Entitlement to Substantive Due Process: Old versus New Property in Land Use Regulation

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Legal discussion of land use regulation usually features the Takings Clause. The Supreme Court changed land use law by striking down land use restrictions as a taking of property,[1] producing what some have called a takings revolution. Yet, this so-called revolution has had little practical effect. Except in cases that strike down developer exactions,[2] Supreme Court decisions rarely have changed the outcome.[3]

This fascination with the Takings Clause demands correction. Takings cases have a limited focus; they usually occur when a municipality applies a legitimate, but targeted, regulation that affects a single or limited group of landowners. An example is wetlands regulation that severely restricts use of property.[4]

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1. Its most recent decision is City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999), discussed in Steven J. Eagle, *Del Monte Dunes, Good Faith, and Land Use Regulation*, 30 ENVTL. L. REP. 10100 (2000), and John D. Echeverria, *Revving the Engines in Neutral:* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 29 ENVTL. L. REP. 10682 (1999).

2. Even here, however, the cases are about evenly divided in accepting dedications for off-site streets and highways. *See* DANIEL R. MANDELKER, LAND USE LAW § 9.16 (4th ed. 1997 & Supp. 1999) [hereinafter LAND USE LAW]. For cases striking down such dedications, *see, e.g.*, Goss v. City of Little Rock, 151 F.3d 861 (8th Cir. 1998) (invalidating a dedication for an adjacent street as condition to rezoning based on possibility of commercial development when there were no present plans for such a development), *cert. denied*, 119 S. Ct. 1355 (1999); Amoco Oil Co. v. Village of Schaumburg, 661 N.E.2d 380 (Ill. App. Ct. 1995).

3. *See* David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from Penn Central to Dolan, and What State and Federal Courts are Doing About It*, 28 STETSON L. REV. 523 (1999); Glenn P. Sugamelli, Lucas v. South Carolina Coastal Council: *The Categorical and Other "Exceptions" to Liability for Fifth Amendment Takings of Private Property Far Outweigh the "Rule,"* 29 ENVTL. L. 939 (2000).

4. Takings claims seldom succeed even in these cases. *See* LAND USE LAW, *supra* note 2, at § 12.04. For a case finding a takings violation in a wetlands permit denial, see Florida Rock Indus., Inc. v. United States, 45 Fed. cl. 21 (1999).

There are other, equally important, land use cases where that present different issues. In these cases a municipality has adopted a land use regulation that carries out legitimate purposes, but a landowner claims that the municipality has applied the regulation arbitrarily.[5] In the usual case a landowner makes a development proposal more intensive than the municipality prefers, the municipality finds some reason to reject it, and the developer claims that the rejection is arbitrary.[6] For example, consider a landowner who owns land zoned for multifamily use. Under the zoning ordinance the planning commission must approve a site plan for any development before it can issue a building permit. The planning commission instructs the landowner that she must reduce the density of the multifamily development to comply with the site plan ordinance, but this is the first time the municipality has demanded a density reduction in a site plan submission. The landowner refuses, arguing correctly that the site plan ordinance does not impose such a requirement. The municipality then rejects the site plan, preventing the developer from proceeding with the project.[7]

What recourse does the developer have? A takings claim is possible if the rejection of the site plan leaves the land without an economically viable use, but because the property is zoned for

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5. The major increase in suburban population in recent decades, along with suburban incorporations and annexations, has shifted the arena in which most land use decisions occur. This shift may explain why arbitrary land use decision making is more of a problem. Special interest groups may capture suburban governments and use their land use powers in an arbitrary manner by opposing new developments for unpopular land uses, such as group homes for the disabled, or opposing developments because of political or personal motives.

Substantive due process claims also arise when a local government adopts a land use regulation that does not serve a legitimate governmental purpose; exclusionary zoning is an example. This type of regulation presents different problems because the facial text of the ordinance, not its application, creates the substantive invalidity. The entitlement rule does not apply when the constitutional infirmity is facial.

6. Most of the recent takings cases the Supreme Court has decided have been cases where a municipality's land use decision was arbitrary. For example, in City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999), a developer scaled down its development several times in response to the city's objections, but the city ultimately rejected the development. *Id*. at 693-94. The developer sued and won on a takings claim. *Id*. at 694.

7. This example is not far-fetched. *See* Kosinski v. Lawlor, 418 A.2d 66, 68 (Conn. 1979) (stating that a municipality may not use site plan review to reject a site plan for a development because it is a "poor use of the site" when the development complies with a zoning ordinance).

multifamily use, this claim cannot stand. The landowner also will not have a takings claim under the takings test that requires a land use regulation to serve a legitimate governmental interest.[8] Site plan review meets this requirement.[9] The problem is the decision to apply the site plan ordinance in an arbitrary way.

An equal protection claim is possible if the municipality does not require a density reduction from other site plan applicants who proposed a development that the zoning ordinance allows.[10] The landowner in the hypothetical then argues that the decision is unfair because the municipality treated other applicants differently.[11] However, the equal protection clause does not reach the situation where a municipality acted arbitrarily but did not treat similar cases differently.[12]

Finally, the developer may have a due process claim. A procedural due process claim exists if the decision-making process is improper or unfair, but these facts do not present this problem. The developer can also claim that the municipality's decision violates substantive due process because it was arbitrary.[13] Substantive due

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8. *See infra* notes 28-35 and accompanying text.

9. *See* Lionel's Appliance Center, Inc. v. Citta, 383 A.2d 773 (N.J. Super. Ct. Law Div. 1978) (discussing the purposes of site plan review).

10. An equal protection claim has the advantage in that it only demands equal protection in the treatment of persons. It does not require the claimant to have a property interest. *See* U.S. CONST. amend. XIV.

11. *See* Thomas v. City of West Haven, 734 A.2d 535 (Conn. 1999) (finding an equal protection violation when the city demanded a site plan when no similar demands were made on other developers). The landowner might also be able to claim an equal protection violation if she could show that the commission demanded a density reduction out of vindictiveness toward the landowner. *See* Olech v. Village of Willowbrook, 120 S. Ct. 1073 (2000). However, equal protection claims that do not implicate fundamental interests or suspect classifications may fail in court for other reasons. Courts usually reject claims of arbitrary and unfair decisions in these cases by finding reasons to support the municipality's decisions. *See* DANIEL R. MANDELKER ET AL., FEDERAL LAND USE LAW § 2.04[3] (1999) [hereinafter FEDERAL LAND USE LAW].

12. Consider, for example an application for a development that a municipality has never heard of before, such as an application for a group home for the disabled, rejected for an arbitrary reason, such as the fears of neighbors. *See, e.g.*, Marks v. City of Chesapeake, Va., 883 F.2d 308 (4th Cir. 1989) (overturning council denial of a permit for a palmistry and fortune-telling business because it was tainted with "religious considerations").

13. The developer can also sue in state court, claiming that the state zoning statute does not authorize the density reduction requirement or that it is unconstitutional under the state constitution. *See* LAND USE LAW, *supra* note 2, at § 6.68. The landowner may also join state and federal constitutional claims, and may have to do so if federal courts in her circuit require plaintiffs to ripen equal protection and due process cases in state courts. *See* FEDERAL LAND

process claims present problems not faced by other constitutional claims because courts have rules that keep them out of court. Some federal circuits, for example, apply the Supreme Court rule that a plaintiff may not bring a substantive due process claim when a more specific constitutional provision is available.[14] These rules do not apply to takings or equal protection claims.[15] This Article examines

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USE LAW, *supra* note 11, at § 4A.02[6].

14. *See* Armendariz v. Penman, 75 F.3d 1311, 1319 (9th Cir. 1996), applying Graham v. Connor, 490 U.S. 386, 394-95 (1989) (stating that claims of use of excessive force must be analyzed under the Fourth Amendment). This rule also applies in zoning cases. *See* Macri v. King County, 126 F.3d 1125 (9th Cir. 1997). *But see* Pearson v. City of Grand Blanc, Mich., 961 F.2d 1211 (6th Cir. 1992). For a further discussion see Toni M. Massaro, *Reviving Hugo Black? The Court's "Jot for Jot" Account of Substantive Due Process*, 73 N.Y.U. L. REV. 1086 (1998).

The Eleventh Circuit has a rule that denies substantive due process protection to when a government action is executive. *See* McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994), *cert. denied*, 513 U.S. 1110 (1995). This rule is inconsistent with a 1998 Supreme Court decision, which applied substantive due process to executive actions. *See* County of Sacramento v. Lewis, 523 U.S. 833 (1998). *See also* David H. Armistead, *Substantive Due Process Limits on Public Officials' Power to Terminate State-Created Property Interests*, 29 GA. L. REV. 769 (1995).

A few other courts of appeals have adopted the view, advanced by Justice Powell in his concurring opinion in *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 229-30 (1985), that substantive due process protects only fundamental constitutional rights and not state-created property interests. *See, e.g.*, Charles v. Baesler, 910 F.2d 1349 (6th Cir. 1990). *But see* Pearson v. City of Grand Blanc, 161 F.2d 1215-23 (allowing the property owner to challenge zoning decisions as a violation of substantive due process). *See also* Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 GEO. L.J. 555, 579 (1997).

Federal courts also limit their review in substantive due process cases by adopting a deferential standard of judicial review or other limitations that limit the cases in which they can find substantive due process violations. *See, e.g.*, New Burnham Prairie Homes, Inc. v. Village of Burnham, 910 F.2d 1474, 1481 (7th Cir. 1990) (requiring a plaintiff to show that the land use decision was arbitrary and irrational and that the decision-makers either committed another substantive constitutional violation or that state remedies are inadequate). The cases are collected by circuit in FEDERAL LAND USE LAW, *supra* note 11, § 2.02[1][b] n.7.3.

15. Another rule, which probably would cover the hypothetical described at the beginning of this Article, applies to both due process and equal protection claims. It holds that those claims are not actionable under § 1983 of the Federal Civil Rights Act if they are "run of the mill" land use disputes. This rule originated in the First Circuit. *See, e.g.*, Creative Env'ts, Inc. v. Estabrook, 680 F.2d 822 (1st Cir. 1982). Courts adopting this rule hold that this kind of dispute does not implicate federal constitutional concerns even though it presents a federal constitutional claim. They do, however, state that they will entertain the constitutional claim if the municipal behavior is egregious, or where there is a gross abuse of power, invidious discrimination, or fundamentally unfair procedures. *Id.* This exception suggests that the rule may simply be a restatement of the deferential review standard that courts apply in substantive due process and equal protection cases. *But see* Welch v. Paicos, 66 F. Supp.2d 138 (D. Mass. 1999) ("In the rough-and-tumble politics of land-use planning, very little can shock the

an important rule that bars a substantive due process action when a landowner claims that a municipality has arbitrarily denied a development approval. This rule holds that a landowner cannot challenge the denial unless he has an entitlement to the approval.

Because judicial acceptance of new property interests is quite recent, we can call this entitlement a "new property" interest. New property is different from "old property," which is the property interest in the ownership of the land. In the hypothetical at the beginning of this Article, the landowner does not have an entitlement that creates new property if the municipality can approve or deny the site plan at its discretion.[16]

The new property requirement comes from the text of the Fifth Amendment, carried over to the Fourteenth Amendment, which provides that no state shall deprive any person of "life, liberty, or property, without due process of law."[17] Supreme Court decisions created the new property in cases where jobholders claimed that procedural due process required a hearing before their governmental employers could terminate them. These cases held that a hearing was necessary only if the jobholders had a property right, or "entitlement," to their jobs. A mere expectation in employment was not enough.

The Supreme Court has never decided whether the entitlement rule applies in a case where a landowner claims that a local governmental decision on a land use application is arbitrary. Despite the lack of Supreme Court guidance, lower federal courts always apply the entitlement rule in procedural due process cases.[18] A

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constitutional conscience.").

Other circuits have adopted the First Circuit rule. *E.g.*, Norton v. Village of Corrales, 103 F.3d 928 (10th Cir. 1996); Gardner v. City of Baltimore Mayor & City Council, 969 F.2d 63 (4th Cir. 1992); Chesterfield Dev. Corp. v. City of Chesterfield, 963 F.2d 1102 (8th Cir. 1992); Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461 (7th Cir. 1988); Burrell v. City of Kankakee, 815 F.2d 1127 (7th Cir. 1987) (rezoning); Hynes v. Pasco County, 801 F.2d 1269 (11th Cir. 1986) (revocation of building permit); Smith v. City of Picayune, 795 F.2d 482 (5th Cir. 1986) (rezoning). For additional citations, see FEDERAL LAND USE LAW, *supra* note 11, at § 4.03[3][a].

16. Courts may rigorously examine the requirements of land use ordinances to determine whether they confer the discretion to approve or deny a land use approval. *See infra* notes 78-87 and accompanying text.

17. U.S. CONST., amend. V.

18. *See infra* note 76.

majority apply it in substantive due process cases when landowners claim that a municipal decision arbitrarily prohibits the development of their land.[19]

The entitlement rule that courts apply to bar substantive due process claims in land use cases keeps landowners out of court. If a landowner does not have an entitlement, a court can dismiss a substantive due process claim without giving him an opportunity to show he can succeed on the merits. Because it allows a municipality to decide if it wants to create an entitlement, the entitlement rule is also circular. A municipality simply has to announce in its land use regulations that land use approvals, such as site plan approvals, do not confer an entitlement.[20] The municipality accomplishes this by adopting a land use ordinance that gives it the discretion to grant or refuse the approval. This discretion defeats a claim of entitlement, which exists only if a municipality has a mandatory duty to grant the approval. An interest in the property for which the municipality denied approval to develop is insufficient.

Courts take a different view under the Takings Clause. The Takings Clause is part of the Fifth Amendment and contains a property requirement. It states that "private property [shall not] be taken for public use, without just compensation."[21] Courts always have held that old property land ownership is enough of a property interest for a takings claim.[22]

Substantive due process provides the basis for reviewing claims that a municipality's land use decision does not serve legitimate governmental interests because the decision is arbitrary. The hypothetical at the beginning of this Article poses this problem. Part I considers whether courts can review legitimacy claims under the Takings Clause. Although the Supreme Court has held that the Takings Clause authorizes legitimacy review, the Court may no

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19. *See infra* note 77.

20. I use the word "announce" intentionally because, as noted later, the Supreme Court has rejected an announcement rule in its interpretation of the takings clause. *See infra* note 121 and accompanying text.

21. U.S. CONST. amend. V.

22. This holding is axiomatic. The very point of a takings case is that a municipality's refusal to allow a more intensive development is a taking of property. The landowner is not required to show an entitlement to the approval.

longer believe in this proposition. It is also unclear whether judicial review of legitimacy under the Takings Clause is more rigorous than it is under substantive due process. Answers to these questions are important. If courts cannot review legitimacy claims under the takings clause, they can review them only in substantive due process cases. However, courts use the entitlement rule to bar substantive due process cases. Even if courts review legitimacy claims under substantive due process, judicial review may be less rigorous than it would be under the Takings Clause.

Part II explains the entitlement rule, its origins in job termination cases where employees made procedural due process claims, and its application to land use cases. Part III then considers whether the entitlement rule should apply to substantive due process cases brought by landowners who claim that a land use decision is arbitrary. This Part also examines the Supreme Court's rejection of the entitlement rule in takings cases, and whether this rejection should apply to substantive due process cases brought by landowners.

Part IV concludes that precedent does not clearly indicate whether courts should apply an entitlement rule to substantive due process claims that a municipal decision to prohibit the development of land is arbitrary. However, judicial reliance on the absolute bar of an entitlement rule prevents courts from considering the policy reasons that should drive access to courts. These reasons suggest that the entitlement rule is wrong.

I. LEGITIMACY CLAIMS IN SUBSTANTIVE DUE PROCESS AND TAKINGS CASES[23]

The judicial activism of the Lochner Era casts a shadow on

23. *See generally* John D. Echeverria & Sharon Dennis, *The Takings Issue and the Due Process Clause: A Way Out of a Doctrinal Confusion*, 17 VT. L. REV. 695 (1993); Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309 (1993); Rosalie Berger Levinson, *Protection Against Government Abuse of Power: Has the Court Taken the Substance Out of Substantive Due Process*, 16 U. DAYTON L. REV. 313 (1991); J. Michael McGuinness & Lisa A. McGuinness Parlagreco, *The Reemergence of Substantive Due Process as a Constitutional Tort: Theory, Proof, and Damages*, 24 NEW ENG. L. REV. 1129 (1990). *See also* Thomas E. Roberts et al., *Land Use Litigation: Doctrinal Confusion Under the Fifth and Fourteenth Amendments*, 28 URB. LAW. 765 (1996).

substantive due process.[24] The Lochner era acquired its bad reputation because Supreme Court decisions applied substantive due process to strike down legislation that advanced important social and economic objectives. It is not surprising, then, that the Supreme Court has a mixed record in applying substantive due process to land use regulations. The Court has upheld land use regulations against substantive due process attacks, but has struck down regulations it considers unacceptable.[25] Lower federal courts have also expressed concern about the role of substantive due process in constitutional jurisprudence.[26]

Despite the Court's mixed record in deciding substantive due process claims in land use cases, it has brought substantive due process concerns into takings law through the first prong[27] of a takings test the Court adopted in *Agins v. City of Tiburon*.[28] Under the first *Agins* prong, a land use regulation violates the Takings Clause if it does not substantially advance legitimate state interests.[29] This prong always has been a mystery because the overlap with substantive due process is obvious. It is not clear why the Court used the Takings Clause to duplicate an inquiry into legitimacy that can

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24. *See* Moore v. City of East Cleveland, 431 U.S. 494, 502 (1976) (plurality opinion) (noting that the history of the Lochner era suggests caution and restraint in applying substantive due process as basis for judicial intervention). *See generally* Richard E. Levy, *Escaping* Lochner*'s Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. REV. 329 (1995).

25. *Compare* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (upholding a limitation on nonrelated persons who could live together), *with* Moore v. City of East Cleveland, 431 U.S. 494 (1977) (invalidating housing code that contained restrictive definition of family that could live together). *See* Levinson, *supra* note 23.

26. For a discussion of the difficulty of placing limits on substantive due process in a land use case, see Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461 (7th Cir. 1988).

27. The second *Agins* prong is the well-known requirement that a land use regulation is a taking if it denies a landowner an economically viable use of her land. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980). The Court's statement of the second prong varies. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992) ("[C]ategorical treatment [is] appropriate . . . where regulation denies all economically viable or productive use of land."). The Court also used similar phrases, such as "all economically feasible use" and "all economically beneficial use." *Id*. at 1016-17 n.7.

28. *Agins*, 447 U.S. at 260. The Court cited *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), which is usually read as invalidating a zoning classification as a violation of substantive due process. *Agins*, 447 U.S. at 260.

29. "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests. . . ." *Id.*

also occur under substantive due process.

There is substantial criticism of the first *Agins* prong,[30] and some confusion with regard to how the Court intends to apply it. The Court has found a taking based on the first prong only when the government demanded a physical dedication of land as a condition to land use approval.[31] If first prong inquiry under the takings clause is limited to this kind of case, it does not apply to a claim that a land use regulation is a taking when there is no physical dedication.

However, the Court approved a jury instruction based on the first prong in a case where it affirmed an award of compensation in a regulatory taking case.[32] The Court did not indicate its views on the first prong because it pointed out that the municipality had approved the instruction.[33] The state courts disagree on the role of the first *Agins* prong in takings law. They disagree on whether a taking occurs when a land use regulation does not serve a legitimate governmental interest or when the landowner cannot show a loss in value that satisfies the second *Agins* prong.[34]

If the first *Agins* prong is still viable, another problem is that judicial review of legitimacy under the takings clause may be more rigorous than judicial review of legitimacy under substantive due process. A debate between Justice Scalia and Justice Brennan in

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30. *See* John D. Echeverria, *Does a Regulation That Fails to Advance a Legitimate Governmental Interest Result in a Regulatory Taking?*, 29 ENVTL. L. 853 (1999); Jerold S. Kayden, *Land-Use Regulations, Rationality, and Judicial Review: The RSVP in the* Nollan *Invitation (Part I)*, 23 URB. LAW. 301, 317-27 (1991).

31. *E.g.*, Nollan v. California Coastal Commission, 483 U.S. 825 (1987).

32. City of Monterey v. Del Monte Dunes, 526 U.S. 687, 704 (1999). The Court indicated that the instruction was consistent with its views on regulatory takings liability, but also noted the city did not object to the takings principles on which the court based its instruction. *Id.* The Court also appeared to reaffirm the first *Agins* prong by holding that a jury trial is available in takings cases and by indicating that it could be available on questions raised under the *Agins* first prong. *Id.* at 693, 720-22.

33. *Id.* at 1644.

34. *See also* Bonnie Briar Syndicate, Inc., v. Town of Mamaroneck, 721 N.E.2d 971 (N.Y. 1999) (rejecting first prong claim in case where landowner did not claim denial of all economically viable use); Goldberg Cos., Inc. v. Council of the City of Richmond Heights, 690 N.E.2d 510 (Ohio 1998)(need only show absence of legitimate purpose if denial of economically viable use not alleged). *Compare* 152 Valparaiso Assoc. v. City of Cotati, 65 Cal. Rptr. 2d 551, 555 (Cal. Ct. App. 1997) (requiring only a showing of improper purpose) *and* City of Pompano Beach v. Yardarm Restaurant, Inc., 641 So.2d 1377 (Fla. Dist. Ct. App. 1994), *with* Del Oro Hills v. City of Oceanside, 37 Cal. Rptr. 2d 677, 687 (Cal. Ct. App. 1995), *and* Estate & Heirs of Sanchez v. County of Bernalillo, 902 P.2d 550, 552 (N.M. 1995).

Nollan v. California Coastal Commission suggests that judicial review of governmental purpose under the takings clause may be more rigorous.[35]

Justice Brennan's dissent explained that a reasonable relationship standard applies when courts review legitimacy questions under substantive due process. He argued the same standard of judicial review should apply when courts review legitimacy issues under the Takings Clause.[36] A footnote by Justice Scalia, who wrote the majority opinion, disagreed. He held that courts should apply a heightened standard of judicial review under the Takings Clause. This standard of review requires a government regulation to "'substantially advance' the 'legitimate state interest' sought to be achieved."[37] So far, however, Justice Scalia's footnote has not attracted a following, as courts have rejected it.[38] Commentators have also ridiculed it as lacking a sound foundation.[39]

This discussion of substantive due process and its overlap with the Takings Clause[40] raises an important problem created by the

35. 483 U.S. 825 (1987).

36. *Id*. at 842-47. Justice Brennan would apply the traditional reasonableness test. *Id*. at 845 n.1.

37. *Id*. at 834 n.3 (quoting Agins v. City of Tiburon, 447 U.S. 225, 260 (1980)).

38. *See* South County Sand & Gravel Co. v. Town of South Kingstown, 160 F.3d 834, 836 (1st Cir. 1998) (upholding a land use ordinance under the Takings and substantive Due Process Clauses and holding that inquiry into governmental purpose is the same under both clauses); Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck, 721 N.E.2d 971 (N.Y. 1999) (applying deferential standard of judicial review in first prong case); Builders Service Corp. v. Planning & Zoning Comm'n, 545 A.2d 530, 540 (Conn. 1988) (stating that a regulation must be "reasonably related" to a legitimate purpose).

39. *See* Kayden, *supra* note 30, at 314 ("Justice Scalia's novel conclusion . . . [was] based on shoddy scholarship and shallow analysis.").

40. Another difference between judicial review under substantive Due Process and under the Takings Clause is that courts apply ripeness rules to determine whether a takings case is ready for litigation. *See* Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186-87 (1985). Courts may not apply these rules to an as-applied substantive due process claim. Under these rules the takings claimant must obtain a final decision from the local decision-making body and must file a claim for compensation in state court before bringing a federal takings claim in federal court. When the landowner returns to federal court, res judicata may bar the takings claim. These rules have kept most as-applied takings claims out of federal court. Legislation introduced in Congress would repeal the rule requiring takings claimants to sue in state court first and would modify the final decision rule so that it will be less likely to bar takings suits. *See* TESTIMONY OF DANIEL R. MANDELKER on H.R. 1534 BEFORE THE HOUSE JUDICIARY COMMITTEE (1997), *reprinted in* John J. Delaney & Duane J. Desiderio, *Who Will Clean Up the "Ripeness Mess" ? A Call for Reform so Takings Plaintiffs can enter the*

entitlement rule. The problem arises because substantive due process provides the only opportunity for reviewing the legitimacy of government regulation if courts cannot review legitimacy questions under the Takings Clause. Assigning legitimacy review to substantive due process means that no review of legitimacy will occur at all if the entitlement rule bars landowners' substantive due process claims by landowners.[41]

Another problem concerns the extent to which courts review legitimacy questions under substantive due process. The reasonable relationship standard urged by Justice Brennan is so deferential that courts could rarely, if ever, upset a land use decision because it does not serve a legitimate governmental purpose. It is essential, however, to be clear about the cases in which courts apply this standard. Courts apply a relaxed review standard when the question is whether a municipality should have adopted a different or arguably better policy in its land use regulations.[42] They do not apply this standard when the purpose of the regulation is legitimate, but a landowner claims that a municipality's application of the regulation was arbitrary. Courts will strike down the decision if the landowner proves her claim.[43] This is the type of case described in the

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Federal Courthouse, 31 URB. LAW. 195, 232-53 (1999). The courts differ on if, and the extent to which, they will apply ripeness rules to substantive due process claims. *See* FEDERAL LAND USE LAW, *supra* note 11, at § 4A.02[6].

There may also be a difference in remedy. In his dissenting opinion in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 656 n.23 (1981), Justice Brennan suggested that compensation would not be payable "where a police power regulation is not enacted in furtherance of the public health, safety, morals, or general welfare so that there may be no 'public use'" but that the landowner would then have an action for damages under § 1983.

41. Presumably, courts would still be willing to review legitimacy questions when litigants bring facial attacks against land use regulations. The entitlement rule does not apply in these cases.

42. *See, e.g.*, Restigouche v. Town of Jupiter, 59 F.3d 1208 (11th Cir. 1995) (upholding an ordinance excluding automobile dealerships from a limited commercial zone to establish an aesthetically pleasing highway corridor and preserve identifiable, traditional downtown). For citations, by circuit, to cases adopting a deferential standard of judicial review in substantive due process cases, see FEDERAL LAND USE LAW, *supra* note 11, at § 2.02[1][a] n.7.3.

43. *See* Bateson v. Geisse, 857 F.2d 1300 (9th Cir. 1988) (reversing the denial of a plaintiff's building permit that met all permit requirements); Moore v. City of Tallahassee, 928 F. Supp. 1140 (N.D. Fla. 1995) (claiming the city applied a zoning ordinance to depress the value of property prior to acquisition).

The Supreme Court applies an arbitrary and irrational standard to the review of legislative action but applies a "shocks the conscience" test to the review of executive action. County of

hypothetical at the beginning of this Article, in which courts use the entitlement rule to bar landowner substantive due process claims.

II. THE ENTITLEMENT BARRIER[44]

A. Its Origins

The entitlement rule that created the new property began with two landmark Supreme Court cases decided in the early 1970s.[45] These cases decided whether procedural due process guaranteed two professors the right to a hearing when their universities terminated their employment. Neither individual had tenure, so the issue was whether they had property protected under the due process clause despite their lack of tenure status.

This issue arose because, without tenure, neither professor had property rights antecedent to their employment that guaranteed job continuation. Their lack of tenure triggered the time-honored right versus privilege doctrine. Under this doctrine continued employment by the university was a privilege that the university could either grant or withhold without having to provide procedural guarantees.

At the time these cases came to the Court, however, the right versus privilege doctrine was under heavy attack,[46] primarily as applied to welfare and other benefits. An influential article almost a decade previous characterized these benefits as "The New Property."[47] It argued for the abolition of the right versus privilege

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Sacramento v. Lewis, 523 U.S. 833 (1998). The Court explained that only "the most egregious official conduct" could be held arbitrary under the Constitution. *Id*. at 846. However, conduct like that in *Bateson* clearly violates substantive due process even under this test. *See* Harold A. Ellis, *Neighborhood Opposition and the Permissible Purposes of Zoning*, 7 J. LAND USE & ENVT'L L. 275 (1992).

44. For other discussions of the entitlement rule as applied to land use disputes raising substantive due process claims, see Kenneth B. Bley & Tina R. Axelrad, *The Search for Constitutionally Protected "Property" In Land-Use*, 29 URB. LAW. 251 (1997); Stewart M. Wiener, *Substantive Due Process in the Twilight Zone: Protecting Property Interests from Arbitrary Land Use Decisions*, 69 TEMP. L. REV. 1467 (1996).

45. Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972).

46. For an argument that the entitlement rule is simply a continuation of the right versus privilege doctrine, see Rodney A. Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 STAN. L. REV. 69 (1982).

47. Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 785 (1964).

doctrine as applied to government benefits and for the recognition of "new" property rights in these benefits that courts should protect.[48]

In the university job termination cases, the Court explicitly noted it had rejected the right versus privilege doctrine.[49] *Perry v. Sindermann*[50] adopted the entitlement requirement to take its place. As the Court put it, the question was whether the professors had an entitlement to the benefit of a university position that would entitle them to a procedural due process hearing.[51] "A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing."[52]

The companion case, Board of Regents of State Colleges v. Roth,[53] added that a unilateral "expectation" is not property: "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."[54] Then, in an important qualification that has strategic significance for entitlements to property, *Roth* held that state law defines whether a property right exists:

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.[55]

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48. Just prior to *Roth* and *Perry*, the Court found a statutory entitlement to welfare benefits that entitled a welfare recipient to a hearing on a benefit termination. Goldberg v. Kelly, 397 U.S. 254, 262 n.8 (1970) (citing Reich, *supra* note 47).

49. "[T]he Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights." *Roth*, 408 U.S. at 571.

50. 408 U.S. 593 (1972).

51. *Id*. at 596.

52. *Id*. at 601 (citing Roth, 408 U.S. at 577).

53. 408 U.S. 564.

54. *Id.* at 577.

55. *Id*. However, the Constitution provides the minimum procedural due process requirements. They are not diminished because a state or municipality provides its own procedures, which it considers adequate. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532,

Finally, the Court made it clear that its decision covered only the new property in public benefits, not the old property, such as the ownership of real estate: "The Court has also made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money."[56] This statement suggests that the entitlement rule was intended to expand rather than diminish property rights, and that land ownership requires constitutional protection even if a landowner does not have an entitlement to a land use approval.

B. A Critique of the Entitlement Rule

Commentators have attacked[57] and defended[58] *Roth* and *Perry* since the Court decided these cases. They were a major departure in the treatment of procedural due process guarantees as applied to government benefits, but the Court offered no precedent and no real explanation for its decisions. It rejected the approach of the district court, which "after assessing and balancing the weights of the particular interests involved," held that procedural due process required a hearing on employment termination.[59] Yet the Court did not explain why the balancing test was unsatisfactory.[60]

The Court also qualified the entitlement rule in a way that significantly narrows the cases where courts can find an entitlement. The most damaging qualification was the rule that state law defines the entitlements that courts can recognize. In subsequent cases, the

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541-42 (1985). *See also* Stevens v. City of Cannon Beach, 510 U.S. 1207, 1211 (1994) (Scalia, J., dissenting from denial of certiorari) (noting that state law defines property rights but the state may not invoke a nonexistent property right to defeat a constitutional claim).

56. *Roth*, 408 U.S. at 571-72. The rest of this Article is redundant if this statement means that ownership of real estate is enough of a property interest for a substantive due process claim. I do not make this assumption because the lower federal courts have applied the entitlement rule to bar substantive due process claims brought by landowners.

57. *E.g.*, Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044 (1984); Mark Tushnet, *The Newer Property: Suggestion for the Revival of Substantive Due Process*, 1975 SUP. CT. REV. 261.

58. *E.g.*, Peter N. Simon, *Liberty and Property in the Supreme Court: A Defense of* Roth *and* Perry, 71 CAL. L. REV. 146 (1983) (defending *Roth* and *Perry* in the employment context because these cases preclude courts from reviewing discretionary actions).

59. *Roth*, 408 U.S. at 570.

60. *See* Rubin, *supra* note 57, at 1098 (noting that the Court employed a discredited formalistic analysis).

Court interpreted this requirement to find an entitlement only if state law mandated the government to grant a benefit, such as a parole from prison.[61] This rule means that the entitlement rule is circular because government can define when an entitlement exists. A statute or ordinance can defeat an entitlement by conferring discretion to grant or withhold a benefit, and courts must accept this decision.[62]

A Seventh Circuit police promotion case, *Bigby v. City of Chicago*,[63] explains how the authority to exercise discretion defeats an entitlement claim. Intervenors challenged a police examination for promotion to lieutenant, claiming that it did not relate to the job duties of police officers.[64] Although the court noted that the statute and ordinance created an expectation that promotion examinations would be fair,[65] Illinois cases had held that these expectations are not "firm and definite," and are not property "in a constitutional sense."[66] Promotion was a matter of discretion.[67]

Cases like *Bigby* have an impact on land use decision making that is usually fatal to the creation of an entitlement. The administration of zoning ordinances is "flexible." This means that the zoning ordinance confers discretion on the zoning body to decide whether it should grant the land use approvals it authorizes, such as site plan approvals.[68] Because the decision whether to grant an approval is discretionary, a landowner does not have an entitlement to it. The site plan hypothetical at the beginning of this Article is a good example.

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61. *See, e.g.*, Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 466 (1981) ("The Connecticut commutation statute, having no definitions, no criteria, and no mandated 'shalls,' creates no analagous duty or constitutional entitlement."). *See also* Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 276 (1998) (following *Dumschat*).

62. *See* Tim Searchinger, Note, *The Procedural Due Process Approach to Administrative Discretion: The Courts' Inverted Analysis*, 95 YALE L.J. 1017, 1019 (1986). *See also* Richardson v. Township of Brady, 2000 U.S. App. Lexis 15520, at 30 (6th Cir. July 5, 2000) (Ryan, concurring; the entitlement rule "is a test devoid of intelligibility and indeed a model of circular reasoning").

63. 766 F.2d 1053 (7th Cir. 1985).

64. *Id*. at 1055.

65. *Id*. at 1156.

66. *Id*. at 1056 (citations omitted).

67. *Id.* (citations omitted).

68. *See* LAND USE LAW, *supra* note 2, at §§ 6.68.

C. The Entitlement Rule in As-Applied Substantive Due Process Cases Brought by Landowners

1. The Problem

This Article is not another attack on the entitlement rule. Instead, I will assume that the entitlement rule, as applied to procedural due process claims, is correct.[69] The question is whether courts should apply this rule in substantive due process cases where a landowner attacks the merits of a land use decision, not just a failure to provide a hearing. The problem in deciding whether the entitlement rule should apply in these cases is that a land use disapproval is not the type of case presented in *Roth* and *Perry*. These were termination of employment cases. The analogue in the land use context is a decision by a municipality to revoke a building permit that it previously issued.

When a municipality attempts to revoke a building permit, the courts apply a vested rights doctrine that is similar to the entitlement rule but stretches further because it protects the permit from rescission.[70] A municipality violates substantive due process if it revokes a building permit when the landowner has a vested right in it,[71] but may revoke the permit if the landowner does not have a

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69. One reviewer who read an earlier draft of this Article pointed out that the application of the entitlement rule to procedural due process cases may be correct. These cases challenge the deprivation of a regulatory benefit, not the deprivation of the land itself, so that requiring an entitlement to the benefit may be reasonable.

70. The vested rights doctrine confers constitutional protection on property rights that a landowner has acquired in the use of his land. An alternative doctrine protects a landowner if she can show that a municipality is estopped from making a more restrictive change in a zoning ordinance that affects her property. Under the majority rule she can do this by proving that she has made substantial expenditures based on a good faith reliance on a building permit that the municipality has issued. Courts apply the same rule when deciding whether a landowner has acquired a vested right and usually view the estoppel and vested right rules as equivalents. See LAND USE LAW, *supra* note 2, at §§ 6.12-6.21.

71. *See, e.g.*, Mont Belvieu Square, Ltd. v. City of Mont Belvieu, 27 F. Supp.2d 935 (S.D. Tex. 1998); Decarion v. Monroe County, 853 F. Supp. 1415 (S.D. Fla. 1994); Mount Sinai Medical Center of Greater Miami, Inc. v. City of Miami Beach, 706 F. Supp. 1525 (S.D. Fla. 1989); Brady v. Town of Colchester, 863 F.2d 205 (2d Cir. 1988).

In procedural due process cases a landowner is protected if he has a vested right in the use of his land. *E.g.*, Nasierowski Bros. Inv. Co. v. City of Sterling Heights, 949 F.2d 890 (6th Cir. 1991). The landowner is also protected if the requested land use is permitted at the time he makes an application for a building permit. *E.g.*, Harris v. County of Riverside, 904 F.2d 497

vested right in it. This rule means that courts view the building permit as a governmental approval in which the landowner must have a property right. This rule makes sense because the municipality previously decided to approve the landowner's development proposal. There is no question of an entitlement to an approval; the question is whether the municipality can revoke it.

The analogue in the employment context to the landowner who applies for a development approval is the applicant who applies for an employment position. There clearly is no entitlement in this situation. As Justice Holmes said long ago, no one has a right to be a policeman.[72] If an applicant for employment does not have an entitlement to it, then the applicant for a land use approval does not have an entitlement to it either. There is then no constitutional basis for attacking the municipality should it deny the approval. This should be the end of the story, unless the old property interest the landowner has in the land makes a difference. That is the next question.

2. How the Courts Apply the Entitlement Rule to Land Use Approvals

The Supreme Court has never decided a case where a landowner claimed that a land use decision, as applied to his property, was a violation of substantive due process.[73] It has only decided substantive due process cases that were facial attacks on land use legislation.[74] Without a Supreme Court decision, lower federal and state courts

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(9th Cir. 1990). See FEDERAL LAND USE LAW, *supra* note 11, at § 2.03[3].

72. When he was on the Massachusetts Supreme Judicial Court, in a case where a policeman was discharged for disobeying regulations prohibiting political activity, Justice Holmes held that "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." Mccauliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (1892).

73. The court granted certiorari in a run-of-the-mill zoning dispute that raised substantive due process questions but dismissed the writ after oral argument. PFZ Properties, Inc. v. Rodriguez, 928 F.2d 28 (1st Cir. 1991), *writ dismissed as improvidently granted*, 503 U.S. 257 (1992). Neither has it considered a land use case where a landowner claimed a land use decision violated procedural due process.

74. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), is an example. This case was a facial attack on a zoning ordinance limiting the number of unrelated persons who could live together.

alone must decide the entitlement issue. All courts find an entitlement if a landowner has a vested right in a development for which he seeks approval.[75] They will then require a municipality to approve a landowner's development proposal.

If a landowner does not have a vested right, courts do not carry over the rule in employment cases that a job applicant does not have an entitlement to employment. If they did this rule would be enough to require dismissal of the landowner's case. Instead, courts divert attention from the ownership issue by concentrating on the land use approval and by asking whether a landowner has an entitlement to the approval. Courts unanimously apply the entitlement rule to dismiss procedural due process claims in land use cases where a municipality has denied a land use approval.[76] Most courts also deny substantive due process claims in these cases.[77] They do not believe the old property interest of the landowner makes a significant difference. The question is whether the majority view in substantive due process

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75. *E.g.*, Decarion v. Monroe County, 853 F. Supp 1415, 1419 (S.D. Fla. 1994); Brady v. Town of Colchester, 863 F.2d 205, 211-12 (2d Cir. 1988). *See also* Sudarsky v. City of New York, 779 F. Supp. 287, 297 (S.D.N.Y. 1991) (finding no entitlement), *aff'd*, 969 F.2d 1041 (2d Cir. 1992).

76. *E.g.*, Sylvia Dev. Co. v. Calvert County, 48 F.3d 810 (4th Cir. 1995) (involving rezoning); Gagliardi v. Village of Pawling, 18 F.3d 188 (2d Cir. 1994) (involving the enforcement of a zoning ordinance); Jacobs, Visconsi & Jacobs Co. v. City of Lawrence, 927 F.2d 1111 (10th Cir. 1991) (involving rezoning and finding that a federal court is not bound by a state determination of what is legislative); Lockary v. Kayfetz, 917 F.2d 1150 (9th Cir. 1990) (involving a water connection); Walker v. City of Kansas City, 911 F.2d 80 (8th Cir. 1990) (involving rezoning); Bateson v. Geisse, 857 F.2d 1300 (9th Cir. 1988) (involving an approval of a plat); Yale Auto Parts, Inc. v. Johnson, 758 F.2d 54 (2d Cir. 1985) (involving a junkyard permit); United Land Corp. of America v. Clarke, 613 F.2d 497 (4th Cir. 1980). For additional citations see FEDERAL LAND USE LAW, *supra* note 11, at § 2.03[3] n.23.

77. For cases refusing to find an entitlement, see, for example: DLC Mgt. Corp. v. Town of Hyde Park, 163 F.3d 124 (2d Cir. 1998) (finding no entitlement to existing zoning); Bituminous Materials, Inc. v. Rice County, 126 F.3d 1068 (8th Cir. 1997); Norton v. Village of Corrales, 103 F.3d 928 (10th Cir. 1996) (involving a subdivision approval); Triomphe Investors v. City of Northwood, 49 F.3d 198 (6th Cir. 1995) (involving a special use permit); Sylvia Dev. Co. v. Calvert County, 48 F.3d 810 (4th Cir. 1995) (involving an approval of a transfer zone); MacKenzie v. City of Rockledge, 920 F.2d 1554 (11th Cir. 1991) (involving a building permit); Deepwells Estates Inc. v. Incorporated Village of Head of the Harbor, 973 F. Supp. 338 (E.D.N.Y. 1997); Breneric Associates v. City of Del Mar, 81 Cal. Rptr. 2d 324 (Cal. Ct. App. 1991). Courts applying the entitlement rule may sometimes find an entitlement. *E.g.*, Village Pond, Inc. v. Town of Darien, 56 F.3d 375 (2d Cir. 1995) (involving a special permit); Scott v. Greenville County, 716 F.2d 409 (4th Cir. 1983) (involving a building permit). For additional citations see FEDERAL LAND USE LAW, *supra* note 11, at § 2.02[1][c].

cases is correct.

A Second Circuit case, *RRI Realty Corp. v. Incorporated Village of Southampton*,[78] is the leading case that applies the entitlement rule to substantive due process claims in land use cases. A developer sued the village and village officials, claiming that a denial of a building permit to renovate a mansion and surrounding oceanfront property violated substantive due process.[79] The court noted that *Roth* and *Perry* were limited to employment and procedural due process issues but "were potentially pertinent to land regulation."[80] They held that a property interest protected by the Fourteenth Amendment "includes not only what is owned but also, in some limited circumstances, what is sought. This expanded concept of property, however, requires more than 'an abstract need or desire' or 'a unilateral expectation' of what is sought" because it requires "a legitimate claim of entitlement."[81]

Despite this holding, the court had second thoughts and wondered why courts could not recognize "the owner's indisputable property interest in the land he owns" as the basis for a substantive due process claim.[82] Their inquiry would then be whether "local government has exceeded the limits of substantive due process in regulating the plaintiff's use of his property by denying the application arbitrarily and capriciously."[83] This inquiry would not require an entitlement to the land use approval. The court finally decided it was committed to the entitlement rule, and that this rule has a beneficial effect.[84] Courts could apply the rule to reject substantive due process claims without having to decide whether a local government's decision was arbitrary.

The court held that it would apply the entitlement rule with considerable rigor: "[a]pplication of the test must focus primarily on

78. 870 F.2d 911 (2d Cir. 1989).
79. *Id*. at 911.
80. *Id.*
81. Id. at 915 (citations omitted).
82. *Id*. at 917.
83. *Id*. (footnote omitted). The court quoted Justice Stevens, who has observed that "the opportunity to apply for [a zoning] amendment is an aspect of property ownership protected by the Due Process Clause of the Fourteenth Amendment." *Id*. at 917-18 (quoting City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 683 (1976) (Stevens, J., dissenting)).
84. *Id.* at 918. The court relied on one of its previous decisions, *Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54 (2d Cir. 1985).

the degree of discretion enjoyed by the issuing authority, not the estimated probability that the authority will act favorably in a particular case."[85] There must be a "certainty or very strong likelihood" that the local government would grant the land use approval. This holding is an application of Supreme Court decisions finding an entitlement does not exist when state law, such as a land use ordinance, grants discretion to grant or deny a land use application. Most courts follow *RRI*.[86]

The Third Circuit forcefully rejected the entitlement rule in substantive due process cases brought by landowners. *DeBlasio v. Zoning Board of Adjustment for the Township of West Omwell* [87] is the leading case. A landowner sued a township's zoning board of adjustment and its members.[88] He challenged the board's decision that the use of his property violated the zoning ordinance, and its denial of a use variance request.[89] After reviewing earlier cases in the circuit that rejected the entitlement rule,[90] the court concluded "that ownership is a property interest worthy of substantive due process protection."[91] It concluded that a landowner states a substantive due process claim by alleging "that the decision limiting the intended land use was arbitrarily or irrationally reached."[92] The court did not explain why it rejected the entitlement rule, but observed in a footnote that the Supreme Court had not decided whether the entitlement rule applied to substantive due process claims.[93] A minority of courts follow *DeBlasio*.[94]

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85. *RRI*, 870 F.2d at 918. The Second Circuit has since held that uncertainty in the applicable law will also defeat the recognition of an entitlement to a land use approval. Natale v. Town of Ridgefield, 170 F.3d 258, 263-64 (2d Cir. 1999).

86. *See supra* note 78.

87. 53 F.3d 592 (3d Cir. 1995).

88. *Id*. at 593-94.

89. *Id*. at 595-96.

90. The principal case was *Bello v. Walker*, 840 F.2d 1124 (3d Cir. 1988), where the municipality refused to issue a building permit.

91. *DeBlasio*, 53 F.3d at 600 (citation omitted).

92. *Id*. at 601 (footnote omitted).

93. *Id*. at n.9. The court quoted the observation from *Roth* that property "includes not only what is owned but also, in some limited circumstances, what is sought." 408 U.S. at 577.

94. *See* Dominion Cogen, D.C., Inc. v. District of Columbia, 878 F.Supp 258 (D.D.C. 1995); Zaintz v. City of Albuquerque, 739 F. Supp. 1462 (D.N.M. 1990) (holding that New Mexico law recognizes the right to use property for a lawful purpose without restriction "for arbitrary and discriminatory reasons by governmental zoning actions"). For Third Circuit

III. DO LANDOWNER SUBSTANTIVE DUE PROCESS CLAIMS FALL IN THE ENTITLEMENT TRAP?

The question now is whether *RRI* and courts that followed it correctly applied the entitlement rule of *Roth* and *Perry*. One problem is that *Roth* and *Perry* were not substantive due process cases. They considered procedural due process claims brought by jobholders who lost their positions. The Court has not decided whether the rule adopted by *Roth* and *Perry* for procedural due process cases should also apply to substantive due process cases.

Another problem is that a landowner in a substantive due process case has an old property right impaired by the denial of a land use approval. In *Roth* and *Perry* the jobholders did not have an old property right in the continuation of their employment. When a landowner makes a takings claim based on the denial of a land use approval, his old property right is enough to confer jurisdiction on a court to hear the claim. The question remains whether an old property right should also be enough for a substantive due process claim.

A. Substantive Due Process as Different

Whether the Court would apply the entitlement rule to substantive due process claims brought by landowners is not clear. Opinions by the Court and individual Justices point in both directions,[95] and the

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district court cases, see for example, *Woodwind Estates, Ltd. v. Gretkowski*, 39 F. Supp. 2d 537 (M.D. Pa. 1999), and *Boudwin v. Great Bend Township*, 921 F. Supp. 1326 (M.D. Pa. 1996).

95. *See, e.g.*, City of Chicago v. Morales, 119 S. Ct. 1849, 1873 (1999) (Scalia, J., dissenting) (stating that there is no authority for the "startling proposition" that a liberty interest has different meanings under substantive and procedural due process); County of Sacramento v. Lewis, 523 U.S. 833, 845-46 (1998) ("stating that [t]he touchstone of due process is protection of the individual against arbitrary action of government, whether . . . denial of fundamental procedural fairness, or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective. . .") (citations omitted); Zinermon v. Burch, 494 U.S. 113, 124-27 (1990) (distinguishing substantive due process and pointing out that a substantive due process violation is complete when a deprivation occurs, but a procedural due process violation is not complete until a state deprives an individual of due process); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985) (stating that the categories of substantive and procedural due process are distinct); Hampton v. Mow Sun Wong, 426 U.S. 88, 120 (1976) (Rehnquist, J., dissenting) (stating that aliens might have substantive liberty interests that a statute cannot deny, but they have no liberty interests protected by procedural due process in acquiring or retaining federal employment); Bolling v. Sharpe, 347 U.S. 497, 499 (1954)

lower federal courts also disagree on whether substantive and procedural due process are equivalent.[96]

However, the historic context of *Roth* and *Perry* suggests that the Supreme Court would apply the entitlement rule in substantive due process cases. These decisions came at the end of an era during which the Court, under Chief Justice Warren, expanded constitutional guarantees. Commentators explain these decisions as an attempt by the Burger Court to limit the expansive doctrines that it inherited from the Warren Court. It did this by adopting well-defined boundaries to limit the cases in which these doctrines could apply.[97] There is merit to this interpretation, which suggests that the Court limited judicial intervention in governmental decision making by adopting the entitlement rule. If this is so, the Court probably would also apply the entitlement rule in substantive due process cases.

This interpretation is consistent with the logic of *Roth* and *Perry*. In these cases the Court made it clear that proof of an entitlement requires a hearing on job terminations but does not require an employer to reinstate an employee.[98] A landowner, however, brings a substantive due process case to compel a land use approval, which is the equivalent of an employee's reinstatement. If the Court does not require reinstatement when it finds an entitlement to a due process hearing, it surely would not abandon the entitlement rule in a substantive due process case where the landowner seeks a similar result by compelling a land use approval.[99]

(holding that unjustifiable discrimination may violate due process).

96. *E.g.*, Bateson v. Geisse, 857 F.2d 1300 (9th Cir. 1988) (finding a substantive due process violation in a denial of a land use permit but applying the entitlement rule to reject a procedural due process claim because the agency had discretion in deciding whether to issue it); Zaintz v. City of Albuquerque, 739 F. Supp. 1462 (D.N.M. 1990) (noting the right of the property owner to use property for a lawful purpose is a "'legitimate claim of entitlement' that is constitutionally protected from arbitrary deprivation").

See also Michael J. Phillips, *The Substantive Due Process Rights of College and University Faculty*, 28 AM. BUS. L.J. 567, 580 n.67 (1991) (noting that courts apply the entitlement rule to substantive due process claims); Smolla, *supra* note 46, at 75 (arguing that cases reject a distinction between substantive and procedural rights).

97. Rubin, *supra* note 57, at 1067; Smolla, *supra* note 46, at 77 n.32.

98. Proof of such a property interest would not, of course, entitle him to reinstatement. It would only obligate college officials to grant a hearing at his request where he could be informed of the grounds for his nonretention and challenge their sufficiency. Perry v. Sinderman, 408 U.S. at 603.

99. Logically, courts should not even ask if an entitlement exists in a substantive due

B. The Takings Analogy

The landowner who did not get her site plan approved in the hypothetical at the beginning of this Article can also bring a takings claim. Though her chances of success on this claim are problematic, her old property interest provides a constitutional basis for bringing her takings claim. The question is whether judicial recognition of old property interests in takings cases means that courts should also recognize old property interests as the basis for substantive due process claims by landowners.

1. Investment-Backed and Unilateral Expectations

Where to begin in comparing as-applied substantive due process with takings claims is a puzzle.[100] As noted earlier, the Takings Clause has a substantive element that asks whether a land use regulation is legitimate.[101] It also has a deprivation element that asks whether the economic impact of a land use regulation on land is so substantial that it amounts to a taking. This is the two-pronged *Agins* test.[102]

Beyond the *Agins* test, if there is no per se taking the Court applies a three-factor balancing test based on *Penn Central Transportation Co. v. New York City*.[103] In *Penn Central* the Court held that the proper analysis for takings claims is done on a case-by-case basis by considering the character of the governmental action, the economic impact on the property owner, and the owner's distinct investment-backed expectations.[104] *Penn Central* introduced

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process case because the Court in *Roth* and *Perry* held only that proof of entitlement requires a due process hearing, not a substantive result. They do not take this position, however, and award a land use approval to the landowner if they find that the land use decision was arbitrary. Courts may believe that they must grant this relief because they can find an entitlement only if there is a mandatory duty to grant the approval. Because the duty is mandatory, a court can compel an approval if it finds that the decision withholding the approval was arbitrary.

100. For Chief Justice Rehnquist's views on the protection of property under the takings and substantive due process clauses, see Stephen J. Massey, *Justice Rehnquist's Theory of Property*, 93 YALE L.J. 541 (1984).

101. *See supra* notes 28-24 and accompanying text.

102. Agins v. City of Tiburon, 447 U.S. 255 (1980).

103. 438 U.S. 104 (1978).

104. *Id*. at 124.

investment-backed expectations into takings law.

The link between takings law and the entitlement theory of *Roth* and *Perry* lies in the investment-backed expectations takings factor. Although the Court in *Penn Central* provided limited guidance on the meaning of this phrase,[105] it held that a landowner does not have investment-backed expectations based solely on a belief that she could probably develop her land.[106] This holding is a link with the Court's holding in *Roth*, which states that expectations in an employment position are not enough of a property interest for a procedural due process claim. Similarly, mere expectations are not enough for a takings claim; they must be investment-backed. The analogy to the holding in *Roth* and *Perry*, that expectations are not property rights, is clear.

What is not so clear is what landowners must prove to show they have investment-backed expectations in takings cases. One interpretation is that expectations are investment-backed when a landowner has a vested right in her use of the property.[107] This interpretation is consistent with the comparable rule, that a municipality must approve a development when a landowner has a vested right in it.[108]

Another important rule that the Supreme Court applies to decide when a landowner has investment-backed expectations is the notice rule. Under this rule a landowner does not have investment-backed expectations if he is on notice that land use regulations apply to his

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105. The Court's opinion indicated that investment-backed expectations were merely one factor courts should consider when reviewing a takings claim, but later cases have held that a failure to establish investment-backed expectations defeats a takings claim. *See* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984) (holding that "the force of this [investment-backed expectations] factor is so overwhelming . . . that it disposes of the taking question"). *See also* Good v. United States, 189 F.3d 1355 (Fed. Cir. 1999) (concluding that a failure to show investment-backed expectations defeated a takings claim).

106. *Penn Central*, 438 U.S. at 130 (holding the argument untenable that property owners can establish a taking by showing they were denied a property interest they had believed was available for development).

107. Daniel R. Mandelker, *Investment-Backed Expectations in Taking Law*, 27 URB. LAW. 215, 237-40 (1995). Not all courts require a vested right. Some find investment-backed expectations if the property owner established a primary use of his property prior to the time a municipality applied its land use regulations to deny permission to develop. *Id.* at 240-43. *See* Florida Rock Indus., Inc. v. United States, 45 Fed. cl. 21 (1999) (finding investment-backed expectations based on use of property at time of purchase).

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

property, and that a government agency may prohibit the development of his land. The notice rule has the same effect as the entitlement rule. It allows the government to decide, through its land use regulations, when a landowner has investment-backed expectations protected by the takings clause.

2. Investment-Backed Expectations, the Notice Rule, and Government Benefits

a. *Monsanto* and the Notice Rule

The notice rule dates from a Supreme Court decision, *Ruckelshaus v. Monsanto Co*.[109] Monsanto applied to the federal Environmental Protection Agency to list a pesticide.[110] As a condition to the listing, the statute required the company to submit data concerning its product, and allowed the EPA to use this data without Monsanto's permission after a designated period. Monsanto claimed that this requirement was a taking of its property but the Court disagreed.[111]

The Court noted that Monsanto was aware that the statute protected the data it supplied only for the statutory nondisclosure period and determined that it was "entitled" to compensation only until that period ended.[112] If Monsanto submitted the necessary data despite these limitations, it could "hardly argue" that its reasonable investment-backed expectations were disturbed when the EPA disclosed this data as authorized by law at the time of submission:

> Thus, as long as Monsanto is aware of the conditions under which the data are submitted, and the conditions are rationally related to a legitimate Government interest, a voluntary submission of data by an applicant in exchange for the economic advantage of a registration can hardly be called a taking.[113]

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109. 467 U.S. 986.
110. *Id*. at 990.
111. *Id*. at 991.
112. *Id*. at 1006.
113. Id. at 1007 (citation omitted). Monsanto also made an argument that the data disclosure requirement was an unconstitutional condition on the registration. *Id*. The Court

This quotation provides the link between the notice rule as applied to takings claims and the entitlement rule as applied to due process claims. Whether a jobholder has an entitlement that requires a hearing on job termination depends on whether he has a property right in that job. State law defines and can defeat that property right. Similarly, in *Monsanto* the conditions imposed by federal law on the pesticide registration defined the company's property right and defeated its investment-backed expectations.[114] The difference is that the Court in *Monsanto* required notice of the regulations. The Court did not discuss the notice problem in *Roth* and *Perry*, probably because it is reasonable to assume an employee has notice of conditions affecting his job.

Monsanto was not a land use case, but courts applied its notice rule in land use cases where landowners filed a takings claim based on a refusal to allow the development of their land. In these cases the courts extended the notice rule to include constructive as well as actual notice. If a landowner knew or should have known at the time of purchase that land use regulations covered her property, she could not claim investment-backed expectations if a government agency later prohibited the development of her land. Courts especially applied this rule in environmental regulation cases, where they

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answered this objection by noting that Monsanto had not challenged the ability of the federal government to regulate the marketing of pesticides, and that it could not do so because pesticide regulation was part of the burdens all must bear in exchange for "'the advantage of living and doing business in a civilized community,'" *Id.* at 1007 (citing Andrus v. Allard, 444 U.S. 51, 67 (1979)).

The Court's answer is an application of the average reciprocity of advantage rule, which the Supreme Court has adopted in cases, such as zoning cases, on the theory that the benefits of a zoning ordinance match its burdens. *See* Daniel R. Mandelker, *Waiving the Taking Clause: Conflicting Signals from the Supreme Court*, *in* PROCEEDINGS OF THE INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN § 7.01-04 (Carol J. Holgren et al. eds., 1995).

114. Like the entitlement rule, the notice rule is circular. As Justice Kennedy pointed out in his concurring opinion in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1034 (1992): "There is an inherent tendency towards circularity in this synthesis, of course; for if the owner's reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority, property tends to become what courts say it is." Justice Kennedy added that some circularity must be tolerated, that the definition is not circular in its entirety, and that "[t]he expectations protected by the Constitution are based on objective rules and customs that can be understood as reasonable by all parties involved." *Id.* at 1035. The definition of property rights in substantive due process cases, however, depends on whether the municipality unilaterally decides to make its decision on a land use approval discretionary.

viewed the purchase of sensitive land, such as wetlands, as a warning that a government agency might prohibit its development.[115]

b. *Nollan v. California Coastal Commission*

The Supreme Court soon had an opportunity, in *Nollan v. California Coastal Commission*,[116] to decide whether the notice rule applied to land use takings claims. Recall that the commission demanded an easement across the Nollan's beachfront property as a condition to the issuance of a building permit for a new dwelling.[117] The Court held that this condition was a taking, but Justice Brennan's dissent argued that a taking had not occurred because the Nollans did not have investment-backed expectations in the development permit.[118]

In reaching this conclusion Justice Brennan observed that the coastal law under which the coastal commission conditioned the Nollan's permit was in place when they applied for it.[119] The commission had required beach access under this law from the other lot owners in the Nollan's development.[120] Justice Brennan also noted that the coastal law authorized the beach access requirement, and argued that this requirement served the legitimate governmental purpose of ensuring public access to the beach. He concluded that the Nollans "could have no reasonable expectation of, and had no entitlement to, approval of their permit application" unless they agreed to a deed restriction ensuring public access to the ocean.[121]

Justice Scalia, writing for the majority, disagreed and rejected Justice Brennan's application of the notice rule:

> But the right to build on one's own property—even though its exercise can be subjected to legitimate permitting

115. *See* Daniel R. Mandelker, *Investment-Backed Expectations in Taking Law*, 31 WASH. U.J. URB. & CONTEMP. L. 3, 29-35 (1987). *E.g.*, Claridge v. New Hampshire Wetlands Bd., 485 A.2d 287 (N.H. 1984).

116. 483 U.S. 825 (1987).

117. *Id*. at 827-28.

118. *Id*. at 861.

119. *Id.*

120. *Id*. at 855-56, 860.

121. 483 U.S. at 860 (Brennan, J., dissenting).

> requirements—cannot be remotely described as a "governmental benefit." And thus the announcement that the application for (or granting of) the permit will entail the yielding of a property interest cannot be regarded as establishing the voluntary "exchange," that we found to have occurred in *Monsanto*.[122]

This holding eliminates the rule that a takings claimant must have a new property entitlement to a land use approval as the basis for a takings claim. The entitlement rule is based on the principle that state law can define a government benefit, such as employment, to eliminate an entitlement interest. It does this by making the availability of a benefit discretionary. In Justice Scalia's words, this is an "announcement" that acceptance of employment requires the "yielding of a property interest" because government can exercise its discretion to terminate the employment.[123] Under Justice Scalia's footnote, no such rule applies under the Takings Clause. The "right to build on one's property" is not a government benefit, so the government cannot eliminate that property right by announcing conditions that defeat it, such as a requirement for beach access.

The real issue is the difference between old and new property. In *Roth* and *Perry* the jobholders did not have an antecedent property right in their positions. That is why the Supreme Court required them to have an entitlement to their jobs as the basis for a property right. In a land use case, the property owner has an antecedent property right in the ownership of his land. The *Nollan* footnote means a land use regulation cannot eliminate that property right by including conditions that restrict it. *Nollan* thus contradicts the majority rule in substantive due process cases that a land use regulation can defeat an entitlement to a land use approval by requiring a discretionary decision on the approval.

This argument is powerful but has its problems. An initial

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122. *Id.* at 825 n.2. Justice Scalia also held the Nollans' right to claim a taking was not defeated simply because they acquired their property after the Commission began to implement its beach access policy. Cases that apply the entitlement rule to substantive due process claims in land use cases do not discuss *Nollan*. *See, e.g.*, RRI Realty Corp. v. Village of Southampton, 870 F.2d 911 (2d Cir. 1989), discussed in *supra* notes 78-85.

123. *Id.* at 833-34 n.2 (citation omitted).

problem is that the basis for Justice Scalia's footnote is as problematic as the entitlement rule that the Court adopted in *Roth* and *Perry*. As Justice Brennan pointed out in his *Nollan* dissent, he could find no basis for the footnote except in some "natural rights" status, which he doubted.[124] Moreover, courts divide on whether to apply the notice rule despite the footnote,[125] and one court has explicitly rejected it.[126] Nevertheless, until the Court rejects the Scalia footnote, it means that land use regulations cannot write the Takings Clause out of existence by announcing restrictions that defeat investment-backed expectations.[127]

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124. Brennan, dissenting in *Nollan*, noted:

> If the Court is somehow suggesting that 'the right to build on one's own property' has some privileged natural rights status, the argument is a curious one. By any traditional labor theory of value justification for property rights, for instance, see, e.g., J. Locke, The Second Treatise of Civil Government 15-26 (E. Gough, ed. 1947), Monsanto would have a superior claim, for the chemical formulae which constitute its property only came into being by virtue of Monsanto's efforts.

483 U.S. at 860 n.10. As one reviewer who read a draft of this Article pointed out, the benefit of registration in Monsanto was important primarily or only because it was required as a matter of law to sell the product and is not essentially different from the "benefit" of a building permit.

125. Refusing to apply *Nollan*'s footnote 2 and holding that a landowner does not have investment-backed expectations if he knew or should have known about the land use regulation at the time of the purchase. *See, e.g.*, Palm Beach Isle Assocs. v. United States, 42 Fed. Cl. 340 (1998); National Adver. Co. v. Village of Downer's Grove, 561 N.E.2d 1300 (Ill. App. 1990) (involving sign regulations); Gazza v. New York State Dep't of Envtl. Protection, 679 N.E.2d 1035 (N.Y. 1997); Brunelle v. Town of Kingston, 700 A.2d 1075 (R.I. 1997). *But see* Cottonwood Farms v. Board of County Comm'rs, 763 P.2d 551 (Colo. 1988); Lopes v. City of Peabody, 629 N.E.2d 1312 (Mass. 1994); East Cape May Assocs. v. New Jersey Dept. of Envtl. Protection, 693 A.2d 114 (N.J. App. Div. 1997). However, most courts have adopted the notice rule in a very mechanical way, generally without citing and certainly without coming to grips with *Nollan*'s footnote 2. *But see* Good v. United States, 189 F.3d 1355, 1361-62 (Fed. Cir. 1999) (discussing why regulatory climate provided notice that defeated takings claim against denial of permit in wetlands).

126. Kim v. City of New York, 681 N.E.2d 312, 316 n.3 (N.Y. 1997).

127. Regulatory uncertainty can still allow land use regulations to defeat a landowner's investment-backed expectations.

> [R]egulatory uncertainty decides the level of regulatory risk assumed by a landowner who enters a land market. The more opinion diverges on whether a landowner will realize his investment-backed expectations in a land market the greater the risk he assumes. It is fair to characterize the purchase of land when these market uncertainties exist as speculative, and conclude that courts should not find a taking when this speculative opportunity is denied.

Mandelker, *supra* note 107, at 234 (footnote omitted). *See also* Kim v. City of New York, 681 N.E.2d at 316 n.3 (rejecting Justice Scalia's footnote). For a contrary view see Steven J. Eagle,

3. Does the Definition of Property Under the Takings Clause Apply to Substantive Due Process?

Justice Scalia's footnote and the entitlement rule are problematic, but both stand as accepted pronouncements by the Court. The next question is whether the Court's definition of property under the Takings Clause should apply to its definition of property under substantive due process.[128] Again, there is no clear answer to this question.

The Court has not considered this issue. In its most extensive discussion of substantive due process and the Takings Clause, the Court divided and did not decide whether old property is enough for a substantive due process claim. In *Eastern Enterprises v. Apfel*,[129] a federal statute retroactively demanded pension contributions from a mining company.[130] The Court held that the statute was unconstitutional, but there was no majority decision.[131] Four justices held that the statute was a taking of property, while five justices analyzed the case under substantive due process. In this second group, only Justice Kennedy held that the statute was unconstitutional.[132]

This difference in opinion on which clause applied gave the Court an opportunity to explain the role of each clause as a constitutional limitation. The application of the statute to a property interest that

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The 1997 Regulatory Takings Quartet: Retreating from the "Rule of Law," 42 N.Y.L. SCH. L. REV. 345, 367-73 (1998).

128. There is, of course, a distinction between the role of the entitlement rule in substantive due process cases and the role of the investment-backed expectations takings factor in takings cases. The entitlement rule is an absolute bar to litigating a substantive due process claim. The accepted understanding is that investment-backed expectations are only a factor courts consider when deciding whether a taking has occurred. A failure to establish investment-backed expectations does not bar a landowner from making a takings claim, although it can defeat a takings claim once a court hears it. This distinction should not make a difference, because the common issue in both situations is the threshold definition of the property interest that is entitled to constitutional protection. In addition, there is some indication that the absence of investment-backed expectations may defeat a takings claim. *See supra* note 106.

129. 524 U.S. 498 (1998). For a discussion of this case, see Echeverria & Dennis, *supra* note 23; Steven J. Eagle, Eastern Enterprises, Substantive Due Process, and a Coherent View of Regulatory Takings, ALA. L. REV. (forthcoming 2000).

130. *Id*. at 504, 517.

131. *Id*. at 504.

132. *Id*. at 539.

was not real property also gave the Court an opportunity to clarify the role of the entitlement rule in defining property interests.[133] It missed both opportunities, though the opinions provide some limited guidance on these issues.

Justice Kennedy's concurring opinion addressed the property issue to some extent. He disagreed with the plurality's decision that the Takings Clause applied and held that a taking had not occurred because the statute did not "operate upon or alter an identified property interest."[134] He did not say whether that property interest must be old property or new property.

Justice O'Connor's plurality opinion examined the difference between the Takings Clause and substantive due process.[135] She applied the old maxim that characterizes the basic issue under the Takings Clause as justice and fairness.[136] Though noting the takings and due process clauses are "correlated to some extent," she held that substantive due process was inappropriate here, expressing concern about using the "vague contours" of the due process clause to review economic legislation.[137] This holding shows misgiving about returning to a Lochner era review of economic legislation, but it does not address the property interest necessary for substantive due

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133. In recent takings decisions the Court has cited *Roth* for the proposition that state law defines property rights. Phillips v. Washington Legal Found., 524 U.S. 156, 164 (1998) (considering whether interest from clients that is earned in lawyer accounts but that will not be returned to clients is property protected by takings clause); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1030 (1992) (holding that the takings clause does not require compensation when the owner is barred from putting land to a use that is proscribed by existing rules and understandings as defined by state law). The Court was not aware in these cases that Justice Scalia rejected the *Roth* analysis in his definition of investment-backed expectations. For an analysis of Chief Justice Rehnquist's views on the definition of property, which notes that he applies old property concepts under the takings clause and new property concepts in procedural due process cases, see Stephen J. Massey, *supra* note 100, at 553-55.

134. Eastern Enterprises, 524 U.S. at 540 (Kennedy, J., concurring).

135. *See id*. at 522-38.

136. *Id*. at 523 ("[T]he process for evaluating a regulation's constitutionality involves an examination of the 'justice and fairness' of the governmental action.") (citing Andrus v. Allard, 444 U.S. 51, 65 (1979)). However, this takings maxim originated in Armstrong v. United States, 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.").

137. *Id*. at 537-38.

process claims based on arbitrary government behavior.[138]

A forceful holding that old property interests are enough to provide a basis for a constitutional challenge under both the Due Process and Takings Clauses comes from the Seventh Circuit. In *River Park v. City of Highland Park*, a landowner brought an action in federal court claiming a violation of due process after a city refused to rezone its property.[139] Writing for the court, Judge Easterbrook rejected the entitlement rule, considered the due process claim, and explained the difference between old and new property:

> Those things people can hold or do without the government's aid count as property or liberty no matter what criteria the law provides. So, for example, the ability to work in the ordinary occupations of the community is a liberty or property interest. Otherwise a single local ordinance providing that "we may put your land in any zone we want, for any reason we feel like" would abolish all property rights in land overnight. The due process and takings clauses are made of sterner stuff.[140]

IV. GETTING THE LANDOWNER'S SUBSTANTIVE DUE PROCESS CLAIM INTO COURT

This Article has discussed the entitlement rule courts apply to dismiss landowner claims that a municipal land use decision violates substantive due process because it is arbitrary. The basis for this rule

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138. Justice Kennedy also examined the difference between the takings clause and substantive due process. Relying on a decision that upheld a statute requiring employers withdrawing from a pension plan to make payments to the plan, he stated "it would be surprising to discover that there had been a taking in the instance where a due process attack had been rejected." *Id.* at 546. Justice Breyer's dissent agreed. *Id.* at 554 (finding the takings clause is concerned with providing compensation for legitimate government action that takes private property to serve the public good). These statements ignore the second prong of *Agins*, which requires compensation when a regulation deprives property of all economically viable use. *See supra* notes 28-35 and accompanying text.

139. 23 F.3d 164, 165 (7th Cir. 1994).

140. *Id.* at 166 (citations omitted). However, the court rejected a claim that the city's refusal to rezone violated procedural due process. *But see* Midnight Sessions, Ltd. v. Philadelphia, 945 F.2d 667, 675-78 (3d Cir. 1991) (distinguishing takings cases and holding plaintiff must have an entitlement to licenses it sought from city to succeed in procedural due process case).

is problematic, but the argument for an alternative that rejects the entitlement rule in substantive due process cases lacks a firm foundation.

One problem is that the Supreme Court has not provided clear guidelines on the role and the definition of the substantive Due Process and Takings Clauses. There is confusion, for example, over whether courts can review the purpose of a land use regulation under both clauses or only under substantive due process. Neither has the Court decided, as some circuits have, that a landowner cannot make a substantive due process claim if he also has a takings claim.[141] If not, and if the landowner cannot challenge the purpose of a regulation under the Takings Clause, then he has no opportunity to challenge the legitimacy of a governmental land use decision. Similarly, the landowner in the hypothetical at the beginning of this Article could not challenge the disapproval of the site plan.

This confusion about the two clauses affects the Court's view on the property interest landowners must have to make a constitutional claim under either clause. Although clarifying the role of each clause may not influence the Court's decision on the property interest necessary for a constitutional claim, there can be no question that clarification would help. For example, if landowners can challenge the governmental purpose of a regulation under either clause, conceptual symmetry argues that courts should apply the same definition of property under both.[142]

Another major problem is that the entitlement rule allows courts to avoid critical policy issues when they decide whether to allow constitutional claims. This is possible because the entitlement rule is circular. It allows a local government to define what it wants to recognize as an entitlement through its land use ordinance by making land use approvals discretionary.

Rules like the entitlement rule also reflect a longstanding judicial dislike of land use cases. *River Park* is an example. Though the court

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141. *See supra* note 14 and accompanying text.

142. Conceptual symmetry does not mean that courts should adopt the takings clause definition of property for substantive due process cases. However, the opposite result, that courts would abandon their acceptance of old property under the takings clause and embrace the new property entitlement rule, is unlikely.

issued a ringing defense of property rights, it was uncompromising in its belief that land use claims do not belong in federal court.[143] Courts sometimes express this concern another way, by holding that landowners who are disappointed with local land use decisions should not bring their disappointments into court as constitutional arguments.[144]

If judicial dislike for land use cases can explain circular rules like the entitlement rule, the next question is whether courts are justified in this dislike. The answer lies in the difference between an as-applied claim that a land use decision is arbitrary and a facial claim against a land use regulation. There are reasons for limiting judicial review when the issue is a facial claim that a land use ordinance is unconstitutional, at least when there are no exclusionary problems. Arbitrary decision making does not deserve this exemption. In the site plan hypothetical, the local government had a legitimate land use policy in its site plan requirement but applied that policy arbitrarily.

Section 1983 of the Federal Civil Rights Act provides another perspective on how courts view municipal responsibility for constitutional violations.[145] Section 1983 provides the judicial remedy for local government wrongdoing that triggers constitutional claims, including substantive due process claims. An important question under § 1983 is whether local governments have a qualified immunity from liability, or whether they are absolutely liable for their constitutional violations. Qualified immunity would restrict local government liability under § 1983 because it would exempt a local government if its actions, though unconstitutional, were done in good faith.

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143. "Federal courts are not boards of zoning appeals. This message, oft-repeated, has not penetrated the consciousness of property owners who believe that federal judges are more hospitable to their claims than are state judges. Why they should believe this we haven't a clue; none has ever prevailed in this circuit, but state courts often afford relief on facts that do not support a federal claim." *River Park*, 23 F.3d at 164.

144. "[Courts should not] endow every disappointed property owner with a section 1983 claim, because every appeal from an adverse ruling necessarily encompasses a claim that the determination by the local agency was, from the owner's point of view, irrational, arbitrary, capricious and an abuse of the agency's discretion." Breneric Associates v. City of Del Mar, 81 Cal. Rptr. 2d 324, 335 (Cal. App. 1998).

145. 42 U.S.C. § 1983 (1994).

The Supreme Court rejected qualified immunity in *Owen v. City of Independence*, in an opinion written by Justice Brennan.[146] A city manager, in a case remarkably like *Roth* and *Perry*, discharged a police chief. The city manager had previously rejected his request for notice of the charges against him, a public hearing, and a reasonable opportunity to respond to those charges. The court of appeals applied a good faith immunity rule to hold that the city was not liable because the discharge had occurred before the Supreme Court decided *Roth* and *Perry*,[147] but the Supreme Court reversed. It held that local governments are absolutely liable for constitutional violations under § 1983.

Justice Brennan's policy reasons for holding local governments absolutely liable conflict dramatically with his reasons for allowing the coastal commission to escape a takings claim in *Nollan*. He held that it would be wrong for local governments to avoid liability under § 1983 for injury they inflict. He then added that "[a] damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees."[148]

Brennan also found that rejecting a qualified good faith immunity for damages caused by constitutional violations harmonized well with developments in common law. He relied on tort law for this holding, a defensible comparison because the Supreme Court views § 1983 as the equivalent of a tort remedy.[149] Tort law doctrines had changed, Justice Brennan argued, and so should doctrines defining governmental responsibility. Individual blameworthiness was no longer the test of liability: "[T]he principle of equitable loss-spreading has joined fault as a factor in distributing the costs of official misconduct."[150]

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146. 445 U.S. 622 (1980).

147. *Id*. at 630 n.10.

148. *Id*. at 651.

149. As the Court pointed out in City of Monterey v. Del Monte Dunes, Ltd., 526 U.S. 687 (1999): "[T]here can be no doubt that claims brought pursuant to § 1983 sound in tort. Just as common-law tort actions provide redress for interference with protected personal or property interests, § 1983 provides relief for invasions of rights protected under federal law." 526 U.S. at 709.

150. *Owen*, 445 U.S. at 657. This principle is similar to the "fairness" principle that is the basis for compensation under the takings clause. *See supra* note 136 and accompanying text. For a discussion of Justice Brennan's views on municipal liability see Joan C. Williams, *The*

One problem with relying on this reasoning to reject the entitlement rule is that *Owen* dealt with municipal liability for constitutional violations not with access to the courts to litigate constitutional claims.[151] Nevertheless, § 1983 provides the judicial remedy for constitutional claims,[152] so *Owen* is relevant to the entitlement rule because this rule eliminates a judicial remedy in substantive due process cases. If a good faith immunity that would limit governmental responsibility for constitutional violations is unacceptable, then an entitlement rule is also unacceptable. This rule allows governments to escape responsibility for substantive due process violations by denying plaintiffs access to the courts.[153]

Loss distribution as a public policy may require more analysis than the Court gave it in *Owen*,[154] but it significantly undercuts an entitlement rule that bars substantive due process claims by landowners.[155] An entitlement rule prevents courts from attempting loss distribution because it allows them to dismiss claims that a land use decision violated substantive due process without reaching the

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Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law, 1986 WIS. L. REV. 83 (1986).

151. *See* City of Canton v. Harris, 489 U.S. 378, 387 (1989) (distinguishing availability of § 1983 as remedy for failure to train from the constitutional violation).

152. Section 1983 is the remedy plaintiffs must use to assert substantive due process claims. *See* San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621, 656 n.23 (Brennan J., dissenting) (landowner may have a damages cause of action under section 1983 when a police power regulation not enacted to further public health, safety, morals, or general welfare).

153. The tort analogy used by Justice Brennan in *Owen* is especially relevant to claims that a land use disapproval violated substantive due process. Arbitrary decision making is clearly analogous to the kind of conduct that constitutes a tort.

154. For a discussion of these problems under the takings clause, see Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997 (1999).

155. Whether loss distribution should triumph over caseload reduction as the dominant social policy is, of course, a value judgment. The *Owen* decision is evidence that the Court believes it should. In one part of his opinion, Justice Brennan discussed the qualified good faith immunity the Court had provided for local officials. He noted that the Court provided this immunity because the Court believed it was unjust to subject an officer, who is required by law to exercise discretion, to legal liability. The Court also believed that a threat of liability would deter officers from fulfilling their office "with the decisiveness and the judgment required by the public good." *Owen*, 445 U.S. at 654. Neither of these concerns, he explained, applied to local government. The first did not apply because the "public at large" enjoys the benefit of government activities, so it is the public at large that should be liable for its administration. The second did not apply, in part, because consideration of the municipality's liability for constitutional violations is "quite properly" the concern of elected or appointed officials. *Id.*

merits. This result is efficient if it eliminates suits that do not present valid constitutional claims, but it is inequitable because it prevents courts from hearing claims that may be valid. Courts should have the opportunity to decide these claims without the convenience of ordering dismissal because a landowner does not have the required new property.

No one gains in a legal environment where landowners suffer from arbitrary decision making or, conversely, where constitutional restrictions prevent necessary planning and land use regulation. Effective judicial review can establish constitutional guidelines that assure fair decisions and provide the necessary framework for land use policies.[156] Access to the courts is essential for judicial review. The entitlement rule denies landowners that access when they claim that a land use decision violates substantive due process. The constitutional basis for this rule is problematic and courts should abolish it.

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156. Providing the necessary doctrinal framework for judicial review is also essential if courts are to achieve these objectives. A colleague and I argued elsewhere that effective judicial review requires a reversal of the presumption of constitutionality when governments abuse their land use authority, and we outlined when we believe a reversal is proper. *See* Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 URB. LAW. 1 (1992).