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Ripe Standing Vines and the Jurisprudential Tasting of Matured Legal Wines—and Law & Bananas: Property and Public Choice in the Permitting Process

*Donald J. Kochan**

ABSTRACT

From produce to wine, we only consume things when they are ready. The courts are no different. That concept of “readiness” is how courts address cases and controversies as well. Justiciability doctrines, particularly ripeness, have a particularly important role in takings challenges to permitting decisions. The courts largely hold that a single permit denial does not give them enough information to evaluate whether the denial is in violation of law. As a result of this jurisprudential reality, regulators with discretion have an incentive to use their power to extract rents from those that need their permission. Non-justiciability of permit denials creates perverse incentives for regulators. This Article examines that phenomenon.

I. INTRODUCTION

Grapes are planted, then pulled off vines, mashed, fermented, and then converted to wines. But not all batches make it to the shelves. Similarly, bananas can be green, yellow, or black, which changes their character and suitability for consumption. Neither the grapes nor the bananas start ready and neither always ends up being consumed. These are stages in produce, but they also provide a useful analogy as to how courts determine whether certain lawsuits are ripe for review — whether they are ripe for the picking or dead on the vine. Judicial review in the permitting process provides a very useful examination of these concepts, where judicial decisions to consume cases mirror our personal decisions of when and whether to buy that wine or eat that banana.

The banana example can provide a visual analogy. Under justiciability doctrines (like the prudent shopping decision), a legal case cannot be too green (not yet ripe), must be yellow (ripe), and cannot be black (moot). The same principle can be seen in distinguishing when a grape is not ready to be picked (not yet ripe for wine), perfect for

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fermenting into wine (ripe), or has wasted away into a raisin (moot). Those are the realities of justiciability. Consider also the phrase, “No wine is good before its time.”¹ When are permitting decisions tested sufficiently for jurisprudential tasting? This question pervades the doctrines of justiciability, as well as the underlying doctrines (constitutionally and prudentially) of standing generally, ripeness, exhaustion, and mootness. Justiciability is ultimately a determination of when a case is “fit” for review.

This Article goes beyond the discussion of when cases are justiciable to whether the decision of “when” motivates governmental actors in deciding to grant or deny permits in the land-use setting. It concludes that the justiciability doctrines allow unilateral powers on the part of government officials to make things “unfit” for review and insulated from scrutiny, which creates perverse incentives in the permitting process. This presents a positive analysis of the general workings of the permitting process within the theories of political economy, analyzing the interaction between jurisprudential principles and regulatory reality. It invites empirical testing of the theories and assumptions presented to gauge their validity and then suggest solutions, should the inefficiencies and inequities of rent-seeking and rent-extraction prove accurate.

Laws now require individuals to receive governmental permission for a large number of personal and economic activities. Astute administrators recognize that there are costs associated with permitting and the regulatory process. Perverse incentives can sometimes flow from the power to grant or withhold such permission. As such, this Article attempts to explain the incentives involved in the permitting process in light of the insights of the public choice theory of regulation.

Part II describes the current state of the ripeness doctrine for regulatory takings review. Part III presents a brief summary of public choice theory. Part IV posits that because the ripeness doctrine decreases the judiciary’s check over agency action, institutional biases granting permits are formed. Although the theories developed here apply to all “permission”-oriented activities in society, from obtaining a liquor

1. For this vineyard verse that is applicable to justiciability juice, see Michael Wilmington, *Many Film Directors Have Ties to the Ad World*, CHI. TRIB., Jan. 26, 1997, at 13 (“Orson Welles . . . , memorably intoned, ‘We will sell no wine before its time.’”); Howard G. Goldberg, *When is ‘Right’ Time for Wine?*, N.Y. TIMES, Sept. 26, 1999, at 30 (“Graying wine lovers may remember Orson Welles intoning ‘We will sell no wine before its time’ in a commercial for Paul Masson wines.”); David Cay Johnston, *Market Place: The Wine Maker Canandaigua is Riding High. But Can It Continue?*, N.Y. TIMES, Mar. 3, 1995, at 6 (“‘We will sell no wine before its time,’ Orson Welles said in a memorable commercial for the mostly forgettable Paul Masson wines.”); Richard Benke, *Orson Welles, Film Genius, Entertainment Boy Wonder*, BOSTON GLOBE, Oct. 11, 1985, at 25 (“[Welles] made . . . spots in which he made famous the phrase, ‘We will sell no wine before its time.’”). To see one of the commercials for nostalgia’s sake, visit Dressing Room, <http://www.youtube.com/watch?v=vaEeAch01FU> (last visited Oct. 5, 2009).

license to receiving a permit for constructing a house, and similar ripeness standards apply for other challenges² including due process claims, this Article will apply the theory by focusing on regulatory takings claims in federal courts. Whether for good or bad, this Article will demonstrate that justiciability hurdles have a significant impact in the power differentials between those seeking permits and those with discretionary power to grant or deny the permission sought.

II. RIPENESS

In addition to the “case or controversy” requirements of Article III of the U.S. Constitution, a regulatory takings claim must overcome prudential hurdles of ripeness before a court will adjudicate a permit denial.³ Only a regulation that “goes too far” results in a taking under the Fifth Amendment.⁴ Thus, many takings claims are blocked by the ripeness doctrine because “[a] court cannot determine whether a regulation has gone ‘too far’ unless it knows how far the regulation goes.”⁵ Ripeness doctrine has created a quagmire for many property owners that fall prey to regulation and hope for judicial resolution in suits against the government.

A few select cases developed the doctrine that has led to a brick wall for the majority of individuals seeking access to courts under regulatory takings claims. The way the ripeness doctrine has developed closes the door to most aggrieved property owners in permitting situations. Justice Kennedy summarized the basic doctrine in *Palazzolo v. Rhode Island*:

These cases 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. Under our 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. As a general rule, until these ordinary processes have been

2. See *infra* Part IV.

3. See, e.g., *Allen v. Wright*, 468 U.S. 737, 750-51 (1984); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-62 (1992).

4. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (finding a Pennsylvania law unconstitutional because it took away valid contractual rights owed to the defendant).

5. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986).

followed the extent of the restriction on property is not known and a regulatory taking has not yet been established.⁶

Palazzolo drew on a number of cases, several of which are described below. These cases illustrate that regulators are largely insulated for takings judicial review due to the ripeness hurdle. Knowing that their actions are not immediately subject to judicial review could motivate regulators to initially deny permit applications. The rational regulator, under these standards, should be expected to use the coercive power of required permission to extract something more from an applicant before bestowing approval. Several cases set up this landowner quandary.

For example, *Suitum v. Tahoe Planning Agency* explained the precedent on ripeness in regulatory takings cases as follows:

There are two independent prudential hurdles to a regulatory takings claim brought against a state entity in federal court. . . . [A] plaintiff must demonstrate that she has both received a “final decision regarding the application of the [challenged] regulations to the property at issue” from “the government entity charged with implementing the regulations,” . . . and sought “compensation through the procedures the State has provided for doing so,” The first requirement follows from the principle that only a regulation that “goes too far,” . . . results in a taking under the Fifth Amendment The second hurdle stems from the Fifth Amendment’s proviso that only takings without “just compensation” infringe that Amendment; “if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation”⁷

Suitum underscores the finality requirement that makes it difficult to establish ripeness in regulatory takings cases.

In *Agins v. City of Tiburon*, landowners facing zoning ordinances restricting the number of houses they could build on their property sued.⁸ Because they had not sought approval for any particular development on their land, however, the Supreme Court declined to reach the merits of this claim.⁹ In *Hodel v. Virginia Surface Mining & Reclamation Ass’n*,

6. *Palazzolo v. Rhode Island*, 533 U.S. 606, 620–21 (2001); *see also* *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 339–40 (2002).

7. *Suitum v. Tahoe Reg’l Planning Agency*, 520 U.S. 725, 733–34 (1997) (citations omitted).

8. *Agins v. City of Tiburon*, 447 U.S. 255, 257–258 (1980), *abrogated by* *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005) (overturned for point of law requiring a substantial state interest).

9. *Id.* at 257, 263.

coal producers and landowners challenged the enactment of the Surface Mining Control and Reclamation Act as a taking of their property.¹⁰ *Hodel* held that where the regulatory regime offers the possibility of a variance from its facial requirements, a landowner must not only submit a development plan but must also seek a variance to ripen his claim.¹¹

Williamson County Regional Planning Commission v. Hamilton Bank, reaffirmed by *Suitum*,¹² set the standard for ripeness review of takings claims.¹³ In *Williamson*, a developer's plan to build a residential complex was rejected by the local Planning Commission as inconsistent with zoning ordinances and subdivision regulations.¹⁴ The Court held that a plaintiff must receive a final and conclusive determination from an agency on the *permissible* use of the developer's property before filing a judicial proceeding.¹⁵ Thus, some attempt to resort to the procedures for obtaining variances is required to establish ripeness.

As the Court later indicated in *MacDonald, Sommer & Frates v. Yolo County*, a determination that one proposal is not permissible does not conclusively resolve the issue of what is permissible.¹⁶ In *MacDonald*, a local Planning Commission rejected a developer's subdivision plan as inconsistent with the zoning regulations.¹⁷ *MacDonald's* application of the *Williamson* "final decision" requirement indicated that multiple proposals or variance applications will sometimes be necessary for a landowner's case to ripen. Because "[r]ejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews,"¹⁸ it cannot be said that every denial is the conclusive and final word on the use of property.

The ripeness and final decision requirements established by these cases severely limit the availability for review of permit denials. There are some independent jurisdictional justifications for these rulings. This Article, however, examines how these rulings contribute to potentially disturbing regulatory behavior.

10. *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 273 (1981).

11. *Id.* at 297.

12. *Suitum*, 520 U.S. 725.

13. *Williamson County Reg'l Planning Comm'n v Hamilton Bank*, 473 U.S. 172 (1985).

14. *Id.* at 176–82.

15. *Id.* at 172–74, 186–94.

16. *MacDonald*, 477 U.S. at 351–353.

17. *Id.* at 343.

18. *Id.* at 353 n.9.

III. THE PUBLIC CHOICE THEORY OF REGULATION¹⁹

Ultimately, these justiciability standards affect the incentives of regulators when they hold the power over landowners seeking to take actions within the discretion of regulators to permit or deny. When justiciability hurdles exist to insulate regulatory decisions from review, it will change the regulators' behavior. Insights from public choice theory explain why.

Public choice theory—also known as the interest-group or economic theory—of legislation can explain governmental behavior in a variety of circumstances. Legislation or regulatory action, including the receipt of governmental “permission” to act, is a saleable commodity.²⁰ Supply and demand principles operate for legislation and regulation in much the same way as with any other economic good. Permission or legislative protection passes to those that gain the greatest value from it—i.e., those that are willing to pay the most for it—-independent of any concerns for overall social welfare.²¹ As Richard Posner describes it, “The ‘interest group’ theory asserts that legislation is a good demanded and supplied much as other goods, so that legislative protection flows to those groups that derive the greatest value from it, regardless of overall social welfare.”²² This is in direct contrast to the long-standing analysis of the production of legislation or regulation as being in the “public interest.”²³

Interest groups—whether they are single individuals or organizations—have an incentive to use available means to influence governmental outcomes. The modes of influence could consist of “political support, promises of future favors, outright bribes, and whatever else politicians value,”²⁴ including honoraria for speaking

19. The majority of this section draws from a previous article the author published which explored applying public choice theory to public use principles of property law. See Donald J. Kochan, “*Public Use*” and the Independent Judiciary: Condemnation in an Interest-Group Perspective, 3 TEX. REV. L. & POL. 49, 79–84 (1998).

20. See George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971); Richard Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335 (1974); JAMES BUCHANAN ET AL., TOWARD A THEORY OF THE RENT-SEEKING SOCIETY (1980); Daniel A. Farber & Philip Frickey, *The Jurisprudence of Public Choice*, 65 TEX L. REV. 873 (1987); Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339–71 (1988).

21. Richard A. Posner, *Economics, Politics and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 265 (1982). Put differently, “interest group theory treats statutes as commodities that are purchased by particular interest groups or coalitions of interest groups that outbid and outmaneuver competing interest groups.” Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 227 (1986) [hereinafter, Macey, *Public-Regarding*].

22. Posner, *supra* note 21, at 265.

23. See generally JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT (1971); DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991).

24. Macey, *Public-Regarding*, *supra* note 21, at 228. To obtain further currency, politicians

engagements or promises of employment (in lobbying or elsewhere) after retirement²⁵ traded for governmental action or inaction beneficial to the interest group. Even if an individual legislator will not receive a direct benefit from an interest group, vote-trading may motivate a rational legislator.²⁶

Public choice theory generally provides a mechanism to predict all governmental actions broadly understood—including the permitting process, legislative acts, administrative agency actions, and executive actions. Indeed, the theory is also not limited to the affirmative act of legislation. Interest groups may often bargain to block legislation or to receive regulatory forbearance.²⁷

Interest groups—including both those in favor of and opposed to land use regulation—seek to use the government to obtain more favorable prices than would be available under competitive market conditions.²⁸ Public choice theory posits that individuals are motivated to escape market prices for the accomplishment of their desires through a process of “rent-seeking”²⁹—expending resources to obtain favors from government, which include direct subsidies or benefits or regulations to harm a competitor.

Rent-seeking is successful because legislators are able to concentrate benefits on a particular interest group while normally dispersing the costs on the general public as taxpayers. The incentive structure that results explains the success of rent-seeking behavior.³⁰ Interest groups have an incentive to obtain the legislation by granting special favors to legislators so long as the cost of the investment does not exceed the benefit they will obtain. When groups “enjoy lower information and transaction costs than others, they will succeed in obtaining wealth transfers to themselves at the expense of other groups. These differential costs are the sine qua non of rent-seeking.”³¹ It is very simple—if you can satisfy your preferences by buying from Wal-Mart at a lower cost than Saks Fifth Avenue, you will choose Wal-Mart. This differential between the market manufacturer

also have an incentive to act as brokers of information for interest groups by “identifying and helping enact legislation that transfers wealth from groups with high information and transaction costs to groups with low information and transaction costs.” *Id.* at 230.

25. Gregg Easterbrook, *What's Wrong with Congress? Before Congress Can Lead the Nation, It Must Be Able to Lead Itself*, 254 ATLANTIC 57, 70–72 (Dec. 1984).

26. See William H. Riker & Steven J. Brams, *The Paradox of Vote Trading*, 67 AM. POL. SCI. REV. 1235, 1236 (1973) (describing the incentives for legislators to engage in vote-trading).

27. See generally Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101 (1987).

28. See generally Farber & Frickey, *supra* note 20.

29. *Id.*

30. For a general discussion of the incentive structure resulting from concentrated benefits and dispersed costs, see Macey, *Public-Regarding*, *supra* note 21, at 229.

31. *Id.*

of a commodity and a governmental manufacturer of a commodity is displayed in Table 1, illustrating the “savings” or “rent” that can be obtained by tapping into governmental commodities.

TABLE 1: THE RENT-SEEKING DIFFERENTIAL

M

Rent

G

M = Market Price to Achieve Desired Result

G = Price to Achieve Desired Result through Legislation (broadly defined)

Rent-seeking means that so long as a preference can be satisfied by investing in a governmental outcome at a lower price than a market-negotiated price (servitudes, for example), the rational economic neighbor or interest group or other party will seek to use the coercive governmental power. Basically, it is about saving money—I could pay my neighbor to agree not to build a deck or I could spend less and get the municipality to ban it.

Thus, in the permitting process, interest groups work to obtain or oppose regulations by lobbying for either a grant or denial of a permit. And the price of regulation is directly proportional to the durability of the agency’s action. William Landes and Richard Posner contend that judicial enforcement of interest-group bargains is a critical factor in lending such durability.³² As such, a high ripeness hurdle created prudentially by the courts insulates many permit denials from invalidation, thereby increasing the price those opposed to development will be willing to pay for securing such a denial.³³ There are several incentives for interest groups to engage in rent-seeking, the combination of which makes rent-seeking successful.

Fighting city hall is costly, and seldom cost-efficient for any particular piece of special interest legislation. That is the brilliance that makes it successful for interest groups. The costs are widely dispersed; thus, fighting any one piece of legislation or regulation is likely to bring only a small benefit to a taxpayer through the elimination of that governmental action’s portion of his tax obligation. The economically

32. William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975).

33. See *infra* Part IV.

rational taxpayer will have little incentive to combat any one piece of legislation.³⁴

Information costs also play a pivotal role in interest group success. The information costs incurred to discover the impact of any issue on the taxpayer are high, thereby deterring him from identifying his interests in the first place. Any individual willing to pay the information and transaction costs associated with fighting legislation would also be required to share the benefit (the absence of legislation) with everyone.³⁵ Known as the “free-rider” problem, this scenario makes it irrational for most individuals to incur the costs of fighting alone.³⁶ Similarly situated individuals are hard to identify, and combined with collective action problems, it is too difficult to share the cost.³⁷ Thus, there will be little incentive for affected persons to come together to fight legislation or regulation, especially in light of the low prospects for success when facing more organized, pre-existing coalitions.³⁸

Interest groups can also control the flow of information better than your lone citizen, especially on more complex issues, thereby encouraging positive reaction to their agendas in legislatures and to the electorate.³⁹ This gives them a competitive advantage for their agenda. The special interest is likely to have a larger influence in the political process and thereby able to offer more to legislators. As Daniel Farber recognized, “All things being equal, it probably is still true that the dispossessed [property owners] are disadvantaged by the one-shot nature of their involvement. Thus, relative to other concentrated groups (such as the construction firms that may support government construction), they may have less clout”⁴⁰

34. See MICHAEL T. HAYES, *LOBBYISTS AND LEGISLATORS: A THEORY OF POLITICAL MARKETS* 69–70 (Rutgers University Press 1981). Hayes explains that “[m]embers of the mass public will generally find it irrational to obtain the information necessary to identify their interests on any given issue and moreover will be ill equipped to interpret any information they do obtain.” *Id.*

35. Similarly, Olson illustrates why laws that benefit the people in general are unlikely to be passed because of classic free-rider problems. See MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES* 41–47 (1982).

36. ROBERT MCCORMICK & ROBERT TOLLISON, *POLITICIANS, LEGISLATION, AND THE ECONOMY: AN INQUIRY INTO THE INTEREST-GROUP THEORY OF GOVERNMENT* 17 (1981).

37. See *id.* at 18.

38. As Macey explains, “Pre-existing coalitions and groups of allied individuals will be more effective than dispersed individuals in obtaining transfers of wealth from society as a whole to themselves.” Macey, *Public-Regarding*, *supra* note 21, at 229.

39. See NORMAN ORNSTEIN & SHIRLEY ELDER, *INTEREST GROUPS, LOBBYING AND POLICYMAKING* 75-76 (Robert L. Peabody ed., 1978); GRAHAM K. WILSON, *INTEREST GROUPS IN THE UNITED STATES* 113-14 (Clarendon Press 1981); Easterbrook, *supra* note 25, at 70.

40. Daniel Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENT. 279, 290 (1992).

When justiciability hurdles make it difficult to challenge decisions,⁴¹ repeat players and those with greater influence can win against the lone landowner in permitting decisions. Legislators and interest groups have incentives to engage in activities that make their actions more difficult to discover and have an incentive to cloud their actions in some public interest.⁴² An individual landowner is unlikely to influence a politician's decision or his electoral chances, for "the probability that a typical voter will change the outcome of the election is vanishingly small."⁴³

Investing and competing for the creation or defeat of legislation or regulation produces nothing but a legislative or regulatory outcome. These actions make no independent economic contribution to society.⁴⁴ In addition to being inefficient and unproductive, the redistributive nature of rent-seeking behavior has been regarded as immoral.⁴⁵ Rules are not crafted in the public interest but are instead designed to benefit a particular interest, a benefit that interest could not have obtained in a competitive (and efficient) market. As Jonathan R. Macey states, the rent-seeking model illustrates that "government will enact laws that reduce societal wealth and economic efficiency in order to benefit [specific] economic groups."⁴⁶

Rent-seeking leads to an inefficient misallocation of resources in society.⁴⁷ It creates "deadweight losses," both as a result of the unproductive expenditures to create legislation⁴⁸ and the increased costs to "consumers" as a result of the rents created.⁴⁹ Moreover, spending to obtain or defeat legislation is diverted away from more productive expenditures.⁵⁰ Mancur Olson describes the inefficient consequences:

41. *See supra* Part I.

42. Macey, *Public-Regarding*, *supra* note 21, at 232.

43. OLSON, *supra* note 35, at 26.

44. Richard A. Posner, *The Social Costs of Monopoly and Regulation*, 83 J. POL. ECON. 807, 812 (1975); William P. Rogerson, *The Social Costs of Monopoly and Regulation: A Game-Theoretic Analysis*, 13 BELL J. ECON. 391 (1982).

45. *See generally* FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* (1944) (providing an in-depth analysis of the problems from rent seeking).

46. Macey, *Public-Regarding*, *supra* note 21, at 230.

47. *See, e.g.*, Paul J. Stancil, *Assessing Interest Groups: A Playing Field Approach*, 29 CARDOZO L. REV. 1273, 1288 (2008) (discussing several categories of economic losses associated with rent-seeking behavior).

48. *See* Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 W. ECON. J. 224, 228–30 (1967); Peter H. Aranson, *Theories of Economic Regulation: From Clarity to Confusion*, 6 J.L. & POL. 247, 270–72 (1990).

49. Tullock, *supra* note 48, at 225.

50. Alm describes the necessity for even those in unregulated industries to expend resources to influence or block legislation. *See* James Alm, *The Welfare Cost of the Underground Economy*, 23 ECON. INQUIRY 243, 243 n.1 (1985).

First, “special-interest organizations and collusions reduce efficiency and aggregate income in the societies in which they operate and make political life more divisive.” Second, interest group coalitions organized to effect wealth transfers “slow down a society’s capacity to adopt new technologies and to reallocate resources in response to changing conditions and thereby reduce the rate of economic growth.” Finally, distributional coalitions increase “the complexity of regulation, the role of government, and the complexity of understanding,” thereby retarding the social evolution of a society and raising the costs of all forms of economic activity.⁵¹

All of these reasons illustrate that limiting rent-seeking is desirable as a means for both increasing growth and limiting redistributive effects in the permitting process.

Interest groups can seek regulations to make it too expensive for their competitor to act. For example, consider you have a patent on a cleaner motor than your competitor. It is rational to ask the EPA to impose more stringent clean air regulations that only your firm can meet. The higher prices to competitors that result are called “economic rents.” Similarly, a market participant may seek to obtain goods (*e.g.*, environmental preservation) directly from the government at a lower cost than they might otherwise need to pay on the open market. Interest groups not only seek out affirmative acts by government officials, but may often bargain to block legislation or to receive regulatory forbearance.⁵²

Given all of this background theory, the rational regulator, therefore, has an incentive to engage in rent-extraction—a type of extortion in which negative regulatory actions are threatened to occur unless the regulator receives a payment or positive regulatory action is conditioned upon a payment. The power to deny includes the power to place conditions on approvals. The perverse incentives associated with that power are amplified when regulatory decisions can evade judicial review. Much of this insulation from judicial review relies on the level of discretionary power. The next Part will apply the principles of public choice theory specifically to the permitting process.

51. Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471, 479–80 (1988) (quoting OLSON, *supra* note 35, at 74).

52. *Id.*

IV. IMPLICATIONS OF PUBLIC CHOICE THEORY FOR THE PERMITTING PROCESS

When something is prohibited unless permitted and discretion and standards are sufficiently loose, regulators have a coercive monopoly power over permit applicants. As the popular adage states, with great power comes great responsibility, but with great discretion also comes great power—especially where there is a hurdle to a judicial check on that power.

Under *Suitum*, the Court recognized that when an agency is vested with a high degree of discretion,⁵³ an attribute “characteristically possessed by land-use boards” and other permitting agencies, it becomes increasingly difficult to prove that the agency will never accept an alternative proposal.⁵⁴ If the agency would accept an alternative proposal, no regulatory taking has occurred because the regulation has not gone too far—i.e., it has not denied the landowner of any economically viable use of his land. Thus, the ripeness doctrine prevents review and allows the agency broad powers to deny a permit or variance application without consequence. In fact, the Court recognized in *MacDonald* 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.”⁵⁵

This is precisely the type of control that facilitates rent-extraction opportunities. Consequently, there are a number of reasons to predict that an agency will favor denials precisely because their non-final nature presents opportunities not available from granting permits. When discretion to deny exists and is insulated from challenge, the rational regulator should see an opportunity to ask for something extra because the applicant is at the regulator’s mercy.

First, the permitting system allows agencies to extract two types of payments. We assume that *A*, the applicant, will make a payment with his initial application to obtain the permit. Next, competitor (*C*) will make payments to the agency (*G*) to facilitate a denial. The ability for *A* to reapply decreases the durability of that denial, so it decreases the amount *C* will pay (conversely, the amount *G*, the regulator, can extract).

After the initial denial, *G* can hold out the possibility of reapplication. And because the initial denial is not ripe for review by the courts, reapplication may become *A*’s only option. This means that *G* can extract payments from both *C* and *A* again. The process might continue

53. *Suitum*, 520 U.S. at 733–35.

54. *Id.* at 738.

55. *MacDonald*, 477 U.S. at 350.

perpetually so long as both *C* and *A* are willing to pay to play, or at least until the issue becomes ripe for review. Of course, even then the process might continue if *A* has a greater likelihood of receiving the permit from the agency than receiving a ruling invalidating the agency's action.

Multiple payments are likely to be in an agency official's best interest. I am not limiting myself to an outright bribe situation, but instead to all the things of value that may be in the interest of the regulator or legislator to procure from his benefactors, as discussed above. Whereas a legislator may fear losing an election and will try to make a more durable commitment to obtain as large a payment in the first instance as possible, agency officials often have career positions and will be net winners by promoting several smaller payments over time rather than receiving one larger initial payment. Additionally, the interest group's initial payment may be larger than expected. Although the ability to reapply decreases the durability of the initial deal, a strong ripeness doctrine means that *C* need not worry about a judiciary upsetting the durability of the initial denial.

A high ripeness hurdle also uniquely affects *G*'s willingness to engage in a deal. The hurdle diminishes one of the functions of the compensation component of the takings clause. *G* has little leverage when he is more likely to be subject to a compensation obligation from a denial. Where there is a risk of a requirement to pay compensation, it at least marginally increases the political liability to government officials when engaging in rent-seeking. The taxpayers, although dispersed, must pay if a taking is found and the award is likely to be more transparent. But when an official's decision cannot be challenged because it is not ripe, the merits are not reached, compensation will not be paid, and their decision can elude transparency, then rent-extraction opportunities increase.⁵⁶

Also supporting the prediction that an agency will favor denials is the relative bargaining power of the typical parties in land-use permitting. The special interest is likely to have a larger influence in the political process, because unlike the landowner, the interest group is probably a repeat player in the political process and thereby able to offer more to legislators.⁵⁷ The benefits offered, the influence gained, and the mutual rewards increase exponentially in the repeat player game.⁵⁸ Property owners are burdened by their limited involvement with the regulators relative to other concentrated groups with more clout, such as

56. *See supra* Part I.

57. *See* ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 122 (2001) ("Sophisticated 'repeat players' in the United States often can avoid the expense and unpredictability of adversarial legalism . . .").

58. *Id.*

environmental groups, the historical preservation lobby, or other supporters of land-use regulation.

Rent-seeking usually works because the activity can use the legislative or regulatory process to concentrate benefits on selected interest groups and disperse costs among the general public—a vehicle that manipulates the transparency of the transaction and insulates those that govern from accountability due to the dilution effect where affected individuals have little incentive to challenge the nature of that legislative or regulatory transaction. Although the denial of a land use permit concentrates a cost on an individual landowner and his information costs in discovering the impact of the regulation are low, there is little incentive in the individualized permitting process for others to join in his effort to obtain a permit or variance. Moreover, the applicant faces the repeat-players who are not only more organized in their opposition but are also able to offer the regulator more. As a result, the economically rational regulator is likely to be more responsive to the lobby opposing a permit. For example, if a regulator too often grants variances to a specific land-use regulation, the durability of future regulations will be questioned. Thus, the price an interest-group seeking to obtain another regulation in the future is willing to pay for that regulation is lowered due to the decreased confidence that the regulation will be applied to reach that interest's goals.

Finally, an agency is likely to exhibit the self-perpetuating tendencies exhibited in bureaucracies—i.e., an incentive for the agency to justify its existence and growth. If all applications are granted, the perception is that very little “regulating” is occurring and it becomes difficult to justify the agency's existence.⁵⁹ When a denial allows another application, the agency creates more work for itself. An initial permit approval gives it only one job with relation to that property, plan, etc. However, a denial, even if everyone does not reapply, creates additional work. It makes sense for the agency, even if it plans to grant the permit, to at least require some changes in a proposal.

Nonetheless, permit applications do get approved. Some activities are too clearly permissible under the regulations to deny them without exposing interest-group politics. Moreover, sometimes it will be of only marginal interest for the anti-development lobby to oppose a permit. Thus, an applicant may outbid the opposing interest group. Furthermore, the development lobbies are somewhat influential, although not as much so for the simple, unconnected landowner. Because of these occurrences,

59. *See generally* WILLIAM NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971) (arguing that bureaucracies maximize their budgets); GEORGE C. ROCHE, AMERICA BY THE THROAT: THE STRANGLEHOLD OF FEDERAL BUREAUCRACY (1983); LUDWIG VON MISES, BUREAUCRACY (1944).

too many denials may also discourage initial applicants. *G* will take this into account. If any payments are to flow to *G* from the potential applicants, they must believe there is at least a reasonable chance of success.⁶⁰ Similarly, the interest-groups opposing a permit must believe there is some risk that an application to which they are opposed will be granted. If there is not, there will be little incentive to make a payment to *G* when the same result will be obtained absent any payment. For this reason, it is in *G*'s long-term interest to hold out the possibility of harm to *C*'s interest by granting some permits.

V. CONCLUSION

Legal bananas must be ripe for eating and legal wines must be matured to drinkable quality before the courts will indulge in their consumption. Justiciability doctrines serve a very important purpose, but we must at least consider that their effects on review of governmental decisions affect the decision-making structure. When a regulator can deny a permit, for example, knowing the decision will not be ripe for review, it is irrational to grant that permit if she still has the ability to exact something without liability.

Ripeness standards serve as a valuable gate-keeping tool for the resolution of permitting disputes but also have developed in a manner to insulate regulators from accountability for their decisions. As such, public-choice theories predict that this places an enormous amount of power in the hands of those empowered with the discretion to permit or deny certain activities. The ability to respond with a “maybe not this plan, but maybe another—come back and see us” provides a regulator enough power and ability to prohibit many landowners from receiving judicial review. With the legal standards on ripeness, and the ability to control and extract, it would be irrational for any regulator *not* to use those powers. Recognition of that reality will help us reexamine discretionary power and jurisprudential controls.

This Article presents only a positive analysis and theory. Empirical testing of the theories and assumptions presented is necessary before any confident conclusions can be drawn as to the validity of these hypotheses. Should these theories prove accurate, however, further research into solutions is also appropriate given the well-documented literature indicating the inefficiencies and inequities of rent-seeking and rent-extraction. For example, the Court in *Suitum* was encouraged to adopt a rule holding that a single variance application is sufficient to

60. The same is true with regard to re-applicants in order to induce subsequent applications.

make a claim ripe, but it declined to do so.⁶¹ However, even if such a rule were adopted, only the ripeness hurdle would be lowered while the difficult task of establishing a taking of private property under the current jurisprudence would remain. Justiciability doctrines keep green legal bananas and insufficiently-aged legal wines away from the bench, but the consequences they create for discretionary authority of the regulatory state and those that are regulated should be understood.

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