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Regulatory Takings and Ripeness in the Federal Courts

*Gregory M. Stein**

I. INTRODUCTION 3
II. REGULATORY TAKINGS AND RIPENESS 6
  A. *Regulatory Takings Law* 7
  B. *The Ripeness Doctrine* 11
    1. Ripeness, in General 11
    2. Modifying the Ripeness Doctrine for Land Use Cases 14
    3. The Land Use Ripeness Cases 17
III. PINPOINTING THE FOUR CRITICAL MOMENTS IN A SUCCESSFUL REGULATORY TAKINGS CLAIM 26
  A. *The Effective Moment* 27
  B. *The Ripeness Moment* 29
  C. *The Decision Moment* 31
  D. *The Cessation Moment* 31
  E. *Summary of the Four Critical Moments* 32
IV. THE PROBLEMATIC SEQUENCE OF EVENTS IN A SUCCESSFUL REGULATORY TAKINGS CASE 32
  A. *The Sequence of Critical Moments in a Successful Case* 34

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1. The Effective Moment Must Precede the Cessation Moment 34
2. The Ripeness Moment Must Precede the Decision Moment 35
3. The Effective Moment Must Precede the Decision Moment 35
4. The Effective Moment Must Precede the Ripeness Moment 36
5. The Sequence of Moments 40

B. *Typical Regulatory Takings Cases Are Highly Sensitive to Delays* 40
1. The Typical Regulatory Takings Plaintiff 41
2. The Typical Regulatory Takings Transaction 44
3. The Typical Regulatory Takings Defendant 45

V. SOME POSSIBLE SOLUTIONS 48

A. *Reexamining the Effective Moment and the Ripeness Moment* 52
1. Reaching the Earliest Possible Ripeness Moment under Existing Law 52
2. Reaching an Earlier Ripeness Moment by Modifying Existing Law 54
3. Creating Exceptions to the Ripeness Test: The Analogy to Mootness 55
4. Redefining the Effective Moment 59

B. *Streamlining the Ripening Process* 61
1. Creating a State Land Use Court 62
2. Enacting a Model State Inverse Condemnation Act 63

C. *Rethinking the Relevance of the Due Process Clause* 66
1. Takings Law Contrasted with Procedural Due Process Law 66
2. The Ripeness Standard Applicable to Procedural Due Process Cases 71
3. Procedural Due Process Claims in the Lower Federal Courts 76
4. Problems with the Procedural Due Process Approach 80

5. Summary of the Procedural Due Process Proposal 84
D. *Putting These Suggestions Together* 85
1. Recognizing Interim Due Process and Takings Violations 85
2. Combining These Proposals 89
E. *Consigning Regulatory Takings Cases to the State Courts or to Non-Judicial Forums* 92
VI. CONCLUSION 98

I. INTRODUCTION

Property owners and land use regulators routinely disagree as to how land should be used. Owners who wish to develop property often view local regulators as narrow-minded provincials who are struggling to latch the municipal door behind themselves. To these property owners, regulators seem to want to block any activity that might change the character of their community and disappoint their own unreasonable expectations as to how their town should remain. For their part, municipal officials frequently see developers as outsiders who hope to overbuild on every square inch of local property. To a zoning board, such a developer appears to want to maximize his own wealth even if this means annoying local residents, overtaxing municipal facilities, and damaging the environment.

But despite their customary sharp differences, owners and regulators are united by a common problem: Supreme Court case law leaves each group uncertain of its rights under the Takings Clause.[1] If a landowner wishes to argue in federal court that a state or local development limitation amounts to a regulatory taking, both sides face years of litigation with an unpredictable result that could prove ruinous to at least one of the litigants.[2]

This result is caused by the Supreme Court's failure to fashion suitable rules for lower federal courts to follow in deciding regulatory takings cases. First, the Court has only partially detailed when a case is sufficiently ripe such that a federal court may exercise

1. The Takings Clause states, "nor shall private property be taken for public use, without just compensation." U.S. Const., Amend. V. The Takings Clause applies te the states through the Fourteenth Amendment. *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 239 (1897). See Part II.A.

2. This Article examines federal actions challenging state or local land use laws, but not federal actions cballenging federal land use laws. For a discussion of the distinction between the two, see note 48.

jurisdiction.[3] Second, the Court has been unable to establish rules for determining in any predictable fashion when a regulation is so excessive as to amount to a taking.[4] Finally, the Court has only partially addressed the question of how to calculate the appropriate compensation in the event a regulation does effect a taking.[5]

The Court's incomplete expositions of takings procedure, takings law, and takings remedies leave litigants with an unusually high level of risk and uncertainty during the years of disagreement[6] and can lead to the financial devastation of one or both of the parties. Landowners and regulators must make a variety of critical decisions early in the regulatory process without knowing the legal consequences of those decisions and without knowing how many years it will be before they will learn those legal consequences. In many cases, landowners do not have the financial ability to survive the

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3. There are two reasons why federal courts should not hear unripe claims. First, Article III courts are constitutionally limited to deciding cases or controversies. U.S. Const., Art. III, § 2. Second, prudent courts do not wish to reach speculative decisions based upon incomplete records. See Parts II.B.1 and II.B.2.

The Supreme Court has fleshed out a ripeness test for land use cases in a series of decisions over a fourteen-year period, developing a compulsory process for litigants that is protracted, difficult, and expensive. See generally *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). In spite of all of this case law, the Court has left some important questions unanswered. See Part II.B.3.

See also *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 17 (1990) (holding that a takings claim arising under federal law was unripe); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1019 (1984) (holding the same as to some of plaintiff's claims arising under federal law).

4. In conceding that the only way te identify most regulatory takings is on an ad hoc basis, the Court has offered only limited guidance to state and federal courts. See, for example, *Penn Central*, 438 U.S. at 124 (noting that "[i]n engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance").

5. The Court held in *First English* that if a municipality regulates property to such a degree that a court later concludes that the property has effectively been taken, then the municipality is required to pay just compensation to the landowner for the duration of the taking. 482 U.S. at 322. See also notes 23-28, 90-92 and accompanying text. This compensation is constitutionally dictated for a regulatory taking even if the taking was unintentional and even if it turns out to be only temperary. *First English*, 482 U.S. at 319. Because the municipality always retains the right to relax enforcement of the regulation, id. at 321, the taking may prove to be only a temporary taking. See Part III.D. The Court has not yet addressed in any greater detail the question of how to calculate just compensation for a temporary or permanent regulatory taking.

6. The ripeness requirement can cause these cases to take years to resolve. See, for example, *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, 1371 (11th Cir. 1993) (holding for the city after seventeen years); *Westborough Mall, Inc. v. City of Cape Girardeau*, 953 F.2d 345, 348 (8th Cir. 1991) (holding for the city seventeen years after landowner began planning a regional shopping mall); *Wheeler v. City of Pleasant Grove*, 896 F.2d 1347, 1349 (11th Cir. 1990) (holding for the landowner after eleven years).

extended ripening process and must abandon their development plans. In the smaller number of cases in which plaintiffs can survive to reach federal court, the court will have to reach a decision with drastic financial consequences based on little case law guidance. And in the occasional case in which the municipality loses, it may face bankrupting liability.

Thus, regulatory takings law and the ripeness doctrine frequently operate at cross purposes. Plaintiffs whose rights must be protected quickly if they are to be protected at all may be fatally delayed by a doctrine that is designed—with good reason—to limit their access to federal court. Defendants who blunder into effecting a taking will pay unnecessarily large awards, augmented by the years of regulatory bickering during which the just compensation meter was silently ticking. And federal courts have shown little inclination to address this doctrinal clash, with few courts even acknowledging that they appreciate the problem.

This Article describes the often unrecognized conflict between regulatory takings law[7] and the ripeness doctrine and offers a number of resolutions to it. Part II provides a brief background of regulatery takings law and the ripeness doctrine. Part III identifies and pinpoints the four critical events in a successful regulatory takings claim. In particular, these two Parts attempt to establish both the moment when a regulatory taking becomes effective and the moment when a regulatory takings claim ripens.

Part IV focuses on the *sequence* of these critical events. Most significantly, this Part emphasizes a fundamental timing point that many courts and commentators fail to recognize: A regulatory taking must become effective months or years before a federal takings claim can ripen. As a result, a landowner may possess a valid constitutional claim that cannot be remedied for quite some time. Litigants in many areas of the law may experience delays after suffering a wrong and before securing a remedy. However, the parties and transactions seen in the typical regulatory takings case, which this Part examines in detail, are unusually sensitive to lengthy delays. The result is that the ripeness doctrine, intended only to establish justiciability, often determines the outcome of these cases long before they can be tried.

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7. Many courts and commentators refer to this conflict as the "temporary takings" problem. But when a regulatory taking begins, it is usually impossible to know whether or when it will end. See Part III.D. Thus, the conflict that is the subject of this Article is more accuratoly described as a regulatory takings problem, and the discussion in this Article applies beth to temporary and permanent regulatory takings, except as otherwise noted. See also note 27.

Finally, Part V offers a number of proposals to reduce this doctrinal tension. These proposals are aimed at different participants in the land use process at all levels of government and set forth a variety of options for speedier resolution of these expensive and emotional disputes. By streamlining the process in one way or another, each of these suggestions seeks to increase the likelihood that judicial decisions will be based on the merits of the arguments and not the stamina of the litigants. These suggestions also aim to minimize the financial havoc that may await whichever party fails to meet a blurry constitutional standard.

In particular, this Part recommends that property owners and courts rely more heavily on procedural due process arguments. In many cases, it is not the *result* of the municipal permitting process that causes problems for litigants, but rather the process itself. Therefore, this Part offers suggestions for reducing the procedural delays characteristic of so many regulatory takings cases. Accomplishing this goal will shorten the time between an alleged wrong and a judicial decision, thereby diminishing the parties' uncertainty and the size of any award that might result, without necessarily favoring either of the parties on the substantive takings law issue.

II. REGULATORY TAKINGS AND RIPENESS

At first glance, the jurisdictional ripeness standard might seem unlikely to thwart the just compensation requirement—in fact, the two appear to have little relationship to each other. Ripeness is a jurisdictional matter arising under Article III of the United States Constitution that also raises substantial questions of judicial prudence, forcing a federal court to decide whether it can and should hear each case.[8] While the Supreme Court has been developing a ripeness test tailored to land use cases since 1978,[9] ripeness issues most often arise in contexts other than land use cases. In contrast, the existence and compensability of regulatory takings were confirmed directly by the Court in 1987, in *First English Evangelical Lutheran Church v. County of Los Angeles*.[10] This decision

8. Federal courts that are deciding whether to hear cases that arise under state or local law must also consider the extent to which principles of federalism preclude their involvement. See Part V.E.

9. See Part II.B.3.

10. 482 U.S. at 319. See Part II.A.

conclusively resolved substantive Fifth Amendment questions that had plagued state and federal courts for years.

In spite of their apparent disjunction, these two doctrines tend to become entangled, because regulatory takings cases by their nature are likely to raise ripeness issues as well. A regulatory taking, as the Supreme Court has defined that term, is not an event. Rather, it is a post hoc conclusion about an earlier, often prolonged series of events. Landowners commonly initiate litigation as this sequence of events is unfolding, when a court is not yet in a position to determine whether a taking has occurred. As a result, the Supreme Court has applied a particularly tough ripeness standard in land use cases, thereby ensuring that regulatory takings law and ripeness doctrine remain intertwined. Part II.A provides a brief summary of regulatory takings law and Part II.B gives an overview of the Court's ripeness cases.

A. Regulatory Takings Law

Both the federal government[11] and the states[12] may take private land for a public purpose, provided that the private owner receives just compensation. States may delegate this power to local government bodies or to quasi-governmental agencies.[13] The public purpose requirement has been broadly construed, allowing condemnation for a wide variety of reasons.[14]

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11. The Fifth Amendment confirms the power of the federal government to condemn property. U.S. Const., Amend. V; *United States v. Carmack*, 329 U.S. 230, 241-42 (1946) (calling the Takings Clause "a tacit recognition of a pre-existing power").

12. The power of eminent domain is an inherent power of the states as sovereign entities. U.S. Const., Amend. X; *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79 (1907); *Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878). The states' power of eminent domain is limited, however, by the Due Process Clause of the Fourteenth Amendment, *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158 (1896), and by the Takings Clause, which has been held to apply to the states through the Fourteenth Amendment, *Chicago B. & Q. R. Co.*, 166 U.S. at 236. Most states have provisions that correspond to the Takings Clause in their own constitutions; all of the remaining states except for North Carolina reach the same result by state statute or case law. See generally Julius L. Sackman and Patrick J. Rohan, 1 *Nichols' The Law of Eminent Domain* § 1.3 at 1-97-1-102 (Matthew Bender, rev. 3d ed. 1992).

13. States are permitted to delegate their eminent domain powers te localities, see, for example, Cal. Const., Art. 11, § 11, or te quasi-governmental entities such as utilities, see, for example, Fla. Stat. Ann. § 361.13(2) (West Supp. 1994); Tenn. Code Ann. § 29-17-301 (1980 & Supp. 1993) (delegating condemnation power to the University of Tennessee); *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 399 (1979) (holding that action hy a regional planning agency created by a bi-state compact was taken under color of state law within the meaning of 42 U.S.C. § 1983). See also *Boom Co.*, 98 U.S. at 406 (holding that the power of eminent domain may be delegated to private corporations provided that the public use requirement is satisfied).

14. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 245 (1984) (finding public purpose in federal court challenge to state law requiring large landowners to sell certain parcels to their tenants so as te disperse land ownership); *Berman v. Parker*, 348 U.S. 26, 30 (1954) (finding

While the Court has resolved many of the major issues that arise in direct condemnation cases, inverse condemnation law remains unsettled. In an inverse condemnation dispute, a municipality will take some action short of a direct condemnation that restricts a private landowner's use of her property, often substantially, without explicitly taking it.[15] The landowner typically argues that, although the enactment is not an explicit condemnation, it has the same effect as an outright taking. Such claims are referred to as inverse condemnation claims because the landowner, rather than the municipality, initiates litigation.[16] Zoning laws,[17] environmental protection laws,[18] historic preservation laws,[19]

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public purpose in federal urban renewal law which had been challenged in federal court). See also *City of Oakland v. Oakland Raiders*, 32 Cal. 3d 60, 646 P.2d 835, 844 (1982) (finding sufficient likelihood of public purpose to survive preliminary motion by property owner challenging state law that might have permitted city to condemn sports franchise to prevent it from relocating); *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 304 N.W.2d 455, 458 (1981) (finding public purpose in state law that allowed city to condemn privato property and then resell it to a private company). See generally Richard A. Epstein, *Takings: Private Property and the Power of Emincnt Domain* 161 (Harvard U., 1985) (calling the nature of the public use requirement an "empty question"). As a result of this broad construction of the public use requirement, most of the recent litigation in the direct condemnation area concerns the just compensation requirement, with landowners disputing proposed awards and courts faced with conflicting appraisals and disagreements as to which of many valuation methods to apply.

15. This Article examines only inverse *regulatory* condemnations. An inverse condemnation can also arise when government action provides for the physical occupation of private property without just compensation. Such actions have consistently been held to constitute compensable takings. See, for example, *Loretto v. Teleprompter Manhattan CATV*, 458 U.S. 419, 421 (1982) (finding taking when state law leads to permanent physical occupation of privato property); *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979) (reaching similar result under federal law); *Seawall Aesociates v. City of New York*, 74 N.Y.2d 92, 542 N.E.2d 1059, 1061 (1989) (reaching similar result in state court under state law). The difficult timing questions that arise in inverse regulatory takings cases are generally much easier to answer when there is a physical occupation with an easily identified beginning and ending.

16. *United States v. Clarke*, 445 U.S. 253, 257 (1980). See also Donald G. Hagman and Julian Conrad Juergensmeyer, *Urban Planning and Land Development Control Law* 606-07 (West, 2d ed. 1986); 27 Am. Jur. 2d *Eminent Domain* § 478 (1966).

17. See, for example, *Smith v. Anchorage Associates*, 131 Misc.2d 622, 501 N.Y.S.2d 751, 756 (S. Ct., 1986), aff'd, 122 A.D.2d 788, 505 N.Y.S.2d 673 (1986) (addressing houseboat zoning); *Cider Barrel Mobile Home Court v. Eader*, 287 Md. 571, 414 A.2d 1246, 1250 (App., 1980) (addressing mobile home zoning); *State v. Lewis*, 406 A.2d 886, 888 (Maine 1979) (addressing junkyard zoning).

18. See, for example, *Esposito v. South Carolina Coastal Council*, 939 F.2d 165, 170 (4th Cir. 1991) (holding that state Beachfront Management Act enacted to preserve dune system did not effect a taking); *Kinzli v. City of Santa Cruz*, 620 F. Supp. 609, 624 (N. D. Cal. 1985), rev'd on other grounds, 818 F.2d 1449 (9th Cir. 1987), amended by, 830 F.2d 968 (9th Cir. 1987) (holding that municipal ordinance establishing "greenbelt" land off limits for further development did not effect a taking); *Pope v. City of Atlanta*, 418 F. Supp. 665, 669 (N. D. Ga. 1976), aff'd, 575 F.2d 298 (5th Cir. 1978) (holding that state River Protection Act did not effect a taking).

19. See, for example, *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 107 (1978), discussed at notes 59-64 and accompanying text; *St. Barthelomew's Church v. City of*

and public health and safety laws[20] all have been subject to inverse condemnation claims.

As far back as 1922, the Supreme Court recognized that governments can "take" property by regulatory action without explicitly condemning it. In Justice Holmes's language for the Court, "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[21] Although the Court continues to wrestle with the question of how far is "too far,"[22] it resolved in *First English*[23] the related question of what remedies are available to the plaintiff who suffers an inverse condemnation.

In *First English*, appellant owned twenty-one acres in a canyon that flooded after a forest fire. The flood destroyed several church-owned buildings, including facilities used for a summer camp.[24] Fearing more floods in the future, Los Angeles County passed a temporary emergency ordinance prohibiting any construction in the canyon. Appellant brought suit in state court alleging that the ordinance constituted a compensable taking. The California Superior Court ruled against the church on a pre-trial motion, the Court of Appeal affirmed, and the California Supreme Court denied review.

On appeal, the United States Supreme Court could not determine whether a regulatory taking had actually occurred, given the absence of a trial. But the Court nonetheless held that "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the

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New York, 914 F.2d 348, 352 (2d Cir. 1990); *Historic Green Springs, Inc. v. Bergland*, 497 F. Supp. 839, 845 (E. D. Va. 1980).

20. See, for example, *Lakeview Dev. Corp. v. City of South Lake Tahoe*, 915 F.2d 1290, 1293 (9th Cir. 1990) (addressing density limitations); *South Dakota Dep't of Public Safety v. Haddenham*, 339 N.W.2d 786, 790 (S.D. 1983) (addressing fireworks regulation); *McShane v. City of Faribault*, 292 N.W.2d 253, 254 (Minn. 1980) (addressing airport approach zoning); *Roark v. City of Caldwell*, 87 Idaho 557, 394 P.2d 641, 642 (1964) (addressing height restrictions).

21. *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922) (Holmes, J.). There is some disagreement as to whether *Pennsylvania Coal* was a takings case at all. Compare *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985) (implying that Justice Holmes's statoment in *Pennsylvania Coal* may refer to the Due Process Clause of the Fourteenth Amendment and not the Takings Clause), and Norman Williams, Jr., et al., *The White River Junction Manifesto*, 9 Vt. L. Rev. 193, 208-14 (1984), with *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 481-502 (1987) (analyzing *Pennsylvania Coal* as a Takings Clause case), and Michael M. Berger and Gideon Kanner, *Thoughts on "The White River Junetion Manifesto": A Reply to tho "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property*, 19 Loyola L.A. L. Rev. 685, 712-13 (1986).

22. See, for example, the cases cited in note 3.

23. 482 U.S. 304.

24. For an engrossing description of the uncontrolled brushfires, heavy rainfall, and devastating flooding and mudslides that are so common in southern California, see John McPhee, *The Control of Nature* 181-272 (Farrar, Straus, and Giroux, 1989).

duty to provide compensation for the period during which the taking was effective."[25] In other words, if a municipality takes some action that a court determines years later to have worked a regulatory taking, then the municipality must provide compensation accruing from the point when the interference first effected the taking.[26]

Although *First English* resolved the uncertainty surrounding the appropriate remedy for an inverse regulatory taking,[27] it left to

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25. *First English*, 482 U.S. at 321. See Sackman and Rohan, 2 *Nichols' The Law of Eminent Domain* §§ 8.05[1] at 8-83-8-91, 12E.01 at 12E-1-12E-9 (cited in note 12). This rule applies even if the municipality decides to abandon the ordinance immediately after the judicial finding that it constitutes a taking, or even if it has already done so *prior to* the court's decision. The abandonment cannot undo the effect of the earlier restrictions, which compel compensation for the temperary regulatory taking. *First English*, 482 U.S. at 321; Sackman and Rohan, *Nichols' The Law of Eminent Domain* § 12E.02 at 12E-10. The abandonment does, however, mark the end of the period for which compensation must be paid. See Part III.D.

26. This resolution of the remedial question does not suggest that a court should be any more willing to find a taking on the merits than it was before *First English* was decided. See, for example, *St. Clair v. City of Chico*, 880 F.2d 199, 202 (9th Cir. 1989). Compensation may be constitutionally required for even the briefest of takings, but the duration of a taking is still relevant to both the compensation calculation and the determination of whether a taking has occurred at all. Since the question of "what is a taking" is so often an "ad hoc, factual inquir[y]," *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978), the duration of the restriction is one of the many relevant factors that a court must consider in making this substantive determination, before it can even reach the remedy question. See, for example, *Norco Construction, Inc. v. King County*, 801 F.2d 1143, 1145 (9th Cir. 1986) (Kennedy, J.) (stating that "[t]he duration of the wrongful taking may be relevant to determining whether a wrong has occurred, as well as the extent of the damage suffered"); *Woodbury Place Partners v. Woodbury, Minn.*, 492 N.W.2d 258, 261 (Minn. App. 1992) (observing that the deprivation of the owner's use was qualified by its defined duration). See also *First English*, 482 U.S. at 330 (Stevens, J., dissenting) (stating "one cannot conduct the inquiry [into what constitutes a taking] without considering the duration of the restriction").

27. Prior to the decision in *First English*, there had been great uncertainty as to whether compensation was required in tomperary regulatery takings cases. In fact, the church had lost in the California courts on the basis of *Agins v. City of Tiburon*, 24 Cal.3d 266, 598 P.2d 25 (1979), aff'd on other grounds, 447 U.S. 255 (1980), in which the California Supreme Court had held that such compensation is not required. See also *Culebras Enterprises Corp. v. Rivera Rios*, 813 F.2d 506, 516 (1st Cir. 1987) (reaching the same result under Puerto Rico law); *Fred F. French Inv. Co., Inc. v. City of New York*, 39 N.Y.2d 587, 350 N.E.2d 381, 385 (1976) (reaching the same result under New York law). But see *Corrigan v. City of Scottsdale*, 149 Ariz. 538, 720 P.2d 513, 516-17 (1986) (overruling prior Arizona case law and requiring compensation and citing cases from several other states in accord). This uncertainty had been compounded by the United States Supreme Court's own actions: In the decade leading up to *First English*, the Court had heard five temporary takings cases, including *Agins*, without ever reaching the merits. See Part II.B.3.

Note also that some of these state and federal inverse condemnation cases arose as regulatory takings cases and not specifically as temporary regulatory takings cases. In light of *First English*'s admonition that a plaintiff cannot force a municipality to convert a temporary taking into a permanent one, 482 U.S. at 321, it is apparent in retrospect that all of these takings claims were actually temporary takings claims. A municipality may repeal the offending ordinance either before or after a court finds a taking, thereby ending its ongoing liability. Id. In a sense, then, all regulatery takings are potentially temperary ones, with the municipality remaining free to cease enforcement of the offending ordinance at any time. See Part III.D.

the lower courts the challenging details of how to calculate compensation. Significantly, the Court offered no suggestion as to how to determine when a temporary regulatory taking begins and ends.[28]

B. The Ripeness Doctrine

1. Ripeness, in General

The ripeness doctrine is a tool designed to determine when judicial review is appropriate.[29] Like the mootness doctrine, ripeness addresses issues of timing. The mootness doctrine attempts to protect courts from deciding cases whose times have passed,[30] while ripeness seeks to protect courts from deciding cases whose times have not yet come.

The ripeness doctrine is generally viewed as being both constitutionally required and judicially prudent. The constitutional mandate results from Article III's requirement that federal courts hear only cases or controversies.[31] The prudential restrictions result from the fact that most courts would rather avoid speculative cases, defer to finders of fact with greater subject matter expertise, decide cases with fully-developed records, and avoid overly broad opinions, even if these courts might constitutionally hear a dispute.[32] The ripeness doctrine, then, focuses both on whether an Article III case or

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28. See Parts III.A, III.D. See also note 176.

29. On ripeness, see generally Paul M. Bator, et al., *Hart and Wechsler's The Federal Courts and the Federal System* 244-55 (Foundation, 3d ed. 1988) & id. at 44-48 (Supp. 1993); Erwin Chemerinsky, *Federal Jurisdiction* 98-109 (Little, Brown, 1989); Laurence H. Tribe, *American Constitutional Law* 72-82 (Foundation, 2d ed. 1988); Charles A. Wright, Arthur R. Miller and Mary K. Kane, 13A *Federal Practice and Procedure* §§ 3532-3532.6 at 112-211 (West, 2d ed. 1985).

30. See notes 192-94 and accompanying text.

31. U.S. Const., Art. III, § 2. See also *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2888 (1992) (stating that "Lucas has properly alleged Article III injury-in-fact in this case"), discussed at notes 93-103 and accompanying text; *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982) (stating that the Constitution requires "actual or threatened injury"); *Babbitt v. United Farm Workers*, 442 U.S. 289, 304 (1979); *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 82 (1978); *International Longshoremen's and Warehousemen's Union v. Boyd*, 347 U.S. 222, 224 (1954).

32. See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149-56 (1967). See also Bator, et al., *Hart and Weschler's The Federal Courts* at 252-53 (cited in note 29); Chemerinsky, *Federal Jurisdiction* at 101 (cited in note 29); Robert C. Power, *Help Is Sometimes Close at Hand: The Exhaustion Problem and the Ripeness Solution*, 1987 U. Ill. L. Rev. 547, 609-10. But see Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. Chi. L. Rev. 153, 155 (1987) (arguing that the ripeness doctrine can be explained entirely on these grounds and is not mandated by Article III).

controversy is present and on whether it would be wise for the court to decide a dispute that may be premature.[33]

The Supreme Court has identified two considerations that are relevant in establishing the ripeness of a case: (1) the hardship to the parties if a court does not decide; and (2) the fitness of the issues for decision.[34] These factors roughly reflect the constitutional case or controversy requirement and the desire to avoid premature decisions.[35] If a litigant will be significantly injured by a court's failure to decide an issue expeditiously, then that court is more likely to determine that the dispute has developed into the required case or controversy. And if the record is well developed and the risk of a speculative or overbroad opinion is minimized, then the issue is more likely fit for decision.[36]

In cases arising out of agency action, courts appropriately require the administrative agency with jurisdiction over the subject matter to reach a final decision as an indispensable part of the ripening process.[37] Even after the relevant agency has reached its final

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33. If there is no case or controversy, then an Article III court lacks jurisdiction to hear the claim. Even if a case or controversy is present, it might be imprudent for such a court to hear the claim. In the latter situation, the dispute is constitutionally justiciable but a court may nonetheless choose to wait. Thus, when courts refer to ripeness as constitutionally required, they are only half correct. Bator, et al., *Hart and Weschler's The Federal Courts* at 252-53. But see Nichol, 54 U. Chi. L. Rev. at 169-70. Moreover, a prudential refusal to hear a case may reflect, at least in part, a preliminary judgment on the merits. See id. at 164-70 (comparing *Williamson County*, 473 U.S. 172, a takings case found to be unripe, with *National Gay Task Force v. Board of Educ. of the City of Oklahoma City*, 729 F.2d 1270 (10th Cir. 1984), aff'd without opinion, 470 U.S. 903 (1985), a free speech case found to be ripe, and in which the plaintiff prevailed). See also *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992) (discussing the constitutional and prudential portions of the related, but distinct, standing doctrine); Craig R. Gottlieb, Comment, *How Standing Has Fallen: The Need to Separate Constitutional and Prudential Concerns*, 142 U. Pa. L. Rev. 1063, 1066-67 (1994) (same).

34. See generally Chemerinsky, *Federal Jurisdiction* at 101-09 (cited in note 29).

35. *Abbott Laboratories*, 387 U.S. at 148-49. See also Chemerinsky, *Federal Jurisdiction* at 100-01 (discussing the criteria for determining ripeness and the purposes of the riponess doctrine). In addressing the ripeness question, federal courts often will scrutinize a much broader array of factors, particularly if the plaintiff risks subjecting himself to criminal sanction. These include "the extent of any injury presently suffered by plaintiffs, the likelihood that they will engage in future conduct that could expose them to such sanction (or would so engage if not threatened with sanctions), and the probable response of the defendant officials if the conduct occurs." Bator, et al., *Hart and Weschler's The Federal Courts* at 244 (cited in note 29). These factors appear simply to be subsets of the larger constitutional and prudential halves of the general ripeness test.

36. Chemerinsky, *Federal Jurisdiction* at 101. Note, however, that in *Abbott Laboratories* the Court treated both of these considerations as discretionary, 387 U.S. at 148-49. See also Chemerinsky, *Federal Jurisdiction* at 101 n.12 (observing that the Court has described ripeness as both constitutional and prudential).

37. Under the Administrative Procedure Act, ouly "final agency action" is reviewable in federal court, 5 U.S.C. § 704 (1988); *FTC v. Standard Oil Co.*, 449 U.S. 232, 238 (1980). Although this Act applies ouly to judicial review of federal agency action, the Supreme Court has applied a similar standard when federal courts are asked to review actions by state agen-

decision, federal courts also may require that the plaintiff exhaust all available administrative remedies before being allowed to bring suit in federal court.[38] Courts therefore may insist that the losing party appeal any unfavorable decision to a higher administrative authority before deciding that the issue is ripe for review.[39] Finally, in cases arising out of state agency action, a federal court may require that the plaintiff exhaust both state administrative and state judicial remedies before bringing suit in federal court.[40]

Courts do not insist upon exhaustion in all areas of the law. In particular, plaintiffs who bring claims under Section 1983[41] generally are not required to exhaust all of their administrative remedies. This more relaxed treatment is exemplified by Section 1983 cases alleging racial discrimination. One of the principal purposes of this Reconstruction-era legislation was to afford African-American plaintiffs a route around state agencies and courts that were less receptive to civil rights claims than the federal courts were.[42] Strict enforcement of an exhaustion requirement would undercut this goal of speedy federal court review, so singularly called for given the substance of this statute and the conditions under which it was frequently enforced. In addition, federal courts express concerns about the res judicata and collateral estoppel effects of a state agency or

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cies, *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 192-94 (1985).

By requiring a plaintiff to employ available administrative processes, a court ensures that administrators with greater expertise can apply standards consistont with those applied in similar cases, guarantees that the facts will be ascertained to the greatost possible extent, and attempts to weed out less meritorious cases. This withholding of federal judicial intervention until the appropriato agency has completod its work also allows cases to ripen with little or no expenditure of judicial resources.

38. Professor Power has described four policies underlying the exhaustion requirement: "(1) furthering administrative autonomy; (2) permitting the agency to resolve factual issues, apply its expertise, and exercise delegated discretion; (3) aiding judicial review; and (4) promoting judicial economy." Power, 1987 U. Ill. L. Rev. at 554 (cited in note 32).

39. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938) (footnote omitted) (noting, in a case involving the National Labor Relations Act, "the long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted"); Power, 1987 U. Ill. L. Rev. at 551-57.

40. See, for example, notes 311-18 and accompanying text.

41. 42 U.S.C. § 1983 (1988).

42. See *Monroe v. Pape*, 365 U.S. 167, 171-83 (1961), overruled on other grounds, *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978) (tracing the legislative history of Section 1983). See also *Mitchum v. Foster*, 407 U.S. 225, 236-43 (1972); Chemerinsky, *Federal Jurisdiction* at 384 (cited in note 29); Brian W. Blaesser, *Closing the Federal Courthouse Door on Property Owners: Ripeness and Abstention Doctrines in Section 1983 Land Use Cases*, 2 Hofstra Prop. L. J. 73, 73-75 (1988); Barry Sullivan, Comment, *Exhaustion of State Administrative Remedies in Section 1983 Cases*, 41 U. Chi. L. Rev. 537, 547-54 (1974) (noting that the proposition underlying Section 1983 is immediato federal adjudication).

court proceeding upon a subsequent federal court action under Section 1983.[43] Thus, the Supreme Court has repeatedly held that Section 1983 plaintiffs alleging discrimination on the basis of race need not exhaust state administrative remedies[44] or state judicial remedies[45] prior to commencing litigation in federal court.[46] But in areas of the law that do not involve Section 1983 claims, the Court typically insists upon exhaustion of administrative remedies, and not just a final agency decision, before a federal court properly may hear a claim.[47]

2. Modifying the Ripeness Doctrine for Land Use Cases

The ripeness doctrine applies to federal courts that have been asked to rule on federal challenges to the application of state or local land use laws.[48] As in any federal case, Article III requires a case or

43. See, for example, *Jennings v. Caddo Parish School Board*, 531 F.2d 1331, 1332 (5th Cir. 1976) (stating that "had appellant wished to reserve her constitutional claims for subsequent litigation in federal court, she could have done so"). For similar discussions of claim and issue preclusion in the land use area, see generally *Fields v. Sarasota Manatee Airport Authority*, 953 F.2d 1299 (11th Cir. 1992); *Norco Constr., Inc. v. King County*, 801 F.2d 1143 (9th Cir. 1986) (Kennedy, J.); Thomas E. Roberts, *Fifth Amendment Taking Claims in Federal Court: The State Compensation Requirement and Principles of Res Judicata*, 24 Urban Law. 479 (1992); notes 306-18 and accompanying text.

44. See, for example, *Patsy v. Board of Regents*, 457 U.S. 496, 500-16 (1982); *McNeese v. Board of Educ.*, 373 U.S. 668, 671-76 (1963).

45. See, for example, *McNeese*, 373 U.S. at 671.

46. Chemerinsky, *Federal Jurisdiction* at 383-88 (cited in note 29).

47. Property owners, like those bringing claims of racial discrimination, may believe that state agencies and courts are less receptive to their claims than are the federal courts. Accord *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 911 F.2d 1331, 1346-47 (9th Cir. 1990) (Kozinski, J., dissenting in part). But even if federal courts are more sympathetic than stato arbiters to property rights claims, as they surely are in some states, these state-level infringements are unlikely to rival the institutional deprivations experienced by former slaves and their descendants. See *Monroe*, 365 U.S. at 171-83. Thus, a similar relaxation of the exhaustion requirement would not be nearly so warranted. See generally *United States v. Carolene Products*, 304 U.S. 144, 153 n.4 (1938) (suggesting that greater judicial scrutiny is warranted in cases involving "prejudice against discrete and insular minorities"); note 326.

48. For excellent discussions of the ripeness doctrine as applied in land use cases arising under state law, see *Long Island Lighting Co. v. Cuomo*, 666 F. Supp. 370, 390-98 (N. D. N.Y. 1987), vac'd on other grounds, 888 F.2d 230 (2d Cir. 1989); *Sintra, Inc. v. City of Seattle*, 119 Wash. 2d 1, 829 P.2d 765, 781 (1992) (Utter, J., concurring).

This Article will not examine the related question of how to ripen a federal case involving a federal land use law. The United States Court of Federal Claims, an Article I court that has jurisdiction over most takings claims brought against the United States, has shown a much greater willingness than other federal courts to hear takings claims. See, for example, *Whitney Benefits, Inc. v. United States*, 18 Cl. Ct. 394 (1989), corrected, 20 Cl. Ct. 324 (1990), aff'd, 926 F.2d 1169 (Fed. Cir. 1991); *Loveladies Harbor, Ine. v. United States*, 15 Cl. Ct. 381 (1988), aff'd 28 F.3d 1171 (Fed. Cir. 1994); *Florida Rock Industries v. United States*, 8 Cl. Ct. 160 (1985), aff'd in part and vac'd in part, 791 F.2d 893 (Fed. Cir. 1986), vac'd, 18 F.3d 1560 (Fed. Cir. 1994); note 219 and accompanying text. This approach is likely to have a tremendous impact upon the

controversy, and federal courts would be prudent to avoid rendering speculative opinions based upon incomplete records. Nonetheless, federal courts afford somewhat different procedural treatment to regulatory takings plaintiffs.[49] These differences are byproducts of the unique nature of the Takings Clause.

The Supreme Court has stated clearly that exhaustion of administrative remedies is not required in federal cases alleging state takings.[50] This disavowal of the exhaustion requirement may reflect the fact that so many takings cases are also brought as Section 1983 cases, for which there is no exhaustion requirement.[51] More likely, it reflects the fact that a requirement similar to that of exhaustion is already built into the ripeness test that the Court applies in takings cases. For while exhaustion is excused, a plaintiff is required to seek just compensation in state court before she can present a ripe case or controversy in federal court. This additional hurdle exists because of the unusual structure of the Takings Clause.

Unlike the Fourteenth Amendment,[52] which provides the constitutional grounding for other Section 1983 claims, the Fifth Amendment's Takings Clause has a specific remedy—just compensation—built in. An allegation of a taking is insufficient to state a ripe

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effectiveness of federal environmental protection laws, such as the Clean Water Act, 33 U.S.C. §§ 1251-1387 (1988 & Supp. 1992).

49. For a discussion of some of the reasons why takings cases are treated differently, see *Cassettari v. Nevada County*, 824 F.2d 735, 739 (9th Cir. 1987). See also *Gamble v. Eau Claire County*, 5 F.3d 285, 287-88 (7th Cir. 1993). Professor Monaghan has called the distinction between land use ripeness principles and Section 1983 exhaustion principles "unclear" but also "sensible." Henry Paul Monaghan, *State Law Wrongs, State Law Remedies, and the Fourteenth Amendment*, 86 Colum. L. Rev. 979, 988 n.71 (1986).

See generally Norman Williams, Jr. and John M. Taylor, 1 *Williams American Planning Law: Land Use and the Police Power* § 5A.16.50 at 6-12 (Callaghan, Supp. 1994) ("*Williams American Land Planning*"); Michael M. Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning*, 20 Urban Law. 735, 786-95 (1988); Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 Cal. W. L. Rev. 1, 2 (1992) (discussing the "special ripeness doctrine applicable only to constitutional property rights claims"); Daniel R. Mandelker and Brian W. Blaesser, *Applying the Ripeness Doctrine in Federal Land Use Litigation*, in Mark S. Dennison, ed., *1989 Zoning and Planning Law Handbook* 471 (Clark Boardman, 1989); Daniel R. Mandelker, Jules B. Gerard, and E. Thomas Sullivan, *Federal Laud Use Law* § 4A.02 at 4A-1--4A-10.7 (Clark, Boardman, Callaghan, 1993).

50. *Williamson County*, 473 U.S. at 192-93. See note 80 and accompanying text. Although the landowner brought its takings claim under Section 1983, the Supreme Court and the lower federal courts also have declined to require exhaustion in takings cases that are not brought under this statute. See, for example, *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 346 (1986).

51. While the Supreme Court has speken broadly about the need to avoid any exhaustion requirement in Section 1983 cases, see notos 41-46 and accompanying text, it probably did not have Section 1983 takings cases in mind when it made these statements.

52. U.S. Const., Amend. XIV.

federal claim; a property owner must allege an *uncompensated* taking. Thus, for a landowner to present a ripe federal claim, she must allege that her property has been taken and that she has sought just compensation and been rebuffed. In the end, the case or controversy portion of the ordinary ripeness test is altered in takings cases in a way that incorporates a modified exhaustion requirement. As a result, ripening a takings case can be a lengthy process.

The prudential portion of the ripeness test also turns out to be extremely difficult to meet in takings cases. Both the highly fact-specific nature of takings claims and the unusually ad hoc nature of takings case law make federal courts particularly reluctant to hear these cases until a record has been fully developed.[53] The need for concrete facts is acute in land use law, where so much litigation arises out of local ordinances about which there may be little reported case law. With a wide variety of different municipalities enacting land use laws and with few of these laws ever reaching the courts, those courts that are called upon to construe these statutes and ordinances[54] need as complete a factual record as possible, so as to avoid making overly broad pronouncements.[55]

The substantive nature of takings law further compounds this problem. The sequence of events which a federal court must examine in deciding whether there has been a taking often spans years of negotiation between landowner and zoning board, or landowner and landmarks commission. All of the facts that develop along the way are relevant to the ultimate substantive determination. Landowners frequently attempt to bring suit while this sequence of events is still underway. But the critical question of "What is a taking?" requires a federal court to review the entire sequence of events in retrospect before it renders a decision. Because a federal court cannot decide whether a regulation takes land until it knows for certain how the regulation will be applied, wise courts are prone to defer deciding.

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53. A detailed factual record may be less essential to a court asked to decide a facial claim. See notes 65-71 and accompanying text.

54. This Article uses the terms "statutes," "laws," "ordinances," and "regulations" interchangeably. Any differences among these types of restrictions are immaterial to this discussion.

55. This desire is not just for the protection of the litigants. "The interest protected by the Court is its own. Litigation based upon hypothetical possibility rather than concrete fact is apt to be poor litigation. The demand for specificity, therefore, stems from a judicial desire for better lawmaking." Nichol, 54 U. Chi. L. Rev. at 177 (cited in note 32). Thus, even where an injury is clearly developing, a court may withhold judgment so as to protect its own interests. Id. For an early discussion of the reasons for applying strict ripeness rules in the land use context, see generally Donald C. Scriven, Comment, *Exhausting Administrative and Legislative Remedies in Zoning Cases*, 48 Tulane L. Rev. 665 (1974).

The plaintiff alleging racial discrimination under Section 1983 is often asking a factfinder to review a series of events that already has occurred; the ripeness requirement simply ensures that the appropriate agency attempts this review before the parties expend judicial resources.[56] In contrast, the plaintiff alleging a taking most often seeks a decision while the facts are still developing, with the parties struggling to determine the application of a specific set of laws to a specific parcel of land. Here, ripeness doctrine must bear an additional burden: It must ensure that federal courts not decide cases before the parties themselves know the final application of the law to the land. The facts are truly ripening, and the factfinder does not yet have any final facts to find.[57]

3. The Land Use Ripeness Cases

The Supreme Court has developed a well-defined ripeness doctrine for land use matters in its recent cases.[58] In order to understand how this doctrine developed, it is important to review briefly the land use cases that the Supreme Court has decided since 1978.

In the first two of these cases, the ripeness questions were somewhat peripheral. In *Penn Central Transportation Co. v. City of New York*,[59] appellants wished to build a fifty-five-story office building above Grand Central Terminal. The New York City Landmarks Preservation Commission denied the required certificate of appropriateness and also denied a certificate for a second, slightly scaled-down tower. Following these denials, appellants filed suit in state court, alleging that the city had taken their property without just compensation in violation of the Fifth and Fourteenth amendments.

56. See, for example, *Cassettari v. County of Nevada*, 824 F.2d 735, 739 (9th Cir. 1987).

57. For a number of additional reasons, including principles of federalism and res judicata, some federal courts have indicated that state courts should have not only the first attempt at deciding these cases, but also the last. See Part V.E.

58. This issue did occasionally arise before 1978. See, for example, *Washington* ex rel. *Grays Harbor Logging Co. v. Coats-Fordney Logging Co.*, 243 U.S. 251, 256 (1917):

> [T]he judgment entered by the superior court to the effect that petitioner was entitled to condemn and appropriate the land in question for its right of way must be construed as being subject to a condition that the proper compensation be first ascertained and paid.
>
> . . . .
>
> [S]uch judgments . . . are not described as final. . . .

The Court dismissed the writ of certiorari because the state court judgment was not final. Id.

59. 438 U.S. 104 (1978).

The New York Court of Appeals ultimately rejected this claim,[60] and the United States Supreme Court affirmed the state court's decision.[61]

The Supreme Court might have dismissed the appeal on ripeness grounds. Both of appellants' proposals had been rejected by the commission at least in part because of their size, and the Court might have held that appellants' claim could not be ripe until they had proposed a third, less massive, tower.[62] Moreover, as the Court also noted, appellants did not seek judicial review of the denial of either certificate. Rather, appellants filed their suit on constitutional grounds. In addition, after upholding the application of this law to the appellants, the New York Court of Appeals had invited them to submit other information which might strengthen their claim.[63]

Rather than accepting this invitation, appellants appealed directly to the United States Supreme Court. Thus, the Supreme Court could have decided for any one of these three reasons that the claim was not ripe because it did not constitute a case or controversy or, more likely, because the record was not developed to the point where the Court could properly reach a decision. But the Court decided the case anyway, upholding the law facially and as applied to appellants.[64] This decision left open the possibility that appellants could return to court at a future date if successively less grandiose plans were also rejected.

Two years later, in *Agins v. City of Tiburon*,[65] appellant landowners challenged city zoning ordinances that restricted their five-acre tract of land to no more than five single-family residences, arguing that the ordinances were facially unconstitutional and seeking compensation for inverse condemnation. Appellants never

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60. *Penn Central Transp. Co. v. City of New York*, 42 N.Y.2d 324, 366 N.E.2d 1271, 1278 (1977).

61. *Penn Central*, 438 U.S. at 136-38.

62. The commission had observed that the tower would be four times the height of the existing terminal, id. at 117-18, and concluded that its preservation mission allows only for modifications of "such character, scale, materials and mass as will protect, enhance and perpetuato the original design rather than overwhelm it." Id. at 118. The Court noted that "nothing the Commission has said or done suggests an intention to prohibit *any* construction above the torminal," id. at 137, and also pointed out that the original plans included a 20-story office tower that was never built, id. at 137 n.34. The Court reasonably might have concluded that appellants could not know exactly how restrictive the Landmarks Preservation Law was until they learned precisely how that law would be applied to their property, and that appellants' applications had not come close te establishing that limit. This conclusion would have led to a dismissal on ripeness grounds.

63. The New York Court of Appeals noted that the claim was based upon a record that had never been fully developed and suggested that additional facts might strengthen appellants' claim. 366 N.E.2d at 1279.

64. 438 U.S. at 130-39.

65. 447 U.S. 255 (1980).

sought approval for any proposed development under the applicable zoning ordinances and never even attempted to learn whether they were eligible to build the maximum of five homes on their lot;[66] the first action they took with respect to their land after the relevant sections of the zoning ordinances became effective was to file their claim in state court.

Why, then, was their claim ripe? Because the challenge was a facial one, arguing that the very existence of these ordinances constituted a taking.[67] Remarking that "there is as yet no concrete controversy regarding the *application* of the specific zoning provisions,"[68] the Court recognized that the only question was "whether the mere *enactment* of the zoning ordinances constitutes a taking."[69] The Court decided that the zoning ordinances were not facially unconstitutional,[70] but noted that appellants remained free to submit specific development plans to city officials.[71] If these plans were rejected, then the landowners presumably might succeed with a challenge to the ordinances as applied specifically to themselves.

Thus by 1980, the Court had suggested the beginnings of a ripeness test. At the outset, a landowner may challenge the offending ordinance on its face. She need not take this step, and she will have a difficult time prevailing on the merits if she does elect this alternative. If the owner foregoes a facial challenge or undertakes such a challenge unsuccessfully, her next option is to submit a development plan to local officials. This may not be sufficient to ripen her claim,

66. *Agins v. City of Tiburon*, 24 Cal.3d 266, 598 P.2d 25, 27 (1979), aff'd, 447 U.S. 255.

67. Accord *Yee v. City of Escondido*, 112 S. Ct. 1522, 1531-32 (1992); *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 478-79 (1987); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 273-74 (1981). See also *Loretto*, 458 U.S. at 438-40 (class action); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386 (1926) (holding that a landowner was not required to seek a building permit or a variance after enactment of a zoning ordinance in order to seek facial relief).

68. *Agins*, 447 U.S. at 260 (emphasis added).

69. Id. (emphasis added).

70. Id. at 259. Because the only question was whether the enactment of the ordinances worked a taking, the only event necessary to ripen the litigation was the enactment of the ordinances. See also *Virginia Surface Mining*, 452 U.S. at 294-97; *Crow-New Jersey 32 Ltd. v. Township of Clinton*, 718 F. Supp. 378, 382-83 (D. N.J. 1989). But see *Southern Pacific Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 505-06 (9th Cir. 1990) (holding that facial claims are not ripe until the landowner also seeks compensation in state court). As a result of this fairly lax ripeness threshold, appellants faced the correspondingly difficult substantive test of demonstrating that the ordinance worked a taking on its face, and not just as applied to one specific landowner on one specific set of facts. See *Agins*, 447 U.S. at 260. See also *Pennell v. City of San Jose*, 485 U.S. 1, 18 (1988) (Scalia, J., concurring in part and dissenting in part).

71. *Agins*, 447 U.S. at 262.

but, as the *Agins* Court held, it is a necessary first step for a litigant who is challenging an ordinance as applied.[72]

The Court articulated additional steps that landowners must take to ripen land use claims in a series of three cases decided during the 1980s. In *San Diego Gas and Electric Company v. City of San Diego*,[73] the Court once again concluded that further state proceedings were needed before it could decide whether a regulatory taking had occurred.[74] As important as the takings question was, the Court lacked jurisdiction to review it. This decision to dismiss was based in large part upon the prudential aspects of the ripeness test.[75] The Court was uncomfortable resolving the remedy issue in a case with an ambiguous record and no clear takings liability.[76]

But the opinion was not rendered solely upon prudential grounds, with the Court also stressing that federal law limits its ap-

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72. Id. at 260.

73. 450 U.S. 621 (1981).

74. The Court, per Justice Blackmun, dismissed the case on ripeness grounds. Id. at 632-33. Justice Brennan dissented, joined hy Justices Stewart, Marshall, and Powell. The dissent saw no ripeness problem and would have found a compensable temporary regulatory taking. Id. at 653 (Brennan, J., dissenting). Such an outcome would have resolved the important remedial question that the Court had never before reached. Justice Rehnquist felt obligated to join the Court on ripeness grounds, but saw fit to note in concurrence that he would otherwise "have little difficulty in agreeing with much of what is said in the dissenting opinion of Justice BRENNAN." Id. at 633-34 (Rehnquist, J., concurring). Thus, five members of the Court indicated that they would support the notion of requiring compensation for temporary regulatory takings when a proper case arose.

Following this unusual 4-1-4 decision, a number of lower federal courts questioned the Court's outcome, arguing that Justice Brennan's dissent tcgether with Justice Rehnquist's concurrence indicated the position of a majority of the Justices. See, for example, *Nemmers v. City of Dubuque*, 764 F.2d 502, 504-05 (8th Cir. 1985); *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1198-1200 (5th Cir. Unit A 1981). These predictions proved to be accurate, and *First English* provided the appropriate settiug for the Court, with two new members, to make this statement explicitly. *First English*, 482 U.S. at 318-19. See notes 90-92 and accompanying text.

75. The Court noted that witnesses had testified that some development might be consistent with the city ordinances in question, that the utility still might be able to build its planned nuclear power plant on the site, and that other forms of industrial development also might be available. *San Diego Gas*, 450 U.S. at 632 n.12.

76. Justice Rehnquist expressed his discomfort about deciding the case by noting, "I would feel much better able to formulate federal constitutional principles of damages for land-use regulation which amounts to a taking of land under the Eminent Domain Clause of the Fifth Amendment if I knew what disposition the California courts finally made of this case." Id. at 636 (Rehnquist, J., concurring).

Lower courts frequently rely on this prudential aspect of the ripeness test as a way to avoid deciding cases in which the record is incomplete. See, for example, *Southern Pacific Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 504 (9th Cir. 1990):

> To address this clahn in this posture, federal courts would be required to guess what possible proposals appellants might have filed with the City, and how the City might have responded to these imaginary applications. It is precisely this type of speculation that the ripeness doctrine is intended to avoid.

pellate jurisdiction to "[f]inal judgments or decrees" of a state court.[77] Once again, the landowner's failure to submit a development plan was constitutionally fatal to its claim, although the submission and denial of a plan would not necessarily have guaranteed a victory, or even a hearing, to the landowner. In *Agins*, the Court had suggested to the landowners that they return to federal court after an application had been rejected. In *San Diego Gas*, the Court transformed that suggestion into a required first step in an as-applied takings claim.[78]

The Court outlined additional steps required to obtain federal judicial review of a land use decision in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*.[79] Respondent bank's suit, arising from the denial of approval for a subdivision, included a claim that the commission had taken its property without just compensation, in violation of Section 1983 and state law. The Court acknowledged that respondent had submitted the development plan required by *Agins* and *San Diego Gas*, but nonetheless found that respondent had not taken either of two additional necessary steps: (1) the landowner never received a final decision regarding the application of the local land use laws to its property; and (2) the landowner never used the procedures available under state law for obtaining just compensation.

To begin with, respondent never received a final decision on its application because it never sought the variance that would have allowed it to proceed, even though the local zoning appeals board had the power to grant such a variance and might have done so. A court could not determine whether petitioner had unreasonably interfered with respondent's investment-backed expectations because the extent of the interference was not yet known. The Court distinguished its cases holding that a Section 1983 plaintiff need not exhaust all administrative remedies by pointing out that an application for a variance would not have constituted the pursuit of an administrative remedy.[80] Rather, it was action on respondent's part that was required before the commission's administrative action could be called final. Respondent could not be heard in federal court until the county reached a final administrative decision; the case law under Section 1983 held only that respondent need not exhaust all administrative

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77. *San Diego Gas*, 450 U.S. at 630 n.10 (citing 28 U.S.C. § 1257).

78. See also *United States v. Riverside Bayview Homes*, 474 U.S. 121, 127 (1985): "[T]he very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired."

79. 473 U.S. 172 (1985).

80. Id. at 192-94.

remedies after that final decision had been made. Thus, a claimant must take all action necessary to finalize the regulatory body's action, including seeking a variance, but need not take any additional action seeking an administrative remedy.

Moreover, respondent did not avail itself of the state procedures available for obtaining just compensation. The Fifth Amendment prohibits only the uncompensated taking of property, so there is no way to know if a violation has occurred until the landowner seeks payment and is rejected.[81] A municipality's alleged constitutional violation is not complete unless it fails to provide adequate compensation for the taking. Until that happens, the case continues to ripen.

The state compensation portion of this decision finds no parallel in the ripeness cases from other areas of the law. This lack of parallelism reflects the fact that the Takings Clause prohibits only uncompensated takings and not the takings themselves. By building in the compensation remedy, the Takings Clause also builds pursuit of this remedy into its own distinctive ripeness test, for an uncompensated inverse taking cannot occur if the landowner never seeks compensation.[82] As a result, the Court could find no rationale in any prior ripeness cases for this portion of its decision, although it cited several other takings cases in accord.[83] Instead, the Court justified this portion of its decision by analogy to *Parratt v. Taylor*,[84] a procedural due process case which held that a postdeprivation hearing sometimes is enough to satisfy due process requirements.[85]

The Court added yet another layer to the ripeness test in *MacDonald, Sommer & Frates v. Yolo County*.[86] In *MacDonald*, appellant challenged the rejection of its subdivision proposal, seeking

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81. This presupposes that state procedures exist for providing compensation in such cases, as they did in Tennessee at the time. Id. at 196 (citing Tenn. Code Ann. § 29-16-123 (1980)). *First English*, decided two years later, seems to require all states to provide such procedures. *Schnuck v. City of Santa Monica*, 935 F.2d 171, 173 (9th Cir. 1991); Roberts, 24 Urban Law. at 481 n.17, 483 & nn.26-28 (cited in note 43). See also *First English*, 482 U.S. at 312 n.6 (stating that "the California court's dismissal of the [compensation] action establishes that 'the inverse condemnation procedure is unavailable. . .'") (quoting *Williamson County*, 473 U.S. at 197)).

82. *Williamson County*, 473 U.S. at 195-96 & n.14.

83. Id. at 194-95.

84. Id. at 194-96 & n.14 (citing *Parratt v. Taylor*, 451 U.S. 527 (1981)).

85. As a result of its reliance on *Parratt*, *Williamson County* is often cited as a procedural due process case. In fact, the Court addressed substantive due process and takings arguments, reaching the same result both ways. *Williamson County*, 473 U.S. at 200. Professor Monaghan has sharply criticized the Court's reasoning here, noting that the opinion's language "indiscriminately mixes jurisdictional, procedural due process, and substantive taking concepts." Monaghan, 86 Colum. L. Rev. at 989 (cited in note 49).

86. 477 U.S. 340 (1986).

declaratory and monetary relief. Once again, the Court held that a regulation may amount to a taking if it goes "too far," but noted that "[a] court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes."[87] After reaffirming the ripeness doctrine it had developed beginning with *Penn Central*, the Court carried its analysis a step further, noting that "[r]ejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews."[88] Thus, two or more variance applications may sometimes be required before a landowner's case ripens.[89]

The Court finally resolved the remedial question the following year in *First English*, holding that regulatory takings are always compensable.[90] Ironically, *First English* was the least ripe of the cases the Court faced.[91] When *First English* reached the Supreme Court, appellant had never sought permission to develop its land, never had a plan denied, and never sought a variance. The Court heard the case anyway, because the state court had decided that appellant would not be entitled to compensation under California law even if there had been a regulatory taking. As a result, the Supreme Court decided the question of whether a regulatory taking was compensable in a case in which no court had found a regulatory taking and no court ever would.[92] It did so because even an undisputed taking would not have provided grounds for the payment of compensation under state law: The landowner was demanding a remedy that California law simply did not offer.

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87. Id. at 348.

88. Id. at 353 n.9.

89. Landowners sometimes submit a series of progressively less grandiose plans. For example, the Ninth Circuit found a case to be ripe after the city of Monterey, California, rejected a landowner's fifth development application. *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1506 (9th Cir. 1990). Each plan called for less dense development than had the plan before it. The landowner apparently did not attempt to litigate earlier, so it is unclear exactly how few applications would have satisfied the court. The opinion states only that at least one development application and one variance application would be required. Id. at 1501.

90. 482 U.S. at 318. See notes 23-28 and accompanying text.

91. "The Court decided the merits of the compensation issue in *First English* on the basis of the defendant's preliminary motion to strike three one-sentence paragraphs from the complaint. It was a far cry from earlier declarations that proper adjudication requires a completo record." Randall T. Shepard, *Land Use Regulation in the Rehnquist Court: The Fifth Amendment and Judicial Intervention*, 38 Cath. U. L. Rev. 847, 852 (1989).

92. On remand, the California Court of Appeal offered two reasons for its conclusion that the county had not taken the church's land: (1) The ordinance was a valid exercise of the police power, designed to protect public health and safety; and (2) the ordinance did not deprive the owner of "all uses" of the campground, but merely prohibited reconstruction or the construction of new structures. *First English Evangelical Lutheran Church v. County of Los Angeles*, 210 Cal. App. 3d 1353, 258 Cal. Rptr. 893, 898-905 (1989) (*"First English II"*).

The Supreme Court confused matters in 1992 with its decision in *Lucas v. South Carolina Coastal Council*.[93] In *Lucas*, state law prevented the landowner from building on his beachfront lots for a four-year period; during the last two of these years, an amendment to the law allowed landowners such as Lucas to apply for special permits.[94] The Court heard the case with respect to both the pre- and post-amendment activities. The council argued that the amendment rendered Lucas's claim of a permanent deprivation unripe because he had not sought a final agency decision.[95] The Court noted that this fact "would preclude review *had the South Carolina Supreme Court rested its judgment on ripeness grounds*;"[96] however, the South Carolina Supreme Court "shrugged off the possibility of further administrative and trial proceedings . . . preferring to dispose of Lucas's takings claim on the merits."[97]

It might seem puzzling that the United States Supreme Court was unwilling to second-guess a state supreme court on a matter of federal jurisdiction, particularly one that it agreed was controlled by Article III.[98] But the Court hinted at the answer to this puzzle when it noted that the state legislature had amended its original, inflexible statute two years after it became effective, "[a]fter briefing and argument before the South Carolina Supreme Court, but prior to issuance of that court's opinion. . . ."[99] The clear implication of the Court's opinion is that the amendment was designed to raise a ripeness barrier retroactively in front of a landowner who had had no special permit option for a full two years. This conclusion is bolstered by the Court's statement that "we do not think it prudent to apply [the] prudential requirement here."[100] The state legislature tried to undo its acts when it thought it would lose an expensive case and the Supreme Court saw no reason to disagree with the state high court's conclusion that the case was ripe.[101] The pre-amendment portion of

93. 112 S. Ct. 2886 (1992).

94. Id. at 2907 (Blackmun, J., dissenting).

95. Id.

96. Id. at 2891 (emphasis added).

97. Id.

98. Id. (stating that "Lucas has properly alleged Article III injury-in-fact . . .").

99. Id. at 2890.

100. Id. at 2892. The problem of municipal had faith also arises in some mootness cases, in which a defendant can unilaterally cause the dismissal of a case it fears it will lose. See notes 193 and 198 and accompanying text.

101. The real puzzle is why the Court states that it *would* have dismissed the case on ripeness grounds if the state high court had done so. See id. at 2891 (stating that "[w]e think these considerations would preclude review had the South Carolina Supreme Court rested its judgment on ripeness grounds . . .").

the claim was ripe because the outright construction ban constituted a final decision. As to the post-amendment portion of the claim, prudence dictated that state legislatures be discouraged from attempting to rewrite history.[102] But the opinion lacks any express statement as to why the Court heard the case with respect to the post-amendment continuation of the taking.[103]

In the seven land use ripeness cases discussed above, the Court frustrated observers by repeatedly failing to decide the regulatory takings remedial issue on ripeness grounds, by adding steps incrementally before a takings case can be heard, and by finally resolving the main remedial question in a case in which there was no taking. But seen in retrospect and as a group, these cases are clear and coherent. A case will not be heard until it is ripe, and there are several steps that a plaintiff must take to ripen her case. Before bringing an as-applied challenge to a regulation in federal court, a landowner will ordinarily be required to apply to the local board for a development permit, seek a variance if her application is denied, and seek just compensation in state court. Once she takes these steps and ripens her federal claim, she has the opportunity to prove a regulatory taking and the right to compensation if she succeeds.

These cases also leave some important questions unresolved. First, while the Court has established several explicit ripeness thresholds, its decisions do not make it possible to ascertain in advance exactly when a federal court will find a given case to be ripe. A variety of important questions can be answered only on a case-by-case basis.[104] This uncertainty is unavoidable, given the many entities with the authority to regulate land use, the unlimited variety of potential development plans, and the wide array of statutes, ordinances, regulations, appeals procedures, variance procedures, and

102. The Court should be careful about discouraging states from relaxing overly harsh regulations. *First English* may have encouraged South Carolina to relax an inflexible restriction; *Lucas* may now deter other states from doing the same.

103. The Court offers only the following conclusory statements:

> In these circumstances, we think it would not accord with sound process to insist that Lucas pursue the late-created "special permit" procedure before his takings claim can be considered ripe. Lucas has properly alleged Article III injury-in-fact in this case, with respect to both the pre-1990 and post-1990 constraints placed on the use of his parcels....

Lucas, 112 S. Ct. at 2891. But see id. at 2906 (Blackmun, J., dissenting) (noting that his "disagreement with the Court begins with its decision to review this case"); id. at 2918 (Stevens, J., dissenting) (referring to the Court's actions as "[c]avalierly dismissing the doctrine of judicial restraint . . ."); id. at 2925 (statement of Souter, J.) (stating that "I would dismiss the writ of certiorari in this case as having been granted improvidently").

104. For example, how many variance applications are required? Which propesals are "grandiose"? Which appeals constitute "finalizing a decision" and which constitute "exhausting administrative remedies"?

state compensation schemes.[105] Yet lower courts must decide in every regulatory takings case whether the plaintiff presents a justiciable case or controversy, and their decisions will often be difficult to predict.

In addition, assuming that a case is ripe and a court finds a regulatory taking, *First English* does not reach the knotty problem of calculating the just compensation that is automatically due. Courts only rarely find regulatory takings and have had little experience in exploring the pivotal timing questions that arise in the remedial portion of such cases. Part III attempts to pinpoint the critical moments in any regulatory takings case, with emphasis on the moment that a taking becomes effective. Part IV examines the sequence of these moments, analyzes why regulatory takings cases are characterized by lengthy delays, and discusses some of the consequences of these delays.

III. PINPOINTING THE FOUR CRITICAL MOMENTS IN A SUCCESSFUL REGULATORY TAKINGS CLAIM

Four moments are critical in any federal regulatory takings claim in which the landowner prevails. First, a taking must become effective.[106] Second, a takings claim must ripen, allowing a federal court to exercise jurisdiction.[107] Assuming that a ripe claim exists, the third critical moment is the point when the court makes its decision that a taking has occurred.[108] Finally, there may be a fourth moment

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105. See, for example, *Hoehne v. County of San Benito*, 870 F.2d 529, 533 (9th Cir. 1989), in which the court stated:

> [T]he solution to [the ripeness] problem is not achieved by color-matching putative precedents and comparing snippets from stated rationales contained in past cases. As in many types of litigation, resolution of this issue turns on the record facts. Relevant cases in the Supreme Court and this court are extremely fact-specific.

106. If a landowner is to succeed on the merits of his regulatory takings claim, he must establish that a taking became effective at some point in the past; if he is to prove the amount of compensation, he must show when. See Part III.A.

107. The plaintiff should establish for the court the moment at which he crossed the last ripeness threshold, thereby allowing himself to enter federal court. Even if the parties never raise the issue, the court has no subject matter jurisdiction over a claim that has not ripened. See Part III.B.

The point at which a regulatory takings claim ripens differs from the point at which the taking becomes effective. In fact, a takings claim cannot ripen until after the taking becomes effective. See Part IV.A.4.

108. This moment is *not* the point in time at which the regulation actually works the taking—that point is the effective moment just described. Rather, it is the subsequent moment when a court, viewing all of the facts retrospectively, renders its decision that a taking has already occurred. See Part III.C.

when the temporary taking ceases.[109] This Part will examine these four critical moments and attempt to establish when each occurs.

A. The Effective Moment

A regulatory takings plaintiff must prove that the alleged taking became effective at some point in the past. The existence of this effective moment is the main substantive issue in the case, and any compensation that is due begins to accrue at the point that the taking became effective.[110] Establishing the instant at which the taking becomes effective, a point this Article refers to as the "Effective Moment," is therefore critical to both the substantive and remedial questions.[111]

Initially, establishing the Effective Moment may appear to be a simple task: If a government regulation is intrusive enough that it amounts to a taking of property, then the taking would appear to have commenced when the regulation became effective. But while these two events can occur simultaneously, there is no reason why they must.[112] Not every landowner suffers equally from the enactment of a municipal ordinance that might in some instances amount

109. This point marks the end of the span during which the municipality is liable for compensation. This is also the only moment of the four that need never occur in a successful regulatory takings claim. See Part III.D.

110. *First English*, 482 U.S. at 321 (holding that "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective").

111. In a forthcoming article, I attempt to locate with precision the beginning and ending points of a temporary regulatory taking, steps that are essential to the accurate calculation of compensation. See Gregory M. Stein, *Pinpointing the Beginning and Ending of a Temporary Regulatory Taking* (forthcoming, 1995). For purposes of this Article, it is more important to establish the *sequence* of the four critical moments in a temporary regulatory takings case, so as to examine this sequence and the delays inherent in it, and a more abbreviated discussion will be sufficient.

112. See Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 S. Ct. Rev. 1, 28: "The taking therefore occurs not at the time of the final judicial determination, but at the earlier moment when the regulation was first placed into effect." Professor Epstein's principal point, that the taking occurs long before the court makes its decision, see Part IV.A.3, need not imply that the taking always occurs as far back as the date when the regulation first became effective. Justice Brennan noted this important distinction in his *San Diego Gas* dissent. 450 U.S. at 656-57 (Brennan, J., dissenting) (suggesting that the regulatory taking begins with the "*application* of the regulation" (emphasis added)).

The view that the Effective Moment must occur at the instant the regulation becomes effective is somewhat more justifiable when the regulation is being challenged on its face. In such a case, the landowner is arguing that the very existence of the regulation, and not just its specific application, works a taking. See *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 687-88 (9th Cir. 1993) (agreeing with a defendant making this argument and holding that the statute of limitations began to run when the regulation became effective). See also *Agins*, 447 U.S. at 262-63 (rejecting a claim that the city's general land use ordinance worked a taking).

to a taking. Regulations often become effective long before individual owners form development plans[113] and long before they suffer any actual injury, and compensation should accrue only from that later point when subsequent events combine with the regulation to effect a taking as applied to a given landowner.[114] It would be unfair to municipalities and a windfall to some landowners if courts were always to treat the effective date of a regulation as the Effective Moment and were always to calculate awards from that point forward.

Courts instead should presumptively define the Effective Moment as the point when the landowner's last required variance application is finally denied by the highest administrative body with the power to consent.[115] This is ordinarily the first time that the municipality states with administrative finality exactly what its position is. A court can conclude at last that the least intensive development that the landowner has sought is more excessive than the municipality is willing to allow. And, knowing the outer limits of the parties' positions, the court can decide whether the municipality's position is legally infirm.

The landowner would be given the chance to rebut this presumptive Effective Moment. The most obvious situation in which this opportunity would be useful is when the municipality uses the permitting process to delay and camouflage a denial that has been inevitable all along. In such a case, a court would have the authority to define the Effective Moment as the date when the municipal body *actually* decided to deny all requests, a date that would predate the official final decision date.

But once a court acknowledges that the true Effective Moment can occur before the date on which a variance is finally denied, it must ask next why it ever attempted to define a uniform moment when Fifth Amendment liability always commences. A more ad hoc approach wonld be flexible enough to account for the myriad factual

113. While this Article uses commercial development examples throughout, and focuses primarily on zoning and subdivision restrictions, the issues the Article discusses can arise in various other situations as well. Historic preservation laws and environmental controls, for example, raise many of the same issues, and the plaintiffs in the reported takings cases vary from homeowners to mobile home park operators to public utilities.

114. See, for example, *Hernandez*, 643 F.2d at 1200 (recognizing that a general zoning ordinance may exist harmlessly for a period of time before other circumstances change to the landowner's detriment).

115. This is the point at which the landowner meets the first half of the *Williamson County* standard, as augmented by *MacDonald*. See *McMillan v. Goleta Water Dist.*, 792 F.2d 1453, 1457 (9th Cir. 1986); notes 81-91 and accompanying text. See generally Robert H. Freilich, *Solving the 'Taking' Equation: Making the Whole Equal the Sum of Its Parts*, 15 Urban Law. 447, 473, 481-82 (1983).

and procedural situations that may arise in any regulatory takings claim. It would recognize that takings fact patterns are too diverse to categorize, and would treat each case on its own merits.

In spite of its obvious attractions, such an approach presents significant problems. An ad hoc approach is highly subjective. It is judicially expensive. It will lead to inconsistencies and confusion among landowners, regulators, and courts. And it will create tremendous planning problems for municipal officials who wish to limit land use without effecting takings. The judicial inquiry into what constitutes a regulatory taking—in which an ad hoc approach has seemed unavoidable—suffers from all of these infirmities. There is no need to import these same problems into the definition of the Effective Moment if a superior alternative is available. In spite of the considerable doctrinal attractiveness of determining the Effective Moment on a case-by-case basis, the drawbacks to such an approach outweigh the benefits.[116]

Moreover, if courts define the Effective Moment presumptively as the point when the final variance application is denied but allow deserving plaintiffs to rebut that presumption, they import the flexibility that the ad hoc method offers in those cases in which it is most appropriate. The fact that this presumptive definition is rebuttable should discourage arbitrary behavior by regulators who might otherwise feel shielded by the definition. And other adequate checks on arbitrary regulatory behavior would remain in place:[117] Inadequate procedures could be addressed by bringing a due process claim,[118] and arbitrary or discriminatory behavior could be addressed by bringing either a due process or an equal protection claim.[119]

B. The Ripeness Moment

Even if the Effective Moment has occurred years before a plaintiff enters federal court, the threshold question the judge must address is whether the plaintiff's claim has ripened. If the federal claim is not ripe, then the court has no jurisdiction to hear it.[120]

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116. Another possibility that may come to mind is to define the Effective Moment as the date when compensation is finally denied by a state tribunal. As demonstrated below, this point in time is constitutionally too late. See Part IV.A.4.

117. See generally *Eide v. Sarasota County*, 908 F.2d 716 (11th Cir. 1990), discussed at note 262.

118. See U.S. Const., Amend. V; U.S. Const., Amend. XIV, § 1; Part V.C.

119. See U.S. Const., Amend. XIV, § 1.

120. An appellate court should review a lower court's ripeness determination (or its unstated assumption that a claim is ripe) de novo. *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d

Establishing the point at which the federal claim becomes ripe, a point this Article refers to as the "Ripeness Moment," is essential to the landowner's claim, and a failure to demonstrate a claim's ripeness should be fatal.

Part II of this Article described the mileposts a court will search for in determining whether a regulatory takings claim is ripe. A plaintiff who wishes to challenge a land use ordinance on its face may do so as soon as that ordinance becomes effective.[121] Thus, the very existence of the land use ordinance is sufficient to ripen a facial claim. However, this low ripeness threshold is accompanied by the much more difficult substantive demands of proving a facial taking.

If a plaintiff elects not to attack the ordinance on its face, her only alternative is to show that the ordinance works a taking as applied to the particular litigant on a particular set of facts. Such a showing requires the landowner to submit a development plan to local officials,[122] to seek a variance once that plan is rejected,[123] and to seek just compensation in a state proceeding[124] before coming to federal court. Moreover, if the initial development plan was grandiose, the court may insist that she submit at least one additional, less ambitious, plan.[125]

The definition of the Ripeness Moment is fairly clear, given the intense Supreme Court interest in this issue since 1978. But pinpointing the Ripeness Moment in a specific case sometimes proves to be a challenge because of the fact-specific nature of each of these thresholds. Thus, while the structure of the test may be well-defined, its contours often are not. Finally, note that this Article defines the Ripeness Moment as the point at which the claim actually ripens and not as the subsequent point at which a court determines that the claim has previously ripened.

1570, 1573 n.7 (11th Cir. 1989); *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1450 (9th Cir. 1987); *Assiniboine and Sioux Tribes v. Board of Oil and Gas*, 792 F.2d 782, 787 (9th Cir. 1986); Fed. R. Civ. P. 12(b)(1) & (b)(6). See generally *Abbott Laboratories*, 387 U.S. at 148-50 (discussing rationale for ripeness doctrine). If a claim is unripe, the court should dismiss it. *Southern Pacific Transp. Co.*, 922 F.2d at 508. See generally Part II.B.3.

121. *Agins*, 447 U.S. at 262-63. See notes 65-71 and accompanying text; *Euclid*, 272 U.S. at 386. But see *Levald*, 998 F.2d at 686 (citing *Williamson County*, 473 U.S. at 196-97, for the proposition that plaintiffs with facial claims first must seek just compensation if pursuit of this remedy is allowable under state law and would not be futile). It is conceivable, if unlikely, that a landowner could even obtain a declaratory judgment prior to a regulation's effective date stating that the regulation will constitute a facial taking when it becomes effective.

122. *Agins*, 447 U.S. at 260.

123. *Williamson County*, 473 U.S. at 186-94.

124. Id. at 193-97.

125. See *MacDonald*, 477 U.S. at 353 n.9; *Penn Central*, 438 U.S. at 135-37. See generally *First English*, 482 U.S. at 311.

C. The Decision Moment

The "Decision Moment" occurs at the instant when a federal court decision in favor of the landowner becomes irrevocable. At its earliest, this moment occurs when a federal district court enters judgment in favor of the property owner, assuming that the municipality decides not to appeal. At its latest, this moment occurs when the Supreme Court decides in favor of the landowner or declines to hear the case. Whatever the procedural setting of the case, the Decision Moment is the moment when the landowner prevails irreversibly.

For purposes of this definition, it does not matter whether the landowner wins or loses at trial, as long as the final decision is in the landowner's favor. Most landowners lose in the end, and for these typical plaintiffs there is no Decision Moment. But whatever the procedural setting of the case, the Decision Moment, if there is one, occurs at the instant when the plaintiff ultimately succeeds.[126]

D. The Cessation Moment

What alternatives does a local governing body have after a federal court finds that a municipality's actions amount to a regulatory taking? *First English* addresses this question directly: "Once a court determines that a taking has occurred, the government retains the whole range of options already available—amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain."[127] But no matter which of these options it chooses, the municipality is required under *First English* to compensate the owner for the period beginning with the Effective Moment and continuing through the point when it amends or withdraws the regulation or explicitly exercises its eminent domain power. This

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126. Note once again that the Decision Moment occurs at the moment when the federal court reaches its decision that a regulatory taking has previously occurred, and not at the earlier moment when the taking was actually effected by the municipality. The Decision Moment is the moment in the subsequent narration of events when the court finally tells the parties what has already happened, not the prior moment in the action when the taking actually occurred. Contrast this with the Effective and Ripeness Moments, which are, respectively, the points in the action when the taking actually becomes effective and the case actually ripens. These two moments constitute times when a significant event *actually occurs*. The Decision Moment, on the other hand, occurs after all of the substantive facts have developed; it is the moment when the court tells the parties that a taking has *previously occurred*. Of course, the fact that a plaintiff reaches the Ripeness Moment does not imply that she will ever reach the Decision Moment: Most landowners with ripe claims lose on the merits.

127. *First English*, 482 U.S. at 321. See also *United States v. Dow*, 357 U.S. 17, 25 (1958).

Article will refer to this latter moment, which marks the end of the period for which there is an ongoing obligation to compensate, as the "Cessation Moment."

Locating this instant with precision can be more challenging than might at first appear. For example, what if the government does not react to the federal court's decision? Will the taking be deemed ongoing, or will the municipality be presumed to have lifted the offending restriction? Will a city attorney's statement that the city will cease enforcement be sufficient to toll the city's liability? The federal courts have yet to address most of these questions,[128] but litigation pertaining to these issues is sure to arise in the future. In any event, if the local legislative body acts quickly and unequivocally to amend or rescind the ordinance that worked a temporary taking or to transform the taking into a permanent one, then the Cessation Moment will be obvious.

E. Summary of the Four Critical Moments

In summary, there are four critical Moments in any federal regulatory takings case in which the landowner prevails. First, the Effective Moment presumptively occurs when the landowner's last required variance application is finally denied at the highest administrative level, although the landowner might rebut this presumption. Second, the Ripeness Moment takes place when the landowner meets the last of the Court's ripeness requirements. Third, the Decision Moment arrives at the point when the federal court system rules irrevocably in the landowner's favor. Finally, the Cessation Moment occurs, if ever, when the local governing body amends or withdraws the offending regulation or expressly condemns the land.

IV. THE PROBLEMATIC SEQUENCE OF EVENTS IN A SUCCESSFUL REGULATORY TAKINGS CASE

Part III pinpointed, with about as much precision as the case law allows, the four critical dates that a federal court must identify in a successful temporary regulatory takings case. The Supreme Court has stated that a federal court has no subject matter jurisdiction over

128. See generally Stein, *Pinpointing the Beginning and Ending of a Temporary Regulatory Taking* (cited in note 111) (discussing the difficulties that may arise in ascertaining the Cessation Moment).

unripe claims, and has given substantial guidance in seven cases[129] as to what hurdles a landowner must clear in order to reach the important Ripeness Moment. If the landowner reaches the Ripeness Moment, and if the court then arrives at the Decision Moment by holding in her favor,[130] the court's next task is to calculate compensation. To do so, the court must always pinpoint the Effective Moment and must also determine the Cessation Moment if the taking has ended.[131] Thus, when the plaintiff is successful, the court must isolate at least three, and often four, of the critical Moments.

Ascertaining when these four Moments occur is a daunting task, but accomplishing it is only a necessary first step. For it is the *sequence* of these four Moments that demonstrates most vividly the discord between regulatory takings law and ripeness doctrine. The effect of this incompatibility is heightened further by the facts typically found in takings cases, which are often brought by similar types of plaintiffs, planning similar transactions, against similar defendants.

Part IV examines the sequence of critical events in a federal regulatory takings case, the factual attributes of a typical case, and the synergistic relationship between the two. Part IV.A will show that, *for any valid claim, the Effective Moment must always precede the Ripeness Moment, and the Ripeness Moment must always precede the Decision Moment.* As a result of this configuration, there must be a gap between the time when a regulatory taking actually occurs and the subsequent time when a court confirms that the taking indeed occurred. And while it is a common feature of litigation for there to be a delay between the time of a violation and the time when a court remedies that violation, the operation of the ripeness requirements in regulatory takings cases expands the length of that delay. In addition, certain factual characteristics commonly found in regulatory takings cases—characteristics examined in Part IV.B—combine to ensure that this substantial time lag will have unusually harsh effects.

129. See Part II.B.3.

130. Recall that the term "Decision Moment," as defined here, assumes a victory by the landowner. If the municipality prevails on the merits, then the court will never reach the Decision Moment and will not need to address the remedy question. Note also that by reaching the Decision Moment, the court concludes that the Effective Moment occurred at some time in the past. See Part III.C.

131. See Parts III.A and III.D.

A. *The Sequence of Critical Moments in a Successful Case*

1. The Effective Moment Must Precede the Cessation Moment

A regulatory taking cannot end before it begins, and so the Effective Moment must always precede the Cessation Moment. In fact, the definition of the Cessation Moment presupposes that the Effective Moment has already occurred. The only unusual fact pattern that merits additional discussion is that in which an injunction bars enforcement of a new land use restriction before the restriction ever becomes effective. Such a claim might seem to illustrate a case in which a taking ends before it begins. Recall, however, that Part III.A defined the Effective Moment as the point at which a regulation actually effects a taking with respect to the plaintiff.[132] Therefore, if an injunction suspends enforcement of the offending regulation before it ever takes effect, then the taking never begins, the Effective Moment never occurs, the landowner must lose her takings claim on the merits, and there is no Cessation Moment.[133]

It is entirely possible that a landowner in such a position may suffer actual economic loss, and it is even possible that such loss may be remediable. The landowner may present a valid due process claim or a valid non-constitutional claim. But the justification for any monetary remedy is not found in the Takings Clause, as there has been no taking.[134]

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132. See Part III.A.

133. In fact, an as-applied claim such as this will not yet be ripe, see Part II.B.3, so a court should never reach the merits. Even if the plaintiff brings a ripe facial claim, the best she can hope for is an injunction against future enforcement, without compensation.

Facial claims are more likely than as-applied claims to give rise to pre-enforcement injunctions, since the effectiveness of the ordinance may be the last step remaining prior to the Effective Moment. But even in a case such as this, the injunction becomes effective before the taking does, so there is no taking, no Effective Moment, no Cessation Moment, and no need to fashion a monetary remedy. Even if a court were to find a compensable taking, the compensation should be zero. *First English*, 482 U.S. at 320.

134. But see *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 911 F.2d 1331, 1334-36 (9th Cir. 1990) (per curiam), in which the Ninth Circuit held that a takings claim was not moot just because the offending plan had been enjoined before it became effective. The court noted that plaintiffs' claim might well be meritless, but was not moot. See also id. at 1343 (Fletcher, J., concurring) (arguing that the district court injunction insulates the defendant from any liability, since it was the injunction, and not tbe plan, that prohibited construction).

2. The Ripeness Moment Must Precede the Decision Moment

The fact that the Ripeness Moment must precede the Decision Moment is also obvious and has been discussed at length earlier.[135] The Decision Moment occurs at the point when a federal court actually renders its decision in favor of the landowner, but a federal court has no subject matter jurisdiction over a regulatory takings claim, and thus cannot reach the Decision Moment, unless that claim has first cleared the Supreme Court's ripeness barriers.

3. The Effective Moment Must Precede the Decision Moment

If a federal court finds that a regulatory taking has occurred, then the taking must have become effective before the court decided the case. Thus, the Effective Moment must precede the Decision Moment. The only way a plaintiff might receive a favorable decision before a regulatory taking becomes effective is if a court is willing to stato in advance that a proposed series of future events will amount to a taking. Such a declaration seems unlikely, particularly in an as-applied case, since the court will want to see exactly what the municipality does and exactly how those actions affect the particular landowner. In fact, the reluctance of federal judges to predict the future is one of the primary reasons why courts apply the ripeness doctrine so vigorously in reglatory takings cases.[136] Even if a court were willing to find a taking in such a setting, *First English* would preclude a compensation award, since the decision would be rendered before "the taking was effective."[137]

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135. See Part II.B.3 and III.B.

136. See Part II.B.3. Courts may be somewhat less reluctant to predict the future in facial cases, in which the municipality may be only one step short of a taking. Id.

137. *First English*, 482 U.S. at 321. Once again, the Decision Moment *can* precede the Effective Moment, but only if the court is willing to find the case ripe, guess what the municipality might do in tbe future, and enjoin these acts. Even if all of these unlikely events occur, takings compensation would never be appropriate, since the taking would not yet be effective; thus this remote pessibility has no significance to the issue of compensation.

Rather than enjoin the municipality, the court might declare that the planned future enforcement of the regulation will constitute a compensable regulatory taking. If the municipality opts to enforce the regulation anyway, then it will have to pay. This situation closely resembles an explicit condemnation, in which the municipality knows that if it proceeds with a cortain action, it will have to compensate the landowner. The only difference between these two cases might be that an entity that condemns explicitly ordinarily knows the size of the award in advance of the Effective Moment and can change its mind if the price is too high, while the entity that elects to enforce a regulation that has been declared a taking in advance of enforcement may not. Even this distinction disappears in jurisdictions with "quick-take" condemnation laws, see, for example, Alaska Stat. § 09.55.440 (Supp. 1993) (authorizing a municipality to take land explicitly immediately and to litigate the size of tbe award later).

4. The Effective Moment Must Precede the Ripeness Moment

In any federal regulatory takings case in which the landowner is to prevail, the Effective Moment must occur before the Ripeness Moment. In fact, the Effective Moment often occurs months or years before the Ripeness Moment. The result of this unavoidable and prolonged sequence of events is that landowners sometimes must abandon claims that might have turned out to be valid, because they cannot survive the ripening process. Surprisingly few courts have focused on this critically important characteristic of regulatory takings cases.

As the Supreme Court pointed out in *Williamson County*,[138] the Ripeness Moment does not occur until the landowner is denied compensation in the appropriate state forum.[139] But what is the occurrence for which plaintiff seeks just compensation in the state proceeding? It is a taking that must have been effected *before* the landowner entered the state forum. The state compensation proceeding, then, is one in which plaintiff landowner is seeking just compensation for a taking that has already occurred. If the Effective Moment has not occurred prior to the time the landowner arrives in the state forum, then there has been no taking yet, the landowner is not entitled to compensation, and she must lose at the state level and then at the federal level.[140] If the Effective Moment has occurred by this time, then the state court will either award just compensation, thereby

Technically speaking, the immediately preceding example demonstrates a regulatory takings case in which the Ripeness Moment and Decision Moment do precede the Effective Moment. However, this Article focuses on regulatory takings cases because of one important quality that they nearly always display: The risk that a party will take certain actions and not learn the substantive consequences of those actions until some time later. Current ripeness doctrine exacerbates this problem. The immediately preceding example, bowever, does not display those characteristics, with the government knowing in advance that it is about te take property. Even if this hypothetical case formally qualifies as an inverse regulatory condemnation, it more closely resembles an explicit taking.

138. 473 U.S. 172.

139. Id. at 186, 194-97. The ripeness threshold in state compensation proceedings is lower than that in the federal takings proceedings to follow. This must be the case, since a loss in state court cannot be a prerequisite te state court jurisdiction. If state courts were to apply the same ripeness standard as federal courts, then no state claim could ever ripen. And if no state claim could ever ripen, then no federal claim could ever ripen either. See Stuart Minor Benjamin, Note, *The Applicability of Just Compensation to Substantive Due Process Claims*, 100 Yale L. J. 2667, 2672 (1991) (stating "[t]he logic of *Williamson County* would suggest that a property owner does not have a ripe taking claim when she enters state proceedings te obtain just compensation").

140. Again, a rare exception may arise if a court is willing to declare that a propesed future course of events will censtitute a taking. See notes 136-37 and accompanying text. It is precisely this sort of speculation that the ripeness doctrine is designed to avoid.

ending the matter, or refuse to award just compensation, thereby ripening the federal claim.

Immediately after the Effective Moment occurs, no one knows whether the state court will ultimately order the municipality to provide just compensation, and it is impossible to tell yet whether the taking is an unconstitutional one. This is one reason why a federal court must find the claim unripe. This timing point is pivotal in regulatory takings cases, since compensation accrues from the Effective Moment.[141] If the state court recognizes the taking, it awards compensation from the Effective Moment, and an uncompensated taking—an unconstitutional event—never occurs. If the state court fails to recognize the taking but the federal court later succeeds, then the federal court awards compensation from the Effective Moment, and an uncompensated taking—an unconstitutional event—has been remedied.[142] In the second case, the award will be larger, reflecting the additional time between the state and federal decisions during which the uncompensated regulatory taking remained effective.[143] The taking is compensable either way, but only the uncompensated taking is unconstitutional.[144]

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141. See Part III.A.

142. The statute of limitations on the federal claim would not begin to run until the demand for compensation is rejected at the state level. See, for example, *Biddison v. City of Chicago*, 921 F.2d 724, 728-29 (7th Cir. 1991) (holding that a federal claim does not accrue for statute of limitations purposes until the state courts deny just compensation). See also *Norco Construction, Inc. v. King County*, 801 F.2d 1143, 1145 (9th Cir. 1986) (Kennedy, J.) (holding that "under federal law the general rule is that claims for inverse taking . . . are not matured claims until planning authorities and state review entities make a final determination on the status of the property").

143. In the latter case, the defendant may be able to raise a res judicata defense in the federal court proceedings. See Part V.E. In either case, the Cessation Moment will ordinarily occur at or soon after the finding of a taking.

144. In his discussion of *Williamson County*, Professor Monaghan notes:

> The Court is quite wrong in thinking that the peint in tine at which a substantive deprivation occurs is a function of the peint in tine at which the state can reasonably provide corrective process. The relationship runs the other way: discussion about the timing of any process due presupposes independent criteria for specifying the point at which the substantive deprivation has occurred.

Monaghan, 86 Colum. L. Rev. at 989 (cited in note 49) (footnote omitted).

In the onritted footnote, Monaghan adds: "If a police officer, acting in a random and unauthorized manner, hauls a speaker from a platform or breaks inte a home without a warrant, the impracticability of predeprivation process does not mean that no substantive deprivation has occurred." Id. at 989 n.75. It *does* mean, however, that one cannot yet tell whether a "substantive deprivation *without due process*" has occurred (assuming that the action was random and unauthorized rather than pursuant to official state policy). And just as the Due Process Clause violation does not occur until the state fails te provide due process, a Takings Clause violation does not occur until the municipality fails to pay just compensation. See id. at 990-93; note 81 and accompanying text.

Recall that when the landowner's variance is finally rejected at the local level, her next step is to seek compensation in the appropriate state forum. If the state judge or administrator agrees with the plaintiff and finds a regulatory taking, then no constitutional violation ever occurs—the government has taken property and must now pay for it. There has never been an uncompensated taking, the landowner has no need to seek redress in federal court and no need to clear any federal ripeness thresholds, and the Ripeness and Decision Moments never arrive.

If the state judge or administrator disagrees with the plaintiff and finds no taking, then a federal judge can either agree or disagree. If the federal judge agrees with the state arbiter, then there has been no Effective Moment and no taking, the Ripeness Moment has arrived, and the landowner loses her ripe claim on the merits. If the federal judge disagrees with the state arbiter, then the federal judge will find a taking and order compensation. That reversal constitutes a federal court statement that the state judge was wrong, which is to say that the Effective Moment had occurred before the state arbiter ruled.

These conclusions can be synthesized as follows: If a valid federal regulatory takings claim does not ripen until compensation is incorrectly denied at the state level, and if compensation can be denied incorrectly at the state level only if a taking has already become effective, then there must be a period of time after a taking becomes effective when a federal takings claim is not yet ripe.[145] If a plaintiff has a valid federal claim—which is to say that she had a valid claim that was incorrectly rejected in the state forum—then the Ripeness Moment must have occurred *at* the time the state denied just compensation and the Effective Moment must have occurred *before* the time the state denied just compensation.[146] Thus, the Effective Moment must precede the Ripeness Moment.[147]

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145. This Article has defined the Effective Moment as typically occurring at the point at which a variance is finally denied, see Part III.A, a point that occurs late in the local administrative process. But even under this late definition of the Effective Moment, the landowner still is entitled to compensation for the period beginning at the Effective Moment, continuing through the unsuccessful state compensation proceedings, and terminating no sooner than the date on which the federal proceedings conclude (unless the municipality voluntarily ceases enforcing the ordinance before this).

146. Prior to *First English*, some states did not have procedures in place for inverse condemnation plaintiffs to seek just compensation at the state level, and some states did not even recognize this remedy. See note 27. The Court implied that the requirement of seeking just compensation would have to be dispensed with in these states. *Williamson County*, 473 U.S. at 194-95. As a result, landowners in these states had a shorter path to federal court and the Effective and Ripeness Moments might coincide.

The Supreme Court came close to saying this in *First English*, when it made the following statement in a footnote: "Though, as a matter of law, an illegitimate taking might not occur until the government refuses to pay, the interference that effects a taking might begin much earlier, and compensation is measured from that time."[148] A more complete statement of the law would be that an illegitimate taking *cannot* occur, according to *Williamson County*, until the government refuses to pay. And once this happens, the interference that

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As a result of *First English*, all states are required to provide just compensation following a regulatory taking. This suggests that all states must have procedures in place for providing such compensation, see, for example, *Calibre Spring Hill, Ltd. v. Cobb County, Ga.*, 715 F. Supp. 1577, 1581 (N.D. Ga. 1989) (explaining that, following *First English*, "it is clear that a state must recognize an inverse condemnation claim for money damages where a zoning regulation amounts to a taking"); Roberts, 24 Urban Law. at 492-93 (cited in note 43). Therefore, the Effective Moment now must precede the Ripeness Moment in all states.

147. There is one set of facts that appears to present a case in which the Ripeness Moment precedes the Effective Moment. In fact, this is not so, but the scenario merits further discussion. Imagine a case in which the plaintiff loses a ripe regulatory takings claim in state court when the state court correctly concludes that there was no taking. Before she can be heard in federal court, the municipality takes some additional action that transforms the non-taking into a taking. What has happened is that the landowner actually possesses two distinct, if factually overlapping, claims, and the Ripeness Moment for her first claim has preceded the Effective Moment for her second claim.

The plaintiff's first claim was unsuccessful because there was no taking. No Effective Moment ever occurred, and her loss at the state level was proper. The Ripeness Moment has now arrived, hut the federal court should agree with the state court and rule in favor of the municipality on the merits. *Penn Central*, 438 U.S. 104, illustrates this point, in that appellants lost hut were invited to return if subsequent events suggested that the non-taking had turned into a taking. See also *First English II*, 258 Cal. Rptr. at 894 (holding that the ordinance did not work a taking). See generally *Yee*, 112 S. Ct. at 1528 (finding no valid facial claim); *Agins*, 447 U.S. at 259 (holding that the ordinances in question did not, on their face, take appellants' property). The plaintiff's second claim is not yet ripe, because the landowner has never sought compensation at the state level for the taking that just became effective. The state court has never had the opportunity to consider the municipality's most recent action. As to this claim, the Effective Moment has occurred, but not the Ripeness Moment. The federal court should refuse to hear the case unless the state court first rejects her claim.

If the federal court senses that the municipality has intentionally acted in this fashion as a way of delaying plaintiff's access to federal court, it may opt te hear the second case anyway. The federal court may state that it is relying upon the prudential prong of the ripeness test; such an approach will he permissible if the constitutional prong has been cleared. It may claim that exceptions to the ripeness requirement are appropriate in cases of futility, see note 186, or municipal bad faith, see note 193. Or the federal court may claim that the first state court proceedings already ripened this second claim. This last analysis is incorrect, in that the state court could not have considered events that happened after it rendered its decision. However, this last approach may actually be no more than a poorly justified example of the second approach, in which the court creates an exception to the ripeness requirements where an exception is equitably warranted and constitutionally acceptable. Federal courts will hear claims that appear to be moot under similar circumstances. Such reasoning may explain why the Supreme Court heard all of the landowner's claims in *Lucas*. See 112 S. Ct. at 2890-92; notes 93-103 and accompanying text.

148. *First English*, 482 U.S. at 320 n.10 (citation omitted). See also *Zilber v. Town of Moraga*, 692 F. Supp. 1195, 1206 n.11 (N.D. Cal. 1988) (recognizing that a taking might have occurred before the application was processed).

effected that taking *must* have begun earlier, or else the government would have been correct in refusing to pay. But once the complete sequence has occurred—once there has been an Effective Moment, an improper denial of just compensation by the state, and a federal suit in which the plaintiff prevails—compensation is calculated for the period beginning with the Effective Moment.

5. The Sequence of Moments

Regulatory takings cases in which the landowner has a valid federal claim all display the four characteristics discussed above. Taken together, these four characteristics lead inevitably to the following two conclusions about valid regulatory takings claims:[149] (1) The Effective Moment must precede the Ripeness Moment, which must precede the Decision Moment;[150] and (2) The Cessation Moment can occur at any time after the Effective Moment and need never occur at all.

In many respects, these conclusions are unsurprising, and the first conclusion is characteristic of valid legal claims in numerous other areas of the law. A court often has no jurisdiction to hear a legal claim until after the alleged wrong occurs,[151] and there ordinarily will be a lag between the time when the court finally obtains jurisdiction and the time when it renders its decision. But regulatory takings cases frequently display characteristics that make them singularly time-sensitive. As a result, the conclusions reached above often lead to special hardships for many landowners and municipalities. Part IV.B discusses the attributes of the typical regulatory takings case, highlighting the distinctive timing problems that both plaintiffs and defendants face in these cases.

B. Typical Regulatory Takings Cases Are Highly Sensitive to Delays

The sequence of Moments in any successful regulatory takings case may appear unremarkable. The ripeness doctrine is designed to

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149. The only cases to which these conclusions do not apply are the unusual factual scenarios discussed in Parts IV.A.1-IV.A.4.

150. See generally Gregory S. Alexander, *Takings, Narratives, and Power*, 88 Colum. L. Rev. 1752, 1756-63 (1988) (discussing related regulatory takings timelines); John Mixon, *Compensation Claims Against Local Governments for Excessive Land-Use Regulations: A Proposal for More Efficient State Level Adjudication*, 20 Urban Law. 675, 702-03 (1988) (same).

151. There are some situations in which a court may decide a claim before the wrong occurs. See, for example, Chemerinsky, *Federal Jurisdiction* at 100-01 (cited in noto 29) (discussing declaratory judgments and ripeness); Declaratory Judgment Act, codified at 28 U.S.C. § 2201 (1988).

delay access to federal court until a case deserves judicial review. Thus, the wrong must mature before a court will spend its limited resources trying to remedy it. And if the case must ripen before a federal court will hear it, then the remedy will always lag behind the deprivation. The wrong must occur, then the court must decide that the wrong merits correction, and then the court must decide what remedy is appropriate.

But regulatory takings cases are distinctive in ways that magnify the effects of this delay. The typical plaintiffs, transactions, and defendants in land use cases ensure that the clash between ripeness doctrine and takings law will have unusually harsh effects. As a result, the delay between a wrong and its remedy that is common to many areas of the law can have uncommon effects in regulatory takings cases.[152] This Section examines the parties and fact patterns characteristic of many regulatory takings cases.

1. The Typical Regulatory Takings Plaintiff

Any holder of a substantial property interest can litigate a regulatory takings claim.[153] In theory, tenants, contract vendees, certain holders of future interests, and others with interests far less extensive than a legal fee simple can claim that the government has taken their property without just compensation. But in practice, given the fact that both a permit application and a variance request are ordinarily required before a federal regulatory takings claim ripens, only those interest holders who are actively attempting to develop land or modify its use are likely to have claims that a federal court will hear.[154]

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152. See, for example, *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, 1393 (11th Cir. 1993):

> The parties have been litigating over the use of 8.5 acres of land for sixteen years. We hope that this litigation, which has outlasted the plans to develop the land, is nearing an end. . . . Regardless of the outcome, it is in the best intorests of all concerned that the outcome be reached sooner rather than later.

See also Mixon, 20 Urban Law. at 687 (cited in note 150) (stating that "[o]ne need not take sides in the dispute between city hall and over-regulated landowners to recognize that the delay inherent in obtaining review of land-use regulations is as much a part of the costly problem as the substantive issue of liability").

153. See Sackman and Rohan, 2 *Nichols' The Law of Eminent Domain* § 5.01[3] at 5-26-5-29 (cited in noto 12).

154. One interesting question that arises is whether an owner who wishes to sell vacant property to a developer can challenge the land use restriction as applied, so as to increase the sale price. Current ripeness doctrine, by requiring a building permit application, presuppeses that it is the current owner who wishes to develop the property. But if the developer does not yet own the property, then the person who wishes to sell to the developer appears to have no practical recourse under current Supreme Court case law. See Berger, 20 Urban Law. at 787

As a result, the ripeness requirement serves to weed the field of potential plaintiffs, removing those owners whose takings claims are seen as tenuous or distant. That, after all, is the point of both the constitutional and prudential elements of the ripeness requirement. The ripeness doctrine narrows the universe of potential claimants to those owners of truly substantial interests in real property—primarily fee simple holders and long-term ground lessees—who wish to develop their land or modify its use in the immediate future.[155]

A substantial number of these landowning entities will be partnerships, corporations, and limited liability companies, as these are the ownership forms most likely to be used by real estate developers. To be sure, individuals, married couples, and tenants in common can bring regulatory takings claims, and a significant number of the Supreme Court's recent takings cases were brought by plaintiffs who fell within these categories.[156] But claims by these individuals and smaller entities are likely to concern smaller parcels; an examination of the size, value, and proposed use of the parcels involved in the Court's cases indicates that business entities owned a large share of the dollar value of the land that has been the subject of regulatory takings claims.[157] This is not surprising. As-applied takings claims are most likely to arise when a change in land use is planned, and the

n.21 (cited in note 49) (questioning whether such a seller is eligible for a variance). Presumably, a court is permitted to fashion an equitable variation of current ripeness doctrine to address such cases. But see Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 Colum. L. Rev. 1697, 1700-01 (1988) (expressing concerns about "judicially created uncertainty").

155. This Article uses the terms "landowner" and "developer" when discussing takings plaintiffs. In some cases, regulatory takings plaintiffs will be neither owners nor developers. It is possible that a federal court would modify the ripeness requirement or broaden the futility exception, see note 186, for a plaintiff who does not fit into one of these predominant categories. For example, a requirement that a remainder holder apply for a permit and then a variance might be impossible to meet, given that the plaintiff might not even know when her interest will become possessory. The remoteness of such a plaintiff's interest, however, would make her substantive claim more difficult to prove in addition to making the current ripeness test nearly impossible to meet. Most likely, the holder of the property interest would not he able to litigato with any success until her property interest became possessory.

156. *Agins*, 447 U.S. 255, and *Nollan v. California Coastal Commission*, 483 U.S. 825, 827 (1987), were each brought by married couples. *Yee*, 112 S. Ct. at 1526, involved several small businesses, at least some of which were family-owned, and *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994), was brought by a sole proprietor. Lucas was a real estate developor who apparently owned the two lots in issue in his own name. *First English* was brought by a church.

157. Hamilton Bank's predecessor-in-interest and MacDonald, Sommer & Frates were planning to develop hundreds of residential units each. San Diego Gas wished to build a nuclear power plant. Penn Central, a huge entity in its own right, had entered into a lease and sublease agreement with a subsidiary of a British corporation; together they wished to develop a large commercial parcel in Manhattan. In contrast, the Agins's wanted to develop five acres, Lucas two lots, the Nollans one lot, Dolan one lot, the Yees two family-owned mobile home parks, and First English a church-owned campground.

various ripeness thresholds are most likely to be met when a change in use is being pursued. For a variety of liability and tax reasons,[158] partnerships, corporations, and limited liability companies are the types of landowning entities most likely to own land that is about to be developed.

But the business entities involved in many major real estate development projects frequently lack the staying power to survive protracted litigation.[159] In spite of the fact that these entities, in contrast with their human counterparts, may endure perpetually, for all practical purposes they must either produce or perish within a period of just a few years. Partners or shareholders invest in these entities with the expectation of seeing returns, or at least construction, within months or years, not decades. The carrying costs of the development parcel, which may include principal and interest on an acquisition loan, real estate taxes and assessments, maintenance of existing structures, insurance, and security, coupled with the costs of ripening and then litigating a regulatory takings claim, can bankrupt a real estate development entity before it ever breaks ground. And since these business entities are typically single-purpose ventures, unlike individuals and married couples, they may lack the financial ability, the diversification of holdings, the willingness, and the stubbornness to subsidize years of costly litigation from other sources of income.[160] Practically speaking, the universe of plaintiffs with the financial ability to survive the lengthy ripening process is small.[161]

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158. Corporations, limited partnerships, and limited liability companies offer limited liability to some or all of their investors. Investors in these entities other than general partners ordinarily can lose no more than they invest. S corporations, partnerships, and limited liability companies are not taxed at the entity level and thus are more attractive to investors. S corporations, limited partnerships, and limited liability companies, if properly structured, offer both limited liability and the ability to avoid entity-level taxation. See generally Harry G. Henn and John R. Alexander, *Laws of Corporations and Other Business Enterprises* §§ 15-17 at 50-57 (West, 3d ed. 1983).

159. See Blaesser, 2 Hofstra Property L. J. at 120 (cited in note 42) (explaining that complicated procedures make pursuing claims impracticable for many owners).

160. See, for example, *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 162 (1973) (quoting *Forgay v. Conrad*, 47 U.S. (6 Howard) 201, 205 (1848)):

> In *Forgay v. Conrad*, . . . the Court held "final" an interlocutory decree requiring a litigant "to deliver up property which he claims," even though a final accounting has yet to be made. Unless that interlocutory order was deemed "final," Mr. Chief Justice Taney pointed out, the "right of appeal is of very little value to him and he may be ruined before he is permitted to avail himself of the right."

161. Recognition of "time-sensitive developers" may lead to a variation of the conceptual severance problem first identified by Justice Brandeis in his dissent in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 419-20 (1922) (Brandeis, J., dissenting). See Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudenee of Takings*, 88 Colum. L. Rev. 1667, 1674-78 (1988) (discussing conceptual severance). A two-year moratorium on

2. The Typical Regulatory Takings Transaction

The nature of development transactions and the business practices that development entities often employ magnify the problems these typical landowners may face. Rather than purchasing the land at the outset, the developer would rather secure the rights to the development parcel in an option agreement or a contract of sale conditional upon receipt of all necessary permits and approvals. Option agreements and conditional contracts nearly always contain outside closing dates that may arrive and pass while the option holder or contract vendee is seeking permits or pursuing a takings claim.[162] And if the developer manages to avoid this problem by acquiring the land outright at the beginning of the process, then it must bear the additional cost of carrying this owned property during the years of administrative and judicial activity.[163]

Developers typically obtain construction and permanent loan commitments early in the development process; such commitments will expire during a prolonged permitting process, leaving developers with the risk of interest rate increases and uncertainty as to the availability of any funds at all. Contractual commitments from architects, contractors, subcontractors, and consultants may expire during the permitting process, and potential tenants may seek other locations. And the business cycle flows forward relentlessly—a project

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construction may be only a minor infringement to someone who owns a fee simple for eighty years; to a short-lived real estate limited partnership with a ninety-day option to purchase, it is fatal. Courts that apply the "diminution in value" takings test, see, for example, *Pennsylvania Coal*, 260 U.S. at 414-16, may conclude that two such owners deserve different treatment. If so, this differing treatment will encourage future fee simple owners to form limited partnerships and convey short term interests to them, so as to maximize the likelihood that the holder of *some* property interest will prevail on a takings claim. One hopes that courts will be able to see through such time-share-like arrangements, just as they attempt te see substance through form when deciding tax cases.

162. See, for example, *Kinzli*, 818 F.2d at 1452:

> The Kinzlis attempted to sell the property in 1978 and 1979 under contracts which were conditioned upon the receipt of permits from the City for residential development. One potential purchaser/developer filed an application on behalf of the Kinzlis with the City for residential units on the property. However, he did not pursue the application once he was told by a staff engineer for the Department of Public Works that the City could not provide wator services to the property.

163. If the developer obtains an option or enters into a conditional contract, then preclosing carrying costs can be allocated as the parties agree, but the developer is likely to absorh some portion of these costs. If the developer acquires the property at the outset, it will have to bear all carrying costs itself, although some portion of these costs may have been factorod into the agreed price. Moreover, if the developer purchases untested property outright, it risks being saddled with that land if the land should prove to be difficult or impossible to develop.

that seemed feasible in 1987 may be out of the question in 1995.[164] Thus, the nature of the typical plaintiff and the nature of the typical transaction combine to dictate that these "perpetual" entities either build or exit within a very short period of time.[165] The ripeness requirements, which delay a landowner's access to court, can be fatal to these sorts of plaintiffs engaged in these sorts of transactions.[166]

3. The Typical Regulatory Takings Defendant

The effects of the ripeness doctrine are intensified further by the nature of the typical defendant. Regulatory entities are municipal bodies, often at the local level, that are inherently slow moving and that possess numerous incentives to delay their final decisions. As elected officials or appointees of elected officials, regulators may be under intense community pressure to deny or delay building permits and variances, in the hope that the applicant will give up or wither away. Their knowledge that developers cannot survive forever and that business cycles fluctuate may lead them to stretch the process out as much as possible, in the hope that the need to decide

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164. The nature of the *land* can also be relevant. In *Wilson v. Commonwealth,* 413 Mass. 352, 597 N.E.2d 43 (1992), plaintiffs' coastal property was destroyed by the sea while their appeal from the denial of their petition to build a revetment was pending before a state agency. The Supreme Judicial Court of Massachusetts remanded one of plaintiffs' claims and dismissed the remaining claims. Id. at 45-46. Even land, usually viewed as an asset that lasts forever, does not always survive the lengthy ripening process.

165. The observation that business transactions may be marked by rigid financial deadlines is not meant to suggest that time-pressured landowners are any more entitled to the relief they seek. These business practices do indicate, however, that certain types of transactions are unusually sensitive to the delays inherent in current ripeness jurisprudence. The result is that protracted procedures, rather than substantive law, often determine outcomes. See, for example, *Bateson v. Geisse,* 857 F.2d 1300, 1304 (9th Cir. 1988):

> In June 1984, the City Council refused to issue Bateson his building permit and further deferred taking action on the permit on August 27, 1984. Meanwhile, in August 1984, during this delay created by the City Council, Bateson's loan commitment was reevaluated and formally withdrawn by the Bank effective December 24, 1984. The Bank foreclosed on the property and Bateson lost the [$108,750] equity he had invested in the property.

The court found due process liability on the part of the city council and each of its individual members, id., but held the takings claim unripe, id. at 1305-06.

See also *Eide v. Sarasota County,* 908 F.2d 716, 719-20 (11th Cir. 1990) (holding unripe, in 1990, the takings claim of a plaintiff who sought rezoning in 1986 to take advantage of favorable capital gains tax laws).

166. See Mixon, 20 Urban Law. at 676-77, 685 (cited in note 150) (arguing for the necessity of reformed procedures).

will evaporate.[167] It was precisely this phenomenon that Justice Brennan bemoaned in his dissent in *San Diego Gas*.[168]

In short, certain types of plaintiffs tend to enter into certain types of transactions, for which they need the approval of certain types of defendants. This pattern results in an environment in which the landowner occasionally suffers harsh treatment at the hands of an otherwise fitting ripeness doctrine. The Supreme Court's response to this problem has not been to streamline the process but to raise the cost of the occasional loss for the municipality. By holding that the Takings Clause is self-executing, the Court has told local regulatory bodies that a miscalculation is not just a mistake, but a very expensive mistake. Local boards now face a small risk of huge liability,[169] but only if the plaintiff survives long enough to ripen its claim.

Given the uncertainties of regulatory takings law and the perishable nature of these parties and these transactions, the likelihood of any claim ever ripening and leading to just compensation has always been slim. Rather than ensuring that regulatory takings claims are litigated more quickly, the compensation remedy appears to have heightened further the incentives to delay. Regulators reduce the already negligible risk of crippling liability by dragging out the process still further. Zoning board members may assume and pray that they will have left public service long before a federal court ever

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167. As Professor Williams has observed:

> Often the municipality prefers that the complainant seek relief from the courts. If he prevails, the municipal officials can say "blame the judge, don't blame us," in response to their constituents. Moreover, many local governments seem to relish prolongod administrative turmoil before reaching a decision from which judicial relief may be sought.

Williams, et al., 9 Vt. L. Rev. at 242-43 (cited in note 21).

168. *San Diego Gas*, 450 U.S. at 655 n.22 (Brennan, J., dissenting). See also Bergor and Kanner, 19 Loyola L.A. L. Rev. at 744-45 (cited in note 21) (examining the hardships experienced by owners who are delayed improperly).

169. For an economic analysis of a similar issue, see Lawrence Blume and Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 Cal. L. Rev. 569, 584-90 (1984) (discussing risk aversion on the part of landowners).

Local regulators may, in some instances, be subject to personal liability under 42 U.S.C. § 1983. But see *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 613-14 (8th Cir. 1980) (holding that claims against municipal legislators acting in their legislative capacities fail due to absolute legislative immunity). The possibility of being held personally liable for the payment of Section 1983 damages for an uncompensated taking provides another incentive for local officials to delay reaching their final decision, since there can be no taking under *Williamson County* until there is a final decision. However, this inclination to delay may be reduced by the offsetting possibility of Section 1983 damages for a due process violation arising out of such a delay. See Part V.C.

reaches a decision.[170] And federal judges probably do not relish the prospect of rendering decisions that might bankrupt a community.[171]

Delayed, time-sensitive claims such as these do not necessarily disappear. A successor-in-interest may later seek to enforce the original owner's rights. A foreclosure sale purchaser, for example, was the landowner in one of the Supreme Court's major ripeness cases: The claim survived even though the original developer did not.[172] But many regulatory takings claims are never decided on their merits, as landowners scale down their plans (more, perhaps, than the law requires), sell their land, give up, go out of business, or are otherwise frustrated. Even if a successor-in-interest ultimately prevails, that is little consolation either to the municipality, which must pay compensation and possibly live with the development it attempted to prevent,[173] or to the shareholders or partners of the original development entity, who are likely to have suffered substantial economic losses. And any compensation that ultimately results may inure to the benefit of a successor party who has already profited once from the misfortune of the original owner, in the form of a depressed purchase price. Thus the original owner suffers while its successor receives a windfall.[174]

Part IV has demonstrated that the critical events in a regulatory takings case must occur in a certain sequence. That sequence often results in a lengthy gap between the time when a regulatory taking becomes effective and the later time when a court can remedy it. In the typical regulatory takings case, delays of this length may be

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170. See, for example, *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, 1393 (11th Cir. 1993) (holding for the city after seventeen years).

171. The post-1987 case law, while inconclusive, does cause the observer to suspect that *First English* has made federal judges extremely reluctant to find regulatory takings on the merits. See note 176. Some commentators predicted such a result prior to *First English*. For example, Professor Freilich, in discouraging the Court from finding the Takings Clause to be self-executing, warned that courts, "reluctant to impose financial burden on municipalities, will simply refuse to find that anything is a 'taking.'" Freilich, 15 Urban Law. at 467 (cited in note 115). See also Williams, et al., 9 Vt. L. Rev. at 238 (cited in note 21) (stating that "if the objective of the 'temporary taking' rule is to aid the developer, the cure may prove to he worse than the malady. . . . Avoidance of constitutional issues by the federal or state ceurts can only create more uncertainty for local governments and landowners than already exists").

172. *Williamson County*, 473 U.S. at 181. The troubled history of the property and its original owner did not save the foreclosure sale purchaser from having its own claim dismissed as unripe by the Supreme Court. Id. at 200.

173. South Carolina ultimately agreed te pay David Lucas more than $1.5 million and admitted that it would have to sell the two disputed lots to a developer in order to raise these funds. H. Jane Lehman, *Accord Ends Fight Over Use of Land; Property Rights Activists Gain in S.C. Case*, Wash. Post E1 (July 17, 1993).

174. "No satisfactory explanation is offered (or even attempted) of how it makes *me* whole if my descendants, . . . or my banker, . . . eventually get to use my property." Berger and Kanner, 19 Loyola L.A. L. Rev. at 744 n.276 (cited in note 21) (citations omitted).

outcome-determinative. Thus, many regulatory takings claims will not survive long enough to be decided on their facts. Even if most of these landowners would be destined to lose on the merits anyway, some of these cases should be resolved on grounds other than ripeness. This problem has been challenging the federal courts for years; Part V proposes a variety of solutions.

V. SOME POSSIBLE SOLUTIONS

The characteristics of the typical regulatory takings case cause the ripeness doctrine to have an unusually potent effect, as Part IV demonstrated. In endorsing the compensation remedy in *First English*,[175] the Court probably assumed that municipalities would fear large compensation awards sufficiently that delays would be reduced. But the cases decided since *First English* do not suggest either that delays are shorter or that landowners are recovering at a significantly greater rate.[176] This may be entirely fitting, reflecting the fact that municipal denials are appropriate in the overwhelming majority of cases. Even so, the process needs to be shortened.

175. 482 U.S. at 319.

176. I have not attempted an empirical analysis of the regulatory takings cases decided since 1987. Nor would such an analysis be particularly useful, in light of the wide variety of local ordinances in dispute, the fact-specificity of the cases, and the absence of any information on the many cases that never reach the courts. However, nothing in the hundreds of federal decisions reported since *First English* suggests that the duration of the process has been shortened or that landowners are recovering on a regular basis.

There appear to be only six cases in which a federal court deciding a case arising under state law has reached the remedy question and two of these did not survive appeals. *Resolution Trust Corp. v. Town of Highland Beach*, 18 F.3d 1536 (11th Cir. 1994); *Wheeler v. City of Pleasant Grove*, 896 F.2d 1347 (11th Cir. 1990); *Nemmers v. City of Dubuque*, 764 F.2d 502 (8th Cir. 1985) (pre-*First English*); *Herrington v. County of Sonoma*, 790 F. Supp. 909 (N.D. Cal. 1991), aff'd 12 F.3d 901 (9th Cir. 1993); *Corn v. City of Lauderdale Lakes*, 771 F. Supp. 1557 (S.D. Fla. 1991), aff'd in part and rev'd in part, 997 F.2d 1369 (11th Cir. 1993); *Front Royal and Warren County Industrial Park Corp. v. Town of Front Royal, Va.*, 749 F. Supp. 1439 (W.D. Va. 1990), vacated 945 F.2d 760 (4th Cir. 1991). See also *France Stone Co., Inc. v. Charter Township of Monroe*, 802 F. Supp. 90 (E.D. Mich. 1992). Moreover, *Herrington* was decided solely on due process and equal protection grounds, 790 F. Supp. at 911, *Nemmers* was a vested rights case, 764 F.2d at 504, and *Corn* was decided purely on substantive due process grounds, 771 F. Supp. at 1569 (although the *Corn* opinion clearly indicates that the measure of compensation would not have differed had the case been treated as a regulatory takings case, id. at 1569-70). See generally Stein, *Pinpointing the Beginning and Ending of a Temporary Regulatory Taking* (cited in note 111) (discussing these cases as well as cases decided by the Court of Appeals for the Federal Circuit).

First English may have increased slightly the percentage of cases in which landowners receive a monetary award, and it may have had an impact on the behavior of applicants and regulaters at the local administrative level, but it appears to have done little to minimize the long delays found in the hundreds of takings cases decided by the federal courts since 1987.

This Part offers a number of solutions to the problems caused by the synergy of regulatory takings law and ripeness doctrine.[177] Each of these proposed solutions relies upon two premises. The first premise is that solutions to procedural problems should address procedure and not the substantive takings law governing these claims. The second premise is that each party in a regulatory takings case possesses at least one legitimate substantive argument.

The first premise, that solutions to procedural problems should be substantively neutral, demonstrates that the goal of these reforms is not to tip the substantive scale in favor of the landowner; rather, it is to ensure that the landowner has the opportunity to place himself on that scale at a time when a judgment in his favor has some practical benefit.[178] Substantive takings law badly needs to be clarified, and some of those clarifications are likely to favor landowners, but the focus here is on the procedural problems caused by the federal ripeness doctrine.

To some degree, procedure and substance are inseparable in these cases. To the extent that a plaintiff who would not survive until trial under existing doctrine might, under these proposals, last long enough to prove his case and receive compensation, these proposals will have changed the outcome. But this does not reflect a modification of the substantive law. Instead, it demonstrates that some deserving plaintiffs are unsuccessful due entirely to the delay inherent in current ripeness doctrine. This should not be viewed as changing substantive takings law, even though it will be outcome-determinative in some cases. Rather, this approach should be seen as allowing more plaintiffs to make their case in federal court, with the understanding that a small number of these additional plaintiffs will ultimately, and deservedly, succeed.

Earlier conflict resolution, which will be the most obvious consequence of some of these proposals, will aid plaintiffs, as they are

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177. In response to *First English*, a number of commentators offered a variety of suggestions as to how to minimize (or maximize) compensation awards in temporary regulatory takings cases; some of this Article's proposals were inspired by their work, as noted herein. For an excellent discussion of several proposals, published shortly after *First English* was decided, see generally Mixon, 20 Urban Law. 675 (cited in note 150).

178. The land use permitting process is highly fact-specific, and delays—often quite lengthy—are to be expected. Justice Stevens indicated his awareness of this point in his dissent in *First English*, 482 U.S. at 329-39. As Professor Alexander notes: "[Justice] Stevens's vision of good-faith regulatory behavior is tied to an understanding of delay as the consequence of the deliberative character of politics. . . . Government delay is simply a fact of life in a regulatory state. . . ." Alexander, 88 Colum. L. Rev. at 1763 (cited in note 150). Federal judges should aim to keep normal procedural delays to an acceptable length and deter abnormal procedural delays altogether.

the parties that generally lack the staying power current ripeness doctrine demands. But these proposals will help defendants as well. In the overwhelming majority of regulatory takings cases, including most of those that will be heard only because these proposals allow them to be heard, the defendant will prevail. From the municipality's point of view, prolonged uncertainty, high legal fees and court costs, and the fear of huge liability will be replaced with a quicker victory and some useful precedent. This may turn out to be little more than an earlier confirmation of the same result that the parties would have obtained under current doctrine, although not necessarily for the same reasons. But the municipality's resulting peace of mind, and its accompanying ability to reduce the portion of its annual budget that must be reserved for possible takings losses, are benefits that should not be taken lightly.

My second assumption, that each party possesses at least one legal argument with some reasonable basis in the facts and the law, acknowledges that in the typical dispute neither side has a completely groundless case. This assumption may seem naive, for there are certainly developers whose sole argument is that everyone has the right to use their property without restriction,[179] just as there are municipalities that delay as long as possible in the hope that deserving landowners will simply go away.[180] My assumption, however, is that these characteristic passions are accompanied in most cases by some

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179. See, for example, *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 466 (7th Cir. 1988) (Posner, J.):

> Granted, the rejection of the plaintiffs' site plan probably reduced the value of their land. The plan must have represented their best guess about how to maximize the value of the property, and almost certainly a better guess than governmental officials would make even if the officials were trying to maximize that value, which of course they were not. But the plaintiffs do not even argue that the rejection of the site plan roduced the value of their parcel much, let alone that the parcel will be worthless unless it can be used to create 181,000 square feet of office space. . . . The plaintiffs in this case have been deprived of their "right" to creato 181,000 square feet of office space on a 17-acre parcel of a much larger tract, and that deprivation is a limited, perhaps minimal, incursion into their property rights. If so it is not a deprivation at all, in the constitutional sense, and the due process clause is not in play.

180. See Alexander, 88 Colum. L. Rev. at 1755 (cited in noto 150) (explaining that "[t]he picture that emerges from [Chief Justice Rehnquist's *First English*] opinion is one of local planners scheming to take private property without paying compensation by imposing substantial restrictions on land use without limiting the duration of the restrictions"); id. at 1764-65 (presenting a similar analysis of Justice Scalia's opinion in *Nollan*).

See also Epstoin, 1987 S. Ct. Rev. 1, 44-45 (cited in noto 112):

> If one believed that government officials were always virtuous, and privato landowners always corrupt, then [the Takings Clause] would be quite unnecessary. But our entire constitutional system, both in its structural features and its protection of individual rights, takes the opposite view of government behavior. People do not shed their self-interest when they assume positions of public trust and pewer.

weightier legal arguments. Anger, pride, and disappointed expectations may affect both parties, inciting some landowners to initiate legal proceedings and goading some municipalities into prolonging the permitting and litigation processes. But these emotions alone are unlikely to carry even the most unreasonable parties through the years of expensive and unpleasant litigation that a regulatory takings claim demands.[181]

Part V offers several suggestions to federal and state judges, state legislators, and local regulators. These proposals are necessary because *First English* alone will suffice neither to reconcile regulatory takings law and the ripeness doctrine nor to accomplish all of their conflicting goals. The recommendations are grouped together based upon their relationship to current ripeness doctrine and takings law. Part V.A focuses on the Effective and Ripeness Moments, and explores whether the problems found in current regulatory takings law could be reduced by reinterpreting or redefining these Moments.[182] Part V.B backs away from these two Moments and examines the ripening process more broadly, emphasizing ways in which the entire process can be shortened within the strictures of existing law.

Part V.C backs away still further and inquires whether the focus on the Takings Clause is too narrow. Litigants, courts, and commentators frequently confuse the elements of due process and regulatory takings claims; this Part offers an analysis of the respective roles of the Due Process and Takings Clauses. In particular, this Part recommends that delays in the decision-making process be addressed under the Due Process Clause, with only the occasional taking that results from this process raising Takings Clause concerns. Once courts recognize that procedural improprieties, which typically do not constitute takings, may nonetheless violate procedural due process standards, they can leave the Takings Clause and its harsh ripeness requirements behind. Such a rejection of the Takings Clause, which focuses on a result more

181. In the occasional case in which one of the parties has absolutely no valid legal argument, the solutions proposed here might unfairly advantage a meritless claim, or at least allow it to survive longer than it should. These proposals should not, however, inhibit a judge's ability to reach the propor substantive result. One hopes that the privilege of earlier access to court will be accompanied, when necessary, by earlier imposition of sanctions. See, for example, *Lockary v. Kayfetz*, 974 F.2d 1166, 1174 (9th Cir. 1992) (upholding a district court's imposition of sanctions on a non-profit organization that provided legal representation to landowners in a land use case).

182. See Part III.A (defining the Effective Moment); Part III.B (defining the Ripeness Moment).

than on a process, is entirely appropriate in cases in which municipal procedures lie at the center of the dispute.

Part V.D examines ways in which the alternatives offered in Parts V.A through V.C can be combined. Some of the solutions offered in these earlier Parts are compatible with one another while others may operate in conflicting ways. Finally, Part V.E concludes by asking whether regulatory takings claims belong in federal court at all. Perhaps the ultimate effect of the ripeness doctrine will be the resolution of most regulatory takings cases in forums other than the federal courts.

A. Reexamining the Effective Moment and the Ripeness Moment

1. Reaching the Earliest Possible Ripeness Moment under Existing Law

The most obvious way in which to expedite a landowner's access to federal court is to interpret existing ripeness requirements in such a way that the Ripeness Moment arrives at the earliest possible time. This result can be accomplished even within the confines of current ripeness doctrine, for while the Supreme Court has laid down explicit ripeness thresholds, there is some elasticity built into each one. By applying the various requirements more flexibly, federal courts could comply with the Supreme Court's ripeness demands while allowing more cases to ripen earlier.[183]

Two examples will illustrate this point. First, recall that the Supreme Court held, in *MacDonald, Sommer & Frates v. Yolo County*,[184] that a single building permit application is not sufficient to ripen every regulatory takings case; in some cases, "exceedingly grandiose development plans" that are rejected must be followed up with "less ambitious plans."[185] By interpreting the phrase "exceedingly grandiose" narrowly, a court would be following the Supreme Court's mandate while rejecting the smallest possible number of cases on these grounds. If courts find only the occasional proposal to be exceedingly grandiose, then only one permit application will be required most of the time, and some cases will ripen more

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183. Since the Effective Moment is defined by reference to most of the same guideposts as the Ripeness Moment, this approach is likely to hasten the arrival of the Effective Moment as well.

184. 477 U.S. 340. See notes 86-88 and accompanying text.

185. 477 U.S. at 353 n.9.

quickly. The result will be that more plaintiffs will be heard in federal court, and heard earlier.

Second, a court could interpret broadly the futility exception, which excuses a plaintiff's failure to clear one of the ripeness hurdles when such an attempt would plainly be futile. Different panels of the Ninth Circuit experimented with different versions of the futility test for several years before that court finally settled upon an extremely narrow futility exception.[186] A broader reading of the futility exception would violate neither the letter nor the spirit of Supreme Court precedent and would allow courts to decide some cases earlier in their lives.[187]

These two examples illustrate how federal courts might interpret the ripeness requirements so as to shorten the overall litigation process and allow more plaintiffs to survive to judgment. Unfortunately, if these suggestions were applied too broadly, they might create the wrong incentives for landowners who foresee impending litigation. Landowners might pad their applications and propose overly grandiose developments, knowing that the federal courts are unlikely to be affected by their grandiosity. Municipalities

186. In *Kinzli v. City of Santa Cruz*, the Ninth Circuit noted: "Under [the futility] exception, the requirement of the submission of a development plan is excused if such an application would be an 'idle and futile act.'" 818 F.2d 1449, 1454 (9th Cir. 1987) (citing *Martino v. Santa Clara Valley Water Dist.*, 703 F.2d 1141, 1146 n.2 (9th Cir. 1983)).

The Ninth Circuit has gone further than most in stating exactly when submission of an application would he futile. At minimum, however, at least one application must be submitted. Id. at 1454-55. As the court stated:

> We reject the district court's view that futility may be determined, absent any rejected development plan, by inquiring whether any beneficial use remains or whether the regulatery regime inhibits the property's marketability. Adoption of such standards would require courts to speculate as to what potential uses may be lurking in the hopes of the property owner and in the minds of developers and city planners. This would result in the same sort of speculation that the ripeness doctrine prohibits.

Id. at 1454.

In other words, for a plaintiff to show that an application is futile and should be excused, he must apply and he rejected. This is not as preposterous as it may at first sound, see *Zilber v. Town of Moraga*, 692 F. Supp. 1195, 1199 n.3 (N.D. Cal. 1988) (stating that "the requirement is excused if it is met"), because the one application that is necessary to prove futility may serve to excuse the repeated reapplications that might otherwise be required to comply with *MacDonald*. See *MacDonald*, 477 U.S. at 353 n.9; *Southern Pacific Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 504 (9th Cir. 1990); *Kinzli*, 818 F.2d at 1455 n.6. Accord *Unity Ventures v. County of Lake*, 841 F.2d 770, 775 (7th Cir. 1988). But see *Eide v. Sarasota County*, 908 F.2d 716, 726 n.17 (11th Cir. 1990) (refusing te state whether one application is always required before a court may find futility). See generally Kassouni, 29 Cal. W. L. Rev. at 49-50 (cited in note 49) (discussing the treatment given *Kinzli* by various courts).

The result in *Kinzli* is hardly compelled by *MacDonald*, and it is within the power of a federal court te find that even one application might be futile.

187. This solution is limited to the extent that the lower federal courts have already reached conclusions to the contrary. The Ninth Circuit, for instance, would need to reexamine its futility cases.

might then be inclined to dispel suggestions of futility by granting more permits, more perhaps than they want to or need to under existing law. In short, while lower federal courts might legitimately be able to interpret precedent in this fashion, they risk overreacting to the ripeness problem, thereby making municipalities unjustifiably timid and landowners unfairly aggressive. And judges would be rendering decisions without knowing for certain the development intensity that a given municipality would have permitted. However, this approach may be helpful if federal judges apply it responsibly, in only the most deserving cases.

Finding an earlier Ripeness Moment is no guarantee that a court will find the muncipality liable. Ripeness is predominantly a question of timing, and interpreting the ripeness test so that some cases ripen earlier should not significantly affect the chances that a landowner will prevail. If anything, this suggestion may decrease slightly the likelihood of a landowner victory, with courts less likely to find constitutional violations on less complete records. And courts are unlikely to find liable municipalities that reject proposals that, while not legally "grandiose," are still decidedly optimistic. Thus, this proposal should not significiantly affect the ability of a landowner to prove the merits of his case.

This suggestion would, however, offer earlier access to court for some plaintiffs. And out of these plaintiffs, those few with the most plausible claims—that is to say, those who most deserve to prevail no matter when they enter the courthouse—will enjoy earlier opportunities to prove their cases. Their odds of prevailing may be unaffected or even reduced slightly, but if their cases are good enough, they will win anyway and win earlier. This is appropriate, as it is these plaintiffs who suffer the most under existing case law. They are the landowners with the strongest claims, but current law may not allow them to last long enough to receive the remedy to which they may be entitled.

2. Reaching an Earlier Ripeness Moment by Modifying Existing Law

Federal courts could expedite the ripening process in a far more sweeping manner if the Supreme Court were to relax its ripeness rules expressly. This would require overruling or narrowing existing law. To the extent that ripeness is constitutionally mandated by the Article III requirement of a case or controversy, this alternative is not available. But to the extent that the ripeness test is prudentially based, the Court is always free to modify it.

The Supreme Court has given no indication that it intends to revisit this issue.[188] If anything, regulatory takings law is an area in which prudence will often dictate a rigorous application of the existing ripeness requirements. The acts that ripen cases are not only procedural hurdles, they are also parts of the substantive record that a federal court may eventually need to evaluate.[189] Relaxing these requirements would frequently place lower federal courts in the position of having to reach substantive judgments based on guesswork.[190] The Court should not add overruled cases and increased uncertainty to an area of law that is already plagued both by the doctrinal clash described in this Article and by substantive questions that inherently demand ad hoc resolution.[191]

3. Creating Exceptions to the Ripeness Test: The Analogy to Mootness

Perhaps ripeness cases should be treated more like their mootness cousins. Courts generally refuse to hear moot cases, in which the disputed issue has passed and no longer demands judicial resolution, just as they refuse to hear unripe cases, in which the disputed issue has yet to crystallize fully.[192] But although an individual case may appear to be moot, courts will nonetheless hear it if it falls within an established exception. For example, a court has the power to hear a case that would otherwise be moot if the defendant is attempting to avoid a decision by its "voluntary cessation of allegedly illegal conduct."[193] Similarly, in *Roe v. Wade*, the Court stated, "Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be 'capable of repetition, yet evading re-

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188. In *Lucas*, the Court arguably heard a case that had not ripened. See notes 93-103 and accompanying text. *Lucas* offered the Court the occasion to reconsider current ripeness law in a case with an extremely sympathetic plaintiff, but the opinion offers no suggestion that the Court ever considered doing so. If anything, the Court reinforced existing ripeness law by arguing strenuously that it was applying it without change. *Lucas*, 112 S. Ct. at 2890-92.

189. See note 55 and accompanying text (discussing the distinction between the ripeness test in the regulatory takings area and the ripeness test in other substantive legal areas).

190. Some commentators argue that the Court should substantially modify its ripeness test. See, for example, Kassouni, 29 Cal. W. L. Rev. 1 (cited in note 49).

191. See *Penn Central*, 438 U.S. at 124 (recognizing that takings cases demand "essentially ad hoc, factual inquiries" and listing factors to be considered when making such inquiries).

192. See, for example, *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (explaining the mootness concept).

193. *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). But see *Davis*, 440 U.S. at 631 (stating the general rule that "voluntary cessation of allegedly illegal conduct" does not make a case moot, but also setting forth facts where such cessation leads to mootness); *De Funis v. Odegaard*, 416 U.S. 312, 318 (1974) (finding no "voluntary cessation of allegedly illegal conduct").

view.'"[194] In other words, if the nature of the case prevents a plaintiff from ever obtaining a final decision—a pregnancy, for example, is certain to end long before the plaintiff can exhaust all possible appeals—but similar cases might arise again and again, the court has the discretion to hear the case.

In some respects, mootness and ripeness are doctrinal mirror images. In an abortion case, the issue arrives and disappears more quickly than the parties can litigate it, and a court may opt to hear a case that has passed its prime because the litigation process provides no better alternative. In a takings case, the plaintiff may disappear before the issue ripens, and the litigation process once again may provide no better alternative than an exception to a general timing rule. If issues that inherently evade review form an exception to the mootness doctrine, perhaps plaintiffs that are incapable of surviving the judicial process merit an exception to the ripeness doctrine.[195]

This standard will unquestionably raise difficult problems of proof. Regulatory takings plaintiffs are often heard to complain that local regulatory actions have placed them on the verge of bankruptcy. But a court would need to exercise its discretion to hear an otherwise unripe case only if the evidence clearly and convincingly supported this assertion, thereby giving plaintiff, rather than plaintiff's bankruptcy trustee, its day in court. The goal is not to eliminate the ripeness requirement, but to provide a narrow exception for plaintiffs whose cases appear to be strong and who might otherwise be deprived of their opportunity to litigate.[196]

A ripeness exception may be a reflection of the mootness exception, but it is not an undistorted reflection. On the one hand, a court could recognize both exceptions as narrow classes of cases in which the constitutional case or controversy requirement is read more broadly than is typical.[197] But the prudential concerns differ. In the mootness case, the facts are all present—overripe, if anything—and the prudential question is whether a court should spend its time on a controversy that has resolved itself. When the defendant has unilat-

194. *Roe v. Wade*, 410 U.S. 113, 125 (1973) (quoting *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911)).

195. The Court has noted that the concept of finality has a "penumbral area." *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159-60 (1973) (quoting *Radio Station WOW v. Johnson*, 326 U.S. 120, 124 (1945) (dictum)).

196. Courts analyzing exhaustion and ripeness questions often inquire as to whether the plaintiff will suffer irreparable injury if relief is delayed. See generally Power, 1987 U. Ill. L. Rev. at 587-98 (cited in note 32) (evaluating the use of irreparable injury analysis as a tool for examining exhaustion questions).

197. See generally Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 Harv. L. Rev. 297 (1979).

erally mooted the question, the court may feel that it is unfair to dismiss the plaintiff's claim;[198] when the controversy may arise again, the court might decide that the present investment of resources will yield long-run benefits.[199] In contrast, in ripeness cases, the facts are still developing. Even if a court can clear the constitutional ripeness hurdles, it may justifiably be reluctant, for prudential reasons, to predict the future. Moreover, a court may be unable to reach a coherent decision, given the different, plausible factual scenarios that the opposing parties are likely to provide.

This problem should not be taken lightly by judges, for they are being called upon to decide still-developing cases based upon feasible but contradictory fact patterns. As noted earlier, the prudential portion of the ripeness test raises issues of both substance and procedure.[200] Justice Holmes noted in 1922 that "if regulation goes too far it will be recognized as a taking,"[201] but one cannot know if a regulation goes too far without knowing how far it goes, and one cannot know how far it goes if it is still "going." Thus, a court that is willing to find such a narrow exception to the ripeness requirement will have to make its decision on the merits before all of the determinative facts have been established. Since later events are likely to be relevant, and may even have the effect of undoing or recharacterizing earlier ones,[202] a decision midway through the process may end up simply being wrong. However, in the exceptional case involving a particularly deserving plaintiff, a court may well decide that prudence dictates taking these risks and deciding a case that is still green.

Although this Article has just compared ripeness to mootness and suggested creating an exception to a rule of justiciability, this proposal would be more precisely described as placing another factor on the jurisdictional scale. In most published regulatory takings decisions, the ripeness test is treated as little more than a formulaic inquiry into whether the plaintiff has passed certain well-marked milestones. But in reality, the test is more accurately described as one that balances interests, rather than as just a judicial checklist. In other subject matter areas, courts recognize that ripeness requires a

198. See note 193 and accompanying text; *United States v. Oregon State Medical Society*, 343 U.S. 326, 333 (1952) (stating that courts should beware of defendants' "protestations of repentance and reform," especially where the activity in question is likely to resume).

199. See note 194 and accompanying text.

200. See Part II.B.1.

201. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (Holmes, J.).

202. See notes 73-78 and accompanying text; notes 207, 234.

court to factor the plaintiff's need for a speedy decision into its determination of whether there is a justiciable case or controversy.

Thus, in *Babbitt v. United Farm Workers*,[203] the Court found ripe a controversy regarding voting rights for unionized farm workers. In reaching this result, the Court weighed the interest of the farmers in receiving a speedy decision against its own need for a fully-developed record, finding that, *under the circumstances*, the dispute was justiciable under Article III.[204] The Court recognized that ripeness—even the constitutional portion of the test—is an inquiry into whether a case should be heard in light of its circumstances, rather than a question of whether the plaintiff has jumped through a certain number of procedural hoops.[205]

An enlightened court should examine the question of whether it faces a ripe controversy in light of the particular situations of the parties. But even if some courts continue to view ripeness in the land use context as little more than a question of clearing certain checkpoints, those courts should, at minimum, concede the need for exceptions in deserving cases. What these courts might call exceptions, more thoughtful courts will recognize as putting an equitable thumb on one side of the justiciability scale.[206]

Finally, note that this suggested ripeness exception is not intended to grant the truly soon-to-be-bankrupt plaintiff any gentler treatment on the substantive regulatory takings question. A

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203. 442 U.S. 289 (1979).

204. The Court stated:

> [A]ppellees' principal complaint about the statutory election procedures is that they entail inescapable delays and so preclude conducting an election promptly enough to permit participation by many farmworkers engaged in the production of crops having short seasons. . . . Appellees admittedly have not invoked the Act's election procedures in the past nor have they expressed any intention of doing so in the future. But, as we see it, appellees' reluctance in this respect does not defeat the justiciability of their challenge *in view of the nature of their claim.*

Id. at 299 (emphasis added).

205. This approach is fitting even for the constitutional portion of the ripeness test, which must be viewed as asking whether there is a case or a controversy in light of circumstances. See *Lucas*, 112 S. Ct. at 2890-92 (finding that Lucas had alleged an injury-in-fact even when his case arguably had not ripened); *Babbitt*, 442 U.S. at 299. One of the goals of the ripeness thresholds is to help a court to establish whether a case or controversy has matured. But in cases in which the thresholds fail to help accomplish this goal, the thresholds should be disregarded—the court must determine whether there is a case or controversy even if the thresholds do not help it to reach that decision. See generally Carol M. Rose, *Crystals and Mud in Property Law*, 40 Stan. L. Rev. 577 (1988) (contrasting hard-edged rules with blurrier exceptions and fact-specificity).

206. The futility exception, see note 186, is another example of this phenomenon. While some courts might refer to this as an exception to the ripeness requirement, it also can be seen as a recognition that a disputo rises to the level of an Article III case or controversy more quickly in municipalities in which a permit or variance application is demonstrably pointless.

relaxation of the ripeness requirement would provide slightly greater access to court, but not any greater likelihood of prevailing on the merits. If anything, the likelihood of success may be reduced somewhat: A court might determine that, although the case may be heard earlier, an improper regulatory taking has not yet occurred because the plaintiff still has non-judicial courses of action available. This is not an option in truly ripe cases, in which all required non-judicial altornatives will, by the very workings of the ripeness test, already have been pursued.[207]

4. Redefining the Effective Moment

Part III recommended that courts define the Effective Moment presumptively as the point when the landowner's last required variance application is finally denied by the highest administrative body with the power to consent.[208] While this is a sensible and justifiable definition for all of the reasons given in Part III, there is little regulatory takings case law either supporting or rejecting this conclusion: Landowners usually lose and the courts have had few occasions to reach this issue. Because the placement of the Effective Moment has a significant impact on the ripening process and on the magnitude of regulatory takings awards, it is appropriate here to reevaluate the proposed definition.[209]

Moving the Effective Moment earlier would affect regulatory takings case law in two relatod but distinct ways. First, it would increase the size of the awards that occasionally will result. This point should be obvious, given that compensation is measured from the time the government's activities effect a taking. If the municipality effects a taking earlier in the process, awards will increase correspondingly.[210] Second, it would freeze the consequences of municipal activities earlier in the permitting process. This earlier freezing of events demands a more complex analysis.

Suppose a court were to state that a regulatory taking becomes effective at the time of the initial building permit application. The court's opinion might read as follows:

207. This point highlights once again the fact that the ripeness question, although generally treated as one of procedure, actually displays a significant overlap with the substantive question of what constitutes a taking. See notes 73-78, 202 and accompanying text, and 234.

208. See Part III.A.

209. See generally Stein, *Pinpointing the Beginning and Ending of a Temporary Regulatory Taking* (cited in note 111).

210. Finding an earlier Ripeness Moment would reduce this effect, as most cases would be decided more quickly. See Parts V.A.1 and V.A.2.

> Now that we are reviewing ripe facts years after they began to happen, we are finally capable of recognizing that a regulatory taking occurred. At tbe time of the building permit application, that taking was ripening in both the procedural and substantive senses of the word. In the procedural sense, tbe facts were still highly premature, and we could not properly have reached a decision under the Supreme Court's ripeness tost. In the substantive sense, the application was one early event in a series that we are only now able to recognize as a taking. With the benefit of this hindsight, we can finally tell that this lengthy sequence of events was destined to effect a taking. We find that taking to have become effective at the date of the application because the plaintiff's use of her property has been restricted since that early date.

This approach must be rejected for two reasons. First, it would force the municipality to pay compensation for an extended portion of the permitting process even though it ordinarily could not have divined that early in the process what the legal effects of its actions would be.[211] A "taking" is a post hoc label for a series of events that cannot be seen to have constitutionally interfered with an owner's hundle of property rights until after they all have occurred. It is unfair to the municipality to find a compensable violation to have become effective early in the decision process, while municipal officials were still evaluating incomplete facts and struggling to reach an initial decision. If a municipality must pay for an improper decision, then it deserves a reasonable amount of noncompensable time in which to consider that decision.[212]

Redefining the Effective Moment in the manner rejected here would notify the municipality that if it takes property, it will be found to have taken that property at a time before it could have known the significance of the events that were transpiring. As the appeals and variance processes unfold, the municipality will be concerned that any failure to concede might result in a retroactive award, forcing it to pay for past events that may not have appeared constitutionally significant as they occurred. In essence, the municipality would be found liable from the date it perpetrated the first element of a regulatory taking, even though that element could not rise to the level of a taking until it was compounded and ratified by several later events.

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211. If the municipality reaches a de facto decision early on, and attempts to use the lengthy permitting process as a means of delaying or avoiding liability, then a court should have the discretion to find that the taking became effective at the earlier point. See note 186. This approach should be used only rarely, and the burden of proving this type of delay rests on the landowner. When the landowner can carry this heavy burden, however, the municipality should be held liable for what it truly did and not for what it purported to do.

212. The municipality is entitled to this breathing space whether or not it reaches the right result, assuming that the process of deciding is itself constitutionally sound. See Part V.C.

This redefinition of the Effective Moment must be rejected for a second reason. An earlier Effective Moment places plaintiffs whose property has been taken in a significantly favored position compared to plaintiffs whose property has not been taken, by compensating the first group of plaintiffs for delays inherent in the permitting process. The Supreme Court has acknowledged that normal delays are non-compensable.[213] By redefining the Effective Moment, a court would be undercutting this conclusion and awarding compensation for a significant portion of the normal permitting process. A plaintiff whose property is taken should not be compensated for those portions of the permitting process that it would have had to endure even if it had received the permit it wanted.

This Article rejects the possibility of finding an earlier Effective Moment because of the additional, serious problems this alternative definition would create. Moreover, several proposals set forth below should address the concerns of those landowners who believe that extended permitting processes are themselves a large part of the problem.[214] One possibility is to shorten the permitting process. Even if this attempt fails, delays and other procedural concerns should be seen as due process problems and not as takings problems. Rather than attempting to remedy inordinate procedural delays by treating them as regulatory takings, courts should recognize that the Due Process Clause is designed to address problems with process. The Takings Clause requires compensation only for the substantive outcome of that process.

B. Streamlining the Ripening Process

An entirely different approach to resolving the conflict between regulatory takings law and ripeness doctrine is to minimize its effect by shortening the lengthy permitting process. If legislators and judges can reduce the time between the initial permit application and the final decision, then the significance of the problem is reduced. While this approach may treat the symptoms without effecting a cure, it merits further examination here and might succeed in conjunction with some of the other proposals set forth in this Article.

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213. *First English*, 482 U.S. at 321; see also *United States v. Riverside Bayview Homes*, 474 U.S. 121, 126 (1985) (stating that "we have made it quite clear that the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatery taking").

214. See Parts V.B and V.C.

1. Creating a State Land Use Court

One method of shortening the permitting process would be for a state legislature to create a special land use court.[215] This new court would, ideally, have jurisdiction over compensation claims arising after variance denials by local regulators.[216] By limiting this court's docket to land use cases, the legislature could minimize the delay between the final variance denial and the state court decision, and the land use judges would develop expertise in state land use matters.

The creation of a land use court would neither change the constitutional definition of a regulatory taking nor modify the constitutional and prudential aspects of the ripeness doctrine. Landowners would still have to obtain a final decision at the local level and regulators would still face the specter of regulatory takings awards. But a state land use court could minimize the negative effects that often ensue when these two doctrines are combined. Once a landowner receives a final administrative decision, his state-level claim would be ripe and would be heard in the land use court in an expeditious manner.

This speedy judicial review would minimize the delay between the asserted Effective Moment and the Ripeness Moment. As a result, it would also reduce the time during which the landowner must remain immobilized and would reduce the size of the award that an offending municipality would have to pay. Moreover, the expertise that land use judges would develop should lead to greater consistency and predictability within each state,[217] reducing the number of borderline cases that need to be litigated and increasing the likelihood of settlements. This increased expertise at the state level is likely to become all the more important in light of the Supreme Court's recent statement that state nuisance law is an important factor in certain federal regulatory takings cases.[218]

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215. See, for example, Or. Rev. Stat. §§ 197.805-.860 (1991 & Supp. 1992) (establishing Land Use Board of Appeals for speedy resolution of land use matters). See also Mass. Gen. Laws Ann. ch. 185, §§ 1-118 (West 1991 & Supp. 1994) (establishing Land Court with jurisdiction over various matters relating to land titles, including certain zoning matters).

216. See Mixon, 20 Urban Law. at 691-92 (cited in note 150).

217. See Berger and Kanner, 19 Loyola L.A. L. Rev. at 696 (cited in note 21) (referring to "the Balkanization of regulatory authority which has become the hallmark of the existing system").

218. *Lucas*, 112 S. Ct. at 2896-2902. As a result of *Lucas* and its heightened emphasis on state nuisance law, out-of-state precedent may become less useful to state and federal courts. See Richard M. Frank, *Inverse Condemnation Litigation in the 1990s—The Uncertain Legacy of the Supreme Court's* Lucas *and* Yee *Decisions*, 43 Wash. U. J. Urban & Contemp. L. 85, 113-14

The suggestion that states create specialized land use courts has its drawbacks. During times of shrinking resources, state legislatures may not believe they can afford the luxury of new special purpose courts, particularly in states with small numbers of land use cases. Moreover, there are strong arguments to be made that various subject matter areas should not be carved out of the state civil court system and placed in single purpose courtrooms. Such an approach has proven to be useful when the subject matter is unusually difficult for judges to master, such as federal tax law, bankruptcy law, and patent law, but is less justifiable when the main function of the court is to grant speedier adjudication to certain classes of plaintiffs and defendants.

Most importantly, this proposal addresses only one aspect of the problem of delay. It provides for the speediest and most consistent possible resolution of claims in which the municipality has already reached a final decision, without inducing the municipality to reach that decision more quickly. But given that so much of regulatery takings law and the ripeness doctrine are dictated by federal law, and given that the discord between these doctrines has yet to be addressed at the federal level, reducing the negative effects of this clash may be the best that a state legislature can do.

Such an approach has been tried in other, less arcane, subject matter areas with some success. Summary housing court proceedings have proved te be a fairly popular alternative to self-help in the landlord-tenant area (although one may question whether they have attained their goals), and small claims courts are frequently available where the unique nature of a claim suggests that a speedy resolution would be particularly appropriate. Note also that a number of state and federal courts, including the United States Court of Federal Claims, have their dockets restricted to claims against the government.[219]

2. Enacting a Model State Inverse Condemnation Act

A related but more extensive proposal would be the promulgation of a Model State Inverse Condemnation Act.[220] The wide variety

(1993) (arguing that "fifty separate bodies of takings law will develop across the nation. . . . [T]he disparities in resulting inverse condemnation decisions are likely to be great").

219. See, for example, 28 U.S.C. § 1491 (1988 & Supp. 1992) (providing that the jurisdiction of the Court of Federal Claims includes most takings claims brought against the United States). See generally note 48.

220. Portions of the American Law Institute's Model Land Development Code could serve as a useful starting point for this project. Model Land Development Code (ALI, 1975). This

of existing land use regulations and procedures means that a prior land use case may be of little precedential value even within a single state because the local ordinance that was the subject of an earlier case differs materially from the ordinance at issue in a subsequent dispute. This results in inconsistency and unpredictability even within a single jurisdiction, leaving parties uncertain as to the legal significance of their actions.

One of the advantages of our federal system is its flexibility in allowing state and local governments to experiment with new and creative legislative ideas. This is particularly important in the area of land use control, in which local history, culture, and politics play such a crucial role. But acting as a laboratory of democracy[221] can be expensive, as the state of South Carolina learned when it attempted to restrict development of certain coastal property.[222] The adoption of a carefully crafted and widely accepted Model Act might appear desirable to a state legislature that wishes to insulate its local jurisdictions while providing fair procedures for landowners.

Various aspects of inverse condemnation procedure would be covered in a broad Model Act. The Act would list the steps that a landowner must take before an as-applied inverse condemnation claim is ripe, in both the constitutional and prudential senses. It would establish standard procedures for local regulators, thereby providing assurance that the state legislature views these procedures as reasonable. By placing time limits on the various actions that landowners and regulators may take, a Model Act would shorten the permitting process and increase the likelihood that a landowner could survive for its duration, while decreasing the potential liability facing a municipality that reaches a wrong result. Moreover, a well-drafted Model Act would provide a fairly fine level of detail, distinguishing

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Code, adopted in 1975, predates most of the Supreme Court's modern regulatory takings law, and its provisions would have to be updated accordingly. The Model Eminent Domain Code, 13 U.L.A. §§ 101-1605 (West, 1986 & Supp. 1994), which focuses on direct condemnations, also contains a number of provisions that could be modified so as to be useful in inverse condemnation cases.

The adoption of a standard state act is no guarantee that any two states will interpret that act in the same way. The Standard Zoning Enabling Act, adopted at one point or another by just about all of the states, has been construed in a variety of different ways in different states. See Williams, et al., 9 Vt. L. Rev. at 225-29 (cited in note 21).

221. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (stating that "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country"); *Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting).

222. See *Lucas*, 112 S. Ct. 2886. The state of South Carolina ultimately settled with Mr. Lucas and agreed to pay him more than $1.5 million. See note 173.

among the procedures to be followed in, for example, ordinary zoning cases, landmarks preservation cases, and environmental protection cases. In fact, the creation of the land use court suggested above[223] might be one aspect of a Model Act.

A Model Act would provide much-needed consistency in an area in which thousands of different procedures are currently applied. At minimum, this consistency would be useful to cities and counties within a state, which would be able to regulato in uniform fashion and behave with greater certainty and fairness once they know how the courts of their stato will answer specific legal questions. At this level, the Model Act would offer some of the same benefits as a land use court, by providing increased predictability. A broad Model Act, however, could go much further and could address land use issues from the beginning of the permitting process to the end. And a Model Act would be even more useful if numerous states adopted it. Once individual provisions of the Act were upheld and interpreted in one or more jurisdictions, they would appear fairly safe to observers in other jurisdictions.

A Model Act need not address ouly matters of procedure. It could also confront the "logical antecedent inquiry into the nature of the owner's estate" and the "understandings of our citizens regarding the contont of, and the state's power over, the 'bundle of rights' that they acquire when they obtain title to property."[224] By so doing, it would begin to clarify exactly what rights property ownership provides, a necessary first step in defining a taking. This definition may vary from state to state, but a Model Act could properly address this challenging question.

Recall that both the ripeness doctrine and the just compensation requirement are mandated by the United States Constitution. The widespread adoption of a model state law is no guarantee that the problem of harmonizing these two doctrines will be addressed. However, one of the concerns facing state and local lawmakers is the fear that each new attempt at a land use law or procedure might run afoul of the United States Constitution, thereby visiting unteld liability upon government bodies. A possible response to this concern is the development of a consistent and streamlined set of procedures which, upon withstanding federal court challenges in some jurisdictions, would be widely seen as relatively secure. While not solving the problem of harmonizing the two doctrines, a Model Act

223. See Part V.B.1.
224. *Lucas*, 112 S. Ct. at 2899.

could sharply reduce its consequences by limiting the uncertainty that has become so damaging to municipalities and landowners.

C. Rethinking the Relevance of the Due Process Clause

Parts V.A and V.B proposed several ways of reducing the conflict between regulatory takings law and the ripeness doctrine that either redefine the takings Moments or streamline the permitting process. These recommendations focus on the elements of the ripeness doctrine and seek to minimize its more harmful effects on regulatory takings law. But if the extended permitting processes that certain municipalities employ cause some portion of this problem, then courts can find a partial solution beyond the ripeness doctrine, in the Due Process Clause.

Part V.C discusses ways in which the increased application of procedural due process law might lead to speedier decisions. Once courts recognize that procedural improprieties, while generally not takings, may constituto procedural due process violations, the constitutional analysis shifts away from the Takings Clause. And if the issue in dispute does not involve takings law, then it may prove inappropriate to apply the takings ripeness standard.

1. Takings Law Contrasted with Procedural Due Process Law

In his *First English* dissent, Justice Stevens questioned the bright line that the majority had drawn between "normal delays" and "going too far."[225] "[N]ormal delays in obtaining building permits, changes in zoning ordinances, variances, and the like" are not compensable, said the Court.[226] However, "[w]here the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."[227]

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225. *First English*, 482 U.S. at 334 (Stevens, J., dissenting).

226. *First English*, 482 U.S. at 321.

227. Id. Professor Kmiec has stated that the difference between these two sorts of delays is "simply that between a regulatory decision that is not final and one that is." Douglas W. Kmiec, *The Original Understanding of the Taking Clause Is Neither Weak nor Obtuse*, 88 Colum. L. Rev. 1630, 1662 (1988). If he is correct, then any delay before a municipality reaches a final decision must be normal and non-compensable.

To the extent that he relies upen takings law, he seems to be correct, except in the most exceptional cases. See notes 230, 233, 234, and Part V.D.1. In fact, the definition of the Effective Moment that is proposed in this Article ensures that a regulatory taking generally cannot become effective before the municipality reaches a final decision. But it does not follow that there should be no other basis for relief if there have been abnormal delays prior to the

The Court's analysis suggests that "normal delays" and "takings" represent the two alternative findings that a court can reach, but this is not the case. The first of the Court's two statements applies to the customary case in which there is a lag between the time when a landowner applies for the permits she needs and the time when she receives them. These delays are to be expected, and are typically non-remediable. The second of these statements applies to cases in which there is an improper denial—the landowner is entitled to compensation that begins to accrue at the Effective Moment. Thus, the first rule focuses on municipal permitting procedures while the second rule focuses on the outcome of those procedures.

Although the Court implies otherwise, these two factual scenarios are not incompatible with one another, and it is entirely possible that one case will demonstrate normal delays followed by a compensable taking. But how should a court treat the procedural delays that typically occur in cases in which the landowner's permit is ultimately denied improperly? Are these delays normal, in that they would have occurred even if the plaintiff had received her permit in the end?[228] Or is this an instance "where the government's activities have already worked a taking of all use of property" even before the day when the final variance request was denied, with the denial representing only the final moment of a fully compensable sequence? After all, if the landowner's application is improperly denied, her use of her land has been restricted since the day she first applied. A rule delaying the accrual of compensation until after the last administrative event occurs might simply cause the defendant to delay the occurrence of that event.[229]

If a landowner claims that a municipality has delayed her application unfairly, her claim should not depend upon whether the municipality ultimately granted her a building permit. Nor should it turn upon whether any permit denial was proper or improper.[230]

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time of the final decision. If delays prior to the final decision are never compensable, then regulators have another strong incentive to delay reaching that final decision.

228. In fact, as Justice Stevens points out, what is so abnormal about the unhappy landowner's subsequent judicial attempt to receive compensation? *First English*, 482 U.S. at 334 n.10 (Steveus, J., dissenting). Why shouldn't the time it takes to litigate a regulatery takings claim be considered a normal delay, for which the landowner is not entitled to compensation? Plaintiffs in other contexts must boar the delays and costs of litigating a claim, even though they may ultimately prevail. So why not find an even lator Effective Moment?

229. See generally Part III.A and Part V.A.4.

230. An improper denial will always be compensable, of course. But that is because it is an improper denial, not because the antecedent delay was abnormally long. The length of the permitting process should not, in and of itself, create liability under the Takings Clause, except in the rarest of cases. See note 227, 233, 234, and Part V.D.1. Nor should the length of the

Rather, the procedural inquiry should focus on procedural questions, such as whether the municipality took a reasonable amount of time to decide.[231] Challenges to procedures should focus on those procedures, irrespective of the final decision and the substantive propriety of that decision.[232]

And if the procedural analysis should center on procedures, the substantive analysis should center on substantive regulatory takings law. The substantive takings decision should not turn upon whether a delay was normal or not, and the procedures employed ought to be just one of the many factors that a court examines in assessing a takings claim. There may be the rare case in which flagrant procedural improprieties amount to a taking,[233] but in the

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permitting process increase the magnitude of takings liability, given that the entire permitting process occurs before the Effective Moment. See Part III.A. Abnormal delays may merit a remedy, but that remedy ordinarily is not takings compensation.

231. Although the *First English* opinion uses the word "normal," 482 U.S. at 321, it is safe to assume that the Court would read a reasonableness standard into this test. If a municipality considers it normal to table all applications for three years, it surely cannot defend against the tenth applicant's procedural due process claim by pointing to the consistently unreasonable treatment it afforded his nine unfortunate predecessors.

232. See, for example, *Russo Development Corp. v. Thomas*, 735 F. Supp. 631, 636 (D. N.J. 1989) (noting, in dictum, that excessive delays might constitute a due process violation). See also *Nollan v. California Coastal Commission*, 483 U.S. 825, 835 n.3 (1987) (stating that "there is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical"); *First English*, 482 U.S. at 339 (Stevens, J., dissenting) (stating that "it is the Due Process Clause . . . that protects the property owner from improperly motivated, unfairly conducted, or unnecessarily protracted governmental decisionmaking").

233. In the exceptional case, procedural delays could amount to a regulatory taking. Intentional delays might merit such treatment. For example, if municipal procedures are employed so as to disguise a decision that was actually made early in the process, it would be appropriate for a court to find the futile procedures to amount to a due process violation. See notes 227, 230, and 234. However, the court might also determine that the intentionally dilatory procedures themselves effected a regulatory taking. Given how difficult it is for a court to find a regulatory taking before it knows how far the challenged regulation goes, cases in which this approach is viable will be uncommon. But see *Schulz v. Milne*, 849 F. Supp. 708, 713 (N.D. Cal. 1994) (denying defendant's motion to dismiss plaintiff's claim making this argument because "[t]his argument is compelling"). A plaintiff generally would be wise to use the Due Process Clause to attack delays that occur during the permitting process, and to reserve his Takings Clause arguments for denials that result from that same process.

See also *First English*, 482 U.S. at 339 (Stevens, J., dissenting) (stating that "I am not persuaded that delays in the development of property that are occasioned by fairly conducted administrative or judicial proceedings are compensable, *except perhaps in the most unusual circumstances*" (emphasis added)); *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 803 (Fed. Cir. 1993) (recognizing that takings may occur due to extraordinary delay); Exec. Order No. 12,630, 53 Fed. Reg. 8859 (1988), reprinted in 5 U.S.C. § 601 (1988) (stating that "[w]hile normal governmental processes do not ordinarily effect takings, undue delays in decision-making during which private property use if [sic] interfered with carry a risk of being held to be *takings*" (emphasis added)). This Executive Order is examined and criticized in Robin E. Folsom, Comment, *Executive Order 12,630: A President's Manipulation of the Fifth Amendment's Just Compensation Clause to Achieve Control Over Executive Agency Regulatory Decisionmaking*, 20

overwhelming majority of cases, the label "taking" should denote a substantive result and not the process by which the municipality reached that result.[234]

Courts should try to treat the process and the result as separate, if overlapping, issues deserving of separate analysis. If a court finds a regulatory taking, then the Effective Moment occurred and compensation began to accrue when the final variance application was denied. Abnormal delays and other procedural irregularities[235] occurring prior to the Effective Moment ordinarily are not takings, but may be remediable under the Due Process clauses of the Fifth[236] and Fourteenth[237] amendments.

To illustrate, suppose that a local zoning board generally acts upon building permit applications within sixty to ninety days. A landowner submits a building permit application that is rejected ninety days later, and then submits a second application, for a less ambitious project, which is rejected eighteen months later. Whether or not a federal court later finds a regulatory taking, it is reasonable to presume, rebuttably, that an abnormal delay began three months after the second application was filed. All delays prior to that point

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B.C. Envtl. Aff. L. Rev. 639, 656-70 (1993). See also *Lake Nacimiento Ranch Co. v. San Luis Obispo County*, 841 F.2d 872, 878-79 (9th Cir. 1987) (referring to landowner's "mistaken attempt to piggyback its taking claim on its procedural due process claim").

234. Of course, substance and procedure are intertwined in regulatory takings cases, see notes 73-78, 202 and accompanying text, and 207, and actual cases will not fall so neatly into the categories that the *First English* Court describes and that are considered here. Thus, a court deciding a regulatery takings case would be wise to examine the entire decision-making process and not just the decision itself. For example, a government body that is leaning toward a "no" voto from the outset may be more inclined to delay its decision. And there will he the occasional "procedural taking" of the kind jnst described. See notes 227, 230, and 233. But in the typical regulatory takings case, the court should treat the municipality's procedures as just one of the many factors it must examine in reaching its judgment on the merits.

This Article has argued earlier that substance and procedure are difficult to distinguish in these cases, see notes 73-78, 202 and accompanying text, and 207. This statement is not inconsistent with the conclusion reached here, that a regulatory taking is a substantive result that a court ordinarily can reach ouly after the permitting process has been completed. Even though the suhstance and procedure may be intertwined, a court that faces a ripe regulatery takings claim must determine what has happened and must render a decision. And this decision will be based upon all of the events that have occurred so far, even though they may be confusing and even though they may have been difficult to evaluate while they were occurring.

235. This Article uses delay as an example of a common procedural irregularity that may merit damages. Other types of procedural irregularities, such as lack of notice, are susceptible of similar analysis. See, for example, *Schulz*, 849 F. Supp. at 713 (finding improper delegation of authority).

236. "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." U.S. Const., Amend. V.

237. "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const., Amend. XIV, § 1.

were normal, irrespective of the ultimate decision of the zoning board or the correctness of that decision, and should not be remediable.

Whether or not the court ultimately finds a regulatory taking, the time during which the first application was pending and the first three months during which the second application was pending were normal delays for which a court should not award compensation or damages, absent a clear showing to the contrary. As for the remaining time after the second application, the burden of proof would shift to the local zoning board to show why these delays were not abnormal. If the zoning board could show, for example, that the applicant had failed to submit additional information or attend required meetings, or that the application was unusually complicated and difficult to act upon, then the board would have carried its burden and would postpone the date on which any due process violation began and any right to damages accrued. In fact, it is entirely possible that more than one distinct due process violation can occur during the pendency of such an application, with normal and abnormal delays interspersed throughout the permitting process and only the abnormal delays remediable.[238] Even though there may be more than one violation (or one discontinuous violation), the intervening normal delays are simply a non-compensable part of the permitting process that landowners should come to expect.

Thus, there will ordinarily be four types of cases. First, there will be cases in which the developer receives a permit in accordance with normal procedures and is not entitled to any remedy. Second, there will be cases in which a regulatory taking occurs, effective as of the moment of the last variance denial, but the permitting process itself is normal and non-remediable. The taking arises as a result of the denial and not as a result of the process. Third, there will be cases in which the developer receives a permit but is nonetheless entitled to damages because the municipality took abnormally long to decide.[239] Finally, there will be cases in which a regulatory taking occurs, effective as of the moment of the final variance denial, and the landowner is also entitled to damages for some portion of the permitting process.

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238. See Part V.D.1.

239. This award would not be grounded in the Takings Clause of the Fifth Amendment except in the rare case in which the court finds there to have been a taking during the pendency of the permit and variance applications, as just noted. See notos 227, 230, 233, and 234.

Assuming that there is no taking, otber grounds exist for awarding damages to compensate for abnormal delay. As suggested here, the Due Process Clause might serve this function. The Equal Protection Clause, U.S. Const., Amend. XIV, § 1, and various provisions of state law might serve as alternative grounds in some instances.

Under the approach proposed here, a plaintiff with a ripe regulatory takings claim may actually arrive in court with two distinct causes of action: (1) the ripe takings claim, arising under the Takings Clause of the Fifth Amendment; and (2) a procedural due process claim arising under the Due Process clauses of the Fifth and Fourteenth amendments.[240] A court deciding these claims will need to ask three questions in order to resolve them. First, were the procedures employed by the municipality normal and reasonable? Abnormal or unreasonable procedures should alert the court to the possibility of a due process violation. Second, was a building permit ultimately granted? The granting of a permit will imply that there was no regulatery taking, although there will be the rare case in which a taking occurred during the permitting process. Finally, if the permit was denied, was the denial appropriate? If there is a denial, and if it is inappropriate, then there has been a regulatory taking. If there is no denial or a proper denial, then the plaintiff's takings claim should fail.

2. The Ripeness Standard Applicable to Procedural Due Process Cases

The plaintiff with a ripe regulatory takings claim, then, also may possess a viable procedural due process claim. The primary concern of this Article, however, is the plaintiff with an *unripe* takings claim, who seeks due process relief long before a federal court can hear her takings claim. If procedural due process claims are subject to the same ripeness standards as regulatory takings claims—if the second claim must wait as long as the first—then this

240. There is no practical or constitutional reason why a specific set of facts cannot give rise to both a takings claim and a procedural due process claim. In Judge Posner's words:

> One might have thought that the takings clause would occupy the field of constitutional remedies for governmental actions that deprive people of their property. . . . But this is not correct; pushed to its logical extreme, the argument would read "property" out of the due process clause of the Fifth and Fourteenth Amendments.

Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 464 (7th Cir. 1988).

Courts and commentators, however, have paid little attention to the relationship between takings law and procedural due process law. For examinatious of the interplay between takings law and *substantive* due process law, see, for example, John D. Echeverria and Sharon Dennis, *The Takings Issue and the Due Process Clause: A Way Out of a Doctrinal Confusion*, 17 Vt. L. Rev. 695 (1993); Thomas E. Roberts and Thomas C. Shearer, *Land-Use Litigation: Takings and Due Process Claims*, 24 Urban Law. 833 (1992); Michael J. Davis and Robert L. Glicksman, *To the Promised Land: A Century of Wandering and a Final Homeland for the Due Process and Taking Clauses*, 68 Ore. L. Rev. 393 (1989); Randall T. Shepard, *Land Use Regulation in the Rehnquist Court: The Fifth Amendment and Judicial Intervention*, 38 Cath. U. L. Rev. 847 (1989).

plaintiff is little better off than she was before. She still must survive long enough to enter federal court; she now has two claims that may never ripen instead of one. The Due Process Clause offers land use plaintiffs an alternative that is useful earlier only if the ripeness test federal courts apply in procedural due process cases is easier to meet than the ripeness test they apply in regulatory takings cases. Before discussing the ripeness test that federal courts should apply in procedural due process cases, a brief discussion of procedural due process law itself is necessary.

In assessing procedural due process claims, the Supreme Court has distinguished between challenges to established state procedures, on the one hand, and claims arising out of the misconduct of state officers, on the other.[241] The plaintiff who challenges established procedures prevails by showing that the procedures are inherently flawed. This type of due process claim is analogous to a facial takings claim, and the attack is a structural one. Like facial takings claims, this type of due process claim will ripen fairly early but will be extremely difficult te prove.

If the case arises out of the misconduct of a state officer, however, a postdeprivation remedy may be sufficient for the state to avoid due process liability. In fact, remedies against the state typically will be unavailable prior to the deprivation in these cases because misconduct by state officers is often unpredictable. This latter type of procedural due process claim more closely resembles an as-applied takings claim. Because the Due Process Clause prohibits only deprivations of property without due process, a court cannot know at the time of the misconduct whether the state will provide due process later, and the case is premature.[242]

This analysis highlights the similarities between the Takings and Due Process clauses. Regulatory takings are constitutionally acceptable as long as the state pays for them in the end; thus a landowner cannot challenge an action as an unconstitutional taking until she is denied compensation. Similarly, deprivations of property of the second type described above, although never constitutionally "acceptable," are not judicially reviewable until the state fails to

241. *Zinermon v. Burch*, 494 U.S. 113, 137 (1990) (liberty interest); *Parratt v. Taylor*, 451 U.S. 527, 543 (1981) (property interest), overruled on other grounds, *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

242. *Parratt*, 451 U.S. at 541-44 (citing *Bonner v. Coughlin*, 517 F.2d 1311, 1319 (7th Cir. 1975) (Stevens, J.), modified en banc, 545 F.2d 565 (1976)).

provide due process.[243] A property owner cannot challenge such an action as a due process violation until she knows that due process will not be provided. Because postdeprivation remedies may avert a procedural due process violation, a ripeness standard much like the one that applies in regulatory takings cases should also be applied in procedural due process cases arising from the misconduct of state actors.[244] Thus the plaintiff with a challenge to established state procedures faces a fairly low ripeness threshold but a tough substantive standard. And the plaintiff with a claim arising out of misconduct by a state officer may find that her claim against the state is unripe until she seeks postdeprivation process.

Because of these similarities, a procedural due process claim may appear to mirror a regulatory takings claim. The image, however, is a distorted one, a point that becomes apparent when one examines in greater detail the ripeness standards applicable to each type of case. It is difficult to imagine a more stringent ripeness test than the one the Supreme Court has developed for regulatory takings cases. But even if a federal court applies this rigorous standard in procedural due process cases, the landowner should be able to meet the elements of the test more easily in the due process setting. Recall that the regulatory takings ripeness standard requires the landowner to make a demanding two-part showing.[245] First, she must demonstrate that the municipality has reached a final decision. Second, she must seek compensation in the appropriate state forum and be rejected. Even if a court attempts to engraft this takings ripeness standard onto procedural due process claims, the different nature of a procedural due process claim should make this standard easier to meet.

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243. *Zinermon*, 494 U.S. at 126 (stating that "[t]he constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process"); *Parratt*, 451 U.S. at 537-38; *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28, 31 (1st Cir. 1991); *G.M. Engineers & Assoc. v. West Bloomfield Township*, 922 F.2d 328, 332 (6th Cir. 1990).

244. For examples of the standard applied in such cases, see *Williamson County*, 473 U.S. at 194-95; *Parratt*, 451 U.S. at 543-44; *Macene v. MJW, Inc.*, 951 F.2d 700, 704-07 (6th Cir. 1991); *PFZ Properties*, 928 F.2d at 31. See also *Southview Assoc., Ltd. v. Bongartz*, 980 F.2d 84, 96-97 (2d Cir. 1992) (distinguishing among various types of takings and substantive due process claims and discussing the ripeness standards applicable to each); *Eide v. Sarasota County*, 908 F.2d 716, 725 n.16 (11th Cir. 1990) (noting that "arbitrary and capricious" substantive due process violations cannot be undone by postdeprivation remedies); Craig W. Hillwig, Comment, *Giving Property All the Process That's Due: A "Fundamental" Misunderstanding About Due Process*, 41 Cath. U. L. Rev. 703, 704 (1992) (noting that "[d]ue process violations, however, can also occur when an *arbitrary or wrongful* deprivation occurs, regardless of the adequacy of the state's deprivation procedures" (emphasis added)).

245. See Part II.B.2.

The first half of the regulatory takings ripeness test requires a final decision by the local administrative body. In a takings setting, this requirement means that the landowner will have to appeal any denial of its initial application, then seek a variance and appeal any denial of that application, and, in some cases, submit a second, less grandiose, application. This sequence of requirements, while onerous, is constitutionally necessary: If the issue that the court will ultimately face is whether the government has gone too far, it is imperative that the parties establish exactly how far the government has gone. If the parties have not yet established the municipality's final position, then it is possible that no violation has occurred or will occur, and it is certain that no court is in a position to make this determination.

In contrast, the procedural due process plaintiff should not need to establish the government's final position on the development project. Even in an as-applied case,[246] the procedural due process plaintiff is alleging only that the municipal agency, acting in a random and unauthorized fashion, has operated in a way that is procedurally inadequate. "If the injury the [holders of the property interest] seek to redress is harm to their property amounting to a 'deprivation' in constitutional terms, a final judgment is required; however, if the injury is the infirmity of the process, neither a final judgment nor exhaustion is required."[247] Even if a court insists on finality in a procedural due process case, the only action that should need to be final is the procedural error, not the substantive taking. And a procedural error can begin and end long before a regulatory taking has been consummated. At most, all that should be required is a rejected appeal of the procedural error, and the error and appeal may begin and end in the early stages of the permitting process, years before any regulatory taking can have been completed.

The second prong of the regulatory takings ripeness test requires the landowner to seek compensation in the appropriate state forum. This particular remedy is dictated because the Takings Clause, uniquely, specifically enumerates it. The procedural due process plaintiff, in contrast, need not seek compensation because nothing in the Due Process Clauses requires pursuit of any remedy in particular. The analogous requirement in the procedural due process

246. See notes 241-44 and accompanying text.

247. *Hammond v. Baldwin*, 866 F.2d 172, 176 (6th Cir. 1989) (citing *Williamson County*, 473 U.S. at 194). See also *Schulz*, 849 F. Supp. at 713 (stating that the "violation occurred the instant City delegated its authority to the Board and continued during the time this delegation persisted.... Thus, City's ripeness argument fails").

setting requires only that the landowner seek a postdeprivation remedy.[248] Given the breadth of this requirement, the plaintiff is not constitutionally limited to either a specific remedy or a specific forum. She may even meet this second half of the ripeness test during the course of meeting the first half.

In some cases, state or local law may narrow the options open to the landowner. She may have to appeal to a specific state or local agency, or may have to file a mandamus action. In many cases, however, the plaintiff will have more than one alternative available. Some of these alternatives are likely to be less burdensome and time-consuming than the regulatery takings requirement of seeking just compensation in the appropriate state court. And even if the plaintiff does choose to seek judicial relief, the availability of injunctive remedies offers the state judge an alternative that is more attractive and less drastic than the awarding of substantial compensation. As a result, the state judge is likely to be less reluctant to order relief and the due process claim may end there.

It would be appropriato for the federal judge facing a procedural due process claim to detormine that such a claim merits a more flexible ripeness standard than a regulatory takings claim deserves.[249] But even if this judge opts to employ the stricter takings ripeness

248. In acknowledging that postdeprivation remedies are sometimes the only remedies that can be provided, *Parratt* seems to suggest that pursuit of these remedies is required. However, the lower federal courts are divided as to whether pursuit of any remedy at all is required in procedural due process cases involving land. Compare *Sinaloa Lake Owner's Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1404 (9th Cir. 1989) (noting that "the rationale for requiring exhaustion of state componsation remedies in taking cases does not extend to a claim that plaintiffs were denied due process") and *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1574 n.8 (11th Cir. 1989) (same result as *Sinaloa*) with *Executive 100, Inc. v. Martin County*, 922 F.2d 1536, 1540 n.12 (11th Cir. 1991) (claiming that the issue is still unresolved in the Eleventh Circuit with respect to "due process takings claims"). See also *Executive 100*, 922 F.2d at 1552 n.73 (Clark, J., concurring in part and dissenting in part) (arguing that "[i]n fact, the Supreme Court in *Williamson County* explicitly distinguished procedural due process claims from takings claims reasoning that due process may be violated regardless of the availability of post-deprivation remedies").

249. Compare *Weissman v. Fruchtman*, 700 F. Supp. 746, 756 (S. D. N.Y. 1988):

> *Williamson* involved the riponess of substantive due process and "taking" claims, and so is not directly apposite to the procedural due process claims discussed here. . . . In substantive due process and "taking" claims, the essential injury is the *deprivation* of plaintiff's property. Thus, a variance request, or even an administrative appoal, is pertinent to such claims because it determines whether, in fact, the plaintiff will be deprived of his or her property.
>
> In procedural due process claims, on the other hand, the key factor is the *process* by which the plaintiff has been deprived of property. . . . The impertant criterion in a procedural due process inquiry is not whether the state was justified in depriving the individual of his or her property, but rather whether the state obeyed the strictures of tbe constitution in bringing about that deprivation.

See also *Schulz*, 849 F. Supp. at 713-14.

standard, the application of this standard to a procedural due process claim ought to ensure the landowner speedier access to a wider array of remedies: The first half of this strict ripeness test can be met more quickly, and the second half can be met more easily and more flexibly. Either way, if a state actor randomly and without authorization deprives a landowner of a protected property interest,[250] and if due process is not provided after this deprivation,[251] then the landowner should be viewed as having a ripe and valid procedural due process claim even though any regulatory takings claim may still be years from ripening.[252]

3. Procedural Due Process Claims in the Lower Federal Courts

Several circuits have heard procedural due process claims before any regulatory takings claim could have ripened. The Ninth Circuit, in *Harris v. County of Riverside*,[253] agreed to hear a procedural due process claim even though plaintiff's regulatory takings and substantive due process claims were not yet ripe. The court noted that any injuries arising from the questionable procedures had already occurred and thus did not depend on the outcome of the

250. On the question of whether a landowner in such a case has a protected property interest, see Part V.C.4.

251. If pestdeprivation due process *is* provided, that due process will itself incorporate an appropriate remedy. A court may assess damages against a municipality, for example, or may order it to act upon an application.

252. The Supreme Court has implied that substantive due process claims are subject to the same riponess requirements as regulatory takings claims, see *Williamson County*, 473 U.S. at 200, hut has never decided whether procedural due process claims are. These two types of due process claims, however, merit entirely different analyses. In the substantive due process setting, just as in the regulatory takings setting, the question is whether a regulation goes too far. A court cannot answer that question until it knows how far the regulation goes. Thus, a court must dismiss as unripe any case brought prior to the time when the municipality statos its final position.

A procedural due process claim, however, raises the question of whether the procedures themselves are constitutionally acceptable, and there is no reason why a court needs te await the results of those procedures before answering that question. While the *Williamson County* opinion speaks of "due process" rights, the court was clearly referring to substantive due process rights. See id. at 197-200. *Williamson County* did not raise any procedural due process issues, and the court's use of the more general term "due process," while confusing, is overbroad.

Although *Williamson County* seems te settle that takings and *substantive* due process plaintiffs must meet the same riponess standards, id. at 200, the circuits are in disagreement on even this point. Compare *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1402 (9th Cir. 1989) (applying a lower ripeness standard for substantive due process claims) and *Bateson v. Geisse*, 857 F.2d 1300, 1303 (9th Cir. 1988) (same) with *Culebras Enterprises Corp. v. Rivera Rios*, 813 F.2d 506, 515 (1st Cir. 1987) (applying the same ripeness standard for both types of claims) and *Ochoa Realty Corp. v. Faria*, 815 F.2d 812, 816 (1st Cir. 1987) (same).

253. 904 F.2d 497 (9th Cir. 1990). See also *Sinaloa Lake Owners Ass'n*, 882 F.2d at 1402.

process.[254] In so holding, the Ninth Circuit distinguished *Herrington v. County of Sonoma*,[255] which had suggested that the regulatory takings ripeness standard should apply in procedural due process cases; in *Harris*, the court found that the due process injury was concrete and separate from any taking.[256]

The Ninth Circuit had laid the groundwork for *Harris* in *Norco Construction, Inc. v. King County*.[257] There, that court had held that a procedural due process claim is generally not ripe until the state has reached a final decision as to how much development is permitted, but then noted in dictum that "a [separate] claim might also arise when it is clear beyond peradventure that excessive delay in such a final determination has caused the present destruction of the property's beneficial use."[258] Thus, plaintiffs in the Ninth Circuit appear to face lower ripeness hurdles in cases in which discrete portions of the permitting process have led to discrete injuries, although Ninth Circuit case law is still unsettled—and extremely panel-dependent—in this area.[259]

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254. *Harris*, 904 F.2d at 501: "In contrast to Harris' taking claim, however, his procedural due process claim challenges the rezoning decision in isolation, as a single decision with its own consequences, rather than as one in a series of County actions resulting in a taking."

255. Id. at 500 (distinguishing *Herrington v. County of Sonoma*, 857 F.2d 567, 569 n.1 (9th Cir. 1988)).

256. The court stated:

> The [requirement of a substantial, nonrefundable] fee and the deprivation of the commercial use of his land amount to actual, concrete injuries which are separate from any taking Harris may have suffered. These injuries thus have already occurred and do not depend on the finality of the County's determination of the permissible uses of his property.

Harris, 904 F.2d at 501.

257. 801 F.2d 1143 (9th Cir. 1986) (Kennedy, J.).

258. Id. at 1145. *Norco* is unusual in that the landowner was arguing for the latest possible Ripeness Moment in the face of the municipality's statute of limitations defense.

259. See, for example, *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1456 (9th Cir. 1987), in which the court stated that "there is no denial of procedural due process because [appellants'] substantive due process claim is not ripe." This statement was true in the factual setting presented in *Kinzli*: It was not a violation of appellants' procedural due process rights for the court to dismiss their unripe substantive due process claim. However, the court's words are too broad, as demonstrated by the Supreme Court's ruling in *Parratt*. If appellants in *Kinzli* had had a procedural due process claim that arose solely from the city's procedural actions, that claim would not necessarily have been premature.

See also *Traweek v. City and County of San Francisco*, 920 F.2d 589 (9th Cir. 1990). *Traweek* seems to cite *Hoehne v. County of San Benito*, 870 F.2d 529, 532 (9th Cir. 1989), for the proposition that the regulatory takings ripeness requirement applies to procedural due process claims as well. *Traweek*, 920 F.2d at 594. *Hoehne* states only that this is sometimes true and relies on pre-*Harris* case law to support even that conclusion. *Hoehne*, 870 F.2d at 532. But see *Southern Pacific Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 507 (9th Cir. 1990) (finding that due process, equal protection, and regulatory takings claims are all subject to the same ripeness requirement).

Case law in the Sixth[260] and Tenth[261] circuits is in accord, and Eleventh Circuit cases suggest that that circuit also might be receptive to this approach.[262] In reaching its result, the Sixth Circuit noted, "[Plaintiff's] injury stemming from the deprivation of procedural due process was immediately sustained and concretely felt, notwithstanding the absence of a 'final' decision from the City concerning the appropriate development of the property."[263] Similarly, the Tenth Circuit observed, "There are many intangible rights that merit the protection of procedural due process although their infringement falls short of an exercise of the power of eminent domain for which just compensation is required under the Fifth and Fourteenth Amendments."[264]

Two circuits have reached results to the contrary. The Seventh Circuit has concluded that the regulatory takings ripeness standard should also apply in procedural and substantive due process cases.[265] In reaching its conclusion, the Seventh Circuit relied upon the Ninth Circuit's *Herrington* opinion, which the latter court has

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260. *Nasierowski Bros. Inv. Co. v. City of Sterling Heights*, 949 F.2d 890, 894 (6th Cir. 1991) (finding procedural due process claim ripe without requiring denial of relief from zoning board). See also *Seguin v. City of Sterling Heights*, 968 F.2d 584, 589-90 (6th Cir. 1992) (finding that a procedural impropriety is an instantly cognizable injury to which a lower ripeness standard applies); *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1215 (6th Cir. 1992) (noting different ripeness standards for substantive due process and regulatory takings claims); *Hammond v. Baldwin*, 866 F.2d 172, 176 (6th Cir. 1989) (stating that "if the injury is the infirmity of the process, neither a final judgment nor exhaustion is required").

261. *Landmark Land Co. of Oklahoma v. Buchanan*, 874 F.2d 717 (10th Cir. 1989). Although the court held in favor of the municipality, it stated directly that regulatory takings and procedural due process claims are subject to different ripeness tests. Id. at 723. See also *J.B. Ranch, Inc. v. Grand County*, 958 F.2d 306, 309-10 (10th Cir. 1992) (noting the different standards for substantive and procedural claims but subsuming general due process protection within the more particularized takings analysis).

262. *Eide v. Sarasota County*, 908 F.2d 716, 720-22 & 722 n.9 (11th Cir. 1990). See also *Resolution Trust Corp. v. Town of Highland Beach*, 18 F.3d 1536, 1547 (11th Cir. 1994). The Eleventh Circuit attempted in *Eide* to clarify the confusion in the substantive law by recognizing three separate causes of action involving takings and substantive due process issues: (1) a "just compensation claim"; (2) a "due process takings claim"; and (3) an "arbitrary and capricious due process claim." *Eide*, 908 F.2d at 720-22. Each of these three claims is subject to its own ripeness standard. Moreover, none of these three causes of action implicates procedural due process law. A procedural due process claim would be subject to yet another ripeness standard under *Eide*, 908 F.2d at 720 n.6, and thus the Eleventh Circuit would also permit the approach proposed here.

263. *Nasierowski*, 949 F.2d at 894.

264. *Landmark Land*, 874 F.2d at 723. See also *Weissman*, 700 F. Supp. at 756 (noting the two different standards); note 249.

See generally Martha M. Cleary, Annotation, *Seeking of Variance as Prerequisite for Ripeness of Challenge to Zoning Ordinance under Due Process Clause of Federal Constitution's Fifth and Fourteenth Amendments—Post-*Williamson *Cases*, 111 A.L.R. Fed. 483, 500-01 (1993).

265. *Unity Ventures v. Lake County*, 841 F.2d 770, 774 (7th Cir. 1988) (finding that a procedural due process claim was unripe prior to the ripening of the regulatory takings claim).

since narrowed.[266] The Third Circuit also has applied the regulatory takings ripeness standard, concluding that "*Williamson* and *MacDonald* require that plaintiffs allow local authorities to act with finality under the zoning ordinance before pursuing a [procedural] due process claim."[267] This result is also suspect. The Supreme Court's sweeping references to "due process law" in *Williamson County* were clearly overbroad in that case, which raised only substantive due process issues.[268] And *MacDonald* was purely a regulatory takings case; the term "due process" is not used in the opinion.[269]

One judge has suggested that his court "retain the finality requirements for procedural due process claims where we cannot find a single, concrete separate injury or where the procedural due process claim is in reality an adjunct to a taking or other constitutional claim."[270] This is a reasonable and balanced suggestion in that it recognizes "legitimate" procedural due process claims while rejecting those claims that merely piggyback on a takings claim in an effort to avoid the stricter regulatory takings ripeness requirements.[271]

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266. See notes 253-55 and accompanying text.

267. *Taylor Inv., Ltd. v. Upper Darby Township*, 983 F.2d 1285, 1294 (3d Cir. 1993). But see *Russo Development Corp. v. Thomas*, 735 F. Supp. 631, 636 (D. N.J. 1989) (noting, in a case arising under federal law, that "the court does not rule out the possibility that a delay by a [federal] government agency may be so excessive as to constitute a deprivation of a party's due process rights").

268. *Williamson County*, 473 U.S. at 182 n.4, 185. See also *Weissman*, 700 F. Supp. at 756 (distinguishing *Williamson County* becanse the Court did not address procedural due process); notes 79-85 and accompanying text.

269. *MacDonald*, 477 U.S. 340. Note that even these strict readings of the case law focus upon only the finality portion of the ripeness test, leaving open the pessibility that a procedural due process claim still can ripen before a regulatory takings claim can. Even if both types of plaintiffs face the same finality requirement, a takings plaintiff must next seek compensation while a due process plaintiff, at most, needs only te seek pestdeprivation process of some sort. See *Long Grove Country Club Estates v. Village of Long Grove*, 693 F. Supp. 640, 659-60 (N. D. Ill. 1988) (finding a developer's due process and equal protection claims ripe, but its takings claim unripe in the absence of a denial of just compensation); notos 248-52 and accompanying text.

270. *Nasierowski Bros.*, 949 F.2d at 899 (Martin, J., concurring). See also *Bigelow v. Michigan Dept. of Natural Resources*, 970 F.2d 154, 159-60 (6th Cir. 1992) (finding procedural due process claims which were ancillary to a takings claim unripe); *J.B. Ranch, Inc. v. Grand County*, 958 F.2d 306, 309-10 (10th Cir. 1992) (subsuming procedural due process claim into takings claim because facts fall "squarely within" the Takings Clause).

See generally, Mandelker and Blaesser, *Applying the Ripeness Doctrine* at 481-84 (cited in noto 49); Blaesser, 2 Hofstra Prop. L. J. at 95-96 (cited in noto 42) (arguing that "[i]n assessing a procedural due process claim, the courts should examine a local gevernment's specific actions during a particular application process, not the 'nature and intensity' of the landowner's development proposal").

271. Even those circuits that decide to apply the strictest possible ripeness standard should recognize that this standard is easier to meet in a procedural due process case than in a regulatory takings case. See Part V.C.2.

In summary, certain deprivations of property arise unpredictably, out of the misconduct of public officials. For example, the members of a county board of zoning appeals may arbitrarily delay deciding a request for a setback variance in violation of the board's own procedures. Because no set of procedures can prevent every deprivation of this type, the only due process that is feasible must occur after the deprivation itself, and even this postdeprivation process will not always be provided. When it is not, the landowner has a ripe federal procedural due process claim against the county.

Federal courts should continue to recognize that the elements of a procedural due process violation differ from the elements of a regulatory taking. The question in these cases is not whether a long series of actions amounts to a taking; rather, it is whether a shorter series of activities denies a landowner the process she is due. As a result, it is possible for this type of due process violation to occur in its entirety during the time when a regulatory takings claim is just beginning to ripen. The broader range of acceptable remedies in procedural due process cases, including damages and injunctive relief, means that postdeprivation process is easier for a state judge to provide than is takings compensation. Even if as-applied due process claims are subjected to a ripeness test as strict as the one employed in as-applied takings claims, due process claims are bound to ripen earlier. Therefore, a landowner whose federal regulatory takings claim is still years from ripening may possess a ripe procedural due process claim.[272] Although a federal court is properly precluded from hearing a regulatory takings claim while the elements of that claim are still developing, there is no reason why it should not hear and decide a procedural due process claim that has developed completely.

4. Problems with the Procedural Due Process Approach

Although the due process analysis proposed here will reduce the doctrinal tension discussed above, it is attended by several problems that merit further exploration. To begin with, the Supreme Court has held that municipalities are not liable for damages under the doctrine of respondeat superior for the behavior of their employees.[273] If a plaintiff brings a procedural due process action

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272. If the procedural due process violation is a facial one, arising out of procedures that are inherently flawed, then the due process claim may ripen even earlier. See Part V.C.2. But this type of claim will be more difficult to prove. Id.

273. *Monell v. Dept. of Social Services*, 436 U.S. 658, 691 (1978). See also *Westborough Mall, Inc. v. City of Cape Girardeau*, 710 F. Supp. 1278, 1282 (E. D. Mo. 1989) (stating that

against a municipality under Section 1983, she must demonstrate either that the municipality is following an official policy or that it is acting pursuant to established custom.[274]

A municipality is unlikely to adopt an official policy that requires delay, inadequate notice, or some other constitutionally infirm process; thus the plaintiff is left with the difficult task of proving that the municipality nonetheless encourages or follows such inadequate procedures as a matter of course. As a result, the procedural due process argument will offer the greatest benefit to the developer who believes that a local zoning board consistently treats similar applicants in an unacceptable manner and can make this demonstration for the court.[275] This argument will be less useful to the developer who believes she is being singled out for unfair treatment by the local zoning board.[276]

Even the property owner who is the victim of a single instance of improper treatment by a municipal zoning body may succeed with a procedural due process claim if she is able te show that the action was taken by a person or body acting in a final policymaking capacity.[277] Identifying precisely which person or board satisfies this requirement is not always easy in a local government setting: Inordinate delay by a zoning board might not suffice, while inordinate delay by a zoning

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"[a]lthough the unauthorized acts of the city manager had the 'potential te become official policies' or may have been 'porceived' as such, § 1983 liability does not attach te injuries inflicted solely by employees or agents. The City has done no more than employ an individual who in the exercise of his discretion reached an erroneous decision").

274. *Monell*, 436 U.S. at 693-94; *St. Louis v. Praprotnik*, 485 U.S. 112, 128 (1988). See generally Joseph G. Cook and John L. Sobieski, Jr., 1 *Civil Rights Actions* ¶ 2.05[A] at 2-62–2-78 (Matthew Bender, 1994).

275. *Bateson v. Geisse*, 857 F.2d 1300, 1303-04 (9th Cir. 1988) (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986): "[W]e find that the city council's decision te arbitrarily withhold Bateson's building permit 'may fairly be said to represent official policy'"); *WAM Properties, Inc. v. Desoto County, Fla.*, 758 F. Supp. 1468, 1472 (M. D. Fla. 1991) (finding that plaintiffs properly pled custom/policy aspect of § 1983 and denying county's motion to dismiss).

276. See, for example, *Coogan v. City of Wixom*, 820 F.2d 170, 176 (6th Cir. 1987) (affirming a directed verdict for the city); *Carr v. Town of Dewey Beach*, 730 F. Supp. 591, 605-09 (D. Del. 1990) (denying liability where defendant was not acting pursuant to a policy or custom). See also *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480-81 (1986) (acknowledging that "'official policy' often refers to formal rules or understandings . . . that are intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time"). See generally Cook and Sobieski, 1 *Civil Rights Actions* ¶ 2.05[B] at 2-78.16(80) and n.196 (cited in note 274).

277. *Praprotnik*, 485 U.S. at 123 (noting that even a single decision can lead te municipal liability if it is taken by "the highest officials responsible for setting policy in that area of the gevernment's business"); *Pembaur*, 475 U.S. at 480 (holding that "even a single decision by such a body constitutes an act of official gevernment policy"). See also *First English*, 482 U.S. at 341 n.17 (Stevens, J., dissenting) (stating that "I am afraid that any decision by a compotent regulatory body may establish a 'policy or custom' and give rise to liability after teday"); *Bateson*, 857 F.2d at 1303 (holding the denial of a single permit to be "policy").

appeals board might. Cases that turn on this question will be highly fact-specific and will require a close examination of local government structure and procedures. But municipal bodies may be held liable on a procedural due process claim even for the occasional misstep.[278]

The property owner who clears these due process barriers and proves her claim will then be entitled to receive damages for the deprivation of her property. Unlike takings compensation, due process damages resemble tort damages, and the plaintiff will have to prove her actual injuries arising from the deprivation.[279] These damages might include increased interest rates resulting from municipal delay, fees for extensions of land option contracts and loan and contractual commitments, and losses incurred as prospective tenants seek other space. Due process damages could be substantial in some cases, but typically will be smaller in amount than regulatory takings compensation. The landowner also would retain the ability to seek injunctive relief, which for many property owners would be the primary aim of an interim due process suit.[280]

Finally, recall that the Due Process Clause addresses deprivations of property. Thus, a procedural due process claim can succeed only if the municipality deprives the landowner of a protected property interest and not merely an expectancy.[281] Some federal courts reject procedural due process claims on this basis, arguing that a plaintiff has no constitutionally protected property interest if her only "property" is the hope that a zoning board will exercise its discretion

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278. See, for example, *Video International Production, Inc. v. Warner-Amex Cable Communications, Inc.*, 858 F.2d 1075, 1087 (5th Cir. 1988) (finding that "[t]he combination of the zoning policy decision by the Board [of Adjustment] and the issuance of the violation notice by the highest City official empowered to execute it [the building inspector], resulted in a policy decision that can be attributed te the City"); *Rodrigues v. Village of Larchmont*, 608 F. Supp. 467, 476 (S. D. N.Y. 1985) (holding that the "decisious of the Board [of Zoning Appeals] are intonded to be binding on the Village. Thus, the Board members are those officers described by *Moncll* . . . whose joint edicts or acts may fairly be said to represent official policy").

Municipalities remain shielded under *Monell* from suits based on acts of local government officials who are not policymakers and are not acting pursuant to established policy or custom. See, for example, *Coogan*, 820 F.2d at 175-76 (categorizing the disputo in question as "mundane" and short of "constitutional proportions").

279. *Carey v. Piphus*, 435 U.S. 247, 257-59 (1978).

280. In a case in which the plaintiff seeks an injunction but not damages, proof of an official policy or established custom may not be required. The Ninth Circuit has expressly reached this conclusion in two cases not involving land use. *Los Angeles Police Protective League v. Gates*, 995 F.2d 1469, 1472 (9th Cir. 1993); *Chaloux v. Killeen*, 886 F.2d 247, 249-50 (9th Cir. 1989).

281. See Mandelker, et al., *Federal Land Use Law* § 2.03[3] at 2-28-2-31 (cited in noto 49); Thomas E. Roberts and Thomas C. Shearer, *Land-Use Litigation: Takings and Due Process Claims*, 24 Urban Law. 833, 840-41 (1992). See generally *Board of Regents v. Roth*, 408 U.S. 564, 570 (1972) (finding that only "protected interests" merit due process protection). *Roth*, the treatise, and the article all discuss procedural due process matters but do not address directly the question of procedural delay.

in her favor by granting her a permit.[282] Note, however, that these unsuccessful claims are most often raised by landowners who bring procedural due process claims as indistinguishable alternatives to their regulatory takings or substantive due process claims. Such a landowner might argue that a denial of a plat approval constitutes a regulatery taking or, in the alternative, a denial of her procedural and substantive due process rights.[283] Federal judges undoubtedly see these procedural due process claims as little more than attempts to salvage otherwise untenable constitutional claims.

The federal courts that have applied the analysis suggested here, however, faced plaintiffs with stronger, more free-standing, procedural due process claims. Each of these courts had little trouble finding a protected property interest or at least acknowledging or assuming that such a property interest might exist. These circuits have been unanimous in their unwillinguess to bar procedural due process claims solely due to an inability to find a protected property interest.[284] The only issue for these courts seems to be whether the landowner has been deprived of that presumed property interest.

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282. A more sweeping argument for the plaintiff is that she has a protected property interest not in a permit but rather in a fair and prompt hearing. If state or local law restricts the behavior of state or local administrators, then a landowner has the right to have those restrictions enforced. This argument would not arise from the municipality's ultimate decision; in fact, it will be most valuable to the plaintiff long before the municipality reaches that decision. Instead, the due process violation here would arise from the improper application of standard procedures.

There is some case law suppert for this argument. See, for example, *Parks v. Watson*, 716 F.2d 646, 656-57 (9th Cir. 1983) (finding statutorily-created procedures to be "entitlements"). See also *Resolution Trust Corp. v. Town of Highland Beach*, 18 F.3d 1536, 1547-48 (11th Cir. 1994). But see *Williams v. City of Seattle*, 607 F. Supp. 714, 719 (W. D. Wash. 1985) (finding that procedural rules are not property interests for due process purposes). See generally Sarah K. Hofstadter, Note, *Protecting State Procedural Rights in Federal Court: A New Role for Substantive Due Process*, 30 Stan. L. Rev. 1019, 1030-36 (1978) (discussing procedural protections for substantive property rights).

For an extreme application of this approach, relying upon an atypical state statute, see *State ex rel. Compass Corp. v. City of Lake Oswego*, 319 Or. 537, 878 P.2d 403, 408 (1994) (holding that, under Oregon law, a party has a right "not merely to an order that rules on the application, hut to an order *compelling an approval*" (emphasis added)).

283. See, for example, *Bateson*, 857 F.2d at 1305 (finding that denial of minor plat application was not denial of due process).

284. *Nasierowski*, 949 F.2d at 897 (finding that "Nasierowski had a property intorest in the old zoning classification" under Michigan law); *Harris*, 904 F.2d at 503 (quoting *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928): "The right of [an owner] to devote [his] land to any legitimate use is properly [sic; 'property' in original] within the protection of the Constitution"); *Landmark Land*, 874 F.2d at 723 (recognizing, in dictum, that the landowner may have a property interest in disputed permits under Oklahoma law). See also *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28, 30-31 (1st Cir. 1991) (stating that the court will assume that a protected property interest exists; court does not address ripeness issue); *Eide*, 908 F.2d at 723-26 (examining what the Eleventh Circuit calls an "arbitrary and capricious due process claim" and applying a somewhat different analysis).

5. Summary of the Procedural Due Process Proposal

Supreme Court doctrine divides land use procedures into two categories, "temporary takings" and "normal delays." But a temporary regulatory taking is the result of a process, while delays occur during that process. Courts must recognize that the procedural question of delay is distinct from the substantive takings question.

The approach proposed here recognizes that even an unfair and unconstitutional denial normally can be expected to take a certain number of weeks, months, or years. This approach recognizes that a process that is designed or employed to delay decisions should be compensable as an abnormal delay, while a fair and reasonable process—even one that takes a long time—should not be compensable, whether or not it reaches the proper result. A landowner should not expect to be compensated for a deliberative period that she would have had to endure even if the zoning board had been entirely reasonable and speedy and had decided ultimately to grant the requested permit. The question of whether a delay has been proper or improper can and must be separated from the question of whether the result constitutes a taking.

Moreover, this approach provides an option for a landowner who wishes to expedite the permitting process while that process is still underway. At this point, the landowner does not have a ripe regulatory takings claim, and it is impossible to know whether a court will later find a taking to have occurred. That question can be answered by the courts only after the entire sequence of events has concluded. During the pendency of the application, the only question that a court is in a position to answer is whether the process has been fair to the applicant so far. The landowner who is awaiting an administrative decision should be allowed to argue that the jurisdiction's procedures violate her procedural due process rights.

Even the two circuits to reach the opposite result did not seem to be concerned with the requirement of a protected property interest. *Taylor Inv.*, 983 F.2d at 1290 (stating that "[p]laintiffs claim they have a protected property interest in the use permit sufficient to implicate due process. We assume, without deciding, that this is the case"); *Unity Ventures*, 841 F.2d at 776 (finding procedural due process claim unripe because defendant had not reached a final decision and failing to discuss whether plaintiff had a protected property interest).

See also *Decarion v. Monroe County*, 853 F. Supp. 1415, 1418-20 (S. D. Fla. 1994) (holding that a refusal to issue an infrastructure permit deprived plaintiffs of a constitutionally protected interest). But see *Orange Lake Assoc., Inc. v. Kirkpatrick*, 21 F.3d 1214, 1224 (2d Cir. 1994) (holding that landowner has no entitlement to existing zoning under New York law and that landowner abandoned its claim by failing to exhaust administrative remedies).

D. Putting These Suggestions Together

1. Recognizing Interim Due Process and Takings Violations

Given that the permitting process often consists of a prolonged series of submissions, hearings, review periods, and actions by zoning boards or similar bodies, it is possible that different mini-sequences occurring during this long process may have different constitutional consequences. Certain procedural sequences may constitute short-term due process violations[285] and may even rise occasionally to the level of separate regulatory takings.[286] And the outcome of the process may itself constitute a regulatory taking. There is no conceptual reason why one part of the process cannot be viewed as a due process violation or a temporary taking, only to be followed by a reasonable period of normal activity, and then by another set of actions constituting a second due process violation or temporary taking. Thus, judges must be careful to examine the entire permitting process and not just the outcome of that process.

Imagine a zoning board that acts reasonably during the early stages of processing an application, only to delay reaching its initial decision for two years. That lag might constitute an interim procedural due process violation, or even an interim temporary taking, no matter what the decision turns out to be. If a second period of reasonable activity follows, and then the zoning appeals board delays reaching a decision on a variance application for eighteen months, that second delay might constitute a second interim due process violation or temporary taking, again irrespective of the decision itself. And an ultimate variance denial might constitute the Effective Moment of a regulatory taking, potentially the third discrete constitutional violation.

In a case such as this, a federal court will be required to apply the usual ripeness test before deciding whether the final denial amounts to a compensable taking. But what about the two interim deprivations? This Article has already argued that each of these mini-sequences might constitute a distinct procedural due process violation, and that free-standing due process violations should be seen as having ripened before the municipality reaches a final decision.[287]

285. See Part V.C.

286. See notes 227, 230, 233, and 234.

287. See Part V.C for discussions of the relevant procedural due process law and the ripeness test that should apply in procedural due process cases.

Thus, the plaintiff who has just suffered an interim due process violation would have a ripe due process claim and an unripe regulatory takings claim. By bringing her due process claim now, she could encourage or compel the municipality to reach an earlier final decision on her application and might also receive damages for the due process violation.

In the alternative, one or both of these first two deprivations might occasionally constitute a separate regulatory taking.[288] If an interim taking such as this can occur, then the next question is when this taking ripens. A federal court can resolve this question in at least three ways. At one extreme, the court could state that no regulatory taking can ripen—not even an interim taking—until the municipality reaches a final decision on the landowner's application. This means that the three discrete takings claims would remain unripe until the end of the permitting process, at which point all three claims would ripen simultaneously.

This first option is permissible under existing ripeness requirements, though not compelled by them.[289] The plaintiff would have no access to court until the appellate administrative body denies her final variance application and the state court denies just compensation. But once the plaintiff surmounts this final ripeness hurdle, she has three ripe claims instead of just one. Nothing in *First English* requires that a temporary taking be a unique and continuous event, and a series of applications, delays, and denials might establish more than one such taking.[290] If the court finds more than one taking, then its next step will be to calculate compensation for each one.

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288. The Ninth Circuit recognized, in a somewhat different setting, that interim takings can occur. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 911 F.2d 1331, 1334-35 (9th Cir. 1990). See also *Lucas*, 112 S. Ct. at 2890-91 (noting that an outright construction ban for two years was amended by the legislature so as to allow special permits and holding that the first two years might be compensable even though special permits subsequently became available).

289. At least one court seems to have taken this approach, *Zilber v. Town of Moraga*, 692 F. Supp. 1195, 1206 n.11 (N. D. Cal. 1988):

> Zilber appears to argue that final decision ripeness should not prevent a court from determining whether events that occurred prior to when a development application could be processed—such as the developer's decision not to exercise its option—amount to a taking. The answer to this argument is that a court will examine the merits of such a claim when it is ripe. After a the [sic] property owner pursues the requisite development application (and variance request), the court will entertain argument that a taking was already accomplished before final processing of the application.

Presumably, a second, independent taking might occur as a *result of* the processing of that application in an unconstitutional fashion.

290. See *First English*, 482 U.S. at 317-18, 321. This case is similar to that in which a court finds a regulatery taking and the municipality respends by relaxing the offending ordinance. If the modification is inadequato, the less restrictive ordinance will also constitute a

Under this approach, the plaintiff's multiple claims would survive, but none of them would ripen until very late in the process. Thus, this plaintiff would face to an even greater degree the ripeness problem that is the subject of this Article: She would have three claims that she may never be able to litigate. However, those plaintiffs who manage to last until the municipality makes its final decision would present several ripe claims instead of just one.[291] If the tremendous liability that can result from *First English* is intended to induce regulators to act more reasonably, then this ripeness approach will increase the magnitude of that liability and should reinforce the intended effect of *First English*. But to the extent that *First English* has failed in practice to have this desired impact, the hypothetical fact pattern represents little more than an extreme example of why current ripeness doctrine needs to be re-examined.

As a second option, a federal court could apply the existing ripeness test separately to each interim violation, even before the municipality reaches its ultimate decision. Existing ripeness doctrine would require a plaintiff to show that each *interim* taking is final and that the municipality will not provide compensation. Because interim takings will arise from procedural improprieties, rather than from a final decision, the finality requirement would have to be met by showing that the procedural impropriety has been completed. In a case of undue delay, for example, the existence of unconstitutional delay is all that is needed—once an improper delay begins, it cannot be undone, and its continued pendency would affect only the size of the award that might result. The plaintiff's next and last required ripening activity would be to seek compensation at the state level. Once the state denies compensation, the landowner would possess a ripe interim takings claim, and the substance of this claim would then be judged under existing regulatory takings law. Each valid interim claim—and there could be more than one—would have its own Effective, Ripeness, Decision, and Cessation Moments.

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regulatory taking. In such a case, a court might find there to have been two discrete takings, each compensable for its duration, perhaps separated by a period of constitutionally permissible activity. See generally Stein, *Pinpointing the Beginning and Ending of a Temporary Regulatory Taking* (cited in note 111).

291. A variation of this approach is to treat the plaintiff as having a single ripe claim, but one that is discontinuous: The just compensation meter would turn on and off, and on and off, and on once again. In essence, the claim would present an alternating sequence of temperary Effective and Cessation Moments, with the single Ripeness Moment occurring near the end of the process. The amount of compensation might differ under this second approach, since the fair market value of the property is determined for any taking as of its Effective Moment. But either way, the plaintiff must survive the entire sequence before she can present any ripe claim.

As this discussion demonstrates, it is difficult to squeeze interim takings into the ripeness test developed for final-decision takings. Existing ripeness doctrine developed under the implicit assumption that a regulatory taking occurs as the result of an administrative process and not as an attribute of the ongoing process. Thus, the question of whether an interim taking is final is not only difficult to answer but also somewhat incongruous to ask. The finality requirement exists because of the impossibility of knowing whether government regulations go too far until one knows how far they go, an issue that does not arise when the purported taking results from procedural improprieties which frequently will be ongoing. In these cases, the violation has commenced and the only question is when it will end. Thus, the existing ripeness test is inapposite and a third alternative is needed.

Under this third option, a federal court would acknowledge that interim takings are qualitatively different from final-decision takings. An interim taking arising from procedural improprieties would require a substantially different ripeness showing than would a final-decision taking that emanates from a substantive decision. If a federal court were to adopt this approach, it would find much of the Supreme Court's existing ripeness doctrine to be inapplicable to interim regulatory takings. And while there is little in the case law to suggest that these two different sorts of takings should be treated differently for ripeness purposes, there is also little in the case law suggesting that federal judges have ever needed to ponder this fairly fine point of law.[292]

This approach would treat each pair of interim Effective and Cessation Moments as bracketing a discrete interim taking. Courts

292. The Ninth Circuit did apply a different ripeness test to an interim taking in *Martino v. Santa Clara Valley Water Dist.*, 703 F.2d 1141, 1147 (9th Cir. 1983) (holding that "[t]o the extent that the Martinos seek to prove that a 'taking' occurred because of unreasonable delays or other unreasonable conduct in the condemnation process, their failure to submit a development plan is irrelevant"). And while the Ninth Circuit decided *Martino* before the Supreme Court decided *Williamson County*, the reasoning of *Martino* seems equally viable today. See also *Schulz*, 849 F. Supp. at 714 (holding that "in the absence of a state remedy for delay alone, plaintiffs' takings claims against defendants for excessive delay are ripe").

Even the current ripeness test is flexible enough that it can be applied in non-standard ways in certain non-standard settings. In *Williamson County*, for example, the Court opined that a plaintiff would not be required to seek just compensation in a state that (unlike Tennessee at the time) did not provide procedures for an inverse condemnation plaintiff to seek such a remedy. *Williamson County*, 473 U.S. at 194-97. And in *Lucas*, the Court was more willing to hear the case than it might otherwise have been because of the absence of a variance procedure in the original statuto and the South Carolina Supreme Court's refusal te dismiss the case on ripeness grounds. *Lucas*, 112 S. Ct. at 2891. But see id. at 2907-08 (Blackmun, J., dissenting) (arguing that Lucas's claim was not ripe since he had not sought a variance).

would apply a modified—and probably more relaxed—ripeness test to an interim taking[293] and then would decide whether procedural improprieties amount to an uncompensated taking. Such an approach might make the rare interim taking look more like a due process violation and less like a final-decision taking. This convergence would be apparent both in the nature of the claim itself and in the nature of the ripeness test applicable to that claim. This is not surprising, given that interim takings arise from procedural improprieties. But due process violations would remain distinguishable from interim takings claims, with each marked by its own ripeness test, its own substantive elements, and its own remedies.[294]

The permitting process operates in fits and starts. Sudden bursts of activity punctuate prolonged periods of delay, and most of these delays are ordinary and reasonable. In a small number of cases, however, these delays will violate the applicant's procedural due process rights and in an even smaller number of cases they will constitute regulatory takings. The federal courts must recognize that violations of both types can occur during the permitting process and not just as a result of the process. Moreover, interim takings arising out of procedural errors are sufficiently different from the substantive final-decision takings that might result months or years later to warrant their own, more precisely tailored ripeness test.[295] Once federal courts recognize that interim due process and takings violations can occur and ripen during the permitting process, landowners will be better able to nudge the process forward judicially when municipalities improperly impede their administrative alternatives.

2. Combining These Proposals

Part V has suggested a number of ways in which ripeness doctrine and regulatory takings law can be harmonized. Each of these suggestions has been followed by a discussion of its benefits and drawbacks. Some of these proposals are incompatible with one another. For example, it will not be necessary to create an exception to the ripeness doctrine for a narrow class of unusually vulnerable plain-

293. This modified ripeness test will require corresponding modifications to the definitions of the Effective, Ripeness, and Cessation Moments.

294. Interim procedural due process violations, while relatively rare, will be more common than interim takings. Only in the rarest case will a federal court find a municipality's mishandling of an application to rise to the level of a taking. See, for example, notes 186 and 211.

295. As previously noted, procedural due process claims also merit their own ripeness standard. See Part V.C.2.

tiffs[296] if the Supreme Court decides to relax the ripeness requirements more generally and find all regulatory takings cases to be justiciable earlier.[297] Similarly, treating the permitting process as a sequence of takings and non-takings[298] may be superfluous in some cases if plaintiffs have a due process argument available during the permitting process.[299]

However, each of these suggestions addresses at least one of the problems caused by the conflict between regulatory takings law and ripeness doctrine, and various permutations of these proposals may blend well. In addition, these suggestions are directed to a variety of different audiences. Federal and state courts and state and local legislative and administrative entities all may have different ideas as to how best to resolve these legal tensions. Different bodies may take different approaches in different jurisdictions, and the many participants in the land use process can observe and learn from each others' successes and failures.

In particular, a clear definition of the Effective Moment,[300] an increased reliance on the Due Process Clause,[301] and the recognition of interim due process[302] and takings[303] violations would go a long way toward resolving much of the existing doctrinal tension. Litigants presently have little idea as to when a regulatery taking begins, a surprising legal gap in light of the *First English* command that takings be compensated from the time they become effective. The courts must end this uncertainty, and should clarify that a regulatory taking does not become effective until the final variance denial at the local level.[304] In spelling out this definition of the Effective Moment, courts would be telling landowners that most delays in the permitting process are to be expectod and ordinarily will not be compensable, whatever the result of that process. If regulatory takings are compensable from the moment they become effective, and if normal delays are not a constitutional violation, then it follows that a compensable taking cannot become effective until the normal delays end. Thus, if a municipality follows a constitutionally normal process,

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296. See Part V.A.3.
297. See Part V.A.2.
298. See Part V.D.1.
299. See Parts V.C and V.D.1.
300. See Part III.A.
301. See Part V.C.
302. See Parts V.C and V.D.1.
303. See Part V.D.1.
304. See Part III.A.

any regulatory taking will commence only when that process has been completetod.

This answer to an important timing question is consistent with substantive takings law. If landowners are on notice that the procurement of necessary permits is unavoidably a time-consuming process, then municipalities should not be held liable for doing exactly what every landowner should have expected. If the result of that process is improper then the landowner is entitled to compensation. But any compensation award arises only from the improper result of the permitting process and not from its unavoidable duration.

All of this discussion assumes that the process by which the municipality typically decides is a reasonable one. It also presupposes that the municipality is treating a given landowner's case in much the same way that it has treated other, similar cases in the past. If either of these assumptions turns out to be false, the landowner will not be left without a remedy. If a municipality typically decides cases in a procedurally unaccoptable way or if this particular case is being treated in an extraordinary fashion by someone with final policymaking authority, then the plaintiff should be permitted to bring a procedural due process claim against the municipality. The ripeness thresholds that apply in regulatory takings cases should not apply in these procedural due process cases, and the landowner would have earlier access to court.[305]

An interim due process claim of this type could take the form of an action for an injunction or an action for damages, and the court could compel the municipality to reach the decision it should have reached earlier, or pay for its failure to do so, or both. From the landowner's point of view, a procedural due process action will force the municipality to do what it should have done already, and perhaps to pay damages for its delay. From the municipality's point of view, the viability of interim due process claims will provide a strong incentive to behave properly. This incentive will not be diminished by protracted ripeness requirements, nor will it be made potentially devastating by a self-executing and very expensive just compensation remedy. Rather, municipalities will be told that if they fail to treat applications fairly, they will lose, lose promptly, and perhaps pay a reasonable amount for their error. And landowners will be told to

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305. The landowner might also have a valid equal protection claim. But see *Bigelow v. Michigan Dept. of Natural Resources*, 970 F.2d 154, 158-59 (6th Cir. 1992) (holding that finality is required before an equal protection claim is ripe). *Bigelow* relied heavily on *Unity Ventures* and *Herrington*, id. at 158, which are criticized above at notes 265-68 and accompanying text.

expect reasonable delays but not to despair in those cases in which the regulatory body drags its municipal heels unreasonably.

In the most egregious cases of intentional or arbitrary procrastination, landowners could also argue that procedural delays have amounted to an interim regulatory taking. Such claims would be difficult to sustain and might need to meet the existing burdensome ripeness test for regulatory takings claims. But this uncommon scenario will play itself out from time to time in cases in which the municipality's behavior is sufficiently blameworthy. In this small subset of extreme cases, landowners would have two overlapping options. They could pursue their due process remedies—declaratory relief and damages—immediately. Or they could pursue their regulatory takings remedy—intermittent just compensation for intermittent takings—whenever their takings claims eventually ripen.

E. Consigning Regulatory Takings Cases to the State Courts or to Non-Judicial Forums

Several of the proposals described above would require action at the state or local level. This dispersal of responses is necessary because the effect of federal ripeness doctrine, and perhaps its primary purpose, has been the removal of many regulatory takings cases from the federal courts. The ripeness doctrine, after all, assumes that there is no federally justiciable case or controversy until a certain sequence of events occurs at the local and state levels, and the ripeness cases since 1978 have progressively added steps to this sequence. So while federal regulatory takings law arises directly under the Fifth Amendment of the United States Constitution, the federal courts have been making it more and more difficult for regulatory takings plaintiffs to enter federal court. The Supreme Court may be recognizing a federal claim that is cognizable only in state court for most or all of its life. "Federal courts, in short, are not the only entities charged with doing justice."[306]

But a plaintiff who litigates in state court may find a subsequent federal claim barred for one of several reasons. Once a state court has determined that compensation is not owing, the doctrines of

306. Nichol, 54 U. Chi. L. Rev. at 179-80 (cited in note 32).

res judicata[307] and full faith and credit,[308] may preclude relitigation in federal court. As Professor Roberts has noted:

> Under well established procedural rules, use of the state courts to litigate the demand for compensation ends the matter. Res judicata will bar relitigation of the claim. Even if the federal claim is viewed as not arising until compensation has been denied, the rule of issue preclusion will prevent relitigation in federal court. The property owner may be dissatisfied with the state court decision, but collateral attack on the state court judgment or findings is not allowed.[309]

Ripeness requires that a plaintiff travel first to state court, and this unavoidable state court proceeding then prevents him from moving on to federal court. The federal court is precluded from revisiting the issue.[310]

The Eleventh Circuit recently confronted this paradox in *Fields v. Sarasota Manatee Airport Authority*.[311] In *Fields*, the issue was whether a landowner who seeks just compensation in state court, as required by *Williamson County*, but does not prevail, is then barred by res judicata from bringing a regulatory takings claim in federal court. Relying on several prior cases decided by the Supreme Court and the Fifth and Eleventh circuits, the Eleventh Circuit concluded that such a plaintiff is *not* barred from bringing such a federal claim if: (1) he is precluded from filing his suit in federal court in the first instance; and (2) he is in state court "involuntarily."[312] Moreover, a plaintiff who meets these two criteria must also, in his state court proceeding, affirmatively reserve his right to pursue federal remedies subsequently.[313] "[The] would-be federal court litigant with a takings

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307. See, for example, *Corn*, 904 F.2d at 587, reversed and remanded on other grounds, 997 F.2d 1369 (11th Cir. 1993) (citing *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 80-85 (1984)): "A federal court must accord a state court proceeding the same preclusive effect the state proceeding would have under state law. . . . Under Florida law, where a second suit is upon the same cause of action and between the same parties as the first, res judicata applies."

308. U.S. Const., Art. IV, § 1; 28 U.S.C. § 1738 (1988 & Supp. 1993); Roberts, 24 Urban Law. at 484-88 (cited in note 43).

309. Roberts, 24 Urban Law. at 483 (footnotes omitted).

310. Id.; Mixon, 20 Urban Law. at 676, 686-87, 727-32 (cited in note 150). The Supreme Court can hear certain direct appeals, as it did in *First English*, *MacDonald*, *San Diego Gas*, *Agins*, and *Penn Central*. However, the Supreme Court's appellate jurisdiction was narrowed substantially in 1988. See 28 U.S.C. § 1257 (1988); Chemerinsky, *Federal Jurisdiction* at 20 (cited in note 29).

311. 953 F.2d 1299 (11th Cir. 1992). See also *Palomar Mobilehome Park v. City of San Marcos*, 989 F.2d 362, 365 (9th Cir. 1993) (relying on *Fields* and also noting that "[w]hile every litigant deserves his or her day in court, few deserve two"); *Peduto v. City of North Wildwood*, 696 F. Supp. 1004 (D. N.J. 1988), affirmed, 878 F.2d 725 (3d Cir. 1989) (holding that issue preclusion barred a developer's claim).

312. *Fields*, 953 F.2d at 1306.

313. Id. at 1303.

clause claim must take the steps necessary [in state court] to perfect his federal claim, but taking the requisite steps need not have the unfortunate effect of precluding the claim that the would-be federal court litigant is trying to perfect."[314]

Thus, an Eleventh Circuit plaintiff must not only follow the detailed sequence of ripeness steps laid out in *Williamson County*, but also must plan early on for what he may need to do later. For those Eleventh Circuit plaintiffs who do not have the foresight expressly to reserve their federal court rights in their state court proceedings, state court is both the beginning and the end of the line for their federal rights. *Williamson County* prevents these plaintiffs from starting out in federal court,[315] and principles of res judicata prevent them from entering federal court later.

"[T]he question is whether the citizens of this country are to be barred from ever vindicating a federal constitutional right through the federal court system."[316] The answer in the Eleventh Circuit is, "No, if they are very patient and very careful." The plaintiffs in *Fields* were not careful, did not reserve their federal rights in the Florida proceedings,[317] and lost on defendant's summary judgment motion in federal district court.[318] Ripeness doctrine and the principles of res judicata combined with a landowner's carelessness to ensure that a federal right could be protected only in state court.

Federal courts that wish to defer deciding regulatory takings cases need not rely solely on the ripeness doctrine and the principles of res judicata and full faith and credit—they have two other tools at their disposal. The *Burford* abstention doctrine[319] allows federal

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314. Id. at 1306 n.5.

315. Id. (citing *Williamson County*, 473 U.S. at 194-95).

316. Id. at 1307 n.8.

317. Id. at 1308-09.

318. Id. at 1302. See also *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482-83 & n.16 (1983) (noting that "[b]y failing to raise his claims in state court a plaintiff may forfeit his right to obtain review of the state-court decision in any federal court. This result is eminently defensible on policy grounds." Id. at 482 n.16); *Peduto*, 878 F.2d at 729 (finding that "[d]enial of a federal forum, however, does not amount to denial of due process"); Mandelker, et al., *Federal Land Use Law* § 4.03[6] at 4-34-4-37 (cited in note 49). But see *Norco*, 801 F.2d at 1146-47 (holding that claims were not barred by res judicata because plaintiff could not yet have raised them during the earlier proceedings).

See generally Monaghan, 86 Colum. L. Rev. at 990 & n.78 (cited in note 49) (discussing federal appeals from unfavorable state court decisions); Williams, et al., 9 Vt. L. Rev. at 245 (cited in note 21) (predicting, in a pre-*First English* article, that, "having loosed the [temporary takings] monster, the Court would use the excuse of its burdensome docket for leaving to the state and lower federal judiciary the task of getting the beast leashed and brought to heel").

319. This branch of the abstention doctrine derives its name from *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). Although at least three other varieties of abstention may apply to land use cases, *Burford* abstention is the type most likely to apply to the more common fact patterns that

courts to avoid deciding cases when to do so would have a disruptive effect upon state policies and programs.[320] In other words, federal courts should not intervene if the state has developed a comprehensive regulatory system.[321] Because state and local land use procedures are often governed by a comprehensive scheme—state enabling acts typically require this and the Supreme Court's regulatory takings cases make it advisable—*Burford* abstention often will be appropriate in the type of case that is the subject of this Article. Like res judicata and full faith and credit, the *Burford* abstention doctrine makes it more likely that plaintiff's day in court will not be a day in federal court.

Finally, a recent Ninth Circuit case held that a state is immune under the Eleventh Amendment from a federal inverse condemnation claim.[322] Without discussing in any great detail why Eleventh Amendment immunity takes priority over the Fifth Amendment just compensation requirement,[323] the court decided that the plaintiff is barred from federal court in its action against a state.[324] This result confirms that there is another way for federal

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are the focus of this Article. For a comprehensive discussion of the abstention doctrine as it arises in land use cases, see William E. Ryckman, Jr., *Land Use Litigation, Federal Jurisdiction, and the Abstention Doctrines*, 69 Cal. L. Rev. 377 (1981). See generally Chemerinsky, *Federal Jurisdiction* at 608-12 (cited in note 29).

320. *Burford*, 319 U.S. at 317-18; *Pomponio v. Fauquier County Board of Supervisors*, 21 F.3d 1319, 1327 (4th Cir. 1994).

321. Ryckman, 69 Cal. L. Rev. at 414-17 (cited in note 319); Blaesser, 2 Hofstra Prop. L. J. at 87-88 (cited in note 42). See also Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 Colum. L. Rev. 309, 311 (1993) (arguing that *Parratt v. Taylor* should be viewed as an abstention case).

322. *Broughton Lumber Co. v. Columbia River Gorge Comm'n*, 975 F.2d 616, 618-19 (9th Cir. 1992). The Eleventh Amendment provides that, "The Judicial power of the United States shall not be construed te extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another Stato, or by Citizens or Subjects of any Foreign State." U.S. Const., Amend. XI. The Eleventh Amendment has been held to preclude suits brought against a state by its own citizens. *Hans v. Louisiana*, 134 U.S. 1, 21 (1890).

323. The Ninth Circuit examined this question somewhat more closely in *Harrison v. Hickel*, 6 F.3d 1347, 1352-54 (9th Cir. 1993) (noting that plaintiffs had access to an alternative forum).

324. The court did not decide whether the state's immunity would be imputed to a bi-state agency that was a codefendant. The court also did not address the question of whether Eleventh Amendment immunity will be imputed te a city or county that regulates land use under state enabling or home rule legislation. But see *Robinson v. Georgia Dept. of Transp.*, 966 F.2d 637, 638 (11th Cir. 1992) (holding that Eleventh Amendment immunity does not apply to municipal corporations, counties, or other political subdivisions).

The *Broughton* decision affirms that, unless Congress clearly says otherwise, a state may use the Eleventh Amendment to avoid other sorts of constitutional liability. This immunity extends, for example, to suits arising under the Equal Protection Clause. See, for example, *McDonald v. Board of Mississippi Levee Commissioners*, 832 F.2d 901, 906 (5th Cir. 1987) (noting that states are immune from Section 1983 actions under the Eleventh Amendment); *McClary v. O'Hare*, 786 F.2d 83, 89 (2d Cir. 1986) (same). In this respect, the defense provided

courts to avoid deciding regulatory takings cases when the defendant is a state.

There is evidence in the case law, then, to suggest that some federal courts are using the ripeness doctrine as one of several ways of relegating inverse condemnation cases to the states. If this is true, then the federal courts have adopted a practice in regulatory takings cases that differs from that used in other Section 1983 cases. This distinction is particularly evident when one recalls the more limited exhaustion requirement applied in racial discrimination cases.[325] There are those who believe that this difference reflects a second-class status for property rights as opposed to other civil rights.[326] More likely, it reflects a greater level of trust in the ability of local officials who face these issues to act fairly,[327] and local and state arbiters to reach reasonable results, in cases involving property rights, even where heavy liability may ultimately fall upon state and local governments.[328] Or this trend may simply reflect federal judges' goals

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to a state by the Eleventh Amendment extends well beyond that provided by the ripeness doctrine, which is applied more flexibly in Section 1983 cases. See notes 41-46 and accompanying text.

325. See notos 41-46 and accompanying text.

326. See *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938) (suggesting that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily te be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry").

The relative importance of property rights as compared with other civil rights is tbe subject of vigorous debato by members of the judiciary and others. Compare *Tahoe-Sierra Preservation Council*, 911 F.2d at 1338 n.5 (stating that "even the framers of the fifth amendment saw the wisdom of enumerating life, liberty, and property separately, and . . . few of us would put equal value on the first and the third") with id. at 1346-47 (Kozinski, J., dissenting in part) (arguing that "[t]he rejoinder that life is more important than property . . . obscures the fact that both are protected by the Bill of Rights and for that reason alone deserve solicitude—rather tban thinly disguised contempt—from members of the judiciary"). The Supreme Court has recently hinted that it agrees with the latter view. *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2320 (1994) (stating that the Takings Clause is not a "poor relation" of the First and Fourth amendments).

For further discussion of the relative status of property rights, see generally Gregory S. Alexander, *Takings and the Post-Modern Dialectic of Property*, 9 Const. Comm. 259, 265 (1992); Kassouni, 29 Cal. Western L. Rev. 1 (1992) (cited in note 49); *Williams American Land Planning* § 5A.20 at 171-79 (cited in note 49).

327. As one federal district court stated:

> [A landowner's] federal claim involving land use must be viewed with particular scrutiny because it challenges local zoning decisions, a sensitive area of social policy best resolved without resort te federal court intervention, absent sufficient allegations of constitutional error. . . . In reviewing the instant complaint, the Court is appropriately mindful that the federal courts are not land use czars. . . .

Arroyo Vista Partners v. County of Santa Barbara, 732 F. Supp. 1046, 1050 (C. D. Cal. 1990).

328. Some state courts have been conspicuously receptive to inverse condemnation and related claims brought by landowners. See, for example, *Sintra, Inc. v. City of Seattle*, 119 Wash.2d 1, 829 P.2d 765, 775 (1992) (reversing summary judgment order in favor of city); *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 542 N.E.2d 1059, 1065 (1989) (finding a

of maintaining manageable dockets.[329] But whatever their reasoning, some federal courts are stating quite clearly that regulatory takings cases are generally matters to be resolved by the states, and may be using ripeness doctrine as one way of keeping these cases in a state forum for as long as possible.

A more extreme view of the ripeness doctrine is that the federal judiciary may be attempting te remove regulatory takings cases from the courts altogether. Under this view, the federal courts are attempting to route these cases to non-judicial forums. Landowners and municipalities who observe the many other cases that drag on for years may opt out of the court system entirely. Perhaps the ultimate result of the ripeness cases, whether intended or not, will be to encourage settlements and other forms of non-judicial resolution.[330]

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moratorium on single-room occupancy housing conversion to be both a physical occupation and a regulatory taking).

329. Judge Posner, among others, has recognized this point:

> This case presents a garden-variety zoning disputo dressed up in the trappings of constitutional law. . . . If the plaintiffs can get us to review the merits of the Board of Trustees' decision under stato law, we cannot imagine what zoning dispute could not be shoehorned into federal court in this way, there te displace or postpone cousideration of some worthier object of federal judicial solicitude.

Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 467 (7th Cir. 1988) (Posner, J.). See also *Hoehne v. County of San Benito*, 870 F.2d 529, 532 (9th Cir. 1989) (emphasizing that "ruling case law makes it very difficult to opon the federal courthouse door for relief from state and local land-use decisions. The Supreme Court has erected imposing barriers . . . to guard against the federal courts becoming the Grand Mufti of local zoning boards"); *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 831-34 (1st Cir. 1982); *Golemis v. Kirby*, 632 F. Supp. 159, 163-65 (D. R.I. 1985) (Selya, J.):

> Se long as a state provides meaningful legal remedies for such instances of inverse condemnation, the state must be given first crack at keeping its own house in order. The fifth and fourteenth amendments, severally or in the ensemble, do not pormit the federal nose to intrude into the stato's tont unless and until the landowner has unsuccessfully travelled the route afforded by the state in a good faith effort te obtain just componsation.
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> . . . .
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> . . . So long as the state offers a suitahle prospect for recourse in respect te an alleged "taking," a landowner must mine that quarry before panning for gold in the federal hills.
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> . . . .
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> . . . The plaintiff's present effort to use a federal venue as an emetic against the municipal action which (in his view) has tainted the eupepsia of his property rights cannot be swallowed.

330. Given the ongoing relationship that developers, municipal officials, and neighbors must frequently enjoy or endure, these cases are well suited to mediation or other forms of altornative disputo resolution. See generally Richard S. Cohen, Douglas K. Wolfson, and Kathleen Meehan DalCortivo, *Settling Land Use Litigation While Protecting the Public Interest: Whose Lawsuit Is This Anyway?*, 23 Seton Hall L. Rev. 844 (1993) (encouraging settlements provided that the intorests of the public, and not just the parties to the litigation, are taken into account).

VI. CONCLUSION

Ripeness doctrine and regulatory takings law are inherently contradictory, and to some degree these inconsistencies cannot be avoided. This Article has proposed a variety of ways in which to address this doctrinal clash. Part V offered several suggestions that recognize the importance of both doctrines and acknowledge the interests of all parties. Each of these proposals attempts to synthesize the two doctrines in a manner that is both fair and predictable, something that existing law fails to accomplish. Some of these proposals can be combined and harmonized, and the likelihood is that different fact patterns will demand different recipes.

The ripeness doctrine places many plaintiffs at a disadvantage from the start, as they typically do not have the staying power required to ripen a regulatory takings case. Moreover, municipalities may have an incentive to exacerbate this problem, as stalling is often the functional equivalent of winning on the merits. This is not to suggest that all land use regulators are evil, calculating despots who devise convoluted procedures designed to starve every developer into giving up. Nor is it meant to suggest that all developers are altruists whose commendable plans for soup kitchens, day care centers, and hospices are constantly being thwarted by overreaching local officials and meddlesome neighbors. The vast preponderance of land use disputes involves two or more parties, typically acting more or less in good faith, who simply disagree strenuously as to how a certain finite resource ought to be used. Landowners, for whatever combination of selfish and virtuous reasons, often want to develop their land and possibly profit along the way, while neighbors and government officials, for many of these same reasons, often want to restrict development and protect their stake in their property, their community, and their environment.

The Supreme Court's response to this problem has been to raise the stakes, by requiring municipalities that miscalculate to pay just compensation. But by balancing the scales in this manner, the Supreme Court has created a land use system of mutual assured destruction. Landowners must struggle to endure for years, worrying throughout whether they can outlast their opponents and prove their case. And even though municipalities nearly always prevail, they must fear the occasional David Lucas with the stamina and financial support necessary to survive the extended process and the legal arguments necessary to win. Since 1987, then, regulatory takings law

and the ripeness doctrine have combined to make land use litigation exceedingly unappealing to both sides.

The current state of the law is untenable in the long run. It is detrimental to developers, in that it discourages some development that may be desirable and legally permissible but not worth the misery of pursuing. It is destructive to land use regulators, who may stall and stall only to face unnecessarily large compensation awards. And it is expensive for everyone, given the years of non-productive administrative and judicial activity that inevitably result. The conflict between these two constitutionally-based doctrines has resulted in little more than confused parties and a substantial waste of resources. Ripeness doctrine has been developing in land use cases since 1978, and *First English*'s failure to confront its weaknesses has become apparent since 1987. Once judges, legislators, and regulators at all levels acknowledge this tension and take creative steps to address it, these two doctrines will be able to coexist far more harmoniously than they have so far.