1996

Determining Ripeness of Substantive Due Process Claims Brought by Landowners Against Local Governments

David S. Mendel
University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>

Part of the [Constitutional Law Commons](#), [Fourteenth Amendment Commons](#), [Land Use Law Commons](#), [Legal Remedies Commons](#), [State and Local Government Law Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

David S. Mendel, *Determining Ripeness of Substantive Due Process Claims Brought by Landowners Against Local Governments*, 95 MICH. L. REV. 492 (1996).

Available at: <https://repository.law.umich.edu/mlr/vol95/iss2/4>

This Note is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

Determining Ripeness of Substantive Due Process Claims Brought by Landowners Against Local Governments

David S. Mendel

INTRODUCTION

Landowners who sustain economic harm from arbitrary and capricious applications of land use regulations¹ may sue the local government entities responsible for applying those regulations under 42 U.S.C. § 1983,² alleging that the local government entities deprived them of substantive due process in violation of the Fourteenth Amendment.³ A landowner who brings this claim — an “as-applied arbitrary and capricious substantive due process” claim⁴ — may in appropriate cases seek

1. Local governments commonly rely on boards, commissions, and individual officials and employees to regulate land use. These government agents apply regulations when they review applications by landowners for variances and special exceptions, rezonings, building and occupancy permits, and approvals of subdivisions and other developments. *See generally* DANIEL R. MANDELKER ET AL., PLANNING AND CONTROL OF LAND DEVELOPMENT 193-204, 447-652 (4th ed. 1995) (presenting a typical zoning ordinance and describing its application).

2. Section 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State . . . subjects, or causes to be subjected, any citizen of the United States 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). Landowners may sue local governments under § 1983. *See Monell v. Department of Social Servs.*, 436 U.S. 658 (1968) (holding that municipalities are “persons” for purposes of § 1983).

3. *See Nectow v. Cambridge*, 277 U.S. 183 (1928) (holding that application of zoning regulations to individual parcels of land must be consistent with substantive due process); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). The Fourteenth Amendment states, in relevant part, that “[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1.

4. *See, e.g., Eide v. Sarasota County*, 908 F.2d 716, 721-22 (11th Cir. 1990) (identifying substantive due process claim where plaintiff alleges that regulation is “arbitrary and capricious, does not bear a substantial relation to the public health, safety, morals, or general welfare, and is therefore an invalid exercise of the police power”). As explained by the court in *Eide*, a plaintiff may bring a “facial” challenge to the regulation as well as an “as-applied” challenge. *See* 908 F.2d at 722. All references to substantive due process claims in this Note, unless otherwise indicated, are to claims alleging that regulations are arbitrary and capricious as applied to the plaintiff’s particular piece of property.

declaratory and injunctive relief, damages, and attorney's fees.⁵ Despite controversy among courts and commentators over both the definition of property interests protected by the Due Process Clause⁶ and the stan-

Two other species of due process claims available to landowners are the procedural due process claim, *see, e.g.*, *Seguin v. City of Sterling Heights*, 968 F.2d 584, 589-90 (6th Cir. 1992), and the claim that regulation constitutes a "taking" of property without due process — sometimes referred to as a "due process takings claim." *See Eide*, 908 F.2d at 721. Landowners may also allege that the government regulations constitute "takings" of property without just compensation, in violation of the Fifth and Fourteenth Amendments — a "just compensation claim" — or that regulations deprive them of equal protection, in violation of the Fourteenth Amendment. *See Eide*, 908 F.2d at 720-24 (cataloguing different constitutional claims available to landowners).

The due process takings claim and the Fifth Amendment just compensation claim are fundamentally similar, because both require the landowner to prove that the government has regulated the property so as to deprive the landowner of all reasonable beneficial use of her land. The only practical difference between the two claims is that in a due process takings claim the landowner seeks an invalidation of the offending regulation and perhaps actual damages, rather than compensation for the value of her property. *See Eide*, 908 F.2d at 721; Katherine E. Stone & Philip A. Seymour, *Regulating the Timing of Development: Takings Clause and Substantive Due Process Challenges to Growth Control Regulations*, 24 LOY. L.A. L. REV. 1205, 1231 (1991). This Note will refer to "takings" claims without necessarily indicating whether they are due process takings claims or just compensation claims.

However, care should be taken to distinguish the due process takings claim from the as-applied arbitrary and capricious substantive due process claim, the one under scrutiny in this Note. Although both claims nominally come under the label of substantive due process, they are based on different legal foundations. *See Southview Assocs. v. Bongartz*, 980 F.2d 84, 96 (2d Cir. 1992); Stuart Minor Benjamin, Note, *The Applicability of Just Compensation to Substantive Due Process Claims*, 100 YALE L.J. 2667, 2670 (1991). Whereas the former requires the showing that a regulation has gone so far that it effectively robs the landowner of the economic value of her property, the latter focuses on whether the regulation, or its application, is "arbitrary and capricious" and unrelated to the advancement of legitimate governmental interests. *See Del Montes Dunes, Ltd. v. City of Monterey*, 920 F.2d 1496, 1499 (9th Cir. 1990); *Eide*, 908 F.2d at 721-22; Stone & Seymour, *supra*, at 1231.

5. *See Eide*, 908 F.2d at 720; ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* § 8.11, at 514 (2d ed. 1994); MANDELKER ET AL., *supra* note 1, at 189.

6. Constitutionally protected property interests "are not created by the Constitution but are 'defined by existing rules or understandings that stem from an independent source such as state law' and arise only where the plaintiff demonstrates a 'legitimate claim of entitlement.'" *Polenz v. Parrott*, 883 F.2d 551, 555 (7th Cir. 1989) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)). In cases involving challenges to zoning decisions, the property interest — the ownership interest in the land itself — "is often assumed without discussion." *Polenz*, 883 F.2d at 556. But in some of these cases, and often in cases involving challenges to denials of permits, courts require the plaintiff to prove an entitlement to a particular use of her land in order to bring a substantive due process claim. *See, e.g.*, *Polenz*, 883 F.2d at 556; *Decarion v. Monroe County*, 853 F. Supp. 1415, 1418-19 (S.D. Fla. 1994) (determining conditions of a "vested property right" under Florida law); DANIEL R. MANDELKER, *LAND USE LAW* § 2.36, at 57 (3d ed. 1993) (calling requirement of proof of entitlement a "minority rule"); David H. Armistead, Note, *Substantive Due Process Limits on Public Officials' Power to Terminate State-Created Property Interests*, 29 GA. L. REV. 769, 784 & n.85

dard of conduct required of local governments under that clause,⁷ the as-applied substantive due process claim can serve as an effective weapon for landowners who seek redress for alleged arbitrary and capricious behavior by local governments.⁸ Moreover, like other constitutional claims available to landowners, substantive due process claims potentially increase the litigation costs and exposure to liability⁹ of local

(1995) (noting disagreement among courts and commentators "as to whether courts should require a state-grounded property interest before finding a violation of an individual's substantive due process rights"). Other courts go even further by suggesting that plaintiffs must have a property interest that is "fundamental." See *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102, 1104 (8th Cir. 1992) ("[T]he conventional planning dispute — at least when not tainted with fundamental procedural irregularity, racial animus, or the like — which takes place within the framework of an admittedly valid state subdivision scheme is a matter primarily of concern to the state and does not implicate the Constitution." (citation omitted)); Rosalie Berger Levinson, *Protection Against Government Abuse of Power: Has the Court Taken the Substance Out of Substantive Due Process?*, 16 U. DAYTON L. REV. 313, 316, 346-47 (1991) (noting uncertainty in lower courts as to whether arbitrary decisions affecting purely economic rights may be successfully challenged under substantive due process).

7. See MANDELKER, *supra* note 6, § 2.36, at 57 (comparing the "traditional rational relationship" test with the "shock the conscience" test); Richard H. Fallon, *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 325-26 (1993); Stone & Seymour, *supra*, note 4, at 1225-27, 1231; Armistead, *supra* note 6, at 809-15.

8. See *Marks v. Chesapeake*, 883 F.2d 308, 312 (4th Cir. 1989) (city council's denial of permit to owner of house after town members expressed "religious objections" to the owner's plans to open a palmistry constituted substantive due process violation); *Bateson v. Geisse*, 857 F.2d 1300, 1303 (9th Cir. 1988) (government's rejections of numerous plat applications, rejection of application for building permit, and proposed zone change on property which would prevent plaintiff from developing property constituted the "sort of arbitrary administration of the local regulations, which singles out one individual to be treated discriminatorily, [and] amount[ed] to a violation of that individual's substantive due process rights"); *Herrington v. County of Sonoma*, 834 F.2d 1488 (9th Cir. 1987) (county supervisory board's finding that plaintiff's proposed subdivision was inconsistent with general plan and board's subsequent downzoning of property violated due process), *as amended*, 857 F.2d 567 (1988); cf. Bruce I. Wiener, Comment, *Obstacles and Pitfalls for Landowners: Applying the Ripeness Doctrine to Section 1983 Land Use Litigation*, 7 J. LAND USE & ENVT'L. L. 387, 395 (1992) (opining that because of the availability of attorney's fees and because plaintiffs need not bring their claims in state court before suing in federal court, "[s]ection 1983 is an important source of redress for landowners who wish to vindicate their rights against the government"). But see Dan Tarlock, *Local Government Protection of Biodiversity: What Is Its Niche?*, 60 U. CHI. L. REV. 555, 592 (1993) (commenting that substantive due process "has ceased to be a meaningful limitation on government regulations except in abuse of process cases and the relatively rare cases where a local government imposes land use regulation to cloak another, usually constitutionally suspect, purpose").

9. According to one commentator, a "driving factor" of the upward trend of public sector litigation costs is the "explosion in the non-traditional use of civil rights statutes — most important, section 1983 of the Civil Rights Act of 1971 — to include cases involving such areas as zoning and land development." Susan A. Macmanus, *The*

governments and their individual agents¹⁰ who seek to implement land use regulations.¹¹

However, the effectiveness of the substantive due process claim as a check on arbitrary government regulation and the related increase in costs imposed upon local governments by the claim largely depend upon when federal courts find the claim “ripe” for judicial review. The ripeness doctrine, as utilized by courts in the land use context, requires

Impact of Litigation on Municipalities: Total Cost, Driving Factors, and Cost Containment Mechanisms, 44 SYRACUSE L. REV. 833, 836-37 (1993) (citation omitted).

Litigation costs and potential liability may increase even if government agents do not behave arbitrarily or capriciously toward landowners, because of the need to defend against and settle meritless suits. *See id.* at 838 (stating that 48.2% of respondents to survey listed an overall increase in frivolous suits as a primary cause of increased litigation costs born by municipalities). Governments will often settle meritless claims in order to avoid legal fees and unwanted controversy. *See id.* at 842 (stating that 81.4% of respondents to survey “acknowledge they settle at least some of their ‘winnable’ cases just to save money”).

For a description of the impact of meritless lawsuits brought against non-governmental individuals and groups and public officials, see Jennifer E. Sills, Comment, *SLAPPS (Strategic Lawsuits Against Public Participation): How Can the Legal System Eliminate Their Appeal?*, 25 CONN. L. REV. 547 (1993). Sills defines a SLAPP suit as a “meritless action filed by a plaintiff whose primary goal is *not* to win the case but rather to silence or intimidate citizens or public officials who have participated in proceedings regarding public policy or public decision making.” *Id.* at 548-49. Twenty-five percent of these suits, which often “masquerade” as constitutional civil rights violations, relate to development and zoning. *See id.* at 547 (citation omitted).

10. Under § 1983, landowners may sue officials and employees of local governments in their individual capacities unless these individuals are protected by qualified or absolute immunity. *See, e.g.,* *Blanche Rd. Corp. v. Bensalem Township*, 57 F.3d 253 (3d Cir. 1995) (involving developer’s § 1983 action against township, its officials, and its employees alleging violation of its substantive due process rights in connection with development of specific lots in industrial park). Although this Note generally will refer only to the liability of local governments, it assumes that what is true for the liability of governments often may extend to the liability of the agents of these governments in their individual capacities.

11. For a comparison of the liability imposed upon local governments by regulatory takings claims and substantive due process claims, see Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1, 82 (1995). *Cf.* Michael M. Berger, *Happy Birthday Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning*, 20 URB. LAW. 735, 740-41 (1988) (summarizing views of advocates who fear that the Supreme Court’s decisions in regulatory takings cases will have “chilling effect” on land use regulation). Professor Stein comments as follows:

Unlike takings compensation, due process damages resemble tort damages, and the plaintiff will have to prove her actual injuries arising from the deprivation. These damages might include increased interest rates resulting from municipal delay, fees for extensions of land option contracts and loan and contractual commitments, and losses incurred as prospective tenants seek other space. Due process damages could be substantial in some cases, but typically will be smaller in amount than regulatory takings compensation.

Stein, *supra*, at 82.

that local governments have one or more opportunities to apply regulations to the properties of landowners before being held liable for arbitrary and capricious behavior in federal court. As a result, a court's approach to determining ripeness has significant practical consequences for local governments and landowners. An underdeveloped ripeness standard — one that allows landowners to quickly bypass local processes to sue in federal court — likely increases the exposure to liability and litigation costs of local governments and individual government agents. Consequently land use regulators will become more timid in applying and enforcing regulations.¹² Hence, an underdeveloped ripeness standard may hinder efforts by local governments to perform regulatory functions that are vital to the health and safety of communities and the protection of the environment.¹³

On the other hand, an overdeveloped ripeness standard may provide incentives to local governments to neglect the concerns of landowners who believe they are being treated unfairly. Local governments, often vulnerable to political pressures in making land use decisions, may violate the substantive due process rights of landowners, and then rely on lengthy local appeals processes to forestall suit in federal court.¹⁴ Landowners of limited financial means may not be able to endure the lengthy administrative processes and litigation and may simply give up on their development plans. "Somehow," one commentator observes, "a right which is only available to those with the intestinal fortitude and economic staying power to hire counsel and pay them to conduct difficult, protracted litigation loses some of its luster."¹⁵

12. See Sills, *supra* note 9, at 550 (describing adverse effects of litigation costs on implementation of land use regulations). An underdeveloped ripeness standard contributes to both higher litigation costs and higher potential liability, because it deprives the government of an opportunity to correct its own mistakes. Increased costs also may result from a greater number of frivolous claims filed by developers seeking to intimidate local governments into approving their land use proposals. See *supra* note 9.

13. For a description of some of the functions of local land use regulation, see Tarlock, *supra* note 8, at 555-56, 559, 575.

14. See Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 CAL. W. L. REV. 1, 22 (1992) (complaining, in context of ripeness standard for takings claims, that "[d]elay has become a well-honed, tactical weapon of the government Fueled by judicial apathy and funded by tax dollars, government has the 'deep pockets' to string out litigation.").

15. Michael M. Berger, *The "Ripeness" Mess in the Federal Courts*, 1993 ALI-ABA COURSE OF STUDY: INVERSE CONDEMNATION AND RELATED GOVERNMENT LIABILITY 41, 43; (discussing ripeness test for takings claims); see also Kassouni, *supra* note 14, at 22 (warning that ripeness standard for takings claims imposes " 'chilling effect' on private property" owners, particularly those in the middle class). Even landowners who eventually secure relief through a local appeals process may incur significant, unrecouped losses because of the delays. Cf. John Mixon, *Compensation*

Courts disagree over the test for determining ripeness of substantive due process claims brought by landowners against local governments.¹⁶ One approach makes ripeness a nonissue; it holds that “the very existence of an allegedly unlawful zoning action, without more, makes a substantive due process claim ripe for federal adjudication.”¹⁷ A second approach requires the landowner to obtain a “final decision” by local authorities regarding the landowner’s desired use of the land under existing regulations. A final decision under this second approach consists of a rejected initial application by the landowner for the desired change in the use of the property — the “initial application” component.¹⁸ A third approach also adopts the requirement of a final decision

Claims Against Local Governments for Excessive Land-Use Regulations: A Proposal for More Efficient State Level Adjudication, 20 URB. LAW. 675, 681 (1988) (“A continuing wrongful denial of development permission can generate enormous consequential damages from loss of development opportunity, lost profits, lost sales, expired options, and accumulated interest.”).

16. Federal courts agree that facial substantive due process claims, *see supra* note 4, are not subject to ripeness requirements that some courts impose for as-applied claims. *See, e.g.,* *Eide v. Sarasota County*, 908 F.2d 716, 723 (11th Cir. 1990).

17. *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1215 (6th Cir. 1992) (citing *Nasierowski Bros. Inv. Co. v. City of Sterling Heights*, 949 F.2d 890, 894 (6th Cir. 1991)); *see also* *Triomphe Investors v. City of Northwood*, 49 F.3d 198, 201 n.2 (6th Cir. 1995); *Dubuc v. Green Oak Township*, 810 F. Supp. 867, 871 (E.D. Mich. 1992). Although the court in *Pearson* appeared to think that its holding regarding the ripeness of substantive due process claims was following precedent, actually it was creating a new rule of law for the circuit. The *Pearson* court wrongly cited *Nasierowski* for the proposition that a substantive due process claim was ripe as soon as the wrongful event occurred; *Nasierowski* was concerned with claims for violations of procedural due process, not substantive due process. *See Nasierowski*, 949 F.2d at 894.

18. *See Christopher Lake Dev. Co. v. St. Louis County*, 35 F.3d 1269, 1273-74 (8th Cir. 1994) (holding that a hearing before the public improvements committee satisfied finality requirement, even though plaintiff had not sought a variance from the board of zoning adjustment or director of planning). Although the Eleventh Circuit has never expressly stated that the finality requirement for substantive due process claims does not include a variance component, it has held numerous claims to be ripe even though the landowners had not pursued variances. *See Resolution Trust Corp. v. Town of Highland Beach*, 18 F.3d 1536, 1547 (11th Cir. 1994) (“A property owner’s rights are violated the moment a governmental body acts in an arbitrary manner and applies that arbitrary action to the owner’s property.”) (citation omitted); *Executive 100, Inc. v. Martin County*, 922 F.2d 1536, 1538-39, 1541 (11th Cir. 1991); *Eide*, 908 F.2d at 726 (stating that it could “conceive of an arbitrary and capricious due process claim in which the final decision requirement would be satisfied with a single arbitrary act”). Moreover, the Sixth Circuit has confirmed the difference between the Eleventh Circuit’s weak finality requirement and the approach by the Ninth and Seventh Circuits which requires a variance. *See Pearson*, 961 F.2d at 1215. *But see* *Tari v. Collier County*, 56 F.3d 1533, 1535, 1536 n.6 (11th Cir. 1995) (characterizing as dicta *Eide*’s suggestion that some circumstances will give rise to only a weak finality requirement and reiterating that ripeness requires a “final decision regarding the application of the regulations to the property at issue” (citation omitted)).

but holds that the final decision consists of not only a rejected initial application but also a rejected application for a variance¹⁹ or other administrative relief — the “variance” component.²⁰ A fourth approach constructs yet another version of finality; it requires the initial application and variance components and also at least one rejection of a reapplication for a change in the use of the property, where the additional proposed use is less ambitious than the one requested in the initial application — the “reapplication” component.²¹ Courts applying the third and fourth approaches have recognized a “futility exception,” which excuses the landowner from either the variance or reapplication components if the government has made clear that pursuit of these avenues would be useless.²²

This Note argues that the ripeness test for substantive due process claims should include a finality requirement that consists of initial application and variance components but not a reapplication component, and a futility exception that extends to the variance component. Part I describes the theoretical justifications for the ripeness doctrine. Part II argues that the ripeness test created by the Supreme Court for regula-

19. In most local jurisdictions, a “variance” is an administrative remedy available to landowners who suffer “unnecessary hardships” as a result of applications of land use ordinances to their properties. See generally MANDELKER ET AL., *supra* note 1, at 455-68.

20. See *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1232 (9th Cir. 1994); *Herrington v. County of Sonoma*, 834 F.2d 1488, 1495 (9th Cir. 1987), *as amended*, 857 F.2d 567 (1988); *Unity Ventures v. County of Lake*, 841 F.2d 770, 775 (7th Cir. 1988); cf. *Aciermo v. Mitchell*, 6 F.3d 970, 973, 976-77 (3d Cir. 1993) (requiring finality but holding here that plaintiff need not apply for a variance or take other measures because he had already secured a final decision on his development plans; plaintiff had only to appeal rejection of application for building permit before claim became ripe); *Taylor Inv., Ltd. v. Upper Darby Township*, 983 F.2d 1285, 1292-93 (3d Cir. 1993) (requiring finality, which in this case meant plaintiff had to appeal denial of use permits).

21. See *Southview Assocs. v. Bongartz*, 980 F.2d 84, 99 (2d Cir. 1992); *Southern Pacific Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 503 (9th Cir. 1990); cf. *Del Montes Dunes, Ltd. v. City of Monterey*, 920 F.2d 1496, 1507 (9th Cir. 1990) (employing “the same final decision requirement that applies to regulatory takings claims” without having to decide reapplication issue); *Landmark Land Co. v. Buchanan*, 874 F.2d 717, 722 n.3 (10th Cir. 1989) (“The final local decision which must be reviewed for arbitrariness is the decision to allow a particular level of development.”).

22. For an example of a decision applying the futility exception under the third approach, see *Herrington*, 857 F.2d at 569. For decisions applying the futility exception under the fourth approach, see *Southern Pacific*, 922 F.2d at 504 and *Del Monte Dunes*, 920 F.2d at 1501-02. As a general matter, the landowner carries a high burden of proof that any of the finality components would be useless. See *Southview Assocs.*, 980 F.2d at 99 (holding that futility exception was not met because state’s Environmental Board had indicated that it still might accept alternate plans).

According to the court in *Eide*, it might even be possible under the second approach for the futility exception to excuse the initial application component. See *Eide*, 908 F.2d at 726-27 n.17 (declining to resolve this issue).

tory takings cases supports a finality requirement for substantive due process claims that consists of initial application and variance components. Just as the Supreme Court has held that a local government does not “take” property until it finally decides how the regulations affect the property, lower courts should hold that a government does not “act” arbitrarily and capriciously until all relevant governmental agents determine that existing regulations do not permit the landowner’s desired use for the property. Part III argues that broad policies related to the quality, efficiency, and propriety of judicial decisionmaking also justify this same finality requirement. Part IV overcomes theoretical and practical objections to the finality requirement proposed in this Note, including the objection that the requirement runs afoul of a separate holding by the Supreme Court that plaintiffs need not exhaust all administrative remedies for constitutional claims under § 1983. This Note concludes that, even though the finality requirement imposes modest restrictions on litigation in federal court, the requirement helps protect the integrity of local planning processes and satisfies concerns among courts about their own role in land use disputes.

I. THE CONSTITUTIONAL AND PRUDENTIAL ASPECTS OF RIPENESS

Ripeness is a justiciability doctrine that courts may employ for either constitutional or prudential reasons to dismiss a variety of constitutional claims.²³ Courts may invoke the ripeness doctrine when a dispute has not yet generated injury significant enough to satisfy the case or controversy requirement of Article III of the United States Constitution.²⁴ When used to ensure that a complainant has suffered injury, the ripeness doctrine “prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagree-

23. There is debate among courts and commentators as to whether the ripeness doctrine is grounded in the case or controversy requirement of Article III or is better characterized as a prudential limitation on federal jurisdiction. See *Taylor*, 983 F.2d at 1289-90 & n.6 (citing cases); Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153 (1987) (emphasizing prudential nature of ripeness and protesting attempts by Burger Court to constitutionalize the doctrine). This Note assumes that ripeness has both constitutional and prudential aspects, see generally 13A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3532.1 (2d ed. 1984), but focuses on the prudential aspects for land use cases.

24. “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution . . .” U.S. CONST. art. III, § 2, cl. 1. On the constitutional aspect of ripeness, see *CHEMERINSKY*, *supra* note 5, § 2.4.1, at 114 (“Specifically, the ripeness doctrine seeks to separate matters that are premature for review because the injury is speculative and never may occur, from those cases that are appropriate for federal court action.”).

ments,"²⁵ and hence maintains the limited role for federal courts provided by the Constitution.²⁶

Even if plaintiffs demonstrate concrete injury sufficient to satisfy the constitutional requirement of a case or controversy, courts may decide that particular lawsuits are not ripe for judicial review because of prudential concerns. These concerns are "prudential," because they are not required by the Constitution; rather, courts invoke them at their own discretion.²⁷ One prudential concern is the importance of the substantive constitutional right under scrutiny compared to other constitutional rights. A court may "hone[] and adjust[] its exercise of substantive [judicial] review" by applying a more burdensome ripeness requirement to less important statutory or constitutional causes of action.²⁸ Other prudential concerns include the accuracy²⁹ and efficiency³⁰ of judicial decisionmaking, as well as proper deference by federal courts to state institutions.³¹ In this respect, "ripeness is best understood as a malleable tool of judicial decision making serving a number of interrelated pur-

25. *Abbott Lab. v. Gardner*, 387 U.S. 136, 148 (1967), *quoted in* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 78 (2d ed. 1988).

26. *See generally* CHEMERINSKY, *supra* note 5, §§ 2.1-2.4 (discussing function of justiciability doctrines of standing and ripeness).

27. *See id.* § 2.4.1, at 116; *TRIBE, supra* note 25, at 82; *WRIGHT ET AL., supra* note 23, § 3532.1, at 115, 118.

28. *Nichol, supra* note 23, at 170; *see also id.* at 167 (stating "the 'court actually does make a decision on the merits when it purports to choose the context in which the decision will be made' " (quoting G. Joseph Vining, *Direct Judicial Review and the Doctrine of Ripeness in Administrative Law*, 69 *MICH. L. REV.* 1443, 1522 (1971))); *cf. WRIGHT ET AL., supra* note 23, § 3532.3, at 159-63 (suggesting that because ripeness analysis "may be complicated . . . by the fact that some rights are more jealously protected than others," courts employ a lower ripeness threshold for claims implicating First Amendment rights, interests in privacy, and statutory rights "affected with particular public interests," such as those in patent litigation). Although Professor Nichol seems to recognize the awkwardness of using what is supposed to be a justiciability doctrine for substantive review, he does not "argue that this use of the doctrine is illegitimate." *Nichol, supra* note 23, at 169.

29. Ripeness helps to foster accurate judicial decisionmaking by requiring parties to develop adequate factual records. *See CHEMERINSKY, supra* note 5, § 2.4.1, at 116; *WRIGHT ET AL., supra* note 23, § 3532.3, at 149; *Nichol, supra* note 23, at 177-78.

30. *See CHEMERINSKY, supra* note 5, § 2.4.1, at 116; *WRIGHT ET AL., supra* note 23, § 3532.3, at 146-47; *Stein, supra* note 11, at 11.

31. The concern about comity to state institutions reflects the normative goal under the United States' system of federalism of preserving state and local autonomy by deferring to state institutions the power to decide an appropriate range of substantive issues. *See WRIGHT ET AL., supra* note 23, § 3532.1, at 121 (stating that "[c]oncern for the relationships between federal courts and state institutions may weigh in the ripeness balance"); *Nichol, supra* note 23, at 178 & n.154 (citing *Toilet Goods Assn. v. Gardner*, 387 U.S. 158, 200 (1967) (Fortas, J., concurring and dissenting)).

poses.”³² However, courts must balance these broad prudential concerns about judicial decisionmaking against the “hardship to the parties of withholding court consideration.”³³ Courts may not consider the institutional benefits of postponing judicial review in isolation from the actual harm that may be suffered by the complainant.³⁴

II. RIPENESS AS A PRUDENTIAL MEANS TO DEFINE THE CAUSE OF ACTION: *WILLIAMSON COUNTY* AND *MACDONALD*

The United States Supreme Court has not established a ripeness test for as-applied substantive due process claims brought by landowners against local governments.³⁵ However, the Court created a ripeness test for regulatory takings claims in *Williamson County Regional Planning Commission v. Hamilton Bank*³⁶ and *MacDonald, Sommer & Frates v. Yolo County*.³⁷ Section II.A demonstrates that the ripeness test set forth in *Williamson County* and *MacDonald* constitutes a prudential redefinition of the cause of action for takings claims, motivated in part by the Supreme Court’s lower regard for certain Fifth Amendment just compensation rights, as compared to other rights. Section II.B contends that the Court’s temperate view toward Fifth Amendment just compensation rights in the land use context gives lower courts reason to incorporate a finality requirement into the ripeness test for substantive due process claims.

A. *Williamson County* and *MacDonald*

In *Williamson County*, a Tennessee landowner brought a takings claim³⁸ against the county planning commission under § 1983 after the

32. Nichol, *supra* note 23, at 176; cf. WRIGHT ET AL., *supra* note 23, § 3532.1, at 130 (stating that “[r]ipeness cases have generated a functional approach that directly weighs the importance of the interest advanced; the extent of injury or risk; the difficulty of deciding the substantive issues and the allied need for specific factual illumination; and the sensitivity of the issues in relation to future cases, the states, and other branches of the federal government”).

33. *Abbott Lab. v. Gardner*, 387 U.S. 136, 149 (1967), *quoted in* Nichol, *supra* note 23, at 174-75.

34. To the extent a court considers the *type* of alleged injury in assessing the hardship to the parties of withholding judicial review, the two prudential policies outlined above — one relating to the court’s view of the underlying cause of action, and one relating to role of the court as a decisionmaker — merge.

35. *See, e.g., Taylor Inv., Ltd. v. Upper Darby Township*, 983 F.2d 1285, 1291 (3d Cir. 1993).

36. 473 U.S. 172 (1985).

37. 477 U.S. 340 (1986).

38. For a definition of a regulatory takings claim, which may be cast as either a due process claim or a Fifth Amendment just compensation claim, see *supra* note 4.

commission refused to approve the development plans of the landowner's predecessor in interest to the property.³⁹ The lower courts determined that the commission's retroactive application of new regulations to the plaintiff's property constituted a taking. The Supreme Court reversed and dismissed the suit on the ground that the landowner's claim was not ripe for review.⁴⁰ The Court held that, in order for a takings claim to be ripe for review by a federal court, the landowner must first obtain a final decision from the appropriate government authorities on the application of the regulations to his or her property, and then utilize any procedures available in state court for obtaining just compensation. The Court's finality requirement demanded that the landowner make at least one development proposal to the government and, if that proposal was rejected, an application for a variance.⁴¹ Here, the landowner — a bank — had failed to obtain a final decision from local authorities by seeking variances that would have allowed it to develop the property according to its proposed plat.⁴²

39. See *Williamson County*, 473 U.S. at 175. The landowner-respondent also had alleged that the commission's refusal to approve its predecessor-in-interest's plan violated the respondent's rights to substantive and procedural due process and denied it equal protection, but these claims were settled against the landowner-respondent in district court. See 473 U.S. at 182 n.4.

40. See 473 U.S. at 182-85.

41. See 473 U.S. at 186-88. The Court based its holding on finality on its decisions in *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264 (1981) (decision not final until the landowner applies for a variance), *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (decision not final until landowner submits at least one development proposal to the appropriate governmental entity for consideration), and *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) (decision not final until the landowner submits second development proposal that is less ambitious than the first).

42. The landowner also had not shown that state inverse condemnation procedures were unavailable or inadequate. See *Williamson County*, 473 U.S. at 187-88, 196-97. Virtually all courts determining the ripeness of as-applied arbitrary and capricious substantive due process claims have held that plaintiffs bringing these claims need not seek compensation in state court to make them ripe for review. See *Acierno v. Mitchell*, 6 F.3d 970, 977 & n.17 (3d Cir. 1993); *Southview Assocs. v. Bongartz*, 980 F.2d 84, 97 (2d Cir. 1992) (following *Sinaloa Lake Owners Assn. v. City of Simi Valley*, 882 F.2d 1398, 1404, 1407 (9th Cir. 1989)); *Eide v. Sarasota County*, 908 F.2d 716, 725 n.16 (11th Cir. 1990). The Supreme Court, by focusing on the unique language of the Just Compensation Clause, seemed to imply that the requirement of a state proceeding applied only to takings claims. The Constitution does not prohibit the taking of property *per se*, only the taking of property without just compensation. See *Williamson County*, 473 U.S. at 194 (citation omitted). Therefore, according to the Court, "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Williamson County*, 473 U.S. at 195; see also *Eide*, 908 F.2d at 725 n.16 ("[T]he just compensation hurdle applied in the just compensation claim context does not apply to arbitrary and capricious due process claims" because

In *MacDonald*, decided the following term, the Supreme Court expanded upon the finality requirement set forth in *Williamson County*.⁴³ The Court held that even though the petitioner had done more to ripen his case than landowners in previous cases — he had submitted one development proposal and received a response thereto⁴⁴ — nevertheless there remained “the possibility that some development [would] be permitted, and thus [the Court was] in doubt regarding the antecedent question whether appellant’s property [had] been taken.”⁴⁵ Hence, in order to satisfy the finality prong of the ripeness test, the petitioner needed to reapply for approval of a less ambitious plan to ensure that no development would be permitted.⁴⁶

“an arbitrary and capricious act by a government is unconstitutional even if the government pays just compensation.” (citation omitted)). *But cf.* *Polenz v. Parrott*, 883 F.2d 551, 558 (7th Cir. 1989) (holding on nonripeness grounds that plaintiff does not state a substantive due process claim without alleging a violation of some other substantive constitutional right or that available state remedies are inadequate (citation omitted)).

The fact that the Court in *Williamson County* nominally had decided a substantive due process claim also has not affected the ripeness tests devised by lower courts for as-applied arbitrary and capricious substantive due process claims. The landowner-respondent in *Williamson County* had attempted to characterize his injury not as a taking in violation of the Just Compensation Clause, but as a taking resulting from an invalid exercise of the police power, violative of the Due Process Clause of the Fourteenth Amendment. The landowner argued that, because it was a violation of due process, the landowner was not obligated to seek just compensation through procedures provided by the state in order to ripen its claim. *See Williamson County*, 473 U.S. at 173, 197-200. However, this argument only changes the claim to a due process takings claim, not an arbitrary and capricious due process claim — the type principally discussed in this Note. *See supra* note 4 (distinguishing the “due process takings claim” from the arbitrary and capricious substantive due process claim). Therefore, the Court’s holding that the landowner’s claim — even if categorized as a substantive due process claim — should be dismissed because the landowner had failed the finality requirement, *see Williamson County*, 473 U.S. at 173, 197-200, has no bearing on the controversy among lower courts over the ripeness test for arbitrary and capricious substantive due process claims.

43. *See MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351-53 (1986). *MacDonald* involved a landowner in California whose subdivision plan was rejected by a local planning commission and, on appeal, by the county board of supervisors. The landowner had immediately filed an action in California state court seeking declaratory and monetary relief for inverse condemnation. *See* 477 U.S. at 342-44.

44. *See* 477 U.S. at 351-53 (citing *Williamson County*, 473 U.S. 172; *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980)).

45. 477 U.S. at 352-53. Although the Court in *MacDonald* did not expressly fault the landowner for failing to apply for a variance, presumably no variance process was available under state or local law that would have allowed the landowner to overcome the county’s previous denial of his subdivision proposal. *See* 477 U.S. at 351 (stating that reapplication requirement, like variance requirement, was means for government to arrive at “‘final, definitive position’” (quoting *Williamson County*, 473 U.S. at 191)).

46. The Court in *MacDonald* also briefly considered whether the plaintiff had been excused from attempting to satisfy all elements of the finality requirement on the

In both *Williamson County* and *MacDonald*, the Court justified the finality requirement on the theory that it could not determine whether the government took the landowner's property until the government fully applied existing regulations to the property. A takings claim often demands that a court make fact-intensive, technical determinations of the economic impact of a regulation upon a given property.⁴⁷ The requirement that landowners first attempt to obtain relief through administrative channels allows a more accurate assessment of the degree of development permitted on the land, and therefore whether the application of the regulation constitutes a taking.⁴⁸ The Court made this rationale explicit in *MacDonald*, where it stated that a "court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes."⁴⁹

Regardless of whether one agrees with the content of the elaborate finality requirement for takings claims,⁵⁰ commentators accurately describe the creation of this requirement as motivated by prudential con-

ground that such efforts would have been futile. The Court concluded that the landowner's allegation of futility had been dismissed legitimately by the courts below. Although the Court implied that the exception would constitute an acceptable argument in other circumstances, it held that reapplications by a landowner could not be futile as long as the government might still permit less valuable development. *See* 477 U.S. at 352 n.8.

47. Among the factors the Court must consider in deciding takings cases are the "economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations." *Williamson County*, 473 U.S. at 191.

48. *See* 473 U.S. at 191.

49. 477 U.S. at 348.

50. Compare Kassouni, *supra* note 14, at 2, 11 (criticizing ripeness test as "stretched beyond its rational limits" and complaining that additional ripeness requirements tacked on for prudential reasons will simply "prevent most middle-class property owners from pursuing their constitutional right to just compensation") with R. Jeffrey Lyman, *Finality Ripeness in Federal Land Use Cases From Hamilton Bank to Lucas*, 9 J. LAND USE & ENVT'L. L. 101, 101 (1994) (observing that ripeness test for takings does not in practice impose onerous burdens on landowners and has allowed subsequent lower federal courts "to create a predictable and understandable body of law").

The Supreme Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), generated minor speculation over whether the *Williamson County* and *MacDonald* holdings are still good law. In *Lucas*, the South Carolina Supreme Court had deemed the plaintiff's takings claim to be ripe, even though after he filed his lawsuit the law prohibiting development of his property — here two parcels of beachfront property — was amended to allow landowners to apply for special permits. The United States Supreme Court, in reversing the South Carolina court's determination that the beachfront regulation did not constitute a taking, also sidestepped the ripeness issue and did not require the petitioner to apply for one of these permits before creating a ripe claim. *See* 505 U.S. at 1011-13. This decision is best seen not as a weakening of the finality requirement, but as a backhanded rejection by the Court of attempts by the South Carolina legislature retrospectively to interpose additional ripeness barriers to the lawsuit of the landowner, who had already gone two years without a special permit option. *See*

cerns.⁵¹ To say that courts need to determine “how far” regulations go is not to say that finality is required by the Constitution. Certainly the technical nature of the takings claim, which requires courts to make “ad hoc factual inquiries with respect to particular property, particular estimates of economic impact, and ultimate valuation,” helps justify an elaborate finality requirement as part of ripeness.⁵² But the Court in *Williamson County* and *MacDonald* simply could have required the landowners to carry their burden of proof that the applications of regulations constituted takings of their properties.⁵³ Instead, the Court mandated the use of local administrative processes as prerequisites to judicial review.

Moreover, the Supreme Court’s holding in *MacDonald* that finality requires a reapplication by the landowner makes sense only if finality is viewed as driven by prudential concerns. Once the government rejects the landowner’s initial application for development, a court would be hard pressed to find in the Constitution any guidance on the number of reapplications that should be required in order for the government’s decision to be final.⁵⁴ In other words, there seems to be no logical point at which a denial of a particular application for development denies a landowner all beneficial use of his or her property. For every proposal that is rejected, there is always another alternative use for the property that would preclude a takings claim, up until the point at which a proposal is submitted that allows the landowner no use at all. A landowner, of course, would have no reason to submit such a proposal.

WRIGHT ET AL., *supra* note 23, § 3532.1, at 68 (Supp. 1996); Stein, *supra* note 11, at 24.

51. See WRIGHT ET AL., *supra* note 23, § 3532.1, at 78 (Supp. 1996) (asserting that “[c]oncerns of ripeness, deference to state procedures, and substantive constitutional principle seem to be mingled in the ripeness ruling in *Williamson County*”); Kassouni, *supra* note 14, at 11; Nichol, *supra* note 23, at 164-67, 181.

52. WRIGHT ET AL., *supra* note 23, § 3532.3, at 154 (citing *Hodel v. Virginia Surface Mining & Reclamation Assn.*, 452 U.S. 264, 293-97 (1981)); see also *infra* Part III (discussing the broad prudential justifications of ripeness).

53. See Kassouni, *supra* note 14, at 30 (arguing that the Supreme Court “relied on substantive takings principles” in its ripeness holding in *MacDonald*; “[i]f a property owner submits evidence that the denial of just one development application works a taking, there is no logical reason why the claim is not ripe. The property owner need only convince a trier of fact that lesser uses would not be economically viable.”). But cf. TRIBE, *supra* note 25, at 80 (using takings cases as examples where “the constitutional ripeness of the issue presented depends more upon a specific contingency needed to establish a concrete controversy than upon the general development of the underlying facts”).

54. Cf. Kassouni, *supra* note 14, at 24 (noting that *MacDonald* opinion fails to indicate “[j]ust how many other proposals must be submitted to establish a ripe claim”).

As noted by commentators, the prudential concern primarily responsible for the Court's elaborate finality requirement in *Williamson County* and *MacDonald* was its lower prioritization of Fifth Amendment just compensation rights arising in the land use context.⁵⁵ Although *Williamson County* and *MacDonald* set forth the three-part finality requirement as part of the test for ripeness, the creation of the requirement also constituted a redefinition of the underlying cause of action — in these cases a takings claim.⁵⁶ No doubt other prudential concerns also gave rise to this finality requirement;⁵⁷ however, the extent to which the Court has required landowners to pursue local avenues of redress is best explained by the Court's temperate view of landowners' constitutional rights to develop their properties.

B. *The Prudential Use of Ripeness to Redefine the Cause of Action for Substantive Due Process Claims*

The same prudential concern motivating the Supreme Court's use of ripeness to redefine the cause of action for takings claims justifies a similar redefinition for substantive due process claims. Substantive due process claims by landowners do not implicate rights that deserve more judicial scrutiny than landowners' Fifth Amendment rights to just compensation.⁵⁸ Moreover, substantive due process claims are not accompa-

55. "Suffice it to say that even the framers of the fifth amendment saw the wisdom of enumerating life, liberty, and property separately, and that few of us would put equal value on the first and the third." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 911 F.2d 1331, 1338 n.5 (9th Cir. 1990) (Reinhardt, J.), *rev'd.*, 938 F.2d 153 (9th Cir. 1991), *quoted in* Kassouni, *supra* note 14, at 1; *see also id.* at 11; Nichol, *supra* note 23, at 165 (arguing that *Williamson County* and First Amendment cases in which the Court employed a low ripeness threshold "tell us far more about the demands of the takings clause and the first amendment, respectively, than about the requisites of article III"); *id.* at 181.

56. *See* Nichol, *supra* note 23, at 181 (contending that by creating components of finality in *Williamson County* the Court merely redefined the elements of a cause of action — "hardly the work of Article III").

57. *See infra* note 81 (describing other prudential concerns motivating the Court's holding in *Williamson County*).

58. *See, e.g., Halverson v. Skagit County*, 42 F.3d 1257, 1261-62 (9th Cir. 1994) (imposing "heavy burden" of proof on plaintiffs in land use context on ground that "the protection from governmental action provided by substantive due process has most often been reserved for the vindication of fundamental rights"); *Lemke v. Cass County*, 846 F.2d 469, 472 (8th Cir. 1987) (Arnold, J., concurring) ("I see no reason to read the Due Process Clause as a constitutionalized Administrative Procedure Act setting up the federal courts as a forum for the review of every run-of-the-mill land-use dispute."), *quoted in* Wiener, *supra* note 8, at 406-07.

Fifth Amendment just compensation rights perhaps receive greater attention than Fourteenth Amendment substantive due process rights, but not vice versa. This is evidenced by the Supreme Court's holding that substantive due process claims may not be

nied by circumstances that make the landowners' plight more sympathetic. Broadly speaking, the substantive due process claim is another arrow in the quiver of landowners who seek to minimize the effects of land use regulation and maximize the development value of their properties.⁵⁹

Given the similar status of Fifth Amendment just compensation rights and Fourteenth Amendment substantive due process property rights, the Supreme Court's logic that local governments cannot "take" property until they have sufficient opportunity to fully apply existing regulations provides an analogy for the ripeness inquiry for substantive due process claims. For these latter claims, courts should reason that one administrative setback for a landowner does not necessarily constitute an arbitrary and capricious "act" within the meaning of the Due Process Clause. "Acting," like "taking," may be broken down analytically into smaller steps. It makes just as much sense to say that a government cannot "act" without considering an application and a variance as it does to say that a government cannot "take" without doing the same. There is no absolute point at which either government activity may be complete and reviewable by a court. Courts may define "taking" and "acting" in a manner that fairly balances the interest in quick judicial remedies on the part of landowners with the interest in effective land use regulation on the part of local governments.⁶⁰ Hence, a local

made if another more specific, enumerated constitutional claim is available. See *Graham v. Connor*, 490 U.S. 386, 395 (1989). Although *Graham* involved allegations of excessive force by police, implicating a violation of the Fourth Amendment, one lower court recently has held that where plaintiffs bring both takings and substantive due process claims, the former subsumes the latter. See *Bateman v. City of West Bountiful*, 89 F.3d 704, 709 (10th Cir. 1996). But see *Pearson v. City of Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992) (holding that limitation on substantive due process claims enunciated in *Graham* does not apply in zoning cases); MANDELKER, *supra* note 6, § 2.36, at 57.

59. See *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 467 (7th Cir. 1988) (Posner, J.) (commenting that alleged violations of the Fifth and Fourteenth Amendments "present[] a garden-variety zoning dispute dressed up in the trappings of constitutional law").

60. This definition of substantive due process rights is in accord with the Supreme Court's reasoning in *Monell v. Department of Social Services*, 436 U.S. 658 (1978), in which it held that municipalities could be liable in damage actions for arbitrary and capricious behavior under § 1983 only when the alleged violation is pursuant to government "policy." See BATOR ET AL., *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1257 (3d ed. 1988) [hereinafter *HART & WECHSLER*] (discussing *Monell*). One might argue that a statute passed by a town council which on its face prohibits development in a particular instance manifests a clear government policy. This argument is undermined, however, by the ad hoc nature of land use decision-making. See *infra* text accompanying note 130. Given the good possibility that what appears to be a clear ordinance may be modified in practice by its application to a specific piece of property, the better view of the *Monell* holding is that it requires a landowner

government does not decide arbitrarily to reject a development project when it creates a land use ordinance that on its face prohibits a particular kind of development desired by an individual landowner. It only rejects a project after the landowner actually submits a development proposal and gives the government sufficient opportunity to make a decision on that proposal.

Under this modified conception of arbitrary and capricious "action," the finality requirement for substantive due process claims should demand that landowners make an initial application and apply for a variance or other appropriate administrative relief before bringing their claims in federal court. Courts should construe the variance component liberally. The variance component means that landowners should be required to pursue other methods of administrative relief if those methods are more appropriate than a "variance" as traditionally conceived.⁶¹ The variance component, which allows the locality to exercise all available forms of decisionmaking on the landowner's particular desired use, also requires that the landowner use all available avenues of administrative appeal for an adverse decision on an initial application.⁶² Courts that already require an initial application and an application for a variance⁶³ recognize the importance of allowing multiple government actors to participate in a land use decision before calling the decision "final."⁶⁴

to submit an initial application and an application for a variance, *see infra* text accompanying notes 61-64, in order to ascertain the true governmental "policy" with respect to her property.

61. *See Wiener, supra* note 8, at 392 (broadly referring to the variance requirement set forth in *Williamson County* as the "administrative relief element"). Other forms of administrative relief include a special exception, a special use permit, and a conditional use. *See MANDELKER ET AL., supra* note 1, at 468-76 (distinguishing these forms of administrative relief from a variance).

62. *See Acierno v. Mitchell*, 6 F.3d 970, 976 (3d Cir. 1993) (holding unripe substantive due process claim arising out of denial of building permit, where development plan had already been approved by state, on ground that plaintiff had not appealed to Board of Adjustment); *Taylor Inv., Ltd. v. Upper Darby Township*, 983 F.2d 1285, 1289 (3d Cir. 1993) (holding unripe substantive due process claim arising out of revocation of lessor's permit on ground that plaintiff failed to reapply for use permit, appeal the revocation decision to the Township Zoning Hearing Board, or seek a variance or special exception); *cf. Bateman*, 89 F.3d at 706-07 (holding plaintiff's takings claim unripe on ground that landowner failed to appeal to the Board of Adjustment and seek "a variance or waiver" from the certificate of noncompliance issued by government employee).

63. *See cases cited supra* note 20.

64. The Third Circuit has stated that the Supreme Court's decisions in *Williamson County* and *MacDonald*, "[i]n the context of land use decisions . . . require state zoning authorities be given an opportunity to 'arrive[] at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question' before its owner has a ripe constitutional challenge based on the disputed decision." *Taylor*, 983

Some courts, however, have argued that the finality requirement has no bearing at all on substantive due process claims.⁶⁵ This logic has allowed a substantive due process claim to be ripe for review when the town zoning board had not yet issued a decision on the variances requested by the developer.⁶⁶ This approach ignores the analogy that lower courts should make to the Supreme Court's holdings in *Williamson County* and *MacDonald*.

The same criticism can be made, albeit to a lesser extent, of courts that require an initial application for a development proposal but no application for a variance.⁶⁷ Even though these courts recognize the importance of the finality requirement for substantive due process claims,⁶⁸ their version of finality potentially deprives the local government of opportunities to consider fully the landowner's desired use. It therefore contradicts the notion that a unitary government action, at

F.2d at 1291 (quoting *Williamson County Regional Planning Commn. v. Hamilton Bank*, 473 U.S. 172, 191 (1985)) (alteration in original).

65. See *Pearson v. City of Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992); cases cited *supra* note 17. In *Pearson*, the Sixth Circuit held that a substantive due process claim arising from a "routine denial of a zoning change," 961 F.2d at 1213, by a small defendant city in Michigan was ripe for review without an application for a variance or other administrative relief. After the city council had rejected the plaintiff's rezoning application, as well as an amended site plan and additional zoning request, the plaintiff had brought suit alleging that the rejection was arbitrary and capricious, depriving him of substantive due process of law. See 961 F.2d at 1214. The court could have held that the complaint met at least a lenient version of the finality rule, although the plaintiff had not applied for a variance and hence could not satisfy the Ninth Circuit's "stricter test" — despite a statement by the *Pearson* court to the contrary. Instead, the court reasoned that in as-applied substantive due process claims, where there was no need to decide whether the plaintiff's property had been taken and whether he had been denied just compensation, an easier ripeness standard was to be applied. See 961 F.2d at 1215. For commentary supporting the Sixth Circuit's position, see Kassouni, *supra* note 14, at 46; Gregory Overstreet, *The Ripeness Doctrine of the Taking Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go to Avoid Adjudicating Land Use Cases*, 10 J. LAND USE & ENVT'L. L. 91, 91 n.1 (1994).

66. See *Dubuc v. Green Oak Township*, 810 F. Supp. 867, 871 (E.D. Mich. 1992). The landowner in *Dubuc* complained that the zoning board of appeals intentionally delayed making a decision on the application for a variance. The court, following *Pearson*, held that a variance was not required. However, the requirement that the board of appeals make a final decision would not have put the landowner in a "catch 22," as the court suggested, see 810 F. Supp. at 871 n.2, because the landowner still could have proven that seeking a final decision would have been futile. Other courts in the Sixth Circuit have also confirmed the approach in *Pearson* that ignores finality for substantive due process claims. See *Millington Homes Investors, Ltd. v. City of Millington*, No. 94-5482, 1995 WL 394143, at *8 (6th Cir. July 3, 1995).

67. See cases cited *supra* note 18.

68. See *Eide v. Sarasota County*, 908 F.2d 716, 725 (11th Cir. 1990) (reasoning that finality requires at least one application by landowner because, "[i]f the authority has not reached a final decision with regard to the application of the regulation to the landowner's property . . . in effect, a decision has not yet been made").

least in the land use context, should be defined to include participation by all relevant agents. This least stringent finality test also creates a greater chance for confusion among courts as to which decision by the government is "final." A good example of this confusion occurs in *Resolution Trust Corp. v. Town of Highland Beach*.⁶⁹ There the Eleventh Circuit first asserted that a "property owner's rights are violated the moment a governmental body acts in an arbitrary manner and applies that arbitrary action to the owner's property."⁷⁰ Then, in an apparent bow to the finality requirement, the court determined that the plaintiff's injury occurred when the town reinterpreted an ordinance, "halting the completion of the [plaintiff's] project, and *made it clear* it would not compromise its reinterpretation that denied the joint venture . . . the benefit of its vested rights."⁷¹ Presumably, a decision is final when it is "clear," but the court does not explain what distinguishes a clear decision from an unclear one.

However, even a very broad conception of government action cannot justify requiring a landowner, in order to obtain a final decision on her original development proposal, to give regulatory authorities the opportunity to consider a different, less ambitious development proposal.⁷² The central inquiry in a substantive due process claim is whether the government *acted* arbitrarily and capriciously, not whether the government *took* the landowner's property. A reapplication requirement might make sense when courts must determine whether the government has deprived the landowner of all beneficial use of her property. But where the landowner alleges that existing regulations entitled her to approval of her first application, then the question of whether further development would be allowed is irrelevant.⁷³ Courts holding that finality for

69. 18 F.3d 1536 (11th Cir. 1994).

70. 18 F.3d at 1547.

71. 18 F.3d at 1547 (emphasis added).

72. For cases applying the reapplication component to substantive due process claims, see *supra* note 21.

73. See, e.g., *Herrington v. County of Sonoma*, 857 F.2d 567, 570 (9th Cir. 1988) (distinguishing *MacDonald's* reapplication requirement intended "to determine the exact permitted level of development" as unique to takings claims), *amending* 834 F.2d 1488 (9th Cir. 1987); cf. *Eide v. Sarasota County*, 908 F.2d 716, 725 n.16 (11th Cir. 1990) (distinguishing the requirement that the zoning decision "be finally made and applied to the property" from the requirement that the local authority make "all other decisions necessary for the court to determine whether the landowner has been deprived of substantially all economically beneficial value of the property").

The Ninth Circuit in *Herrington* had issued an earlier opinion, amended by the opinion cited above, that more explicitly denied the relevance of the *MacDonald* reapplication requirement to substantive due process claims. See 834 F.2d at 1497. However, it does not appear from the amended opinion that the Ninth Circuit changed its view that the *MacDonald* reapplication requirement is uniquely tailored to the claim al-

substantive due process claims requires at least one reapplication by the landowner have failed to justify coherently this standard.⁷⁴

In addition, if after submitting an initial application it would be futile for the landowner to pursue a decision on this application, appeal an adverse decision, or apply for a variance, the landowner should be excused from doing so. This futility exception, adopted by virtually all circuits, provides justice to landowners who cannot use existing administrative processes because of the unwarranted manipulation of these processes by government agents.⁷⁵ The futility exception also allows landowners to bypass the variance component when the government offers no such procedure for the type of application sought.⁷⁶ In this way, courts can accommodate the many differences among land use ordinances. Finally, in exceptional circumstances, the futility exception may excuse the pursuit of certain components of finality when the govern-

leging a deprivation of substantially all economically viable use of property. For a different reading of the amended opinion, see MANDELKER ET AL., *supra* note 1, at 161 (claiming that Ninth Circuit applied ripeness rules from takings cases in amended opinion but not in first opinion).

74. This failure is illustrated by the Second Circuit's decision in *Southview Associates v. Bongartz*, 980 F.2d 84 (2d Cir. 1992), which involved a developer whose application for a building permit for a residential subdivision — already downsized to accommodate a deer yard which the developer discovered after purchasing the land — was denied by Vermont's District III Environmental Commission on the ground that the proposed development violated the state's growth control regulations. After unsuccessful appeals before Vermont's Environmental Board and Supreme Court, the developer sued the Board's individual members under § 1983. See 980 F.2d at 87-92.

The Second Circuit held that Southview was required to submit at least one more development application to the state in order for the claim to be ripe for review. Although the Vermont Environmental Board had applied state regulations "to the one particular subdivision proposal in question, it [had] yet to provide a 'final, definitive position regarding how it will apply the regulations at issue to the particular land in question.'" 980 F.2d at 99 (quoting *Williamson County Regional Planning Comm'n. v. Hamilton Bank*, 473 U.S. 172, 191 (1985)). However, in attempting to explain why a reapplication was required, the *Southview* court's only suggestion was that unless it had "a final decision before it, it [could not] determine whether a claimant was deprived of property and whether the government conduct was arbitrary and capricious." 980 F.2d at 97. This argument is unpersuasive, if not disingenuous. Southview could have sustained a loss of a property interest if it was unjustly denied an opportunity to develop according to existing regulations. Also, the court did not need the benefit of knowing the fate of reapplications by Southview in order to determine whether the decision on the first application was arbitrary and capricious.

75. For example, the government might unjustifiably delay consideration of an application for development, hence making it impossible for the landowner to secure a rejection and proceed to satisfy the finality requirement. See, e.g., *Dubuc v. Green Oak Township*, 810 F. Supp. 867, 869 (6th Cir. 1992).

76. See *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1232 n.4 (9th Cir. 1994); *Herrington v. County of Sonoma*, 857 F.2d 567, 569 (9th Cir. 1988).

ment unambiguously states at an early stage that it will not allow the landowner's desired use.⁷⁷

III. RIPENESS AS A PRUDENTIAL TOOL OF JUDICIAL DECISIONMAKING: BROAD POLICY ARGUMENTS FOR REQUIRING LANDOWNERS TO OBTAIN A FINAL DECISION

Prudential concerns about the institutional capacity of federal courts to decide substantive due process claims further support the incorporation of a finality requirement into the ripeness test for these claims. These additional prudential concerns include the accuracy, efficiency, and propriety of federal judicial decisionmaking at a given point in time. They should be distinguished from the prudential concern about the relative importance of the underlying cause of action⁷⁸ because they broadly apply to all instances of judicial decisionmaking.⁷⁹ However, even though prudential concerns about judicial decisionmaking do not depend directly on the cause of action, substantive due process claims brought by landowners typically involve factual circumstances that accentuate these concerns. Courts deciding substantive due process claims brought by landowners face the unpleasant task of interposing their bulky judicial apparatus on conflicts that are local and usually political in nature. They must resolve highly contextual questions such as what constitutes arbitrary and capricious conduct and what constitutes an appropriate remedy for the landowner. Hence, even if lower courts chose to ignore the Supreme Court's flexible view of property rights under the Fifth and Fourteenth Amendments⁸⁰ — and declined to adopt a ripeness test for substantive due process claims derived from *Williamson County*

77. See *Southern Pacific Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 504 (9th Cir. 1990); *Herrington*, 857 F.2d at 570 (basing exercise of futility exception on government testimony that "the *only* means of obtaining approval of [plaintiff's] 32-lot proposal was through a General Plan amendment"). However, in no case should the futility exception excuse the submission of an initial development application. See, e.g., *Kawaoka*, 17 F.3d at 1232; *Southern Pacific*, 922 F.2d at 504.

78. See *supra* Part II.

79. See Nichol, *supra* note 23, at 176.

80. One commentator expressed this view as follows:

While freedom of speech is a fundamental constitutional right, there is no legal, moral, or prudential reason to grant it preferential status. Other constitutional rights, such as the right of just compensation for a taking of private property, are also worthy of judicial solicitude. As the Supreme Court once remarked in a discussion of standing requirements, "we know of no principled basis on which to create a hierarchy of constitutional values or a complementary 'sliding scale' of standing which might . . . invoke the judicial power of the United States."

Kassouni, *supra* note 14, at 10 (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 484 (1982)).

and *MacDonald* — they still would have to consider these additional prudential concerns and postpone decisionmaking accordingly.

The difference between the concern about the underlying cause of action and broad concerns about judicial decisionmaking can be expressed in another way. The redefinition of the substantive due process cause of action turns ripeness into an inquiry that asks whether the allegedly arbitrary and capricious act has *yet* occurred. Courts must determine whether the government has indeed “acted” in an arbitrary and capricious manner. By contrast, a ripeness standard driven by broad concerns about judicial decisionmaking is founded on the notion that, *irrespective of whether the government has yet acted*, courts should postpone deciding a case until they are competent or until it is wise to do so.⁸¹

Unfortunately, although broad prudential concerns about judicial decisionmaking have affected lower courts’ ripeness decisions for substantive due process claims, the courts have neither fully identified these concerns nor systematically explained their importance. Rather, in a given case, a court typically makes isolated, somewhat unfocused references to only one or two of these concerns. Section III.A identifies four separate prudential concerns about judicial decisionmaking that justify applying the finality requirement to substantive due process claims: the ability of courts to determine arbitrary and capricious behavior, the ability of courts to fashion remedies, comity to state institutions, and judicial economy. This section also explains why each of these prudential concerns provides less support for the reapplication component of finality than for the initial application and variance components. Section III.B argues that landowners should have to satisfy the initial appli-

81. In this respect, prudential concerns about judicial decisionmaking are intended to stand as a justification for finality that is independent of the prudential concern about the underlying cause of action — and the analogy to the Supreme Court’s reasoning in *Williamson County* and *MacDonald* that the government does not “take” property until it makes a final decision — explicated *supra*, Part II.

On the other hand, these two types of prudential concerns justifying ripeness are not mutually exclusive. The Supreme Court in *MacDonald* made reference, albeit brief, to prudential concerns about judicial decisionmaking when it took note of the inherent flexibility of local agencies that make land use decisions. See *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 350 (1986) (“[L]ocal agencies charged with administering regulations governing property development are singularly flexible institutions; what they take with one hand they may give back with the other.”). This mention of flexibility introduces concerns about the competence and economy of federal courts compared to state institutions. Moreover, to the extent the Supreme Court justified its takings ripeness test on the need for a more developed factual record, it based this test on a concern about judicial decisionmaking. Hence, it is possible for an amalgam of prudential concerns to justify the ripeness standard employed by courts for substantive due process claims.

cation and variance components in order to make their substantive due process claims ripe for review, but for fairness reasons should not have to satisfy the reapplication component.

A. *Four Prudential Concerns*

1. *Ability of Courts to Ascertain Injury*

Courts may turn to the ripeness doctrine because they question their ability to decide certain issues at a particular point in time without a more developed factual record. This is especially true for substantive due process claims, where the issue is whether the government's behavior may be characterized as "arbitrary and capricious." Given the highly contextual nature of the local land use decisionmaking process — complicated further by the large variety of land use ordinances — courts need a well-developed record to put the defendant's behavior into perspective.⁸²

A finality requirement that includes the initial application and variance components helps satisfy the concern about the ability of courts to assess injury to landowners. In the event litigation ensues, courts benefit from an improved factual record that shows some degree of concrete harm to the landowner. Courts can better assess whether the government's actions, taken as a whole, were sufficiently egregious to constitute arbitrary and capricious behavior.

However, the concern about a court's ability to assess injury does not strongly justify a finality requirement that also includes a reapplication requirement. The reapplication component would continue to improve the factual record that eventually comes before the court because it would mandate at least one more instance of government decision-making. But this continued improvement likely would be marginal, given that the government has had sufficient opportunity — through the initial application and variance components — to decide on the landowner's originally desired use.

82. According to Professor Stein:

The need for concrete facts is acute in land use law, where so much litigation arises out of local ordinances about which there may be little reported case law. With a wide variety of different municipalities enacting land use laws and with few of these laws ever reaching the courts, those courts that are called upon to construe these statutes and ordinances need as complete a factual record as possible, so as to avoid making overly broad pronouncements.

Stein, *supra* note 11, at 16 (citations omitted).

2. Ability of Courts to Fashion Appropriate Remedies

Without a final decision by the government, federal courts may have difficulty not only ascertaining arbitrary and capricious behavior but also determining an appropriate remedy. This difficulty may extend to both injunctive relief and damages. State courts, which have had more occasions to decide remedies for arbitrary behavior by land use regulators, usually hesitate to grant site-specific injunctive relief to landowners out of fear of infringing on local legislative discretion.⁸³ Although federal courts, like state courts, can choose from a range of options for injunctive relief other than an order that permits immediate development,⁸⁴ this choice may prove difficult to make and awkward to implement.

More important, when calculating damages courts likely will encounter significant problems in determining the extent of economic injury. One commentator prefers the measure of damages resulting from due process claims brought by landowners because they are "more flexible than under takings jurisprudence"; in due process claims damages "need not be measured by the fair market value of the affected property interest, but by the actual economic damage inflicted by the regulation."⁸⁵ Also, due process claims allow awards of punitive damages for proof of "evil motive or intent."⁸⁶ But determining "actual economic damage" in the land use context is a burdensome task for courts. For a

83. See MANDELKER ET AL., *supra* note 1, at 232-33 (discussing *City of Richmond v. Randall*, 211 S.E.2d 56 (1975)).

84. See *Herrington v. County of Sonoma*, 834 F.2d 1488, 1504 (9th Cir. 1987), *as amended*, 857 F.2d 567 (1988) (affirming injunctive relief invalidating local government's inconsistency determination, and awarding damages for delay, although injunction provided "no guarantee that a development proposal will ultimately be approved"); MANDELKER ET AL., *supra* note 1, at 233 (discussing alternatives to specific relief such as invalidation of current zoning or remand to local decisionmaking authority for reconsideration). Often, the nature of the plaintiff's allegations necessarily will make possible only limited injunctive relief. See *Eide v. Sarasota County*, 908 F.2d 716, 726 (11th Cir. 1990) (discussing hypothetical arbitrary rejection of landowner's application for rezoning in which "the remedy . . . would not be an injunction requiring a grant of commercial zoning, but rather would be the overturning of the arbitrary decision, possibly an injunction against similar irrational decisions, and other remedies depending on the situation").

85. Stone & Seymour, *supra* note 4, at 1243; see also MANDELKER ET AL., *supra* note 1, at 189-90 (discussing advantages of remedies under § 1983).

86. See Stone & Seymour, *supra* note 4, at 1243; *supra* note 11. However, punitive damages are not available against municipalities. See MANDELKER ET AL., *supra* note 1, at 190 (citing *City of Newport v. Fact Concerts, Inc.*, 458 U.S. 247 (1981)).

landowner deprived of a use to which she is entitled, a court must assess damages resulting from delays⁸⁷ and lost opportunity costs.⁸⁸

A finality requirement may assuage the concern over assessing damages in at least three ways. First, finality will provide more opportunities for landowners and governments to reach compromises that in practice might prove superior to remedies devised by courts.⁸⁹ In this respect, finality serves as a prophylactic measure to ensure that all presumably superior compromise solutions are first attempted. Second, finality reveals a pattern of behavior on the part of individual government agents such that courts can determine whether their conduct was so egregious that punitive damages are justified. Last, by postponing litigation, finality prevents claims involving only speculative future damages — damages that are predicted to result from a denial of a particular use of the property.⁹⁰ Where plaintiffs allege harm inflicted by a lost opportunity cost, the delay imposed by finality allows courts to focus, at least in part, on a fixed period of time in which landowners have suffered measurable, concrete injuries.⁹¹

However, the concern about the court's ability to determine an appropriate remedy does not support a finality requirement that includes the reapplication component. Even if a landowner successfully were to obtain permission on a second, less ambitious development proposal, she most likely would continue to suffer harm resulting from the wrongful denial of her original proposal. At least as a theoretical matter, she should still be allowed to sue for the damages caused by adverse economic effects sustained as a result of not developing according to the initial development proposal. This remaining governmental liability means that the reapplication requirement would not have advanced

87. See MANDELKER ET AL., *supra* note 1, at 190-91 (showing complicated nature of formula used by court in assessing damages for delays caused by arbitrary regulatory behavior (citing *Herrington v. County of Sonoma*, 790 F. Supp. 909 (N.D. Cal. 1991))).

88. See, e.g., *Bickerstaff Clay Prods. Co. v. Harris County*, 89 F.3d 1481, 1489 (11th Cir. 1996) ("A person whose property is affected by [an invalid zoning classification] may recover damages for any injury the classification may have caused him"); *Blanche Rd. Corp. v. Bensalem Township*, 57 F.3d 253, 261 (3d Cir. 1994).

89. See *Taylor Inv., Ltd. v. Upper Darby Township*, 983 F.2d 1285, 1291 (3d Cir. 1993) (noting that finality may be required for ripeness because "land-use regulation generally affects a broad spectrum of persons and social interests, and . . . local political bodies are better able than federal courts to assess the benefits and burdens of such legislation" (citation omitted)).

90. See *Stone & Seymour*, *supra* note 4, at 1234.

91. Cf. *Herrington v. County of Sonoma*, 857 F.2d 567, 569 (9th Cir. 1988) (interpreting *Williamson County* and *MacDonald* to require, for substantive due process claims as well as takings claims, "a final decision by the government which inflicts a concrete harm upon the plaintiff landowner").

the goal of securing a presumably superior remedy — one that would preclude further litigation in federal court — through negotiations between the landowner and local government.

One might counterargue that as a practical matter the landowner would hardly ever pursue litigation after receiving permission to develop according to a modified proposal, and that therefore the interest in achieving a remedy through local negotiations continues to weigh heavily in favor of a reapplication requirement. Moreover, the reapplication requirement would continue to advance the prudential interests in revealing patterns of conduct by individual government agents for the purpose of determining punitive damages, and in waiting until at least some of the landowner's alleged injury is fixed and measurable.⁹² Nevertheless, because there remains the theoretical possibility that the landowner may bring suit even if she receives permission to develop according to a modified proposal, the concern about judicial capacity to determine remedies does not support the reapplication component as strongly as it supports the initial application and variance components.

3. *Comity to State Institutions*

The incorporation of the finality requirement into the ripeness standard for substantive due process claims advances the normative goal of allocating a reasonably significant sphere of responsibility to local officials.⁹³ State and local governments have traditionally exercised significant discretion with respect to land use issues.⁹⁴ A meaningful ripeness requirement supports the long-standing sense that allowing local governments a degree of flexibility in both creating land use regulations

92. See *Herrington v. County of Sonoma*, 834 F.2d 1488, 1507 (9th Cir. 1987) (Tang, J., dissenting) (arguing that finality requirement should include reapplication component because otherwise "damages are not calculable"; "Any verdict based upon sheer speculation about the amount of damages is prone to be excessive because it is not constrained by the appropriate measure of actual damages.").

93. See *Nichol*, *supra* note 23, at 178 (observing that ripeness "allows federal courts to give due respect to the scope of responsibilities to other government decision makers" and "limits any judicial proclivity to 'pre-empt and prejudge issues that are committed for an initial decision to an administrative body or special tribunal'" (quoting *Public Serv. Comm'n. v. Wycoff Co.*, 344 U.S. 237, 246 (1952))).

94. See *Tari v. Collier County*, 56 F.3d 1533, 1537 (11th Cir. 1995) ("Zoning provides one of the firmest and most basic of the rights of local control." (citation omitted)); *Tarlock*, *supra* note 8, at 558; *Armistead*, *supra* note 6, at 794 (describing view "that federal courts should stay out of local government decisions" because of "concern about both swelling litigation and overburdening local governments and officials with damage awards and federal judicial interference").

and adjudicating disputes is one important manifestation of the United States' system of federalism.⁹⁵

Moreover, a ripeness standard that includes a finality requirement is consistent with existing Supreme Court doctrine that limits suits against state officials under section 1983 in federal court.⁹⁶ Through this doctrine the Court has, according to one commentator, "preserve[d] its vision of appropriate state-federal relations."⁹⁷ The Court "is reluctant to constitute the Due Process Clause as a font of tort law because to do so would displace traditional state authority and thereby alter longstanding balances of power in the federal system."⁹⁸ Likewise, the finality requirement provides local governments with a small but legitimate sphere of flexibility in which to mediate competing interests in land use

95. See, e.g., *Tari*, 56 F.3d at 1537 ("[I]f a local investigator's issuance of a citation was all that was necessary for a claim to ripen, the federal courts would become 'master zoning boards' in disputes which are best handled at the local level."); *Eide v. Sarasota County*, 908 F.2d 716, 726 n.17 (11th Cir. 1990) (arguing in favor of finality requirement on ground that "zoning is a delicate area where a county's power should not be usurped without giving the county an opportunity to consider concrete facts on the merits prior to a court suit"); *Hoehne v. County of San Benito*, 870 F.2d 529, 532 (9th Cir. 1988) (arguing that the ripeness requirements announced in *Williamson County* and *MacDonald* are applicable to all constitutional claims, because they erect "imposing barriers . . . to guard against the federal courts becoming the Grand Mufti of local zoning boards"), quoted in *Stone & Seymour*, *supra* note 4, at 1234; *Mixon*, *supra* note 15, at 708 ("Basic principles of federalism and orderly process would obviously be better served by deferring federal jurisdiction in land-use cases until claimants pursue and exhaust available state remedies.").

96. See *Fallon*, *supra* note 7, at 309 (citing Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 646-47 (1989)).

97. *Fallon*, *supra* note 7, at 309.

98. *Id.* at 350. Professor Fallon goes so far as to say, in light of cases already decided by the Supreme Court, that federal courts should abstain altogether from hearing substantive due process claims against state governments where the states themselves provide adequate remedies through their judicial systems. See *id.* at 345 (arguing that the Court's holding in *Parratt v. Taylor*, 451 U.S. 527 (1981), that a state's provision of adequate postdeprivation judicial remedies can negate an allegation that due process was denied "would fit best into the surrounding doctrinal framework if it were recharacterized as launching a body of federal abstention doctrine" for substantive due process claims). That is not the argument here. The lower courts do not seem prepared to take this route, see *supra* note 42, and other commentators have demonstrated why abstention by federal courts for such claims should be discouraged. See *Levinson*, *supra* note 6, at 356; *Armistead*, *supra* note 6, at 792-97 (arguing that permitting substantive due process claims to proceed directly in federal court will not interfere with the prerogatives of local government because of the high standard of proof that must be met by the plaintiff property owner). This said, to the extent the policy of maintaining federalism supports an abstention doctrine for substantive due process claims, it also applies to the adoption for these claims of a ripeness doctrine that includes the finality requirement.

without fear of immediately incurring liability in federal court under section 1983.

Again, however, this prudential concern justifies including the initial application and variance components in the finality requirement but not the reapplication component. Because the landowner theoretically would still be able to sue for harm inflicted by the government's refusal of the initial development proposal, even arrangements that allowed landowners to develop their properties would remain subject to the supervision of federal courts.

4. *Judicial Economy*

A court that grounds a ripeness test on judicial economy consciously defers adjudication of a dispute so as to conserve its judicial resources for other controversies.⁹⁹ The court essentially engages in a cost-benefit analysis in order to maximize the value gained from judicial review across a broad spectrum of disputes.

Claims by landowners against local governments involving allegations of arbitrary and capricious behavior in the application of land use regulations may be particularly susceptible to concerns about judicial economy for at least two reasons. First, governments apply land use regulations so often that the number of potential disputes is vast. Second, the disputes themselves are extremely fact-intensive, requiring significant expenditures of resources once they end up in court.

One might argue that concerns about judicial economy should be of limited importance when constitutional rights are at stake. According to this view, the effects on federal dockets of securing justice for constitutional violations are irrelevant. Courts have been clear, however, that the sheer volume of the land use caseload necessitates interposing barriers to review.¹⁰⁰ Moreover, the Supreme Court and some lower federal courts most likely had in mind these benefits of judicial economy in

99. See Stein, *supra* note 11, at 13 n.37 (noting that "withholding of federal judicial intervention until the appropriate agency has completed its work . . . allows cases to ripen with little or no expenditure of judicial resources").

100. See *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 467 (7th Cir. 1988) (refusing to rule on merits because court could not "imagine what zoning dispute could not be shoehorned into federal court in this way, there to displace or postpone consideration of some worthier object of federal judicial solicitude"); *Scudder v. Town of Glendale*, 704 F.2d 999, 1003 (7th Cir. 1983) (arguing that the "[a]vailability of federal review of every zoning decision would only serve to further congest an already overburdened court system").

their varied overtures to the virtues of local "flexibility."¹⁰¹ Given the variability of many local land use decisions, it would be wasteful for federal courts to intervene when there is a good chance of the offensive decision being reversed by a later administrative action.¹⁰² However, like the prudential concerns about determining appropriate remedies and comity to local regulatory authorities, the judicial economy concern does not justify expanding the finality requirement to include the reapplication component, given that the development eventually permitted as a result of the landowner's modified proposal does not erase all of the local government's potential liability.

B. *Broad Prudential Concerns as Justification for Finality*

Prudential concerns about judicial decisionmaking in their totality outweigh any harm to landowners inflicted by the initial application and variance components of the finality requirement. A landowner who obtains permission to develop according to her original plans may sustain some adverse effects from the delay associated with the normal processing of applications.¹⁰³ However, the finality requirement will enable federal courts to assuage significantly concerns about their ability to assess injury, their ability to determine appropriate remedies, comity to state institutions, and judicial economy.

Prudential concerns about judicial decisionmaking do not outweigh harm to landowners inflicted by the reapplication component of the finality requirement. The reapplication component would advance prudential concerns in two general respects. First, in many cases it would continue to improve the factual records considered by courts. Second, in some cases the reapplication component possibly would enable landowners and local governments to reach compromises that preclude further litigation — despite the theoretical possibility of a remaining cause of action — hence possibly easing courts' concerns about their ability

101. See *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 350 (1986); *Southern Pacific Transp. Co. v. City of Los Angeles*, 922 F.2d at 498, 503 n.5 (9th Cir. 1990).

102. See *Southern Pacific*, 922 F.2d at 503 n.5 (observing that the flexibility of local zoning systems becomes "obviously useless if the property owners abandon their applications after rejection by civil servants with narrow authority and before seeking relief from a body with broader powers").

103. See, e.g., *Kawaoka v. City of Arroyo Grande*, 796 F. Supp. 1320 (C.D. Cal. 1992), *affd.*, 17 F.3d 1227 (9th Cir. 1994); *Herrington v. County of Sonoma*, 790 F. Supp. 909 (N.D. Cal. 1991), *affd.*, 12 F.3d 901 (9th Cir. 1993). The landowner can hold the government accountable for unreasonable delays. See, e.g., *Urbanizadora Versalles, Inc. v. Rivera Rios*, 701 F.2d 993 (1st Cir. 1983); *Eaton v. City of Solon*, 598 F. Supp. 1505 (N.D. Ohio 1984).

to determine appropriate remedies, comity to state institutions, and judicial economy.

But to the extent the reapplication requirement furthers prudential policies, courts must balance these policies against the hardship to the party of withholding judicial review.¹⁰⁴ It would be unfair to require landowners to satisfy additional procedural requirements after the government has arrived at a final decision on the use for which the landowner is entitled.¹⁰⁵ Although the reapplication component might make sense for takings claims, where the injury alleged is the deprivation of all substantial economically viable use of the property, it has no logical connection to a substantive due process claim, where the injury alleged is an arbitrary and capricious denial of a particular use. Even assuming that substantive due process property rights are not as highly cherished as other constitutional rights, courts should not gut them entirely for the sake of prudential concerns, which in these cases would be only marginal and speculative.¹⁰⁶

IV. THEORETICAL AND PRACTICAL OBJECTIONS TO FINALITY

Although prudential concerns about the importance of the as-applied substantive due process claim and the accuracy, propriety, and efficiency of judicial decisionmaking weigh in favor of a finality requirement as a part of ripeness, one might still object to finality on four grounds — two theoretical and two practical. The finality requirement proposed in this Note might be challenged on the theoretical ground that it violates the Supreme Court's holding in *Patsy v. Florida Board of Regents*.¹⁰⁷ *Patsy* held that plaintiffs bringing claims against state governments under section 1983 in federal court are not required first to exhaust state administrative remedies.¹⁰⁸ A second objection, more practical in nature, is that a finality requirement would impose a costly bureaucratic hurdle on middle class landowners and entrepreneurs who might go bankrupt or simply give up before securing a judicial remedy for arbitrary and capricious treatment by the government.¹⁰⁹ The third objection, which is related to the second, is that the ripeness doctrine

104. See *supra* text accompanying notes 33-34.

105. Cf. Kassouni, *supra* note 14, at 29 (suggesting limitations on the reapplication requirement for takings cases given the "financial and emotional plight of property owners").

106. Cf. Kassouni, *supra* note 14, at 7 (arguing that "[c]ourts should not draw arbitrary standards for determining when the impact of a regulation is significant enough to rise to the level of a 'hardship' ").

107. 457 U.S. 496 (1982).

108. See 457 U.S. at 516.

109. See generally Kassouni, *supra* note 14.

encourages local governments to *create* administrative mechanisms for relief that in effect benefit the wealthier and politically connected segments of communities. The fourth objection — this one theoretical — is that a conscious decision by a federal court to postpone decision on an alleged violation of a constitutional right amounts to an abdication of the court's responsibility.¹¹⁰

The finality requirement stipulates that landowners cannot sue in federal court after the first alleged instance of arbitrary and capricious behavior; rather, they must take certain administrative steps to ensure that the government has truly "acted." Hence, the components of finality can be challenged as so similar to the components of administrative exhaustion that courts cannot require finality under *Patsy*.

In *Williamson County*, the Supreme Court held that the rule in *Patsy* did not apply to the finality requirement for takings claims. The Court's reasoning in *Williamson County* strongly suggests that *Patsy* also does not apply to the finality requirement for substantive due process claims. In *Williamson County*, the Court characterized the finality requirement as "concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual concrete injury."¹¹¹ By contrast, the exhaustion requirement forbidden by *Patsy* "refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate."¹¹² Hence, although landowners bringing takings claims might have to obtain a final decision by applying for a variance, they do not have to use state procedures that "clearly are remedial" or that "result in a judgment whether [the government's] actions violated any of [the landowners'] rights."¹¹³

The "initial decisionmaker" theory used in *Williamson County* applies to the finality requirement for substantive due process claims for two reasons. First, both the government's decision on the landowner's initial application and on her application for a variance can be con-

110. See, e.g., Wiener, *supra* note 8, at 387 ("Despite section 1983 and the Court's expression of civil rights actions belonging in court, landowners often find such support to be meaningless rhetoric.").

111. *Williamson County Regional Planning Commn. v. Hamilton Bank*, 473 U.S. 172, 193 (1985).

112. 473 U.S. at 193.

113. This distinction, as applied to the case of the petitioner in *Williamson County*, meant that he was not required to appeal the rejection by the county planning commission of his preliminary plat application to the Board of Zoning Appeals, "because the Board was empowered, at most, to review that rejection, not to participate in the Commission's decisionmaking." 473 U.S. at 193.

strued as activities of the “initial decisionmaker.” This interpretation of the government’s activities is consistent with the argument in Part II that the government has not truly “acted” until it renders decisions on the landowner’s initial application and application for a variance. Second, courts have distinguished finality from exhaustion by noting that the former “ensures that the issues and the factual components of the dispute are sufficiently fleshed out to permit meaningful judicial review.”¹¹⁴ Hence, at least some of the prudential policies advanced by the initial application and variance components — namely, the policies of increasing the competence of federal courts to determine factual issues and assess damages — match those already used by courts to justify finality despite *Patsy*.

However, this Note’s argument for a liberal construction of the variance requirement¹¹⁵ may initially appear to contradict the Court’s statement in *Williamson County* that landowners should not be required to pursue appeals that “clearly are remedial” in nature.¹¹⁶ This apparent contradiction may be reconciled for several reasons. *Williamson County* should be read as carving out a broad exception to the holding in *Patsy* for constitutional claims brought by landowners against local governments under section 1983. Commentators have repeatedly noted the similarity between the doctrines of ripeness and administrative exhaustion, especially where ripeness is based on prudential considerations,¹¹⁷ and the Supreme Court reaffirmed the independence of the doctrines only in dicta.¹¹⁸ In fact, lower courts have given short attention to the statement in *Williamson County* barring “remedial” administrative appeals in the land use context; they have not refrained from requiring landowners to appeal decisions of governmental entities in order to make their claims ripe for review.¹¹⁹

114. *Bateman v. City of West Bountiful*, 89 F.3d 704, 707 (10th Cir. 1996) (citing *Lujan v. National Wildlife Fedn.*, 497 U.S. 871 (1990)).

115. The variance requirement means that a final decision should include appeals by the landowner to all government agents with jurisdiction to pass judgment on the landowner’s original desired use. See *supra* text accompanying notes 60-63.

116. See *Williamson County*, 473 U.S. at 193.

117. See *WRIGHT ET AL.*, *supra* note 23, § 3532.6, at 195.

118. See *Williamson County*, 473 U.S. at 192-93.

119. See, e.g., *Acierno v. Mitchell*, 6 F.3d 970, 976 (3d Cir. 1993) (finding that plaintiff had to appeal decision of county’s Development and Licensing Division to board of adjustment to make claim ripe); *Taylor Inv., Ltd. v. Upper Darby Township*, 983 F.2d 1285, 1290-93 & n.10 (3d Cir. 1993) (taking note of statement in *Williamson County* that exhaustion of state remedies is not required for takings claims but nevertheless holding that decision of zoning officer had to be appealed to hearing board before landowner’s substantive due process claims would be ripe for review); cf. *Bateman v. City of West Bountiful*, 89 F.3d 704, 706 (10th Cir. 1996) (holding takings claim unripe

This liberal construction of *Williamson County's* exception to *Patsy* is buttressed by other Supreme Court decisions that appear to limit *Patsy's* scope. The most important of these decisions is *Parratt v. Taylor*,¹²⁰ in which the Court held that states do not deny due process to plaintiffs who seek postdeprivation remedies for the loss of property as a result of random and unauthorized acts of government officers, where the state provides adequate postdeprivation redress.¹²¹ Although a later case held that *Parratt* applies only to procedural due process violations,¹²² a Seventh Circuit panel deciding a substantive due process claim recently reasoned that just as "[t]he *Parratt* doctrine had already created one exception to the principle that exhaustion of state remedies is not required in a federal civil rights suit . . . *Williamson* created another."¹²³ One commentator goes even further in his interpretation of *Parratt* by arguing that the case should be viewed as creating an abstention doctrine for certain substantive due process claims.¹²⁴

Finally, *Patsy* itself arguably should not apply to substantive due process claims arising in the land use context. *Patsy* involved an allegation by an employee of a state university that the university had discriminated against her on account of race and gender. It is debatable whether the *Patsy* Court intended its holding to extend to every other species of constitutional claim under section 1983, particularly claims by plaintiffs who do not allege that they have suffered injury as a result of being a member of a discrete and insular minority.¹²⁵ Furthermore, commentators have speculated whether the *Patsy* Court "confuse[d] the

because plaintiff failed to appeal issuance of certificate of noncompliance to city board of adjustment).

120. 451 U.S. 527 (1981).

121. See 451 U.S. at 543-44.

122. See *Zinerman v. Burch*, 494 U.S. 113, 125 (1990).

123. *Gamble v. Eau Claire County*, 5 F.3d 285, 288 (7th Cir. 1993) (Posner, J.) (holding unripe landowner's due process takings claim); see also *Mixon*, *supra* note 15, at 713 (arguing for a broad interpretation of *Parratt* in the context of due process claims arising out of land use decisions). But see *Levinson*, *supra* note 6, at 350 (arguing despite *Parratt* that substantive due process "focuses on whether the government has abused its power, and any violation is complete as soon as the act is committed").

124. See *Fallon*, *supra* note 7, at 344 ("When the Court's confusions are stripped away, *Parratt* held that there could be no federal remedy for the alleged substantive due process violation if a federally adequate scheme of remedies existed in state court."); *supra* note 98.

Patsy is also limited by *Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100 (1981), in which the Supreme Court held that federal courts, for reasons of comity, should not decide claims seeking remedies from state taxation, as long as the state provides remedies that are plain, adequate, and complete. See *HART & WECHSLER*, *supra* note 60, at 1352.

125. See *Stein*, *supra* note 11, at 14 & n.47.

question of exhaustion of state remedies in general . . . with the question of exhaustion of distinctively administrative remedies.”¹²⁶ The finality requirement proposed in this Note — one which requires only administrative appeals that pertain directly to the landowner’s initial development proposal — would gain additional support from reading *Patsy* to bar only “state remedies in general.”

The practical concern for middle class property owners, especially those forced to negotiate with grossly unresponsive government officials who have political incentives to engage in arbitrary and capricious behavior, should not lightly be dismissed. Against this concern, however, one must consider the implications of failing to give flexibility to local governments to create and administer land use regulations. Subjecting local governments to potential liability for every alleged instance of wrongful behavior would encourage well-capitalized developers to use the threat of lawsuit to impose unwanted or illegal development plans on communities, regardless of the standard of conduct of the responsible government entity. The extension of the finality requirement to substantive due process claims recognizes, as one commentator notes, “the real world interplay between developer and regulator.”¹²⁷ Furthermore, the threat of government over-reaching must be balanced against the evolving view that an individual parcel of real property is not just “a commodity” to be “intensively developed” and protected from “forced redistribution” by the state, but part of a larger ecological resource that should be protected by environmental land use regulation.¹²⁸ Finally, for situations involving obvious bad faith on the part of governments, federal courts can use the futility exception to excuse certain components of finality and do justice in a given case.

The other practical objection to ripeness focuses not on the barriers it poses to the middle class, but on the opportunities for certain landowners to receive preferential treatment. According to this argument, the more that land use decisionmaking becomes an ad hoc enterprise, the more certain individuals within communities will be able to use their wealth and influence to turn the variety of administrative processes to their advantage. Not only does this greater potential for corruption

126. HART & WECHSLER, *supra* note 60, at 1351 (comparing *Patsy* with the “Court’s careful articulation of the judge-made rule that, subject to some limited exceptions, administrative remedies must be exhausted in suits challenging federal administrative action”).

127. Lyman, *supra* note 50, at 104 n.12 (arguing for a uniform finality requirement for takings and substantive due process claims).

128. Tarlock, *supra* note 8, at 586, 595.

create an equal protection problem, but it also threatens to undermine the possibility of coherent land use planning.¹²⁹

However, it seems late in the day to speculate on whether local governments will engage in greater ad hoc decisionmaking as a result of the ripeness doctrine. Administrative processes allowing for case-by-case application of land use policies already have entrenched themselves in the ordinances of most local governments.¹³⁰ Even if the ripeness requirement were relaxed for most jurisdictions, this would not prevent certain members of communities from utilizing already existing administrative processes to garner preferential treatment. In other words, ripeness only makes administrative processes mandatory; the absence of ripeness would do nothing to prevent the voluntary use of these processes by individuals and developers who deem it in their interests to do so.

As for the contention that courts must demonstrate equal vigilance for all alleged constitutional injuries, this position belies a misunderstanding of the role of federal courts in a modern administrative state. Violations of constitutional rights do not give rise to an immediate cause of action in federal courts. The modern law governing rights to judicial review and rights to judicial remedies, as one commentator puts it, "den[ies] any absolute individual right to judicially dispensed corrective justice."¹³¹ It has a much more modest goal, which is to "affirm[] a supervening, quasi-managerial social interest in maintaining mechanisms of judicial oversight that are adequate to keep government generally, albeit not perfectly, within the bounds of law."¹³²

V. CONCLUSION

Land use regulation has long played a vital role in maximizing the welfare of communities. Not only does it contribute to health and safety and improve aesthetics, but increasingly it helps protect valuable environmental resources.¹³³ These functions are becoming more important as time goes on. The shift in emphasis in environmental regulation from controlling toxic risks to preserving biodiversity will, as one commenta-

129. *Accord* MANDELKER ET AL., *supra* note 1, at 448-49 (observing that under certain conditions "zoning becomes a discretionary decisionmaking process rather than a system in which land uses are permitted as-of-right"); *id.* at 492 (noting a potential equal protection argument in cases of "spot zoning").

130. *See id.* at 197 (describing content of the Standard State Zoning Enabling Act, which has been substantially integrated into most state legislation).

131. Fallon, *supra* note 7, at 339.

132. *Id.* at 339; *cf.* HART & WECHSLER, *supra* note 60, at 1346-47 (summarizing virtues of judicial discretion).

133. *See supra* text accompanying note 13.

tor puts it, "place new environmental protection responsibilities *and* opportunities on local governments, the front line resource management units."¹³⁴ Land use regulations also allow local governments to comply with state growth management statutes, which states are enacting in increasing number.¹³⁵

An underdeveloped ripeness standard that allows landowners to bring substantive due process claims against local governments upon the first manifestation of alleged arbitrary and capricious behavior would needlessly escalate the potential liability for governments. Fear of increased liability, in turn, would threaten the implementation of essential regulatory activities. Such a threat would be imposed for the sake of a constitutional right which, although deserving of some judicial scrutiny, would arguably distract courts from attending to worthier complaints that are better suited for federal judicial resolution.

The requirement that landowners obtain a final decision on their desired land use before suing in federal court helps alleviate litigation pressures on land use regulators. Courts should impose this finality requirement on two theories. First, by holding that governments do not in fact "act" until they issue a final decision, courts would be redefining the cause of action for violations of substantive due process in the same way that the Supreme Court has redefined the cause of action for takings claims. Second, courts should require finality to satisfy concerns about their own roles as decisionmakers. Courts appropriately assume that they have only a "quasi-managerial" interest in protecting landowners from arbitrary and capricious treatment by government agents applying use regulations.¹³⁶ It is upon this relatively modest role as a broad overseer of property rights that the future of desirable land use planning and ecological protection, not to mention wise judicial decisionmaking, may depend.

134. Tarlock, *supra* note 8, at 556.

135. See Jeffrey M. Eustis, *Between Scylla and Charybdis: Growth Management Act Implementation that Avoids Takings and Substantive Due Process Limitations*, 16 U. PUGET SOUND L. REV. 1181 (1993) (describing goals of Washington State's Growth Management Act of 1991 and the consequent legal challenges to local governments under takings and substantive due process doctrines); see generally *Eide v. Sarasota County*, 908 F.2d 716 (11th Cir. 1990) (ruling against landowner who challenged application of comprehensive plan adopted by Sarasota County, Florida, to comply with the state's Local Government Planning and Development Regulation Act).

136. Cf. Tarlock, *supra* note 8, at 563 (arguing that "it is difficult but possible to integrate the 'imperatives' of biodiversity protection with the protection of individual rights within the framework of federal constitutional law and local government regulatory authority").