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Trying to Halt the Procedural Merry-Go-Round: The Ripeness of Regulatory Takings Claims After Palazzolo v. Rhode Island

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TRYING TO HALT THE PROCEDURAL MERRY-GO-ROUND: THE RIPENESS OF REGULATORY TAKINGS CLAIMS AFTER *PALAZZOLO v. RHODE ISLAND*[1]

I. INTRODUCTION

Imagine a landowner had sought to develop his property by submitting a proposed plan that conformed to all zoning and planning requirements, but the relevant regulatory agency rejected his application. Suppose also that, along with its denial, the agency indicated it would approve less intensive development. Subsequently, the landowner submitted another application seeking the exact level of development the agency indicated it would accept. The landowner's frustration would be understandable if the agency were to deny this application as well, indicating once again that it would approve less intensive development. If this very same exchange were to occur several times, the landowner would probably feel justified turning to the courts for protection of his or her constitutional right against a governmental taking without compensation. Most would probably be surprised and outraged to learn that even after this administrative run-around, the landowner could still be denied his day in court. However, the Supreme Court's regulatory takings doctrine has allowed this very result to occur.[2]

While one may be tempted to dismiss it as "merely" a procedural requirement, the issue of ripeness can have a profound effect on the enforcement of constitutional rights. Ripeness doctrine serves as a gatekeeper to the court system by dictating when a claim may be brought.[3] By preventing

1. 121 S. Ct. 2448 (2001).

2. This hypothetical scenario was adapted from the facts of *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*. 920 F.2d 1496, 1502 (9th Cir. 1990). In *Del Monte Dunes*, a judge of the United States District Court for the Northern District of California dismissed a landowner's claim as unripe after a similar administrative history. *Id*. at 1500. The United States Court of Appeals for the Ninth Circuit ultimately reversed this judgment of the district court. *Id*. at 1509. The case nevertheless demonstrates the potentially harmful power of the Supreme Court's regulatory takings ripeness doctrine.

3. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.4.1, at 114 (3d ed. 1999) (stating that ripeness is a justiciability doctrine that determines when review is appropriate); *see also* Marla E. Mansfield, *Standing and Ripeness Revisited: The Supreme Court's "Hypothetical" Barriers*, 68 N.D. L. REV. 1, 68 (1992) (explaining that while "standing" deals with the "who" of a lawsuit, "ripeness" deals with the "when").

premature adjudication,[4] ripeness doctrine maintains "the limits on judicial power appropriate in a democratic society."[5] While ripeness requirements affect all constitutional claims, they have a particularly significant role in regulatory takings claims brought under the Takings Clause of the Fifth Amendment.[6] The Supreme Court's regulatory takings ripeness doctrine states that before a landowner is able to bring a takings claim in court he must first obtain a "final decision" regarding the application of a challenged regulation to his or her property, and, second, he must utilize any available state procedures for obtaining just compensation.[7] The requirement of obtaining a "final decision," also known as "finality ripeness," enables a court to determine the extent of a regulation's application.[8] In a regulatory takings claim, this is crucial because such a taking can occur only where a government regulation goes "too far."[9]

At different points in its development, finality ripeness doctrine has taken on different "shades." These shades have reflected what the Court has considered to be the appropriate limits on judicial power or, alternatively, what the Court has viewed as the judicial system's proper role.[10] The Court's initial

4. Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967). In *Abbott*, the Court explained that the basic rationale of the ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Id.* at 148-49.

5. Navegar, Inc. v. United States, 103 F.3d 994, 997 (D.C. Cir. 1997). In *Navegar*, the court noted that Article III justiciability principles serve "several important functions, not the least of which are maintaining the limits on judicial power appropriate in a democratic society." *Id.* at 997-98. *See also* Flast v. Cohen, 392 U.S. 83, 97 (1968) (explaining that "[f]ederal judicial power is limited to those disputes which confine federal courts to a rule consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process").

6. U.S. CONST. amend. V. The Fifth Amendment V states, in relevant part, "nor shall private property be taken for public use, without just compensation." *Id.*

7. Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186 (1985).

8. The Court's ripeness decision in *Palazzolo* addressed only what is required to obtain a final decision; therefore, this Note will focus upon the finality ripeness requirements since the Constitution forbids only governmental taking without just compensation. *See supra* note 6. As a result, the second part of the *Williamson County* test, exhaustion of state compensation procedures, is also crucial to determining whether there has been a violation of constitutional rights in a specific instance. As with finality ripeness requirements, this second part of the *Williamson County* test has given rise to several issues. For a brief discussion of these issues, see *infra* note 118.

9. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). According to Justice Holmes, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.*

10. *See* discussion *supra* at note 5.

finality ripeness decisions reflected its respect for the autonomy and discretion of regulatory agencies by encouraging negotiation between landowners and regulatory agencies.[11] To do so, the Court's decisions required landowners to apply for variances and to make additional applications even after agencies had denied earlier applications.[12] These requirements, while well-intentioned, created a procedural merry-go-round that prevented landowners from being able to bring regulatory takings claims to court. This tilted the balance of power between regulatory agencies and landowners in favor of regulatory agencies, placing the legitimate rights of landowners at risk.[13] In response, the Court altered the "shade" of its takings ripeness doctrine so as to provide more protection for landowners' rights.[14] Prior to its 2001 term, the Court's recent decisions had indicated that it was more inclined to hold a landowner's regulatory takings claim to be ripe, but they did not completely halt the procedural merry-go-round. The Court once again addressed this problem in *Palazzolo v. Rhode Island*.[15] While not fundamentally changing the takings ripeness doctrine, *Palazzolo* continues the Court's trend of finding regulatory takings claims to be ripe, and it offers much-needed protection for landowner's rights by indicating that courts should hold a takings claim to be ripe under a wider range of circumstances. However, vagueness in the Court's decision may ultimately leave both landowners and regulatory agencies dissatisfied with the status of the takings ripeness doctrine.

Part II of this Note discusses the development of the Court's regulatory takings ripeness doctrine, and Part III addresses the problems that have arisen under the Court's previous takings ripeness decisions. Part IV examines in detail the Court's decision in *Palazzolo*. Part V discusses how *Palazzolo* indicates that courts should hold claims to be ripe under broader circumstances, resulting in increased protection for the constitutional rights of landowners, and how, because of its shortcomings, *Palazzolo* may leave both landowners and regulatory agencies dissatisfied.

11. *See infra* Part II.C.

12. *See, e.g.*, *Williamson County*, 473 U.S. at 193-94 (holding that a claim is not ripe until a landowner has pursued available variances); MacDonald, Sommer & Frates v. Yolo Co., 477 U.S. 340, 353 n.9 (1986) (indicating that to ripen a claim after denial of an initial application, a landowner should submit additional, less intensive applications).

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

14. *See, e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1014 n.3 (1992) (stating that it would be "pointless" for the landowner to submit an application for development); Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 739 (1997) (stating that "no occasion exist[ed] for applying *Williamson County's* requirement [of a 'final decision']").

15. 121 S. Ct. 2448 (2001).

II. DEVELOPMENT OF THE TAKINGS RIPENESS DOCTRINE

A. The Court's General Ripeness Doctrine

The Court's regulatory ripeness doctrine is distinct from the Court's general ripeness doctrine.[16] As expected, however, the history and function of the latter provides insight into the role and purpose of the former. In general, ripeness addresses the "conditions that must exist before a dispute is sufficiently mature to enable a court to decide a case on the merits."[17] As the Court has explained, "[r]ipeness is peculiarly a question of timing."[18] Therefore, when a claimant brings his claim prematurely, it will be found nonjusticiable and barred from court.[19]

Both constitutional and prudential principles provide support for the ripeness doctrine.[20] First, the Constitution limits federal courts' review to true

16. *See Suitum*, 520 U.S. at 733-44 (discussing the Court's general ripeness doctrine and its takings ripeness doctrine in separate sections); *see also* Max Kidalov and Richard H. Seamon, *The Missing Pieces of the Debate Over Federal Property Rights Legislation*, 27 HASTINGS CONST. L.Q. 1, 8 (1999) (noting that the various names of the takings ripeness doctrine reflect the doctrine's distinctness from the Court's general doctrine of ripeness); Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 CAL. W. L. REV. 1, 2 (1992) (stating that the Court has developed a "special ripeness doctrine applicable only to constitutional property rights claims").

17. Patrick W. Maraist, *A Statutory Beacon in the Land Use Ripeness Maze: The Florida Private Property Rights Protection Act*, 47 FLA. L. REV. 411, 416 (1995). While varying slightly in their enunciation, other authorities define ripeness in a similar fashion. *See, e.g.*, JACOB A. STEIN ET AL., 5 ADMINISTRATIVE LAW § 48.01, at 48-3 (1988 revision) (citations omitted) (noting that despite having no precise definition, the concept of ripeness "involves determining whether decisions of a particular agency are at a stage which permits judicial resolution"); BLACK'S LAW DICTIONARY 1328 (7th ed. 1999) (defining ripeness as being "[t]he circumstance existing when a case has reached, but has not yet passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made").

18. Regional Rail Reorganization Act Cases, 419 U.S. 102, 140 (1974).

19. Julia C. Haffner, Suitum v. Tahoe Regional Planning Agency: *The United States Supreme Court Revisits Ripeness in the Regulatory Takings Context*, 11 TUL. ENVTL. L.J. 129, 132 (1997) (stating that "[f]indings of nonjusticibility usually arise when a plaintiff prematurely challenges the constitutionality of a regulatory scheme"). According to one commentator:

> The issue of ripeness is jurisdictional in nature. The Supreme Court has consistently held that it has no jurisdiction to hear unripe claims and has dismissed attempts by landowners to force the Court to grant jurisdiction to adjudicate unfinal judgments. Specifically, ripeness is a matter of subject matter jurisdiction and is a pure legal question to be decided by the court. That is, a court cannot decide the merits of a case until the plaintiff has ripened its claim.

Michael K. Whitman, *The Ripeness Doctrine in the Land-Use Context: The Municipality's Ally and the Landowner's Nemesis*, 29 URB. LAW. 13, 20-21 (1997) (citations omitted).

20. *See* Mansfield, *supra* note 3, at 68; *see also* 58 AM. JUR. PROOF OF FACTS 3d 135 (2000) (noting that "'ripeness' in takings jurisprudence is a blend of constitutional and prudential concepts"). As one commentator has explained:

cases and controversies only.[21] Therefore, if a claim is brought before a true "case" or "controversy" has formed, it is not ripe, and a court cannot hear it. Second, as a prudential matter, a court cannot properly adjudicate a case if the record before it is incomplete.[22] Thus, by avoiding premature adjudication, ripeness doctrine prevents courts from becoming entangled "in abstract disagreements over administrative policies,"[23] and assists courts "in gaining a firmer factual footing."[24]

A court might also find it desirable to hold a claim to be unripe even where the record is fully developed.[25] For example, a court may wish to protect regulatory agencies from judicial interference until agencies arrive at their

> It has been said that there are two reasons why federal courts in particular should not hear unripe claims. First, Article III courts are constitutionally limited to deciding cases or controversies under Article III of the Constitution. Second, prudent courts do not wish to reach speculative decisions based upon incomplete records.

Whitman, *supra* note 19, at 23 (citations omitted).

21. *See* U.S. CONST. art. III, § 2. Article III states:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Id.

22. *See* Kevin J. Cross, *Just a Little Longer Mrs. Suitum, Your Case is Just About Ripe for Review:* Suitum v. Tahoe Regional Planning Agency, 9 VILL. ENVTL. L.J. 439, 444 (1998); *see also* CHEMERINSKY, *supra* note 3, § 2.4.1. at 117 (explaining that the purpose of the ripeness doctrine is to improve the quality of judicial decision by requiring adequate records and statements of facts as prerequisites of review). According to one commentator, "most courts would rather avoid speculative cases, defer to finders of fact with greater subject matter expertise, decide cases with fully-developed records, and avoid overly broad opinions, even if these courts might constitutionally hear a dispute." Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1, 11 (1995).

23. *See* Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967); *see also* Mansfield, *supra* note 3, at 68.

24. *See* Mansfield, *supra* note 3, at 22.

25. According to Justice Brandeis, "[t]he Court [has] developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional question pressed upon it for decision." Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346 (1936) (Brandeis, J., concurring). Commentators have also noted the Court's voluntary restraint. *See* Maraist, *supra* note 17, at 418 (noting that "[t]he prudential aspect of ripeness is also utilized by the judiciary to refrain from deciding cases that are within the court's jurisdiction but are nonetheless inappropriate for judicial review"); *see also* CHEMERINSKY, *supra* note 3, § 2.1 at 42 (noting that even though the Constitution permits federal court adjudication, some courts have decided that proper policy motives require no review in some cases).

decisions.[26] As Alexander Bickel argued, the Court should utilize ripeness doctrine, which he referred to as one of the "passive virtues," to avoid judicial decision-making where it is more appropriate for another branch of the government to take action first.[27] Such restraint enables other branches of government the opportunity to function,[28] which in turn maintains "the limits on judicial power appropriate in a democratic society."[29]

At varying times and in varying situations, the Court has utilized ripeness doctrine to further such policy goals. For example, early ripeness cases held that a claim was ripe for review only when private parties were impacted directly.[30] In the 1930s, the Court utilized this restrictive approach to ripeness

26. *See Abbott Labs., Inc.*, 387 U.S. at 148-49; *see also* Mansfield, *supra* note 3, at 68.

27. *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 111-198 (1st ed. 1962) (discussing the "passive virtues"). According to Bickel:

> [E]ven in a perfectly real, concrete, and fully developed controversy, [the office of the Court] is not necessarily to resolve issues on which the political processes are in deadlock; it may be wise to wait till the political institutions, breaking the deadlock, are able to make an initial decision, on which the Court may then pass judgment.

Id. at 146. Bickel believed that under the Constitutional system of government, the power of initial decision belongs to the legislature; therefore, "it is quite wrong for the Court to relieve [people] of [the] burden of self-government." *Id*. at 156.

28. *See* Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153, 178 (1987) (stating that "ripeness . . . allows courts to postpone interfering when necessary so that other branches of government . . . may perform their functions unimpeded"); *see also* Mansfield, *supra* note 3, at 22 (stating that "[r]ipeness doctrine can allow other branches of government the opportunity to work").

29. *See supra* note 5; s*ee also* Robert F. Frelich, *Administrative Remedies for Unduly Harsh Regulation*, 11 A.L.I.-A.B.A. 655, 665 (stating that ripeness doctrine "protects the administrative agency's autonomy by allowing them to correct its own errors, thus ensuring that individuals are not encouraged to ignore its procedures and resort directly to courts").

30. *See, e.g.*, United States v. Los Angeles & Salt Lake R.R. Co., 273 U.S. 299, 309-10 (1927) (concluding that the "so-called" order being challenged was not subject to judicial review because it did not command the plaintiff to do or not do anything); *see also* Mansfield, *supra* note 3, at 20.

The Court moved away from this strict conception of its general ripeness doctrine in 1967. In *Abbott Laboratories, Inc. v. Gardner*, the Court established a two-part test for its general ripeness doctrine requiring an evaluation of "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." 387 U.S. 136, 149 (1967). The first prong addresses whether the question presented by the claim is one of law. *See, e.g.*, Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 201 (1983); *see also* Mansfield, *supra* note 3 at 69. The second prong contemplates the difficulties that either prompt or delayed review would create for either the private party or the agency. *See, e.g.*, Lotz Realty Co. v. United States, 757 F. Supp. 692, 697 (E.D. Va. 1990) (holding that decision is not final because judicial action would divert manpower from an agency's normal functions, thereby burdening the agency). According to one commentator, the two-part *Abbott* formula allows for more flexible results than the Court's earlier ripeness decisions. *See* Mansfield, *supra* note 3, at 70.

to protect New Deal social programs from attack.[31] Many claimants were unable to pass the high threshold of ripeness, which made it difficult to challenge these legislative programs or the regulations promulgated thereunder. By limiting its power to what it believed appropriate, the Court shifted power from itself to legislative and administrative agencies. Such use of the ripeness doctrine closely resembles the manner in which ripeness came to be used in the context of regulatory takings claims.

B. The Role of Ripeness in Regulatory Takings Claims

To understand the role of ripeness in regulatory takings claims, one must first understand the nature of regulatory takings claims.[32] The Takings Clause of the Fifth Amendment permits the government to seize private property for public use, provided that it pays the owner "just compensation."[33] The Court

As discussed previously, the Court's ripeness doctrine in the regulatory takings context has diverged from its general ripeness doctrine. *See* discussion *supra* note 16. While the Court's general ripeness doctrine has become more flexible, until recently the Court's takings ripeness doctrine has been formalistic. *See* Kassouni, *supra* note 16, at 2 (arguing that "the Supreme Court's traditional conception of ripeness bears little resemblance to the formalistic test applicable to constitutional property rights"). Kassouni also noted that *Abbott Laboratories* "has been largely ignored when constitutional property rights are at issue." *Id*. at 3. Another commentator has suggested that this divergence is due to the nature of the claims addressed under the ripeness doctrine. *See* Nichol, *supra* note 28, at 165 (noting that "[t]he ripeness requirement consistently has been molded to meet the dictates of the substantive claim on the merits"). As Professor Nichol explained, the Court has allowed pre-enforcement challenges to laws regulating, for instance, speech because such laws "chill" potential speech. *Id*. at 165-66. However, since Fifth Amendment takings claims turn on "ad hoc factual determinations directed to particular estimates of the economic impact on the property in question," the Court has ruled that it is particularly important that adjudication take place in a concrete factual setting. *Id*. at 166.

31. *See* Mansfield, *supra* note 3, at 20 (characterizing the approach to ripeness by justices committed to the New Deal social experiment as "restricted"). Professor Mansfield explained that "[u]ntil an agency has actually acted against a party, the potential plaintiff would, unfortunately have to choose between changing behavior or risking sanctions." *Id*. at 21.

32. There are three separate constitutional claims that landowners may employ in defense of their property rights: Fifth Amendment just compensation claims, due process claims, and equal protection claims. *See* Kassouni, *supra* note 16, at 3. Kassouni argued that ripeness doctrine as applied to regulatory takings is inapplicable to substantive due process and equal protection claims. *See* Kassouni, *supra* note 16, at 44-47. Leaving aside whether this argument is correct, this Note focuses upon the Court's takings ripeness jurisprudence in only Fifth Amendment just compensation claims.

33. *See* discussion *supra* note 6. The Takings Clause is applicable to the States through the Fourteenth Amendment. Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226 (1897). The Fourteenth Amendment states in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend XIV.

first recognized that the Fifth Amendment requirement of just compensation extends beyond physical seizures to limitations imposed by governmental regulation in its 1922 decision of *Pennsylvania Coal Co. v. Mahon*.[34] The Court held in *Pennsylvania Coal* "that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[35] While it established the existence of regulatory takings, *Pennsylvania Coal* provided little guidance as to how far a regulation could go before it went "too far."[36]

During the fifty-five years following *Pennsylvania Coal*, the Court did little to elaborate on the concept of regulatory takings.[37] Beginning in the late 1970s, however, the Court returned to this arena with vigor.[38] This renewed interest was fueled by a shift in the nature of governmental regulations. After World War II, governments utilized land-use regulations to further "novel societal goals," such as historic preservation, open space preservation and

34. 260 U.S. 393 (1922).

35. *Pennsylvania Coal Co*., 260 U.S. at 415.

36. In the Court's 1992 decision in *Lucas v. South Carolina Coastal Council*, Justice Scalia stated that "our decision in *Mahon* offered little insight into when, and under what circumstances, a given regulation would be seen as going 'too far' for the purposes of the Fifth Amendment." 505 U.S. 1003, 1015 (1992).

37. *See* ROBERT MELTZ ET AL., THE TAKINGS ISSUE 6 (1st ed. 1999). As Meltz explained, in the late 1930s the Supreme Court abandoned "the close constitutional scrutiny . . . that had characterized the first decades of the century. Given the new hands-off approach, it was only natural that takings challenges to regulatory control of property should be disfavored." *Id*. In further explaining the dearth of regulatory takings decisions, Meltz stated that in the 1950s and 1960s, the Warren Court focused on parts of the Bill of Rights concerned with individual liberties, rather than property rights. *Id*.

38. *Id*. Upon returning to the arena of regulatory takings claims, the Court's decisions have developed two separate types of claims. The first type of claim was outlined in *Penn Central Transp. Co. v. New York*, 438 U.S. 104 (1978), and includes "circumstances where the application of a regulation to particular property is a taking of some interest in property that is less than the whole, although the regulation may not effect a taking on its face." Wendie L. Kellington, *New Takes on Old Takes: A Takings Law Update*, SG021 ALI-ABA 511, 514 (2001). *Penn Central* claims involve considering three factors: first, "the character of the invasion, [second,] the economic impact of the regulation as applied to the particular property, and [third,] the property owner's distinct investment backed expectations with respect to that property." *Id.* at 514-15. For a detailed discussion of this type of claim, see STEVEN J. EAGLE, REGULATORY TAKINGS § 6-4 (1st ed. 1996). The second type is a categorical claim where the deprivation of all economically beneficial use is alleged. *See* Kellington, *supra* at 513. This claim was established in *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003 (1992). *Lucas* claims for just compensation under the Fifth Amendment have two essential elements. *See* Kellington, *supra* at 514. First, the imposition of a regulation must totally deprive a landowner of a right in property, and, second, the right deprived must be recognized under state law and must not be a nuisance. *Id*. Again, for a more detailed discussion of this type of claim, see EAGLE, *supra* at § 7-6. As discussed *infra*, both types of claims played a role in the Court's decision in *Palazzolo*, despite the fact that the petitioner raised only a *Lucas* claim.

growth control.[39] The 1960s and 1970s saw governments enact many environmental regulations.[40] These regulations restricted the permissible uses and development of landowners' property, which led many landowners to seek compensation through regulatory takings claims. Confronted with the increased number of regulatory takings claims, the Court began to develop its regulatory takings ripeness doctrine.

In some respects, ripeness doctrine serves the same function in regulatory takings claims as it does in other contexts. It prevents premature adjudication of disagreements with administrative policies,[41] thereby ensuring the development of a factual record that will enable a court to determine whether a taking has occurred.[42] This function is especially important in regulatory takings claims, which turn on "ad hoc factual determinations directed to particular estimates of the economic impact on the property in question."[43] However, beyond this role, ripeness doctrine also serves an additional, unique function in regulatory takings claims. As the Court has recognized, regulatory agency land-use decisions are subject to change and compromise.[44] By requiring claims to be ripe before adjudication, ripeness doctrine ensures there is adequate time and flexibility for the parties to reach a mutually acceptable resolution.[45] Ripeness doctrine "sends the municipality a clear message that the landowner is serious about challenging [a] regulation before the case winds up in court, allowing [a regulatory agency] time to effect a possible

39. *See* MELTZ, *supra* note 37, at 7.

40. *Id.* Meltz noted that "[t]hese new generations of controls . . . undoubtedly raised the judicial eyebrow. Preserving ecosystems, in the contemporary mainstream ethic that courts inevitably reflect, does not rank with zoning adult bookstores out of residential neighborhoods." *Id*.

41. *See* Michael B. Hitchcock, Suitum v. Tahoe Regional Planning Agency: *Applying the Takings Ripeness Rule to Land Use Regulations and Transferable Development Rights*, 28 GOLDEN GATE U. L. REV. 87, 93 (1998) (noting that the takings "ripeness doctrine functions to avoid premature adjudication of disagreements with administrative policies").

42. *See* Kathryn E. Kovacs, *Accepting the Relegation of Takings Claims to State Courts: The Federal Courts' Misguided Attempts to Avoid Preclusion Under Williamson County*, 26 ECOLOGY L.Q. 1, 7 (1999); *see also* Tinnerman v. Palm Beach County, 641 So.2d 523, 525 (1994) (noting that the ripeness doctrine "enables a court to determine whether a takings has occurred and, if so, its extent").

43. *See* Nichol, *supra* note 28, at 166.

44. *See* MacDonald, Sommer & Frates v. Yolo Co., 477 U.S. 340, 350 (1986) (stating that "[t]he local agencies charged with administering regulations governing property development are singularly flexible institutions; what they take with the one hand they may give back with the other").

45. *See* Robert P. Butts, *Private Property Rights in Florida: Is Legislation the Best Alternative?*, 12 J. LAND USE & ENVTL. L. 247, 262 (1997) (stating that ripeness doctrine recognizes that "given time, the parties will reach a political or administrative resolution"); *see also* Freilich, *supra* note 29, at 664 (stating that ripeness doctrine "provides flexibility for the negotiation of land use disputes prior to resorting to judicial review").

compromise."[46] It ensures that the parties have one last opportunity to resolve their differences "before resorting to the expense, delay and aggravation of lawsuits."[47] The practical benefits of negotiation to the parties are clear. Negotiation also provides a regulatory agency the opportunity to exercise its powers of discretion before a court interferes with the application of the agency's rules. Therefore, utilizing ripeness to encourage negotiation also maintains the proper limit on judicial power.

C. Judicial Development of the Takings Ripeness Doctrine

The Court's initial takings ripeness decisions sought to promote negotiation between landowners and regulatory agencies by requiring landowners to pursue variances and submit additional applications. This approach to the ripeness doctrine reflected the Court's desire to respect the autonomy and discretion of regulatory agencies, and thereby maintain the appropriate limits on judicial power as the Court had done in the 1930s. However, the Court's efforts to encourage this negotiation between landowners and regulatory agencies placed the legitimate rights of landowners in jeopardy. As a result, the Court's recent ripeness doctrine decisions have reflected an inclination to find claims to be ripe, which offers landowners some protection by enabling them to litigate their takings claims at an earlier point in the procedural process.

1. Initial Decisions: Putting the Merry-Go-Round into Motion

In 1978, the Court issued its landmark regulatory takings decision in *Penn Central Transportation Co. v. New York City*.[48] In *Penn Central*, the Court rejected a landowner's challenge to a regulation that prohibited construction of an office building above Grand Central Station. The Court reasoned that this did not amount to a regulatory taking because other beneficial uses of the site remained.[49] In rejecting the claim, the Court also noted that the landowners

46. John Mixon & Justin Waggoner, *The Role of Variances in Determining Ripeness in Takings Claims Under Zoning Ordinances and Subdivision Regulations of Texas Municipalities*, 29 ST. MARY'S L.J. 765, 774 (1998). Mixon and Waggoner argued that this additional time "should increase the likelihood that the city attorney will educate the governing body and board of adjustment on the necessity of looking at the classification, assessing its reasonableness, and weighing its value against the chance of substantial monetary loss." *Id.* Lastly, they noted that the "procedure can shift the municipality's focus away from . . . public health, safety and welfare . . . , towards consideration of the impact such regulations are likely to have on a particular landowner." *Id.* at 774-75.

47. *Id.* at 775.

48. 438 U.S 104 (1978).

49. *Id.* at 138. The Court stated:

> On this record, we conclude that the application of New York City's Landmarks Law has not effected a "taking" of appellants' property. The restrictions imposed are substantially related to the promotion of the general welfare and not only permit reasonable beneficial

had not applied for approval of a smaller structure.[50] Some have argued this provided the foundation for the Court's subsequent ripeness requirements that an applicant modify or resubmit a proposal before a takings claim will be considered.[51]

Two years later, the Court decided *Agins v. City of Tiburon*.[52] In *Agins*, the Court indicated that the regulatory takings claim before it was unripe because the landowners had never actually sought approval for development of their land under the challenged regulations.[53] The Court reaffirmed *Agins* the following year in *San Diego Gas & Electric Co. v. City of San Diego*.[54] In *San Diego Gas*, the Court again rejected a regulatory takings appeal because the landowner had never submitted a development plan. As the Court noted, its

> use of the landmark site but also afford appellants opportunities further to enhance not only the Terminal site proper but also other properties.

Id.

50. *Id*. at 137. The Court stated that, "Counsel for appellants admitted at oral argument that the Commission ha[d] not suggested that it would not, for example, approve a 20-story office tower along the lines of that which was part of the original plan for the Terminal." *Id*. at 137 n.34.

51. *See, e.g.*, Hitchcock, *supra* note 41, at 95 (stating that *Penn Central Transp. Co.* "provided the foundation for subsequent requirements that an applicant, whose development proposal was denied, modify or resubmit the application before a case is ripe"); Maraist, *supra* note 17, at 422 (stating that the Court's decision "paved the way for subsequent requirements that an applicant modify or resubmit a proposal before a case is ripe").

52. 447 U.S. 255 (1980). In *Agins*, the city of Tiburon, California adopted two ordinances that modified existing zoning requirements after the landowners had acquired five acres of unimproved land in the city. *Id.* at 257. Specifically, the ordinances restricted the developments that the landowners were allowed to undertake to one-family dwellings. *Id*. Without ever seeking approval for development of their land under the zoning ordinances, the landowners filed a two-part complaint seeking: (1) two million dollars for inverse condemnation; and (2) a declaration that that zoning ordinances were facially unconstitutional. *Id*. at 257-58.

53. *Id*. 447 U.S. at 260. The Court stated:

> Because the appellants have not submitted a plan for development of their property as the ordinances permit, there is as of yet no concrete controversy regarding the application of the specific zoning provisions. . . . Thus, the only question properly before us is whether the mere enactment of the zoning ordinances constitutes a taking.

Id. Note that, while failure to submit a plan for development rendered the appellants' as applied takings claim unripe, the Court also indicated that a facial challenge to a regulation is ripe from the moment such regulation is enacted. *Id*. The Court has also made it clear that a landowner making a facial takings claim is not subject to finality ripeness requirements because, by definition, the mere enactment of the law, and not its application, takes the property. Yee v. City of Escondido, 503 U.S. 519, 534 (1992).

54**.** 450 U.S. 621 (1981). In *San Diego Gas*, a landowner purchased in 1966 a 412-acre parcel of land in an area in the northwest part of San Diego, California as a possible site for a nuclear power plant to be constructed in the 1980s. *Id*. at 624-25. However, in 1973, the city rezoned part of the landowner's property and established an open-space plan. *Id.* Subsequently, the landowner filed suit seeking damages for inverse condemnation, mandamus and declaratory relief. *Id*. at 626.

review was limited to "'final judgments or decrees' of a state court;" since no proposal was ever submitted, the Court of Appeals was unable to issue a final decision as to whether there had been any taking.[55] Thus, the Court's decision indicated that to ripen a regulatory takings claim, landowners must submit a development plan and subsequently have it rejected.[56] During that same year, the Court also decided *Hodel v. Virginia Surface Mining & Reclamation Association*.[57] Although the Court did not rest its decision in *Hodel* on ripeness doctrine, the Court did address a ripeness issue. Specifically, the

55. *Id*. at 633. As the Court of Appeal explained:

> [Appellant] complains that it has been denied all use of its land which is zoned for agriculture and manufacturing but lies within the open space area of the general plan. It has not made application to use or improve the property nor has it asked [the] City what development might be permitted. Even assuming no use is acceptable to the City, [appellant's] complaint deals with the alleged overzealous use of the police power by [the] City. Its remedy is mandamus or declaratory relief, not inverse condemnation. [Appellant] did in its complaint seek these remedies asserting that [the] City had arbitrarily exercised its police power by enacting an unconstitutional zoning law and general plan element or by applying the zoning and general plan unconstitutionally. However, on the present record these are disputed fact issues not covered by the trial court in its findings and conclusions. They can be dealt with anew should [appellant] elect to retry the case.

Id. at 630.

56. One commentator has concluded that, "[i]n *Agins*, the Court had suggested to the landowners that they return to federal court after an application had been rejected. In *San Diego Gas*, the Court transformed that suggestion into a required first step in an as-applied takings claim." *See* Stein, *supra* note 22, at 21.

57. 452 U.S. 264 (1981). In *Hodel*, coal producers and landowners challenged the enactment of the Surface Mining Control and Reclamation Act of 1977. *Id*. at 273. Specifically, the plaintiffs' claim was directed at the sections of the Act establishing its interim regulatory program, which they contended violated, among other constitutional provisions, the just compensation clause of the Fifth Amendment. *Id*. at 273. Since the claim brought was a facial challenge, the Court did not confront the same type of ripeness difficulties as in as-applied cases. The Court stated:

> Because appellees' taking claim arose in the context of a facial challenge, it presented no concrete controversy concerning either application of the Act to particular surface mining operations or its effect on specific parcels of land. Thus, the only issue properly before the District Court and, in turn, this Court, is whether the 'mere enactment' of the Surface Mining Act constitutes a taking. . . . The test to be applied in considering this facial challenge is fairly straightforward. A statute regulating the uses that can be made of property effects a taking if it 'denies an owner economically viable use of his land . . .' . . . The Surface Mining Act easily survives scrutiny under this test.

Id. at 295-96 (citations omitted). The Court held, in part because the Surface Mining Act did not facially prevent beneficial use of coal-bearing land, that there was no reason to suppose that the "mere enactment" of the Surface Mining Act had deprived appellees of economically viable use of their property. *Id*. at 296-97.

Court indicated that where a regulation provides possible variances from its requirements, a landowner should pursue such variances to ripen his claim.[58]

The regulatory takings ripeness doctrine began to crystallize in the Court's 1985 decision of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*.[59] In *Williamson County*, the Court established its two-part test for ripeness. This test requires a landowner, first, to obtain a final decision regarding the application of the challenged regulations to his property, and, second, to utilize any available state procedures for obtaining just compensation.[60] In *Williamson County*, the Williamson County Regional Planning Commission ("Commission") amended its zoning ordinances after a commercial landowner had begun constructing a residential subdivision on its property.[61] Because the Commission eventually denied the landowner's applications to complete the development for reasons related to the zoning ordinance changes, the landowner brought a regulatory takings claim.[62] However, the Court concluded that the landowner's regulatory takings claim was unripe and refused to address the merits of the complaint.[63]

Under the first part of its ripeness test, the Court held that the landowner had not obtained a final decision regarding how it would be allowed to develop its property[64] because the landowner had not sought variances that would have

58. *See id*. at 297. The Court stated:

> [A]ppellees cannot at this juncture legitimately raise complaints in this Court about the manner in which the challenged provisions of the Act have been or will be applied in specific circumstances, or about their effect on particular coal mining operations. There is no indication in the record that appellees have availed themselves of the opportunities provided by the Act to obtain administrative relief by requesting either a variance . . . or a waiver . . . . If appellees were to seek administrative relief under these procedures, a mutually acceptable solution might well be reached with regard to individual properties thereby obviating any need to address the constitutional questions. The potential for such administrative solutions confirms that conclusion that the taking issue decided by the District Court simply is not ripe for judicial resolution.

Id.

59. 473 U.S. 172 (1985).

60. *Id*. at 186. The Court stated that, "[b]ecause respondent has not yet obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property, nor utilized the procedures Tennessee provides for obtaining just compensation, respondent's claim is not ripe." *Id*.

61. *Id*. at 178.

62. *Id*. at 181-82. The Commission based its denial on reasons including density problems, road grades, lack of fire protection and minimum frontages. *See id*.

63. *Id*. at 185.

64. *Williamson County*, 473 U.S. at 190. Specifically, the Court stated:

> The Commission's regulations clearly indicated that unless a developer applied for a variance in writing and upon notice to other property owners, "any condition shown on the plat which would require a variance will constitute grounds for disapproval of the plat." Thus, in the face of respondent's refusal to follow the procedures for requesting a variance, and its refusal to provide specific information about the variances it would

allowed it to develop the property according to its proposed plat.[65] Thus, *Williamson County* transformed into a finality ripeness requirement *Hodel*'s suggestion that a landowner pursue a variance where possible.[66] Under the second part of the ripeness test, the Court noted that the landowner "did not seek compensation through the procedures the State [had] provided for doing so."[67] The Court explained this was necessary to ripen a takings claim because, until a landowner has sought and been denied compensation, he cannot claim a violation of the Takings Clause, which permits a government to take private property for public use so long as the government gives its owner "just compensation."[68]

The Court's first opportunity to reaffirm and apply the *Williamson County* test came one year later in the case of *MacDonald, Sommer & Frates v. Yolo County*.[69] In *MacDonald*, another subdivision developer brought a regulatory takings claim after the local planning commission rejected the developer's proposed map for the subdivision.[70] The Court attempted to utilize this opportunity to explain the "final decision" requirement under *Williamson County*.

> require, respondent hardly can maintain that the Commission's disapproval of the preliminary plat was equivalent to a final decision that no variances would be granted. As in *Hodel*, *Agins*, and *Penn Central*, then, respondent has not yet obtained a final decision regarding how it will be allowed to develop its property.

Id. (citations omitted).

65. *Id.* at 188-90. "It appears that variances could have been granted to resolve at least five of the Commission's eight objections to the plat." *Id.* at 188. However, "the record contains no evidence that respondent ever filed a written request for variances from the cul-de-sac, road-grade, or frontage requirements of the subdivision regulations." *Id.* at 189. "Accordingly, until the Commission determines that no variances will be granted, it is impossible for the jury to find, on this record, whether respondent 'will be unable to derive economic benefit' from the land." *Id.* at 191 (citations omitted).

66. According to one commentator:

> [*Williamson County*] added the requirement that in addition to the *Agins* requirement that a development application be submitted, a plaintiff alleging an as-applied taking must also seek a variance subsequent to a denial of its application. Without a variance request, courts and juries are unable to determine the extent of the regulatory restriction and thus determine whether the restriction affects a taking of property without just compensation.

Whitman, *supra* note 19, at 31.

67. *Williamson County*, 473 U.S. at 194.

68. *Id.* at 195. While this second requirement has very important ramifications, this Note focuses on the first component of ripeness under *Williamson County*. *See* discussion *supra* note 8 and *infra* note 118.

69. 477 U.S. 340 (1986).

70. *Id.* at 342-43. Reasons the commission rejected the plan include that it did not provide for sufficient access to the subdivision by a public street; it did not provide for adequate sewer and water service; and the local Sheriff's Department could not provide sufficient protection for the area. *Id.*

According to the Court an "essential prerequisite to [asserting a regulatory takings claim] is a final and authoritative determination of the type and intensity of development legally permitted on the subject property."[71] However, as the Court recognized, regulatory agencies possess great discretion;[72] therefore, obtaining this determination is often difficult. The Court held that the landowner in *MacDonald* had not obtained such a determination despite the fact that it had submitted a proposal and received the regulatory agency's denial.[73] As the Court explained, "rejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews."[74] Therefore, landowners must submit additional applications seeking less intensive development before a claim will be ripe. The Court did not specify how many applications must be filed before a claim is ripe, but it did recognize a "futility exception" to its finality ripeness requirements. Specifically, the Court stated that "[a] property owner is of course not required to resort to piecemeal litigation or otherwise unfair procedures in order to obtain [a final and authoritative] determination."[75] However, the Court provided no guidance as to when multiple applications will become "unfair." Therefore, rather than clarifying finality ripeness requirements, *MacDonald* actually added greater confusion.

The Court's reapplication requirement had detractors from the beginning. In his dissent from the Court's opinion in *MacDonald*, Justice White argued against importing this requirement into the Court's "final decision" analysis.[76] While he agreed that the "final decision" requirement was necessary to ensure that a regulatory agency had arrived at a definitive position, he did not believe that repeated applications and denials were necessary to establish that position.[77] Justice White argued that there were situations where "[a] decisionmaker's definitive position may sometimes be determined by factors other than its actual decision on the issue in question," such as where an

71. *Id*. at 348. As the Court explained, this requirement is due to the nature of a regulatory takings claims in that "a court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *Id.*

72. *Id*. at 350 (stating that "local agencies charged with administering regulations governing property development are singularly flexible institutions; what they take with the one hand they may give back with the other").

73. *Id*. at 351.

74. *MacDonald*, 477 U.S. at 353 n.9.

75. *Id*. at 350 n.7.

76. *Id*. at 359 (White, J., dissenting). Justice White was joined in his dissent by Chief Justice Burger, Justice Powell and Justice Rehnquist. *Id.* at 353.

77. *Id*. at 359. Justice White argued that, "[n]othing in our cases, however, suggests that the decisionmaker's definitive position may be determined only from explicit denials of property-owner applications for development. Nor do these cases suggest that repeated applications and denials are necessary to pinpoint that position." *Id*.

agency's denial explained that the agency interpreted its regulations to bar all development.[78]

2. Recent Decisions: Slowing the Merry-Go-Round

Justice White's concern about the Court's reapplication requirement proved to be prophetic. In theory, the Court's finality ripeness requirements respected the autonomy and discretion of regulatory agencies. In practice, however, these requirements endowed regulatory agencies with too much power, which threatened the legitimate rights of landowners.[79] By itself, this should have caused concern for the Court; it took on particular significance, though, as the Court became more conservative in the years following *MacDonald*.[80] Given the conservative Court's general sensitivity to threats to the rights of landowners,[81] it is not surprising that the Court began to retreat from the strict requirements of its finality ripeness doctrine after *MacDonald*. Rather than encouraging negotiation, the Court's recent decisions have sought to protect landowners' rights by opening the courthouse door and allowing them to adjudicate their regulatory takings claims.

The 1992 case of *Lucas v. South Carolina Coastal Council*[82] was the first decision to reflect the changing shade of the Court's regulatory takings ripeness doctrine. In *Lucas*, the owner of beachfront property brought a regulatory takings claim after legislation was passed that "flatly prohibited" construction of habitable improvements on land seaward of a specified baseline, which included the landowner's property.[83] In contrast to *Agins*, the

78. *MacDonald*, 477 U.S. at 359. Justice White stated:

> [I]f a landowner applies to develop its land in a relatively intensive manner that is consistent with the applicable zoning requirements and if the governmental body denies that application, explaining that all development would be barred under its interpretation of the zoning ordinance, I would find that a final decision barring all development had been made, even though the landowner did not apply for less intensive developments.

Id.

79. *See infra* Part III.B.

80. The complexion of the Court changed considerably between its decision in *MacDonald* and its next ripeness decision. Two Republican presidents appointed a total of four justices during this time. President Ronald Reagan appointed Justice Antonin Scalia in 1986, and he appointed Justice Anthony M. Kennedy in 1988. *See* KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW B-6 (14th ed. 2001). President George Bush appointed Justice David Souter in 1990, and he appointed Justice Clarence Thomas in 1992. *Id.*

81. The Court has decided a number of takings claims in favor of landowners. *See, e.g.*, Nollan v. California Coastal Comm'n, 483 U.S. 825, 836-38 (1987) (holding that unless a permit restriction serves the same legitimate police power purpose as a development ban, such restriction constitutes a taking); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 319 (1987) (holding that temporary deprivations are compensable under the Takings Clause to the same extent as permanent deprivations).

82. 505 U.S. 1003 (1992).

83. *Id*. at 1008-09.

Court held the claim was ripe even though the landowner never submitted any plan to develop his property.[84] According to the Court, "such a submission would have been pointless" since the regulatory agency had stipulated that no building permit would have been issued under the challenged legislation regardless of whether there had been an application.[85] With this statement, the Court added a "pointlessness" modification to the futility exception, allowing the exception to be invoked even where a landowner has filed no application.[86] This pointlessness modification limited the *Agins* requirement that a regulatory takings claim could be ripe only after a landowner had actually applied to develop his or her property.

Five years later, the Court's decision of *Suitum v. Tahoe Regional Planning Agency*[87] further opened the courthouse door to landowners. In *Suitum*, a regulatory agency denied a landowner permission to build on her property because it determined that her property was within an environmentally protected zone.[88] Under the challenged legislation, the landowner was entitled to Transferable Development Rights (TDRs) as a result of this classification.[89] Despite making no attempt to sell these TDRs, the Court held that the landowner had received a "final decision" as required by *Williamson County*.[90]

According to the Court, *Williamson County*'s final decision requirement "applies to decisions about how a takings plaintiff's own land may be used, and it responds to the high degree of discretion characteristically possessed by

84. *Id*. at 1012-13. The Court stated:

> In these circumstances, we think it would not accord with sound process to insist that Lucas pursue the late-created "special permit" procedure before his takings claim can be considered ripe. Lucas has properly alleged Article III injury in fact in this case, with respect to both the pre-1990 and post-1990 constraints placed on the use of his parcels by the Beachfront Management Act. That there is a discretionary "special permit" procedure by which he may regain—for the future, at least—beneficial use of his land goes only to the prudential "ripeness" of Lucas's challenge, and for the reasons discussed we do not think it prudent to apply that prudential requirement here.

Id.

85. *Id*. at 1014 n.3.

86. *See* R. Jeffrey Lyman, *Finality Ripeness in Federal Land Use Cases from Hamilton Bank to Lucas*, 9 J. LAND USE & ENVTL. L. 101, 124-27 (1993). While the futility exception had previously been available only after "at least one" meaningful application had been submitted, the pointlessness modification allowed the futility exception to be invoked even where no application had been submitted. *Id.* at 125.

87. 520 U.S. 725 (1997).

88. *Id*. at 731.

89. TDRs were designed to ease the sharpness of the land use restrictions in place. *Id*. at 730. Owners who were denied permission to build on their lands were granted these TDRs to sell to owners of land eligible for development. *Id*. For a full discussion of the role and function of TDRs, see *id*. at 730.

90. *See id*. at 744.

land use boards in softening the strictures of the general regulations they administer."[91] However, under the challenged legislation, the regulatory agency could not permit any additional land coverage or other permanent land disturbances on land that was in an environmentally protected zone.[92] Therefore, once the regulatory agency had determined that the landowner's property was in such a zone, its discretion was exhausted, and, as a result, the Court held that the landowner's regulatory takings claim was ripe.[93]

The Court's decision in *Suitum* limited the finality ripeness requirements by establishing that where a regulatory agency possesses no further discretion, landowners need not submit multiple applications to ripen their takings claims. However, *Suitum* did not provide any guidance or place any limits on the reapplication requirement where a regulatory agency retains discretion to exercise in the application of its regulations; consequently, it failed to completely stop the procedural merry-go-round of reapplication. While it was clearly a victory for landowners, *Suitum* left some commentators disappointed,[94] and, more importantly, it left landowners still facing the possibility of submitting an unspecified number of applications to ripen their regulatory takings claims.

III. PROBLEMS CAUSED BY THE COURT'S TAKINGS RIPENESS DOCTRINE

A. Status of the Takings Ripeness Doctrine Prior to Palazzolo v. Rhode Island

As demonstrated by the foregoing discussion, the Court's regulatory takings ripeness doctrine evolved in a piecemeal fashion. To understand the problems that the Court's takings ripeness doctrine caused, the individual requirements of the Court's previous takings ripeness decisions are collected and explained below. As the centerpiece of the regulatory takings ripeness

91. *Id*. at 738. The Court further explained:

> When such flexibility or discretion may be brought to bear on the permissible use of property as singular as a parcel of land, a sound judgment about what use will be allowed simply cannot be made by asking whether a parcel's characteristics or a proposal's details facially conform to the terms of the general use regulations.

Id. at 738-39.

92. *Suitum*, 520 U.S. at 739.

93. *Id*. at 739. Specifically, the Court stated that "[b]ecause the agency has no discretion to exercise over Suitum's right to use her land, no occasion exists for applying *Williamson County*'s requirement that a landowner take steps to obtain a final decision about the use that will be permitted on a particular parcel." *Id*.

94. *See, e.g.*, Haffner, *supra* note 19, at 141 (arguing that the Court's decision in *Suitum* was a "weak attempt at guidance" and that the test for obtaining a final decision remained "analytically cryptic"); *see also* Cross, *supra* note 22, at 476 (arguing that the Court's analysis was proper, but that it "failed to seize an opportunity to clear up confusion regarding ripeness in land use cases").

doctrine, *Williamson County* established that a landowner must both obtain a final decision regarding the application of the challenged regulations to his property and utilize any available state procedures for obtaining just compensation.[95] However, since this Note focuses on finality ripeness, only the requirements under the first part of the *Williamson County* test are considered herein.

1. Final Decision Distinguished from Exhaustion of Administrative Remedies

As the Court carefully distinguished in *Williamson County*, finality ripeness doctrine requires that a landowner obtain a final decision, not exhaust administrative remedies:

> The question whether administrative remedies must be exhausted is conceptually distinct . . . from the question whether an administrative action must be final before it is judicially reviewable. While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate.[96]

One commentator draws the distinction between the two by labeling the exhaustion requirement as "vertical finality" and the finality requirement as "lateral finality."[97] Under this rubric, a landowner is not obligated to "climb the administrative ladder" of vertical finality in search of review of the initial decisionmaker's ruling; however, the final decision requirement does require that a landowner seek confirmation from the initial decisionmaker that its denial of his application is, in fact, final.[98]

95. Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186 (1985).

96. *Id*. at 192 (citations omitted).

97. *See* Michael M. Berger, *The "Ripeness" Mess in Federal Land Use Cases or How the Supreme Court Converted Judges into Fruit Peddlers*, *in* INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN, 7-15 (Matthew Bender ed., 1991).

98. Thomas E. Roberts, *Ripeness And Forum Selection in Fifth Amendment Takings Litigation*, 11 J. LAND USE & ENVTL. L. 37, 47-48 (1995). Even with this useful distinction, the concepts often become confusingly intertwined when applied. In *Williamson County*, the Court held that the developer would not be required to appeal the planning commission's rejection of its plat to the board of adjustment because the board of adjustment had only the power to review, and did not participate in the approval decision. *Williamson County*, 473 U.S. at 193. However, the Court also indicated that the developer must approach both the board of adjustment and the planning commission to apply for variances because both of those bodies had power to grant such variances. *Id*. at 188-90. Therefore, "[t]he specific context of local procedures coupled with the purpose of local land use rules drive the course of action a property owner must take" in order to

2. The "Meaningful Application" Requirement

The Court established in *Agins* and *San Diego Gas* that a landowner must actually submit an application for development before there can be a final decision from the regulatory agency charged with administering a challenged regulation.[99] This seemingly straightforward requirement was complicated by *MacDonald*, which held that a landowner's application must be "meaningful."[100] The only guidance the Court has provided as to what constitutes a "meaningful application" is that the application cannot be "exceedingly grandiose."[101] The specific examples of what the Court considers to be "exceedingly grandiose" are not helpful to most landowners.[102] However, to ensure that one has, in fact, submitted a meaningful application, the Court has established that finality ripeness requires a landowner to pursue either variances or submit additional applications.

ripen his or her claim. Thomas E. Roberts, *Ripeness And Forum Selection in Fifth Amendment Takings Litigation*, 11 J. LAND USE & ENVTL. L. 37, 48 (1995).

99. *See supra* notes 52–56 and accompanying text.

100. MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 352 n.8 (1986). In *MacDonald*, the Court explained:

> [T]he Court of Appeal relied on the decisions in *Agins* to illustrate that the property owners there—as here—had not attempted to obtain approval to develop the land in accordance with applicable zoning regulations and for this reason had failed to allege facts which would establish an unconstitutional taking of private property. The implication is not that future applications would be futile, but that a meaningful application had not yet been made.

Id. (citations omitted); *see also* Gregory Overstreet, *The Ripeness Doctrine of the Taking Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go to Avoid Adjudicating Land Use Cases*, 10 J. LAND USE & ENVTL. L. 91, 107 (1994) (noting that "the existence of a final decision cannot be determined without a meaningful application").

101. *MacDonald*, 477 U.S. at 353 n.9; *see also* James Rosen, *Private Property and the Endangered Species Act: Has the Doctrine of Ripeness Stymied Legitimate Takings Claims?*, 6 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 31, 41 (1999) (stating that "[c]urrently, the only guidance that lower courts have is that an application must be 'meaningful' and cannot be 'exceedingly grandiose'"); *see also* Overstreet, *supra* note 100, at 107 (noting that "*MacDonald* held that a meaningful application cannot include a request for 'exceedingly grandiose' development").

102. *See* Roberts *supra* note 98, at 50-51. Professor Roberts stated:

> The Supreme Court has given some examples of grandiose and meaningful applications, though these examples are not especially helpful. The proposal rejected by the county in *MacDonald* was referred to as an "intense type of residential development." The *MacDonald* Court also intimated that the "five Victorian mansions" sought in *Agins v. City of Tiburon* and the nuclear power plant in *San Diego Gas & Electric Co. v. City of San Diego* were of the grandiose variety. The proposed fifty-five office tower atop the landmark Grand Central Station in the *Penn Central* case was also likely "grandiose."

Id.

As required under both *Hodel* and *Williamson County*, landowners must apply for a variance where such an option exists.[103] Even where a regulation requires an agency to deny a landowner's application, the regulation "takes" nothing from the landowner if it also empowers the agency to grant a variance that allows the landowner to develop as desired.[104] Since a variance helps define the extent of a regulation's restrictions, it must be pursued before a landowner can ripen a regulatory takings claim.[105]

Likewise, as *MacDonald* established, a landowner must submit additional permit applications for alternate, scaled-down projects that a regulatory agency might find acceptable.[106] Requiring additional applications recognizes the fact that land development is often a process of negotiation between a regulatory agency and a landowner.[107] Circumstances dictate when and how often reapplication must be made, which unfortunately requires guesswork on the part of the landowner to determine whether additional applications are necessary.[108] In *MacDonald*, the Court spoke disapprovingly only of "relatively intense"[109] and "grandiose" proposals."[110] Therefore, one commentator has argued that *MacDonald* should be read to require repeated submissions only where the initial request is grandiose.[111] However, as

103. *See supra* notes 58-67 and accompanying text.

104. Seeking a variance is not a step in exhausting administrative remedies. Rather, it establishes the extent of development that the decision-maker will permit under the applicable regulation. Thus, it is a component of lateral finality, not vertical finality.

105. *See MacDonald*, 477 U.S. at 348; *see also supra* note 72 and accompanying text (noting that regulatory agencies possess great discretion).

106. *See* Duane J. Desiderio, *Growing Too Smart -Takings Implications of Smart Growth Policies*, 13 NAT. RESOURCES & ENV'T 330, 331 (1998); *see also* 58 AM. JUR. 3D *Proof of Facts* § 137 (2000) (noting that "[t]he submission and denial of a single application may not be sufficient to satisfy the finality requirement of ripeness").

107. In *MacDonald*, the Court noted that "[l]and use planning is not an all-or-nothing proposition." 477 U.S. at 347. The Court also stated, "local agencies charged with administering regulations governing property development are singularly flexible institutions; what they take with the one hand they may give back with the other." *Id*. at 350.

108. *See* Roberts, *supra* note 98, at 51. Landowners must consider whether a regulatory agency might also reject a more modest proposal. *Id*. at 50. This requires landowners to predict what regulatory agencies will allow in their discretion. Furthermore, there is an inherent tension within this reapplication requirement. As Professor Roberts explained:

> On one level, a developer may be required to submit a request or requests and make some concessions. However, reading the meaningful application rule to make a local government's decision unreviewable because a developer is unwilling to significantly reduce a project to meet what that developer considers unreasonable demands is an overly broad application of the rule.

Id. at 52.

109. *MacDonald*, 477 U.S. at 347.

110. *Id*. at 353.

111. *See* Roberts, *supra* note 98, at 52 (noting that *MacDonald* "need not be read as requiring repeated submissions").

discussed above, the Court has provided little practical guidance as to what is "grandiose."[112] The Court's decision in *Suitum* limited the reapplication requirement, but it removed the obligation of reapplication only in situations where regulatory agencies no longer possess any discretion to exercise in determining the extent of permissible development.[113] Consequently, where regulatory agencies have discretion, landowners are still confronted with the possibility of submitting an unknown number of applications, each asking for less intensive development, before ripening a regulatory takings claim.

3. Futility

The Court's decision in *MacDonald* also recognized the existence of a futility exception to the "final decision" requirement.[114] There are two separate ways in which a landowner can successfully invoke the futility exception. First, if a landowner has submitted at least one application, he can invoke the futility exception by showing that there is strong evidence that variance applications or scaled-down reapplications would not succeed.[115] Second, under the pointlessness modification established by *Lucas*, a landowner may successfully invoke the futility exception even without filing an initial application by proving that doing so would be "pointless."[116] The

112. *See supra* notes 102-03 and accompanying text.

113. Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 739 (1997) (noting that there was no occasion to fulfill the "final decision" requirement because the regulatory agency had no further discretion to exercise).

114. *See supra* note 75 and accompanying text. While *MacDonald* provided support for such a futility exception, it did not offer much guidance as to the contours of such exception.

115. *See* Lyman, *supra* note 86, at 124. Courts have inferred futility where:

> [T]he agency has no power to grant relief; the agency lacks the power to grant relief which would permit the proposed project to be developed; the community is openly hostile to the property owner's proposal; the regulatory agency is openly hostile either toward the property owner, his proposal, or the type of development proposed; or the regulation was adopted to preclude the type of development the owner wishes to make.

Michael M. Berger, *"Ripeness" Test for Land Use Cases Needs Reform: Reconciling Leading Ninth Circuit Decisions is an Exercise in Futility*, 11 ZONING & PLAN. L. REP. 57, 60 (1988).

However, successfully invoking the futility exception under the above situations is often difficult. *See* Roberts, *supra* note 98, at 53 (stating that "[s]uspicions as to local hostility or even oral statements by local officials generally cannot be relied upon to release the property owner from the obligation of making a formal application").

116. *See* Lyman, *supra* note 86, at 125. Lyman argued that this pointlessness modification is detrimental to the goals of ripeness.

> The pointlessness modification undermines the instrumental benefits of the previous finality ripeness requirements by leaving courts with precious little guidance when they review future allegations of futility or pointlessness. Under the previously existing standard, their judgment could be informed by at least one identifiable interaction between the developer and the regulatory body. The record created by that interplay, while likely to be scanty, particularly in the context of locally controlled zoning, would nevertheless provide some indication of the posture struck by the regulators. In contrast,

applicability of the futility exception depends upon whether the relief sought is theoretically possible, not the likelihood of success.[117] Therefore, where relief is theoretically possible, landowners remain confronted with the vexatious problem of determining whether and how many times to reapply.

B. Threats Facing Landowners' Rights

The Court's regulatory takings ripeness doctrine threatens the rights of landowners.[118] With respect to finality ripeness, landowners encounter difficulty ascertaining the number of applications needed to ripen a claim as well as when submitting further applications will be considered futile.[119]

> courts henceforth will often be forced to speculate on the basis of a bald assertion and an abbreviated response.

Id.

117. *See* Roberts, *supra* note 98, at 53. Professor Roberts also stated that "[w]hile the absence of a variance or other similar procedure may render the claim ripe as to prong one on futility grounds, such an absence, standing alone, is not proof of futility. Even where no variance procedure exists, instances arise where a rezoning must be sought." *Id*. at 54.

118. While this Note focuses on the problems with the finality ripeness requirements, the second part of the *Williamson County* test, exhaustion of state compensation procedures, has also created problems. These problems deal with preclusion and landowners' inability to bring a claim in federal court after pursing all available remedies on the state level, which often includes bringing an action in state court. Two commentators have described the problem succinctly.

> Put simply, the preclusion doctrines prevent re-litigation of claims and issues in a subsequent court that were already decided in an earlier forum. Assuming that property owners must ripen their takings cases by litigating in state court first, federal courts are refusing to hear takings claims that were already litigated before state tribunals. Thus, the synergy between the preclusion doctrines and current ripeness rules is that owners are forced to litigate their constitutional takings claims in state court, without ever receiving a federal adjudication on the merits.

John J. Delaney and Duane J. Desiderio, *Who Will Clean Up the "Ripeness Mess"? A Call for Reform so Takings Plaintiffs Can Enter the Federal Courthouse*, 31 URB. LAW. 195, 200-01 (1999). For further discussion of this problem, see generally Thomas E. Roberts, *Procedural Implications of* Williamson County/First English *in Regulatory Takings Litigation: Reservations, Removal Diversity, Supplemental Jurisdication,* Rooker-Feldman*, and Res Judicata*, 31 ENVTL. L. REP. 10353 (2001); Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 WASH. U. J.L. & POL'Y 99 (2000); *supra* note 42 and accompanying text; and Douglas T. Kendall, *Choice of Forum and Finality Ripeness: The Unappreciated Hot Topics in Regulatory Takings Cases*, 33 URB. LAW. 405, 407-21 (2001) (discussing the intersection of the second *Williamson County* ripeness requirement with issue and claim preclusion).

119. *See* Roberts, *supra* note 98, at 37-39. Professor Roberts stated:

> Despite [the requirements enunciated by the Court in its decisions] the case reporters over the past decade are filled with suits that have been filed prematurely in both state and federal court without a final decision from the local authorities . . . . Some of these premature litigation efforts are understandable in light of uncertainty regarding the finality of a decision for the purposes of prong one and the difficulty in distinguishing finality from exhaustion.

Id.

Under *MacDonald*, landowners must engage in an indefinite and circular process that includes application, reapplication, followed by application for variances. One commentator likens a landowner's search for finality ripeness to "chasing a feather in the wind."[120] Due to this elusive nature, "the ripeness requirements in the land use context have created an almost impenetrable wall between landowners and the judicial system."[121] Landowners who fail to attain finality ripeness are "left at the courthouse steps after spending extraordinary amounts of [time and] money to even knock on the courthouse door."[122] Many landowners are familiar with this result; in fact, the great majority of landowners' regulatory takings claims have been dismissed on ripeness grounds.[123] Furthermore, even where landowners have been successful in their attempts to have their claims heard on their merits, they have first had to pass through years of costly litigation and negotiation due to the Court's ripeness requirements.[124]

These problems facing landowners were highlighted in the case of *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*.[125] In *Del Monte Dunes*, a regulatory agency denied a landowner permission to develop property even after the landowner submitted four separate applications, three of which sought the exact level of development that the agency had previously indicated would be acceptable.[126] Upon denial of its final proposal, the landowner filed an administrative appeal with the city council, which found the plan "conceptually satisfactory" and granted a conditional use permit to commence development.[127] However, even after the landowner met the conditions imposed for development, the regulatory agency again denied the proposed development.[128] After another administrative appeal was denied,[129] the

120. *See* Maraist, *supra* note 17, at 417.

121. *Id*. at 415.

122. *Id*. at 448.

123. According to a survey of reported federal takings cases through the end of 1998, 83% of regulatory takings cases with an opinion reported by a U.S. district court were dismissed on ripeness or abstention grounds, and of those landowners that could afford to bring an appeal, 64% of them still faced dismissal on jurisdictional grounds. *See* Delaney & Desiderio, *supra* note 118, at 196.

124. For those few landowners that received a determination that their takings claims could be adjudicated on the merits, not an actual adjudication upon those merits, had to endure an average of 9.6 years of negotiation and litigation. *Id*.

125. Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 920 F.2d 1496 (9th Cir. 1990).

126. *Id*. at 1502.

127. *Id.* at 1502-03.

128. *Id*. at 1504.

129. *Id*.

landowner filed a regulatory takings claim.[130] Remarkably, a federal district court held the landowner's regulatory takings claim to be unripe.[131]

By barring landowners' regulatory takings claims from court, even those with near-farcical procedural backgrounds such as *Del Monte Dunes*, finality ripeness requirements have endangered landowners' property rights in two ways. Most obviously, these ripeness requirements have denied landowners the protection afforded by formal adjudication of their regulatory takings claims. In addition, finality ripeness threatens landowners' rights through the very process of negotiation it seeks to further.[132] Regulatory agencies have little incentive to negotiate seriously with landowners. Agencies know that ripeness requirements make it difficult, if not nearly impossible, for landowners to bring regulatory takings claims in court.[133] Therefore, rather than making concessions to landowners, regulatory agencies can simply require landowners to submit more applications, each asking for less intensive development. Without the ability to make a credible threat to bring a claim in court, landowners are stripped of perhaps their most important bargaining chip. Not surprisingly, ripeness doctrine has been referred to as "the landowner's nemesis and the municipality's best friend."[134]

During its 1997-1998 term, the United States Congress considered legislation that would have addressed the problems created by finality ripeness requirements.[135] This legislation addressed finality ripeness in two manners. First, it "uniformly call[ed] for submission of one development application to a zoning body, and pursuit of one available waiver and/or appeal therefrom."[136]

130. *Del Monte Dunes*, 920 F.2d at 1500.

131. *Id*. The Court of Appeals subsequently found the claim ripe. *Id*. at 1509. However, *Del Monte Dunes* demonstrated the possibility for inequitable results under the Court's finality ripeness requirement.

132. This second danger to landowners' rights occurs within the process of what Professor Marc Galanter refers to as "litigotiation." *See generally* Marc S. Galanter, *Worlds of Deals: Using Negotiation to Teach about Legal Process*, 34 J. LEGAL EDUC. 268, 268 (1984). In Professor Galanter's view, settlement and adjudication should be thought of as "aspects of a single process of strategic maneuver and bargaining in the (actual or threatened) presence of courts." Marc. S. Galanter, *Federal Rules and the Quality of Settlements: A Comment on Rosenberg's*, The Federal Rules of Civil Procedure in Action, 137 U. PA. L. REV. 2231, 2232-33 (1989). "The courts are central to the litigotiation game because of the 'bargaining endowments' they bestow on the parties . . . . Bargaining chips derive from the substantive entitlements conferred by legal rules and from the procedural rules that enable these entitlements to be vindicated. " *See* Galanter, *supra*, at 268-69.

133. *See supra* notes 119-124 and accompanying text.

134. *See* Whitman, *supra* note 19, at 14.

135. *See* The Private Property Rights Implementation Act of 1997, H.R. 1534, 105th Cong. (1997), *available at* http://thomas.loc.gov (last visited Jan. 21, 2002); The Private Property Rights Implementation Act of 1998, S. 2271, 105th Cong. (1998), *available at* http://thomas.loc.gov (last visited Jan. 21, 2002).

136. *See* Delaney & Desiderio, *supra* note 118, at 248.

This would have greatly clarified the "meaningful application" requirement and eliminated the guesswork involved in reapplication. Second, this legislation would have codified the futility exception by "provid[ing] that a property owner need not make one application, or pursue a waiver/appeal therefrom, where the prospects for success are reasonably unlikely and intervention by the district court is warranted to decide the merits."[137] This legislation received considerable bipartisan support, but it fell just short of obtaining the number of votes necessary to overcome an anticipated filibuster.[138] However, the opposition's main point of contention dealt with the legislation's effect on the second part of the *Williamson County* test.[139] There appeared to be little disagreement over the positive effects this proposed reform would have had on the finality ripeness requirements.

IV. THE COURT'S DECISION IN *PALAZZOLO V. RHODE ISLAND*

Threats to landowners' property rights stemming from the finality ripeness requirements have persisted despite both the Court's recent landowner-friendly decisions and the attempted legislative reform. The Court's most recent opportunity to address this problem came in *Palazzolo v. Rhode Island*.[140] While not fundamentally changing the regulatory takings ripeness doctrine, *Palazzolo* continues the Court's trend of holding claims to be ripe. *Palazzolo* offers protection for landowners' rights by indicating that courts should hold regulatory takings claims to be ripe under a wide range of circumstances. Due to vagueness in some parts of the opinion, however, the Court's decision may

137. *Id*. at 249.

138. H.R. 1534 had 239 co-sponsors and passed the House of Representatives by a vote of 248-178. However, its companion bill S. 2271 fell 8 votes shy of the 60 votes needed to overcome an anticipated filibuster. *Id*. at 195.

139. *See id*. at 197. Delaney & Desiderio stated:

> A vehement opposition ultimately defeated S. 2271 in the Senate. The main contention of the Bill's detractors focused on the current ripeness requirement that a property owner must first exhaust state compensation remedies prior to receiving a federal hearing on the merits of a takings. This translates into a requirement that property owners must "go two rounds" by first paying for litigation in the state court, before federal court litigation can be pursued to vindicate federally protected property rights. The Bills, however, would have dispensed with mandating initial state court litigation as a ripening element to a federal claim. The Bills would have allowed property owners who only assert federal claims access to the federal courts once they received a final decision from land-use officials on the permissible uses of the property at issue. Nonetheless, the Bill's detractor's insisted that, if federal judges were permitted to hear the merits of federal takings cases without initial state court litigation, then somehow the traditional province of localities to regulate land use would be usurped.

Id. For one commentator's rebuttal of the criticisms directed towards this legislation, see John J. Delaney, *The Ripeness Hurdle for Takings Claims—H.R. 1534: Leveling the Playing Field for Citizens with Takings Claims in Federal Courts*, 14 A.L.I. 473, 478-81 (1998).

140. 121 S. Ct. 2448 (2001).

ultimately leave both landowners and regulatory agencies dissatisfied with the status of the regulatory takings ripeness doctrine.

In 1959, Anthony Palazzolo and several other individuals formed Shore Gardens, Inc. (SGI), which purchased three underdeveloped adjoining parcels of land along the coastline of Westerly, Rhode Island.[141] Mr. Palazzolo subsequently purchased the interests of his associates and became the sole shareholder of SGI.[142] Between 1962 and 1971, SGI made three attempts to develop the property, none of which was successful.[143] Before the next application was made, two significant intervening events occurred. In 1971 Rhode Island created the Rhode Island Coastal Resources Management Council, which passed regulations designating certain areas as "protected coastal wetlands."[144] Seven years later, title of the disputed parcel passed to Mr. Palazzolo in his individual capacity.[145]

In 1983, Mr. Palazzolo again sought to develop his property. He submitted an application to the Council that requested permission to fill the entire wetlands land area of his property for development purposes. The Council, however, rejected this application, in part because it conflicted with the Coastal Resources Management Plan that was in effect.[146] In 1985, Mr. Palazzolo submitted another application. This proposal sought to construct a private beach club that required filling only eleven of Mr. Palazzolo's eighteen wetland acres.[147] The Council rejected this application as well because it concluded this proposed activity did not serve a "compelling public purpose," as was required to secure a special exception under its regulations.[148] Mr.

141. *Id*. at 2455.

142. *Id*.

143. *Id*. The first application, made in 1962, sought to fill the entire property. This application, however, was denied by the Rhode Island Division of Harbors and Rivers due to "lack of essential information." *Id*. The second application was submitted one year later, and in 1966, while the second application was still pending, SGI submitted a third proposal that sought "more limited filling for use as a private beach club." *Id*. The Rhode Island Department of Natural Resources initially indicated its approval of the second and third applications, but it later withdrew this approval due to "adverse environmental impacts." *Id*. at 2455-56.

144. *Id*. at 2456.

145. *Palazzolo*, 121 S. Ct. at 2456. The reason title passed to Palazzolo was because SGI failed to pay its taxes and lost its corporate charter. "[T]itle to the property passed, by operation of state law, to petitioner as the corporation's sole shareholder." *Id*.

146. *Id*. Other reasons the Council offered for rejecting this application included that it was vague and inadequate for the size and nature of the proposed project. *Id*.

147. *Id*. The Court described the proposed project as a "beach club," but stated that "[t]he details do not tend to inspire the reader with an idyllic coastal image, for the proposal was to fill 11 acres of the property with gravel to accommodate 50 cars with boat trailers, a dumpster, port-a-johns, picnic tables, barbecue pits of concrete, and other trash receptacles." *Id.*

148. *Id*. Under the Council's regulations, a landowner who wished to fill his or her land needed a "special exception," which was granted only if the proposed activity served a "compelling public purpose which provides benefits to the public as a whole as opposed to

Palazzolo appealed this decision to the Rhode Island state courts, which affirmed the Council's decision.[149]

Mr. Palazzolo subsequently brought a regulatory takings claim before the Rhode Island Superior Court, seeking damages of $3,150,000, which was based upon an appraiser's estimate of the value that a 74-lot residential subdivision would have on the property.[150] Upon completion of a bench trial, a justice of the Rhode Island Superior Court ruled against Mr. Palazzolo.[151] The Rhode Island Supreme Court affirmed this decision, holding first that the claim was not ripe; second, that Mr. Palazzolo could not challenge regulations that were passed before he succeeded to legal title; and, third, that his claimed deprivation of all economically beneficial use was contradicted by undisputed evidence that $200,000 in development value remained on an upland portion of his property.[152] After granting certiorari, the Supreme Court of the United States reversed the Rhode Island Supreme Court on the first two issues, upheld its decision regarding the third issue and remanded the case for further consideration.[153]

A. The Majority Opinion

Recognizing that "[t]he central question in resolving the ripeness issue . . . is whether [he] obtained a final decision from the Council determining the permitted use for [his] land," the Court held that Mr. Palazzolo had satisfied the requirements of finality ripeness.[154] The Rhode Island Supreme Court had concluded that Mr. Palazzolo's claim was not ripe in part due to his failure to pursue "any other use for the property that would involve filling substantially less wetlands."[155] Relying on *MacDonald*, the Rhode Island Supreme Court

individual or private interests." *Id*. (citing the Rhode Island Coastal Resources Management Program § 130A(1)).

149. *Id*.

150. *Palazzolo*, 121 S. Ct. at 2456.

151. *Id*.

152. *Id*. at 2457. In addition to holding that Mr. Palazzolo could not recover under the claim asserting denial of all economic use, the Rhode Island Supreme Court also concluded he could not recover under the more flexible *Penn Central* test. In reaching this conclusion, the Rhode Island Supreme Court reasoned that Mr. Palazzolo could have "no reasonable investment backed expectations" that were affected by the challenged regulation because the regulation predated his ownership. *Id*.

153. *Id*. With respect to the ripeness issue, the Court voted 6-3 to reverse the decision of the Rhode Island Supreme Court. Justice Kennedy's majority opinion was joined by Chief Justice Rehnquist, as well as Justices O'Connor, Scalia, Thomas and Stevens. *Id*. at 2454. However, the decision of the Court was only 5-4 regarding the issue of whether post-enactment acquisition of title would bar a claim because Justice Stevens did not join. *Id*.

154. *Id*. at 2458.

155. *Palazzolo*, 121 S. Ct. at 2458 (citing Palazzolo v. Rhode Island, 746 A.2d 707, 714 (R.I. 2000)).

had concluded that the extent of permissible development would not be known until Mr. Palazzolo filed additional applications requesting less filling on the wetlands.[156] However, the United States Supreme Court reversed, stating that this reasoning "[was] belied by the unequivocal nature of the wetland regulations at issue and by the Council's application of the regulations to the subject property."[157] The Court argued that there was no indication that the Council would have accepted Mr. Palazzolo's proposals if they had occupied a smaller area. The Court based this conclusion on the fact that the Council denied Mr. Palazzolo's proposed activity because it was not a "compelling public purpose," not because it was grandiose or requested too much fill.[158] Once the Council made this decision, the extent of permissible development on Mr. Palazzolo's land and further applications were unnecessary.

As the Court explained, its earlier decisions "stand for the important principle that a landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation."[159] The Court also held, however, that "once it becomes clear that [an] agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened."[160] With respect to Mr. Palazzolo's claim, the Council's decisions denied *any* filling of Mr. Palazzolo's wetlands because his proposals were not "compelling public purpose[s]."[161] Since "with no fill there [could] be no structures and no development on the wetlands," the extent of permissible development was known, and Mr. Palazzolo did not need to pursue further applications to ripen his claim.[162]

156. *Id*. The Rhode Island Supreme Court suggested "that while the Council rejected [Mr. Palazzolo's] effort to fill all of the wetlands, and then rejected his proposal to fill 11 acres, perhaps an application to fill (for instance) 5 acres would have been approved." *Id*.

157. *Id*.

158. *Id*. at 2459.

159. *Id*. The Court also stated that "a landowner must give a land-use authority an opportunity to exercise its discretion." *Id*. Furthermore,

> [u]nder [the Court's] ripeness rules a takings claim based on a law or regulation which is alleged to go too far in burdening property depends upon the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law.

Id.

160. *Palazzolo*, 121 S. Ct. at 2459.

161. *Id*. According to the Court, the fact that the Council interpreted its regulations to bar Mr. Palazzolo from engaging in any filling or development activity on the wetlands was further reinforced by the briefs, arguments and statements by counsel for both sides. *Palazzolo*, 121 S. Ct. at 2459.

162. *Id*.

In holding Mr. Palazzolo's claim to be ripe, the Court also addressed the fact that he never submitted an application to develop solely the unprotected uplands portion of his parcel. Such an application likely would have been approved.[163] Rhode Island argued that because Mr. Palazzolo did not pursue development opportunities on this portion of his land a court could not determine "how far" the challenged regulation actually went in taking his property.[164] While the Court agreed that the purpose of ripeness doctrine is to determine "how far" a regulation limits a landowner's use of his property,[165] it argued there was no uncertainty regarding the value of Mr. Palazzolo's uplands parcel.[166] According to the Court, Rhode Island had accepted a value of $200,000 for this parcel in its brief.[167] Furthermore, the Court concluded that this was the extent of permissible development because Rhode Island had an incentive to establish the highest value possible since it was aware of the applicability of a *Penn Central* regulatory takings claim.[168] Since the extent of permissible development was known, the Court held that Mr. Palazzolo did not need to actually apply to develop the uplands portion of his parcel in order to ripen his claim.

The final issue the Court faced in holding Mr. Palazzolo's claim to be ripe was that he had never applied to develop the subdivision that served as the basis for the damages he sought.[169] The Court recognized that "[t]he mere

163. *Id*. at 2460. This uplands parcel was not within the zone of protected land and therefore was not subject to the strict "compelling public purpose" test. Council officials testified at trial that they would have allowed Mr. Palazzolo to develop this portion of his parcel. *Id.*

164. *Id*. The Rhode Island Supreme Court had noted, "[i]t would be possible to build at least one single-family home on the upland portion of the parcel." *Id*. (emphasis added). In arguing that Mr. Palazzolo's claim was unripe, Rhode Island contended use of the qualification "at least" suggested there was additional development possible. *Id.*

165. *Id*.

166. *Palazzolo*, 121 S. Ct. at 2460-61.

167. *Id*. at 2460. Mr. Palazzolo's petition for certiorari stated that his uplands had an estimated $200,000 of worth. The Court noted that Rhode Island not only did not contest this figure, but it also cited it as a fact in its opposition brief. *Id.*

168. *Id*. at 2461. In her dissent, Justice Ginsburg argued Rhode Island may have accepted the $200,000 value for the upland parcel because only a *Lucas* claim was raised in the pleadings at the state trial court. *Id*. at 2474 (Ginsburg, J., dissenting). She contended that because a *Penn Central* claim was not pursued at trial, Rhode Island had no reason to assert that more than a single-family residence might be placed on the upland parcel. *Id*. However, the Court concluded that Rhode Island was aware of the applicability of *Penn Central* and that the state court opinions could not be read as indicating that a *Penn Central* claim was not properly presented from the beginning of the litigation. *Id*. at 2461.

169. *Id*. This is relevant because the Council considered a proposal only where an applicant had satisfied "all other regulatory preconditions for the use envisioned in the application." *Id*. A subdivision proposal would have required several forms of approval, and since Mr. Palazzolo did not pursue them, Rhode Island accused Mr. Palazzolo of employing a "hide the ball strategy of submitting applications for more modest uses to the Council, only to assert later a takings claim action predicated on the purported inability to build a much larger project." *Id.*

allegation of entitlement to the value of an intensive use will not avail the landowner if the project would not have been allowed under other existing, legitimate land use limitations."[170] However, the Court also explained that its ripeness decisions did not require Mr. Palazzolo to apply for this subdivision because the limitations imposed by the Council's regulations were clearly known from the denial of his applications.[171] To conclude its ripeness discussion, the Court provided a useful summary:

> [W]here the state agency charged with enforcing a challenged land use regulation entertains an application from an owner and its denial of the application makes clear the extent of development permitted, and neither the agency nor a reviewing state court has cited non-compliance with reasonable state law exhaustion or pre-permit processes, federal ripeness rules do not require the submission of further and futile applications with other agencies.[172]

After holding that Mr. Palazzolo's regulatory takings claim was ripe, the Court addressed whether the Rhode Island Supreme Court was correct in concluding that Mr. Palazzolo's acquisition of title after the enactment of the challenged regulation prevented him from bringing his regulatory takings claim. According to the Court, a regulatory takings claim "is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction."[173] For support the Court cited its decision in *Nollan v. California*

170. *Id*. Furthermore, the Court also indicated that it would not prohibit local governments from requiring landowners to "follow normal planning procedures," nor would it prohibit them from "enact[ing] rules to control damage awards based on hypothetical uses that should have been reviewed in the normal course." *Id*.

171. *Palazzolo*, 121 S. Ct. at 2462. The Council had informed Palazzolo that he could not fill his wetlands, and, therefore, "it follows of necessity" that he could not fill it to build a subdivision. *Id*. at 2461.

172. *Id*. at 2462 (citation omitted).

173. *Id*. at 2464. The Court noted that the Rhode Island Supreme Court's contrary holding amounted to "a single, sweeping, rule: [a] purchaser or successive title holder . . . is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking." *Id*. at 2462. In rather colorful language, the Court stated that "[t]he State may not put so potent a Hobbesian stick into the Lockean bundle." *Id.* at 2462. This issue was discussed extensively prior to the Supreme Court's decision of *Palazzolo*. For discussion of the "notice rule," see generally Steven J. Eagle, *The Regulatory Takings "Notice Rule": Sources and Implications*, 64 A.L.I.-A.B.A. 365 (2001); R.S. Radford & J. David Breemer, *Great Expectations: Will* Palazzolo v. Rhode Island *Clarify the Murky Doctrine of Investment-Backed Expectations in Regulatory Takings Law?*, 9 N.Y.U. ENVTL. L.J. 449 (2001) and Daniel J. Hulsebosch, *The Tools of Law and the Rule of Law: Teaching Regulatory Takings After* Palazzolo, 46 ST. LOUIS U. L.J. __ (2002). This issue will likely generate great interest among commentators; however, this Note will not address in depth either the majority's position or the concurrences and dissents regarding this issue. Rather, this Note highlights the role of ripeness in the Court's reasoning regarding this issue.

Coastal Commission[174] as well as ripeness concerns. Under these ripeness concerns, the Court noted that it might take years to ripen a claim, and "[s]hould an owner attempt to challenge a new regulation, but not survive the process of ripening his or her claim . . . under [the Rhode Island Supreme Court's] proposed rule the right to compensation may not [be] asserted by an heir or successor, and so may not be asserted at all."[175] The Court concluded that where the steps necessary to ripen a claim were not taken, or could not have been taken by a previous owner, "[i]t would be illogical, and unfair, to bar a regulatory takings claim because of the post-enactment transfer of ownership."[176]

Despite succeeding on the ripeness and post-enactment acquisition issues, Mr. Palazzolo's regulatory takings claim for total deprivation of economically beneficial use ultimately failed because the Court recognized that $200,000 of undisputed value remained in the uplands portion of Mr. Palazzolo's parcel.[177] The Court remanded the case to the Rhode Island state court system to examine Mr. Palazzolo's claim under a *Penn Central* analysis, which had not been addressed at trial.[178]

174. 483 U.S. 825 (1987). In *Nollan*, the Court confronted the issue of whether a state regulatory agency could require oceanfront landowners to provide beach access to the public as a condition to obtaining a development permit. *Id.* at 827. The principal dissenting opinion in *Nollan* noted that the relevant regulatory agency's policy was to require the condition. Therefore, the Nollans, who purchased their home after the policy became effective, were "on notice that new developments would be approved only if provisions were made for lateral beach access." *Id*. at 860. However, a majority of the *Nollan* Court rejected this argument, stating that "[s]o long as the [regulatory commission] could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot." *Id*. at 833 n.2.

175. *Palazzolo*, 121 S. Ct. at 2463. The rule proposed by the Rhode Island Supreme Court would prejudice newly regulated landowners by stripping them of the ability to transfer any interests that were possessed prior to a regulation. *Id*.

176. *Id*.

177. *Id*. at 2465. Mr. Palazzolo had accepted both the Council's contention and the Rhode Island trial court's finding that his parcel, by way of the uplands portion, retained $200,000 of development value under the challenged regulations. *Id.* at 2464. He attempted to avoid an adverse finding on this issue by arguing that the upland parcel was distinct from the wetlands portions, and that the asserted deprivation of all beneficial use should be limited to the latter. *Id*. However, the Court noted that Palazzolo did not present this argument in either the state courts or his petition for certiorari and held that since the case came before it on the premise that the entire parcel served as the basis for his takings claim, the total deprivation argument failed. *Id.*

178. *Id*. at 2465. For a discussion of the distinction between a *Penn Central* regulatory takings claim and *Lucas* claims of total deprivation of economically beneficial use, see *supra* note 38.

B. The Ripeness Dissent

In her dissent, Justice Ginsburg argued that the Court's opinion was "both inaccurate and inequitable."[179] She contended that the Court's decision was inaccurate because the record was ambiguous with respect to the extent of permissible development.[180] As a result, Justice Ginsburg believed Mr. Palazzolo needed to file additional applications to ripen his claim.[181] To defeat Mr. Palazzolo's claim of total deprivation of economic use, Rhode Island needed only to establish that *some* beneficial use remained under the challenged regulations.[182] Therefore, Rhode Island established "only a floor, not a ceiling" to the value of Mr. Palazzolo's uplands portion of his parcel when it proved the Council would have allowed him to build a $200,000 home on it.[183] For related reasons, Justice Ginsburg argued the Court's decision was also inequitable. Because Rhode Island had no reason to pursue further inquiry into potential upland development, Justice Ginsburg stated that Mr. Palazzolo's tactic of presenting a new claim before the Court amounted to a "bait-and-switch ploy," which the Court ought not have entertained.[184]

V. ANALYSIS OF *PALAZZOLO V. RHODE ISLAND*: THE NEW "SHADE" OF RIPENESS

While the Court's decision in *Palazzolo v. Rhode Island* does not fundamentally change the regulatory takings ripeness doctrine, it nevertheless is a significant decision. Continuing its recent trend, *Palazzolo* reflects the

179. *Id*. at 2473 (Ginsburg, J., dissenting). Justice Ginsburg was joined in her dissent by Justice Souter and Justice Breyer. *Id*. at 2472.

180. *See Palazzolo*, 121 S. Ct. at 2477 (Ginsburg, J., dissenting) (noting that witnesses acknowledged at trial that Mr. Palazzolo might be able to build on an undetermined number of lots on the uplands parcel).

181. *Id*. at 2473. Justice Ginsburg viewed Mr. Palazzolo's case as a "close analogue" to *MacDonald* and cited *MacDonald* for the proposition that "[r]ejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews." *Id*. (citing MacDonald, Sommer & Frates v. Yolo Co., 477 U.S. 340, 353 n.9 (1986)).

182. *Id*. at 2474. Justice Ginsburg stated that Palazzolo "pressed only a *Lucas*-based claim that he had been denied *all* economically viable use of his property." *Id.* "Responding to Palazzolo's *Lucas* claim, the State urged as a sufficient defense this now uncontested point: CRMC 'would [have been] happy to have [Palazzolo] situate a home 'on the uplands,' thus allowing [him] to realize 200,000 dollars." *Id.*

183. *Id*. at 2476.

184. *Id*. at 2474. Justice Ginsburg argued that in holding Palazzolo's claim ripe, the Court "transform[ed] the State's legitimate defense to the only claim Palazzolo stated below into offensive support for other claims he state[d] for the first time [before the Supreme Court]." *Id.* at 2476. Furthermore, she argued that the "Court's waiver ruling thus amount[ed] to an unsavory invitation to unscrupulous litigants: Change your theory and misrepresent the record in their petition for certiorari; if the respondent fails to note your machinations, you have created a different record on which this Court will review the case." *Id.*

Court's growing inclination to hold regulatory takings claims to be ripe, thus modifying the "shade" of the takings ripeness doctrine. In keeping with the Court's clarification of its takings ripeness doctrine, lower courts should find claims to be ripe under a wider range of circumstances. By opening the courthouse door to landowners and their regulatory takings claims, *Palazzolo* offers increased protection for landowners' rights. However, the Court's decision in *Palazzolo* contains vagueness that may ultimately leave both landowners and regulatory agencies dissatisfied with the status of the takings ripeness doctrine.

Upon initial review, it may be difficult to ascertain what *Palazzolo* contributes to the regulatory takings ripeness doctrine. Indeed, some commentators have suggested that the Court's decision in *Palazzolo* adds little, if anything, to the Court's existing ripeness doctrine.[185] This conclusion is understandable, especially since *Palazzolo* can be seen as a close analogue to the Court's earlier decision of *Suitum*. In *Suitum* the Court indicated that where an agency has no further discretion to exercise over a landowner's right to use his property, the finality ripeness doctrine does not require the landowner to pursue variances or submit additional applications.[186] According to the Court in *Palazzolo*, "the Council's decisions make plain that the agency interpreted its regulations to bar [Mr. Palazzolo] from engaging in any . . . development activity on the wetlands."[187] Once the Council interpreted its regulations to prohibit any development, it necessarily had no further discretion to exercise. The Court, therefore, could have held Mr. Palazzolo's claim to be ripe without expanding beyond its earlier decision in *Suitum*. While this analysis is ultimately correct, such a narrow view of the Court's decision does not recognize the importance of the Court's growing inclination to hold regulatory takings claims to be ripe.

On several levels, *Palazzolo* reflects the Court's inclination to hold a takings claim to be ripe. Superficially, this inclination is most apparent in Mr. Palazzolo's avoidance of the procedural problems that have plagued many landowners who previously attempted to bring regulatory takings claims.[188]

185. *See, e.g.*, John D. Echeverria, *A Preliminary Assessment of* Palazzolo v. Rhode Island, 31 ENVTL. L. REP. 11112, 11115 (2001) (stating that "the outcome [in *Palazzolo*] appears to have turned on the particular facts of the case and the Court has not broken any new ground in terms of basic doctrine"); Steven J. Eagle, Palazzolo v. Rhode Island*: A Few Clear Answers and Many New Questions*, 32 ENVTL. L. REP. 10127, 10131 (2002) (noting that "[i]t is unclear whether *Palazzolo* will have an appreciable effect upon the Court's regulatory takings ripeness jurisprudence").

186. *See supra* notes 91-93 and accompanying text.

187. *Palazzolo*, 121 S. Ct. at 2459.

188. Perhaps the most obvious, yet least trustworthy, reflection of the Court's inclination to hold a regulatory takings claim to be ripe is the fact that the Court held Mr. Palazzolo's claim to be so. *Palazzolo*, 121 S. Ct. at 2464. By itself, this stands in contrast to the Court's early takings ripeness decisions. *See supra* Part II.C.1.

This is made even more noteworthy by Mr. Palazzolo's successful evasion of the procedural merry-go-round of reapplication. Mr. Palazzolo submitted a total of only two applications to develop his property, and while the second application requested less intensive development, it still ambitiously sought to fill more than half of his wetlands property.[189] After this brief and relatively modest attempt to accommodate, the Court held Mr. Palazzolo's takings claim to be ripe. In this respect, *Palazzolo* stands in stark contrast to *Del Monte Dunes*, where the landowner followed an exhaustive and frustrating process of application, denial, re-application and denial again only to have a district court hold its regulatory takings claim to be unripe.[190] Such a dramatic contrast provides at least a superficial indication that the Court is leaning toward holding regulatory takings claims to be ripe at a lower threshold.

The Court's inclination is even more meaningfully reflected by the extent of the Court's shift away from encouraging negotiation. As Justice Ginsburg's dissent illustrated, Rhode Island presented a compelling argument that the value of Mr. Palazzolo's uplands parcel remained uncertain.[191] Had the Court sought to encourage negotiation between Mr. Palazzolo and the Council, it could have easily utilized its ripeness doctrine to require additional applications, which would have provided more time and opportunity for compromise and settlement outside of the court system. Instead, the Court went to great lengths to enable Mr. Palazzolo to litigate his takings claim without further delay. Even though the Council never made a decision regarding what development it would allow on Mr. Palazzolo's uplands parcel, the Court argued that the value was certain since Rhode Island had "stipulated" to it in its opposition brief.[192] In order to sidestep further ambiguity,[193] the Court postulated that this was the maximum value of the parcel because Rhode Island was merely *aware* of the applicability of a claim Mr. Palazzolo did not raise at the trial level.[194] Leaving aside questions of whether the Court's

189. *Palazzolo*, 121 S. Ct. at 2458. Mr. Palazzolo's second application sought to fill eleven of his eighteen wetland acres. *Id*.

190. For a description of the landowner's difficulties in *Del Monte Dunes*, see *supra* notes 125-31 and accompanying text.

191. Rhode Island argued that the value of the uplands parcel remained in doubt because the Rhode Island Supreme Court had merely stated that "it would be possible to build at least one single-family home on the upland portion of the parcel." *Palazzolo*, 121 S. Ct. at 2460 (emphasis added); s*ee also supra* notes 180-83 and accompanying text.

192. *See* discussion at *supra* note 164 and accompanying text.

193. Possible ambiguity still remained because Mr. Palazzolo had brought only a claim of total deprivation of economic use. Any value, not only the highest value, remaining in the uplands parcel would be sufficient to defeat this claim. *See* discussion at *supra* note 168 and accompanying text.

194. *See id.* The Court's argument could be characterized cynically as requiring Rhode Island to anticipate every claim Mr. Palazzolo might have brought and argue against each one, regardless of whether he ever actually brought them.

decision was ultimately correct, the Court could have reasonably held Mr. Palazzolo's claim to be unripe at any one of several steps if it had sought to encourage negotiation. The Court's decision not to do so indicates that it had a greater interest in protecting Mr. Palazzolo's property rights through litigation.

In *Palazzolo*, the Court attempted to ensure that the rights of landowners are protected when they first bring regulatory takings claims. The Court's clarification of the finality ripeness requirements indicates to lower courts that they should hold claims to be ripe under a wider set of circumstances. As the Court had previously explained, the ripeness doctrine exists to ensure that the extent of a challenged regulation is known.[195] In *Palazzolo* the Court stated that "the extent of the restriction on property is not known and a regulatory taking has not yet been established"[196] until a regulatory agency has the opportunity to explain the reach of a challenged regulation "using its own reasonable procedures."[197] However, the court also stated that, "once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty," ripeness doctrine requires nothing further from a landowner.[198] With this clarification, the Court placed two limitations on the finality ripeness requirements.

The Court's two limitations provide increased protection against the procedural merry-go-round by enabling landowners to bring their regulatory takings claims in court. The first limitation halts the operation of finality ripeness only where agencies have no further discretion to exercise. Therefore, it merely reaffirms the Court's decision in *Suitum*.[199] Because the permissible uses of property can be known to a reasonable degree of certainty even where an agency still possesses discretion,[200] the second limitation offers landowners protection beyond that provided by *Suitum*. This limitation on finality ripeness requirements directs courts to hold claims to be ripe in two situations not specifically covered by the Court's previous decisions. In the first situation, an agency might deny an application but also specify what development it will

195. *See* MacDonald, Sommer & Frates v. Yolo Co., 477 U.S. 340, 348 (1986). The Court stated:

> It follows from the nature of a regulatory takings claim that an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property. A court cannot determine whether a regulation has gone "too far" unless it knows how far the regulation goes.

Id.

196. *Palazzolo*, 121 S. Ct. at 2459.

197. *Id.*

198. *Id*.

199. *See* discussion at *supra* note 93 and accompanying text.

200. *Palazzolo*, 121 S. Ct. at 2459. The importance of this limitation to the Court is highlighted by the fact that the Court repeats it once again at the end of its ripeness discussion. *See id*. at 2462.

allow. Depending on the clarity and definiteness of the agency's description, a court should conclude that the extent of permissible development is known to a reasonable degree and hold a takings claim to be ripe without requiring the landowner to submit further applications. In the second situation, an agency might require repeated submissions, never giving any indication as to what, if any, development it will permit. Here, a court could reasonably conclude that the agency did not intend to permit any development.[201] Therefore, a regulatory takings claim brought under such circumstances would be ripe without requiring submission of additional applications.

The Court suggested that its two limitations, particularly the second, should be read expansively when it indicated that pursuing variances and multiple applications are not always necessary in order to know the extent of permissible development. According to the Court,"[a]s a general rule, until [a landowner has pursued variances and submitted additional applications] the extent of [a] restriction on property is not known."[202] Because this is only "a general rule," there must be other ways by which the extent of restrictions may be known.[203] This enables courts to hold regulatory takings claims to be ripe even where agencies still possess discretion as described in the two foregoing scenarios.

Despite the limitations that *Palazzolo* places on finality ripeness requirements, it may initially seem that the Court's decision actually authorizes agencies to establish more procedural requirements before allowing one to bring a regulatory takings claim. The Court stated that "[t]he mere allegation of entitlement to the value of an intensive use will not avail the landowner if the project would not have been allowed under other, existing, legitimate land use limitations."[204] The Court also indicated that it would not prohibit state

201. At oral arguments in *Del Monte Dunes*, some Justices indicated that such a conclusion can reasonably be drawn. As one commentator has explained:

> The hostility of some of the justices to the city's position was apparent at oral argument before the Supreme Court. Justice Kennedy took the city to task for seeking to deny Del Monte Dunes a remedy for the city's repeated denials of its application. Not to be outdone in condemning the agency, Justice Scalia observed that the developer had submitted five applications, each for a reduced development in response to a recommendation by the agency, yet the agency denied each application in succession, and then quipped, "isn't there some point at which . . . you begin to smell a rat[?]"

Kendall, *supra* note 118, at 428.

202. *Palazzolo*, 121 S. Ct. at 2459.

203. This statement harkens back to the dissent in *MacDonald* where Justice White argued that "[a] decisionmaker's definitive position may sometimes be determined by factors other than [an agency's] actual decision on the issue in question." *MacDonald*, 477 U.S. at 359; *see also supra* notes 77-78. Given that Justice White was arguing against a rule requiring repeated applications, *id*., the Court's implicit adoption of Justice White's reasoning further indicates that it endorses a more limited application of its finality ripeness requirements.

204. *Palazzolo*, 121 S. Ct. at 2461.

and local governments from requiring landowners to "follow normal planning procedures" or bar them from "enact[ing] rules to control damage awards based on hypothetical uses that should have been reviewed in the normal course."[205] Such statements appear to grant government officials "the opportunity to establish added protections against premature litigation."[206] As one commentator explained:

> [L]ocal officials may well interpret such "added protections against premature litigation" language as a green light to pile more and more preconditions upon landowners embarking on prolonged sets of negotiations with agency officials with the goal of obtaining "final determinations" that themselves are preconditions to state judicial review.[207]

While this analysis seems reasonable, the Court in *Palazzolo* also stated that "[g]overnment authorities, of course, may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision."[208] This statement removes any doubt that the Court's decision sought to stop the procedural merry-go-round that has threatened landowners' rights.[209]

By limiting the finality ripeness requirements, *Palazzolo* protects landowners' rights in two ways. First, these limitations provide landowners with greater access to courts by indicating that courts should hold claims to be ripe under a greater set of circumstances. Simply securing substantive review of their regulatory takings claims under the Fifth Amendment increases protection for landowners' constitutional rights. Second, greater access to the court system also provides landowners with an important bargaining chip to utilize in their negotiations with regulatory agencies.[210] Legitimate threats to bring claims in court will pressure regulatory agencies to engage seriously in a process of negotiation and compromise with landowners, which will hopefully lead to mutually acceptable resolutions outside of the court system. Agencies will be motivated to use their discretion to the fullest extent possible in adjusting the strictures of land-use regulations, which further protects landowners' rights.

While it offers landowners the promise of greater protection for their rights, the vagueness of the Court's ripeness decision in *Palazzolo* may leave both landowners and regulatory agencies dissatisfied with the status of the

205. *Id*.; *see also* Echeverria, *supra* note 185. According to Professor Echeverria, agencies "should carefully review their land use regulations to ensure that they clearly state that an authorization is conditional upon meeting other applicable regulatory requirements." *Id.*

206. *Id*.

207. Eagle, *supra* note 185, at 10131.

208. *Palazzolo*, 121 S. Ct. at 2459.

209. Eagle, *supra* note 185, at 10132. According to Professor Eagle, this statement indicates that "overreaching by localities might result in judicial invalidation of the unwarranted obstacles to development that flourish under *Williamson County*." *Id.*

210. *See* discussion at *supra* note 132.

regulatory takings ripeness doctrine. Landowners' primary complaint with the Court's decision will be that it does not provide the necessary definiteness or clarity.[211] Even if claims are considered ripe because the permissible uses of property are known to a reasonable degree, regulatory agencies, relying on the hazy standard of what is "reasonable," might still require landowners to submit multiple applications. This would defeat the Court's attempt to provide increased protection to landowners from the procedural merry-go-round.

Two considerations must be balanced against this criticism. First, this criticism suggests only that regulatory agencies might not believe that the Court's decision truly grants landowners greater access to the courthouse, and that, therefore, *Palazzolo* does not adequately increase landowners' bargaining strength. Even if true, this argument does not affect landowners' actual access to court, which an examination of the Court's trend certainly indicates has increased. Thus, *Palazzolo* still stands for increased protection by securing substantive review of landowners' regulatory takings claims.

Second, in order to respect the autonomy of regulatory agencies and allow them to use their discretion, any judicially created standard of ripeness must be fact-sensitive. Were the Court to limit arbitrarily the number of applications, courts would risk intruding upon the decision-making processes of regulatory agencies, thus crossing the boundary of proper judicial power. To achieve a more definite standard of ripeness, the legislature must enact it.

The Court's decision in *Palazzolo* may also create problems for regulatory agencies. The lack of definiteness could enable landowners to bring a regulatory takings claim before the extent of challenged regulations is truly known. This in turn would provide landowners with disproportionate strength in the negotiation process, permitting them to stymie the valid application of regulations that do not go "too far." Second, under a fact-sensitive standard of ripeness a court might hear a claim before a regulatory agency is able to exercise its discretion, which would transgress the bounds of proper judicial power. Finally, were a court to decide a regulatory takings claim on the basis of an incomplete factual record, it might hold a regulatory agency liable for taking more of a landowner's property than it actually would have taken if it had been allowed to exercise its discretion.

While these threats to regulatory agencies are significant, a further consideration ameliorates at least one of these shortcomings in the *Palazzolo* decision. The final threat mentioned above would motivate regulatory agencies to indicate exactly the extent of permissible development at the earliest possible stage of the application process. Such forthrightness would save both landowners and regulatory agencies time and money. Unfortunately, this does

211. *Palazzolo* certainly does not possess the definiteness or clarity of the failed federal legislation. For a discussion of the substance of this legislation, see *supra* notes 136-37 and accompanying text.

not address the first two concerns, which are serious threats to the appropriate distribution of power in a democratic system.

VI. CONCLUSION

The Supreme Court's regulatory takings ripeness doctrine represents one of the most significant threats currently facing the constitutional rights of landowners. The Court's ripeness decision in *Palazzolo v. Rhode Island* is its most recent attempt to address the problems caused by the finality ripeness requirements of its takings ripeness doctrine. While the Court's decision in *Palazzolo v. Rhode Island* does not fundamentally change the regulatory takings ripeness doctrine, it does change its "shade." Therefore, it is a significant takings ripeness decision.

Palazzolo's significance rests in the fact that it reflects the Court's growing inclination to hold takings claims to be ripe. Initially, the Court's takings ripeness decisions sought to encourage negotiation by requiring landowners to pursue variances and submit multiple applications. While these requirements respected the autonomy and discretion of regulatory agencies, they also threatened the legitimate rights of landowners by creating a procedural merry-go-round that prevented landowners from being able to bring a claim in court. In response, the Supreme Court has attempted to provide landowners greater protection by changing the "shade" of the regulatory takings ripeness doctrine. Continuing the Court's recent trend, *Palazzolo v. Rhode Island* reflects the Court's growing inclination to hold regulatory takings claims to be ripe. Given the Court's clarification of its takings ripeness doctrine, lower courts should hold regulatory takings claims to be ripe under a wider range of circumstances. By opening the courthouse door for landowners to litigate their regulatory takings claims, *Palazzolo* offers increased protection for landowners' constitutional rights. However, due to the shortcomings of the Court's decision in *Palazzolo*, it may ultimately leave both landowners and regulatory agencies dissatisfied with the status of the takings ripeness doctrine.

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