Fordham Law Review

Volume 81 | Issue 1 Article 7

2012

Must Substantive Due Process Land Use Claims Be So "Exhaust"ing?

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MUST SUBSTANTIVE DUE PROCESS LAND USE CLAIMS BE SO "EXHAUST"ING?

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When is a land use dispute a federal case? Although some perceive challenges to zoning and land use laws as local issues ripe for local resolution, some fights over land use pose constitutional questions suitable for federal adjudication. Indeed, many zoning disputes implicate substantive due process, a federally protected constitutional guarantee. A circuit split has developed regarding when plaintiffs may assert substantive due process claims in federal court. While the First and Seventh Circuits only hear such cases when the plaintiff has first brought her substantive due process claim in state court, the Second, Third, Ninth, and Eleventh Circuits impose no such requirement. This Note argues that the First and Seventh Circuits' state court litigation precondition is erroneous because this requirement is both unnecessary and inefficient.

TABLE OF CONTENTS

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INTRODUCTION

In October 2011, the Fairfax County, Virginia zoning board ordered Mark Grapin, a veteran of the Iraq War, to demolish a tree house he built in his yard.[1] Unbeknownst to Grapin, the tree house—located on his front yard—contravened county zoning codes, and required a variance to be constructed.[2] Because he spent over $3,000 on materials and permits to build the tree house (and, perhaps more importantly, because he promised the tree house to his two young boys), Grapin appealed the zoning board's decision.[3] Ultimately, Grapin was victorious, and after receiving a petition

1. Brianne Carter, *Falls Church Tree House Fight Goes to Fairfax County Zoning Board*, WJLA.COM (Nov. 29, 2011, 10:18 AM), http://www.wjla.com/articles/2011/11/falls-church-tree-house-fight-goes-to-fairfax-county-zoning-board-69701.html.

2. Todd Starnes, *Dad Fights Zoning Board's Order to Destroy Backyard Tree House*, FOXNEWS.COM (Oct. 17, 2011), http://www.foxnews.com/us/2011/10/17/dad-fights-zoning-boards-order-to-destroy-backyard-tree-house/.

3. *Id.*

with 1,500 signatures in favor of the tree house, the zoning board granted Grapin the necessary variance, preserving his children's leafy retreat.[4]

The zoning code that Grapin inadvertently violated is an example of a land use regulation.[5] Local governments can regulate the use of land within their domain as part of their inherent police power.[6] Indeed, U.S. municipalities have imposed land use restrictions since the colonial era.[7] As the country grew and developed over the nineteenth and twentieth centuries, local governments increasingly exercised their power to regulate land use in furtherance of public welfare objectives like health, safety, and environmental conservation.[8] Zoning laws regulating property use are now common across the country.[9] It was fortunate that the Fairfax County zoning board granted Grapin's variance request, as courts rarely invalidate zoning regulations.[10]

In spite of the presumption in its favor, however, the government's regulatory ability is not infinite and is subject to a number of limits imposed by the U.S. Constitution.[11] Accordingly, landowners can use the courts to challenge regulations that unconstitutionally exceed the government's police power. Indeed, these claims often give rise to heated clashes between local governments and their constituents.[12] Many land use disputes are framed as substantive due process (SDP) claims and allege that the regulations are invalid exercises of a state's police power, based on the theory that the regulations are unrelated to any legitimate governmental objective[13] and are thus unconstitutional.[14]

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4. *Falls Church Tree House Can Stay with Conditions, Zoning Board Says*, WJLA.COM (Nov. 30, 2011, 11:17 AM), http://www.wjla.com/articles/2011/11/falls-chuch-tree-house-can-stay-with-conditions-zoning-board-says-69759.html.

5. *See infra* Part I.A.

6. 1 EDWARD H. ZIEGLER, JR., RATHKOPF'S THE LAW OF ZONING AND PLANNING § 1:2 (4th ed. 2012) (power to regulate land use is inherent in a sovereign state).

7. *See, e.g.*, John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1259–81 (1996) (describing land use ordinances imposed by colonial governments).

8. *See* 1 ZIEGLER, *supra* note 6, § 1:2 (describing the increased regulation of land use in furtherance of public goals).

9. *See id.* § 1:3 (zoning regulations adopted in a large majority of the municipalities across the country).

10. BRIAN W. BLAESSER ET AL., LAND USE AND THE CONSTITUTION § 4.03 (Brian W. Blaesser & Alan C. Weinstein eds., 1989) (land use regulations presumed constitutional); *see infra* notes 36–40 and accompanying text.

11. *See* 1 ZIEGLER, *supra* note 6, § 2:2 (zoning regulations must not violate constitutional limitations).

12. *E.g.*, Patrick Cassidy, *Sound Wind Farm Dispute Nears Climax*, CAPE COD TIMES (Jan. 12, 2010), http://www.capecodonline.com/apps/pbcs.dll/article?AID=/20100112/NEWS/1120305 (detailing dispute between nearly one dozen Cape Cod towns, five Indian tribes, and the federal government, over the proposed construction of 130 wind turbines in Nantucket Sound); Tim Gannon, *Riverhead ZBA to Rule on Fate of S. Jamesport House*, SUFFOLK TIMES (Sept. 16, 2011, 3:39 AM), http://suffolktimes.timesreview.com/2011/09/19858/riverhead-zba-to-rule-on-fate-of-s-jamesport-house/ (discussing a dispute over zoning regulations prohibiting the plaintiff from constructing his home).

13. See *infra* Part I.C for a full discussion of SDP claims.

Choosing a venue for SDP challenges can, however, be a tricky decision. When deciding between state and federal courts, SDP plaintiffs may often pursue a federal claim as authorized by 42 U.S.C. § 1983,[15] due to allegations of constitutional injury.[16] Nonetheless, land use claims must satisfy additional requirements before federal courts can adjudicate them.[17] Because land use claims often suffer from jurisdictional defects,[18] federal courts use ripeness to ensure that only claims which are ready—that is, ripe—to be decided, are.[19]

Despite the myriad land use disputes brought in federal court,[20] the U.S. Supreme Court has enunciated a clear ripeness standard for only one type: the regulatory takings claim.[21] Regulatory takings claims allege that the government unlawfully "took" private property by enacting strict land use restrictions, thereby triggering a Fifth Amendment duty to provide the landowner with just compensation.[22] The Supreme Court has decreed two preconditions that plaintiffs must meet before such claims ripen. First, plaintiffs must obtain a final decision regarding the application of the regulations to their land. Second, they must pursue just compensation in state court.[23] These two requirements are respectively known as finality[24] and exhaustion.[25] Unless plaintiffs satisfy both requirements, their takings claims are unripe, and federal courts will not resolve them.[26]

Although these ripeness requirements developed in the context of regulatory takings, federal courts have applied them to other land use disputes.[27] This Note focuses specifically on these ripeness requirements' applicability to SDP claims. Unlike the ripeness standard for regulatory takings, the standard applicable to SDP claims has not been given uniform effect throughout the circuits. Indeed, the First and Seventh Circuits require both finality and exhaustion,[28] while the Second, Third, Ninth, and Eleventh Circuits require only finality.[29]

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14. This Note will frequently use the term SDP. While SDP claims can take many forms, when used in this Note, the term will refer exclusively to SDP claims alleging that land use regulations are arbitrary or irrational.

15. 42 U.S.C. § 1983 (2006).

16. *See* MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION CLAIMS & DEFENSES § 1.01 (4th ed. 2003) (noting that § 1983 provides a cause of action for violations of federal rights).

17. For a full discussion of the ripeness of select land use claims, see *infra* Parts II.C, III.

18. *See infra* Part II.C.

19. For a full discussion of ripeness's aims, see *infra* Part II.B.

20. *See infra* Part I.B–D.

21. *See infra* Part II.C.1–2.

22. 2 PATRICIA E. SALKIN, AMERICAN LAW OF ZONING § 16:1 (5th ed. 2012) (explaining how takings of property require just compensation pursuant to the Fifth Amendment).

23. For an in-depth discussion of these ripeness requirements, see *infra* Part II.C.2.

24. *See infra* Part II.C.1.

25. *See infra* Part II.C.2.

26. *See* 2 SALKIN, *supra* note 22, § 16:12 (indicating that to be heard by a court, takings must be "ripe for review"); *see also infra* Part. II.C.

27. *E.g.*, Forseth v. Vill. of Sussex, 199 F.3d 363, 370 (7th Cir. 2000) (holding that SDP claims are subject to both finality and exhaustion); *see also infra* Part III.

28. *See infra* Part III.C.

29. *See infra* Part III.B.

The application of finality to SDP claims is logical.[30] Without a final application of regulations to the property, one cannot know how the regulations will affect the property owner, and thus it is unclear whether any injury has been sustained.[31] However, the relevance of two questions—whether a litigant has been denied just compensation, and in turn, whether a litigant must have pursued her claim in state court before bringing an SDP claim in federal court—remain debatable.[32]

This Note argues that exhaustion is unnecessary for SDP claims. Focusing on the aims of exhaustion and its resulting practical and legal effects, this Note concludes that it is not only pointless to require SDP plaintiffs to sue in state court before federal court, but also inefficient. Once plaintiffs satisfy finality, SDP claims do not benefit from state court litigation as there is no subsequent change in the facts underlying the dispute, even if such litigation is completed. Instead, due to the constitutional nature of the potential injuries sustained, federal courts have jurisdiction over SDP claims once litigants satisfy finality.[33]

This Note proceeds in four parts. Part I provides a background of SDP claims, distinguishing them from select counterpart land use disputes, most importantly, takings and due process takings claims. Part II then discusses ripeness in general, the doctrinal foundations that ground its application to land use claims, and the ripeness standard that federal courts apply to regulatory takings. Next, Part III details the circuit split over SDP ripeness, contrasting the circuits applying only finality with those applying both finality and exhaustion. Last, in Part IV, this Note criticizes the application of exhaustion to SDP claims, ultimately concluding that its application is both unnecessary and wasteful.

I. CHALLENGING THE VALIDITY OF LAND USE LAWS: LAND USE REGULATIONS, SUBSTANTIVE DUE PROCESS, AND TAKINGS

This Part provides a background of SDP challenges to land use regulations. It begins with a discussion of the government's power to regulate land use, followed by an explanation of SDP challenges to this regulatory power. Finally, it distinguishes SDP claims from other commonly asserted land use disputes, including regulatory takings, due process takings, and private takings.

A. Governmental Power to Regulate Land Use

State governments' police power enables them to regulate land use.[34] Most state legislatures view land use as a primarily local concern and delegate their regulatory power to local governments.[35] In the same spirit,

30. See *infra* Part III.A for a full discussion of finality's application to SDP claims.
31. *See infra* notes 217–19 and accompanying text.
32. *See infra* Parts III.B, IV.
33. *See infra* Parts III.B, IV.A.
34. 1 SALKIN, *supra* note 22, § 2:1 ("[Z]oning restrictions are enacted pursuant to the police power of the state.").
35. *Id.* (noting that most states delegate the zoning power to political subdivisions).

courts generally defer to local zoning regulations and liberally construe valid police power objectives when scrutinizing land use restrictions.[36] As a result, all regulations that reasonably serve "public health, safety, morals, or general welfare" are valid exercises of the police power, and will be upheld in court.[37] Legitimate land use regulations can vary from the extremely complex, like limiting the manner in which industrial mining may be done,[38] to the more mundane, like prohibiting the construction of a swing set in one's backyard.[39] Regardless of complexity, courts rarely find that regulations exceed the scope of a state's police power and will defer to local legislatures' judgment of what land use laws are appropriate to achieve local goals.[40]

While governmental power to regulate land use is broad, it is not infinite.[41] On the contrary, it is subject to a number of potent limitations, many of which derive from the Constitution.[42] When land use regulations exceed these constitutional boundaries, courts may invalidate them.[43]

B. Limits on the Zoning and Planning Powers of Local Governments

Despite the broad deference given to land use regulations, the Constitution limits the states' regulatory abilities.[44] These limits, deriving from the Fifth and Fourteenth Amendments, enable litigants to challenge land use regulations, and allow courts to invalidate those that violate constitutional rights.[45] While there are numerous constitutional limits protecting distinct constitutional guarantees,[46] this Note focuses on those

36. *Id.* § 7:3 ("The requirement of a police power objective . . . should be liberally construed."); *e.g.*, Nectow v. City of Cambridge, 277 U.S. 183, 187–88 (1928) (indicating that courts do not invalidate land use determinations unless they are clearly arbitrary or irrational).

37. 1 SALKIN, *supra* note 22, § 7:3.

38. *E.g.*, Dock Watch Hollow Quarry Pit, Inc. v. Twp. of Warren, 361 A.2d 12, 16–18 (N.J. Super. Ct. App. Div. 1976), *aff'd*, 377 A.2d 1201 (N.J. 1977) (describing limitations on mining).

39. Paul Schott, *Non-Complying Swing Set Not Child's Play for Westport Zoning Officials*, CONN. POST (Apr. 23, 2011, 1:55 PM), http://www.ctpost.com/local/article/Non-complying-swing-set-not-child-s-play-for-1349734.php.

40. BLAESSER ET AL., *supra* note 10, § 4.03 (noting that courts "rarely hold that a land use regulation violates substantive due process"); 1 ZIEGLER, *supra* note 6, § 1:2 (discussing how federal courts have adopted a "broad and expansive" view of the police power); *see* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 386–87 (1926) (suggesting that societal development requires imposition of land use controls).

41. 1 SALKIN, *supra* note 22, § 6:1 (power to regulate land use is limited).

42. *Id.* § 2:26 (courts will not uphold unconstitutional regulations).

43. *Id.* (indicating that courts may invalidate regulations as a whole, or as applied to a single parcel).

44. JULIAN C. JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW § 3.5 (2d ed. 2007) (explaining that federal and state constitutions limit municipalities' regulatory ability).

45. 1 ZIEGLER, *supra* note 6, § 1:2 (detailing how the due process and takings clauses provide causes of action to litigants challenging zoning regulations).

46. *See generally* JUERGENSMEYER & ROBERTS, *supra* note 44, § 10.13–.15 (describing procedural due process, equal protection, and First Amendment rights limiting land use regulations).

deriving from the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution, specifically, SDP.[47]

C. Substantive Due Process

The Due Process Clause of the Fourteenth Amendment guarantees that no one shall be deprived of "life, liberty, or property, without due process of law."[48] Due process prohibits arbitrary or unreasonable legislation,[49] including arbitrary or unreasonable land use regulations.[50] As a result, landowners can challenge the validity of land use laws, and courts may strike down those that are "not reasonably related to promoting some legitimate public purpose."[51] In effect, these SDP claims allege that the state has exceeded its police powers by enacting regulations that fail to serve a legitimate objective.[52] SDP claims are the most commonly used basis for challenging land use regulations.[53] Section 1983, which provides a civil remedy against state actors for the deprivation of federal rights—including constitutional guarantees[54]—is an oft-used mechanism for bringing SDP challenges.[55]

The Supreme Court first applied the SDP requirement that land use regulations must further a legitimate governmental purpose when it upheld a municipality's zoning scheme in *Village of Euclid v. Ambler Realty Co.*[56] In that case, the village enacted a comprehensive zoning plan, dividing the municipality into different districts where specific land uses were proscribed or prescribed.[57] The landowner's parcel was residentially zoned,

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47. The Fourteenth Amendment also guarantees procedural due process. *See id.* § 10.13. As these claims present an entirely different legal question than SDP, *id.* (noting that procedural due process concerns how a deprivation of process came about, not why), their ripeness requirements are not relevant to this Note.

48. U.S. CONST. amend. XIV.

49. 2 SALKIN, *supra* note 22, § 15:2 (stating that the Fourteenth Amendment "acts to prohibit arbitrary and unreasonable government actions").

50. JUERGENSMEYER & ROBERTS, *supra* note 44, § 10.12 ("Supreme Court recognizes the right to be free from arbitrary or irrational [land use regulations]."); 1 E. C. YOKLEY, ZONING LAW AND PRACTICE § 3-13 (4th ed. 2008) ("Substantive due process demands that zoning regulations . . . be reasonably exercised.").

51. BLAESSER ET AL., *supra* note 10, § 4.03 (explaining that SDP requires regulations to further legitimate interests); 1 ZIEGLER, *supra* note 6, § 3:2.

52. *See* 2 SALKIN, *supra* note 22, § 15:2 ("The essence of a claim that a zoning ordinance or land use regulation violates substantive due process is that it is unreasonable and bears no rational relationship to a legitimate state interest.").

53. 1 ZIEGLER, *supra* note 6, § 3:2 (noting that SDP claims are the "most frequently and successfully used ground for challenging the constitutionality of zoning restrictions").

54. 5 SALKIN, *supra* note 22, § 46:1 (describing § 1983).

55. *Id.* (explaining how § 1983 allows litigants to bring SDP challenges); 4 ZIEGLER, *supra* note 6, § 66:25 ("[Section] 1983 creates a federal remedy that is available for certain violations of federal constitutional or statutory law in land use cases."); *see* J. David Breemer, *Ripeness Madness: The Expansion of* Williamson County*'s Baseless "State Procedures" Takings Ripeness Requirement to Non-Takings Claims*, 41 URB. LAW. 615, 634 (2009) (noting that § 1983's purpose is to allow federal courts to protect against unconstitutional state action).

56. 272 U.S. 365 (1926).

57. *Id.* at 379–83 (detailing zoning regulations).

impeding it from using it industrially.[58] In an effort to commercially exploit its property, the landowner attempted to invalidate the zoning regulations as violative of SDP.[59] The Court affirmed the zoning laws, however, finding "sufficiently cogent" justifications for their enactment.[60] The village's zoning plan furthered a number of legitimate public interests, including ensuring fire departments could access all properties, decreasing traffic accidents, and improving the overall quality of life for residents.[61] Noting the importance of context in SDP claims,[62] the Court added that challenges alleging the facial invalidity of regulations would not be heavily scrutinized, and therefore required only minimal justification to prove their constitutionality.[63] As such, the comprehensive zoning regulations in *Euclid* were, on their face, constitutional.[64]

Euclid's holding reveals two important aspects of SDP claims. First, it demonstrates that whether a regulation violates SDP is a fact-intensive inquiry, and courts will consider a variety of factors in assessing each claim.[65] Ultimately, however, a regulation will be upheld if it is "reasonably calculated" to achieve the stated governmental objective.[66] Federal courts thus engage in what is known as "rational basis review" when scrutinizing land use regulations for SDP validity, upholding regulations that can conceivably be related to some legitimate public purpose.[67] This strong deference to zoning regulations is due, in part, to federal courts' desire to keep their dockets clear of local zoning disputes.[68]

Second, *Euclid* distinguishes between facial and as-applied SDP claims, a distinction still recognized today.[69] In asserting a facial SDP claim, landowners challenge property regulations on their face, before they are

58. *Id.* at 384 (land was residentially zoned).

59. *See id.* (noting that the complaint alleged that the zoning plan amounted to a deprivation of Fourteenth Amendment due process rights).

60. *Id.* at 395 (noting regulations were not "clearly arbitrary and unreasonable").

61. *Id.* at 394 (listing purposes furthered by the comprehensive zoning plan).

62. *Id.* at 387–88 (explaining that a valid use of police power varies with the circumstances).

63. *Id.* at 395 (noting that the Court will not heavily scrutinize "sentence by sentence" zoning provisions not yet applied to the property).

64. *Id.* at 397 ("[T]he ordinance in its general scope and dominant features . . . is a valid exercise of authority.").

65. *See, e.g.*, 2 SALKIN, *supra* note 22, § 15:11 (indicating that whether a regulation is arbitrary or unreasonable is "highly fact specific").

66. 1 ZIEGLER, *supra* note 6, § 3:17.

67. 2 SALKIN, *supra* note 22, § 15:3 (explaining how federal courts presume that land use regulations are constitutional); 1 ZIEGLER, *supra* note 6, § 3:17 (suggesting that regulations are valid when a conceivable link to a public objective exists); *see also* Russell W. Galloway, Jr., *Basic Substantive Due Process Analysis*, 26 U.S.F. L. REV. 625, 644 (1992) (noting that exercises of police power, including land use regulations, are valid if "one can hypothesize" a legitimate interest that the government "might have been attempting to further").

68. *See* 1 ZIEGLER, *supra* note 6, § 3:3 (stating that the rational basis test reflects a "docket clearing method of avoiding local zoning cases").

69. *Euclid*, 272 U.S. at 395 (distinguishing between challenges to regulations already applied to one's property and those launched by the "mere existence" of the ordinance).

even applied to their land.[70] Facial claims thus assert that the regulations cannot further a legitimate governmental interest under any set of circumstances.[71] In contrast to facial challenges, as-applied challenges concern only the alleged unconstitutional application of regulations to one's property, not the regulations themselves.[72] As-applied SDP claims concern regulations that have already affected a landowner's property,[73] and allege that only such application violates their SDP rights.[74] Because SDP protects against arbitrary governmental conduct,[75] however, land use regulations that fail to advance legitimate government interests, either in theory or in practice, violate SDP.[76]

D. Substantive Due Process Claims Distinguished from Takings

Commonly asserted alongside SDP claims are takings challenges, which are founded upon different legal theories and seek different remedies.[77] While this Note primarily focuses on SDP claims, it is necessary to distinguish them from takings, as the two are often confused.[78]

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70. *See* Stephen E. Abraham, Williamson County *Fifteen Years Later: When is a Takings Claim (Ever) Ripe?*, 36 REAL PROP. PROB. & TR. J. 101, 107 (2001) (explaining that facial challenges arise "from mere enactment of the regulation").

71. 2 SALKIN, *supra* note 22, § 15:11 ("When a litigant brings a facial challenge, she must show that the regulation is unreasonable in all of its applications."); *see, e.g.*, Cnty. Concrete Corp. v. Twp. of Roxbury, 442 F.3d 159, 164 (3d Cir. 2006); Smithfield Concerned Citizens for Fair Zoning v. Town of Smithfield, 907 F.2d 239, 244 (1st Cir. 1990) (holding that a land use regulation does not facially violate due process if "a rational relationship exists between it and a legitimate governmental objective").

72. 2 SALKIN, *supra* note 22, § 15:11 ("[I]n an as applied challenge, [a litigant] must show only that it is unconstitutional as applied to her property."); *e.g.*, WMX Techs., Inc. v. Gasconade Cnty., 105 F.3d 1195, 1198 n.1 (8th Cir. 1997) (noting that as-applied challenges attack "only the decision that applied the ordinance to [one's] property, not the ordinance in general"); Eide v. Sarasota Cnty., 908 F.2d 716, 722 (11th Cir. 1990) (discussing facial and as-applied challenges).

73. *See* 2 SALKIN, *supra* note 22, § 15:11 (explaining that as-applied claims involve unconstitutional applications of regulations to one's property).

74. David S. Mendel, Note, *Determining Ripeness of Substantive Due Process Claims Brought by Landowners Against Local Governments*, 95 MICH. L. REV. 492, 492 (1996) ("Landowners who sustain economic harm from arbitrary and capricious applications of land use regulations may sue the local government entities responsible for applying those regulations . . . alleging that the local government entities deprived them of substantive due process in violation of the Fourteenth Amendment.").

75. *See supra* note 49 and accompanying text.

76. *E.g.*, Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 542 (2005) ("[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."); *Cnty. Concrete*, 442 F.3d at 169 (explaining that successful facial challenges "allege facts that would support a finding of arbitrary or irrational legislative action" (quoting Pace Res., Inc. v. Shrewsbury Twp., 808 F.2d 1023, 1035 (3d Cir. 1987))).

77. *See, e.g.*, Crown Point Dev., Inc. v. City of Sun Valley, 506 F.3d 851, 855 (9th Cir. 2007) (explaining the distinction between takings and SDP claims).

78. *See, e.g.*, JUERGENSMEYER & ROBERTS, *supra* note 44, § 10.12 ("The relationship between substantive due process and regulatory takings has been confusing."). Indeed, distinction between these claims is critical for ripeness purposes. *Compare infra* notes 264–68, *with infra* Part III.C.

1. Takings

The Takings Clause of the Fifth Amendment prohibits the government from taking private property "for public use, without just compensation."[79] Applicable against the states through the Fourteenth Amendment,[80] the Takings Clause places a limit on the power of local governments to regulate land use by compelling them to compensate landowners for regulations that excessively restrict the use of private property.[81] In effect, this limit is two-pronged. First, it prevents governments from taking land, under any circumstances, unless the taking furthers a legitimate public purpose.[82] Second, it requires governments to compensate landowners when a taking occurs.[83]

Governments may affect a taking in at least two ways: physical or regulatory takings.[84] Physical takings occur when the government actually occupies or condemns land or property.[85] This physical invasion of a property interest imposes upon the government a "categorical duty to compensate" the landowner,[86] no matter how minimal the infringement may be.[87] Second, the government may take property by affecting a regulatory taking. Regulatory takings occur following the enactment of governmental regulations that place "such a burdensome restriction on a landowner's use of his property that the government has for all intents and

79. U.S. CONST. amend. V.

80. Chi., Burlington & Quincy R.R. v. City of Chi., 166 U.S. 226, 239 (1897) (holding that due process requires compensation for takings); 1 ZIEGLER, *supra* note 6, § 6:2 (explaining that the Fifth Amendment is applicable to local governments through the Fourteenth Amendment).

81. 2 SALKIN, *supra* note 22, § 16:1 (noting that excessive land use restrictions may require just compensation to the landowner).

82. *Id.* § 17:1 (explaining that Fifth Amendment authorizes only takings for a public purpose); *e.g.*, Kelo v. City of New London, 545 U.S. 469, 477 (2005) (holding that takings are valid when purpose is future public use); Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984) (holding that takings are valid when they are "rationally related to a conceivable public purpose"); *cf.* Montgomery v. Carter Cnty., 226 F.3d 758, 766 (6th Cir. 2000) (noting that takings for a private purpose "are unconstitutional regardless of whether just compensation is paid").

83. 2 SALKIN, *supra* note 22, § 17:1 (explaining that valid takings must be fairly compensated); *e.g.*, Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194 (1985) (stating that the Fifth Amendment "proscribes taking without just compensation").

84. *See* 1 ZIEGLER, *supra* note 6, § 6:1 (noting different types of takings).

85. 2 SALKIN, *supra* note 22, § 16:6 (describing physical invasions of property as per se takings); *e.g.*, Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537 (2005) ("The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property."); Asociación de Subscripción Conjunta del Seguro de Responsabilidad Obligatorio v. Flores Galarza, 484 F.3d 1, 28 (1st Cir. 2007) ("A physical taking occurs either when there is a condemnation or a physical appropriation of property.").

86. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322 (2002); *see* Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 ECOLOGY L.Q. 307, 320 (2007) (noting that physical occupations of space are "per se" takings).

87. *E.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 438 (1982) (holding that the installation of cable T.V. equipment, limited to "plates, boxes, wires, bolts, and screws" on the roof and side of an apartment building amounted to a physical taking requiring compensation).

purposes 'taken' the landowner's property."[88] Not all property use restrictions amount to a regulatory taking, however, and there is no set "test" for courts to determine whether regulations excessively burden property and amount to a regulatory taking.[89] In this context, the line between SDP and takings can become hazy.

a. Takings Mistaken for Substantive Due Process

The confusion between SDP and takings claims is due in large part to the Supreme Court's decision in *Agins v. City of Tiburon*,[90] which made the deprivation of property resulting from regulations that failed to substantially advance a legitimate state interest actionable as a taking.[91] While such regulations would purportedly be invalid exercises of the police power, and presumably violative of SDP,[92] *Agins* empowered litigants to challenge them as takings. After *Agins*, therefore, takings and SDP analyses became entangled.[93]

In light of the confusion between takings and SDP claims, some federal courts began to hold that the Takings Clause preempted SDP claims.[94] Such courts relied on *Graham v. Connor*,[95] which held that SDP should not be used in situations where another constitutional amendment affords more explicit protections.[96] For example, in extending this logic to land use claims, the Ninth Circuit concluded that the Takings Clause "was sufficiently express" in its restrictions on governmental interference with property rights to preempt the use of SDP in land use disputes.[97]

While the Ninth Circuit consolidated SDP and takings claims, other courts did not. In *John Corp. v. City of Houston*,[98] the Fifth Circuit

88. Mark S. Dennison & Steven M. Silverberg, *Zoning: Proof of Inverse Condemnation from Excessive Land Use Regulation* § 2, *in* 31 AM. JUR. 3D *Proof of Facts* 563 (1995); *see also* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (holding that a regulation that "goes too far" is recognized as a taking).

89. *See Tahoe-Sierra*, 535 U.S. at 322–32 (noting that whether a regulatory taking occurs is a "fact specific inquiry"); 2 SALKIN, *supra* note 22, § 16:1 (describing different regulatory taking "tests").

90. 447 U.S. 255 (1980).

91. *See* JUERGENSMEYER & ROBERTS, *supra* note 44, § 10.12 (explaining that *Agins* caused confusion between regulatory takings and SDP by injecting the substantially advance test into takings analysis).

92. *See supra* notes 37, 49, 51 and accompanying text (noting that SDP is violated by regulations that further no legitimate purpose).

93. *See* Nisha Ramachandran, *Realizing Judicial Substantive Due Process in Land Use Claims: The Role of Land Use Statutory Schemes*, 36 ECOLOGY L.Q. 381, 387 (2009) (explaining that SDP language and reasoning "seeped into takings doctrine through *Agins*").

94. *E.g.*, Armendariz v. Penman, 75 F.3d 1311, 1325 (9th Cir. 1996) (en banc) (discussing preemption of SDP rights by the takings clause).

95. 490 U.S. 386 (1989).

96. *See* Mark Fenster, *The Stubborn Incoherence of Regulatory Takings*, 28 STAN. ENVTL. L.J. 525, 538 (2009) (discussing the Ninth Circuit's reliance on *Graham*'s explicit constitutional provision language).

97. Robert H. Thomas, *The Ninth Circuit Rediscovers Substantive Due Process in Land Use Cases*, 31 ZONING & PLAN. L. REP., no. 11, 2008, at 1, 4; *see* Ramachandran, *supra* note 93, at 390 (noting *Armendariz*'s holding that the Takings Clause preempted SDP claims).

98. 214 F.3d 573 (5th Cir. 2000).

explicitly declined to analyze SDP claims as takings.[99] The court noted that SDP claims often assert a violation of rights "not protected by the Takings Clause," and that "a careful analysis must be undertaken to assess the extent to which a plaintiff's substantive due process claim rests on protections that are also afforded by the Takings Clause."[100] As such, because the plaintiff alleged that the regulations were unconstitutionally vague—which would violate SDP[101]—its SDP claim was separately cognizable from its takings claim and worthy of a distinct analysis.[102] Indeed, other circuits distinguished between SDP and takings claims, causing a circuit split to develop.[103]

b. Lingle: *Separation of Takings and Substantive Due Process*

In 2005, however, the Supreme Court settled the score between the circuits, distinguishing SDP from takings in *Lingle v. Chevron U.S.A. Inc.*[104] In *Lingle*, the Court held that whether regulations furthered legitimate governmental purposes was an "inquiry in the nature of a due process, not a takings" analysis, and thus was irrelevant to whether a taking had occurred.[105] Detangling the two theories, the Court clarified that a takings analysis "presupposes that the government has acted in pursuit of a valid public purpose,"[106] and concerns instead the "magnitude, character and distribution of a governmental action's impact on private property rights."[107] Regulations that fail to promote a legitimate purpose, on the other hand, are invalid with or without compensation, rendering irrelevant the Takings Clause's just compensation requirement.[108]

In distinguishing between the different analytical frameworks relevant to takings and SDP analyses, the Court mandated that SDP and takings claims be analyzed separately.[109] For example, in *Lingle*, Chevron asserted a

99. *See id.* at 583 ("[A] blanket rule that . . . the Takings Clause subsumes any substantive due process claim relating to a deprivation of property is both inconsistent with our precedents and with the approach taken by a majority of other circuit courts.").

100. *Id.*

101. *See id.* at 585 (indicating that the complaint alleged that the ordinance was unconstitutionally vague).

102. *See id.* (recognizing plaintiff's takings and SDP claims).

103. *See, e.g.*, Lindquist v. Buckingham Twp., 68 F. App'x 288, 289–90 (3d Cir. 2003) (analyzing SDP and takings claims separately); Gavlak v. Town of Somers, 267 F. Supp. 2d 214, 220 (D. Conn. 2003) (noting distinction between takings and SDP claims); *see* Fenster, *supra* note 96, at 539 (discussing various circuits' rejection of the Ninth Circuit's approach).

104. 544 U.S. 528 (2005).

105. *Id.* at 540.

106. *Id.* at 543.

107. 2 SALKIN, *supra* note 22, § 16.4.

108. *See* JUERGENSMEYER & ROBERTS, *supra* note 44, § 10.12 ("If a law fails to promote a legitimate end, it is invalid and it makes no sense to proceed to discuss whether compensation is due under the Fifth Amendment.").

109. *See Lingle*, 544 U.S. at 544 (holding that allegations of arbitrary and irrational regulations do not state a claim under the Takings Clause); Fenster, *supra* note 96, at 540 ("*Lingle* explicitly held that takings claims and substantive due process claims were doctrinally and analytically distinct.").

takings claim,[110] challenging a Hawaii land use statute, Act 257,[111] which placed rent caps on leases between oil companies and independent gas station operators.[112] Hawaii argued that this rent cap would benefit consumers by keeping gasoline prices low, and thus did not affect a taking, as it substantially advanced a legitimate interest.[113] Although the district and circuit courts accepted as legitimate Hawaii's interest in regulating gas prices through the rent cap, they nevertheless both found that a taking occurred because Act 257 would not have any effect on gas prices, and thus failed to substantially advance Hawaii's purported interests.[114] The Supreme Court reversed, noting that Chevron's claim alleging Act 257 was "fundamentally arbitrary and irrational" for failing to have any effect on gasoline prices did "not sound under the Takings Clause," but it did potentially state an SDP claim, as the legitimacy of the regulations themselves were called into question, and the underlying effect on Chevron's property value was not at issue.[115] Indeed, *Lingle* directly overruled the Ninth Circuit's merging of SDP and takings.[116] Challenges to regulations alleging a failure to serve a legitimate interest are thus actionable exclusively as SDP claims, not as takings.[117]

2. Due Process Takings

Another source of confusion between SDP and takings claims arises from another claim, called "due process takings," which allege that land use regulations are "unduly onerous," violating SDP.[118] Such cases are hard to distinguish from takings, as courts may find that such regulations either "go too far," and as discussed, amount to a regulatory taking,[119] or that they are unduly onerous and thus violative of SDP.[120] Indeed, apart from their remedies, due process takings and garden variety regulatory takings claims are essentially identical.[121] Due process takings are, however, quite different from SDP claims: SDP claims contend that regulations fail to serve a legitimate purpose; due process takings, on the other hand, merely

110. *Lingle*, 544 U.S. at 533 (noting Chevron asserted a takings claim).
111. HAW. REV. STAT. ANN. § 486H-10.4 (2008).
112. *Lingle*, 544 U.S. at 533 (describing Act 257 and its requirements).
113. *Id.* at 534 (noting Hawaii's argument).
114. *Id.* at 535–36 (noting that oil companies could "unilaterally" raise wholesale oil prices, circumventing Act 257's aim to control gas prices).
115. *Id.* at 544.
116. Crown Point Dev., Inc. v. City of Sun Valley, 506 F.3d 851, 855 (9th Cir. 2007) (noting that *Lingle* "pulls the rug out from under [the Ninth Circuit's] rationale for totally precluding substantive due process claims based on arbitrary or unreasonable conduct").
117. *See* JUERGENSMEYER & ROBERTS, *supra* note 44, § 10.12 (stating that a regulation's "failure to advance a legitimate state interest is only actionable under the due process clause").
118. *Id.* (noting that SDP protects against "unduly onerous" laws).
119. *Id.* (explaining that regulatory takings may result from regulations which go "too far"); *supra* note 88 and accompanying text.
120. JUERGENSMEYER & ROBERTS, *supra* note 44, § 10.12 (indicating that regulations may be unduly onerous, violating SDP).
121. *Id.* (noting that the due process taking remedy is injunctive relief and damages, while the takings remedy is just compensation).

contend regulations have "gone too far."[122] As such, in contrast to SDP claims, due process takings do not allege regulations are arbitrary or irrational.[123] Understanding the difference between due process takings and SDP claims is essential, as some federal courts distinguish these claims for ripeness purposes.[124]

3. Private Takings

Another claim commonly confused with SDP claims are private takings, which allege that the government illegitimately took property to further a private, not public, purpose.[125] Because the Fifth Amendment requires takings to further a valid public purpose, a taking that does not satisfy this requirement is unconstitutional, even if just compensation is paid.[126] While there is some overlap between SDP challenges alleging that land use regulations serve no legitimate purpose and private takings claims alleging that land has been taken for an illegitimate private purpose, courts often distinguish between the two.[127] Indeed, many circuits recognize both SDP and private takings, analyzing each dispute separately.[128] Distinction between these two claims is beyond the scope of this Note, however. Because all private takings and SDP claims allege that land use regulations exceed the police power,[129] and because circuits that separately

122. *See* Southview Assocs. v. Bongartz, 980 F.2d 84, 96 (2d Cir. 1992) (explaining that while due process takings claims are premised on the theory that a regulation has gone too far, SDP claims challenge regulations as arbitrary or irrational).

123. *Id.* (noting that the SDP claim alleges arbitrary and capricious governmental action).

124. *Compare* JUERGENSMEYER & ROBERTS, *supra* note 44, § 10.12 (indicating that *Williamson County*'s two-pronged ripeness test applies to "unduly onerous" SDP claims, while most circuits apply only the finality test to SDP claims), *and infra* notes 264–68 and accompanying text, *with infra* Part III.C (discussing how the First and Seventh Circuits apply both *Williamson County* prongs to SDP claims).

125. 26 AM. JUR. 2D *Eminent Domain* § 43 (2004) (noting that a state cannot authorize the taking of property for private use).

126. *Id.* ("Takings of private property for strictly private uses are unconstitutional regardless of whether just compensation is paid."); *see supra* note 82 and accompanying text.

127. *E.g.*, Crown Point Dev., Inc. v. City of Sun Valley, 506 F.3d 851, 856 (9th Cir. 2007) (discussing how *Lingle* overruled Ninth Circuit precedent barring any SDP claim challenging the validity of regulations); Warren v. City of Athens, 411 F.3d 697, 705–06 (6th Cir. 2005) (declining to merge SDP and private takings claims); *see* Jonathan Rohr, Note, *Assessing the Scope of* Williamson County*: Why It Should Be Applied to Private Purpose Claims*, 30 CARDOZO L. REV. 1809, 1818–19 (2009) (discussing differing approaches to private takings claims).

128. *E.g.*, Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 543 (2005) (explaining how due process may be violated because the purpose of a taking "is found to be impermissible—for instance because it fails to meet the 'public use' requirement *or* is so arbitrary as to violate due process") (emphasis added); Action Apartment Ass'n v. Santa Monica Rent Control Bd., 509 F.3d 1020, 1023–26 (9th Cir. 2007) (analyzing SDP and private takings separately); Whittaker v. Cnty. of Lawrence, 674 F. Supp. 2d 668, 690–91, 700–01 (W.D. Pa. 2009) (same).

129. 26 AM. JUR. 2D, *supra* note 125, § 43 (noting that the public use requirement is coterminous with the police power).

acknowledge private takings also allow such claims to proceed under an SDP theory,[130] they are, for purposes of this Note, the same.[131]

With SDP providing landowners with one method to challenge land use regulations, it is a relatively simple task to assert a claim questioning the validity of property restrictions. Less simple, however, is choosing a venue for these claims. As discussed in Parts II and III, choosing to assert land use claims in state or federal court can be an extremely important decision to make, as years of additional litigation could result from the wrong choice of venue.

II. NOT SO FAST: FEDERAL COURTS AND RIPENESS OF LAND USE DISPUTES

Part II focuses on landowners' ability to assert their land use claims in federal court. It begins with a brief introduction to federal jurisdiction, followed by a discussion of ripeness generally. Next, it discusses ripeness in land use claims. Lastly, it details the ripeness standard the Supreme Court announced for takings claims in *Williamson County Regional Planning Commission v. Hamilton Bank*,[132] which informs SDP ripeness.

A. Federal Jurisdiction

Federal courts are courts of limited jurisdiction, and can only hear claims over which Congress or the Constitution grants them authority.[133] Provided federal courts have jurisdiction over a claim, they can adjudicate it whether it is originally filed in federal court or removed from state court.[134]

One basis for federal jurisdiction, federal question jurisdiction, occurs when a plaintiff's claim involves a matter of federal law.[135] Federal question jurisdiction derives from Article III of the Constitution, which bestows upon federal courts the ability to decide all "[c]ases, in Law and Equity, arising under this Constitution, [and] the Laws of the United

130. *See Action Apartment*, 509 F.3d at 1026 (explaining that allegations which fail to state private takings do state a claim under SDP theory); *Whittaker*, 674 F. Supp. 2d at 690–91, 697–701 (analyzing allegations of a private purpose taking as a private taking and SDP violation).

131. *See* Rohr, *supra* note 127, at 1819 (suggesting that SDP and private takings are essentially identical).

132. 473 U.S. 172 (1985).

133. *See* 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3522, at 100 (3d ed. 2008) (indicating federal courts are empowered to hear only cases whose jurisdiction derives from the Constitution or Congress); Anthony C. Piccirillo, Note, *Sisyphus Meets Icarus: The Jurisdictional and Comity Limits of Post-satisfaction Anti-foreign-suit Injunctions*, 80 FORDHAM L. REV. 1407, 1421 (2011) ("U.S. federal courts are courts of limited jurisdiction and derive their power solely from the U.S. Constitution or statute.").

134. 28 U.S.C. § 1441(a) (2006); *see* 16 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 107.14 (3d ed. 2011) (noting that the removal statute allows defendants to remove to federal court cases over which federal courts have jurisdiction).

135. *See* 13D WRIGHT ET AL., *supra* note 133, § 3561, at 162 (explaining that federal question jurisdiction concerns "vindication of federal rights").

States."[136] Although "arising under" federal law may falsely imply a simple standard for determining jurisdiction,[137] for purposes of this Note it suffices to say that federal courts may exercise jurisdiction over claims authorized by a federal statute.[138] Because federal courts exist at least in part to provide an unbiased forum for plaintiffs to vindicate federally protected rights, resolving federal statute violations in federal court is logical.[139]

Federal jurisdiction for land use claims, however, is not so simple. Because § 1983 authorizes SDP claims,[140] federal courts would normally have federal question jurisdiction over them.[141] Nevertheless, federal courts have developed a supplemental requirement—ripeness—as an antecedent to their jurisdiction over many claims, including constitutional land use claims.[142] Consequently, until ripened, federal courts lack jurisdiction over land use disputes, and cannot adjudicate them.[143]

B. Ripeness

Ripeness reflects the jurisdictional limit on federal courts' ability to hear claims.[144] To that end, federal courts impose ripeness requirements on claims anchored in future events, whose occurrence is uncertain, to ensure that jurisdiction exists.[145] Indeed, ripeness ensures that courts hear only claims that are fit for adjudication and that actually warrant judicial intervention.[146] Accordingly, two distinct concerns fuel ripeness:

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136. U.S. CONST. art. III, § 2.

137. *See, e.g.*, 13D WRIGHT ET AL., *supra* note 133, § 3564, at 241 (indicating that the federal question must be substantial); *id.* § 3566, at 261 (indicating that the federal question must be in the "well-pleaded complaint").

138. *See* 32A AM. JUR. 2D *Federal Courts* § 884 (2007) (noting that federal courts have original jurisdiction over claims that arise from the violation of federal law). This usually applies, however, only if the statute authorizes a private cause of action. *See id.* § 905 (explaining that claims alleging violations of federal statutes do not arise under federal law unless the violated federal statute provides a private cause of action).

139. *See* 13D WRIGHT ET AL., *supra* note 133, § 3561, at 162 ("The Founders clearly envisioned that federal question jurisdiction would provide plaintiffs with a sympathetic forum for the vindication of federal rights.").

140. *See* 4 ZIEGLER, *supra* note 6, § 66:27 (discussing how § 1983 allows landowners to seek remedies for deprivation of any constitutional right, including SDP); *supra* notes 54–55 and accompanying text.

141. *See* SCHWARTZ, *supra* note 15, § 1.07 (explaining how federal courts normally have federal question jurisdiction over § 1983 claims); *supra* note 138 and accompanying text.

142. Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153, 162 (1987) (noting that ripeness is used to determine jurisdiction over constitutional claims).

143. BRIAN W. BLAESSER & ALAN C. WEINSTEIN, FEDERAL LAND USE LAW AND LITIGATION § 12.IV, at 1185 (2011 ed.) (explaining that ripeness determines federal jurisdiction over land use claims).

144. 15 MOORE ET AL., *supra* note 134, § 101.70 (noting that ripeness is relevant to subject matter jurisdiction).

145. *Id.* (explaining that ripeness is a question of timing, as courts do not adjudicate claims until a real dispute exists); *e.g.*, United States v. Broad. Music, Inc., 275 F.3d 168, 178 (2d Cir. 2001) (finding that ripeness cautions courts against deciding claims contingent upon future events).

146. *See* 15 MOORE ET AL., *supra* note 134, § 101.70.

jurisdictional limits on federal courts, and prudential concerns to exercise judicial restraint.[147]

Article III of the Constitution, which empowers courts to only hear "Cases" or "Controversies," motivates jurisdictional ripeness concerns.[148] Jurisdictional ripeness prevents courts "from becoming entangled in purely abstract or theoretical disagreements," which have yet to concretely affect the parties, and are thus not a "case or controversy" over which the courts have jurisdiction.[149] Ripeness accordingly helps courts avoid rendering "decisions absent a genuine need to resolve a real dispute."[150] Courts avoid premature adjudication for numerous reasons, such as to avoid encroaching on other governmental agencies' spheres of authority,[151] because of the prohibition on issuing advisory opinions,[152] and because of their inability to make a competent decision regarding prematurely filed claims.[153]

In addition to these jurisdictional concerns, ripeness also furthers prudential, non-constitutionally mandated considerations.[154] Prudential ripeness requires an additional inquiry into whether the "harm asserted has matured sufficiently to warrant judicial intervention."[155] To that end, courts consider "the wisdom, rather than the constitutionality" of hearing certain disputes.[156] Many concerns underlie this determination.[157] First, federal courts use ripeness to maximize the accuracy and efficiency of judicial decision-making by only deciding cases with a well-developed factual record.[158] Second, federal courts use ripeness to respect other

147. *See id.* (explaining that jurisdictional limits and judicial restraint are both ingredients of ripeness); 13B WRIGHT ET AL., *supra* note 133, § 3532.1, at 375 (noting that Article III and prudential limitations shape contemporary ripeness analysis).

148. U.S. CONST. art. III § 2; 13B WRIGHT ET AL., *supra* note 133, § 3532.1, at 375 ("Article III provides the starting point [for ripeness].").

149. 15 MOORE ET AL., *supra* note 134, § 101.70; *e.g.*, Entm't Concepts, Inc., III v. Maciejewski, 631 F.2d 497, 500 (7th Cir. 1980) (explaining that ripeness is rooted in the "case or controversy" requirement).

150. 13B WRIGHT ET AL., *supra* note 133, § 3532.1, at 372; *see* 15 MOORE ET AL., *supra* note 134, § 101.70 (identifying ripeness's core goal as helping courts to avoid making unnecessary decisions).

151. 13B WRIGHT ET AL., *supra* note 133, § 3532.1, at 394 ("[E]stablishing proper relationships between the judiciary and other branches of the federal government lie at the core of ripeness policies."); *e.g.*, Hodgers-Durgin v. De la Vina, 199 F.3d 1037, 1042–43 (9th Cir. 1999) (noting the federalism principles underlying ripeness).

152. 13B WRIGHT ET AL., *supra* note 133 § 3532.1, at 375–78 (noting that the prohibition against advisory opinions fuels jurisdictional ripeness concerns); *e.g.*, United States v. Broad. Music, Inc., 275 F.3d 168, 178–79 (2d Cir. 2001) (refusing to issue an advisory opinion and dismissing the case as unripe).

153. 13B WRIGHT ET AL., *supra* note 133, § 3532.1, at 375–78 (noting that limits on judicial competence motivate jurisdictional ripeness concerns).

154. Mendel, *supra* note 74, at 500 (noting that prudential ripeness is not constitutionally mandated).

155. 13B WRIGHT ET AL., *supra* note 133, § 3532.1, at 385 n.22.

156. 15 MOORE ET AL., *supra* note 134, § 101.70; *see* 13B WRIGHT ET AL., *supra* note 133, § 3532.1, at 375 (explaining that while Article III "provides the starting point" for ripeness inquiries, prudential concerns are also considered).

157. *See* 13B WRIGHT ET AL., *supra* note 133, § 3532.1, at 372–79.

158. *E.g.*, CSG Exploration Co. v. Fed. Energy Regulatory Comm'n, 930 F.2d 1477, 1486 (10th Cir. 1991) (dismissing as unripe a claim whose factual record was not fully

governmental institutions' rights to settle disputes.[159] Third, ripeness helps courts avoid deciding cases on constitutional grounds, which is a canon of federal adjudication.[160] These prudential concerns, however, are considered alongside the hardship that deferring judgment would impose on the parties.[161] If there is a likelihood of hardship to the parties, these prudential considerations will yield, and courts will likely adjudicate the dispute.[162]

C. Ripeness of Land Use Disputes

Despite common concerns underlying ripeness, federal courts apply varying ripeness standards in different legal contexts,[163] tailoring the rigor of the ripeness inquiry to the individual claim at hand.[164] In turn, federal courts have developed unique ripeness requirements for land use disputes.[165] Indeed, the Supreme Court has announced specific ripeness requirements for regulatory takings claims as a result of their increased assertion in federal court.[166] Because regulatory takings, if asserted too early, present unique challenges for federal adjudication,[167] clear ripeness rules help weed out premature claims.[168] As other land use claims, like

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developed); *see* 13B WRIGHT ET AL., *supra* note 133, § 3532.1, at 374 (indicating that prudential ripeness concerns the accuracy and efficiency of judicial decision making).

159. 13B WRIGHT ET AL., *supra* note 133, § 3532.1, at 398 (explaining that deference to state institutions fuels prudential ripeness analysis); *e.g.*, *supra* note 151 and accompanying text.

160. 16 AM. JUR. 2D *Constitutional Law* § 125 (2009) (discussing how federal courts avoid adjudication of federal constitutional claims when alternative grounds for a decision exist); *e.g.*, Hastings v. Judicial Conference, 770 F.2d 1093, 1099 (D.C. Cir. 1985) (dismissing a constitutional challenge to a statute as premature).

161. *See* 13B WRIGHT ET AL., *supra* note 133, § 3532.7, at 714 (explaining that courts must consider "the need for decision and the weight of the reasons for deferring decision" in a prudential ripeness inquiry); Mendel, *supra* note 74, at 501 (discussing how courts balance prudential concerns against hardship to the parties).

162. 36 C.J.S. *Federal Courts* § 90 (2004) ("The greater the hardship to the parties of withholding court consideration, the more likely a court will be to find ripeness."); *see* 13B WRIGHT ET AL., *supra* note 133, § 3532.1, at 394–95 ("Judicial action becomes more appropriate as the hardship of denying decision increases.").

163. *E.g.*, Nichol, *supra* note 142, at 166–67 (comparing ripeness standards for takings and First Amendment claims).

164. *E.g.*, Ienco v. Angarone, 429 F.3d 680, 684 (7th Cir. 2005) (holding that a convicted felon's false arrest claim is unripe until the conviction is overturned); Fed. Express Corp. v. Mineta, 373 F.3d 112, 120 (D.C. Cir. 2004) (holding unripe a challenge to the Air Transportation Safety and System Stabilization Act recoupment procedures until the procedure was actually applied); *see* Nichol, *supra* note 142, at 161 (explaining that courts employ "several distinct processes" to determine the ripeness of claims).

165. *E.g.*, Murphy v. New Milford Zoning Comm'n, 402 F.3d 342, 347 (2d Cir. 2005) (explaining how land use disputes have specific ripeness requirements); *see infra* Parts II.C.1–2, III.

166. *See* 13B WRIGHT ET AL., *supra* note 133, § 3532.1.1, at 420 (identifying a special category of ripeness that applies to regulatory takings claims); *see also* BLAESSER & WEINSTEIN, *supra* note 143, § 12.IV, at 1186 (describing how land use ripeness developed in response to regulatory takings).

167. *See infra* notes 179–98 and accompanying text.

168. Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1, 7 (1995) (explaining that the Supreme Court developed the ripeness

SDP claims, are often asserted alongside takings claims, courts sometimes muddle the ripeness standard applied to each.[169] Nevertheless, as these claims involve different legal rights and remedies,[170] the relevant ripeness inquiries may differ.

In *Williamson County*, the Court addressed the ripeness of regulatory takings.[171] In this seminal case, a developer alleged that a taking occurred after land use regulations limited the developer's ability to develop its property.[172] The landowner intended to intensely develop and subdivide its 676-acre parcel to eventually include 736 homes.[173] Although the zoning commission approved the original plans, subsequent changes to the zoning code resulted in the developer's already initiated construction plans becoming non-compliant.[174] After the developer submitted a revised development plan, the zoning board rejected the developer's modified proposals, as even they failed to comply with the more stringent zoning ordinances.[175] This rejection prompted the takings claim, which alleged that compliance with the Commission's requirements would severely diminish the amount of homes that the developer could construct on its parcel, resulting in a net loss of over $1 million.[176] In deciding this claim,[177] the Court announced a two-pronged ripeness standard, which must be satisfied before regulatory takings claims are cognizable in federal court.[178]

1. Prong One: Finality

Williamson County's first ripeness prong, finality, requires the administrative agency charged with implementing land use regulations to have "arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question."[179] This requires landowners to apply for permits to complete construction, to receive a final denial or modification of the submitted plan by the appropriate regulatory agency, and to subsequently apply for variances from the relevant zoning

doctrine because landowners "commonly initiate litigation" before a regulatory taking is complete).

169. *See* 13B WRIGHT ET AL., *supra* note 133, § 3532.1.1, at 447–48.

170. *See supra* Part I.D (distinguishing takings and SDP claims).

171. Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186 (1985) (noting that the takings claim was unripe).

172. *See id.* at 176–82, 185 (describing zoning laws precluding the developer from building).

173. *Id.* at 177 (noting the original construction plans).

174. *Id.* at 180–81 (describing non-compliant aspects of the development proposal).

175. *Id.* at 181 (describing the commission's denial of a new proposal).

176. *Id.* at 182 (alleging that meeting the commission's requirements would curtail development and cause economic loss).

177. The Court did not answer whether the developer stated an SDP or Fifth Amendment takings claim, because either way, the claim was unripe. *See id.* at 199–200.

178. *See* Rohr, *supra* note 127, at 1809 (explaining how *Williamson County* imposes a two-pronged ripeness standard on takings claims).

179. *Williamson Cnty.*, 473 U.S. at 191; *see* 2 SALKIN, *supra* note 22, § 16:12 (indicating that finality is satisfied when the government agency enforcing the regulations makes a final decision regarding the application of the regulations to one's property).

laws.[180] Finality is a necessary prerequisite to takings because the crux of a regulatory taking—whether regulations have actually deprived property of value—cannot be determined until it is clear how regulations affect the property in question.[181] As such, jurisdictional concerns regarding whether there is "an actual, concrete injury" are at the forefront of finality.[182]

Prudential concerns unique to the land use context also underscore finality.[183] For example, to reduce federal decisions on constitutional grounds, federal courts require that regulatory agencies' action be final and definitive, such that courts need only decide constitutional challenges to zoning decisions, like regulatory takings, if absolutely necessary.[184] Further, seeking to develop case law only when it can be done wisely, federal courts limit their takings decisions to the final application of regulations to property.[185] This ensures that all the facts necessary to properly adjudicate the claim are before the court when it renders its decision.[186]

Williamson County demonstrates finality in action. There, the developer failed to secure a final decision regarding the applicability of the zoning laws to his parcel.[187] Although the county denied the developer's original and revised proposals, the developer failed to seek any variances from the zoning laws, which could have allowed its original development proposal to proceed.[188] Indeed, the developer and municipality wildly differed when estimating how intensely the property could be developed.[189] As a result, the extent to which the rezoning affected the property's value was

180. *See* 2 SALKIN, *supra* note 22, § 16:12 (explaining that applying for permits, having the proposal denied or modified, and applying for variances in response are all necessary to satisfy finality).

181. *See Williamson Cnty.*, 473 U.S. at 193–94 (noting that finality concerns the final decision of an application of regulations to one's property); 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, 96–97 (1994) (explaining that the extent of development that is permitted by the regulation is a necessary factor to determine how property is affected).

182. *See Williamson Cnty.*, 473 U.S. at 191 (explaining that the Court cannot evaluate the factors of a regulatory taking until finality is satisfied); *cf.* Overstreet, *supra* note 181, at 96 (discussing how a final decision is a prerequisite to "whether a taking has occurred").

183. *See* 13B WRIGHT ET AL., *supra* note 133, § 3532.1.1, at 423–32 (describing different concerns underscoring finality's application to land use claims).

184. *See* Southview Assocs. v. Bongartz, 980 F.2d 84, 96–97 (2d Cir. 1992) (suggesting that finality promotes avoidance of constitutional issues).

185. *See* 13B WRIGHT ET AL., *supra* note 133, § 3532.1.1, at 423–32.

186. *See id.* (explaining that finality ensures that relevant legal issues can be fully explored through the facts on the record).

187. *Williamson Cnty.*, 473 U.S. at 194.

188. *Id.* at 193–94.

189. *Id.* at 182 (noting that the developer alleged that only sixty-seven units could be constructed in compliance with the zoning laws, while the municipality argued that three hundred could be built).

unknown,[190] and the Court could not ascertain whether the developer sustained an injury.[191]

2. Prong Two: Exhaustion

The second *Williamson County* ripeness prong, exhaustion, requires plaintiffs to pursue just compensation for the alleged taking in state court before seeking compensation in federal court.[192] Plaintiffs must exhaust any process a state provides for obtaining compensation,[193] including inverse condemnation claims,[194] procedures created by local statutes,[195] or even proceedings under a state constitution.[196] Unless a plaintiff can show that an adequate procedure does not exist for his takings claim, failure to resort to state remedies will render his claim unripe.[197] Failure to pursue state remedies for just compensation, even if the remedy sought is equitable relief, likewise renders a plaintiff's claim unripe.[198]

The origin of exhaustion is simple: because the Fifth Amendment proscribes only takings "without just compensation," a state does not violate the Fifth Amendment until it fails to fairly compensate the taking of private property.[199] Any takings claim thus remains unripe "until the State fails to provide adequate compensation for the taking," because up to that

190. *Id.* at 194 (explaining that because the plaintiff failed to seek variances, no "final, reviewable decision" existed).

191. *Id.* at 191 (suggesting that until variances are denied, whether property can produce an economic benefit remains unknown); *see* Overstreet, *supra* note 181, at 96 (noting that taking cannot be determined until it is clear "exactly how limited" the use of property is).

192. *Williamson Cnty.*, 473 U.S. at 194–95 (noting that takings claims are unripe if the plaintiff does not first "seek compensation through the procedures the State has provided"); BLAESSER & WEINSTEIN, *supra* note 143, § 12:14, at 1188 (explaining that *Williamson County* requires takings plaintiffs to exhaust state remedies before filing a claim in federal court).

193. *Williamson Cnty.*, 473 U.S. at 195 ("[I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.").

194. *E.g.*, *id.* at 196–97 (finding that the Tennessee inverse condemnation proceeding was adequate).

195. *E.g.*, Harbours Pointe of Nashotah, L.L.C. v. Vill. of Nashotah, 278 F.3d 701, 704 (7th Cir. 2002) (local statutory remedy adequate).

196. *E.g.*, Vandor, Inc. v. Militello, 301 F.3d 37, 39 (2d Cir. 2002) ("A takings claim is unripe where 'a remedy potentially is available under the state constitution's provision.'" (quoting Villager Pond, Inc. v. Town of Darien, 56 F.3d 375, 380 (2d Cir. 1995))).

197. JOHN MARTINEZ, GOVERNMENT TAKINGS § 4:5 (2011) (suggesting that exhaustion is not required if no remedy is available); *e.g.*, *Williamson Cnty.*, 473 U.S. at 196–97 (holding that the takings claim was unripe because there was no showing of inadequacy or unavailability of compensation procedures); *see* Peters v. Vill. of Clifton, 498 F.3d 727, 732 (7th Cir. 2007) ("If a property owner demonstrates that state procedures for obtaining just compensation are either unavailable or inadequate, the claim is immediately ripe in federal court.").

198. *E.g.*, Alto Eldorado P'ship v. Cnty. of Santa Fe, 634 F.3d 1170, 1174 (10th Cir. 2011) (noting that regardless of the remedy sought, takings claims are unripe unless state court just compensation procedures are exhausted).

199. *Williamson Cnty.*, 473 U.S. at 194–95 (explaining that there is no violation of the Just Compensation Clause until compensation has been denied).

point, state action is incomplete.[200] Exhaustion therefore ensures that the courts have jurisdiction to hear takings, since prior to the denial of just compensation, there is no case or controversy that the court can adjudicate.[201]

In addition to this jurisdictional concern, some prudential ripeness considerations also underscore exhaustion. First, many federal courts are, frankly, reticent to hear land use disputes.[202] Requiring plaintiffs to first sue in state court before bringing a federal takings claim provides a handy tool to avoid hearing such claims.[203] Second, exhaustion improves efficiency by preventing federal courts from intervening in disputes until pre-existing procedures meant to provide relief fail to do so.[204] If state procedures can compensate the taking, federal interference is unnecessary—unless a state fails to pay up.

Williamson County also demonstrates exhaustion in play, as the developer failed to exhaust any state court remedies prior to filing his regulatory takings claim.[205] Tennessee law authorized inverse condemnation proceedings for physical invasions of property, as well as de facto condemnations of property resulting from restrictive zoning regulations.[206] Because the developer failed to either exploit or demonstrate the inadequacy of this remedy, it did not satisfy exhaustion, and its regulatory takings claim remained unripe.[207]

While *Williamson County* decreed this clear, two-pronged ripeness requirement for regulatory takings,[208] the SDP ripeness standard is undetermined.[209] Federal courts have, however, used *Williamson County* as a basis for crafting an SDP ripeness standard, and its requirements are potentially applicable to federal SDP claims.[210] Indeed, *Williamson County*'s ripeness mandates, if unsatisfied, may induce federal courts to dismiss SDP claims as unripe.[211] Consequently, a circuit split has

200. *Id.* at 195.

201. *See* Stein, *supra* note 168, at 16 (noting that in takings, exhaustion is incorporated into the case or controversy requirement).

202. *See* Overstreet, *supra* note 181, at 103 (identifying federal courts' unwillingness to decide land use disputes as a significant aspect of ripeness); *see also infra* notes 223, 331 and accompanying text.

203. *See* 1 ZIEGLER, *supra* note 6, § 3:18 (explaining that some federal courts use ripeness to bar review of zoning disputes).

204. *See* MARTINEZ, *supra* note 197, § 4:2 (noting that courts avoid becoming involved in disputes unless other means of relief are exhausted).

205. *Williamson Cnty.*, 473 U.S. at 194 ("A second reason the taking claim is not yet ripe is that respondent did not seek compensation through the procedures the State has provided for doing so.").

206. *Id.* at 196.

207. *Id.* at 196–97.

208. *See supra* notes 178–98 and accompanying text.

209. *See infra* Part III.

210. BLAESSER & WEINSTEIN, *supra* note 143, § 12.12, at 1186 (suggesting that *Williamson County* may apply to SDP claims).

211. *See id.* (suggesting that federal courts may dismiss unripe SDP claims that do not satisfy *Williamson County* ripeness); 13B WRIGHT ET AL., *supra* note 133, § 3532.1.1, at 442 (noting that constitutional claims asserted alongside regulatory takings are at times subject to the same ripeness standard as regulatory takings).

developed over the applicability of the second *Williamson County* prong—exhaustion—to SDP claims.

III. *WILLIAMSON COUNTY* AND SUBSTANTIVE DUE PROCESS RIPENESS: THE CIRCUIT SPLIT OVER EXHAUSTION

While Part II detailed the ripeness standard for regulatory takings, this part focuses on the ripeness requirements for SDP claims. Like regulatory takings, SDP claims may involve the application of regulations to property.[212] Consequently, many of the ripeness concerns for regulatory takings, like avoiding interference in local disputes[213] and deciding cases only when all necessary facts have been sufficiently developed,[214] inform SDP ripeness as well. Nonetheless, different circuits have distinctly applied *Williamson County* ripeness to SDP claims,[215] with some applying only finality, and others applying exhaustion too. In fact, a circuit split has developed, and two different SDP ripeness standards are currently in use. The Second, Third, Ninth, and Eleventh Circuits apply only finality to SDP claims, while the First and Seventh apply both finality and exhaustion.

This part begins with a brief discussion of the universal application of finality to SDP claims. Next, it discusses those circuits that exempt SDP claims from exhaustion, highlighting exemplary cases and noting why these circuits find SDP claims ripe once they satisfy finality. Finally, this part discusses the First and Seventh Circuits' application of exhaustion to SDP claims, including the reasoning behind their more rigorous standard.

A. Universal Application of Finality to Substantive Due Process Claims

All circuits apply *Williamson County* finality to as-applied SDP claims.[216] Finality is an essential prerequisite to SDP claims because,

212. *See supra* notes 73–76 and accompanying text.

213. *See supra* note 204 and accompanying text.

214. *See supra* notes 185–86 and accompanying text.

215. *See infra* Part III.B–C.

216. JUERGENSMEYER & ROBERTS, *supra* note 44, § 10:12 ("Most courts have held that the final decision ripeness requirement applies to as-applied, arbitrary and capricious substantive due process claims."); *e.g.*, Cnty. Concrete Corp. v. Twp. of Roxbury, 442 F.3d 159, 164 (3d Cir. 2006) (finality applies to as-applied SDP claims); Gamble v. Eau Claire Cnty., 5 F.3d 285, 287–88 (7th Cir. 1993) (applying *Williamson County* finality to an arbitrary and capricious SDP claim); Southview Assocs. v. Bongartz, 980 F.2d 84, 96–97 (2d Cir. 1992) (identifying an SDP claim "premised on arbitrary and capricious government conduct" as subject to finality); Eide v. Sarasota Cnty., 908 F.2d 716, 725 (11th Cir. 1990) (*Williamson County* applies to SDP claim). Finality is not required for facial SDP challenges, however. JUERGENSMEYER & ROBERTS, *supra* note 44, § 10:12 (facial SDP claims not subject to *Williamson County*); *e.g.*, *Cnty. Concrete*, 442 F.3d at 164 (facial attacks not subject to *Williamson County* finality); Kittay v. Giuliani, 252 F.3d 645, 646–47 (2d Cir. 2001) (affirming dismissal of a facial SDP claim on the merits when finality was not satisfied); *Eide*, 908 F.2d at 725 (noting precedent which decided facial SDP claims on the merits prior to finality's satisfaction). Because facial challenges confront the enactment of a regulation directly, not its application in a particular instance, how regulations affect one's property is irrelevant. Katherine E. Stone & Philip A. Seymour, *Regulating the Timing of Development: Takings Clause and Substantive Due Process Challenges to Growth Control*

before the final application of regulations to property, it is impossible to know if a landowner has suffered an actual or concrete injury.[217] Whether regulations are the product of arbitrary or irrational conduct cannot be known until the final regulations have actually been promulgated.[218] Furthermore, the extent to which regulations restrict property use, and therefore whether a party has even been injured by such restrictions, cannot be determined until finality is satisfied.[219] Accordingly, jurisdictional concerns of only hearing an actual dispute with an actual injury motivate finality in SDP ripeness.[220]

Prudential concerns underscore finality in the SDP context as well, namely concerns over only deciding cases with a fully developed factual record.[221] Until regulations are finally applied, the circumstances surrounding their application are unknown, leaving unclear key facts relevant to whether they were applied arbitrarily.[222] Moreover, finality allows courts to respect the decision-making power of local zoning boards and to avoid becoming a federal zoning board of appeals.[223] By allowing local zoning authorities to render final decisions before ruling on a case, federal courts further comity between independent governmental institutions.[224] For example, the Second Circuit noted that these federalism principles underscore finality, explaining that "[r]equiring a property owner to obtain a final, definitive position from zoning authorities evinces the judiciary's appreciation that land use disputes are uniquely matters of local concern more aptly suited for local resolution."[225]

Regulations, 24 LOY. L.A. L. REV. 1205, 1237 (1991) (noting that facial challenges allege mere enactment of the regulation is an invalid exercise of the police power).

217. *See* 2 SALKIN, *supra* note 22, § 15:7 (explaining that a final decision is necessary to determine if any injury was inflicted).

218. Osborne v. Fernandez, No. 06-CV-4127 (CS)(LMS), 2009 WL 884697, at *31 (S.D.N.Y. Mar. 31, 2009) (noting that the plaintiffs cannot allege that conduct is arbitrary and capricious until the challenged conduct is final), *aff'd*, 414 F. App'x 350 (2d Cir. 2011).

219. *See* 2 SALKIN, *supra* note 22, § 15:7 (explaining that finality ensures that the complaining party has suffered an injury).

220. *E.g.*, Murphy v. New Milford Zoning Comm'n, 402 F.3d 342, 347 (2d Cir. 2005) (indicating that Article III concerns of fitness for review motivate courts to defer review of cases not involving an actual, concrete dispute); *see supra* notes 148–53 and accompanying text.

221. *E.g.*, *Osborne*, 2009 WL 884697, at *31 (noting that finality ensures that the issues in plaintiff's complaint are perfected, or alternatively mooted, if a final decision in plaintiff's favor is granted); *see supra* note 158 and accompanying text.

222. *E.g.*, *Murphy*, 402 F.3d at 348 (explaining that finality ensures that the record is fully developed); *see supra* notes 185–86 and accompanying text.

223. 2 SALKIN, *supra* note 22, § 15:3 (suggesting that federal courts are reluctant to invalidate zoning decisions); *e.g.*, Harlen Assocs. v. Inc. Vill. of Mineola, 273 F.3d 494, 505 (2d Cir. 2001) (repeating the "admonition that federal courts should not become zoning boards of appeal"); Cornell Cos. v. Borough of New Morgan, 512 F. Supp. 2d 238, 256 (E.D. Pa. 2007) (noting the court's reluctance to become a zoning board of appeals).

224. *Murphy*, 402 F.3d at 348.

225. *Id.*

B. Circuits Exempting Substantive Due Process Claims from Exhaustion

Most circuits exempt SDP claims from exhaustion.[226] Indeed, neither the Second,[227] Third,[228] Ninth,[229] nor Eleventh[230] Circuits require plaintiffs to exhaust state remedies prior to filing an SDP claim.[231] In these circuits, to successfully state an SDP claim, once finality is satisfied, a plaintiff must show that it had a constitutionally protected property interest that the government denied in an arbitrary or irrational manner.[232]

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226. *See* 2 SALKIN, *supra* note 22, § 15:7 (explaining that numerous circuits do not bar SDP claims for failing to exhaust state remedies).

227. Southview Assocs. v. Bongartz, 980 F.2d 84, 97 (2d Cir. 1992) ("[T]he compensation requirement is inapplicable to [plaintiff's] substantive due process claim premised on arbitrary and capricious government conduct.").

228. Cnty. Concrete Corp. v. Town of Roxbury, 442 F.3d 159, 164 (3d Cir. 2006) (noting that SDP claims ripen once finality is satisfied).

229. Surf & Sand, L.L.C. v. City of Capitola, 717 F. Supp. 2d 934, 938 (N.D. Cal. 2010) (denying motion to dismiss SDP claim as unripe because exhaustion was unsatisfied).

230. Restigouche, Inc. v. Town of Jupiter, 59 F.3d 1208, 1212 (11th Cir. 1995) (noting that an SDP claim ripens once finality is satisfied).

231. Other circuits have inconsistent or incognizable ripeness requirements. The Sixth and Tenth Circuits appear to exempt SDP claims from exhaustion, but are not explicit in this policy. *See* Signature Props. Int'l Ltd. v. City of Edmond, 310 F.3d 1258, 1267 (10th Cir. 2002) (noting that *Williamson County* ripeness applies to SDP claims, but applying only finality); Tri-Corp. Mgmt. v. Praznik, 33 F. App'x 742, 748 (6th Cir. 2002) (determing that an SDP claim was ripe even though exhaustion was not satisfied, but announcing no explicit exemption from exhaustion). Similarly, the Fifth, Eighth, and D.C. Circuits appear to exempt SDP claims from exhaustion, but have not enunciated a clear ripeness standard. *See* Snaza v. City of St. Paul, 548 F.3d 1178, 1182, 1183–84 (8th Cir. 2008) (holding that the takings claim was unripe for failure to satisfy exhaustion, while the SDP claim was dismissed on the merits, with no mention of ripeness); John Corp. v. City of Hous., 214 F.3d 573, 585 (5th Cir. 2000) (finding an SDP claim to be ripe, but not stating the ripeness standard); Tri Cnty. Indus. v. District of Columbia, 104 F.3d 455, 459–60 (D.C. Cir. 1997) (dismissing an SDP claim, either on the merits or as unripe, without stating the ripeness standard). Finally, the Fourth Circuit purports to exempt SDP claims from exhaustion, but also requires, as an essential element of an SDP claim, that plaintiffs seek state court redress of SDP injuries. *Compare* Acorn Land, L.L.C. v. Balt. Cnty., 402 F. App'x 809, 816 n.11 (4th Cir. 2010) (noting that exhaustion does not apply to SDP claims), *with id.* at 818 (dismissing the SDP claim for failure to state a claim when state procedures were not exhausted).

232. *See* Harlen Assocs. v. Inc. Vill. of Mineola, 273 F.3d 494, 505 (2d Cir. 2001) (holding that plaintiffs must demonstrate that a valid property interest was deprived arbitrarily or irrationally); Sameric Corp. v. City of Phila., 142 F.3d 582, 590 (3d Cir. 1998) ("To establish a substantive due process claim, a plaintiff must prove that it was deprived of a protected property interest by arbitrary or capricious government action."); Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398, 1407 (9th Cir. 1989) ("To establish a violation of substantive due process, the plaintiffs must prove that the government's action was 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.'" (quoting Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926))), *overruled by* Armendariz v. Penman, 75 F.3d 1311 (9th Cir. 1996); *see also* Eide v. Sarasota Cnty., 908 F.2d 716, 722 (11th Cir. 1990) ("To prove an arbitrary and capricious due process claim, a plaintiff need only prove that the government has acted arbitrarily and capriciously" in denying a property interest). The Eleventh Circuit also requires that the act be legislative in character. *See* Lewis v. Brown, 409 F.3d 1271, 1273 (11th Cir. 2005) (holding that non-legislative acts cannot support an SDP claim).

To understand this ripeness standard, take *Southview Associates v. Bongartz*.[233] There, the plaintiff challenged a town zoning board's denial of a permit that would have allowed it to develop its property despite its potential location within a protected deer habitat.[234] The plaintiff purchased eighty-eight acres of undeveloped land in rural Vermont with intentions of intensely developing the land into seventy-eight vacation homes.[235] Meanwhile, a Vermont land use statute, Act 250,[236] required certain categories of development projects[237]—including the developer's—to receive special permits granted by local commissions prior to initiating construction.[238] Unfortunately for the plaintiff, the Act 250 commission determined that the proposed development would interfere with a nearby deeryard, an environmental habitat essential to the winter survival of deer, and denied the permit application.[239] After unsuccessfully appealing the commission's decision to the Vermont Environmental Board and State Supreme Court,[240] the plaintiff filed suit in federal court.[241] In addition to regulatory and due process takings claims, the plaintiff alleged that the commission arbitrarily denied the permit, violating SDP; thus the court engaged in three separate ripeness analyses.[242] While concluding that regulatory and due process takings claims were subject to both *Williamson County* prongs,[243] the court exempted the plaintiff's SDP claim from the exhaustion prong, as the government action was arbitrary and "largely unrelated" to pursuing state court compensation.[244]

In a similar Ninth Circuit case, *Surf & Sand, L.L.C. v. City of Capitola*,[245] the plaintiff challenged city ordinances preventing the plaintiff from subdividing or selling its property.[246] The plaintiff claimed that the ordinances, as applied to his property, violated SDP, as they were unrelated

233. 980 F.2d 84 (2d Cir. 1992).

234. *See id.* at 92 (noting that the zoning board denied plaintiff's Act 250 permit application).

235. *Id.* at 89–90 (describing plaintiff's intent to heavily develop its parcel).

236. VT. STAT. ANN. tit. 10, § 6001 (2010).

237. *Southview*, 980 F.2d at 88 (listing types of developments covered by Act 250).

238. *Id.* at 88–89 (describing the approval mechanism required by Act 250 prior to the granting of permit allowing development).

239. *Id.* at 90–91 (detailing the Commission's determination that the parcel was situated within a deeryard and its subsequent denial of Act 250 permits).

240. *Id.* at 91–92 (noting both unsuccessful appeals).

241. *Id.* at 92 (indicating that the plaintiff filed suit in federal district court).

242. *Id.* at 96–100 (considering whether *Williamson County* applies to the plaintiff's takings, due process takings, and SDP claims).

243. *Id.* at 97 (indicating that both prongs of *Williamson County* apply to regulatory takings and due process takings).

244. *Id.* (explaining that the pursuit of state court compensation is unrelated to arbitrary and irrational SDP claims). The court ultimately found the plaintiff's SDP claim unripe not for a failure to satisfy exhaustion, but instead because finality had not been achieved. *Id.* at 99 (dismissing as unripe the plaintiff's SDP claim because finality was not satisfied).

245. 717 F. Supp. 2d 934 (N.D. Cal. 2010).

246. *See id.* at 936 (indicating that the town adopted a "Conversion Ordinance" preventing subdivision of mobile home sites, and enacted a Park Closure Ordinance imposing duties on mobile home site owners prior to closing).

to any legitimate governmental purpose.[247] Like the Second Circuit, the Ninth Circuit distinguished the plaintiff's SDP claim from a takings claim and engaged in two separate ripeness analyses.[248] Consequently, the court declined to apply the apparently "illogical" exhaustion requirement to the plaintiff's SDP claim, because SDP claims do not seek just compensation.[249] After reaching the merits of the claim, the court held that the allegations stated an SDP claim for purposes of the motion to dismiss.[250]

There are numerous reasons why these circuits exempt SDP claims from exhaustion. First, these circuits narrowly read *Williamson County* exhaustion as uniquely applicable to takings claims.[251] As such, exhaustion is "germane to takings challenges as it stems from the Fifth Amendment's proviso that only takings without 'just compensation' infringe that Amendment."[252] Because SDP derives from the Fourteenth Amendment, which may be violated with or without just compensation,[253] exhaustion is irrelevant to such claims. The distinct constitutional sources of SDP and takings challenges therefore warrant different ripeness inquiries for each claim.[254]

Second, because the injury stemming from an SDP violation does not require a denial of just compensation,[255] these circuits view the government's action as complete regardless of compensation.[256] On the contrary, the remedies for SDP violations are "invalidation of the regulation and actual damages" and do not include just compensation for the taken property.[257] There is a sufficiently concrete injury, therefore, prior to the

247. *See id.* at 939 (detailing allegations that the ordinances merely purported to further legitimate objectives).

248. *See id.* at 938 (finding the takings claim unripe, but the SDP claim ripe).

249. *See id.* at 937–38 (noting that exhaustion is inapplicable to arbitrary and irrational SDP claims, as due process violations are not remedied by compensation).

250. *See id.* at 939 (finding that an SDP claim was stated, but noting the questionable chances of ultimate success).

251. *See* 2 SALKIN, *supra* note 22, § 15:7 (explaining how exhaustion evolved as an essential element of a takings claim).

252. Murphy v. New Milford Zoning Comm'n, 402 F.3d 342, 349 (2d Cir. 2005) (internal quotation marks omitted); *see* Cnty. Concrete Corp. v. Twp. of Roxbury, 442 F.3d 159, 168 (3d Cir. 2006) (explaining that exhaustion addresses a "unique aspect of Just Compensation Takings claims").

253. *See supra* note 108 and accompanying text.

254. *E.g.*, N. Pacifica, L.L.C. v. City of Pacifica, 526 F.3d 478, 480 (9th Cir. 2008) (noting that an SDP claim is distinct from a takings claims, and thus is not subject to exhaustion); *see* 13B WRIGHT ET AL., *supra* note 133, § 3532.1.1 n.30, at 443 (explaining that because SDP claims do not derive from the Takings Clause, exhaustion does not apply to them).

255. *See* Breemer, *supra* note 55, at 641–42 (indicating that a takings injury is a denial of just compensation, not a prior irrational action).

256. *Id.* at 642 (suggesting that arbitrary governmental action alone inflicts an injury).

257. *Cnty. Concrete*, 442 F.3d at 168; *see* Surf & Sand, L.L.C. v. City of Capitola, 717 F. Supp. 2d 934, 938 (N.D. Cal. 2010) ("[I]t would be illogical to require a plaintiff to seek compensation in state proceedings for a due process violation, because such violations, if proven, are not remedied by 'compensation.'").

denial of just compensation, and these circuits consider it proper to exercise jurisdiction over SDP claims before plaintiffs exhaust state remedies.[258]

Third, while both SDP and regulatory takings claims challenge the regulation of property, these distinct claims "scrutinize that process in slightly different ways."[259] While takings concern the deprivation of a property's economic value, SDP claims alternatively attack the "decision to apply the zoning to the property" as arbitrary or irrational.[260] Takings, therefore, mature only when this economic value—just compensation—has been deprived.[261] Because SDP claims lack this economic component, these circuits find them ripe once regulations are finally applied to the property.[262] As there is a "sufficiently concrete question for review" as soon as the decision to apply regulations is final, these circuits find SDP claims ripe once this threshold is met.[263]

Notably, for ripeness purposes, these circuits sometimes distinguish between SDP claims and due process takings.[264] While the former are exempted from exhaustion,[265] the latter may be subject to both prongs of *Williamson County*,[266] because such due process takings claims are essentially identical to regulatory takings claims.[267] Since these due process violations involve questions of law that are practically identical to takings, it follows that the ripeness standard is identical too.[268]

In sum, because of the distinct natures of SDP and takings claims,[269] these circuits apply different ripeness standards to each claim. By borrowing finality, but not exhaustion, from *Williamson County*, these circuits apply a unique ripeness analysis to SDP claims, as exhaustion, in their view, is irrelevant to these claims.[270]

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258. *See* Breemer, *supra* note 55, at 641–42 (noting that the absence of just compensation is not part of an SDP inquiry).

259. Restigouche, Inc. v. Town of Jupiter, 59 F.3d 1208, 1212 (11th Cir. 1995).

260. *Id.*

261. *See id.* (explaining that takings claims are ripe after the extent of permitted development is clear and compensation is sought).

262. *See id.* (holding that the SDP claim was ripe, because the zoning decision was finally made).

263. *Id.*

264. *See* Shanks v. Dressel, 540 F.3d 1082, 1087 (9th Cir. 2008) (explaining that the Takings Clause subsumes SDP claims that do not allege arbitrary and capricious conduct); Villas of Lake Jackson, Ltd. v. Leon Cnty., 121 F.3d 610, 613–14 (11th Cir. 1997); Southview Assocs. v. Bongartz, 980 F.2d 84, 96 (2d Cir. 1992) ("[A] substantive due process claim premised on the theory that a regulation has gone too far is subject to both prongs of the *Williamson*[*County*] ripeness test.").

265. *See supra* notes 226–63 and accompanying text.

266. *See Shanks*, 540 F.3d at 1087 (explaining how takings analysis governs SDP claims which fail to allege arbitrary action); Gavlak v. Town of Somers, 267 F. Supp. 2d 214, 220 (D. Conn. 2003).

267. *See, e.g.*, *Southview Assocs.*, 980 F.2d at 96 n.7 (explaining that due process takings "can only occur if the regulation has the same effect as a taking by eminent domain," and are thus essentially the same as regulatory takings); *supra* note 121 and accompanying text.

268. *See Southview Assocs.*, 980 F.2d at 97 (applying both prongs of *Williamson County* to takings and due process takings claims).

269. *See, e.g.*, *supra* notes 249, 259 and accompanying text.

270. *See supra* notes 251–63 and accompanying text.

C. Circuits Subjecting Substantive Due Process Claims to Exhaustion

Contrary to the aforementioned circuits, the First and Seventh Circuits apply exhaustion to SDP claims.[271] This is so despite their recognition that SDP claims are different from takings challenges.[272]

The Seventh Circuit first addressed SDP ripeness in *Gamble v. Eau Claire County*,[273] where the plaintiff sued after failing to secure permits necessary to build a convenience store, gas station, and car repair shop on her property.[274] Although the plaintiff originally obtained the required permits, the zoning agency revoked them after neighbors complained; the zoning board of appeals ultimately affirmed this decision.[275] The plaintiff challenged this revocation as irrational and a violation of her SDP rights.[276] After distinguishing her SDP and takings claims—as the SDP claim sought invalidation of the regulations or full pecuniary damages, not just compensation[277]—the court noted it was "not obvious" that SDP claims "should require exhaustion of state remedies."[278] Despite such ruminations, the court ultimately held that *Williamson County* mandated that "even if a taking can be challenged as a denial of substantive due process, a suit based on this theory is premature if the plaintiff has possible state remedies against the zoning regulation or other state action that he wants to attack."[279] Noting the rare success of SDP claims,[280] the *Gamble* court broadly interpreted *Williamson County* as imposing a duty to exhaust state judicial remedies on plaintiffs bringing federal civil rights suits in the land use context and declined to address the purportedly unripe SDP claim.[281]

The Seventh Circuit honed its ripeness standard in *Covington Court, Ltd. v. Village of Oak Brook*,[282] where the plaintiff asserted a § 1983 SDP claim

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271. *See* Deniz v. Municipality of Guaynabo, 285 F.3d 142, 149 (1st Cir. 2002) (explaining that an SDP claim does not lie until exhaustion is satisfied); Gamble v. Eau Claire Cnty., 5 F.3d 285, 288 (7th Cir. 1993) (dismissing the plaintiff's SDP claim for failing to exhaust "state judicial remedies").

272. *See* Gen. Auto Serv. Station v. City of Chi., 526 F.3d 991, 1000–01 (7th Cir. 2008) (noting that SDP protects property rights from "random and irrational" government action); Mongeau v. City of Marlborough, 492 F.3d 14, 18 (1st Cir. 2007) (explaining how a land use SDP claim was stated because plaintiff pled activity which shocked the conscience); Doherty v. City of Chi., 75 F.3d 318, 325 (7th Cir. 1996) (recognizing "the potential for a substantive due process claim in the context of land-use decisions that are arbitrary and unreasonable, bearing no substantial relationship to the public health, safety or welfare").

273. 5 F.3d 285 (7th Cir. 1993).

274. *Id.* at 285 (describing the plaintiff's construction plans).

275. *See id.*

276. *See id.* (noting that the county revoked the plaintiff's permits).

277. *See id.* at 286 (indicating that the plaintiff's SDP claim is different from a takings claim).

278. *Id.* (describing the nature of the plaintiff's suit as distinguished from a takings claim).

279. *Id.* at 287.

280. *Id.* (noting that success under an SDP theory is "rare").

281. *Id.* at 288 (noting that *Williamson County* creates an "exception to the principle that exhaustion of state remedies is not required in a federal civil rights suit," in affirming the dismissal of an SDP claim).

282. 77 F.3d 177 (7th Cir. 1996).

as a result of an alleged private taking.[283] There, the plaintiff developer acquired all but one lot in a residential area, Whitehall Park, with plans to construct a residential subdivision.[284] Unfortunately for the plaintiff, the owner of the sole lot remaining in Whitehall Park, Bailes, opposed the development plans.[285] Even more unsettling was Bailes's influence over the zoning board, whose president informed the plaintiff that until Bailes was on board, the zoning board would not approve the development.[286] After the plaintiff appeased Bailes by making over $100,000 worth of improvements to Bailes's lot, Bailes withdrew his opposition, and the zoning board approved the development.[287] Although able to develop, the plaintiff challenged the board's conditioning of his development approval on Bailes's acquiescence as both a private taking and an SDP violation.[288] Even though the claim raised due process concerns,[289] the court continued what it started in *Gamble* and decreed that SDP claims, regardless of their allegations, remain unripe until plaintiffs exhaust state court remedies.[290] Viewing SDP and takings claims as identical, the court held that "[l]abels do not matter" and mandated that plaintiffs challenging land use regulations under SDP or takings theories must exhaust state court remedies before filing suit in federal court.[291]

Finally, in *Forseth v. Village of Sussex*,[292] the Seventh Circuit finalized its SDP ripeness standard, definitively applying exhaustion to SDP claims.[293] In *Forseth*, the plaintiff landowners filed a § 1983 challenge[294] against the Village of Sussex for conditioning the approval of their proposed development on conveying a piece of land to the Village Board president.[295] Indeed, the allegations in *Forseth* were strikingly similar to those in *Covington*[296]: because the pre-conditions to final approval were allegedly unrelated to any legitimate governmental objective, the plaintiffs contended that the regulations violated SDP.[297] Relying heavily on *Covington*,[298] the Seventh Circuit reasoned that because the plaintiff's SDP

283. *See id.* at 178 (alleging an SDP violation under § 1983).
284. *Id.* (noting the plaintiff's acquisition of all but one lot, and the plaintiff's plans to build).
285. *Id.* (indicating that the remaining resident Bailes opposed development).
286. *Id.*
287. *Id.*
288. *Id.* (noting the plaintiff's allegations).
289. *Id.* at 179 (suggesting that private takings raise due process concerns).
290. *Id.* (holding that SDP claims challenging regulations are unripe until state remedies are exhausted).
291. *Id.* (quoting River Park, Inc. v. City of Highland Park, 23 F.3d 164, 167 (7th Cir. 1994)) (applying exhaustion to a due process challenge of regulations).
292. 199 F.3d 363 (7th Cir. 2000).
293. *Id.* at 370 (indicating that an SDP claim is subject to both finality and exhaustion).
294. *Id.* at 365 (noting that Forseth sued under § 1983).
295. *Id.* at 366 (noting that conditioning the approval of a final development plan on the conveyance of a buffer strip to the Village Board president forms the basis of plaintiff's claim).
296. *Id.* at 370 (noting that the allegations were "unmistakably similar" to *Covington*).
297. *Id.* at 369 (alleging that the regulations furthered private, not public, interests).
298. *Id.* at 370 (comparing the allegations to, and drawing the same legal conclusion as, *Covington*).

claim fell "within the framework for takings claims," it was subject to identical ripeness requirements.[299] The court recognized its draconian application of exhaustion, acknowledging that it even applied to cases involving "troubling facts and allegations" of improper governmental conduct.[300] Nonetheless, in applying exhaustion, the court made eminently clear that it would not "excuse any substantive due process claim in the land-use context from *Williamson*[*County*]'s ripeness requirements," regardless of the seriousness of the allegations involved.[301]

The First Circuit also applies exhaustion to SDP claims.[302] Take, for example, *Deniz v. Municipality of Guaynabo*,[303] where the plaintiff asserted numerous claims, including § 1983 SDP and regulatory takings claims, after a municipality threatened to condemn his property.[304] There, the plaintiff's takings claim was unripe for failing to satisfy exhaustion, as the court rejected his argument that no adequate compensation procedures existed.[305] Skeptical of his SDP claim,[306] the court further held that the plaintiff could not avoid *Williamson County* by "[d]ressing a takings claim in the raiment of a due process violation," and applied exhaustion to it as well.[307] Using sweeping language similar to *Forseth*'s,[308] the court held that "no substantive due process claim will lie" until exhaustion is satisfied.[309] Indeed, in interpreting *Deniz*, the First Circuit has determined that any claim coextensive with a taking must satisfy exhaustion.[310]

Notably, in *Downing v. Rhode Island*,[311] the First Circuit recognized the possibility that SDP claims may be distinct enough from takings to warrant different ripeness requirements.[312] In that case, a developer challenged the Rhode Island Historic Preservation and Heritage Committee's order to halt the development of his property, because it was the alleged site of a historic Native American settlement, as violative of SDP.[313] In dicta, the lower court noted that were a plaintiff to rely on different elements of proof—such as conscious shocking action for an SDP claim—such claims may warrant a

299. *Id.*
300. *Id.*
301. *Id.* at 369.
302. Deniz v. Municipality of Guaynabo, 285 F.3d 142, 149 (1st Cir. 2002) (noting that no SDP claim lies until exhaustion is satisfied).
303. *Id.*
304. *Id.* at 145 (explaining that the mayor intended to exercise eminent domain).
305. *Id.* at 146, 149 (noting and rejecting the plaintiff's argument that Puerto Rican law affords no remedy for an inverse condemnation).
306. *See id.* at 145 (noting that the plaintiff, "[f]or good measure," added an SDP claim to his takings claim).
307. *Id.* at 149.
308. *Compare* text accompanying *infra* note 309, *with* text accompanying *supra* note 301.
309. *Deniz*, 285 F.3d at 149.
310. Downing/Salt Pond Partners, L.P. v. Rhode Island, 698 F. Supp. 2d 278, 289 (D.R.I. 2010), *aff'd*, 643 F.3d 16 (1st Cir. 2011), *cert. denied*, 132 S. Ct. 502 (2011).
311. *Id.*
312. *See id.* at 290 (suggesting that the "unique elements of proof" for an SDP claim could warrant different treatment of SDP claims).
313. *Id.* at 279 (explaining how the preservation commission halted plans to develop sixty-seven acres of property, which the plaintiff challenged as violative of SDP).

different analysis from a takings claim.[314] Nevertheless, on appeal, the First Circuit declined to specifically address whether the plaintiff's SDP claim could proceed, despite failing to satisfy exhaustion, when it arose "from the same allegedly illegal state conduct" as a taking.[315] Instead, the court cited to *Deniz*, noting that disguising a takings claim as a due process violation could not serve to circumvent *Williamson County*, and dismissed the claim as unripe.[316]

1. Why Apply Exhaustion?

Whether jurisdictional or prudential ripeness concerns underlie these circuits' application of exhaustion is unclear, as they sometimes interpret *Williamson County* to impose jurisdictional limits, while at other times they highlight its prudential goals.[317] For example, in *Forseth*, the Seventh Circuit referred to *Williamson County*'s jurisdictional decree in dismissing the unripe SDP claim for lack of subject matter jurisdiction.[318] On the other hand, in *Peters v. Village of Clifton*,[319] the court viewed *Williamson County* not as a jurisdictional limit, but merely as a Supreme Court mandate with which the court was forced to comply.[320] In spite of this conflicted interpretation, a number of common themes pervade the First and Seventh Circuits' jurisprudence, revealing their primary motivations behind applying exhaustion.[321]

2. Uncovering 'Takings in Disguise'

These circuits' primary motivation to apply exhaustion is to prevent plaintiffs from circumventing *Williamson County* by labeling their takings claims as SDP claims.[322] Numerous advantages are associated with framing one's claim as SDP rather than as a takings, such as more favorable

314. *Id.* at 290 (noting the different elements of SDP and other claims, which if relied upon, distinguish them from takings analysis).

315. Downing/Salt Pond Partners, L.P. v. Rhode Island, 643 F.3d 16, 28 (1st Cir. 2011) (declining to consider arguments that *Williamson County* ripeness applies only to takings claims), *cert. denied*, 132 S. Ct. 502 (2011).

316. *Id.* (noting that the First Circuit has "previously held that a plaintiff cannot, merely by recasting its takings claim 'in the raiment of a due process violation,' evade the *Williamson County* ripeness requirements").

317. *Compare id.* at 20 (noting that federal courts lack jurisdiction before the *Williamson County* prongs are satisfied), *and* Flying J Inc. v. City of New Haven, 549 F.3d 538, 544 (7th Cir. 2008) ("The point of *Williamson County* is that there is no case or controversy within the meaning of Article III until the plaintiff has pursued all available remedies in state court."), *with* Peters v. Vill. of Clifton, 498 F.3d 727, 734 (7th Cir. 2007) ("*Williamson County*'s ripeness requirements are prudential in nature.").

318. *See* Forseth v. Vill. of Sussex, 199 F.3d 363, 370 (7th Cir. 2000) (noting that SDP claims must satisfy exhaustion before federal courts have jurisdiction).

319. 498 F.3d 727 (7th Cir. 2007).

320. *See id.* at 734 (explaining that the prudential nature of *Williamson County* does not empower federal courts to deviate from Supreme Court requirements).

321. *See infra* notes 322–34 and accompanying text.

322. *E.g.*, River Park, Inc. v. City of Highland Park, 23 F.3d 164, 167 (7th Cir. 1994) (explaining that one cannot "avoid *Williamson* by applying the label 'substantive due process'" to their claim).

remedies and presumably less stringent ripeness requirements, which incentivizes plaintiffs to frame what are essentially takings challenges as SDP claims.[323] The Seventh Circuit closes this apparent loophole to *Williamson County* by applying exhaustion to SDP claims that are "essentially a takings claim."[324] Consequently, any SDP claim—regardless of the allegations therein—when "based on the same facts as a takings claim," is subject to exhaustion.[325] Similarly, the First Circuit applies exhaustion to claims based on "other legal theories . . . that, in substance, allege no more than a takings claim."[326] These claims, whose "key issues" are the same as a takings claim, are therefore subject to *Williamson County*.[327] While the Second, Third, Ninth, and Eleventh Circuits thus distinguish between these disguised due process takings and SDP claims for ripeness purposes,[328] the First and Seventh Circuits do not.

3. Reluctance to Decide Substantive Due Process Claims

The Seventh and First Circuits' general skepticism of SDP claims also fuels their application of exhaustion.[329] These courts are disinclined to hear SDP claims because the chances of successfully stating an SDP claim are rather low.[330] Indeed, when addressing SDP claims, courts in these circuits often note the minimal chances plaintiffs have in succeeding on an SDP claim.[331] This high threshold to success, combined with the local nature of these land use disputes,[332] results in a severe aversion to federal adjudication of SDP claims. Requiring plaintiffs to first bring these claims

323. TJ's S., Inc. v. Town of Lowell, 895 F. Supp. 1116, 1122 (N.D. Ind. 1995) (noting that SDP became the "theory of choice" in the Seventh Circuit because the remedies and procedural requirements were different than those associated with takings), *amended by* 924 F. Supp. 92 (N.D. Ind. 1996).

324. *Id.*; *see, e.g.*, *River Park*, 23 F.3d at 167 ("Labels do not matter. A person contending that state or local regulation of the use of land has gone overboard must repair to state court."); Hamed v. City of Belleville, No. 09–cv-718-DRH, 2010 WL 3359460, at *3 (S.D. Ill. Aug. 23, 2010) (explaining that *Williamson County* applies to takings claims "guised" as SDP violations).

325. Greenfield Mills, Inc. v. Macklin, 361 F.3d 934, 961 (7th Cir. 2004).

326. Downing/Salt Pond Partners, L.P. v. Rhode Island, 698 F. Supp. 2d 278, 289 (D.R.I. 2010), *aff'd*, 643 F.3d 16 (1st Cir. 2011), *cert. denied*, 132 S. Ct. 502 (2011).

327. *Id.* (identifying claims whose key issues are the same as takings claims subject to the same ripeness requirements); *see supra* notes 309–10 and accompanying text.

328. *See supra* notes 264–68 and accompanying text.

329. *TJ's S., Inc.*, 895 F. Supp. at 1122 (explaining that because SDP claims pass "constitutional muster easily," Seventh Circuit courts consider such challenges more appropriately filed in state court), *amended by* 924 F. Supp. 92 (N.D. Ind. 1996).

330. *E.g.*, Polenz v. Parrott, 883 F.2d 551, 558 (7th Cir. 1989) ("[T]he federal courts are not zoning boards of appeal and will not overturn merely erroneous decisions."); *supra* notes 35–40, 68, 306 and accompanying text.

331. *See, e.g.*, Forseth v. Vill. of Sussex, 199 F.3d 363, 369 (7th Cir. 2000) (explaining that a hurdle to success through SDP theory "would be high and difficult" to clear); Gamble v. Eau Claire Cnty., 5 F.3d 285, 287 (7th Cir. 1993) (noting that success under SDP theory is "rare"); *Polenz*, 883 F.2d at 558 ("[A] plaintiff bears a very heavy burden in a substantive due process action attacking a decision of local zoning officials.").

332. *See, e.g.*, Covington Court, Ltd. v. Vill. of Oak Brook, 77 F.3d 177, 178 (7th Cir. 1996) (noting that the SDP claim involved an "attempt to convert a decidedly local issue into a constitutional takings claim").

in state court thus provides an easy dismissal mechanism for SDP claims.[333] As such, exhaustion operates as a tool to avoid adjudicating SDP claims.[334]

The Seventh Circuit's reluctance to hear land use disputes is further evidenced by an additional essential element of SDP claims that only it requires.[335] To state an SDP claim in the Seventh Circuit, one must show "1) that the state's decision was arbitrary and irrational, and 2) that the state committed a separate constitutional violation or that state law remedies are inadequate."[336] Although it has acknowledged its status as the lone circuit requiring proof of a separate constitutional violation,[337] the Seventh Circuit notes its desire to exercise a "disciplined jurisprudence" in deciding land use disputes to justify its extra pleading requirement.[338] This supplemental element underscores the Seventh Circuit's disinclination to entertain SDP claims in general, as it heightens the already onerous burden a plaintiff must show to bring an SDP claim.[339]

In sum, two primary concerns fuel the Seventh and First Circuits' application of exhaustion. First, its across the board application to all SDP claims ensures crafty litigants asserting disguised takings claims do not evade *Williamson County*'s requirements.[340] Second, these circuits are simply reticent to hear SDP claims in general, and use exhaustion to decrease the frequency with which they are forced to adjudicate them.[341] When comparing this more stringent ripeness standard with the less onerous requirements of the Second, Third, Ninth, and Eleventh Circuits, however, one ripeness analysis emerges as superior.

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333. *See* 1 ZIEGLER, *supra* note 6, § 3:18 (noting that some federal courts impose ripeness to bar review of SDP claims).

334. *E.g.*, Hager v. City of W. Peoria, 84 F.3d 865, 869–70 (7th Cir. 1996) (dismissing an SDP claim when exhaustion was unsatisfied); *see* Rohr, *supra* note 127, at 1824 (indicating that the Seventh Circuit broadly interprets *Williamson County* to keep local zoning disputes in state court).

335. *Compare supra* note 232 and accompanying text, *with infra* note 336 and accompanying text. Even the First Circuit does not require this extra element, for that matter. *See* Mongeau v. City of Marlborough, 492 F.3d 14, 17 (1st Cir. 2007) (explaining that SDP is violated by constitutional deprivation through conscious shocking action by governmental official).

336. Contreras v. City of Chi., 119 F.3d 1286, 1295 (7th Cir. 1997); *see* Gen. Auto Serv. Station v. City of Chi., 526 F.3d 991, 1000–01 (7th Cir. 2008) (indicating that SDP land use challenges must allege an arbitrary action and an independent constitutional violation, or inadequacy of state law remedies).

337. Doherty v. City of Chi., 75 F.3d 318, 325–26 (7th Cir. 1996) (noting that other circuits require neither a separate constitutional violation, nor inadequacy of remedies).

338. *Id.* at 325 (noting that "[a]s a result" of a need for disciplined jurisprudence in zoning disputes, courts in the Seventh Circuit require an additional constitutional violation or inadequacy of state remedies).

339. *See supra* notes 10, 36–40, 61, 63, 66–67 and accompanying text (courts rarely strike down regulations).

340. *See supra* notes 322–27 and accompanying text.

341. *See supra* notes 329–38 and accompanying text.

IV. THE FIRST AND SEVENTH CIRCUITS' APPLICATION OF EXHAUSTION IS UNNECESSARY, INEFFICIENT, AND UNJUST

As discussed in Part III, circuits that exempt SDP claims from exhaustion focus on different ripeness concerns than those that require exhaustion. In balancing these considerations against the need for efficiency and equity, however, it is clear that applying exhaustion to SDP claims simply does not make sense.

This part argues that exhaustion should not be applied to SDP claims for three primary reasons. First, because SDP claims ripen once they satisfy finality, federal courts can thus properly adjudicate them at this point.[342] Second, because exhaustion is inefficient—as it astronomically increases SDP plaintiffs' costs and needlessly depletes state court resources,[343] while simultaneously stagnating land development[344]—its application is, frankly, wasteful. Finally, as exhaustion arms defendants with an unfair procedural tool, its application to SDP claims is particularly unjust, further exposing the erroneous logic behind its application.[345]

A. Substantive Due Process Claims Ripen Once Regulations Are Finally Applied to Property

First and foremost, exhaustion should not be applied to SDP claims because SDP claims ripen upon satisfying finality. As required,[346] once the regulations at issue are finally applied, there is a clear record from which a court can ascertain all the relevant facts and make an accurate and just decision regarding whether regulations are arbitrary.[347] After this threshold inquiry is met, a court has all the facts necessary to properly decide SDP claims.[348] A suit pursuing just compensation is entirely irrelevant to the validity of land use regulations, and has no effect on any facts relevant to an SDP claim.[349] Therefore, padding the factual record with the inevitably irrelevant facts resulting from the just compensation claim furthers no legitimate purpose in an SDP ripeness analysis.

Moreover, the defendant's action is complete once regulations are finally applied, as the disputed regulations have affected the property, and the plaintiff has sustained a concrete injury if the regulations violate SDP.[350] Deferring judgment at this point does not further the central aim of ripeness, to avoid rendering unnecessary decisions,[351] as judicial intervention could resolve the central issue at hand: whether the challenged regulations further

342. *See infra* Part IV.A
343. *See infra* Part IV.B.1.
344. *See infra* Part IV.B.2.
345. *See infra* Part IV.C.
346. *See supra* note 158 and accompanying text.
347. *See supra* notes 181, 184–85 and accompanying text (indicating that finality ensures that the record is fully developed, and that there is a concrete injury requiring judicial redress).
348. *See supra* notes 221–22, 262–63 and accompanying text.
349. *See supra* Part I.D.1.b (SDP and takings are separate claims).
350. *See supra* Part III.A, notes 255–58, 262–63 and accompanying text.
351. *See supra* note 150 and accompanying text.

a legitimate governmental interest.[352] Consequently, SDP claims are ripe upon achieving finality, and federal courts have jurisdiction to hear SDP claims at this point in the litigation.[353]

Despite SDP claims ripening at finality, the First and Seventh Circuits claim *Williamson County* clearly mandates that SDP claims must satisfy exhaustion.[354] This, however, ignores the text and facts of that seminal case. As discussed, *Williamson County* dealt with a regulatory taking.[355] The exhaustion requirement thus resulted from the unique circumstances of the takings claim facing the Court.[356] In regulatory takings, exhaustion ensures that plaintiffs have suffered an injury—a taking without just compensation—by forcing them to be denied just compensation in state court.[357] In contrast, commanding SDP plaintiffs to pursue compensation furthers no logical purpose, as these litigants do not even seek such a remedy.[358] Indeed, the Second, Third, Ninth, and Eleventh Circuits correctly note that this fact was essential to *Williamson County*'s holding.[359] Conversely, the First and Seventh Circuits' expansive reading of *Williamson County* results neither in changes to the record, nor in changes to the position of the parties post-exhaustion, which render SDP claims more fit for judicial review. In fact, prudential ripeness considerations overwhelmingly fuel their application of exhaustion,[360] rendering arguments that they lack jurisdiction to hear SDP claims inapposite.

Although ripeness is integral in determining whether a federal court can properly adjudicate claims, it cannot be used as a construct to prevent plaintiffs from vindicating federal rights in federal courts merely because their federal rights arise in the land use context.[361] Nonetheless, one of the primary reasons the First and Seventh Circuits apply exhaustion is to prevent their dockets from resembling a federal zoning board of appeals.[362] Despite the numerous reasons why these circuits propose that land use claims are more apt for state court resolution,[363] § 1983 SDP claims are a federal cause of action over which federal courts have jurisdiction.[364] But for the expansive reading of *Williamson County* adopted by these circuits, jurisdiction over § 1983 SDP claims would be a given.[365] As a result, that

352. *See supra* notes 51–52 and accompanying text.
353. *See supra* note 181 and accompanying text.
354. *See supra* notes 317–21 and accompanying text.
355. *See supra* notes 171–78 and accompanying text.
356. *See supra* notes 199–200 and accompanying text.
357. *See supra* notes 199–201 and accompanying text (indicating that no constitutional violation, and thus no case or controversy, exists until compensation is denied).
358. *See supra* notes 255–58 and accompanying text.
359. *See supra* notes 252–59 and accompanying text.
360. *See supra* notes 322–34 and accompanying text (indicating that docket control and efficiency are primary motivations behind exhaustion).
361. *See supra* notes 202–03, 329–32 and accompanying text.
362. *See supra* notes 329–34 and accompanying text.
363. *See supra* notes 329–32 and accompanying text.
364. *See supra* notes 54–55, 140–41, 283, 294, 304 and accompanying text.
365. *See supra* notes 138–41 and accompanying text.

the First and Seventh Circuits are not federal zoning boards of appeal is of no matter;[366] at stake in SDP claims are constitutional rights, which the federal courts are empowered, indeed required, to vindicate.[367] In fact, a central purpose of federal courts is to facilitate vindication of federal rights,[368] whatever the context may be. Nevertheless, exhaustion impedes plaintiffs' access to the federal court system, unnecessarily requiring them to file suit in state court, simply due to the context in which their constitutional claim arises.[369]

To be sure, the First and Seventh Circuits are correct in applying exhaustion to takings in disguise.[370] In fact, applying exhaustion to these claims is consistent with *Williamson County*[371] and the weight of the circuits.[372] Exhaustion is only illogical when applied to SDP claims that are not actually takings in disguise. Nonetheless, the First and Seventh Circuits' blanket rule that all SDP claims based on the same facts as a taking must be takings in disguise is overly broad,[373] applying more to SDP claims than to just takings claims labeled as such. Because the Supreme Court has mandated that takings and SDP claims must be analyzed separately,[374] the First and Seventh Circuits must apply distinct ripeness standards to each claim. Like the Second, Third, Ninth, and Eleventh Circuits, the First and Seventh Circuits should distinguish between takings in disguise and bona fide SDP claims,[375] applying exhaustion only to the former.

B. Exhaustion's Side Effects Render It Inefficient

In addition to furthering no logical purpose in SDP ripeness, exhaustion certainly lives up to its name in the First and Seventh Circuits. Instead of guiding courts to properly adjudicate disputes, exhaustion depletes both plaintiffs' and state courts' resources by unnecessarily prolonging and complicating land use challenges. Although exhaustion does provide these circuits with an easy dismissal mechanism to keep their dockets clear of land use disputes,[376] it comes at an unjustifiable cost.

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366. *See supra* note 334 and accompanying text. In any event, circuits exempting SDP claims also share this concern. *See supra* notes 300–01, 329–34, and accompanying text. If they can hear SDP claims, so too can the First and Seventh Circuits.

367. *See supra* notes 135–41 and accompanying text.

368. *See supra* note 139 and accompanying text.

369. *See supra* note 281 and accompanying text (indicating that federal civil rights suits normally do not require exhaustion, except in the land use context).

370. *See supra* notes 322–27 and accompanying text.

371. *See supra* note 177 and accompanying text (indicating that *Williamson County* may have applied to a due process taking).

372. *See supra* notes 264–68 and accompanying text.

373. *See supra* notes 322–27 and accompanying text.

374. *See supra* notes 104–09 and accompanying text.

375. *Compare supra* notes 264–68 (applying exhaustion only to due process takings), *with supra* Part III.C.2 (applying exhaustion to all SDP claims, presuming that they are takings in disguise).

376. *See supra* notes 300–01, 329–34 and accompanying text.

1. Exhaustion Wastes Plaintiff and State Court Resources

By applying exhaustion to SDP claims, the First and Seventh Circuits order plaintiffs to bring an identical challenge in state court.[377] Nonetheless, since it is so hard to prevail on SDP claims,[378] these circuits should conserve the parties' and state courts' resources by simply reaching the merits of these likely ill-fated suits in the first instance. In SDP ripeness, exhaustion serves prudential goals to fetter out takings in disguise and avoid adjudicating land use disputes.[379] This purportedly efficient use of exhaustion[380] is anything but. Conversely, mandating plaintiffs to refile their likely ill-fated SDP claims in state court does nothing more than waste judicial resources and prolong the near inevitable dismissal of the SDP claim.[381]

An argument in favor of exhaustion—that is, in favor of placing an onerous load on plaintiffs asserting SDP challenges—may sound like this: a high cost associated with asserting SDP claims will deter a large number of plaintiffs from ever filing these mostly unsuccessful suits in the first place. Perhaps this potential deterrent effect motivates the First and Seventh Circuits' application of exhaustion. While this approach does have logical merits, and could theoretically serve to deter some landowners from filing suit, it does not appear to be working. Instead, plaintiffs continue to file SDP claims, prompting repeated dismissals on ripeness grounds.[382] As such, the deterrence sought from applying exhaustion has simply not occurred. Consequently, these circuits should take a different approach to handling SDP claims and reach the claims' merits as soon as possible.

Determining whether a land use regulation violates SDP is a relatively simple task for federal courts: they must only decide whether regulations are so arbitrary or irrational that their application cannot be related to any conceivable legitimate governmental purpose.[383] Perhaps due to the high burden plaintiffs must meet in proving the illegitimacy of land use regulations, most federal courts do not apply exhaustion to SDP claims.[384] Indeed, courts exempting SDP claims from exhaustion are just as deferential to local governments as the First and Seventh Circuits, and it is

377. *See supra* note 192 and accompanying text (indicating that plaintiffs cannot satisfy exhaustion unless they have first filed their SDP challenge in state court).

378. *See supra* notes 10, 36, 40, 67, 250 and accompanying text.

379. *See supra* Part III.C.2–3.

380. *See supra* notes 333, 338 and accompanying text (applying exhaustion to control docket size and exercise judicial restraint).

381. *See supra* notes 10, 36, 40, 67, 250 and accompanying text (indicating that SDP claims are hard to prevail on).

382. *E.g.*, LaFlamboy v. Landek, 587 F. Supp. 2d 914, 949 (N.D. Ill. 2008) (noting that the plaintiff asserted an SDP claim alongside his takings claim without satisfying exhaustion); Schneider v. Cnty. of Will, 190 F. Supp. 2d 1082, 1092 (N.D. Ill. 2002) (noting that the plaintiff asserted an SDP claim independent from a takings claim without satisfying exhaustion); *see supra* note 316 and accompanying text (dismissing an SDP claim for lack of ripeness).

383. *See supra* notes 50–51 and accompanying text.

384. *See supra* Part III.B.

equally difficult to succeed on the merits in other circuits.[385] Notwithstanding such deference, courts not applying exhaustion often manage to reach the merits of SDP claims, directly scrutinizing the disputed regulations.[386] Because courts strongly defer to the validity of land use laws, dismissing SDP claims is easily accomplished.[387] In fact, the First and Seventh Circuits routinely acknowledge that SDP challenges on the merits are almost always destined to fail.[388] As a result, they should be inclined to employ less stringent ripeness standards to enable a dismissal on the merits and definitively terminate the dispute.

Of course, not all SDP claims can be so easily dismissed.[389] Nonetheless, in the unlikely event that a plaintiff does state an SDP violation, is this not the exact reason plaintiffs can challenge land use regulations through § 1983? The entire purpose of allowing plaintiffs to contest land use laws is to allow them to invalidate those that violate their constitutional rights.[390] To avoid adjudicating SDP claims that may actually state a claim, therefore, cannot motivate federal courts' application of exhaustion.

Indeed, even assuming for the sake of argument that it is more efficient to dismiss SDP claims on ripeness grounds rather than on the merits, this alone is not sufficient to justify such a draconian ripeness policy. Indeed, ripeness analyses must balance the benefits of dismissing a case as unripe against the hardships to the parties that may result.[391] There is an utter dearth of such considerations in the First and Seventh Circuits. While these courts do purport to exhibit sympathy for SDP plaintiffs,[392] their failure to act upon this apparent compassion by strictly applying exhaustion reveals the illusory nature of such empathy. On the contrary, these circuits hold a largely negative view of SDP plaintiffs, characterizing them as litigants aiming to game the system by attempting to vindicate a takings claim without first satisfying *Williamson County*'s clear ripeness mandate.[393]

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385. *See supra* notes 36–40, 67 and accompanying text (explaining that federal courts defer to local land use regulations, employing rational basis in determining their validity). In fact, the Third Circuit is even more deferential to local governments than the Seventh. *See* United Artists Theatre Circuit, Inc. v. Twp. of Warrington, 316 F.3d 392, 401 (3d Cir. 2003) (explaining that only conduct which shocks the conscience violates SDP in the land use context).

386. *See, e.g.*, *supra* note 250 (reaching the merits of an SDP claim on a motion to dismiss).

387. *See supra* notes 10, 36, 40, 67 and accompanying text (noting that courts rarely invalidate land use regulations).

388. *See supra* notes 329–30 and accompanying text (explaining that SDP claims are difficult to prevail on); *see also* Anderson v. Chamberlain, 134 F. Supp. 2d 156, 159 n.5 (D. Mass. 2001) (remarking that SDP claims are unlikely to succeed).

389. *See, e.g.*, *supra* note 250 and accompanying text (SDP claim stated).

390. *See supra* note 55 and accompanying text.

391. *See supra* note 161 and accompanying text (indicating that hardship to the parties is an essential element of a prudential ripeness inquiry).

392. *See supra* notes 299–300 and accompanying text (noting troubling allegations).

393. *See supra* notes 291, 307, 316, 322–23 and accompanying text (noting that SDP claims are frequently characterized as takings in disguise).

Entirely absent from the First and Seventh Circuits' ripeness analysis, however, is a consideration of the added costs, both temporal and financial, that applying exhaustion to SDP claims imposes on such plaintiffs.[394] The onerous costs of relitigating SDP claims in state court could potentially prevent plaintiffs from refiling their claim after it is dismissed as unripe. This extreme hardship should therefore play a prominent role in these circuits' ripeness analysis, ultimately leading them to find the case ripe.[395]

2. Exhaustion Stagnates Local Development

In addition to wasting plaintiffs' and state courts' resources,[396] exhaustion also inefficiently stagnates local development by prolonging the duration of land use disputes. When federal courts refuse to reach the merits of SDP claims, the question of whether regulations are valid, and thus how property can be used, remains uncertain.[397] Consequently, in the interim, landowners often do not attempt to develop property in conformity with the challenged regulations, clinging to the hope that the regulations will be invalidated.[398] Such hope is likely false, however. While in rare instances zoning regulations may be invalidated, thereby allowing developers to exploit their property in defiance of land use laws, this is a rare instance indeed; developers will most likely be forced to comply with the challenged regulations.[399] Forcing plaintiffs to refile SDP claims in state court only extends the time that land sits idly by, being put to no efficient use. Exhaustion thus promotes the inefficient use of land in the interim period between the initiation and the resolution of an SDP challenge.

To illustrate, take the aforementioned *Downing* case.[400] There, the developer's plans to develop his sixty-seven acre parcel were halted by the committee's determination that his land was a historic site.[401] In dismissing the developer's SDP challenge as unripe, the underlying validity of the historic designation, and in turn whether the developer could develop his parcel as intensely as he had originally planned, remained uncertain.[402] Had the federal court addressed the SDP claim, the validity of the regulations would have been determined immediately, allowing the developer to devise alternate, compliant modes of development. Instead,

394. *See infra* Part IV.B.2.

395. *See supra* notes 161–62 and accompanying text (explaining that hardships to parties are relevant to ripeness, and should lead courts to find cases ripe if extreme).

396. *See supra* notes 377–82 and accompanying text.

397. *See supra* notes 143–44 and accompanying text (indicating that ripeness precludes federal courts from exercising jurisdiction over claims).

398. *See supra* notes 49–55 and accompanying text (explaining that SDP claims allege that the regulations are invalid).

399. *See supra* notes 10, 36–40, 63, 67 and accompanying text (noting that regulations are rarely invalidated).

400. *See supra* notes 311–16 and accompanying text.

401. *See supra* note 313 and accompanying text.

402. *See supra* note 316 and accompanying text (dismissing case as unripe, instead of reaching the merits).

the litigation continued to the First Circuit, where, once again, the court declined to reach the merits of the SDP claim, as the claim remained unripe.[403] Despite two chances to uphold or strike down the committee's decision, the federal courts passed the buck to the state court, which only prolonged the length of time the committee's determinations remained in question. In turn, the developer never implemented alternative plans, and his land remained undeveloped while the dispute dragged on.

Notably, this inefficient side effect of exhaustion is absent in takings claims. Takings plaintiffs do not challenge the validity of land use regulations, but instead aim to collect just compensation due to regulations interfering with the use of their land.[404] Consequently, such plaintiffs are more likely to comply with unfavorable regulations even while their just compensation claims are unresolved, as the regulations themselves are not at issue. As such, sending takings plaintiffs to state court does not stagnate development, because how the land can ultimately be used is not at issue there.

C. Exhaustion Provides an Unjust Procedural Advantage to Defendants

The inequity of applying exhaustion to SDP claims is further evidenced by the unjust practical advantage it affords to SDP defendants. Applying exhaustion to these claims leaves plaintiffs susceptible to crafty procedural moves by defendants, who can, without any fault of the plaintiffs, 'unripen' SDP claims.

The federal removal statute, 28 U.S.C. § 1441,[405] allows defendants to remove a claim brought in state court to federal court.[406] In circuits applying exhaustion to SDP claims, § 1441 transforms from a mere procedural tool into a mighty weapon, empowering defendants to remove ripe SDP claims filed in state court to federal court, rendering the claim unfit for review.[407] This procedural maneuver exponentially increases the time and cost associated with SDP challenges, forcing plaintiffs to futilely litigate an unripe claim in federal court. Nonetheless, the First and Seventh Circuits have opened the door to such conduct, and are frequently faced with such claims.[408] The draconian nature of exhaustion is amplified in the removal context, as it demonstrates how plaintiffs, even when trying to comply with federal court mandates, are at the behest of defendants seeking to delay plaintiffs' SDP challenges.

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403. *See supra* notes 315–16 and accompanying text.
404. *See supra* notes 106–07 and accompanying text.
405. 28 U.S.C. § 1441 (2006).
406. *See supra* note 134 and accompanying text.
407. *E.g.*, 8679 Trout, L.L.C. v. N. Tahoe Pub. Utils. Dist., No. 2:10-CV-01569-MCE-EFB, 2010 WL 3521952, at *5 (E.D. Cal. Sept. 8, 2010) ("Although the claim was ripe when it was originally filed in state court, it became unripe the moment that Defendants removed it.").
408. *E.g.*, CBS Outdoor, Inc. v. Vill. of Itasca, No. 08 C 4616, 2009 WL 3187250, at *2 (N.D. Ill. Sept. 30, 2009) (describing how the defendants removed the SDP claim, then pursued dismissal on ripeness grounds); Anderson v. Chamberlain, 134 F. Supp. 2d 156, 159–60 (D. Mass. 2001) (same).

In cases where plaintiffs originally filed an SDP challenge in state court, it is only fair for the First and Seventh Circuits to reach the merits of the claim at hand. In fact, the Ninth Circuit has already adopted this approach.[409] Because courts have jurisdiction over SDP claims that satisfy finality,[410] not reaching the merits of SDP claims removed to federal court by the defendant is simply unjust.

CONCLUSION

Ripeness is an essential criterion that federal courts use to ensure that they function properly and efficiently. Federal courts are understandably concerned with docket control and want to avoid adjudicating petty disputes better suited for state court. These concerns create a tension in SDP claims, however, as they are almost always local disputes that also implicate federal constitutional rights.

Although land use disputes may not carry the same weight as other federal causes of action, they are still often a cognizable federal claim entitled to federal jurisdiction. As such, it is inappropriate for federal courts to manipulate their ripeness analysis to avoid hearing these claims. Due to this conflict of interest, the Supreme Court, like it did for regulatory takings, should announce a clear ripeness requirement for SDP claims, binding federal courts to an irrefutable standard of action. By clarifying the ripeness standard, the Supreme Court can eliminate confusion over the appropriate venue for SDP claims, simplifying the litigation surrounding these often-heated land use disputes.

409. *E.g.*, McClung v. City of Sumner, 548 F.3d 1219, 1223–24 (9th Cir. 2008) (assuming that a takings claim was ripe after municipal defendants removed the case to federal court).

410. *See supra* Parts III.A–B, IV.A.