

LITIGATING LAND USE CASES IN FEDERAL COURT: A SUBSTANTIVE DUE PROCESS PRIMER

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Editor's Synopsis: This Article argues that land use plaintiffs should have access to federal courts when they can claim that abusive governmental decisions violate their substantive due process rights. Traditionally, land use plaintiffs have faced many hurdles in getting their cases into federal court. This Article shows how courts can provide effective constitutional relief in land use cases involving governmental abuse.

This Article discusses major hurdles that land use plaintiffs traditionally face when bringing a case in federal court, including the entitlement rule, the ripeness barrier, and Graham preemption. The entitlement rule means that a plaintiff must have an entitlement to property before she can bring a substantive due process claim. The ripeness barrier requires a plaintiff in a takings case to obtain a final decision from the local government before bringing a takings claim in federal court. Graham preemption prevents a court from hearing a substantive due process case if the case could have been brought under a more specific constitutional clause, such as the takings clause.

This Article concludes with a discussion of the appropriate standard of review that should be applied in land use substantive due process cases. The Article rejects the shocks the conscious standard applied by the Supreme Court in influential Fourth Amendment cases as the appropriate standard and goes on to discuss the inconsistency of standards applied within circuits to other substantive due process cases. The Article ends with an analysis of the "arbitrary conduct" standard of judicial review applied when municipalities engaged in abusive conduct in land use cases.

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which . . . have a tendency . . . to occasion . . . serious oppressions of the minor party in the community.

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I. INTRODUCTION

A developer applied for building permits to build modular homes on three vacant lots.¹ The building department denied the application without a written explanation and referred him to the mayor.² The mayor told him: “I don’t want them homes over here in Ecorse at all. Your home is ugly, and we don’t appreciate that home being here in Ecorse. I’m not going to have any more of those houses built. I’m going to have that house torn down.”³ The developer sued in federal court for a violation of substantive

¹ See *Brown v. City of Ecorse*, 322 Fed. App’x 433, 444 (6th Cir. 2009).

² See *id.*

³ *Id.* The building code official also determined the lots did not meet the minimum square footage requirements for residential homes, but the developer claimed the homes complied, which made them a permitted residential use. See *id.* at 444 n.4. See generally

due process, but the Sixth Circuit dismissed his case.⁴ He did not have a constitutionally protected entitlement.⁵ The city could refuse to issue building permits under an aesthetic compatibility ordinance.⁶

In this example, the developer could argue the mayor rejected his project because he did not want modular housing in the community, or because he did not want his homes, or for both reasons. None of these reasons might provide the developer with relief in court. The developer could argue effectively, however, that he was targeted for arbitrary abusive treatment, a substantive due process violation.⁷ A court could also hold the building permit denial was a total exclusion that did not serve a legitimate governmental purpose, which also is a substantive due process violation.⁸

Daniel R. Mandelker, *Zoning Barriers to Manufactured Housing*, 48 URB. LAW. 233 (2016).

⁴ See *Brown*, 322 Fed. App'x at 443. Procedures available in the local land process would not have been much help. The model act on which most zoning legislation is built provides minimal procedure. See U.S. DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT § 7 (1926). Model legislation proposed by the American Planning Association includes detailed and disciplined procedures for quasi-judicial land use decisions. See AM. PLANNING ASS'N, GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE 10-1 to 10-90 (Stuart Meck ed., 2002), <https://www.planning.org/growingsmart/guidebook/> [perma.cc/9AEQ-4NZC]. For discussion, see Daniel R. Mandelker, *Model Legislation for Land Use Decisions*, 35 URB. LAW. 635 (2003).

⁵ See *Brown*, 322 Fed. App'x at 443.

⁶ As authorized by the ordinance, the building official also considered whether the dwelling was “aesthetically compatible in design and appearance to homes in the neighborhood in which it is located[,]” but it is not clear it was rejected for this reason because the building department did not give the developer a written explanation for its rejection. See *id.* at 444. Courts have upheld requirements of this type as applied to manufactured housing. See Mandelker, *supra* note 3, at 260–65; see also Kenneth Pearlman et al., *Beyond the Eye of the Beholder Once Again: A New Review of Aesthetic Regulation*, 38 URB. LAW. 1119, 1180–81 (2006) (reviewing case law and concluding that most state courts accept some form of aesthetic controls).

⁷ See *infra* Part V.D.

⁸ The manufactured housing cases provide an example. See *High Meadows Park, Inc. v. City of Aurora*, 250 N.E.2d 517, 522 (Ill. App. Ct. 1969) (holding the zoning ordinance did not provide for special use); *Tocco v. Atlas Twp.*, 222 N.W.2d 264, 268 (Mich. Ct. App. 1974) (holding the exclusion of manufactured housing parks not allowed); *S. Burlington Cty. N.A.A.C.P. v. Mount Laurel Twp.*, 456 A.2d 390, 450 (N.J. 1983) (ruling that municipalities “must provide zoning for low-cost mobile homes as an affirmative device in their zoning ordinances.”); *Koston v. Town of Newburgh*, 256 N.Y.S.2d 837, 840 (N.Y. Sup. Ct. 1965) (invalidating the exclusion of mobile home parks); *Town of Conover v. Jolly*, 177 S.E.2d 879, 882 (N.C. 1970) (arguing lack of statutory authority prevented denial of permit); *Borough of Malvern v. Jackson*, 529 A.2d 96, 98–99 (Pa. Commw. Ct. 1987) (invalidating the exclusion of mobile home parks). Some courts upheld total

Substantive due process applies when municipalities⁹ abuse their land use powers.¹⁰ As the Supreme Court explained, “The touchstone of due process is protection of the individual against arbitrary action of government.”¹¹ In the land use process, governments can often act arbitrarily by blocking a project, delaying a project, or refusing to recognize a project approval.¹² A municipality can also make changes to its land use ordinances that can block or delay a project.¹³ An example is downzoning to a land use that does not permit the project.¹⁴ Substantive due process does not always provide protection in these cases, as federal courts often refuse to act when government abuse occurs.¹⁵

A famous example comes from a Seventh Circuit case in which a village rejected a site plan for office development because it believed the village had too many offices.¹⁶ Judge Posner held the case “presents a garden-variety zoning dispute dressed up in the trappings of constitutional law.”¹⁷ He did not believe it presented questions of abusive decision

exclusions of manufactured housing, relying on the usual negative reasons for discriminatory treatment. *See Barre Mobile Home Park v. Town of Petersham*, 592 F. Supp. 633, 635–37 (D. Mass. 1984), *aff’d*, 767 F.2d 904 (1st Cir. 1985). It is unlikely a court would uphold a total exclusion today.

⁹ In this Article the term “municipality” applies to cities, counties, villages, towns, and townships.

¹⁰ Unlike procedural due process, a plaintiff does not have to seek a postdeprivation remedy before suing for a substantive due process violation. *See Zinermon v. Burch*, 494 U.S. 113, 132 (1990); Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833, 872–92 (2003) (discussing the postdeprivation remedy problem). *But see* Gen. Auto Serv. Station v. City of Chicago, 526 F.3d 991, 1008 (7th Cir. 2008) (requiring plaintiff to show inadequacy of state remedies before bringing substantive due process claim).

¹¹ *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)).

¹² *See generally Coniston Corp. v. Vill. of Hoffman Estates*, 844 F.2d 461 (7th Cir. 1988) (discussing the broad level of discretion given to legislatures).

¹³ *See id.*

¹⁴ *See Neuzil v. City of Iowa City*, 451 N.W.2d 159, 167 (Iowa 1990).

¹⁵ *See Coniston*, 844 F.2d at 468–69.

¹⁶ *See id.* at 461.

¹⁷ *Id.* at 467. He added, “If the plaintiffs can get us to review the merits of the Board of Trustees’ decision under state law, we cannot imagine what zoning dispute could not be shoehorned into federal court in this way . . .” *Id.*; *see also Creative Env’ts, Inc. v. Estabrook*, 680 F.2d 822, 833 (1st Cir. 1982) (holding that denial of a subdivision plan “is too typical of the run of the mill dispute between a developer and a town planning agency”); *Welch v. Paicos*, 66 F. Supp. 2d 138, 166 (D. Mass. 1999) (“In the rough-and-tumble politics of land-use planning, very little can shock the constitutional conscience.”).

making based on illegitimate governmental purposes,¹⁸ and he did not have a problem with “selfish opposition to zoning changes.”¹⁹

This Article argues that land use plaintiffs should have access to federal courts²⁰ when they can claim that abusive governmental decisions violate substantive due process.²¹ Abuse of power problems especially occur in small-scale land use disputes,²² as in the case at the beginning of

¹⁸ Because the village did not have a legitimate zoning reason for rejecting the site plan, a state court would likely invalidate the rejection as an improper control of competition. *See, e.g., Hernandez v. City of Hanford*, 159 P.3d 33, 48 (Cal. 2007) (noting rule, but upholding zoning ordinance that restricted the location of furniture stores). Judge Posner, however, dismissed the problem by holding that “much governmental action is protectionist or anticompetitive . . .” *Coniston*, 844 F.2d at 467; *see Daniel R. Mandelker, Control of Competition as a Proper Purpose in Zoning*, 14 ZONING DIG. 33 (1962).

¹⁹ *Coniston*, 844 F.2d at 467.

²⁰ There is no barrier to the litigation of federal constitutional claims in state courts, and litigants should have equal access to a federal forum. *See Testa v. Katt*, 330 U.S. 386, 394 (1947); Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 U.C.L.A. L. REV. 233, 300 (1988) (arguing for a rule of litigant choice because it “maximizes the opportunity for the protection of individual liberty, increases litigant autonomy, and enhances federalism”). The debate over parity considered the argument—never empirically supported—that federal courts are more protective of constitutional rights than state courts. For discussion, *see Burt Neuborne, Parity Revisited: The Uses of A Judicial Forum of Excellence*, 44 DEPAUL L. REV. 797, 799 (1995) (“I continue to believe that a relative institutional advantage for the plaintiff exists in federal court; an advantage resulting from a mix of political insulation, tradition, better resources and superior professional competence.”). There also is the argument that the federal constitution requires uniformity of interpretation at the federal level. *See Chemerinsky, supra* at 292–95. Attorneys can also recover attorney’s fees in successful federal court suits based on constitutional claims. *See Civil Rights Attorney’s Fees Award Act of 1976*, 42 U.S.C. § 1988. Suit is brought under the Federal Civil Rights Act, 42 U.S.C. § 1983. Attorney’s fees are not usually recoverable in state court litigation. All state statutory citations in this Article refer to the current statute unless otherwise indicated. The same applies to state regulations and ordinances.

²¹ *See WILLIAM A. FISCHER, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* 180 (1995) (discussing the importance of judicial review in protecting property rights against regulatory activities at local government level where political processes are more likely to be influenced by majoritarian pressure); Helen Hershkoff, *State Courts and the “Passive Virtues”*: *Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1924 (2001) (arguing for independent state judicial access rules, noting that “local government lacks many of the checks and balances that the federal model assumes”).

²² *See Carol M. Rose, New Models for Local Land Use Decisions*, 79 NW. U. L. REV. 1155, 1160 (1985) (discussing the problem of numerous small-scale land use disputes and noting “it is precisely their small scale and uncontroversial character that may open the door to arbitrariness or inside deals”). Professor Frieden points out there are political incentives for not recognizing the demands of property owners: “Where the transaction costs of dealing with the claims of owners of specific assets are greater than the net benefits

this Article where the property owner could not protect himself.²³ I do not argue for a return to the *Lochner* era,²⁴ when the Supreme Court relied on substantive due process to reject social legislation.²⁵ Land use legislation that advances acceptable governmental policy is entitled to respect.²⁶ I argue, instead, for effective judicial review when abuse occurs in the land use process.²⁷

policymakers may expect from satisfying some of the claimants, we would expect that politicians would want to avoid making these decisions.” Jeffrey A. Frieden, *Towards A Political Economy of Takings*, 3 WASH. U. J.L. & POL’Y 137, 143–44 (2000).

²³ See *Brown v. City of Ecorse*, 322 Fed. App’x 443, 446 (6th Cir. 2009).

²⁴ The reference is to *Lochner v. New York*, 198 U.S. 45 (1905), in which the Court held unconstitutional a New York maximum-hours law that applied to bakeries. The decision is universally condemned as representing improper judicial invalidation of social legislation. See Michael J. Phillips, *The Slow Return of Economic Substantive Due Process*, 49 SYRACUSE L. REV. 917, 921–23 (1999) (stating “criticism of the old Court’s substantive due process decisions comes from almost all points on the political spectrum”); see also Aviam Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888–1921*, 5 LAW & HIST. REV. 249, 250 (1987) (“[*Lochner*] is still shorthand in constitutional law for the worst sins of subjective judicial activism.”). Justice Breyer, referring to *Lochner*, called its protection of economic liberty “the constitutionalization of economic theories preferred by individual jurists.” *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 591–92 (2011) (Breyer, J., dissenting).

²⁵ This is not an argument for a revival of economic due process, which has attracted influential advocates. See Suzanna Sherry, *Property Is the New Privacy: The Coming Constitutional Revolution*, 128 HARV. L. REV. 1452 (2015) (reviewing RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION* (2014)); Note, *Resurrecting Economic Rights: The Doctrine of Economic Due Process Reconsidered*, 103 HARV. L. REV. 1363 (1990) (arguing in part for heightened means-ends review). Economic due process is concerned with the regulation of market-based economic activity. See Suzanna Sherry, *Selective Judicial Activism: Defending Carolene Products*, 14 GEO. J.L. & PUB. POL’Y 559, 564–65 (2016). This Article accepts reasonable regulation of market-based economic activity.

²⁶ Judicial attacks on these policies are usually brought through a facial challenge. As Justice Stevens explained, facial challenges are an “uphill battle.” *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 495 (1987) (upholding Pennsylvania Subsidence Act). Justice Scalia muted facial challenges by referring to “our contemporary understanding of the broad realm within which government may regulate without compensation” *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1024 (1992) (holding land use restriction is a categorical per se taking); see also *Constr. Indus. Ass’n of Sonoma Cty. v. City of Petaluma*, 522 F.2d 897, 908–09 (9th Cir. 1975) (upholding local growth management program against substantive due process objections).

²⁷ In abuse of land use process cases, courts can take a cue from the Supreme Court’s mandate in equal protection cases charging racial motivation. In equal protection cases, courts must consider suspicious history and procedural and substantive change in decision making as evidence of racially discriminatory intent. See *Vill. of Arlington Heights v.*

Federal courts frequently avoid considering abuse of power problems by applying several rules that block land use cases.²⁸ They may apply an entitlement rule to dismiss a case when a municipality has the discretion to reject a land use project;²⁹ a ripeness rule that requires an unnecessary final decision by a local government;³⁰ a rule that substantive due process claims in land use cases must be brought under the takings clause;³¹ or a standard of judicial review that protects municipalities from judicial intervention.³² These rules are applied even though they are based on Supreme Court decisions for other types of cases, and even though the Court has never applied them in a land use case.³³ This Article discusses the litigation difficulties these rules create, explains their origins and how they are applied, and recommends their rejection or modification.

Barriers to litigation are not always fatal. Courts have found constitutional violations in a substantial number of cases when plaintiffs alleged abusive governmental conduct.³⁴ Sometimes they have found a property owner had an entitlement. Most often courts have ignored the rules that place barriers to litigation and either did not apply a protective standard of judicial review or found that the standard was satisfied.³⁵ These cases point the way to a more effective judicial review in land use cases when government has engaged in abusive conduct.

Part II discusses the entitlement rule. A plaintiff must have an entitlement to property to bring a substantive due process case.³⁶ In land use cases, a landowner does not have an entitlement to property when a municipality has the discretion to deny a land use project.³⁷ This barrier to litigation is disabling because the use of discretion is heavily built into the

Metro. Hous. Dev. Corp., 429 U.S. 252, 270–71 (1977) (holding failure to rezone for affordable housing project is not racially discriminatory).

²⁸ See Brian W. Blaesser, *Substantive Due Process Protection at the Outer Margins of Municipal Behavior*, 3 WASH. U.J.L. & POL'Y 583, 585–86 (2000) (discussing the approaches taken by courts in different circuits).

²⁹ See *infra* Part. II.B.

³⁰ See *infra* Part. III.

³¹ See *infra* Part. IV.

³² See *infra* Part. V.

³³ See Blaesser, *supra* note 28, at 586.

³⁴ See *infra* Part IV.D.

³⁵ See *infra* Part V.D.3.

³⁶ See Blaesser, *supra* note 28, at 588.

³⁷ See *id.* at 589 (discussing RRI Realty Corp. v. Vill. of Southampton, 870 F.2d 911 (2d Cir. 1989)).

land use system.³⁸ I argue the rule is wrongly conceived and should be discarded. Ownership of property should be enough for an entitlement to property.

Part III discusses the ripeness rule. The Supreme Court adopted this rule for takings cases, where it requires plaintiffs to get a final decision on their project in order to sue in federal court.³⁹ A majority of courts wrongly apply the finality rule to substantive due process cases.⁴⁰

Part IV discusses the Supreme Court's misconceived rule that substantive due process cases are preempted if they can be brought under a more specific constitutional provision. Some federal courts hold a land use case is preempted if it could be brought under the takings clause,⁴¹ but the Supreme Court has cast doubt on this requirement.

Part V discusses the judicial review standards federal courts apply to substantive due process claims in land use cases. These standards protect government conduct, especially the highly protective "shocks the conscience" standard, which the Supreme Court adopted in a police chase case.⁴² I argue the Court did not intend this standard to apply to land use cases, and I discuss a substantial group of land use cases where courts found substantive due process violations when municipalities acted abusively.

II. THE ENTITLEMENT RULE

A. What it Means: Old vs. New Property

A major litigation barrier keeps land use cases out of federal court. It comes from the rule that a plaintiff must have an entitlement to property before she can bring a substantive due process claim. The entitlement rule began with two early Supreme Court cases where college teachers without tenure brought procedural due process objections when they were dismissed from their jobs without a hearing.⁴³ The Court held in one of

³⁸ *See id.*

³⁹ *See Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985), *overruled by* *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019).

⁴⁰ *See generally* J. David Breemer, *Ripeness Madness: The Expansion of Williamson County's Baseless "State Procedures" Takings Ripeness Requirements to Non-Taking Claims*, 41 URB. LAW. 615 (2009).

⁴¹ *See infra* Part IV.B.

⁴² *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998).

⁴³ *See Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 596 (1972) (refusing to rehire a new professor after one year of teaching did not require a hearing); *Perry v.*

these cases that the plaintiff did not have a property interest that required procedural due process protection.⁴⁴ He did not have a justifiable expectation that the college intended to continue his employment.⁴⁵ As the Court explained, “[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.”⁴⁶ The Court added that property claims are created by “an independent source such as state law,”⁴⁷ though federal courts decide whether a property interest has been created.⁴⁸ The teacher cases were procedural due process cases, but the courts have applied the entitlement rule to substantive due process cases.⁴⁹

The entitlement the Court recognized in the teacher cases is called “New Property”⁵⁰ because government creates it. Government benefits, such as social security benefits, are other examples.⁵¹ There is no

Sinderman, 408 U.S. 593, 595 (1972) (addressing failure to reemploy after teacher taught for several years and remanding for full hearing on the facts).

⁴⁴ See *Roth*, 408 U.S. at 578.

⁴⁵ See *id.* at 564. Compare *Perry*, 408 U.S. at 603 (remanding case to determine whether plaintiff had property interest).

⁴⁶ *Roth*, 408 U.S. at 577. The Court added, “It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.” *Id.*

⁴⁷ *Id.* Commentators have noted that this rule creates a gap “because the Court’s method effectively ceded the domain of constitutional property to governmental actors over which the Court, in its capacity as constitutional interpreter, had no control.” Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 923 (2000).

⁴⁸ “Although the underlying substantive interest is created by ‘an independent source such as state law,’ federal constitutional law determines whether that interest rises to the level of a ‘legitimate claim of entitlement’ protected by the Due Process Clause.” *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978) (first quoting *Roth*, 408 U.S. at 577; then quoting *Perry*, 408 U.S. at 602).

⁴⁹ See Daniel R. Mandelker, *Entitlement to Substantive Due Process: Old Versus New Property in Land Use Regulation*, 3 WASH. U. J.L. & POL’Y 61 (2000).

⁵⁰ The concept was made popular in a famous article, Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964). For discussion of this concept see *Hillcrest Prop., LLP v. Pasco Cty.*, 915 F.3d 1292, 1298 n.8 (11th Cir. 2019) (quoting Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965)); see also *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970) (explaining government entitlements).

⁵¹ The Court held in *Roth* that a teaching position at a university is a benefit that requires an entitlement. 408 U.S. at 477.

entitlement unless there is a legitimate claim to a benefit.⁵² Conversely, ownership of real property is “Old Property” and is created differently.⁵³ Government does not create the entitlement.⁵⁴ Private ownership creates the entitlement.⁵⁵ This distinction has always been clear in the Supreme Court, which has always recognized Old Property as an entitlement in takings clause cases.⁵⁶ Old Property also provides an entitlement that supports a claim under the substantive due process clause.⁵⁷

A Seventh Circuit panel got it right.⁵⁸ It held that Old Property created an entitlement in a procedural due process case, a decision that applies to

⁵² Some courts will not find an entitlement if there are uncertain questions of state law. *See* *Greenbriar Vill., L.L.C. v. Mountain Brook, City*, 345 F.3d 1258, 1265–66 (11th Cir. 2003) (finding no federally protectable property interest where there existed a debate over the meaning of state law used to recognize that property interest); *Natale v. Town of Ridgefield*, 170 F.3d 258, 263–64 (2d Cir. 1999) (holding state law dispute as to whether homebuilder had grandfathered subdivision rights was sufficiently in doubt to defeat the existence of a federally protectable property interest). Certification to the state court or abstention are more appropriate remedies. *See* *O’Mara v. Town of Wappinger*, 485 F.3d 693, 700 (2d Cir. 2007) (certifying question of New York state law when there was a lack of clear entitlement to certificate of occupancy), *certified question accepted*, 868 N.E.2d 213 (N.Y. 2007), and *certified question answered*, 879 N.E.2d 148 (N.Y. 2007). *Pullman* abstention is required if state law is unsettled. *See* *R.R. Comm’n of Tex. v. Pullman Co.*, 312 U.S. 496, 501–02 (1941); *see also* *Burford v. Sun Oil Co.*, 319 U.S. 315 (1942) (requiring abstention for complex state regulatory program). *But see* *Lehman v. City of Louisville*, 967 F.2d 1474, 1478 (10th Cir. 1992) (holding abstention under either *Pullman* or *Burford* is inappropriate for question of legal uncertainty).

⁵³ *See* Charles A. Reich, *The New Property*, 73 *YALE L.J.* 733, 771–73 (1964).

⁵⁴ *See id.*

⁵⁵ *See id.*

⁵⁶ *See, e.g.*, *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978) (dealing with the ownership of a railroad station). One court distinguished the takings cases because it claimed they have a different purpose. *See* *DLC Mgmt. Corp. v. Town of Hyde Park*, 163 F.3d 124, 132 (2d Cir. 1998) (finding the purpose of takings cases is to provide compensation for a “constitutionally-sanctioned exercise of governmental power,” and a substantive due process claim stops the property infringement). A property interest provides the basis for contesting a governmental action in court. It has nothing to do with the purpose or merits of a claim.

⁵⁷ *See* *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 167 (7th Cir. 1994) (leaving open the possibility that a taking for private use could amount to a substantive due process claim).

⁵⁸ *See id.*; *see also* *Zaintz v. City of Albuquerque*, 739 F. Supp. 1462, 1468 (D.N.M. 1990) (concluding the plaintiff “had a protected property interest in the commercial use of their property on an equal basis with others engaged in their type of business”).

substantive due process.⁵⁹ The plaintiff applied for a rezoning, but the city delayed approval until the plaintiff went bankrupt.⁶⁰ The court held the plaintiff “surely had a property interest in the land, which it owned in fee simple,” and could “contend that the City’s regulation . . . deprived it of property without due process.”⁶¹ It added that “[t]hose things people can hold or do without the government’s aid count as property or liberty no matter what criteria the law provides.”⁶²

The panel’s decision is a minority. Courts generally hold a landowner in a substantive due process case has only a unilateral expectation, not an entitlement, if a municipality can use its discretion to deny her land use project.⁶³ Old Property is not enough. This rule blocks substantive due

⁵⁹ See *River Park*, 23 F.3d at 165. On the merits, the court held the proper remedy was a takings claim, which should have been litigated in state courts. See *infra* Part III; see also *Collier v. Town of Harvard*, No. Civ. A. 95-11652-DPW, 1997 WL 33781338, at *4 (D. Mass. Mar. 28, 1997) (finding the “constitutionally cognizable interest” rule does not apply to substantive due process). Compare *Hillcrest Prop., LLP v. Pasco Cty.*, 915 F.3d 1292, 1298 (11th Cir. 2019) (“[N]either the Supreme Court nor this Court draws a distinction between old property and new property.”).

⁶⁰ See *River Park*, 23 F.3d at 165.

⁶¹ *River Park*, 23 F.3d at 166. The court held that government benefits and grants are different, and that the “arbitrary power of petty bureaucrats [over them is] checked by calling these promises ‘property’ and requiring the government to supply due process.” *Id.* (quoting *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970)). Third Circuit cases on this issue conflict. Compare *DeBlasio v. Zoning Bd. of Adjustment for W. Amwell*, 53 F.3d 592, 601 (3d Cir. 1995), *abrogated by* *United Artists Theater Circuit v. Twp. of Warrington*, 316 F.3d 392 (3d Cir. 2003) (“[O]ne would be hard-pressed to find a property interest more worthy of substantive due process protection than ownership;” property interest established by claim that land use decision arbitrarily or irrationally reached), *with* *Woodwind Estates, Ltd. v. Gretkowski*, 205 F.3d 118, 123 (3d Cir. 2000), *abrogated by* *United Artists*, 316 F.3d at 392 (“[T]he holder of a land use permit has a property interest if a state law or regulation limits the issuing authority’s discretion to restrict or revoke the permit by requiring that the permit issue as a matter of right upon compliance with terms and conditions prescribed by the statute or ordinance.”).

⁶² *River Park*, 23 F.3d at 166. As the court noted, “Efforts to distinguish among kinds of public assistance and involvement have produced the positivist approach of *Roth* and later cases, (citations omitted), under which only promises marked by determinate criteria count as ‘property.’” *Id.*

⁶³ See *infra* Part II.B. Justice Stevens took a contrary position. In a case in which the majority upheld a city charter that mandated supermajority voter approval of a zoning amendment, he noted in dissent that “[a] zoning code is unlike other legislation affecting the use of property.” *City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 682–83 (1976) (Stevens, J., dissenting) (upholding mandatory zoning referendum). He added that the frequency of zoning change under available procedures, and the consistency of the zoning in the case at hand with the basic plan, “all support my opinion that the opportunity to apply for an amendment is an aspect of property ownership protected by the Due Process

process litigation whenever a property owner must obtain a discretionary approval for her project, such as a special permit—a situation that occurs frequently.

The entitlement rule in land use litigation has a fatal circularity problem. A leading Second Circuit case where the plaintiff was denied a building permit makes the point.⁶⁴ To create an entitlement, the court held, there must be a “certainty or a very strong likelihood” of approval that focuses on the degree of discretion⁶⁵ the issuing authority has, not the “estimated probability” the authority will act favorably.⁶⁶ The issuing authority’s discretion must be so narrowly circumscribed that approval is “virtually assured.”⁶⁷ This statement of the entitlement rule, which is typical,⁶⁸ is a false promise that sets a trap for plaintiffs. Entitlements are self-defining.⁶⁹ Municipalities can block the creation of entitlements simply by adopting standards for land use approvals that give them discretion.⁷⁰ Federal courts have delegated control over substantive due process litigation to local governments.⁷¹

B. How the Entitlement Rule is Applied in Land Use Litigation

Understanding how courts apply the entitlement rule requires an understanding of how land use regulation functions.⁷² Zoning is an early

Clause of the Fourteenth Amendment.” *Id.*; see also *RRI Realty Corp. v. Inc. Vill. of Southampton*, 870 F.2d 911, 918 (2d Cir. 1989) (quoting Stevens, J.). Justice Scalia argued in a takings case that the right to develop property did not belong in the “benefit” category: “But the right to build on one’s own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a ‘governmental benefit.’” *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 833 n.2 (1987) (holding lateral access easement was a taking).

⁶⁴ See *RRI Realty Corp.*, 870 F.2d 911. *Accord*, *Clubside, Inc. v. Valentin*, 468 F.3d 144, 154 (2d Cir. 2006); *Harlen Assocs. v. Inc. Vill. of Mineola*, 273 F.3d 494, 503–04 (2d Cir. 2001).

⁶⁵ *RRI Realty Corp.*, 870 F.2d at 917. The Architectural Review Board had the discretion to exercise sound judgment and to reject plans that are “not of harmonious character.” *Id.* at 918–19. This delegation of discretionary authority should have been enough to prevent the creation of an entitlement.

⁶⁶ *Id.* at 918.

⁶⁷ *Id.*

⁶⁸ See Blaesser, *supra* note 28, at 588 n.21.

⁶⁹ See *id.* at 589.

⁷⁰ See *id.*

⁷¹ See *id.* at 590.

⁷² Almost 20,000 local governments in this country are authorized to exercise land use regulation powers. U.S. Census Bureau, *Local Government Units: 1972 to 2012*,

and widely adopted land use regulation based on the separation of incompatible uses, which the Supreme Court upheld.⁷³ It was expected to be self-executing and function with no official discretion in its implementation.⁷⁴ The zoning ordinance designates permitted land uses, which determine the development that can occur as of right with no need for municipal approval.⁷⁵ This limited purpose has expanded; land use regulation is now a hybrid system with programs not limited to land use separation, such as historic preservation and growth management.⁷⁶ They introduced new systems of discretionary control that dominate.⁷⁷ Land use regulation is an inherently discretionary system,⁷⁸ in which almost all land use projects require some form of discretionary review.⁷⁹ Planned unit

<http://www.census.gov/govs> [perma.cc/ME2A-XLAU]. There are about 16,000 towns or townships, and many of these in the Mid-Atlantic states of New York, Pennsylvania and New Jersey have land use regulation powers.

⁷³ See *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 386–87 (1926).

⁷⁴ As the report by the Douglas Commission explained, The originators of zoning anticipated a fairly simple administrative process. They thought of the zoning regulation as being largely ‘self-executing.’ After the formulation of the ordinance text and map by a local zoning commission and its adoption by the local governing body, most administrations would require only the services of a building official who would determine whether proposed construction complied with the requirements.

U.S. NAT’L COMM’N ON URBAN PROBLEMS, *BUILDING THE AMERICAN CITY* 202 (1969), https://archive.org/details/buildingamerican00unit_0/page/202 [perma.cc/43T5-7TV6].

⁷⁵ See *id.* at 201–02.

⁷⁶ See DONALD L. ELLIOTT, *A BETTER WAY TO ZONE: TEN PRINCIPLES TO CREATE MORE LIVABLE CITIES* (2008) (explaining the transition to a hybrid system).

⁷⁷ See BRIAN W. BLAESSER, *DISCRETIONARY LAND USE CONTROLS: AVOIDING INVITATIONS TO ABUSE OF DISCRETION* (2019); Blaesser, *supra* note 28, at 584 (discussing tensions in discretionary review).

⁷⁸ See *Siena Corp. v. Mayor & City Council of Rockville, Maryland*, 873 F.3d 456, 462 (4th Cir. 2017) (“Time and again we have explained that zoning ‘is an inherently discretionary system.’”).

⁷⁹ See email from Gary Feder, Senior Counsel, Husch Blackwell LLP, to author (Feb. 27, 2019, 08:37 CST) (on file with author) (noting that landowners and developers, in 45 years of land use practice, always engaged him as project legal counsel “because their plans require that a local government provide discretionary land use approval of some kind,” such as a rezoning or a conditional use permit).

developments,⁸⁰ special exceptions,⁸¹ design review⁸² and subdivision controls⁸³ are examples.

Special exceptions, which are frequently required, are a good example of land use regulation. A special exception is a land use that requires review by a local zoning board because it may have compatibility or other problems in the zone in which it wants to locate.⁸⁴ State statutes⁸⁵ authorize a board of adjustment, or similar local board, to approve special exceptions under criteria adopted by the legislative body. A landowner does not have an entitlement if these criteria give the board discretion to approve or reject the special exception.⁸⁶ Discretion is conferred by the common standard that special exceptions can be approved only if they are “compatible” with adjacent uses.⁸⁷ The prevalence of this and similar

⁸⁰ See Daniel R. Mandelker, *New Perspectives on Planned Unit Developments*, 52 REAL PROP. TR. & EST. L.J. 229 (2017) (explaining the discretionary review system).

⁸¹ See *infra* notes 84–87 and accompanying text.

⁸² See, e.g., DANIEL R. MANDELKER, DESIGNING PLANNED COMMUNITIES 7 (Universe, Inc., 2010) (explaining use of discretionary design standards), <http://landuselaw.wustl.edu/BookDPC/Designing%20Planned%20Communities.pdf> [perma.cc/6KRH-T9EC].

⁸³ See DANIEL R. MANDELKER & MICHAEL ALLEN WOLFE, LAND USE LAW § 9.08-9.09 (6th ed. 2015, updated 2019) (discussing scope of authority and discretion to accept or reject).

⁸⁴ See *Cty. Council of Prince George’s Cty. v. Zimmer Dev. Co.*, 120 A.3d 677, 691 n.17 (Md. 2015) (explaining that a special exception is a “zoning device that provides a middle ground between permitted and prohibited uses”); *People’s Counsel for Balt. Cty. v. Loyola Coll. in Md.*, 956 A.2d 166, 197 (Md. 2008) (“[T]he local legislature puts on its ‘Sorting Hat’ and separates permitted uses, special exceptions, and all other uses.”).

⁸⁵ For the basis of these statutes, see U.S. DEP’T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT, § 7 (1926). Special exceptions are also called conditional uses. Zoning statutes also authorize variances, for which a hardship standard is provided by state law. See *id.* Decisions by a local board or agency on a special use, variance, or similar approval are quasi-judicial. See, e.g., *RCG Props., LLC v. City of Atlanta Bd. of Zoning Adjustment*, 579 S.E.2d 782 786–88 (Ga. Ct. App. 2003) (discussing special administrative permit and variance); *Dupuis v. City of New Orleans through Zoning Bd. of Zoning Adjustments*, 224 So. 3d 1046, 1048 (La. App. 2017) (discussing height variance).

⁸⁶ See *Crooked Creek Conservation & Gun Club, Inc. v. Hamilton Cty. N. Bd. of Zoning Appeals*, 677 N.E.2d 544, 546 (Ind. Ct. App. 1997) (denying a special exception for a gun club).

⁸⁷ For discussion of standards for special exceptions that confer discretion and those that do not, see *id.* at 546. A municipality runs the risk that excessively discretionary standards will be invalidated as vague or as an unconstitutional delegation of power, but the courts have approved standards with enough discretion to prevent plaintiffs from establishing an entitlement. See Daniel R. Mandelker, *Delegation of Power and Function in Zoning Administration*, 1963 WASH. U. L. Q. 60 (1963).

discretionary standards means that landowners will almost always fail the test for an entitlement when a special use is denied.

Another important discretionary element in zoning is the authority of a legislative body to amend the zoning map by moving property from one land use zone to another, which is frequently required for a land use project.⁸⁸ There is no entitlement because the decision to approve or disapprove⁸⁹ a map amendment is a discretionary legislative act in almost all states,⁹⁰ and zoning statutes⁹¹ do not provide criteria for legislative zoning decisions.⁹²

Courts have explained their justification for the entitlement rule. In a typical statement, one court of appeals explained, “Federal judges lack the knowledge of and sensitivity to local conditions necessary to a proper balancing of the complex factors that enter into local zoning decisions.”⁹³

⁸⁸ See U.S. DEP’T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT, § 5 n.30 (1926). This is the model act on which all state zoning statutes are based. It authorized “changes” to zoning regulations, which was intended to authorize amendments. *Id.* at n.30. Amendments and similar terms were omitted for the sake of brevity. See *id.*

⁸⁹ A refusal to rezone is a legislative act in most states and is not appealable under state law. It can be challenged collaterally through an injunction that asks a court to enjoin enforcement of the existing ordinance as arbitrary. See, e.g., *Copple v. City of Lincoln*, 274 N.W.2d 520 (Neb. 1982) (challenge to rezoning).

⁹⁰ See *Rose*, *supra* note 22, at 1158–60 (discussing cases that hold that rezoning is a legislative act).

⁹¹ The Standard State Zoning Enabling Act did not provide standards for amendments. See A STANDARD STATE ZONING ENABLING ACT, § 7. Zoning statutes typically do not provide standards. See, e.g., 45 R.I. GEN. LAWS ANN. § 45-24-51.

⁹² A legislative body can also block a project by downzoning a site. In a typical case, a project was allowed as a permitted use, but the legislative body downzoned the site to a less intensive use that did not include the project. Discretion has been exercised, and a court will uphold a downzoning if it meets substantive due process requirements. See *New Port Largo, Inc. v. Monroe Cty.*, 95 F.3d 1084, 1091 (11th Cir. 1996) (downzoning to airport not unreasonable); *Smithfield Concerned Citizens for Fair Zoning v. Town of Smithfield*, 907 F.2d 239, 245 (1st Cir. 1990) (downzonings rationally related to legitimate purposes); *Rogin v. Bensalem Twp.*, 616 F.2d 680, 689 (3d Cir. 1980) (discussing density change as a rationale for downzoning).

⁹³ *Sullivan v. Town of Salem*, 805 F.2d 81, 82 (2d Cir. 1986). *Accord Gardner v. City of Balt. Mayor & City Council*, 969 F.2d 63, 67 (4th Cir. 1992); *Zito v. Town of Babylon*, No. 09-CV-4202(JS)(AKT), 2012 WL 12883371, at *3 (E.D.N.Y. June 28, 2012), *aff’d on other grounds*, 534 F. App’x 25 (2d Cir. 2013); *Willoughby Dev. Corp. v. Ravalli Cty.*, No. CV 07-002-M-DWM, 2008 WL 11450593, at *9 (D. Mont. May 15, 2008), *aff’d*, 338 F. App’x 581 (9th Cir. 2009); *Pennington v. Teufel*, 396 F. Supp. 2d 715, 720 (N.D. W.Va. 2005), *aff’d on other grounds*, 169 F. App’x 161 (4th Cir. 2006); *Woodward & Lothrop, Inc. v. Neall*, 813 F. Supp. 1158, 1159 (D. Md. 1993). The court in *Sullivan* added, “Even were we blessed with the requisite knowledge and sensitivity, due regard for the

Lack of knowledge and sensitivity has not kept the Supreme Court from entering other disputes where complex factors require proper balancing.⁹⁴

Federal courts almost always dismiss a case when a municipality rejects a land use project.⁹⁵ They have no difficulty rejecting claims of entitlement because criteria in the land use ordinance give the municipality discretion to make the land use decision.⁹⁶ They have held that entitlements did not exist when plaintiffs challenged refusals to rezone,⁹⁷ refusals to grant special exceptions,⁹⁸ refusals to grant subdivision

constitutional role of the federal courts in our dual judicial system would permit us to exercise jurisdiction in zoning matters only when local zoning decisions infringe national interests protected by statute or the constitution.” 805 F.2d at 82.

⁹⁴ The Court was not concerned about complex balancing or the “dual judicial system” when it examined the details of a state statute that governed the rights of grandparents to have visitation with their grandchildren and held it violated substantive due process. *See Troxel v. Granville*, 530 U.S. 57, 72 (2000). For a complex balancing test for procedural due process the courts constantly apply, see *Matthews v. Eldredge*, 424 U.S. 319, 348–49 (1976); *see also* E. THOMAS SULLIVAN & TONI M. MASSARO, *THE ARC OF DUE PROCESS IN AMERICAN CONSTITUTIONAL LAW* 155–56 (2013) (“[E]xceptional hostility to substantive due process because it demands judicial judgment is quite puzzling.”).

⁹⁵ *See generally* *Tollbrook, LLC v. City of Troy*, 774 F. App’x 929 (6th Cir. 2019); *EJS Props., LLC v. City of Toledo*, 698 F.3d 845 (6th Cir. 2012); *Snaza v. City of Saint Paul Minn.*, 548 F.3d 1178 (8th Cir. 2008); *Crown Point I v. Intermountain Rural Elec. Ass’n*, 319 F.3d 1121 (10th Cir. 2003); *Harlan Assocs. v. Inc. Vill. of Mineola*, 273 F.3d 494 (2d Cir. 2001); *DLC Mgmt. Corp. v. Town of Hyde Park*, 163 F.3d 124 (2d Cir. 1998); *Norton v. Vill. of Corrales*, 103 F.3d 928 (10th Cir. 1996); *Triomphe Inv’rs v. City of Northwood*, 49 F.3d 198 (6th Cir. 1995); *Biser v. Town of Bel Air*, 991 F.2d 100 (4th Cir. 1993); *Executive 100, Inc. v. Martin Cty.*, 922 F.2d 1536 (11th Cir. 1991); *Walker v. City of Kansas City*, 911 F.2d 80 (8th Cir. 1990).

⁹⁶ *See generally* cases cited *supra* note 95.

⁹⁷ *See Tollbrook*, 774 F. App’x at 935 (holding that appellant property owner did not have an entitlement when appellant challenged the denial of a conditional rezoning request); *EJS Props.*, 698 F.3d at 856 (holding that the Toledo’s City Council possessed the discretion to deny a request for a zoning ordinance that it never approved); *Executive 100*, 922 F.2d at 1549 (describing a refusal to rezone); *Walker*, 911 F.2d 80 at 94.

⁹⁸ *See Snaza*, 548 F.3d at 1183 (holding business owner did not have an entitlement when she challenged the denial of a conditional use permit to allow for the operation of an outdoor auto sales lot on her property because the property did not meet the minimum lot size or the driveway setback requirements in the city’s zoning regulations); *Crown Point*, 319 F.3d at 1217 (affirming the denial of the proposed land use of the appellant because appellant could not point to any criteria that would limit the discretion of the appellee); *Harlan Assocs.*, 273 F.3d at 503–04 (explaining that the zoning board, in exercising its discretion, had to consider “[w]hether the proposed use will be hazardous . . . by reason of excessive traffic, assembly of persons or vehicles or proximity to travel routes or congregations of children, pedestrians or others”); *DLC Mgmt.*, 163 F.3d at 133 (explaining that the zoning board may approve a special permit if the location and size of the special

approval,⁹⁹ and refusals to grant a variety of other land use approvals that required discretionary review.¹⁰⁰ However, courts have found an entitlement in the occasional case when an ordinance did not require an exercise of discretion.¹⁰¹

C. Exceptions to the Entitlement Rule

A limited number of exceptions provide landowners with an escape from the entitlement rule. These are situations where an established property interest creates an entitlement that allows a court to consider a case without balancing complex factors. Municipal attempts to disturb an established property interest violate substantive due process.¹⁰²

use is compatible with district development); *Triomphe Inv'rs*, 49 F.3d at 203 (explaining how the language of the city's zoning regulations, which stated that a special use permit "may" be granted, provided the City Council with discretion); *Biser*, 991 F.2d at 104 (explaining that the zoning board had to consider whether the sought after special exception "would adversely affect the public health, safety, security, morals or general welfare or would result in dangerous traffic conditions or would jeopardize the lives or property of people living in the neighborhood").

⁹⁹ See *Norton*, 103 F.3d at 931 (describing how the state statute provided the planning authority with discretion).

¹⁰⁰ See *Hillcrest Prop., LLP v. Pasco Cty.*, 915 F.3d 1292, 1298 (11th Cir. 2019) (exaction); *Pulte Home Corp. v. Montgomery Cty., Md.*, 909 F.3d 685,692 (4th Cir. 2018) (master plan); *Quinn v. Bd. of Cty. Comm'rs for Queen Anne's Cty., Md.*, 862 F.3d 433, 439 (4th Cir. 2017), (sewer service), *cert. denied*, 138 S. Ct. 1593 (2018); *Siena Corp. v. Mayor & City Council of Rockville Md.*, 873 F.3d 456, 462–63 (4th Cir. 2017) (conditional zoning plan); *Henry v. Jefferson Cty. Comm'n*, 637 F.3d 269, 275 (4th Cir. 2011) (density restriction in community unit plan); *Braun v. Ann Arbor Twp.*, 519 F.3d 564, 574 (6th Cir. 2008) (future zoning); *Clubside Inc. v. Valentin*, 468 F.3d 144, 154 (2d Cir. 2006); *Crowley v. Courville*, 76 F.3d 47, 52 (2d Cir. 1996) (variance); *Sylvia Dev. Corp. v. Calvert Cty., Md.*, 48 F.3d 810, 826 (4th Cir. 1995) (transfer zone district); *Gardner*, 969 F.2d at 69 (public works agreement); *Silver v. Franklin Twp. Bd. of Zoning Appeals*, 966 F.2d 1031, 1036 (6th Cir. 1992) (conditional zoning); *Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84, 101 (2d Cir. 1992) (Vermont Act 250 permit); *RRI Realty Corp. v. Inc. Vill. of Southampton*, 870 F.2d 911, 918 (2d Cir. 1989) (design review), *cert. denied*, 493 U.S. 893 (1989); *Spence v. Zimmerman*, 873 F.2d 256, 258–59 (11th Cir. 1989) (temporary certificate of occupancy); *Crossroads Outdoor LLC v. Green Oak Charter Twp.*, No. 18-CV-11368, 2019 WL 1326641, at *10 (E.D. Mich. Mar. 25, 2019).

¹⁰¹ See *Walz v. Town of Smithtown*, 46 F.3d 162, 168 (2d Cir. 1995) (excavation permit); See *Bateson v. Geisse*, 857 F.2d 1300, 1303 (9th Cir. 1988) (building permit); see also *Scott v. Greenville Cty.*, 716 F.2d 1409, 1419 (4th Cir. 1983) (reversing denial of permit to build affordable housing, which was an expressly permitted use).

¹⁰² See *G&H Dev., Inc. v. Benton-Parish Metro. Planning Comm'n*, 641 F. App'x 354, 355 (5th Cir. 2016); *Mongean v. City of Marlborough*, 492 F.3d 14, 18 (1st Cir. 2007); *FM Props. Operating Co. v. City of Austin*, 99 F.3d 167, 169 (5th Cir. 1996).

Courts recognize an entitlement when a property owner has a nonconforming use, which is a use legally in place when a zoning ordinance, or an amendment to a zoning ordinance, was adopted.¹⁰³ Abusive conduct occurs when a municipality interferes with a nonconforming use, as by refusing to allow changes.¹⁰⁴ A court can find a substantive due process violation when this kind of obstruction occurs.¹⁰⁵

Vested rights are another example of an established property interest. There are a variety of rules governing vested rights.¹⁰⁶ Under the majority rule, a vested right is created when a landowner relies on a government permit by making a substantial investment in his project.¹⁰⁷ Abusive governmental conduct occurs when a municipality prohibits or restricts a vested right after it is established, and federal courts find a substantive due process violation in these situations.¹⁰⁸

¹⁰³ A nonconforming use is treated as a protected property right. *See* MANDELKER & WOLFE, *supra* note 83, §§ 5.74–5.82.

¹⁰⁴ A municipality can deny expansion of a nonconforming use if its character is changed. *See* Conforti v. City of Manchester, 677 A.2d 147, 150 (N.H. 1996) (finding the conversion of a movie theater to a concert venue constituted an impermissible change in character); Town of Belleville v. Parrillo's, Inc., 416 A.2d 388, 391 (N.J. 1980) (finding the conversion of a restaurant to a disco constituted an impermissible change in use).

¹⁰⁵ *See* Greene v. Town of Blooming Grove, 879 F.2d 1061, 1065 (2d Cir. 1989) (“In this case, by contrast, the parties do not dispute, and we agree, that Greene’s nonconforming use constitutes ‘property’ under the fourteenth amendment.”). The court noted, “Under New York law, a vested nonconforming use is one that existed before enactment of the zoning ordinance prohibiting the use and that is continuously maintained after the zoning changes.” *Id.* This is a typical definition. *Compare with* L.M. Everhart Const., Inc. v. Jefferson Cty. Planning Comm’n, 2 F.3d 48, 52 (4th Cir. 1993) (nonconforming use not established).

¹⁰⁶ For discussion of the different rules, see *Western Land Equities v. City of Logan*, 617 P.2d 388, 391–95 (Utah 1980).

¹⁰⁷ *See* MANDELKER & WOLFE, *supra* note 83, at § 6.14 n.78.

¹⁰⁸ *See* *A Helping Hand, LLC v. Baltimore Cty.*, 515 F.3d 356, 371 (4th Cir. 2008) (prohibiting change in zoning ordinance to preclude clinic from operating when plaintiff obtained and exercised permit as required by Maryland law); *Cine SK8, Inc. v. Town of Henrietta*, 507 F.3d 778, 784 (2d Cir. 2007) (prohibiting attempt to amend permit when substantial improvements based on special permit); *Reserve, Ltd. v. Town of Longboat Key*, 17 F.3d 1374, 1380 (11th Cir. 1994) (discussing cases on equitable estoppel through substantial reliance on building permit; merits not decided) *cert. denied*, 513 U.S. 1080 (1995); *see also* John J. Delaney & Emily J. Vaias, *Recognizing Vested Development Rights As Protected Property in Fifth Amendment Due Process and Takings Claims*, 49 WASH. U. J. URB. & CONTEMP. L. 27, 40–44 (1996) (includes chart of vesting rules in each state).

Some courts provide vested rights protection even though a landowner has not received a building permit. A minority of states confer vested rights protection on the day an application for a permit is filed. A landowner is entitled to carry out his project under the regulations in effect when he filed his application.¹⁰⁹ Staff approval can also provide protection. Municipal staff may approve a project, but the municipality may reject the staff decision and prohibit the development, as by downzoning the property.¹¹⁰ Some courts find that a landowner's reliance on staff approval created a vested right.¹¹¹ A substantive due process violation occurs if the vested right is disturbed.¹¹²

¹⁰⁹ See *Wedgewood Ltd. P'ship I v. Twp. of Liberty*, 610 F.3d 340, 353–54 (6th Cir. 2010) (analyzing procedural due process and finding developer had a vested property interest in existing zoning classification at time of application for certificate of occupancy when township improperly attempted to modify the zoning); see also OR. REV. STAT. § 227.178(3) (codifying rule); Gregory Overstreet & Diana M. Kircheim, *The Quest for the Best Test to Vest: Washington's Vested Rights Doctrine Beats the Rest*, 23 SEATTLE U.L. REV. 1043, 1045 (2000).

¹¹⁰ For state court decisions protecting a landowner from subsequent change, see *In re Langlois/Novicki Variance Denial*, 175 A.3d 1222, 1232 (Vt. 2017) (using equitable estoppel to stop town from bringing enforcement action when a landowner relied to his detriment on zoning administrator's erroneous oral assurances that a permit was not needed); *In re 244.5 acres of land*, 808 A.2d 753, 756 (Del. 2002) (protecting a landowner because of expenditures based on preliminary approval by city prohibiting enforcement of preservation district setback); compare *Colonial Inv. Co. v. City of Leawood*, 646 P.2d 1149, 1152 (Kan. App. 1982) (finding no specific intent or purpose to induce act in reliance).

¹¹¹ See *Nasierowski Bros. Inv. Co. v. City of Sterling Heights*, 949 F.2d 890, 897 (6th Cir. 1991) (concluding in an instance of downzoning, that plaintiff had a property interest in old zoning classification that permitted his development. Plaintiff purchased property after city told him use was permitted under the zoning ordinance. Plaintiff then expended considerable money and effort in drafting a site plan and submitted it for preliminary approval, petitioned for a variance from specific site plan requirements, and negotiated with city's planners and engineers in an effort to resolve minor disputes); *Nemmers v. City of Dubuque, Iowa*, 716 F.2d 1194, 1197 (8th Cir. 1983) (finding a vested right when city participated in widening of road across property and encouraged county to rezone to industrial use, developer began development relying on county zoning, but city later downzoned after annexation; discussing Iowa cases); *Tandy Corp. v. City of Livonia*, 81 F. Supp. 2d 800, 808 (E.D. Mich. 1999) (upholding a plaintiff's downsizing case in which a planning director defended and explained the initial proposed commercial rezoning. Plaintiff then expended considerable time and money developing site plans and obtaining building permits and began site grading. Zoning then changed over plaintiff's objection). But see *Dutko v. Lofthouse*, 549 F. Supp. 2d 187, 190 (D. Conn. 2008) (holding inclusion in earlier zoning maps did not give property owner a right to rezoning).

¹¹² See *Nasierowski Bros. Inv. Co.*, 949 F.2d at 897; *Nemmers*, 716 F.2d at 1197; *Tandy Corp.*, 81 F. Supp. 2d at 808.

In addition to vested rights protection, the courts hold a municipality may not interfere with a land use approval it has previously granted.¹¹³ An example is a special permit. A municipality violates substantive due process if it blocks a previously approved project, as by withholding zoning compliance permits required later.¹¹⁴ Landowner protection ends when a project approval expires¹¹⁵ or is revoked.¹¹⁶

Exceptions to the entitlement rule can provide powerful protection from abusive municipal conduct, as in states where landowners have a protected vested right the day they file an application for a project. Entitlements based on established property rights are consistent with the concern that federal courts should avoid having to balance complex factors in land use cases. Certainty avoids complexity, and municipal discretionary actions that interfere with an established property right are prohibited. The difficulty is that the exceptions rest on landowner reliance, such as reliance on a building permit or staff approval to create a vested right. Entitlement creation is shifted from protection of municipal

¹¹³ Substantial reliance on the approval by beginning construction is not required. *See In re Langlois*, 175 A.3d at 1231.

¹¹⁴ *See Villager Pond, Inc. v. Town of Darien*, 56 F.3d 375, 379 (2d Cir. 1995) (holding that a special permit created a property interest, and that clear entitlement rule did not apply in a case where zoning compliance permits were improperly withheld by town), *cert. denied*, 519 U.S. 808 (1996); *Soundview Assocs. v. Town of Riverhead*, 725 F. Supp. 2d 320, 334 (E.D.N.Y. 2010) (holding town acted in bad faith by delaying action on building permit while changing zoning law); *T.S. Haulers, Inc. v. Town of Riverhead*, 190 F. Supp. 2d 455, 461 (E.D.N.Y. 2002) (holding town permit must issue because state permit had issued); *see also Watrous v. Town of Preston*, 902 F. Supp. 2d 243, 260 (D. Conn. 2012) (showing landowner obtained certificate of occupancy from town; wetlands commission lacked jurisdiction). A proposed rezoning is not enough. *See Dutko*, 549 F. Supp. 2d at 190 (holding inclusion in earlier zoning maps did not give property owner a right to rezoning).

¹¹⁵ *See Nat'l Waste Managers, Inc. v. Anne Arundel Cty.*, 763 A.2d 264, 274 (Md. Ct. Spec. App. 2000) (finding expiration period had tolled); *Appeal of Newtown Racquetball Assocs. from Newtown Twp. Zoning Hearing Bd.*, 464 A.2d 576, 580 (Pa. Commw. Ct. 1983) (finding special exception had lapsed).

¹¹⁶ *See Petruso v. Schlaefter*, 474 F. Supp. 2d 430, 438 (E.D.N.Y. 2007) (revoking building permit when construction partially complete), *aff'd in part*, 312 F. App'x 397 (2d Cir. 2009); *1808 Corp. v. Town of New Ipswich*, No. 2006-0912, 2008 WL 11258736, at *1 (N.H. Mar. 12, 2008) (revoking for noncompliance with site plan); *Parkview Assocs. v. City of New York*, 519 N.E.2d 1372, 1374 (N.Y. 1988) (revoking illegally issued building permit); *McNew v. Zoning Hearing Bd. of E. Marlborough Twp.*, No. 1425 C.D. 2016, 2017 WL 3081076, at *10 (Pa. Commw. Ct. July 20, 2017) (revoking for noncompliance with special exception).

discretion to protection of landowner reliance.¹¹⁷ Fairness to the landowner displaces municipal autonomy and provides a shield against municipal abuse. Recognition of fairness as a deciding factor is welcome, but fairness concerns should also inform substantive due process protection when exceptions are not available.

D. An Uncertain Journey

Landowners who bring substantive due process litigation in land use cases face an uncertain journey. They constantly fail when they try to establish entitlements. Exceptions to the entitlement rule can provide protection, but exceptions are limited and may require litigation. The entitlement rule as applied to land use litigation has weak constitutional support and should be rejected.

Protection from the entitlement rule is possible if a court does not consider it. The Supreme Court did not consider it in a land use case.¹¹⁸ It held it did not decide whether the claimant had an entitlement to building permits because the city's refusal to issue them did not violate substantive due process.¹¹⁹ Courts in several circuits have also decided land use cases raising substantive due process claims without considering the entitlement rule, but it is not clear whether the entitlement rule would have applied, whether the court's failure to consider the rule was intentional, or whether the court did not know the entitlement rule was available.¹²⁰ Courts may

¹¹⁷ For discussion of the reliance interest in vested rights cases, see *In re* 244.5 acres of land, 808 A.2d 753, 757–58 (Del. 2002); see also Kenneth A. Stahl, *Reliance in Land Use Law*, 2013 B.Y.U. L. REV. 949, 957–60 (2013) (discussing vested rights). The Supreme Court has recognized reliance interests as a basis for constitutional protection. See *Nordlinger v. Hahn*, 505 U.S. 1, 13 (1992) (upholding constitutional amendment protecting reliance by property owners on property assessment in effect at time amendment was passed; “[C]lassifications serving to protect legitimate expectation and reliance interests do not deny equal protection of the laws.”).

¹¹⁸ See *City of Cuyahoga Falls v. Buckeye Cmty. Hope Foundation*, 538 U.S. 188 (2003). The building official refused to issue building permits for an affordable housing project that had received site plan approval because a referendum on the project was pending. See *id.* at 193.

¹¹⁹ See *id.* at 198. The court of appeals had previously held there was a property interest in the approved site plan. *Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls*, 263 F.3d 627, 642 (6th Cir. 2001).

¹²⁰ For an example in the First Circuit, see *Mongeau v. City of Marlborough*, 492 F.3d 14, 17 (1st Cir. 2007) (denying building permit). For examples in the Fifth Circuit, see *G&H Dev., L.L.C. v. Benton-Par. Metro. Planning Comm’n*, 641 F. App’x 354, 355 (5th Cir. 2016) (denying subdivision application); *FM Props. Operating Co. v. City of Austin*, 93 F.3d 167, 169 (5th Cir. 1996) (addressing land development permit denial). For

have considered the entitlement rule unnecessary because they decided against the plaintiff in all but one of these cases.¹²¹

III. THE RIPENESS BARRIER

A finality ripeness rule adopted by the Supreme Court for takings cases is another barrier to substantive due process claims in land use cases.¹²² The finality rule requires a plaintiff in a takings case to obtain a final decision from the local government before bringing a takings claim in federal court.¹²³ The Supreme Court held a final decision is needed in takings cases because courts must consider several factors when deciding whether a taking has occurred.¹²⁴ These factors cannot be applied to decide whether a taking has occurred until there is a “final, definitive position”

examples in the Seventh Circuit, see *CEnergy-Glenmore Wind Farm No. 1, LLC v. Town of Glenmore*, 769 F.3d 485, 490 (7th Cir. 2014) (addressing delay in granting wind farm developer’s application for building permits); *Doherty v. City of Chicago*, 75 F.3d 318, 320 (7th Cir. 1996) (denying zoning certification). For examples in the Eighth Circuit, see *Anderson v. Douglas Cty.*, 4 F.3d 574, 577 (8th Cir. 1993) (denying application); *Lemke v. Cass Cty.*, 846 F.2d 469, 470 (8th Cir. 1987) (denying rezoning application); *Littlefield v. City of Afton*, 785 F.2d 596, 607 (8th Cir. 1986) (denying building permit). For examples in the Ninth Circuit, see *North Pacifica LLC v. City of Pacifica*, 526 F.3d 478, 484–85 (9th Cir. 2008) (addressing delays in processing development application); *Nelson v. City of Selma*, 881 F.2d 836, 838–39 (9th Cir. 1989) (denying rezoning). For examples in the Tenth Circuit, see *Onyx Properties LLC v. Board of Cty. Comm’rs of Elbert Cty.*, 838 F.3d 1039, 1048 (10th Cir. 2016) (addressing enforcement). For examples in the Eleventh Circuit, see *Goodman v. City of Cape Coral*, 581 F. App’x 736, 737 (11th Cir. 2014) (addressing rezoning denial); *Lewis v. Brown*, 409 F.3d 1271 (11th Cir. 2005) (addressing rezoning denial); *Greenbriar Vill., L.L.C. v. Mountain Brook, City*, 345 F.3d 1258, 1262 (11th Cir. 2003) (revoking a permit); *see also Samson v. City of Bainbridge Island*, 683 F.3d 1051, 1058 (9th Cir. 2012) (considering but not deciding the entitlement question).

¹²¹ *See Littlefield*, 785 F.2d at 607 (denying building permit).

¹²² *See Williamson Cty. Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985). For discussion see MANDELKER & WOLFE, *supra* note 83, §§ 2.25–2.33. For criticism of the ripeness rules, see Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 WASH. U.J.L. & POL’Y 99 (2000).

¹²³ *See Hamilton Bank*, 473 U.S. at 186–89. The plaintiff must also make a request for administrative relief, which includes zoning variances. *See, e.g., Exec. 100, Inc. v. Martin Cty.*, 922 F.2d 1536, 1540 (11th Cir. 1991); *S&R Dev. Estates, LLC v. Bass*, 588 F. Supp. 2d 452, 461 (S.D.N.Y. 2008).

¹²⁴ *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123–24 (1978) (adopting multi-factor takings test and upholding landmark designation of Grand Central Terminal).

applying a governmental regulation to the land.¹²⁵ As the Court held in an earlier case, the takings inquiry is “essentially ad hoc.”¹²⁶

The second ripeness rule initially required a plaintiff to sue in state court to obtain compensation before bringing a takings claim in federal court.¹²⁷ The Supreme Court has now held that a suit in state court is not required.¹²⁸

The Supreme Court has not decided whether the finality rule for takings cases applies to substantive due process cases, but it should not apply.¹²⁹ Substantive due process asks a different question. As the Court explained, substantive due process “probes the regulation’s underlying validity. [It] . . . is logically prior to and distinct from the question whether a regulation effects a taking.”¹³⁰ The substantive due process inquiry is not ad hoc, does not require consideration of multiple factors, and does not require compensation.¹³¹ A few land use cases have held that substantive due process cases do not have to comply with the ripeness rules because they raise different issues.¹³²

¹²⁵ *Hamilton Bank*, 473 U.S. at 191.

¹²⁶ *Penn Central*, 538 U.S. at 124.

¹²⁷ *See Hamilton Bank*, 473 U.S. at 194.

¹²⁸ *See Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019) (overruling *Hamilton Bank* on this issue, and holding the requirement that suit must be brought first in state court imposes an unjustifiable burden on takings plaintiffs and conflicts with the Court’s takings jurisprudence). A few courts held that both ripeness rules applied to substantive due process claims. *See Forseth v. Vill. of Sussex*, 199 F.3d 363, 368 (7th Cir. 2000) (both rules apply); *Bateman v. City of W. Bountiful*, 89 F.3d 704, 709 (10th Cir. 1996) (“the ripeness requirement of *Williamson* applies to due process and equal protection claims that rest upon the same facts as a concomitant takings claim”); *see also Deniz v. Municipality of Guaynabo*, 285 F.3d 142, 149 (1st Cir. 2002) (holding that dressing a takings claim as a substantive due process claim does not evade the ripeness requirements).

¹²⁹ *See Nader James Khorassani, Note, Must Substantive Due Process Land Use Claims Be So “Exhaust”ing?*, 81 *FORDHAM L. REV.* 409 (2012); *see also J. David Breemer, supra* note 40.

¹³⁰ *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005) (upholding rent control law).

¹³¹ *See id.*

¹³² *See Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1214 (6th Cir. 1992) (recognizing differences in takings cases); *P.L.S. Partners, Women’s Med. Ctr. of Rhode Island, Inc. v. City of Cranston*, 696 F. Supp. 788, 795 (D.R.I. 1988) (distinguishing takings claims; “substantive due process challenge focuses exclusively on the decision by the building inspector”). The Fifth Circuit takes a modulated view, and does not apply the ripeness rules if a plaintiff asserts a substantive due process claim not available under the takings clause. *See John Corp. v. City of Houston*, 214 F.3d 573, 583–86 (5th Cir. 2000); *Bienville Quarters, LLC v. E. Feliciana Par. Police Jury*, No. Civ. A. 07-158-JJB-DLD,

Ripeness is not a problem when a land use plaintiff brings a facial substantive due process claim.¹³³ It is a problem only when a plaintiff challenges a land use decision as applied to her property. In these cases a majority of circuits¹³⁴ apply the final decision ripeness rule.¹³⁵ This rule

2010 WL 2653317, at *3 (M.D. La. June 25, 2010) (explaining that the court in *John Corp* decided that the *Williamson County* test does not apply to substantive due process or equal protection claims); see also *Bateson v. Geisse*, 857 F.2d 1300, 1303 (9th Cir. 1988) (holding that state compensation suit not required and failing to discuss final decision).

¹³³ Facial substantive due process cases are exempted from the ripeness rules. See, e.g., *Cty. Concrete Corp. v. Town of Roxbury*, 442 F.3d 159, 166 (3d Cir. 2006) (zoning ordinance); *Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651, 655 (9th Cir. 2003) (vacancy control ordinance); *Smithfield Concerned Citizens for Fair Zoning v. Town of Smithfield*, 907 F.2d 239, 241–42 (1st Cir. 1990) (zoning ordinance); *Beacon Hill Farm Assocs. II Ltd. P’ship v. Loudoun Cty. Bd. of Supervisors*, 875 F.2d 1081, 1082–83 (4th Cir. 1989) (zoning ordinance regulating mountainside development). These decisions are consistent with the Supreme Court’s exemption of facial takings claims from the ripeness rules. See *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) (holding that a facial takings claim does not depend on deprivation of economic use of property or whether landowners are compensated in the context of rent control ordinances); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014–42 n.4 (1992) (“Facial challenges are ripe when the Act is passed.”).

¹³⁴ See *Miles Christi Religious Order v. Township of Northville*, 629 F.3d 533, 538 (6th Cir. 2010); *Murphy v. New Milford Zoning Comm’n*, 402 F.3d 342, 347–48 (2d Cir. 2005) (explaining how *Hamilton Bank* applies to substantive due process cases); *Samerie Corp. of Del., Inc. v. City of Philadelphia*, 142 F.3d 582, 596–97 (3d Cir. 1998); *McKenzie v. City of White Hall*, 112 F.3d 313, 317 (8th Cir. 1997); *Restigouche, Inc. v. Town of Jupiter*, 59 F.3d 1208, 1212 (11th Cir. 1995) (not requiring variance request; distinguishing takings claims); *Taylor Inv., Ltd. v. Upper Darby Twp.*, 983 F.2d 1285, 1290 (3d Cir. 1993); *Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84, 96 (2d Cir. 1992) (showing arbitrary and capricious substantive due process claim); *Eide v. Sarasota Cty.*, 908 F.2d 716, 726 (11th Cir. 1990), cert. denied, 498 U.S. 1120 (1991); *Beacon Hill*, 875 F.2d at 1082; *Landmark Land Co. of Okla., Inc. v. Buchanan*, 874 F.2d 717, 722 (10th Cir. 1989); *Shelter Creek Dev. Corp. v. City of Oxnard*, 838 F.2d 375, 379 (9th Cir. 1988); *Herrington v. Sonoma Cty.*, 834 F.2d 1488, 1494–97 (9th Cir. 1987) (holding, however, that the reapplication rule does not apply); *Vashi v. Charter Twp. of W. Bloomfield*, 159 F. Supp. 2d 608, 614 (E.D. Mich. 2001), aff’d, 74 F. App’x 575 (6th Cir. 2003); *Pond Brook Dev., Inc. v. Twinsburg Twp.*, 35 F. Supp. 2d 1025, 1028 (N.D. Ohio 1999); *Mont Belvieu Square, Ltd. v. City of Mont Belvieu*, 27 F. Supp. 2d 935, 940 (S.D. Tex. 1998); *Oxford House, Inc. v. City of Virginia Beach, Va.*, 825 F. Supp. 1251, 1260 (E.D. Va. 1993). A court will not require compliance with the final decision rule if compliance is futile. See *Murphy*, 402 F.3d at 349.

¹³⁵ It is similar to a jurisdictional ripeness rule the federal courts apply to other types of cases. See *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967) (applying jurisdictional ripeness rule to food and drug regulations). Exhaustion of remedies is not required when plaintiffs sue under the federal civil rights act, 42 U.S.C. § 1983, but the Court distinguished exhaustion of remedies from the final decision rule. *Hamilton Bank*, 473 U.S.

creates problems for a land use plaintiff because it adds an uncertain step to the litigation process. Finality is not a bright line rule.¹³⁶ A plaintiff will not know until he gets a court ruling whether the municipality has made a final decision on his project. He runs the risk of dismissal if a judge rules against him, and he must go back to the municipality to get a final decision the court will accept. Additionally, the final decision rule should not apply because a substantive due process violation is complete when the municipality makes its decision.¹³⁷ A final decision is not required so that a municipality can consider the “factors” that led to its conclusion.¹³⁸

The final decision rule especially has no role in government abuse cases. A Third Circuit case made this point. There, government officers “deliberately and improperly interfered with the process by which the Township issued permits, in order to block or to delay the issuance of plaintiffs’ permits,” and did so for reasons unrelated to the permit application.¹³⁹ These actions, the court held, were enough to establish a substantive due process violation even if the plaintiffs eventually received their permit.¹⁴⁰ The final decision rule did not apply.¹⁴¹ The plaintiffs were not dependent on a final decision from the county because they were not appealing an adverse decision on a permit application.¹⁴²

IV. THE PREEMPTION RULE IN *GRAHAM V. CONNOR*

A. Preemption in Substantive Due Process Cases

A plaintiff litigating a land use case where the government has acted abusively has more than one constitutional alternative. In addition to suing

at 192–93. For a discussion of variances that were available to a plaintiff, see *Murphy*, 402 F.3d at 352–53.

¹³⁶ For discussion of cases applying the final decision rule see BRIAN W. BLAESSER & ALAN C. WEINSTEIN, *FEDERAL LAND USE LAW AND LITIGATION* § 12:22 (2018). For discussion of cases applying a futility rule that is an exception to the final decision rule, see *id.* § 12:23; see also 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 & ENVTL. L. 91 (1994).

¹³⁷ See *McKinney v. Pate*, 20 F.3d 1550, 1556–57 (11th Cir. 1994).

¹³⁸ See *id.*

¹³⁹ *Blanche Rd. Corp. v. Bensalem Twp.*, 57 F.3d 253, 267–68 (3d Cir. 1995); see also *Bello v. Walker*, 840 F.2d 1124, 129 (3d Cir. 1988) (showing government officials interfered with building permit process for partisan political or personal reasons unrelated to merits of application; not applying or discussing the final decision rule).”

¹⁴⁰ See *Blanche*, 57 F.3d at 267–68.

¹⁴¹ See *id.*

¹⁴² See *id.*

under substantive due process,¹⁴³ she can sue for a violation of equal protection if she believes she was treated unfairly.¹⁴⁴ She can also claim a taking has occurred if she claims the land use regulation that applies to her property is too restrictive.¹⁴⁵

A careful attorney might bring all three claims. The difficulty is that a substantive due process claim might be preempted if it could have been brought under a more specific constitutional clause, such as the takings clause. A Supreme Court decision, *Graham v. Connor*, requires this result.¹⁴⁶ In that case, the Court held the Fourth Amendment preempted a substantive due process claim that law enforcement officers used excessive force during an arrest.¹⁴⁷ Some federal courts have extended *Graham* preemption in land use cases to include preemption by the takings clause.¹⁴⁸

Graham preemption is a judicial anomaly unsupported by Supreme Court doctrine and should be overruled. It conflicts with the well-established Supreme Court rule that a plaintiff can sue on multiple constitutional theories.¹⁴⁹ It survives, nonetheless, and the Supreme Court

¹⁴³ In a related group of cases, some federal courts have held that substantive due process claims are barred as ancillary to a takings claim. *See* Breemer, *supra* note 40, at 632–33; *see also* Braun v. Ann Arbor Charter Twp., 519 F.3d 564, 574 (6th Cir. 2008) (claim for equitable relief not ancillary to takings clause).

¹⁴⁴ *See* Village of Willowbrook v. Olech, 528 U.S. 562, 563–64 (2000).

¹⁴⁵ *See* Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 185 (1985).

¹⁴⁶ 490 U.S. 386 (1989).

¹⁴⁷ *See id.* at 388.

¹⁴⁸ *See infra* notes 161–168 and accompanying text.

¹⁴⁹ *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 49 (1993) (“We have rejected the view that the applicability of one constitutional amendment pre-empts the guarantees of another.”); *Soldal v. Cook Cty.*, 506 U.S. 56, 70 (1992) (“Where such multiple violations are alleged, we are not in the habit of identifying as a preliminary matter the claim’s ‘dominant’ character. Rather, we examine each constitutional provision in turn.”); *Hudson v. Palmer*, 468 U.S. 517 (1984) (applying both Fourth Amendment and Fourteenth Amendment Due Process Clause in the context of section 1983 litigation); *Ingraham v. Wright*, 430 U.S. 651 (1977) (applying Eighth Amendment and Fourteenth Amendment Due Process Clause in the context of corporal punishment in public schools). Professor Massaro advances even more compelling reasons for abandoning *Graham v. Connor*. *See* Toni M. Massaro, *Reviving Hugo Black? The Court’s “Jot for Jot” Account of Substantive Due Process*, 73 N.Y.U. L. REV. 1086, 1090–92 (1998) (arguing that *Graham* runs afoul of the Court’s important prudential practices, violates the Court’s own interpretive rules and practices, improperly invokes “vagueness” as the reason for this unique interpretive approach, and is fundamentally inconsistent with the Court’s caselaw on substantive due process). *But see* Rubin, *supra* note 10, at 865 (“Bill of Rights

has extended it to other Fourth Amendment cases¹⁵⁰ and to other constitutional provisions.¹⁵¹

An important problem with *Graham* preemption is that the Court has not given clear advice on when it occurs. Its explanation of the rule varies. In *Graham*, the Court found preemption because “the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct”¹⁵² The Court later modified this explanation. It held the rule applies “[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior”¹⁵³ Physically intrusive behavior is not necessary under this modified rule.

Neither has the Court defined what it means by an “explicit textual source.”¹⁵⁴ It has found preemption both when a substantive due process claim was “covered by”¹⁵⁵ and when it “aris[es] under”¹⁵⁶ an explicit constitutional provision. Nor is it clear whether a claim under an explicit constitutional provision must be successful to make *Graham* preemption apply. In *Lewis v. County of Sacramento*, the Court considered a Fourteenth Amendment claim only after it held a Fourth Amendment claim could not stand.¹⁵⁷ It did not decide whether a successful suit on an explicit constitutional clause is necessary to make *Graham* preemption apply.

provisions can be understood to provide not just a floor, but the total measure of substantive due process protection.”).

¹⁵⁰ See *Albright v. Oliver*, 510 U.S. 266, 271–75 (1994) (plurality opinion; malicious prosecution).

¹⁵¹ See *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997) (Eighth Amendment).

¹⁵² *Graham*, 490 U.S. at 395.

¹⁵³ *County of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998) (quoting *Albright*, 510 U.S. at 273 (plurality opinion of Rehnquist, C.J.), in turn quoting *Graham*, 490 U.S. at 395).

¹⁵⁴ *Graham*, 490 U.S. at 395.

¹⁵⁵ *Lanier*, 520 U.S. at 272 n.7.

¹⁵⁶ *Graham*, 490 U.S. at 397.

¹⁵⁷ “The Fourth Amendment covers only ‘searches and seizures,’ neither of which took place here. . . . *Graham*’s more-specific-provision rule is therefore no bar to respondents’ suit.” *Cty. of Sacramento*, 523 U.S. at 833–44 (citing *Evans v. Avery*, 100 F.3d 1033, 1036 (1st Cir. 1996), “noting that ‘outside the context of a seizure, . . . a person injured as a result of police misconduct may prosecute a substantive due process claim under section 1983.” In *Graham*, 490 U.S. 386, and *Lanier*, 520 U.S. 252, the Court remanded the cases because they were brought under the wrong legal standard and the Court did not reach the merits of the constitutional claim under the Bill of Rights.

The takings clause is the best candidate for *Graham* preemption in land use cases. It will occur if a court holds the takings clause is an explicit constitutional provision that preempts the substantive due process claim. A plaintiff must then satisfy the final decision rule in order to bring a takings claim.¹⁵⁸ A more serious problem is that *Graham* preemption under the takings clause creates a dead end for a plaintiff because a takings claim is almost impossible to win.¹⁵⁹ Two Supreme Court takings rules apply to land use regulation. One rule finds a categorical per se taking under *Lucas v. South Carolina Coastal Commission*¹⁶⁰ when a government regulation “denies all economically beneficial or productive use of land.”¹⁶¹ Success under this rule is difficult. A comprehensive survey identified only a handful of cases that found a *Lucas* taking.¹⁶² Most of the successful cases did not consider typical land use regulations, such as zoning.¹⁶³

A second takings rule based on *Penn Central Transportation Company v. City of New York*¹⁶⁴ applies a three-factor test to decide whether a taking has occurred.¹⁶⁵ A survey of cases in three courts of

¹⁵⁸ See *supra* notes 122–126 and accompanying text.

¹⁵⁹ In state cases where courts found a taking, there was either an abusive attempt to stop a project after the property owner relied on county approval, see *Lockaway Storage v. City of Alameda*, 156 Cal. Rptr. 3d 607, 622 (Cal. Ct. App. 2013), or abusive action such as an arbitrary downzoning, see *Avenida San Juan P’ship v. City of San Clemente*, 135 Cal. Rptr. 3d 570, 579 (Cal. Ct. App. 2011); see also Michael M. Berger, *Property, Democracy, & the Constitution*, 5 BRIGHAM-KANNER PROP. RTS. CONF. J. 45, 58 nn.70, 71 (2016) (citing these cases as examples of takings). A court did not find a taking in the absence of reliance. See *Bottini v. City of San Diego*, 238 Cal. Rptr. 3d 260, 286 (Cal. Ct. App. 2018) (distinguishing *Lockaway*).

¹⁶⁰ 505 U.S. 1003 (1992) (holding regulation of coastal land use constituted a total taking). For a critical evaluation, see Daniel R. Mandelker, *Of Mice and Missiles: A True Account of Lucas v. South Carolina Coastal Council*, 8 J. LAND USE & ENVTL. L. 285 (1993).

¹⁶¹ *Lucas*, 505 U.S. at 1015.

¹⁶² See Carol Necole Brown & Dwight H. Merriam, *On the Twenty-Fifth Anniversary of Lucas: Making or Breaking the Takings Claim*, 102 IOWA L. REV. 1847 (2017) (*Lucas* claims were successful in only 1.7% or 27 of 1700 takings cases reviewed by authors.).

¹⁶³ The authors grouped the cases into the following categories: (1) nuisance abatement cases, (2) cases considering private agreements and the denominator problem, (3) cases where there was segmentation of uses under the zoning pyramid, and (4) cases where there were taking delays. See *id.* at 1862–87.

¹⁶⁴ 438 U.S. 104 (1978) (upholding landmark designation of Grand Central Terminal).

¹⁶⁵ See *id.* at 124. These factors are the economic impact of the regulation on the claimant, whether the claimant had distinct investment-backed expectations, and the character of the governmental action. For discussion of the investment-backed expectations

appeal found plaintiff success rates were equally as low as they were under the *Lucas* categorical rule. Plaintiffs prevailed in only four of the forty-five cases where the courts reached the merits of the takings claim.¹⁶⁶ These studies show that *Graham* preemption creates a dead end for the substantive due process plaintiff in the vast majority of cases. Few takings claims are successful, but lack of success may not prevent preemption.

B. *Graham* Preemption Through the Takings Clause in the Federal Courts¹⁶⁷

There is no Supreme Court guidance on whether *Graham* preemption applies in land use cases. Some federal courts may have assumed it does not apply. They decided substantive due process land use cases that would have required dismissal under *Graham* preemption but did not consider this possibility.¹⁶⁸ It is not clear whether the courts' failure to consider

takings factor, see Daniel R. Mandelker, *Investment-Backed Expectations in Taking Law*, 27 URB. LAW. 215 (1995).

¹⁶⁶ See Adam R. Pomeroy, *Penn Central After 35 Years: A Three Part Balancing Test or A One Strike Rule?*, 22 FED. CIR. B.J. 677, 692 (2013) (concluding that *Penn Central* is not applied as a balancing test). This success rate is lower than a success rate found in an earlier study. See F. Patrick Hubbard et al., *Do Owners Have a Fair Chance of Prevailing Under the Ad Hoc Regulatory Takings Test of Penn Central Transportation Company?*, 14 DUKE ENVTL. L. & POL'Y F. 121, 141–44 (2003). A comprehensive survey by one of the author's students found that only three takings cases based on an owner's investment-backed expectations were successful.

¹⁶⁷ Courts have preempted substantive due process claims in land use cases based on other constitutional clauses. See *Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32, 46 (1st Cir. 1992) (discussing the First Amendment and retaliation for political views); *Michael v. Letchinger*, No. 10 C 3897, 2011 WL 3471082, at *13 (N.D. Ill. Aug. 5, 2011) (discussing the First Amendment and religious animus, enforcement of facially neutral zoning, and building code provisions that closed church); *El Dia, Inc. v. Rossello*, 30 F. Supp. 2d 160, 174 (D.P.R. 1998) (discussing the First Amendment and denial of land-use permits and instigation of administrative investigations, retaliation for critical news coverage); *Heidorf v. Town of Northumberland*, 985 F. Supp. 250, 256 (N.D.N.Y. 1997) (discussing the Fourth Amendment and holding that building demolition was a seizure, but that procedural due process claim did not preempt substantive due process claim).

¹⁶⁸ See, e.g., *A Helping Hand, LLC v. Baltimore Cty., Md.*, 515 F.3d 356, 368 (4th Cir. 2008) (recognizing vested right to project); *Berger v. City of Mayfield Heights*, 154 F.3d 621, 626 (6th Cir. 1998) (holding a land clearing ordinance invalid); *Texas Manufactured Hous. Ass'n v. City of Nederland*, 101 F.3d 1095, 1106 (5th Cir. 1996) (upholding restriction on placement of manufactured homes); *Restigouche, Inc. v. Town of Jupiter*, 59 F.3d 1208, 1214 (11th Cir. 1995) (upholding prohibition on automobile sales in downtown corridor); *Smithfield Concerned Citizens for Fair Zoning v. Town of Smithfield*, 907 F.2d 239, 243 (1st Cir. 1990) (upholding zoning ordinance revision); *Maroney v. Fiorentini*, No. 16-CV-11575-DLC, 2017 WL 6063064, at *6 (D. Mass. Dec.

Graham preemption was intentional, or whether the courts did not know that *Graham* preemption was available. The facts in these cases indicated a takings claim would not have been successful, which may have been a factor in the decisions.

When courts considered *Graham* preemption, its application to land use cases through the takings clause was mixed. Several courts of appeal found *Graham* preemption. The Tenth,¹⁶⁹ Ninth,¹⁷⁰ and Sixth¹⁷¹ Circuits took a formalistic approach. Accepting *Graham* literally, they held the takings clause provided an explicit constitutional textual source that required preemption of substantive due process claims. The Eleventh Circuit decided the framers of the Constitution did not intend to replicate takings clause protections in the Fourteenth Amendment.¹⁷² The Third Circuit has leaned toward preemption.¹⁷³ Conversely, some courts of

7, 2017) (recognizing claim based on refusal to issue building permits); *Dosiak v. Town of Brookhaven*, No. CV 16-6658, 2017 WL 7048912, at *14 (E.D.N.Y. Nov. 27, 2017) (upholding action of town in issuing stop work order, commencing criminal and civil enforcement proceeding and seeking preliminary relief); *Cranberry Promenade, Inc. v. Cranberry Twp.*, No. CV 09-1242, 2011 WL 13257871, at *17 (W.D. Pa. Dec. 29, 2011) (upholding denial of a land use application in favor of another development); *Cherry Hill Towers, L.L.C. v. Twp. of Cherry Hill*, 407 F. Supp. 2d 648, 654 (D.N.J. 2006) (upholding approval delay).

¹⁶⁹ See *Miller v. Campbell Cty.*, 945 F.2d 348, 352 (10th Cir. 1991) (declaring village uninhabitable and interpreting the takings clause to impose “very specific obligations”).

¹⁷⁰ See *Esplanade Props., LLC v. City of Seattle*, 307 F.3d 978, 982 (9th Cir. 2002) (denying application to develop shoreline property); *Buckles v. King Cty.*, 191 F.3d 1127, 1137 (9th Cir. 1999) (precluding a substantive due process claim based on “spot zoning[,]” and explaining that “[c]hanging the label will not change the result”); *Macri v. King Cty.*, 126 F.3d 1125, 1129 (9th Cir. 1997) (denying plat application), *cert. denied*, 522 U.S. 1153 (1998); *Armendariz v. Penman*, 75 F.3d 1311, 1324 (9th Cir. 1996) (en banc) (enforcing a housing code to reduce price for private shopping center and containing extensive discussion of basis for takings claims), *followed by Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 949 (9th Cir. 2004) (enforcing water quality standards).

¹⁷¹ See *Ackermann Enters., Inc. v. City of Bellevue*, No. 14-207-ART, 2016 WL 4499659, at *5 (E.D. Ky. Aug. 24, 2016) (denying proposed changes in site plan), *opinion amended on reconsideration*, *Ackermann Enters., Inc. v. City of Bellevue*, No. 14-207-ART, 2016 WL 5171864 (E.D. Ky. Sept. 19, 2016). *Accord Montgomery v. Carter Cty.*, 226 F.3d 758, 769 (6th Cir. 2000) (considering the taking of a private driveway).

¹⁷² See *Bickerstaff Clay Prod. Co. v. Harris Cty. By & Through Bd. of Comm’rs*, 89 F.3d 1481, 1490 (11th Cir. 1996) (addressing R-1 residential zoning).

¹⁷³ See *Assocs. in Obstetrics & Gynecology v. Upper Merion Twp.*, No. 03-2313, 2004 WL 2440779, at *5 (E.D. Pa. Oct. 29, 2004) (applying a more stringent standard for substantive due process claims in a case over a successful cease and desist order against plaintiff’s land use; Third Circuit has not squarely endorsed *Graham* preemption, but has indicated reluctance to use substantive due process when other constitutional claims are

appeals did not find preemption.¹⁷⁴ The District of Columbia Court of Appeals¹⁷⁵ and the Sixth Circuit¹⁷⁶ rejected preemption without discussion.¹⁷⁷ The Fifth Circuit held a court must carefully consider whether a plaintiff's substantive due process claim is also protected by the takings clause.¹⁷⁸

Rule duplication is why the Supreme Court held a substantive due process claim was preempted by the takings clause. The Supreme Court at one time applied a takings rule that “[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests”¹⁷⁹ This rule duplicated an identical “substantially advance” rule that courts apply when they decide whether substantive due process is violated.¹⁸⁰ Preemption occurred because a substantive due process claim could be litigated under an identical rule through the takings clause.

A change in Supreme Court doctrine eliminated rule duplication as the basis for *Graham* preemption under the takings clause. *Lingle v. Chevron USA, Inc.*¹⁸¹ held the “substantially advance” rule is no longer a basis for

available); *see also* *JSS Realty Co., LLC v. Town of Kittery*, 177 F. Supp. 2d 64, 70–71 (D. Me. 2001) (recognizing preemption rule as applied to substantive due process takings claim).

¹⁷⁴ *See* *S. Cty. Sand & Gravel Co. v. Town of S. Kingstown*, 160 F.3d 834, 836 (1st Cir. 1998) (recognizing preemption rule but deciding case under substantive due process because differences between takings and substantive due process clauses are semantic). At that time courts applied an identical legitimate governmental purposes test under both the takings clause and the substantive due process clause.

¹⁷⁵ *See* *Tri Cty. Indus., Inc. v. D.C.*, 104 F.3d 455, 459 (D.C. Cir. 1997).

¹⁷⁶ *See* *Hartman & Tyner, Inc. v. Charter Twp. of W. Bloomfield*, 1993 WL 15130 at *3, 985 F.2d 560 (6th Cir. 1993) (unpublished table decision) (relying on *Pearson*); *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1214 (6th Cir. 1992) (omitting any discussion of preemption).

¹⁷⁷ *Accord* *Collier v. Town of Harvard*, No. Civ. A. 95-11652-DPW, 1997 WL 33781338, at *4 n.13 (D. Mass. Mar. 28, 1997) (holding that *Graham* does not apply when specific constitutional provision not involved).

¹⁷⁸ *See* *John Corp. v. City of Houston*, 214 F.3d 573, 581–83 (5th Cir. 2000) (considering a vagueness claim, and finding no blanket rule of preemption); *see also* *Braun v. Ann Arbor Charter Twp.*, 519 F.3d 564, 574 (6th Cir. 2008) (denial of rezoning and variance involving a targeting of plaintiff's project).

¹⁷⁹ *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (holding takings claim against density restriction not ripe).

¹⁸⁰ *Lingle v. Chevron USA Inc.*, 544 U.S. 528, 540 (2005) (holding this test is a substantive due process test, not a takings test).

¹⁸¹ 544 U.S. 528 (2005).

a takings claim but applies only to substantive due process claims.¹⁸² The takings clause no longer provides a basis for *Graham* preemption because there is no takings rule that duplicates substantive due process.¹⁸³

The Ninth Circuit recognized this change. In *Crown Point Development, Inc. v. City of Sun Valley*,¹⁸⁴ the court, reversing an earlier decision, relied on *Lingle*'s deletion of the "substantially advance" rule from takings law to reject *Graham* preemption.¹⁸⁵ *Lingle*, the court held, "pulls the rug out from under" *Graham* preemption, which "no longer applies to claims that a municipality's actions were arbitrary and unreasonable, lacking any substantial relation to the public health, safety, or general welfare."¹⁸⁶ Other Ninth Circuit cases are in accord,¹⁸⁷ but land

¹⁸² For discussion see Breemer, *supra* note 40, at 638–39.

¹⁸³ *But see* Braun v. Ann Arbor Charter Twp., 519 F.3d 564, 574 (6th Cir. 2008) (recognizing but not applying the preemption rule to a denial of rezoning and variance).

¹⁸⁴ 506 F.3d 851, 853–54 (9th Cir. 2007) (showing arbitrary and irrational denial of permit application).

¹⁸⁵ For discussion of *Crown Point*, see Nisha Ramachandran, *Realizing Judicial Substantive Due Process in Land Use Claims: The Role of Land Use Statutory Schemes*, 36 *ECOLOGY L.Q.* 381, 389–91 (2009); J. David Breemer et al., *Property Rights in the Ninth Circuit, and Beyond*, 9 *ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS* 47, 48–50 (2008); Robert H. Thomas, *The Ninth Circuit Rediscovered Substantive Due Process in Land Use Cases*, *ZONING AND PLANNING LAW REPORT*, Dec. 2008, at 1, 5–7.

¹⁸⁶ *Crown Point*, 506 F.3d at 855. The court also relied on *County of Sacramento v. Lewis*, decided pre-*Lingle*. In that case, the Court reached the substantive due process claim because the plaintiff did not have a successful Fourth Amendment claim. 523 U.S. 833, 842–44 (1998). The Ninth Circuit interpreted *County of Sacramento* to mean a claim is covered by the takings clause only if it falls into one of the takings categories, even if the takings claim cannot be successful. *Crown Point*, 506 F.3d at 855. The substantive due process claim is not preempted if the conduct "alleged" cannot be a taking. *See id.* at 855–56. A "substantially advance" claim is an example. *See id.*

¹⁸⁷ For Ninth Circuit and district court cases, see *N. Pacifica LLC v. City of Pacifica*, 526 F.3d 478, 484 (9th Cir. 2008) (discussing unreasonable delays in approval; "The irreducible minimum of a substantive due process claim challenging land use regulation is failure to advance any governmental purpose."); *Shanks v. Dressel*, 540 F.3d 1082, 1086 (9th Cir. 2008) (recognizing reversal of *Graham* in historic district approval); *Equity Lifestyle Props., Inc. v. Cty. of San Luis Obispo*, 548 F.3d 1184, 1194 n.19 (9th Cir. 2008) (discussing rent control); *Action Apartment Ass'n, Inc. v. Santa Monica Rent Control Bd.*, 509 F.3d 1020, 1025 (9th Cir. 2007) (same); *Laurel Park Cmty., LLC v. City of Tumwater*, 790 F. Supp. 2d 1290, 1302 (W.D. Wash. 2011), *aff'd on other grounds*, 698 F.3d 1180 (9th Cir. 2012) (discussing manufactured home district); *Ruff v. Cty. of Kings*, No. CV-F-05631 OWWGSA, 2008 WL 4287638, at *12 (E.D. Cal. Sept. 17, 2008) (discussing permit denial; intentional and discriminatory treatment); *Gypsum Res., LLC v. Guinn*, No. 205-CV-0583-RCJ-LRL, 2008 WL 872835, at *2 (D. Nev. Mar. 27, 2008) (claiming zoning restrictions depressed price of land for acquisition); *MHC Fin., Ltd. v. City of San Rafael*,

use plaintiffs may face *Graham* preemption elsewhere unless other circuits follow the Ninth Circuit's lead.¹⁸⁸

V. THE STANDARD OF JUDICIAL REVIEW IN SUBSTANTIVE DUE PROCESS CASES

A. In the Supreme Court

A court that gets past litigation barriers can consider a land use case that makes a substantive due process claim, but must then decide what standard of judicial review should apply. Federal courts have no guidance from the Supreme Court on this problem because it has not adopted a standard of judicial review for land use cases that raise substantive due process issues. However, the Court did adopt a restrictive judicial review standard¹⁸⁹ for substantive due process cases in an influential Fourth Amendment case.¹⁹⁰

*County of Sacramento v. Lewis*¹⁹¹ was a suit brought by parents of a motorcycle passenger killed in a high-speed police chase. Justice Souter turned to substantive due process when he did not find Fourth Amendment liability. He first explained the purpose and function of the substantive due process clause: “The touchstone of due process is protection of the individual against arbitrary action of government,”¹⁹² which includes “the

No. C-00-03785 VRW, 2008 WL 440282, at *26 (N.D. Cal. Jan. 29, 2008) (“[A]fter *Lingle*, there is no explicit text for assessing whether a regulation is effective in achieving a legitimate public purpose; only the Due Process Clause remains.”).

¹⁸⁸ *Crown Point* leaves open the question whether other takings rules, such as the *Penn Central* takings factors, provide a basis for takings clause preemption as an explicit constitutional provision. See *Crown Point*, 506 F.3d at 855–56.

¹⁸⁹ This standard is narrower than state standards. See *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1221 (6th Cir. 1992) (“Therefore, it must be emphasized that the state court scope of review of a decision of a state administrative agency is far broader than the federal scope of review under substantive due process.”).

¹⁹⁰ See U.S. CONST. amend. IV (stating the “right of the people to be secure. . . against unreasonable searches and seizures”).

¹⁹¹ 523 U.S. 833 (1998). See Erica L. Reilley, *County of Sacramento v. Lewis: A “Conscience-Shocking” Decision Regarding Officer Liability in High-Speed Police Pursuits*, 32 LOY. L.A. L. REV. 1357 (1999); Matthew D. Umhofer, *Confusing Pursuits: Sacramento v. Lewis and the Future of Substantive Due Process in the Executive Setting*, 41 SANTA CLARA L. REV. 437 (2001) (criticizing test).

¹⁹² *Cty. of Sacramento*, 523 U.S. at 845 (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)). He added that substantive due process “protects against government power arbitrarily and oppressively exercised.” *Id.* at 846; see also *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (stating the purpose of the substantive due process clause is “to secure the individual from the arbitrary exercise of the powers of government,” and “to prevent

exercise of power without any reasonable justification in the service of a legitimate governmental objective”¹⁹³

Justice Souter then made a fundamental distinction: “criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue.”¹⁹⁴ This distinction shaped the case, but Justice Souter did not discuss the judicial review standard for reviewing legislation, including economic legislation such as land use regulation. The accepted standard is the rational relationship test,¹⁹⁵ which is easily satisfied.¹⁹⁶ He turned instead

governmental power from being “used for purposes of oppression” (citations omitted). For a history of substantive due process see Rosalie Berger Levinson, *Reining in Abuses of Executive Power Through Substantive Due Process*, 60 FLA. L. REV. 519, 524–29 (2008); see also SULLIVAN & MASSARO, *supra* note 94, at 26–32 (explaining substantive due process). Justice Harlan’s dissent in *Poe v. Ullman*, 367 U.S. 497, 543 (1961), is probably the most influential statement on substantive due process. There he stated that the “full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution.” *Id.* Instead, it is a continuum that “includes a freedom from all substantial arbitrary impositions and purposeless restraints” *Id.*

¹⁹³ *Cty. of Sacramento*, 523 U.S. at 846.

¹⁹⁴ *Id.*

¹⁹⁵ See *Shelton v. City of Coll. Station*, 780 F.2d 475, 482–84 (5th Cir. 1986) (en banc) (explaining the basis for judicial review of legislative zoning decisions), *cert. denied*, 477 U.S. 905 & 479 U.S. 822; *Kamaole Pointe Dev. LP v. Cty. of Maui*, 573 F. Supp. 2d 1354, 1377 (D. Haw. 2008). This standard is not necessarily protective. The Court has applied the rational relationship test in several cases to invalidate legislation, sometimes as a violation of substantive due process, without changing the standard of judicial review, a test called “rational basis with a bite.” *E.g.*, *Berger v. City of Mayfield Heights*, 154 F.3d 621, 624 (6th Cir. 1998) (holding that a land clearing ordinance that applied to smaller-sized lots with no more than 100 feet of frontage was unconstitutional); see Jeffrey D. Jackson, *Classical Rational Basis and the Right to Be Free of Arbitrary Legislation*, 14 GEO. J.L. & PUB. POL’Y 493, 511–15 (2016) (arguing for a return to a stricter standard); see also Steven J. Eagle, *Property Tests, Due Process Tests and Regulatory Takings Jurisprudence*, 2007 B.Y.U. L. REV. 899, 951–52 (2007) (describing tiers of strict and intermediate scrutiny and rational basis review, and noting criticism of the tier structure).

¹⁹⁶ For a discussion of the rational relationship test, see Jackson, *supra* note 195, at 494 (criticizing rational basis review because test applies “without regard to what the legislature’s actual purpose was or whether that purpose or any other legitimate purpose is actually served by the legislation”); Tara A. Smith, *A Conceivable Constitution: How the Rational Basis Test Throws Darts and Misses the Mark*, 59 S. TEX. L. REV. 77 (2017) (explaining and criticizing defenses of and objections to the rational basis test). Compare Nicholas Walter, *The Utility of Rational Basis Review*, 63 VILL. L. REV. 79 (2018) (discussing the history of and defending rational basis review because it forces government to put forward an explanation of a law that may have a subtly beneficial effect on legislative and governmental decision making, allows courts to decide a case on narrow grounds when

to the case at hand, which he viewed as a case of “abusive executive action.”¹⁹⁷ For these cases Justice Souter held the Court has “repeatedly emphasized that only the most egregious official conduct can be said to be ‘arbitrary in the constitutional sense.’”¹⁹⁸ He explained: “for half a century now we have spoken of the cognizable level of executive abuse of power as that which shocks the conscience.”¹⁹⁹

There are significant problems in applying Justice Souter’s judicial review standard to land use cases.²⁰⁰ One is that the distinction between legislation²⁰¹ and “a specific act of a governmental officer” is not workable at the local government level if it means that every action by a local legislative body that affects land use enjoys rational relationship review.²⁰²

they cannot agree on the fundamental questions animating the case, and in some situations enhances judicial review); see also Aaron Belzer, *Putting the “Review” Back in Rational Basis Review*, 41 W. ST. U. L. REV. 339 (2014) (discussing judicial review under the equal protection clause).

¹⁹⁷ *Cty. of Sacramento*, 523 U.S. at 846.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* Justice Souter elaborated this holding in a footnote, stating that to establish a substantive due process violation a plaintiff must show that the challenged conduct was “so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.” *Id.* at, 847 n.8. An earlier case equated the shocks the conscience test with the arbitrary conduct standard. See *Collins v. City of Harker Heights*, 503 U.S. 115, 128 (1992) (characterizing the failure to train employees as “arbitrary, or conscience-shocking, in constitutional sense”). Whether the shocks the conscience judicial review standard replaces or supplements the traditional substantive due process tests is not clear.

²⁰⁰ Some commentators make compelling arguments that the shocks the conscience standard should be abandoned. Professor Levinson argues it is “historically untenable,” and that “it is counterintuitive to make it more difficult for plaintiffs to challenge executive misconduct.” Rosalie Berger Levinson, *Time to Bury the Shocks the Conscience Test*, 13 CHAP. L. REV. 307, 308 (2010). For other commentary criticizing this standard, see Erica Chee, *Property Rights: Substantive Due Process and the “Shocks the Conscience” Standard*, 31 U. HAW. L. REV. 577, 577 (2009) (arguing that the standard is inconsistent with the purpose of substantive due process, difficult to apply as it is largely subjective, gives unwarranted amount of deference to administrative decisions, and disregards uniqueness of land use cases; noting that disagreement among the circuits regarding which standard to use further illustrates the inappropriateness of the standard); Parna A. Mehrbani, *Substantive Due Process Claims in the Land-Use Context: The Need for A Simple and Intelligent Standard of Review*, 35 ENVTL. L. 209, 236–41 (2005) (recommending the standard adopted in *Euclid*).

²⁰¹ In the Eleventh Circuit, substantive due process liability does not attach when an executive actor deprives a property owner of a state-created property right. See *DeKalb Stone, Inc. v. Cty. of DeKalb*, 106 F.3d 956, 959–60 (11th Cir. 1997), *cert. denied*, 522 U.S. 861.

²⁰² *Cty. of Sacramento*, 523 U.S. at 846.

An action by a local legislative body²⁰³ is not necessarily legislative. It can either be legislative or quasi-judicial depending on the action that is taken. State courts vary in how they define a legislative body's action that affects land use.²⁰⁴ A common definition is that a legislative body's action is quasi-judicial if it applies existing law.²⁰⁵ Under this definition, a legislative body can act quasi-judicially when it makes land use decisions,²⁰⁶ when it

²⁰³ A constitutional separation of powers does not exist at the local government level. *E.g.*, *Citizens for Reform v. Citizens for Open Gov't, Inc.*, 931 So. 2d 977, 989 (Fla. Dist. Ct. App. 2006); *Tendler v. Thompson*, 352 S.E.2d 388, 388 (Ga. 1987); *State v. Buncich*, 51 N.E.3d 136, 144 (Ind. 2016); *Martin v. Murray*, 867 N.W.2d 444, 450 (Mich. App. 2015); *Ball v. Fitzpatrick*, 602 So. 2d 873, 878 (Miss. 1992); *Estate of Romero ex rel. Romero v. City of Santa Fe*, 137 P.3d 611, 616 (N.M. 2006); *City Council, City of Reading v. Eppihimer*, 835 A.2d 883, 893 (Pa. Commw. Ct. 2003); *Moreau v. Flanders*, 15 A.3d 565, 579 (R.I. 2011); *Hubby v. Carpenter*, 350 S.E.2d 706, 710 (W. Va. 1986); *see also Lewis v. Brown*, 409 F.3d 1271, 1273 (11th Cir. 2005) ("While the actions of some government officials can easily be categorized as legislative or executive, for others, like county commissioners who act in both a legislative and executive capacity, sorting out which hat they were wearing when they made a decision can be difficult.").

²⁰⁴ Federal courts are not bound by state court decisions on these issues. *See Lewis v. Brown*, 409 F.3d at 1273–74 (holding denial of rezoning was an executive act); *Shelton v. City of Coll. Station*, 780 F.2d 475, 479–81 (5th Cir. 1986) (en banc) (holding that specific zoning is legislative), *cert. denied*, 477 U.S. 905 & 479 U.S. 822. For federal cases discussing these issues, *see Onyx Properties LLC v. Bd. of Cty. Comm'rs of Elbert Cty.*, 838 F.3d 1039, 1046 (10th Cir. 2016) (discussing tests), *cert. denied*, 137 S. Ct. 1815 (2017); *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1221 (6th Cir. 1992) ("It may be safely said that there is 'no bright line' between the legislative and administrative functions."); *Coniston Corp. v. Vill. of Hoffman Estates*, 844 F.2d 461, 468–69 (7th Cir. 1988) (discussing factors that decide this issue).

²⁰⁵ For state court tests that decide whether a zoning action by a legislative body is legislative or quasi-judicial, *see, e.g. Maryland Overpak Corp. v. Mayor and City Council of Baltimore*, 909 A.2d 235, 245 (Md. 2006) (holding quasi-judicial if "(1) the act or decision is reached on individual, as opposed to general, grounds, and scrutinizes a single property; and (2) there is a deliberative fact-finding process with testimony and the weighing of evidence"); *Peachtree Dev. Co. v. Paul*, 423 N.E.2d 1087, 1091–92 (Ohio 1981) (holding a zoning action quasi-judicial if "the action taken is one enacting a law, ordinance or regulation, or executing or administering a law, ordinance or regulation already in existence"); *Neuberger v. City of Portland*, 603 P.2d 771, 775 (Or. 1979) (holding a zoning action quasi-judicial "when a particular action by a local government is directed at a relatively small number of identifiable persons, and when that action also involves the application of existing policy to a specific factual setting," but each indicator is considered separately). *Compare Arnel Dev. Co. v. City of Costa Mesa*, 620 P.2d 565, 567 (1980) (rejecting size of parcel and number of landowners affected as indicators of quasi-judicial zoning action).

²⁰⁶ *See, e.g., Worthington v. City Council of Rohnert Park*, 31 Cal. Rptr. 3d 59, 65 (Cal. App. 2005) (discussing a referendum concerning a memorandum of understanding with Indian tribe on mitigation of potential impacts of future casino project). *Phillips v.*

approves site plans²⁰⁷ and planned unit developments,²⁰⁸ when it approves or rejects zoning map amendments,²⁰⁹ and when it issues land use permits.²¹⁰ The Supreme Court may understand that the legislative versus administrative distinction is questionable as the basis for judicial review.²¹¹ It ignored the distinction in a land use case that considered a building official's refusal to issue building permits.²¹²

What level of judicial review Justice Souter would require for quasi-judicial decisions by legislative bodies is unknown. State courts have required a stricter judicial scrutiny than rational basis review.²¹³ Quasi-judicial actions by legislative bodies should not receive rational basis

City of Whitefish, 330 P.3d 442, 452 (Mont. 2014) (discussing a challenge to a referendum rescinding an interlocal agreement with county concerning planning and zoning authority over extraterritorial area); *McCallen v. City of Memphis*, 786 S.W.2d 633, 639 (Tenn. 1990) (holding approval of planned unit development was an administrative act); *Leonard v. City of Bothell*, 557 P.2d 1306, 1308 (Wash. 1976) (discussing a zoning amendment initiative).

²⁰⁷ See, e.g., *Rockford Homes, Inc. v. Canal Winchester*, No. 09AP-827, 2010 WL 779269, at *6 (Ohio Ct. App. Mar. 9, 2010).

²⁰⁸ For a leading case, see *State ex rel. Comm. for the Referendum of Ordinance No. 3844-02 v. Norris*, 792 N.E.2d 186, 190–93 (Ohio 2003) (legislative approval of final development plans and subdivision plats for planned unit development quasi-judicial); see also *Devaney v. City of Burlington*, 545 S.E.2d 763, 765–66 (N.C. App. 2001) (holding city council's action in approving Manufactured Housing Overlay District quasi-judicial).

²⁰⁹ A minority of courts treat zoning decisions by legislative bodies as a quasi-judicial act, which requires quasi-judicial procedures. The leading case adopting the minority view is *Fasano v. Bd. of Cty. Comm'rs of Washington Cty.*, 507 P.2d 23, 26 (Or. 1973). *Accord* *Cty. Council of Prince George's Cty. v. Zimmer Dev. Co.*, 120 A.3d 677, 687 (Md. 2015).

²¹⁰ See *Williams v. City of Kirkwood*, 537 S.W.2d 571, 574 (Mo. App. 1976). A legislative body may act quasi-judicially in the zoning process. See also Philip L. Fraietta, *Contract and Conditional Zoning Without Romance: A Public Choice Analysis*, 81 *FORDHAM L. REV.* 1923, 1932–36 (2013) (discussing quasi-judicial view).

²¹¹ See *Harris v. Cty. of Riverside*, 904 F.2d 497, 501 (9th Cir. 1990) (“In determining when the dictates of due process apply, however, we find little guidance in formalistic distinctions between ‘legislative’ and ‘adjudicatory’ or ‘administrative’ government actions.”).

²¹² See *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 198–99 (2003) (citing *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998)) (applying egregious or arbitrary government conduct standard to deny substantive due process claim based on failure to issue building permit for project when referendum was pending on project).

²¹³ For cases considering the standard of judicial review to apply to quasi-judicial zoning decisions by legislative bodies, see *Bd. of Cty. Comm'rs of Brevard Cty. v. Snyder*, 627 So. 2d 469, 475 (Fla. 1993) (applying strict scrutiny); *Fasano*, 507 P.2d at 29–30 (placing the burden to support rezoning on the person seeking change).

review in federal courts. They can be abusive actions that require judicial intervention.

An informed reading of *County of Sacramento* raises a more fundamental problem. Justice Souter did not expect the shocks the conscience standard to be applied in land use cases.²¹⁴ He clearly intended it only for executive abuse of power cases like police chase cases, where officials make split-second judgments with no opportunity for repeated reflection.²¹⁵ Land use officials do not make split-second judgments with no opportunity for repeated reflection.

This interpretation is confirmed by Justice Souter's concern about constitutionalizing state torts.²¹⁶ The shocks the conscience standard clearly reflects his concern that plaintiffs would bring executive abuse of power cases in federal courts as an alternative to state tort litigation.²¹⁷ Plaintiff success in state tort suits in these cases is problematic,²¹⁸ and the

²¹⁴ See *Cty. of Sacramento*, 523 U.S. at 846.

²¹⁵ This conclusion is reinforced by Justice Souter's extensive discussion of a "deliberate indifference" standard the Court adopted earlier for executive abuse cases. See *id.* at 836. He held it did not apply to police officers who had to act in haste under pressure, and that the higher shocks the conscience standard applied. See *id.* Apparently, this discussion was in response to the first question presented in the petition for certiorari, which was whether the legal standard of conduct for a substantive due process violation was "shocks the conscience," "deliberate indifference," or "reckless disregard." *Id.* at 855–56 (quoting concurring opinion of Chief Justice Rehnquist).

²¹⁶ See *id.* at 855.

²¹⁷ Constitutional litigation in federal court also is an alternative for abusive governmental conduct in the land use process because governmental immunity may apply. See, e.g., *Vill. of Bloomington v. CDG Enters., Inc.*, 752 N.E.2d 1090, 1096–101 (Ill. 2001) (holding that the "corrupt or malicious motives" exception was not included in statute providing governmental immunity in tort). However, Justice Souter's reference to a "font of tort law" was clearly not intended to apply to tort liability arising from executive abuse of power. *Cty. of Sacramento*, 523 U.S. at 848.

²¹⁸ For discussion of governmental tort liability, see, for example, Arvo Van Alstyne, *Governmental Tort Liability: Judicial Lawmaking in a Statutory Milieu*, 15 STAN. L. REV. 163 (1963) (California law); Amy Felman, Comment, *The Special Duty Doctrine: A Just Compromise*, 31 ST. LOUIS L. J. 409, 410–15 (1987); Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 798–822 (2007); John C. Sheldon, *The Mercurial Concept of Discretionary Governmental Immunity*, 24 ME. B.J. 14, 22–24 (2009) (discussing Maine decision); Hugh D. Spitzer, *Realigning the Governmental/Proprietary Distinction in Municipal Law*, 40 SEATTLE U. L. REV. 173, 189–95 (2016); Kelly Mahon Tullier, *Governmental Liability for Negligent Failure to Detain Drunk Drivers*, 77 CORNELL L. REV. 873, 877–93 (1992); Lauren Villa, *Public Service, Private Entity: Should the Nature of the Service or Entity be Controlling on Issues of Sovereign Immunity?*, 78 SAINT JOHN'S L. REV. 1257, 1258–61 (2004).

federal constitutional alternative is attractive. Local governments may be liable in some states, but governmental immunity can protect governments for actions carried out as part of an official's public duties.²¹⁹ Public officers, such as police officers, may also be immune.²²⁰

Justice Souter clearly explained his concern. He held the "due process guarantee does not entail a body of constitutional law imposing liability

²¹⁹ For cases explaining the basis for liability, either judicially or under a statute, see, for example, *City of Caddo Valley v. George*, 9 S.W.3d 481, 484–85 (Ark. 2000) (finding insurance requirement was a waiver of immunity) (noted in *Caroline L. Curry, City of Caddo Valley v. George: Stop or I'll Sue: Police Chases and the Price Cities May Pay*, 55 ARK. L. REV. 1425, 1446–47 (2002)); *City of Pinellas Park v. Brown*, 604 So. 2d 1222, 1225–26 (Fla. 1992) (adopting "foreseeable zone of risk" standard and rejecting sovereign immunity); *Hudson v. City of Chicago*, 881 N.E.2d 430, 446–47 (Ill. App. Ct. 2007) (rejecting immunity under Tort Immunity Act); *Clark v. S.C. Dep't of Pub. Safety*, 608 S.E.2d 573, 578 (S.C. 2005) (describing discretionary function immunity); *Haynes v. Hamilton Cty.*, 883 S.W.2d 606, 609 (Tenn. 1994) (applying statute creating liability for negligent "conduct"). For cases denying liability, see, for example, *Wade v. City of Chicago*, 847 N.E.2d 631, 640 (Ill. App. Ct. 2006) (holding that the officer did not act "willful or wanton" as required by statute); *Robbins v. City of Wichita*, 172 P.3d 1187, 1198 (Kan. 2007) (holding that officers did not act with "reckless disregard" in violation of statutory duty); *Pletan v. Gaines*, 494 N.W.2d 38, 40 (Minn. 1992) (applying official and district immunity); *Rochon v. State*, 862 A.2d 801, 802 (Vt. 2004) (holding that a waiver of immunity requires recklessness).

²²⁰ See *Bachner Co. v. Weed*, 315 P.3d 1184, 1190 (Alaska 2013) (holding qualified good faith immunity similar to federal law); *Medeiros v. Kondo*, 522 P.2d 1269, 1272 (Haw. 1974) (holding no immunity for malicious actions); *Nusbaum v. Blue Earth Cty.*, 422 N.W.2d 713, 722–23 (Minn. 1988) (recognizing immunity for discretionary functions); *Everitt v. Gen. Elec. Co.*, 932 A.2d 831, 845 (N.H. 2007) (holding municipal police officers immune from personal liability for decisions, acts or omissions that: (1) are made within the scope of their official duties while in the course of their employment; (2) are discretionary, rather than ministerial; and (3) not made in a wanton or reckless manner); *Fielder v. Stonack*, 661 A.2d 231, 241 (N.J. 1995) (applying absolute immunity in absence of willful misconduct); *Brown v. Town of Chapel Hill*, 756 S.E.2d 749, 768 (N.C. Ct. App. 2014) (discussing immunity similar to governmental immunity); *DuBree v. Commonwealth*, 303 A.2d 530, 532 (Pa. Commw. Ct. 1973) (discussing immunity for high public officials); *Youngblood v. Clepper*, 856 S.W.2d 405, 408 (Tenn. Ct. App. 1993) (discussing discretionary function immunity); *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994) (including a high speed chase; "Government employees are entitled to official immunity from suit arising from the performance of their (1) discretionary duties in (2) good faith as long as they are (3) acting within the scope of their authority."). See generally *Bonnie E. Bull, In Pursuit of Remedy: A Need for Reform of Police Officer Liability*, 64 S.C. L. REV. 1015, 1023 (2013) (discussing South Carolina decision); *Derek W. Meinecke, Assessment of Police Conduct During High-Speed Chases in State Tort Liability Cases: The Effects of Fiser v. City of Ann Arbor and Rogers v. City of Detroit*, 46 WAYNE L. REV. 325, 328 (2000) (discussing police and municipal liability).

whenever someone cloaked with state authority causes harm,”²²¹ and that “the constitutional concept of conscience shocking duplicates no traditional category of common-law fault.”²²² Quoting earlier Supreme Court cases, he held “the Fourteenth Amendment is not a ‘font of tort law to be superimposed upon whatever systems may already be administered by the States,’”²²³ and that “[o]ur Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society.”²²⁴

The shocks the conscience standard should be limited to cases that would create a “font of tort law.”²²⁵ Its application to regulatory programs like land use regulation is questionable. Justice O’Connor did not mention

²²¹ *Cty. of Sacramento*, 523 U.S. at 848. Justice Souter also held that the Court has rejected “the lowest common denominator of customary tort liability as any mark of sufficiently shocking conduct.” *Id.* at 848–49.

²²² *Id.* at 848. Justice Souter added that it “rather points clearly away from liability, or clearly toward it, only at the ends of the tort law’s spectrum of culpability.” *Id.*; see also *Collins v. City of Harker Heights*, 503 U.S. 115, 128–29 (1992). The Court refused to find a substantive due process violation in a wrongful death case, where the plaintiff claimed a city breached its duty of care by failing to provide a safe workplace environment for an employee. See *id.* at 128. It held the claim was “analogous to a fairly typical state-law tort claim,” and that it had rejected claims that “the Due Process Clause should be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law.” *Id.*

²²³ *Cty. of Sacramento*, 523 U.S. at 848 (quoting *Paul v. Davis*, 424 U.S. 693, 701 (1976)); see Susan K. Friedlaender, *Deliberate Indifference to Property Rights: The Proper Application of the “Shocks the Conscience” Standard in Executive Abuse Zoning Cases*, 38 MICH. REAL PROP. REV. 18, 21 (2011) (“Lewis’ concern with turning the Constitution into a ‘font of tort law’ is the key to understanding the meaning of egregious conduct in this context and applying the ‘shocks the conscience.’”).

²²⁴ *Cty. of Sacramento*, 523 U.S. at 848 (quoting *Daniels v. Williams*, 474 U.S. 327, 328 (1986)). It is highly unlikely Justice Souter saw his restrictive standard of judicial review in *County of Sacramento* as applying to all lawsuits brought against government under the substantive due process clause. “Souter believed that the Constitution expressed a libertarian ideal—that freedom from the restrictions of government counted as much as, or more than, the right of legislators to pass laws limiting individual freedom.” JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 45 (2007).

²²⁵ *Cty. of Sacramento*, 523 U.S. at 848 The Court has been inconsistent in applying the shocks the conscience standard. Compare *Chavez v. Martinez*, 538 U.S. 760, 787 (2003) (discussing coercive police interrogation case, plurality opinion; six justices agreed the fundamental rights strand of substantive due process applied to a claim involving executive action as well as the shocks the conscience test), with *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 887 (2009) (quoting shocks the conscience test in case considering the recusal of a judge).

this standard in a land use case in which she considered a refusal to issue building permits. She read *County of Sacramento*²²⁶ as holding that “only the most egregious official conduct can be said to be ‘arbitrary in the constitutional sense.’”²²⁷ This is only part of Justice Souter’s formulation, and it is unknown whether the omission of shocks the conscience language was intentional.

Later, in *Lingle v. Chevron U.S.A. Inc.*,²²⁸ Justice O’Connor explained what substantive due process requires without mentioning the shocks the conscience judicial review standard.²²⁹ She eliminated the failure to “substantially advance[]” legitimate state interests as a takings test,²³⁰ holding that “this formula prescribes an inquiry in the nature of a due process, not a takings, test.”²³¹ This change in doctrine required Justice O’Connor to explain the role of the “substantially advance” formula in substantive due process: “The ‘substantially advances’ formula suggests a means-ends test: It asks, in essence, whether a regulation of private property is *effective* in achieving some legitimate public purpose.”²³² This test can have judicial bite because it “has some logic in the context of a due process challenge, for a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause.”²³³ How this test affects the shock the

²²⁶ 523 U.S. at 846.

²²⁷ *City of Cuyahoga Falls*, 538 U.S. 188, 198 (2003). Justice O’Connor may have intended this standard as equivalent to the shocks the conscience standard. She also referenced rational basis review by holding that a direction to deny the permits while the petition was pending “represented an eminently rational directive.” *Id.* at 199; see Levinson, *supra* note 200, at 339–40.

²²⁸ 544 U.S. 528 (2005); see J. Peter Byrne, *Due Process Land Use Claims After Lingle*, 34 *ECOLOGY L.Q.* 471, 471–77 (2007).

²²⁹ See *Lingle*, 544 U.S. at 545.

²³⁰ *Id.* at 545.

²³¹ *Id.* at 540. See Eagle, *supra* note 195, at 900–01 (arguing takings tests should be reformulated as a due process test).

²³² *Lingle*, 544 U.S. at 542 (quoting *Cty. of Sacramento*, 523 U.S. at 846: “Due Process Clause intended, in part, to protect the individual against ‘the exercise of power without any reasonable justification in the service of a legitimate governmental objective.’” (emphasis in original)). The terms “purpose” and “objective” are apparently meant to be equivalent.

²³³ *Lingle*, 544 U.S. at 542. Justice Kennedy, in his concurring opinion, also stated there was a place for substantive due process review of regulation: “This separate writing is to note that today’s decision does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process (citation omitted). The failure of a

conscience standard is unknown, but it clearly applies to cases of governmental abuse.

B. The Judicial Review Standard in the Federal Courts

With no clear guidance from and confusion in the Supreme Court,²³⁴ the federal courts are divided²³⁵ on the judicial review standard they should apply.²³⁶ *Lingle* has not made a difference. Only a few cases have considered *Lingle*'s effect on the judicial review standard for substantive due process cases, and they are mixed.²³⁷ The Eleventh Circuit found nothing new.²³⁸ The Ninth Circuit held that *Lingle* adopted a legitimate governmental purpose test.²³⁹

regulation to accomplish a stated or obvious objective would be relevant to that inquiry.” *Id.* at 548–49. This is, he pointed out, a “permissive standard.” *Id.*

²³⁴ Justice Souter was not clear in *County of Sacramento* about how courts should apply the shocks the conscience rule. *See* 523 U.S. at 847 (“[T]he measure of what is conscience shocking is no calibrated yard stick.”). For discussion of what the Supreme Court meant by this judicial review standard, see *Levin v. Upper Makefield Twp.*, No. Civ. A. 99-CV-5313, 2003 WL 21652301, at *8 (E.D. Pa. Feb. 25, 2003), *aff’d*, 90 F. App’x 653 (3d Cir. 2004); see also JEFFREY TOOBIN, *THE OATH: THE OBAMA WHITE HOUSE AND THE SUPREME COURT* 90 (2012) (noting that Justice Souter made fun of his gnarled style).

²³⁵ For example, the Eleventh Circuit holds that substantive due process protects executive action only if a fundamental right is involved. *See Hillcrest Prop., LLP v. Pasco Cty.*, 915 F.3d 1292, 1321 (11th Cir. 2019).

²³⁶ For discussion of the views in the various circuits, see *Onyx Props. LLC v. Bd. of Cty. Comm’rs of Elbert Cty.*, 838 F.3d 1039, 1049–50 (10th Cir. 2016), *cert. denied*, 137 S. Ct. 1815 (2017); *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1217–19 (6th Cir. 1992); Chee, *supra* note 200, at 586–601; Levinson, *supra* note 200, at 320–34; Mehrbani, *supra* note 200, at 230–36; Stewart M. Wiener, *Comment, Substantive Due Process in the Twilight Zone: Protecting Property Interests from Arbitrary Land Use Decisions*, 69 TEMP. L. REV. 1467, 1476–80 (1996); see also *Mettler Walloon, L.L.C. v. Melrose Twp.*, 761 N.W.2d 293, 307–13 (Mich. App. 2008) (discussing state cases).

²³⁷ The South Carolina Supreme Court held that *Lingle* did not adopt a “new, freestanding due process test . . . rather, we view the ‘substantially advances’ theory as embraced within the ‘arbitrary and capricious’ analysis.” *Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, 737 S.E.2d 601, 611 (S.C. 2013).

²³⁸ *See Kentner v. City of Sanibel*, 750 F.3d 1274, 1278 (11th Cir. 2014) (regarding an ordinance preventing construction of new docks and piers in beach zone; rejecting an argument that *Lingle* “created a new type of property rights-based substantive due process claim” based on the substantially advances test); *Flagship Lake Cty. Dev. No. 5, LLC v. City of Mascotte*, 559 F. App’x 811, 816 n.3 (11th Cir. 2014) (noting *Lingle* did not address “a substantive due process claim arising out of a zoning decision when a city denied rezoning”).

²³⁹ *See N. Pacifica LLC v. City of Pacifica*, 526 F.3d 478, 484 (9th Cir. 2008) (rejecting a developer’s substantive due process claim concerning an unreasonable delay

Inconsistency within circuits²⁴⁰ makes it difficult to decide which standard of judicial review is dominant. Cases in several circuits use the shocks the conscience standard.²⁴¹ The zoning issues considered in these cases varied. Many cases considered abusive governmental action, such as harassment and delay, but other cases considered legislative land use policies that should have received rational basis review.²⁴² Cases in other circuits did not apply the shocks the conscience standard but adopted judicial review standards just as demanding.²⁴³ They included a “grave

in approving permit; “The irreducible minimum of a substantive due process claim challenging land use regulation is failure to advance any governmental purpose.”). The court did not hold that proof of arbitrary and irrational conduct was also needed.

²⁴⁰ For discussion of inconstancies in the Third Circuit see Clifford B. Levine & L. Jason Blake, *United Artists: Reviewing the Conscience Shocking Test Under Section 1983*, 1 SETON HALL CIR. REV. 101, 110–12 (2005); see also *MARJAC, LLC v. Trenk*, 380 F. App’x 142, 147 (3d Cir. 2010) (applying shocks the conscience test).

²⁴¹ See, e.g., *Siena Corp. v. Mayor & City Council of Rockville Md.*, 873 F.3d 456, 464 (4th Cir. 2017) (prohibiting storage facilities near public school); *Najas Realty, LLC v. Seekonk Water Dist.*, 821 F.3d 134, 145 (1st Cir. 2016) (opposing development); *EJS Props., LLC v. City of Toledo*, 698 F.3d 845, 862 (6th Cir. 2012) (discussing a city council’s refusal for rezoning because developer refused to make contribution council member demanded for local community center to assist retirees from local company with prescription drug issues); *Bettendorf v. St. Croix Cty.*, 631 F.3d 421, 426 (7th Cir. 2011) (revoking permit); *Klen v. City of Loveland, Colo.*, 661 F.3d 498, 513 (10th Cir. 2011) (concerning a continuous campaign of harassment, deceit, and delay); *Mongeau v. City of Marlborough*, 492 F.3d 14, 17 (1st Cir. 2007) (discussing building permit denial); *Torromeo v. Town of Fremont*, 438 F.3d 113, 118 (1st Cir. 2006) (discussing delay in issuing permit), *cert. denied*, 127 S. Ct. 257; *Eichenlaub v. Twp. of Indiana*, 385 F.3d 274, 285 (3d Cir. 2004) (discussing selectively applied subdivision regulations, delayed permit); *United Artists Theatre Circuit, Inc. v. Twp. of Warrington*, 316 F.3d 392, 399 (3d Cir. 2003) (Judge Alito; delaying approval); *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1217–19 (6th Cir. 1992) (rezoning denial; noting that “shocks the conscience” standard is more useful in cases involving physical force but useful in zoning cases too; requiring extreme rationality); *Obsession Sports Bar & Grill, Inc. v. City of Rochester*, 235 F. Supp. 3d 461, 468 (W.D.N.Y.), *aff’d*, 706 F. App’x 53 (2d Cir. 2017) (discussing zoning that required restaurant and bar to close during certain hours).

²⁴² Courts have occasionally adopted the rational relationship test. See *Norton v. Vill. of Corrales*, 103 F.3d 928, 932 (10th Cir. 1996) (discussing delay in approving subdivision; finding “no conceivable rational relationship to the exercise of the state’s traditional police power through zoning”). This test usually is applied to legislation. See, e.g., *Kentner v. City of Sanibel*, 750 F.3d 1274, 1281 (11th Cir. 2014) (discussing rational basis when an ordinance prevented new construction of docks and accessory piers).

²⁴³ For a case requiring improper motive in a project denial, see *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, 1375 (11th Cir. 1993) (finding that a deprivation of property interests is of a constitutional stature only if the denial is by “improper motive and by means that were pretextual, arbitrary and capricious, and . . . without any rational

unfairness” standard that requires a “deliberate flouting of the law that trammels significant personal or property rights,”²⁴⁴ and a requirement that government conduct must be “so outrageously arbitrary as to constitute a gross abuse of governmental authority.”²⁴⁵ Cases in a number of circuits relied on the formula adopted by *Lingle*, that a violation can be found when government conduct is arbitrary with no substantial relationship to a legitimate governmental objective,²⁴⁶ or adopted an “arbitrary and capricious” standard or some variation thereof.²⁴⁷

basis”) (quoting *Spence v. Zimmerman*, 873 F.3d, 256, 258 (11th Cir. 1989)). *Contra* *United Artists Theatre Circuit, Inc. v. Twp. of Warrington*, 316 F.3d 392, 400 (3d Cir. 2003) (discussing denial of development approval).

²⁴⁴ *George Washington Univ. v. District of Columbia*, 318 F.3d 203, 209 (D.C. Cir. 2003) (upholding rejection of campus plan). The grave unfairness standard is also satisfied by “a substantial infringement of state law prompted by personal or group animus.” *Id.*

²⁴⁵ *Harlen Assocs. v. Inc. Vill. of Mineola*, 273 F.3d 494, 505 (2d Cir. 2001) (discussing the denial of a special use permit for a convenience store and finding no violation); *Natale v. Town of Ridgefield*, 170 F.3d 258, 263 (2d Cir. 1999) (upholding the denial of building and zoning permits when there was no conduct so “outrageously arbitrary as to constitute a gross abuse of governmental authority”); *see also* *Bituminous Materials, Inc. v. Rice Cty.*, 126 F.3d 1068, 1070 (8th Cir. 1997) (noting that there was no violation for restrictions on permit because “plaintiff must prove that the government action in question is ‘something more than . . . arbitrary, capricious, or in violation of state law’”) (quoting *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102, 1104 (8th Cir. 1992)).

²⁴⁶ *See Corn*, 997 F.2d at 1374 (upholding refusal to approve mini-warehouse because the city was not acting “arbitrarily and capriciously, which means that the action ‘does not bear a substantial relation to the public health, safety, morals, or general welfare’”) (quoting *Eide v. Sarasota City*, 908 F.2d 716, 721 (11th Cir. 1990); *Burrell v. City of Kankakee*, 815 F.2d 1127, 1129 (7th Cir. 1987) (upholding rejection of multi-family housing development and defining “arbitrary and unreasonable” as “bearing no substantial relationship to the public health, safety or welfare”); *Shelton v. City of Coll. Station*, 780 F.2d 475, 482–83 (5th Cir. 1986) (en banc) (upholding rejection of variance), *cert. denied*, 477 U.S. 905. For the application of this test to legislation, *see Samson v. City of Bainbridge Island*, 683 F.3d 1051, 1058 (9th Cir. 2012) (upholding ordinances establishing and extending moratorium because the ordinances were not “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare”) (quoting *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1234 (9th Cir. 1994)); *A Helping Hand, LLC v. Baltimore Cty., Md.*, 515 F.3d 356, 372 (4th Cir. 2008) (rejecting ordinance restricting location of methadone clinics, finding the ordinances to be “clearly arbitrary and unreasonable, with no substantial relationship to a legitimate governmental purpose”).

²⁴⁷ *See, e.g., Paterek v. Vill. of Armada*, 801 F.3d 630, 648 (6th Cir. 2015) (applying an arbitrary or irrational standard); *Tri Cty. Paving, Inc. v. Ashe Cty.*, 281 F.3d 430, 440 (4th Cir. 2002) (using the term arbitrary and irrational); *Tri-Corp Mgmt. Co. v. Praznik*, 33 F. App’x 742, 748 (6th Cir. 2002) (applying arbitrary and capricious standard). For cases

C. Back to Basics

Rejection of the shocks the conscience standard is the starting point for understanding judicial review in land use cases that raise substantive due process issues. Justice O'Connor's substantially advance test²⁴⁸ provides the groundwork.²⁴⁹ Justice Souter adopted a similar test in *County of Sacramento*.²⁵⁰ There he held that substantive due process protects the individual against "the exercise of power without any reasonable justification in the service of a legitimate governmental objective,"²⁵¹ and against the arbitrary action of government.²⁵² These

adopting this test before *County of Sacramento*, see Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence, Kan., 927 F.2d 1111, 1119 (10th Cir. 1991) (upholding rejection of shopping mall); RRI Realty Corp. v. Southampton, 870 F.2d 911, 914 (2d Cir. 1989) (denying building permit), *cert. denied*, 493 U.S. 893; Coniston Corp. v. Vill. of Hoffman Estates, 844 F.2d 461, 467 (7th Cir. 1988) (upholding project disapproval and explaining that "by 'arbitrary and unreasonable' in *Burrell* we meant invidious or irrational").

²⁴⁸ See *supra* notes 228–233 and accompanying text.

²⁴⁹ Justice O'Connor did not cite, but essentially approved, the guidelines for judicial review the Supreme Court adopted when it upheld the constitutionality of zoning in its *Euclid* decision. See Vill. of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 386–88 (1926). For a similar argument that courts should return to *Euclid*, see Mehrbani, *supra* note 200, at 236–41.

²⁵⁰ See *supra* notes 192–193 and accompanying text.

²⁵¹ Cty. of Sacramento, 523 U.S. 833, 846 (1998). There is additional support for these guidelines in another of Justice Souter's comments in *County of Sacramento*, in which he stated that "conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." *Id.* at 849. The Supreme Court and numerous lower court decisions, including land use cases, have quoted the "intended to injure" test. See Rosales-Mireles v. United States, 138 S. Ct. 1897, 1906 (2018) (discussing sentencing guidelines); Chavez v. Martinez, 538 U.S. 760, 775 (2003) (discussing police interrogation). A Westlaw search on November 3, 2018, found 107 courts of appeal cases. For land use cases see, e.g., Highway Materials, Inc. v. Whitmarsh Twp., 386 F. App'x 251, 258 (3d Cir. 2010) (discussing zoning denial); Vorum v. Canton Twp., 308 F. App'x 651, 653 (3d Cir. 2009); Blain v. Twp. of Radnor, 167 F. App'x 330, 336 (3d Cir. 2006) (discussing plat denial); Harlen Assocs. v. Inc. Vill. of Mineola, 273 F.3d 494, 505 (2d Cir. 2001) (discussing zoning denial). The search brought up 645 district court cases. For land use cases, see, e.g., Zaloga v. Borough of Moosic, No. 3:10CV2604, 2011 WL 2938422, at *12 (M.D. Pa. July 19, 2011); Aardvark Childcare & Learning Ctr., Inc. v. Twp. of Concord, 401 F. Supp. 2d 427, 445 (E.D. Pa. 2005).

²⁵² See *Cty. of Sacramento*, 523 U.S. at 845. Equal protection law can point the way to arbitrary governmental conduct that requires judicial correction. In *Village of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000), the Supreme Court found a "class of one" equal protection violation when the village improperly demanded an oversized easement for a water line from a property owner. Justice Breyer's concurring opinion explained the

guidelines are the backbone of substantive due process and are all courts need in land use cases. Shocks the conscience should be kept, if at all, as a standard for executive abuse cases that are suable as state torts, like the executive abuse that occurred in *County of Sacramento*.

D. Abusive Conduct Cases Where Courts Found a Violation of Substantive Due Process

Barriers to litigation and protective standards of judicial review can be significant obstacles to land use plaintiffs in federal courts. Despite these barriers, a substantial group of cases found²⁵³ substantive due process violations when municipalities engaged in abusive conduct in land use cases.²⁵⁴ They usually applied an “arbitrary conduct” standard of judicial review, or some variant of that rule, rather than the shocks the conscience standard.²⁵⁵ They did not discuss the finality rule²⁵⁶ or *Graham* preemption, and they either ignored the entitlement rule or found an entitlement in an established legal right, such as a vested right.

The cases divide into two groups. In one group, the courts applied the test that government action must meet legitimate governmental objectives, and held that governmental conduct was abusive if it did not comply with

standard that should apply. *See id.* at 565–66. He held a class of one action must contain some element of “vindictive action,” “illegitimate animus,” or “ill will” in order to violate equal protection. *Id.* The property owner argued that “the Village’s demand was actually motivated by ill will resulting from the Olechs’ previous filing of an unrelated, successful lawsuit against the Village.” *Id.* at 563. Courts can apply this standard in substantive due process cases. Equal protection and substantive due process law can interact. See Pamela S. Karlen, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 MCGEORGE L. REV. 473, 492 (2002), who argues for “a stereoscopic approach to the Fourteenth Amendment—one in which understandings of liberty and equality inform one another.” For discussion of *Olech* and what it means, see William D. Araiza, *Constitutional Rules and Institutional Roles: The Fate of the Equal Protection Class of One and What It Means for Congressional Power to Enforce Constitutional Rights*, 62 SMU L. REV. 27 (2009).

²⁵³ In some of these cases, a district court refused to grant the defendant municipality’s motion to dismiss or motion for summary judgment, or the plaintiff successfully appealed an order granting the municipality’s motion for summary judgment or motion to dismiss, and the court held the complaint stated a cause of action. These courts did not decide the merits of the case, but these decisions indicate the basis for a cause of action a court would uphold against dismissal.

²⁵⁴ *See Phillips, supra* note 24, at 927–34 (reviewing several federal land use cases).

²⁵⁵ Some of these cases predated *County of Sacramento*, and so the courts did not have to consider whether to apply the shocks the conscience test.

²⁵⁶ The finality rule should not apply in cases of governmental abuse. *See supra* note 149 and accompanying text.

this guideline. In the second group, the courts applied the guideline that rejects arbitrary municipal conduct, and held the municipal conduct was arbitrary.

1. *No Legitimate Basis for the Decision*

Cases in which rejection of a land use project was based on neighborhood opposition are an important group of cases in which government conduct did not have a legitimate governmental basis. Neighborhood participation is expected and can be helpful.²⁵⁷ An influential Homevoter Theory²⁵⁸ about the zoning process argues, however, that homeowners control decisions that affect their property interests, and that they block new development when they believe it has a negative effect on their home values.²⁵⁹ Homeowner control can be reinforced by a ward courtesy system.²⁶⁰ Legislative bodies where this system exists²⁶¹ will follow the advice of the legislative district member

²⁵⁷ See Mandelker, *supra* note 80, at 261–68.

²⁵⁸ See WILLIAM A. FISCHER, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLITICS 18 (2001). For discussion of a study of New York City zoning decisions that finds support for the Homevoter Theory, see Vicki Been et al., *Urban Land-Use Regulation: Are Homevoters Overtaking the Growth Machine?*, 11 J. EMPIRICAL LEGAL STUD. 227, 231 (2014); see also Lauren Ames Fischer et al., *Unequal Exceptions: Zoning Relief in New York City, 1998–2017*, 39 J. PLAN. EDUC. & RES. 1, 10 (2018) (“[T]he process appears to primarily benefit advantaged groups.”). For examples of capture in local governments, see Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 URB. LAW. 1, 36–39 (1992).

²⁵⁹ A competing Growth Machine Theory argues that developers and their allies control the process in which governments approve new development. See generally, Harvey Molotch, *The Political Economy of Growth Machines*, 15 J. URB. AFF. 29, 31–34 (1993). It is not clear, however, that growth machines are attentive to conflicts over development created by neighborhood opposition. See Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 404–09 (1977) (arguing that developers control urban areas, and homevoters suburban areas, and that land developers are the “largest investors in municipal politics in the United States”).

²⁶⁰ The ward courtesy system requires election of the governing body by wards. Governing body members are elected at large in many municipalities, especially in the South, and counties often have a commission form of government, which is elected at large. Cities seldom have this form of government. See DANIEL R. MANDELKER ET AL., STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM ch. 1, § D[1] (9th ed. forthcoming).

²⁶¹ Court decisions on whether a ward courtesy arrangement violates substantive due process are mixed. Compare *Hornsby v. Allen*, 326 F.2d 605, 610 (5th Cir. 1964) (holding a liquor license invalid), with *Arroyo Vista Partners v. City of Santa Barbara*, 732 F. Supp. 1046, 1051 (C.D. Cal. 1990) (holding a denial of an application for development plan valid).

where a land use change is proposed and reject it if she opposes it, possibly with no legitimate basis for the opposition.

State courts have held the rejection of a land use project violated substantive due process when it was based entirely on neighborhood opposition.²⁶² Federal courts also found substantive due process violations when this occurred.²⁶³ The Fourth Circuit, for example, found a substantive due process violation when a city refused to approve a conditional use permit for a palmistry.²⁶⁴ It held that “government officials simply cannot act solely in ‘reliance on public distaste for certain activities, instead of on legislative determinations concerning public health and safety [or otherwise] dealing with zoning.’”²⁶⁵

Courts found a substantive due process violation in several other types of cases when a municipality rejected a land use project for an illegitimate reason.²⁶⁶ In a typical case, a court found a violation when officials refused

²⁶² See Munir Saadi, *Neighbor Opposition to Zoning Change*, 49 URB. LAW. 393 (2017) (discussing substantive due process and equal protection objections); see also *Sunderland Family Treatment Servs. v. City of Pasco*, 903 P.2d 986, 993 (Wash. 1995) (reversing denial of special use permit for group home based on fears of neighbors, and explaining “there is an important distinction between well founded fears and those based on inaccurate stereotypes and popular prejudices”). Objectionable neighbor opposition based on fear can also trigger a successful equal protection claim under *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (overruling denial of permit for group home). See Saadi, *supra* at 400–05 (discussing *City of Cleburne*).

²⁶³ See *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1509 (9th Cir. 1990) (reversing order of dismissal on a claim that the city council abruptly changed course after approving a 190-unit residential project, giving only broad conclusory reasons motivated by pressure from neighbors and other residents of city to prohibit development of project), *aff’d on other grounds*, 526 U.S. 687, 722 (1999); *Wheeler v. City of Pleasant Grove*, 664 F.2d 99, 100 (5th Cir. 1981) (reversing the decision of the district court regarding the plaintiff’s claim for damages when the city issued an ordinance prohibiting the permitted construction of the plaintiff’s apartment project after the city held a referendum that showed an overwhelming resistance to the proposed project).

²⁶⁴ See *Marks v. City of Chesapeake*, 883 F.2d 308, 311 (4th Cir. 1989).

²⁶⁵ *Id.* at 311.

²⁶⁶ See *Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls*, 263 F.3d 627, 644 (6th Cir. 2001) (reversing district court’s grant of summary judgment on plaintiff’s substantive due process and equal protection claims when city allowed referendum rejecting low-income housing project to go forward, even though it complied with zoning ordinance as admitted by Law Director; mayor said issue was low-income housing), *rev’d in part, vacated in part*, 538 U.S. 188, 199–200 (2003); *Brady v. Town of Colchester*, 863 F.2d 205, 208 (2d Cir. 1988) (overruling the lower court’s order of dismissal because there were genuine issues of fact with regard to the plaintiff’s equal protection, substantive due process, and Fair Housing Act claims); *Tandy Corp. v. City of Livonia*, 81 F. Supp. 2d 800, 811 (E.D. Mich. 1999) (reversing summary judgment, the court refused to accept reasons

to process an application for a sand extraction permit because of illegitimate political considerations.²⁶⁷ Dislike of a developer or a project can be enough.²⁶⁸ This problem occurred in the case at the beginning of this Article, where the mayor rejected modular housing because he didn't want "that house."²⁶⁹

Cases also arise in which a municipality rejects or makes excessive demands on a land use project, but does not have the authority to take these actions.²⁷⁰ In a Second Circuit case, the court found a substantive due process violation when the municipality did not have the authority to revoke a building permit, demand zoning permits and certificates of occupancy, and subject the plaintiff to an overall approval process.²⁷¹ Other courts found a violation of substantive due process in similar cases.²⁷²

Courts found a substantive due process violation when a project complied with the land use ordinance, but the municipality rejected it.²⁷³ An example is a case where a residential subdivision complied with the subdivision regulations. The court held the county had to base its decision

for change, including providing one uniform zoning district for property, providing uses compatible with and in harmony with surrounding uses, and continued development of a corporate park, as legitimate zoning reasons when the city zoned property from professional office use to general commercial use and then zoned it back again).

²⁶⁷ See *Cordeco Dev. Corp. v. Santiago Vasquez*, 539 F.2d 256, 260 (1st Cir. 1976).

²⁶⁸ See *Brady*, 863 F.2d at 208.

²⁶⁹ *Brown v. City of Ecorse*, 322 Fed. App'x 443, 444 (6th Cir. 2009).

²⁷⁰ A state court can invalidate the decision for lack of statutory or home rule authority. See STATE AND LOCAL GOVERNMENT, *supra* note 260, chs. 2, 3.

²⁷¹ See *Brady*, 863 F.2d at 215–16 (insinuating that the municipality's dislike of plaintiff procedural requirements were motivated by the municipality's dislike of plaintiff).

²⁷² See *Cine SK8, Inc. v. Town of Henrietta*, 507 F.3d 778, 789 (2d Cir. 2007) (reversing summary judgment where the defendant had no power to amend the permit and there was race-based hostility to plaintiff's clientele); *Brady v. Town of Colchester*, 863 F.2d 205, 215–16 (2d Cir. 1988) (holding there was no authority under state law to revoke building permit, demand zoning permits and certificates of occupancy, and to subject plaintiff to overall approval process; dislike of plaintiff); *Littlefield v. City of Afton*, 785 F.2d 596, 607 (8th Cir. 1986) (holding there was an unconstitutional condition on the granting of the permit).

²⁷³ See *Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls*, 263 F.3d 627, 644 (6th Cir. 2001) (finding a violation in the denial of a building permit when the city allowed referendum on a lower-income housing project that was "entirely consistent" with zoning regulations), *rev'd in part, vacated in part sub nom.* 538 U.S. 188 (2003); *Altaire Builders, Inc. v. Vill. of Horseheads*, 551 F. Supp. 1066, 1077 (W.D.N.Y. 1982) (denying summary judgment and dismissal motions when a rejected planned unit development fully complied with the ordinance).

on the regulations and requirements contained in the subdivision ordinance, so it could not reject the subdivision by using broad powers of discretion.²⁷⁴

In other cases the courts found substantive due process violations when a municipality approved a land use project but added new requirements later.²⁷⁵ In a Sixth Circuit case, the court held plaintiffs had a recognized property interest in special approval land use permits a village had approved, and a legitimate claim of entitlement to a certificate of occupancy.²⁷⁶ It found a disputed issue of fact when the village ignored these permits and the entitlement, handled plaintiffs in a different manner from other businesses, unjustifiably prosecuted plaintiffs and withheld building permits.²⁷⁷

Problems of this kind arise in site plan review, which controls the arrangement, layout, and design of a proposed use of land.²⁷⁸ Land use agencies can review the site details of a development project for compliance with the site plan ordinance, but they must accept the zoning that applies to the project. Despite compliance with the zoning ordinance, a municipality may attempt to reject a site plan because it does not agree with how the property is zoned, or because it relies on land use problems it resolved when it adopted the zoning ordinance. There is a substantive due process violation in these instances because the municipality must accept the zoning that applies. As one court held, designation of the site as a permitted use establishes a “conclusive presumption” that the use does not adversely affect the district, and it precludes further inquiry into its

²⁷⁴ See *S. Co-op. Dev. Fund v. Driggers*, 696 F.2d 1347, 1351 (11th Cir. 1983) (upholding summary judgment for plaintiff).

²⁷⁵ See *545 Halsey Lane Props., LLC v. Town of Southampton*, 39 F. Supp. 3d 326, 341 (E.D.N.Y. 2014) (denying a motion to dismiss when a municipality imposed requirements inconsistent with a prior grant to plaintiff); *Hillside Prods., Inc. v. Duchane*, 249 F. Supp. 2d 880, 894 (E.D. Mich. 2003) (“City Planning Commission lacked the authority to revoke Hillside’s Special Approval Land Use once it was granted.”).

²⁷⁶ See *Paterek v. Vill. of Armada*, 801 F.3d 630, 648 (6th Cir. 2015) (holding summary judgment was precluded when there was arbitrary enforcement, a new permit requirement, and modification of an existing permit when the plaintiff already had a permit).

²⁷⁷ See *id.*

²⁷⁸ See MANDELKER, *supra* note 83, § 6.63. This requirement usually applies to both residential and nonresidential development. The zoning ordinance can require municipal approval of a site plan for project development details, such as landscaping, parking, and building placement.

effect on traffic, municipal services, property values or a zoning district's "general harmony."²⁷⁹

2. *Arbitrary Behavior by Municipalities*

Arbitrary behavior by municipalities occurred in the second group of cases in which courts found substantive due process violations. Arbitrary behavior can corrupt the land use process, as when there was an attempt to extort a plaintiff who applied for project approval for the benefit of a planning board member.²⁸⁰ Courts also found substantive due process violations when there was animus against a plaintiff or a class of individuals. In a court of appeals case, the court held a town board acted with racial animus when it amended a special use permit to prohibit teenage dances in a dance hall where the clientele was a predominantly racial minority.²⁸¹ Courts found unacceptable animus in similar cases.²⁸²

In a related group of cases, courts found substantive due process violations when a municipality targeted a plaintiff for discriminatory treatment even though animus was not an issue. In a Ninth Circuit case, a city council voted to withhold a building permit from the plaintiff without

²⁷⁹ *TLC Dev., Inc. v. Town of Branford*, 855 F. Supp. 555, 557 (D. Conn. 1994) (granting plaintiff's motion for summary judgment). Some state cases reach the same result. *See, e.g., Sherman v. City of Colo. Springs Planning Comm'n*, 680 P.2d 1302, 1304 (Colo. App. 1983) (holding a proposed 14-story residential building was a permitted use under the zoning code, and the site plan application was denied because of neighborhood opposition based on height and traffic); *Kosinski v. Lawlor*, 418 A.2d 66, 68 (Conn. 1979) (reversing a retail complex rejection as a "poor use of the site"); *S.E.W. Friel v. Triangle Oil Co.*, 543 A.2d 863, 870 (Md. App. 1988) (holding a municipality cannot disapprove a site plan solely because permitted use is not compatible with surrounding area).

²⁸⁰ *See Collier v. Town of Harvard*, No. Civ. A. 95-11652-DPW, 1997 WL 33781338, at *6 (D. Mass. Mar. 28, 1997) (discussing an attempt to extort an easement for the personal benefit of a member of the planning board, who would personally profit from the denial of the application).

²⁸¹ *See Cine SK8, Inc. v. Town of Henrietta*, 507 F.3d 778, 787 (2d Cir. 2007) (overruling a summary judgment motion). The amendment caused the dance hall to close and go into bankruptcy. *See id.*

²⁸² *MARJAC, LLC v. Trenk*, 380 F. App'x 142, 147-48 (3d Cir. 2010) (reversing summary judgment, finding selective enforcement was motivated by antipathy toward the plaintiffs' Italian heritage); *Cty. Concrete Corp. v. Town of Roxbury*, 442 F.3d 159, 170 (3d Cir. 2006) (reversing dismissal in a case of downzoning that restricted expansion of business following false accusations, verbal disparagement, and imposition of illegal conditions and restrictions); *Brockton Power LLC v. City of Brockton*, 948 F. Supp. 2d 48, 69 (D. Mass. 2013) (considering summary denial of application for extension of previously granted drinking water approval that made it impossible for the plaintiff to develop the property for any purpose).

providing any process, even though issuance of the permit was mandatory.²⁸³ Courts in a number of other cases found substantive due process violations when municipalities engaged in similar objectionable conduct. They found violations when a municipality engaged in arbitrary enforcement, insisted on a new permit requirement, modified an existing permit, and admitted the plaintiff was handled in a different manner than other business owners.²⁸⁴

There can be a substantive due process violation when a municipality unreasonably delays a project.²⁸⁵ Delay is an abusive tactic that can effectively stop a project. A municipality can delay a project by withholding necessary approvals, such as a building permit or a special exception. Courts found violations when a municipality intentionally

²⁸³ See *Bateson v. Geisse*, 857 F.2d 1300, 1303 (9th Cir. 1988) (affirming judgment for plaintiff).

²⁸⁴ See *Paterek v. Vill. of Armada*, 801 F.3d 630, 648–49 (6th Cir. 2015) (reversing summary judgment for arbitrary enforcement, new permit requirement, and modification of existing permit when plaintiff already had a permit, and the municipality admitted that it handled plaintiff differently than other business owners); *Hardesty v. Sacramento Metro. Air Quality Mgmt. Dist.*, 307 F. Supp. 3d 1010, 1040 (E.D. Cal. 2018) (upholding jury finding for total deprivation of right to mine in violation of a vested right); *Maroney v. Fiorentini*, No. 16-CV-11575-DLC, 2017 WL 6063064, at *7 (D. Mass. Dec. 7, 2017) (discussing pressure on plaintiffs to drop state court lawsuit); *545 Halsey Lane Props., LLC v. Town of Southampton*, 39 F. Supp. 3d 326, 341 (E.D.N.Y. 2014) (denying a motion to dismiss when a town arbitrarily and without explanation required the plaintiff to request site plan approval, refused to permit plaintiff to erect structures permitted under a grant that complied with town code's dimensional requirements, and required plaintiff to remove permitted improvements and relinquish right to store landscaping equipment); *Soundview Assocs. v. Town of Riverhead*, 725 F. Supp. 2d 320, 338 (E.D.N.Y. 2010) (denying motion to dismiss when plaintiff alleged defendants, in bad faith, arbitrarily extinguished clearly established rights to build health spa under special permit and unlawfully coerced and threatened plaintiff into abandoning its permit appeal rights so that town board could approve an application by plaintiff's lessee.); see also *JSS Realty Co., LLC v. Town of Kittery*, 177 F. Supp. 2d 64, 70 (D. Me. 2001) (refusing to dismiss claim that citizen-initiated zoning amendment targeted plaintiff by reducing amount of permitted developable area and abolishing transfer of retail development rights).

²⁸⁵ While extraordinary delay in decision making can also be a taking of property, courts usually hold that even prolonged decision making is not a taking, even though it deprives a landowner of the use of her land during the decision period. See *MANDELKER*, *supra* note 83, § 2.23; see also *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cty.*, 482 U.S. 304, 321 (1987) (suggesting in dictum that normal delays in obtaining building permits should not be a taking).

delayed a land use project by making unreasonable demands that eventually stopped it or caused its bankruptcy.²⁸⁶

3. *Summary and Review*

This Article critically reviewed a set of rules that block land use litigation in federal courts when the plaintiff raises substantive due process claims. Despite these rules, the cases discussed in this section show that courts can provide effective constitutional relief in cases of governmental abuse. Courts provide this relief by applying a standard substantive due process doctrine that allows courts to find a violation when government conduct is arbitrary or does not satisfy legitimate governmental interests. Courts ignore rules that place barriers to litigation, though courts sometimes found the plaintiff satisfied the entitlement rule because the plaintiff held a vested right.

VI. CONCLUSION

Municipal land use officials do their best to provide a disciplined process for considering land use projects. Abusive government conduct occurs when process is abused. Federal courts have adopted litigation barriers that keep land use plaintiffs from challenging abusive conduct as a violation of substantive due process. They have questionable antecedents in the Supreme Court, but federal courts apply them to reject land use cases that raise substantive due process problems. This Article discussed these barriers, explained their origins and how they are applied, and recommended their abandonment or modification.

This Article also discussed the standard of judicial review courts apply when land use plaintiffs claim a violation of substantive due process. Federal courts are conflicted on this issue, but they usually apply standards that protect local governments, primarily a standard that requires conscience-shocking proof. This standard should not apply in land use

²⁸⁶ See *Scott v. Greenville Cty.*, 716 F.2d 1409, 1419 (4th Cir. 1983) (reversing summary judgment in favor of city council where city council committee issued order to zoning administrator to freeze issuance of building permit for low-income housing project in zoning district zoned for project); *Maroney v. Fiorentini*, 2017 WL 6063064, at *7 (finding violation when permit for and building of booster station were delayed even though state and municipal water pressure requirements were met); *Zaimes v. Cammerino*, No. CIV.A 3:09-CV-1964, 2010 WL 1390876, at *5 (M.D. Pa. Apr. 1, 2010) (denying a motion to dismiss when there was a claim that defendants knowingly and intentionally delayed construction for the purpose of driving plaintiff into bankruptcy, and engaged in bad faith practices, such as backing out of agreements to delay plaintiff's ability to seek review of the determinations and making frivolous objections to the construction).

cases, where courts should apply traditional guidelines for substantive due process violations.

Federal courts applied these guidelines in a substantial number of land use cases. They found substantive due process violations when government actions did not substantially advance a legitimate governmental interest, or when they were arbitrary. These cases provide a basis for a more effective judicial supervision of the land use process.