degrees, that real property interests are intrinsically unique. *See, e.g., Gail v. United States*, 58 F.3d 580, 585 n.7 (10th Cir. 1995) (holding that mineral rights are as unique as the real property they are related to); *Bean v. Indep. Am. Sav. Ass’n*, 838 F.2d 739 (5th Cir. 1988) (presuming that interests in real property are unique). The uniqueness aspect of real property is also enshrined in the contract law doctrine of specific performance. *See* RESTATEMENT (SECOND) OF CONTRACTS § 360 cmt. e (AM. LAW INST. 1981); *see also* Jason S. Kirwan, *Appraising a Presumption: A Modern Look at the Doctrine of Specific Performance in Real Estate Contracts*, 47 WM. & MARY L. REV. 697, 698 (2005) (stating that the unique nature of real estate makes it the venerable example in which specific performance can be granted in a contract dispute).

64. *See, e.g., Georgia-Pacific Consumer Prods., LP v. Ratner*, 762 S.E.2d 419, 424-25 (Ga. 2014) (holding that neighbors affected by harmful hydrogen sulfide gas pollutants caused by an adjacent mill could not form a class because their individual exposure to the gas, in terms of nature and degree, was unique, and therefore the named plaintiffs could not establish a “common contention” with the other putative class members).

65. *See Califano v. Yamasaki*, 442 U.S. 682, 706 (1979) (reviewing the certification of a nationwide class under an abuse of discretion standard).

III. The Factual Background of Onyx

In 1983, the County Board for Elbert County, Colorado enacted a set of zoning regulations including a map of the county that demarcated the boundaries of the zones the board had created.⁶⁶ In 1997, the board realized that the 1983 zoning map had been misplaced at some point in the intervening years.⁶⁷ Kenneth Wolf, the county's Planning Director, was charged with creating a new set of maps and regulations known as "The Wolf Documents" based upon his research of county history.⁶⁸ From 1997 to 2008, landowners within the county that sought to subdivide their farmland were informed by the County Board that their land was zoned "A" for "Agriculture," and that the farmers were required to submit applications and pay the requisite fees in order to subdivide.⁶⁹ After doing so, the landowners later learned that the Wolf Documents used to create the zoning regulations were never formally enacted.⁷⁰

Two different cases arose from this discovery.⁷¹ The first, "The *Onyx* Litigation," involved the landowners' initial attempt to bring a class action against Elbert County in the District Court for the District of Colorado claiming procedural and substantive due process violations by the county.⁷² The district court denied class certification, causing thirty-two of the landowners to jointly file the same claims against Elbert County Board as part of a second suit known as "The *Quinn* Litigation."⁷³

In "The *Onyx* Litigation," the district court ultimately dismissed the plaintiffs' substantive due process claim and granted summary judgment in favor of the Elbert County Board on the procedural due process claim.⁷⁴ In "The *Quinn* Litigation," the district court dismissed both the procedural and substantive due process claims brought by the landowners, even after they were given leave to amend their complaint.⁷⁵ On appeal, the *Onyx* plaintiffs asserted that summary judgment was improperly granted on their

66. Brief of Appellants at 5-6, *Onyx Props. LLC v. Bd. of Cty. Comm'rs*, 838 F.3d 1039 (10th Cir. 2016) (No. 15-1141).

67. *Id.* at 6.

68. *Id.* at 7.

69. *Onyx Props.*, 838 F.3d at 1042.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

procedural due process claim.⁷⁶ The *Quinn* plaintiffs argued that both their substantive and procedural due process claims were improperly dismissed.⁷⁷ *Onyx* and *Quinn* were merged on appeal by the Tenth Circuit.⁷⁸

IV. The Tenth Circuit's Decision

The court's opinion, written by Judge Hartz, contains a discussion divided into two parts: an analysis of the appellants' procedural due process claims and a separate section for their substantive due process claims.⁷⁹

A. The Procedural Due Process Claims

The court began by stating the requirements for procedural due process as interpreted by previous Tenth Circuit decisions.⁸⁰ Although the court admitted that the Due Process Clause commands that states grant affected plaintiffs fair notice and an opportunity to be heard, it subsequently held that a "[v]iolation of state procedural requirements . . . does not in itself deny federal constitutional due process."⁸¹ The Tenth Circuit followed the lead of the Supreme Court in *Bi-Metallic Investment Co. v. State Board of Equalization*, employing a rationalization that is part efficiency argument and part democratic theory.⁸² This reasoning posited that unless a legislative act seemed to target specific individuals or groups, the burden of having to hear out every affected citizen would bring government to a standstill.⁸³ The court reasoned that individuals have other avenues to be heard by their legislatures, particularly through the political process and the "ultimate sovereignty of the people."⁸⁴

After explaining its justifications for denying the plaintiffs' relief, the court admitted that not all actions undertaken by legislative bodies, specifically county or city governments, are irrefutably legislative.⁸⁵ If a

76. *Id.* at 1042-43.

77. *Id.* at 1042.

78. *Id.* at 1043.

79. *Id.* at 1044, 1048.

80. *Id.* at 1044; *see also* Moore v. Bd. of Cty. Comm'rs, 507 F.3d 1257, 1259 (10th Cir. 2007) ("[P]rocedural due process is the provision . . . of 'some kind of notice and . . . some kind of hearing.'" (quoting Zinermon v. Burch, 494 U.S. 113, 127 (1990))).

81. *Onyx*, 838 F.3d at 1044.

82. *Id.* at 1045 ("[S]uch a requirement would be too burdensome, and the public had other means of influencing legislative decisions . . .") (citing *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915)).

83. *See id.* (citing *Bi-Metallic*, 239 U.S. at 445).

84. *Id.*

85. *Id.* at 1046.

legislative act “has a limited focus” or is “based on grounds that are individually assessed,” the act could be seen as more administrative than legislative, and legislative immunity would therefore not apply.⁸⁶ Nevertheless, the *Onyx* court ultimately found that the enactment of a “general zoning ordinance” is categorically legislative in nature, and that the Elbert County Board was immune from § 1983 liability.⁸⁷

B. The Substantive Due Process Claims

The Tenth Circuit found no denial of substantive due process because the *Onyx* and *Quinn* plaintiffs claimed only that the County Board engaged in misrepresentation and subterfuge, not that the substance of the underlying regulation violates due process.⁸⁸ The court further expounded that even if the plaintiffs’ claims were valid, they were not egregious and shocking enough to reach the threshold for bringing substantive due process claims to a federal court.⁸⁹ The Tenth Circuit believed that, though it found no violation of federal due process, a remedy for the plaintiffs’ grievances may exist under state law.⁹⁰

V. Cracking Onyx

The Tenth Circuit’s decision in *Onyx* reached two conclusions: (1) that the Elbert County Board’s enactment of the Wolf Documents enjoyed immunity from due process challenges; and (2) the fact that the regulations were erroneously and covertly enacted does not shift the balance of due process interests against the government. These conclusions disregard the factors for measuring the amount of process due as enumerated in *Mullane* and *Mathews*.⁹¹ Because property interests are deemed to be lower in the constitutional pecking order, the burden on plaintiffs seeking recourse for infringed-upon property interests is one few successfully overcome.⁹² To pass this high bar and successfully challenge a state’s interference with real

86. *Id.*

87. *Id.*; see also SALKIN, *supra* note 43, § 46:5 (describing how county boards are entitled to immunity from § 1983 liability for their legislative activities, and how courts routinely hold the enactment of local zoning ordinances to be legislative acts).

88. *Id.* at 1048.

89. *Id.* at 1049 (asserting that “[i]ntentionally or recklessly causing injury through the abuse or misuse of governmental power is not enough” to violate the substantive aspect of the Due Process Clause).

90. *Id.* at 1048.

91. See discussion *supra* Section II.A.

92. See discussion *supra* Section II.B.1-2.

property, a plaintiff must usually demonstrate that the action of the legislative body is not legislative at all, but rather administrative in nature.⁹³ In the case of the *Onyx* plaintiffs, this could have been accomplished through closely scrutinizing the Elbert County Board's procedural errors. In the alternative, there exists a substantive due process argument that the real property rights infringed upon were constitutionally protected.

A. *Procedurally Polishing Onyx*

The continuation of government and the functionality of the courts are undoubtedly compelling interests. The problem, however, presented from *Bi-Metallic* and its offspring leading up to *Onyx* is one of proportion and perspective: are small county boards allowed to pass legislation that affects a handful of individuals within their county, without notice or hearing, and claim the full breadth of legislative immunity equally vested in the parent state legislature? The Due Process Clause says no “*State*” shall deprive citizens of life, liberty, and property without due process of law.⁹⁴ But are county boards, like the one in *Onyx*, operating as arms of the state, or are they acting in a more autonomous capacity? The Supreme Court in *Bogan v. Scott-Harris* found any distinction between state, county, and city governments to be irrelevant, as both state and local legislators derive their immunity from the same source—history and English common law.⁹⁵ But this immunity extends only so far as the County Board's actions can be considered legislative.⁹⁶ A closer examination of the governmental action at the heart of *Onyx* reveals substantial flaws in the court's reasoning. More importantly, such scrutiny exposes the action to be more of an administrative act than a purely legislative one. Even if the zoning plan was unquestionably legislative, the procedural safeguards that would grant legitimacy to its enactment were ineffective because the plan was not properly enacted.

1. *A Matter of Authority and Scope*

One of the arguments left unexplored by the *Onyx* plaintiffs is that the zoning plan particularly targeted the landowners, and, consequently, that the enactment of the plan by the Elbert County Board was not a clearly legislative act. The zoning regulation affected only a small group of

93. See discussion *supra* Section II.B.2.

94. U.S. CONST. amend. XIV, § 1 (emphasis added).

95. 523 U.S. 44, 49-52 (1998) “The rationales for according absolute immunity to federal, state, and regional legislators apply with equal force to local legislators.” *Id.* at 49.

96. See discussion *supra* Section II.B.2.

landowners on potentially lucrative real estate in one of Colorado's most rapidly growing counties.⁹⁷ It stands that if local legislatures derive their immunity against due process challenges from its parent state, then the facts of *Onyx* should be viewed through a state-wide lens. The Elbert County Board's targeting of the landowners should have met the "limited focus" requirement and triggered the immunities exception from *Bi-Metallic* and its progeny. The Tenth Circuit's holding to the contrary, that the Elbert County landowners were not specifically targeted to the degree required to trigger the *Bi-Metallic* exception,⁹⁸ reveals how unreasonably and frustratingly high the threshold is to bring property due process challenges in federal court.

The Tenth Circuit response to these difficulties is that these plaintiffs could always "seek [their] remedy under state law."⁹⁹ After all, the Colorado Constitution has its own due process clause.¹⁰⁰ But if the *Onyx* plaintiffs pursued a remedy under Colorado law, what exactly is guaranteed by the Fourteenth Amendment's Due Process Clause? When it comes to property interests, it seems that the clause has become redundant at best and effectively nullified at worst.

Yet perhaps the clearest indicator of the administrative nature of the *Onyx* zoning plan is the question of whether rectifying the county board's failure to follow established procedures would be unduly burdensome.¹⁰¹ By allowing the commissioners of Elbert County to ignore the commands of the U.S. and Colorado¹⁰² Constitutions at will, the *Onyx* court practically declared the minimal requirements of due process to be undue burdens. Unequivocally, the Elbert County Board chose to do what was easy instead of what was proper, and then relied upon legislative immunity and Supreme Court decisions from the *Bi-Metallic* line of cases to get away with it.¹⁰³ The end result is an undeniable subversion of the original purpose of legislative immunity. The doctrine of legislative immunity, originally a

97. See *Elbert County*, COLO. ENCYCLOPEDIA, <https://coloradoencyclopedia.org/article/elbert-county> (last visited Sept. 2, 2018).

98. *Onyx*, 838 F.3d at 1048 (using a Ninth Circuit case involving a zoning ordinance that "affected only two landowners" as an example of the degree of specific targeting needed to make a zoning ordinance administrative (citing *Harris v. Cty. of Riverside*, 904 F.2d 497, 502, 504 (9th Cir. 1990))).

99. *Id.* at 1048.

100. COLO. CONST. art. II, § 25.

101. *Crymes v. DeKalb Cty.*, 923 F.2d 1482, 1485 (11th Cir. 1991).

102. COLO. CONST. art. II, § 25.

103. See Brief of Appellee at 34-37, *Onyx Props. LLC v. Bd. of Cty. Comm'rs*, 838 F.3d 1039 (10th Cir. 2016) (No. 15-1141).

tenet of English law,¹⁰⁴ was swiftly and zealously adopted by the fledgling United States¹⁰⁵ to “encourage a representative of the public to discharge his public trust with firmness and success” without the fear of being sued by “powerful” opponents to the legislation.¹⁰⁶ Instead of encouraging and protecting legislators from potent adversaries, the *Onyx* opinion promotes the opposite: that legislative immunity fully allows local governments to dismiss the Due Process Clause as a nuisance, one that can be ignored without repercussion when encroaching upon the real property rights of private citizens. What was once designed as a safeguard for the public trust is now used as a weapon against it.

The Fourteenth Amendment was largely enacted to ensure that individual states complied with the mandates of the Constitution during the Reconstruction era.¹⁰⁷ It was not enacted to grant local governments free reign to disregard state or federal procedural rules, nor protect them from legitimate scrutiny when they violate the law. With its decision in *Onyx*, the Tenth Circuit has widened the already expansive gap between federal judicial policy and what the plain language of the Fourteenth Amendment clearly commands to the states and their local government catspaws. If a government is to fulfill the role of “the omnipresent teacher” that leads “the whole people by its example,” disregard for constitutional rights by state and local legislatures, and the subsequent nod of approval by the federal courts, will only foster “contempt for the law.”¹⁰⁸

104. Though the concept of legislative immunity dates back to late fourteenth century England, it was not officially codified into law until the writing of the English Bill of Rights in 1689. See An Act Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown (Bill of Rights), 1689, 1 W. & M., c. 2, § 9 (Eng.) (“That the Freedome of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament.”).

105. See 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 863, at 328 (Boston, Hilliard, Gray & Co. 1833) (“This privilege . . . now belongs to the legislature of every state in the Union, as matter of constitutional right.”).

106. *Tenney v. Brandhove*, 341 U.S. 367, 373 (1951) (quoting 2 COLLECTED WORKS OF JAMES WILSON 38 (James DeWitt Andrews ed., 1896)).

107. For more historical context concerning the enactment of the Reconstruction Amendments, see Fred O. Smith, Jr., *Due Process, Republicanism, and Direct Democracy*, 89 N.Y.U. L. REV. 582, 625-26 (2014).

108. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) (“Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.”).

2. *The Political Process Is Ill-Equipped as a Safeguard and Remedy*

The safeguards derived from the democratic process, including the power of public opinion and the ability to vote disfavored legislators out of office, are not substitutes for constitutionally guaranteed due process, nor are they effective against improperly-enacted legislation. The *Onyx* court's reasoning for declaring the actions of Elbert County as legislative relies upon the erroneous assumption that even the surreptitiously-enacted pieces of legislation are vetted by the democratic process alongside their above-the-table counterparts. But private citizens do not write or call their elected representatives to protest or approve of legislation they know nothing about. They cannot read or listen to news stories about who voted in favor of the latest stealthily-drafted bill.

The Tenth Circuit believed that such political safeguards against legislative mismanagement and dishonesty somehow applied to the enactment of the zoning regulations derived from the Wolf Documents in 1997. By following *Bi-Metallic*'s holding, federal courts have adhered to a fiction—that the sheer size of the general public would keep legislators in check and dissuade them from deceptive, clandestine, and pernicious conduct.¹⁰⁹ If this belief was honestly held when *Bi-Metallic* was handed down in 1915, cases involving the underhanded actions of legislators would assuredly be unheard of today after the population of the country has more than tripled.¹¹⁰ But the reality is that the landowners suspected nothing was amiss until evidence of the board's secret creation of new zoning documents was brought to light in 2007—a full decade after the Wolf Documents were enforced—in the context of a federal case.¹¹¹ If this revelation had not been made, the zoning ordinance would have remained

109. *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) (“Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.”); *see also* *Rogin v. Bensalem Twp.*, 616 F.2d 680, 693 (3d Cir. 1980) (“[T]he relatively large number of persons affected works to ensure that the legislature will not act unreasonably.”).

110. According to the United States Census Bureau, the population of the country was approximately 100 million people in 1915. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, PB96-119060, POPULATION OF STATES AND COUNTIES OF THE UNITED STATES: 1790 TO 1990, at 3 (1996). The population of the United States as of September 2018 is approximately 328.6 million. *See United States and World Population Clock*, U.S. CENSUS BUREAU, <https://www.census.gov/popclock/> (last visited Sept. 24, 2018).

111. *See Bd. of Cty. Comm'rs v. Rohrbach*, 226 P.3d 1184, 1187 (Colo. App. 2009) (detailing board's approval of zoning map in 1998 and subsequent but noting there was no evidence the board adopted the maps).

passively accepted and unchallenged by the Elbert County landowners indefinitely.

The Due Process Clause should invalidate, in its entirety, any legislation that fails to adhere to constitutional and statutory due process minimums, no matter the delay in the error's discovery. If it does not, then the clause is diminished "to a form of words."¹¹² This assertion is grounded in Tenth Circuit precedent. The court has previously, and quite clearly, held that "[n]on-compliance with statutory requirements relating to notices and hearings are . . . infirmities [which] cannot be overlooked and the fact that such an ordinance has been 'on the books' . . . does not instill life into an ordinance which was void at its inception."¹¹³ Additionally, though the court has previously ruled that zoning ordinances fall within the general police power of the states, they still "must scrupulously comply with statutory requirements, including notice and hearing, in order to provide due process of law."¹¹⁴ Plainly stated, the *Onyx* court relied upon the presence of political and procedural safeguards that simply cannot exist when the legislation was not correctly enacted.

The Tenth Circuit's labelling inconsistencies in the opinion itself further underscore that the County Board's enactment was not as clearly legislative as the court claimed it to be.¹¹⁵ When analyzing the plaintiffs' procedural due process claims, the Tenth Circuit wasted no time in declaring that the actions of the Elbert County Board were legislative.¹¹⁶ The Tenth Circuit's subsequent analysis of the plaintiff's substantive due process claims presents a misleading argument. In a single sentence, it labels the zoning regulation enactment as "clearly executive"¹¹⁷ when the court just spent a majority of the opinion belaboring that it was clearly "legislative."¹¹⁸ Then, the court dismissively applied the incorrect executive standard to purportedly legislative action.¹¹⁹ Instead, the *Onyx* court should have

112. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920).

113. *Carter v. City of Salina*, 773 F.2d 251, 254 (10th Cir. 1985).

114. *Id.*

115. *See Onyx Props. LLC v. Bd. of Cty. Comm'rs*, 838 F.3d 1039, 1048 (10th Cir. 2016) (holding that the "legislative nature of general zoning decisions" barred the plaintiffs from bringing federal due process challenges, while also holding that the very same conduct is "clearly executive"), *cert. denied*, 137 S. Ct. 1815 (2017).

116. *Id.* at 1046.

117. *Id.* at 1048.

118. *Id.* at 1044-48.

119. *See id.* at 1048-49 ("When analyzing executive action, 'only the most egregious official conduct can be said to be arbitrary in the constitutional sense.' Intentionally or

labeled the action in dispute as administrative because it only served to enforce existing law. The county itself admitted that the Wolf Documents were enacted as mere replacements for the missing original 1983 zoning regulations.¹²⁰

It was unsurprising that the *Onyx* plaintiffs consequently could not meet the heavy burden of proving “egregious” and “conscience[-]shocking” misconduct when the court exchanged definitions and standards to create the desired outcome in its ruling.¹²¹ Over half a century ago, Justice Black’s concurrence in *Rochin v. California* prophetically warned of the dangers in implementing such philosophical and “accordion-like” requirements for due process cases.¹²² In federal court, the deck was, and remains, stacked against the plaintiff.

B. Substantively Scrutinizing Onyx

Even if the act was not administrative, the Tenth Circuit’s valuation of the state’s interest in efficiency was erroneously weighed against the plaintiffs’ interest in their constitutionally protected property rights. Since *Bi-Metallic*, courts at the federal level have skewed the balance of interests between states and citizens in favor of efficient governance, often holding that the availability of unexhausted remedies at the state level precludes plaintiffs from pursuing remedies in federal court.¹²³ This valuation misappraises the factors set out in *Mathews* as applied to the facts of *Onyx*. First, the plaintiffs’ unrestrained rights to use and possess their real estate,

recklessly causing injury through the abuse or misuse of governmental power is not enough.” (quoting *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998))).

120. *Id.* at 1042.

121. *See id.* at 1048-49.

122. 342 U.S. 165, 177 (1952) (Black, J., concurring) (“Of even graver concern, however, is the use of the philosophy to nullify the Bill of Rights. I long ago concluded that the accordion-like qualities of this philosophy must inevitably imperil all the individual liberty safeguards specifically enumerated in the Bill of Rights.”).

123. *See, e.g., Guttman v. Khalsa*, 669 F.3d 1101, 1115 (10th Cir. 2012) (“A failure to comply with state or local procedural requirements does not necessarily constitute a denial of federal due process.” (quoting *Hicks v. City of Watonga*, 942 F.2d 737, 746 n. 4 (10th Cir. 1991))); *Reams v. Irvin*, 561 F.3d 1258, 1267 (11th Cir. 2009) (“Because we conclude that available state remedies were adequate . . . , [plaintiff] failed to establish that her procedural due process rights were violated.”); *Sylvia Dev. Corp. v. Calvert Cty.*, 48 F.3d 810, 829 (4th Cir. 1995) (“[T]he fact that established state procedures were available . . . belies the existence of a substantive due process claim.”); *Int’l Harvester Co. v. City of Kansas City*, 308 F.2d 35, 38 (10th Cir. 1962) (“[T]he result of error in the administration of state law, though injury may result, is not a matter of federal judicial cognizance under the due process clause of the fourteenth amendment.”).

while perhaps no longer considered fundamental rights, are nonetheless important and constitutionally protected interests. Second, though Fourteenth Amendment precedent has postulated that the system would become clogged if private citizens could bring property due process claims at will, both judicial efficiency and the real estate interests of private citizens would be better served if the courts granted class certification to groups of similarly affected landowners.

1. In Defense of Property Rights

Although “property” takes its place among “life” and “liberty” in both the Fifth and Fourteenth Amendments’ Due Process Clauses, property has been relegated to a subordinate rank ever since the downfall of the *Lochner* Era in 1937.¹²⁴ Since then, property rights have been “pushed to the constitutional back burner.”¹²⁵ The Supreme Court filled the gap left in its jurisprudential prerogatives with the fundamental right to “liberty” in the lamentably oft-cited footnote in *United States v. Carolene Products Co.*¹²⁶

However, around the turn of the twenty-first century, property rights have slowly crept back into the Supreme Court’s good graces. For example, in *Dolan v. City of Tigard*, Chief Justice Rehnquist wrote that there was no readily obvious reason why property interests should be treated as any less important than the other rights guaranteed by the Bill of Rights.¹²⁷ Unfortunately, *Dolan* was a case involving the Takings Clause and eminent domain, not the Due Process Clause.¹²⁸ In truth, the Supreme Court has never respected property rights in due process challenges as highly as it does in eminent domain¹²⁹ or Fourth Amendment case law.¹³⁰ But rights do

124. U.S. CONST. amends. V, XIV, § 1; *see also* HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* (1993).

125. Alexander, *supra* note 27, at 736.

126. 304 U.S. 144, 152 n.4 (1937).

127. 512 U.S. 374, 392 (1994).

128. *Id.* at 383-84.

129. Alexander, *supra* note 27, at 735.

130. *United States v. Jones*, 565 U.S. 400, 405 (2012) (“The text of the Fourth Amendment reflects its close connection to property.”).

not have to be valued as fundamental to be guaranteed,¹³¹ nor do they need to be fundamental to bring a due process challenge for their infringement.¹³²

The County Board's enactment of the zoning regulation without proper notice or a hearing is immediately recognizable as a restraint upon the *Onyx* plaintiffs' rights in their real estate, chiefly the rights to use and possess, without due process. Five years before the Tenth Circuit handed down the *Onyx* opinion, it held in *Jordan-Arapahoe, LLP v. Board of County Commissioners* that the rights to use and possess were recognized as interests that were "fully protected by the Due Process Clauses of the federal and state constitutions" and "subject to a proper exercise of the police power."¹³³ In the context of zoning regulations specifically, the Tenth Circuit stated that "a municipality's power to zone must be balanced against landowners' rights."¹³⁴ Admittedly, the *Jordan-Arapahoe* opinion stands for the proposition that real property rights recognized as being constitutionally protected arise from "an independent source such as state law," and thus real property due process claims should be disputes for state courts to resolve.¹³⁵ However, Colorado courts recognize the rights to use and possess real property as important, if not constitutionally protected, interests.¹³⁶ No amount of police power should be able to bypass this acknowledged requirement of due process when real property interests are infringed through zoning regulations, regardless of whether that power is wielded by a robust state legislature or the smallest county board.¹³⁷

131. Alexander Hamilton, like many other Federalists, was staunchly against the creation of a Bill of Rights out of fear that the people would believe the enumerated rights were the only ones they possessed as United States citizens. *See generally* THE FEDERALIST NO. 84 (Alexander Hamilton).

132. *See* *Lawrence v. Texas*, 539 U.S. 558, 594 (2003) (Scalia, J., dissenting) (noting that Court held intimate consensual homosexual conduct was a protected liberty interest under the Fourteenth Amendment's Due Process Clause despite not being described by the Court "as a 'fundamental right' or a 'fundamental liberty interest' nor [subjected] to strict scrutiny").

133. 633 F.3d 1022, 1026 (10th Cir. 2011).

134. *Id.*

135. *Id.* at 1025.

136. *See* *City of Englewood v. Apostolic Christian Church*, 362 P.2d 172, 174 (Colo. 1961) ("The right to the use and enjoyment of property for lawful purposes is the very essence of the incentive to property ownership."); *Eason v. Bd. of Cty. Comm'rs*, 70 P.3d 600, 607 (Colo. App. 2003) (observing that the plaintiff's interest in the right to use and enjoy his real property was "certainly a weighty interest").

137. *See* *Carter v. City of Salina*, 773 F.2d 251, 254 (10th Cir. 1985).

2. *The Federal Efficiency Problem and the Class Certification Solution*

On the other side of the balance of interests lies the government's desire for an efficient judiciary.¹³⁸ An individual plaintiff seeking relief on property due process grounds must meet multiple aforementioned burdens to avoid their case being summarily dismissed for the sake of judicial expediency. However, when groups of similarly-affected real property owners petition for class certification in an effort to assuage the government's fears of inefficient proceedings, the courts often deny certification on grounds that the injuries are inherently unique.¹³⁹

Accepting the efficiency argument on its face, the federal system's insistence on denying class certification to plaintiffs like the ones in *Onyx* is puzzling. The Tenth Circuit, and indeed the federal court system at large, bemoans the possibility of massive dockets should every individual be allowed to bring property due process challenges against their state.¹⁴⁰ While ensuring that the justice system remains in working order is indeed a legitimate, if not outright compelling, concern, the answer seems to be staring the Tenth Circuit in the face—in the interest of efficiency, grant class certification to these types of plaintiffs.

Yet, before the *Onyx* court begins its opinion in earnest, the issue of class certification is snuffed out in an early footnote.¹⁴¹ The Tenth Circuit's off-handed dismissal of a solution to an issue afflicting the entire court system stems mainly from an erroneous application of the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*.¹⁴² In *Dukes*, Justice Scalia clarified that the commonality requirement in Rule 23(b) is not a commonality of injuries suffered amongst the class, but whether the resolution of the class action had "the capacity . . . to generate common answers."¹⁴³ When *Onyx* was at the trial stage, the District Court of Colorado interpreted *Dukes* as having defined the class formation commonality requirement as stating that each class member must have been

138. See *Onyx Props. LLC v. Bd. of Cty. Comm'rs*, 838 F.3d 1039, 1045 (10th Cir. 2016) (stating that granting individual landowners a chance to be heard before adopting legislation "would be too burdensome"), *cert. denied*, 137 S. Ct. 1815 (2017).

139. See discussion *supra* Section II.B.3.

140. See discussion *supra* Section II.B.1.

141. *Onyx*, 838 F.3d at 1043 n.1 ("[W]e need not address the *Onyx* plaintiffs' arguments concerning denial of class certification . . . because any potential claims based on the same alleged due-process violations must also fail.").

142. 564 U.S. 338 (2011).

143. *Id.* at 350 (quoting Nagareda, *supra* note 58, at 132).

harmed to the exact same degree.¹⁴⁴ This is a misleading interpretation of Rule 23(b). The plain language of Federal Rule of Civil Procedure 23(b) only commands “that the questions of law or fact common to class members predominate over any questions affecting only individual members.”¹⁴⁵

In *Onyx*, the members of the putative class were all landowners affected by the same zoning regulation promulgated by the Wolf Documents.¹⁴⁶ Each class member alleged due process violations stemming from the zoning regulation’s improper restraint on their rights to use and possess.¹⁴⁷ By the Supreme Court’s standard set out in *Dukes*, the *Onyx* plaintiffs met the commonality of injury requirement since an answer on whether the Wolf Documents passed constitutional muster would be relevant to every member of the class. The benefits of granting class certification to plaintiffs like those in *Onyx* would be substantial. In addition to helping restore real property rights to their historic seat in American legal thought, the judiciary’s interest in an efficient system would be served, and the Due Process Clause would once more be enforced in its entirety.

VI. *The Rocky Road Left by Onyx*

It would be easy to write off *Onyx* as an innocuous opinion. Even if they were successful at trial, the remedy options available to the landowners would likely have been limited to some form of injunctive relief against Elbert County.¹⁴⁸ And what would such relief truly accomplish when the County Board could simply re-enact the same zoning ordinance again under proper procedures? While this perspective has merit, it misses the big picture. *Onyx* is only the latest symptom of two much graver ailments: the legislative overreaching by local governments with impunity and the steady erosion of the rights ensured by the Due Process Clause in the name of convenience. As a result, plaintiffs like the ones in *Onyx* will find no remedy when a state infringes upon their real property interests except in the most egregious and flagrant circumstances. Instead, they will fall through the cracks of a judicial system that has derogated the Due Process

144. *See Onyx Props. LLC v. Bd. of Cty. Comm’rs*, 295 F.R.D. 506, 511-12 (D. Colo. 2013), *aff’d*, 838 F.3d 1039 (10th Cir. 2016), *cert. denied*, 137 S. Ct. 1815 (2017).

145. FED. R. CIV. P. 23(b)(3).

146. *Onyx*, 838 F.3d at 1041.

147. *Id.*

148. *See* 42 U.S.C. § 1983 (2012).

Clause's protections in this area to a point where they are effectively meaningless.

Nonetheless, "[t]ime works changes, brings into existence new conditions and purposes."¹⁴⁹ Though the prestige of property rights has remained tarnished since the downfall of the *Lochner* era, what exactly is considered a fundamental right protected by the Due Process Clause is not, and never will be, set in stone.¹⁵⁰ A day may come when real property rights once again enjoy the constitutional limelight, for as American society grows and advances, what is considered a fundamental right will necessarily have to change as well.

A chance for such a change took place on January 26th, 2017, when the *Onyx* plaintiffs petitioned the United States Supreme Court to either reaffirm *Bi-Metallic*, or to once again recognize that real property rights are fully protected by the Constitution, if not fundamental. Regretfully, the Supreme Court did not seize upon this opportunity to clarify its positions. Nor did the Court comment on the possibility of curtailing modern legislative immunity for actions that encroach upon the real property interests of private citizens, especially those actions that did not undergo even a minimal amount of due process.¹⁵¹ With only silence from our highest Court, we are left with a blind spot in the law, one which local governments now exploit to tread upon the constitutional rights of the American people.

Alan Fonseca

149. *Weems v. United States*, 217 U.S. 349, 373 (1910).

150. *See Wolf v. Colorado*, 338 U.S. 25, 27 (1949) ("To rely on a tidy formula for the easy determination of what is a fundamental right . . . may satisfy a longing for certainty but ignores the movements of a free society.").

151. The United States Supreme Court denied the plaintiffs' petition for writ of certiorari to the Court of Appeals for the Tenth Circuit on April 24, 2017. *Onyx Props. LLC v. Bd. of Cty. Comm'rs*, 137 S. Ct. 1815 (2017).