ELR
NEWS & ANALYSIS

Palazzolo v. Rhode Island: A Few Clear Answers and Many New Questions

by Steven J. Eagle

The U.S. Supreme Court's latest regulatory takings decision, *Palazzolo v. Rhode Island*,[1] is significant for its rejection of what I term the positive notice rule.[2] It also confirms the narrow scope of the categorical rule, developed in *Lucas v. South Carolina Coastal Council*,[3] for government actions that work complete takings of property.

Beyond that, *Palazzolo* evokes the potential for the enhanced recognition of property rights implicit in some of the Court's earlier cases. In particular, it signals fresh life to the doctrine of partial regulatory takings and to the concept of the relevant parcel. On the other hand, a majority of the Justices indicated that a weaker form of the notice rule should have some bearing on landowners' "reasonable investment-backed expectations." The latter concept is crucial in partial takings analysis, and, arguably, applies to complete takings analysis as well.

Given the open-ended possibilities of *Palazzolo*, it is not clear, especially in the initial round of analyses, whether the case's intriguing potential, or dire threats, are implied by the Court or inferred by the commentators. Indeed, backing up a step, the lack of completeness in the record[4] may have led the Justices themselves to infer facts based upon their conceptions of the Takings Clause.[5]

The reflections on the meaning of *Palazzolo* expressed here might usefully be juxtaposed with those of another *Environmental Law Reporter* (*ELR*) commentator, Prof. John Echeverria, whose perceptions of regulatory takings and environmental issues have diverged from my own.[6] In his Dialogue on *Palazzolo* in a recent issue of *ELR*,[7] Professor Echeverria reads out of (or into) the Court's decision a somewhat different set of conclusions than I reach here. Although I am less willing to see the Court's 5-4 division[8] in starkly partisan terms,[9] I agree that they reflect important differences on the relative roles of the police power and individual liberty.

Professor Echeverria concluded that *Palazzolo* "represents another incremental step by an activist Court in the direction of a new, libertarian rewrite of the Takings Clause."[10] As an initial matter, I am not persuaded that the term "judicial activism" is very helpful.[11] Also, while the Court has in recent decades shifted its emphasis in the protection of property rights from the Due Process Clause to the Takings Clause,[12] it has vindicated property rights at many

The author is a Professor of Law at George Mason University School of Law. He may be contacted at seagle@gmu.edu.

1. 121 S. Ct. 2448 (2001).
2. This term is used for convenience in describing the rule as the Court enunciated and rejected it in *Palazzolo*: "A purchaser or a 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. I mean by the label "positive" to implicate the jurisprudential tradition of positivism, often associated with Austin, that asserts that law is nothing more than the positive command of the sovereign. *See generally* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (Wilfrid E. Rumble ed., 1995) (1832). To some extent, positivism has been accepted as a source of property law in the United States. *See*, *e.g.*, PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 84 (1980) (describing the states as "possessed of residual authority that enables [them] to define 'property' in the first instance"). For a fuller explication, see *infra* note 42 and accompanying text.
3. 505 U.S. 1003, 22 ELR 21104 (1992).
4. One notable example is the lack of an accurate survey of the parcel or definitive information about the size of its wetland and upland components.
5. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").
6. *See*, *e.g.*, John D. Echeverria, *Revving the Engines in Neutral:* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 29 ELR 10682 (Nov. 1999); Steven J. Eagle, Del Monte Dunes*, Good Faith, and Land Use Regulation*, 30 ELR 10100 (Feb. 2000).
7. John D. Echeverria, *A Preliminary Assessment of* Palazzolo v. Rhode Island, 31 ELR 11112 (Sept. 2001).
8. Justice Anthony M. Kennedy wrote for the Court. Joining him in the majority were Chief Justice William H. Rehnquist, and Justices Sandra Day O'Connor, Antonin Scalia, and Clarence Thomas. In sharply diverging concurring opinions Justices O'Connor and Scalia differed on how preacquisition regulations should affect landowners in future cases. Justice John Paul Stevens joined the majority in holding that the case was ripe (making the lineup 6-3 on that issue) but otherwise dissented. Justice Ruth Bader Ginsburg dissented, joined by Justices David Souter and Stephen Breyer. Justice Breyer also wrote a separate dissent.
9. Apropos of no other connection to that case, Professor Echeverria informs us in the third paragraph of his Dialogue that the decision in *Palazzolo* had the Justices "dividing along the same partisan lines as in *Bush v. Gore*." *Id*. at 11112 (citing Bush v. Gore, 121 S. Ct. 525 (2000)).
10. *Id*. at 11112.
11. Just as the physicist defines "noise" as "unwanted sound," commentators, both left and right, define judicial activism as a reaching out to change the law in an improper direction. However, to the extent that "activism" might be expanded to include dicta beyond the scope of the case, *Palazzolo* is not bereft of it. The articulation of the Court's "discomfort with the logic" of the "parcel as a whole" rule is an obvious example. *Palazzolo*, 121 S. Ct. at 2465.
12. The Fifth Amendment to the U.S. Constitution provides that "[n]o person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The Fourteenth Amendment provides that "nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ." *Id*. amend. XIV, §1. The Court first held that states may not take private property for public use without just compensation in Chicago, B.&Q.R.R. v. City of Chicago, 166 U.S. 226, 236 (1897). While the theory of that case was substantive due process, the Court now treats it as establishing the proposition that the Takings Clause is applicable to the states. *See*, *e.g.*, Dolan v. City of Tigard, 512 U.S. 374, 384 n.5, 24 ELR 21083, 21085 n.5 (1994); Palazzolo v. Rhode Island, 121 S. Ct. 2448, 2457 (2001). *See also* Steven J. Eagle, *Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 ALA. L. REV. 977, 998-1001 (2000).

points in our history.[13] Indeed, as even critics have recognized, property rights were the "great focus" of the Framers.[14] Thus, while surely vivid prose, the assertion that the Court's recent regulatory takings jurisprudence is either "new" or a "rewrite" remains dubious, to say the least.[15]

I do agree with Professor Echeverria, however, that *Palazzolo* largely is about incremental change. It continues the process of fleshing out the extent of deprivation of economic use that triggers the categorical rule of *Lucas*.[16] It further explicates the *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*[17] ripeness rule, and lends some support to the view that the rule is "prudential."[18] Furthermore, *Palazzolo* reiterates the importance of the "investment-backed expectations" doctrine in *Penn Central Transportation Co. v. City of New York*.[19] This provides a glimmer of hope that the chimera of "expectations" might be made comprehensible.[20]

One can sense in *Palazzolo* reverberations of earlier concerns about fairness. These first were manifested in the sufficient nexus doctrine of *Nollan v. California Coastal Commission*,[21] and subsequently in the rough proportionality requirement in *Dolan v. City of Tigard*.[22] Fairness was the leitmotif of the recently decided *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*[23]

Palazzolo might be seen, therefore, as part of a second generation of regulatory takings cases that explore the ramifications of earlier opinions establishing foundational doctrine. The takings case in which certiorari was granted the day after *Palazzolo* was handed down, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[24] similarly sets the scene for a reexamination of temporary takings doctrine as established in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*.[25]

A Summary of the Facts in the Case

Anthony Palazzolo, an elderly salvage yard owner and lifelong resident of Westerly, Rhode Island, brought an inverse condemnation action against the state Coastal Resources Management Council (CRMC). He alleged that the CRMC's denial of his application to fill some 18 acres of coastal wetlands constituted a taking of his property under the U.S. Constitution and state constitutions. The trial court found for the CRMC.[26] The Rhode Island Supreme Court affirmed, holding that the case was "not ripe for judicial review," but proceeding to a discussion of the merits nevertheless.[27]

Palazzolo has been president of Shore Gardens, Incorporated (SGI), since its incorporation on July 29, 1959. On December 2, 1959, Palazzolo, with Natale and Elizabeth Urso, transferred three adjoining parcels in the town of Westerly to SGI. In 1959, while Palazzolo and Natale Urso were the sole shareholders in SGI, it submitted to the town a new plat subdividing the entire property into 80 lots. Between 1959 and 1961, SGI transferred for value 11 of the lots to various grantees. These lots were apparently in the upland area of the parcel and could be built upon with little alteration to the land. In 1960, Palazzolo acquired Urso's interest and became the sole shareholder. In 1969, five of the previously sold lots were reacquired by SGI. After this transaction, SGI was the record owner of 74 of the original 80 lots. Although SGI's corporate charter was revoked in 1978, it remains the record owner, and all taxes on the property are assessed to SGI.[28]

The parcel consists primarily of coastal wetlands and marshlands, including some 18 acres of wetland and a small, but undetermined amount of upland not exceeding an acre or two. Some of the platted lots are substantially under the waters of Winnipaug Pond. Additional land that is not permanently under water is subject to daily tidal inundation, and "ponding" in small pools occurs throughout the wetlands. The area serves as a refuge and feeding ground for

13. *See generally* James W. Ely Jr., The Guardian of Every Other Right: A Constitutional History of Property Rights (2d ed. 1998).
14. *See* Jennifer Nedelsky, Private Property and the Limits of American Constitutionalism 92 (1990) ("The great focus of the Framers was the security of basic rights, property in particular, not the implementation of political liberty.").
15. One's judgment about this sweeping and unsupported assertion depends largely upon whether one accepts as the controlling norm the 1787 Constitution and its Lockean underpinnings that deem property a bulwark of political liberty, or, alternatively, the notion that the Reconstruction and the New Deal periods have constituted "constitutional moments" when the people have vested in the national government sweeping new powers outside the textually specified amendment process. *See* Bruce Ackerman, We the People: Foundations 132 (1991). The Supreme Court's subordination of economic liberty to other rights in United States v. Carolene Prods., 304 U.S. 144, 152-53 n.4. (1938), consummated the Court's acquiescence in the New Deal process. In criticizing this approach, Justice Scalia observed that he instead "would follow the text of the Constitution, which sets forth certain substantive rights that cannot be taken away, and adds, beyond that, a right to due process when life, liberty, or property is to be taken away." United States v. Carlton, 512 U.S. 26, 42 (1994) (Scalia, J., concurring in the judgment). Not having Professor Ackerman's ability to discern constitutional from nonconstitutional moments, I adhere to Justice Scalia's view. *See* Steven J. Eagle, Regulatory Takings §2-7(f)(1) et seq. (2d ed. 2001).
16. 505 U.S. at 1003, 22 ELR at 21104.
17. 473 U.S. 172 (1985).
18. Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 733, 27 ELR 21064, 21065 (1997).
19. 438 U.S. 104, 124, 8 ELR 20528, 20533 (1978).
20. *See* Steven J. Eagle, *The Rise and Rise of "Investment-Backed Expectations,"* 32 Urb. Law. 437 (2000) (asserting that it is not now comprehensible).
21. 483 U.S. 825, 17 ELR 20918 (1987).
22. 512 U.S. 374, 24 ELR 21083 (1994).
23. 526 U.S. 687, 29 ELR 21133 (1999). *See generally* Eagle, *supra* note 6.
24. 216 F.3d 764, 30 ELR 20638 (9th Cir. 2000), *reh'g en banc denied*, 228 F.3d 998 (9th Cir. 2000), *cert. granted*, 121 S. Ct. 2589 (2001). *See* Steven J. Eagle, *Temporary Regulatory Takings and Development Moratoria: The Murky View From* Lake Tahoe, 31 ELR 10224 (Feb. 2001); Thomas E. Roberts, *Moratoria as Categorical Regulatory Takings: What* First English *and* Lucas *Say and Don't Say*, 31 ELR 11037 (Sept. 2001); Steven J. Eagle, *Development Moratoria,* First English *Principles, and Regulatory Takings*, 31 ELR 11232 (Oct. 2001).
25. 482 U.S. 304, 17 ELR 20787 (1987). *See* Steven J. Eagle, *Just Compensation for Permanent Takings of Temporal Interests*, 10 Fed. Cir. B.J. 485 (2001) (asserting that "temporary" takings are compensable takings of beneficial enjoyment for temporal intervals).
26. Palazzolo v. Coastal Resources Mgmt. Council, No. 86-1496, 1995 WL 941370 (R.I. Super. Jan. 5, 1995).
27. Palazzolo v. State, 746 A.2d 707, 709, 30 ELR Digest 20420 (R.I. 2000).
28. Palazzolo v. Rhode Island, 121 S. Ct. 2448, 2455-56 (2001).
29. 746 A.2d at 709-10, 30 ELR Digest at 20420.

fish, shellfish, and birds, provides a buffer for flooding, and absorbs and filters runoff into the pond.[29]

Between 1962 and 1985, Palazzolo filed several applications with state agencies seeking permission to substantially alter the property. During the same period, state regulations governing alterations to coastal wetlands became increasingly stringent. On March 29, 1962, Palazzolo submitted an application to the Division of Harbors and Rivers (DHR) of the Department of Natural Resources (DNR) to dredge the pond and use the dredge to fill the subject property. This application was returned to Palazzolo by DHR because it lacked essential information. On May 16, 1963, Palazzolo filed an application seeking approval to build a bulkhead, to dredge the pond, and to fill the property. At the time of these two applications, there was no statutory requirement that any state agency approve the filling of coastal wetlands, but a party wishing to dredge a river or pond was required to gain approval of the DHR.[30]

In 1965, the Rhode Island Legislature adopted an act on intertidal wetlands protection that gave the DNR the authority to restrict filling in coastal wetlands. On April 29, 1966, Palazzolo applied for DHR approval to dredge the pond and fill the tidal marshlands so he could construct a recreational beach facility, and, on April 1, 1971, the DHR issued a decision approving the applications and giving Palazzolo the option of either constructing a bulkhead and filling the marsh or constructing a beach facility. On November 17, 1971, the DHR revoked its assent, and this revocation was not appealed.

In 1971, the Legislature created the CRMC and gave it authority to regulate coastal wetlands. In 1977, the CRMC promulgated a set of regulations—the Coastal Resources Management Program—that prohibited the filling of coastal wetlands without a special exception from the CRMC.[31]

In March 1983, Palazzolo filed an application with the CRMC seeking approval to construct a bulkhead on the shore of the pond and fill approximately 18 acres of salt marsh. That application, nearly identical to the application submitted in 1963, was rejected by the CRMC. Palazzolo did not appeal that decision. In January 1985, Palazzolo filed an application to fill wetlands on the property, again for the purpose of creating a recreational beach facility. This application, nearly identical to the 1966 application, was denied by the CRMC on February 18, 1986. Palazzolo's appeal of this denial itself was denied.[32]

While Palazzolo's appeal of the 1986 CRMC decision was proceeding, he filed the instant action alleging that the CRMC's denial of his application constituted a taking of his property without just compensation, in violation of the Fifth Amendment to the Constitution and Article 1, Section 16, of the Rhode Island Constitution. Palazzolo sought damages in the amount of $3.150 million, based on the profits he claimed he would receive from filling the wetlands and developing the property as 74 lots for single-family homes. A jury-waived trial was held in June 1997, and on October 24, 1997, the trial justice issued a 13-page decision that made findings of fact and law. The trial justice concluded that Palazzolo's property had not been taken and Palazzolo appealed.[33]

The Rhode Island Supreme Court noted that SGI was the owner of the parcel from its purchase in 1959 until the corporation's charter was revoked in 1978. By that time, when the defunct corporation's assets devolved upon its sole shareholder "the regulations limiting his ability to fill the wetlands were already in place."[34] The court concluded: "[A] regulatory takings claim may not be maintained where the regulation predates the acquisition of the property."[35]

The Court Rejects the Positive Notice Rule

The Notice Rule and Its Sources

The notice rule states, in its most general formulation, that the legal rights of a person taking title to property subsequent to the promulgation of a regulation are affected by that regulation. The rule has two sources. One is a qualification of the holding in *Lucas*,[36] which stated that a deprivation of all economically beneficial use of property constituted a taking.[37] However, the rule is not absolute, but rather cabined by limitations on the use of land which "inhere in the title itself."[38] These include "restrictions that background principles of the State's law of property and nuisance already place upon land ownership."[39] The notice rule deemed statutes and local ordinances to be "background principles" for this purpose.

The other source of the notice rule is in the "investment-backed expectations" test in *Penn Central*,[40] later dubbed the "reasonable investment-backed expectations" test in *Kaiser Aetna v. United States*.[41] The theory was that an owner should not gain a windfall by obtaining the right to land uses that he did not contemplate at the time of purchase. Statutes and regulations existing at the time of purchase were deemed to affect the buyer's reasonable expectations.

Rejection of the Positive Notice Rule in Palazzolo

Under the positive notice rule, a postregulation purchaser cannot assert legal rights that conflict with the regulation. This was the position of the Rhode Island Supreme Court in *Palazzolo*[42] and of a number of other jurisdictions.[43] The most significant aspect of the Supreme Court's opinion in *Palazzolo* is the Court's rejection of the positive notice rule. Justice Anthony M. Kennedy, writing for the Court, declared:

> When the [CRMC] promulgated its wetlands regulations, the disputed parcel was owned not by petitioner

30. 121 S. Ct. at 2455-56.

31. 746 A.2d at 710-11, 30 ELR Digest at 20420.

32. *Id*. at 711, 30 ELR Digest at 20420 (citing Palazzolo v. Coastal Resources Mgmt. Council, No. 86-1496, 1995 WL 941370, at *1 (R.I. Super. Jan. 5, 1995).

33. *Id*.

34. *Id.*

35. *Id*.

36. 505 U.S. at 1003, 22 ELR at 21104.

37. *Id*. at 1029, 22 ELR at 21111.

38. *Id.*

39. *Id.*

40. 438 U.S. at 124, 8 ELR at 20533.

41. 444 U.S. 164, 175, 10 ELR 20042, 20045 (1979) (providing no explanation for the change in terminology).

42. 746 A.2d at 716-17, 30 ELR Digest at 20420. *See supra* note 35 and accompanying text.

43. *See*, *e.g.*, Gazza v. New York State Dep't of Envtl. Conservation, 679 N.E.2d 1035, 28 ELR 20053 (N.Y. 1997); City of Virginia Beach v. Bell, 498 S.E.2d 414 (Va. 1993).

> but by the corporation of which he was sole shareholder. When title was transferred to petitioner by operation of law, the wetlands regulations were in force. The state court held the postregulation acquisition of title was fatal to the claim for deprivation of all economic use and to the *Penn Central* claim. While the first holding was couched in terms of background principles of state property law and the second in terms of petitioner's reasonable investment-backed expectations, the two holdings together amount to a single, sweeping, rule: A purchaser or a successive title holder like petitioner is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking.
>
> The theory underlying the argument that post-enactment purchasers cannot challenge a regulation under the Takings Clause seems to run on these lines: Property rights are created by the State. So, the argument goes, by prospective legislation the State can shape and define property rights and reasonable investment-backed expectations, and subsequent owners cannot claim any injury from lost value. After all, they purchased or took title with notice of the limitation.
>
> The State may not put so potent a Hobbesian stick into the Lockean bundle. The right to improve property, of course, is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions. . . . The Takings Clause, however, in certain circumstances allows a landowner to assert that a particular exercise of the State's regulatory power is so unreasonable or onerous as to compel compensation. Just as a prospective enactment, such as a new zoning ordinance, can limit the value of land without effecting a taking because it can be understood as reasonable by all concerned, other enactments are unreasonable and do not become less so through passage of time or title. Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.[44]

The Importance of the Rejection of the Positive Notice Rule in Palazzolo

The true import of the rejection of the notice rule in *Palazzolo* could be grasped only by imagining a contrary holding. The Court declared that "a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title."[45] Had the word "not" been omitted, a state or town could convert at will any property right held in fee to a corresponding right that both would be inalienable and held in life estate.

While *Palazzolo* leaves a fuller explication of "background principles" for another day, it significantly rooted the concept in "those common, shared understandings of permissible limitations derived from a State's legal tradition."[46] It is possible that the meaning of "background principles" might be elucidated in *Palazzolo* itself, since the state is free to argue on remand that its wetlands restrictions constitute background principles of its law.

It is true that rejection of the positive notice rule in *Palazzolo* "represents a setback for government defendants and destroys one of the few bright-line rules in an otherwise muddled area of the law."[47] But doctrines that are draconian in their destruction of constitutionally protected rights should no more be tolerated because they are tidy when they constrict property than when they constrict other individual liberties.

Should Rejection of the Positive Notice Rule Apply Differently to Arm's-Length Purchasers?

One possibly remaining issue under the otherwise-repudiated positive notice rule is whether the Court's holding applies to arm's-length purchasers as well as to those, like Palazzolo, who had preregulation beneficial interests or who acquired their postregulation interests through gift or devise.

Characterizing the case as involving "a technical legal transfer of ownership from a corporation owned by Palazzolo to Palazzolo himself," Professor Echeverria asserted that "[a] majority of the Court evidently believed that this and other types of *nonfinancial* transfers (such as inheritances and gifts) should not create an absolute bar to the subsequent assertion of takings claims by transferees."[48] He deemed *Palazzolo* "distinguishable from the case, for example, in which a speculator purchases heavily regulated lands at a low price and then alleges a taking seeking full market value "compensation" under the Takings Clause."[49]

While it may be, as Professor Echeverria suggests, that concern about "windfalls" will lead some Justices to consider buyer expectations in the context of possible strategic behavior,[50] there is no reason to believe that such concerns should countenance an absolute bar to takings claims by postregulatory arm's-length purchasers. The Rhode Island Supreme Court itself was emphatic in treating the SGI-Palazzolo transfer as no different from any other. It emphasized that the land was acquired and subsequent transactions were executed by SGI, not Palazzolo.[51] It noted that "[t]he owner of the shares of stock in a company is not the owner of the corporation's property."[52] Furthermore, "having 'received the benefits of corporate ownership for many years [claimant] may not now disregard the corporate form of ownership merely because it no longer serves his interests.'"[53]

Given the possibilities for strategic behavior among peo-

44. 121 S. Ct. at 2462-63 (internal citations omitted).

45. *Id*. at 2464.

46. *Id. See also* Steven J. Eagle, *The 1997 Regulatory Takings Quartet: Retreating From the "Rule of Law,"* 42 N.Y.L. Sch. L. Rev. 345, 399 (1998) (drawing an analogy to the sea anchor and observing that "background principles do not prevent gradual change, but do keep individual rights from being capsized by squalls of legislative passion." *Id*. at 399 n.337.

47. Echeverria, *supra* note 7, at 11113.

48. *Id*. at 11114 (emphasis added).

49. *Id*.

50. *Id*. (citing Justice O'Connor's concerns about preacquisition notice and windfalls, *Palazzolo*, 121 S. Ct. at 2467 (O'Connor, J., concurring)).

51. 746 A.2d at 715, 30 ELR Digest at 20420.

52. *Id*. at 715-16, 30 ELR Digest at 20420 (quoting Rhode Island Hosp. Trustee Co. v. Doughton, 270 U.S. 69, 81 (1926) (brackets in original)).

53. *Id*. (quoting Brotherton v. Dept. of Envtl. Conserv., 675 N.Y.S.2d 121, 122 (App. Div. 1998) (bracketed material in original)).

ple and entities with interrelated business interests, it would be difficult or impossible to fashion an absolute bar to some postregulation purchasers, but not others, that is both workable and fair. Even transfers motivated by love and affection might have their antecedents in strategic planning. These subtleties augur against any bright-line rule. The better answer, therefore, is that *Palazzolo* ought to be treated as a categorical rejection of the positive notice rule, and not as a repudiation limited to nonfinancial transfers.

The Ripeness Issue

In *Williamson County*,[54] the Court announced that a landowner's takings claim is not ripe for review in federal court until the owner obtains a "final decision" regarding the application of the restriction to his property and also utilizes state procedures for obtaining just compensation.[55] Until both prongs of *Williamson County* are met, the owner's takings claim is "premature."[56] In practice, the *Williamson County* ripeness rules have spawned so much complexity and delay that only litigants with the deepest pockets and most patience can obtain federal review.[57]

Ripeness in the Palazzolo Case

After discussing the various plans that Palazzolo had pursued to a greater or lesser extent over the years, the state supreme court held that his takings claim was not ripe because Palazzolo had not filed an application for the 74-lot subdivision that gave rise to the litigation, nor had he submitted a less ambitious plan for development.[58]

The Supreme Court approached ripeness from a practical perspective. It first interpreted the less-than-clear record to determine that the state agency had "interpreted its regulations to bar petitioner from engaging in any filling or development activity on the wetlands."[59] Furthermore, the Court stated:

> While a landowner must give a land-use authority an opportunity to exercise its discretion, 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, a takings claim is likely to have ripened.[60]

The agency precluded use of fill, and "with no fill there can be no structures and no development on the wetlands. Further permit applications were not necessary to establish this point."[61]

Will Palazzolo Impact the Court's Ripeness Rules?

It is unclear whether *Palazzolo* will have an appreciable effect upon the Court's regulatory takings ripeness jurisprudence. It is likely that the case breaks no new ground, although, in eschewing formalism, *Palazzolo* may encourage lower courts to take a more practical view of ripeness.

In the course of its ripeness discussion, 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."[62] Citing this language, Professor Echeverria stated that "the Court's opinion appears to grant government officials the opportunity to establish added protections against premature litigation," and that they "should carefully review their land use regulations to ensure that they clearly state that an authorization is conditional upon meeting other applicable regulatory requirements."[63]

On its face, there is nothing amiss in this advice. On the other hand, local 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 which, under *Williamson County*, generally is a precondition to federal judicial review.

This leads one to recall both Justice William J. Brennan's cry against state delaying tactics in *San Diego Gas & Electric Co. v. City of San Diego*,[64] and that municipal disingenuousness was at the heart of the Court's recent opinion in *Del Monte Dunes*.[65] There, the Court upheld the use of a jury to determine whether the city truly acted to substantially advance its own articulated rules.[66] In the process, it refused the U.S. Solicitor General's demands[67] to explicate the substantial advancement prong of its opinion in *Agins v. City of Tiburon*.[68] "Substantial advancement," of course, invokes the concept of ends-means review long associated with substantive due process.

Those considering the imposition of additional regulatory preconditions to agency final determinations should heed the *Palazzolo* Court's invocation of *Del Monte Dunes*:

54. 473 U.S. at 172.
55. *Id*. at 186.
56. *Id*. at 197. However, the Court never has held explicitly that there is a right to federal judicial review, even after maturation of the owner's takings claim. *See* Rainey Bros. Constr. Co. v. Memphis & Shelby Co. Bd. of Adjustment, 178 F.3d 1295 (table) (6th Cir. 1999), *cert. denied*, 528 U.S. 871 (1999).
57. *See generally* John J. Delaney & 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 (1999).
58. 746 A.2d at 713-14, 30 ELR Digest at 20420 (citing MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 351, 16 ELR 20807, 20810 (1986)).
59. Palazzolo v. Rhode Island, 121 S. Ct. 2448, 2459 (2001).
60. *Id*.
61. *Id*.
62. *Id*. at 2461.
63. *See* Echeverria, *supra* note 7, at 11115.
64. 450 U.S. 621, 655 n.22, 11 ELR 20345, 20353 n.22 (1981) (Brennan, J., dissenting). In making the point that municipalities manipulate rules to foreclose just compensation, Justice Brennan quoted a city attorney:

    > If legal preventive maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. One of the extra "goodies" contained in [a then-recent case] appears to allow the City to change the regulation in question, even after trial and judgment, make it more reasonable, more restrictive, or whatever, and everybody starts over again.

    Id.
65. 526 U.S. at 687, 29 ELR at 21133.
66. *Id*. at 703-07, 29 ELR at 21136-40.
67. *Id*. at 704, 29 ELR at 21137. *See* Brief for the United States as Amicus Curiae Supporting Petitioner, Part *1 at 22-24, 27-28 (Questions Presented), City of Monterey v. Del Monte Dunes at Monterey, Ltd., No. 97-1235, 1998 WL 308006 (U.S. 1999). *See also* Eagle, *supra* note 6, at 10107.
68. 447 U.S. 255, 260, 10 ELR 20361, 20362 (1980).

"Government authorities, of course, may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision."[69] The implication is that overreaching by localities might result in judicial invalidation of the unwarranted obstacles to development that flourish under *Williamson County*.

When Does a Regulatory Taking Occur?

Where government exercises its power of eminent domain, the Court noted in *Palazzolo*, it is "well settled that . . . any award goes to the owner at the time of the taking, and that the right to compensation is not passed to a subsequent purchaser."[70] Similarly, in the case of a physical invasion without exercise of eminent domain, "the fact and extent of the taking are known," so that the same rule applies.[71]

The process of defining when a regulatory taking occurs, on the other hand, is fraught with complexity and uncertainty.[72] In addition, the long process necessary to ripen a takings claim makes it likely that the owner who litigates the claim acquired title after the act that is determined retrospectively at the trial to have constituted the taking. Thus, the ability to assert that a takings claim has not yet ripened, and, alternatively, that the claim had ripened during the tenure of a prior owner, would be a powerful weapon in the hands of the government.[73]

The Court dealt with these problems in *Palazzolo* by holding that "[i]t would be illogical, and unfair, to bar a regulatory takings claim because of the postenactment transfer of ownership where the steps necessary to make the claim ripe were not taken, or could not have been taken, by a previous owner."[74]

The Court Upholds the Narrow View of Complete Deprivation Under the *Lucas* Categorical Rule

When *Lucas*[75] was decided in 1992, it was possible to assume that an extension of the Court's recently renewed concern for property rights would take the form of a gradual relaxation of what it took to "deprive[ ] land of all economically beneficial use."[76]

As *Palazzolo* confirms, this has not come to pass. The Court held that Palazzolo's parcel retained $200,000 in development value under the state's wetlands regulations.[77] Interpreting *Lucas*, it added:

> Assuming a taking is otherwise established, a State may not evade the duty to compensate on the premise that the landowner is left with a token interest. This is not the situation of the landowner in this case, however. A regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property "economically idle."[78]

Discerning the Relevant Parcel

Palazzolo noted that the petitioner attempted to "revive" his *Lucas* claim in the Supreme Court by arguing, for the first time, that his total deprivation claim was limited to the wetlands portion of his parcel and that the uplands portion should be excluded from its analysis.[79] The Court rejected this argument, without considering the merits, on the ground that it was made too late.[80]

Nevertheless, Justice Kennedy, writing for the Court, made very significant general observations about its relevant parcel jurisprudence. Justice Kennedy observed that some of the Court's cases "indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole."[81] Then he added, pointedly, "but we have at times expressed discomfort with the logic of this rule."[82] Given Palazzolo's failure to raise the issue in timely fashion, Justice Kennedy concluded that "we will not explore the point here."[83]

While Justice Kennedy's pointed dictum certainly raised afresh the question of defining the relevant parcel, I disagree that he was "elevating" it.[84] Unlike Professor Echeverria, I do not believe that the relevant parcel issue is "settled law."[85] Nor would I fault Justice Kennedy's description of it as a "difficult, persisting question."[86] Professor Echeverria's suggestion that Justice Kennedy's position is "a disingenuous effort to minimize the revolutionary change that repudiation of the property as a whole rule would entail" is therefore both wrong on the merits and unfair as a personal characterization.[87]

In determining whether a regulation necessitates the payment of just compensation, courts look at the fraction of value that has been taken. As the Court put it in *Keystone Bituminous Coal Ass'n v. DeBenedictis*,[88] "our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, [and] one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.'"[89]

Discerning the numerator of the takings fraction primarily is an issue of appraising the reduction in value resulting

69. *Palazzolo*, 121 S. Ct. at 2459 (citing *Del Monte Dunes*, 526 U.S. at 698, 29 ELR at 21138).
70. 121 S. Ct. at 2463.
71. *Id*.
72. *See*, *e.g.*, Gregory M. Stein, *Pinpointing the Beginning and Ending of a Temporary Regulatory Taking*, 70 WASH. L. REV. 953 (1995).
73. This approach was advocated in dissent by Justice Stevens, who demanded a "[p]recise specification of the moment a taking occurred" and stated that "it is the person who owned the property at the time of the taking that is entitled to the recovery." *Palazzolo*, 121 S. Ct. at 2469 (Stevens, J., concurring in part and dissenting in part).
74. *Id*. at 2463.
75. 505 U.S. at 1003, 22 ELR at 21104.
76. *Id*. at 1027, 22 ELR at 21110. *See* Steven J. Eagle & William H. Mellor III, *Regulatory Takings After the Supreme Court's 1991-1992 Term: An Evolving Return to Property Rights*, 29 CAL. W. L. REV. 209 (1993) (predicting such a relaxation).
77. 121 S. Ct. at 2464.
78. *Id*. at 2464-65 (quoting *Lucas*, 505 U.S. at 1019, 22 ELR at 21108).
79. *Id*. at 2465.
80. *Id*.
81. *Id*. (citing Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497, 17 ELR 20440, 20447 (1987)).
82. *Id*. (citing *Lucas*, 505 U.S. at 1016-17 n.7, 22 ELR at 21107 n.7).
83. *Id*.
84. Echeverria, *supra* note 7, at 11114.
85. *Id*.
86. *Palazzolo*, 121 S. Ct. at 2465.
87. Echeverria, *supra* note 7, at 11114.
88. 480 U.S. 470, 17 ELR 20440 (1987).
89. *Id*. at 497, 17 ELR at 20447 (citation omitted).

from the regulation. Discerning the denominator is a thorny issue of law. Both sides have incentives to overreach. Landowners want to engage in "conceptual severance," so that the relevant property is defined as to be as congruent as possible with the interest taken.[90] In order to prevent such manipulation, *Penn Central* stated that the Court "does not divide a single parcel into discrete segments . . . . [It] focuses rather [on the] extent of the interference with rights in the parcel as a whole."[91]

Yet government's incentive to overreach is symmetrical to that of the landowners. In *Penn Central* itself, the railroad had owned an extensive array of apartment and office buildings extending up Park Avenue from Grand Central Terminal. In its decision subsequently reviewed by the Supreme Court, the New York Court of Appeals earlier had declared the relevant parcel to comprise the "total value of the taking claimant's other holdings in the vicinity."[92] In *Lucas*,[93] the Court described this as an "extreme—and we think, unsupportable—view of the relevant calculus."[94] The *Lucas* observation was in the same footnote as the Court's confession that the "rhetorical force" of its "deprivation of all economically feasible use" rule exceeded the precision of its relevant parcel analysis.[95]

Since *Lucas*, the lower federal courts have been on their own in ascertaining the relevant parcel in regulatory takings cases. In *Loveladies Harbor, Inc. v. United States*,[96] the Federal Circuit noted that its precedent "displays a flexible approach, designed to account for factual nuances,"[97] an observation that could be applied to other courts as well. *Loveladies* rejected the "parcel as a whole" approach, holding that it would be unfair to deem the landowner's original tract as the relevant parcel, given that it had been acquired, and much of it resold, prior to the imposition of the restrictions complained of.[98] Likewise, in *Palm Beach Isles Associates v. United States*,[99] the Federal Circuit held that the disparity of physical characteristics, developmental history of the tract, and other factors required excluding previously sold land from the relevant parcel. Although reaching the opposite conclusion, the U.S. Court of Federal Claims recently performed a similar analysis in *Broadwater Farms Joint Venture v. United States*.[100] The Pennsylvania Commonwealth Court, in *Machipongo Land & Oil Co. v. Commonwealth Department of Environmental Resources*,[101] adopted what it termed a "multi-faceted approach" that would consider various factors.

> They include whether the landowner had investment-backed expectations; whether any land that could be part of the denominator was sold or developed prior to the regulation's enactment or enforcement; the dates of acquisition; the extent to which the parcel has been treated as a single unit; and the extent to which the protected land enhances the value of the remaining land. Just like any test that balances various considerations on an ad hoc basis, the multi-faceted approach fails to offer either regulators or property owners any certainty as to whether a regulation will result in a taking. It also has some of the same disadvantages as the contiguous land approach in that the outcome is determined by the status of those who own the land and their "expectations."[102]

Some commentators have attempted to define "relevant parcel" in objective ways not dependent upon the owner's intent. John Fee's approach, treating a taken property right as a relevant parcel if it has independent economic viability,[103] was cited in *Palazzolo*.[104] I have suggested, in a similar vein, that a property right is a relevant parcel if it is deemed in the property marketplace to be an "economic unit."[105]

While this survey is not exhaustive, it does demonstrate that Justice Kennedy's possible instigation of a reassessment of the "parcel as a whole" rule hardly is "revolutionary."[106]

The Specter of Partial Takings

In *Penn Central*,[107] the Court introduced its "ad hoc" balancing test for regulatory takings.[108] Subsequently, the Court adopted categorical tests for permanent physical invasions in *Loretto v. Teleprompter Manhattan CATV Corp.*,[109] and for complete deprivations of economically beneficial use in *Lucas*.[110] In the latter case, the dissent of Justice John Paul Stevens criticized the total deprivation requirement as arbitrarily depriving an owner suffering a 95% diminution in value of just compensation.[111] The Court responded:

> This analysis errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation. Such an owner might not be able to claim the benefit of our categorical formulation, but, as we have acknowledged time and again, "[t]he economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations" are keenly relevant to takings analysis generally.[112]

In *Palazzolo*, the Court reiterated, as it had in *Lucas*, that a compensable taking does not require a total deprivation:

> Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a

90. Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1676 (1988).

91. 438 U.S. at 130-31, 8 ELR at 20534.

92. Penn Cent. Transp. Co. v. City of New York, 366 N.E.2d 1271, 1276-77, 7 ELR 20579, 20582 (N.Y. 1977), *aff'd*, 438 U.S. 104, 8 ELR 20528 (1978).

93. 505 U.S. at 1003, 22 ELR at 21104.

94. *Id*. at 1016 n.7, 22 ELR at 21107 n.7.

95. *Id*.

96. 28 F.3d 1171, 24 ELR 21072 (Fed. Cir. 1994).

97. *Id*. at 1181.

98. *Id*.

99. 208 F.3d 1374, 1379, 30 ELR 20481, 20482, *aff'd on reh'g*, 231 F.3d 1354, *reh'g en banc denied*, 231 F.3d 1365 (Fed. Cir. 2000).

100. 35 Fed. Cl. 232 (Fed. Cl. 1996), *aff'd*, 121 F.3d 727, 27 ELR 21516 (Fed. Cir. 1997).

101. 719 A.2d 19 (Pa. Commw. 1998).

102. *Id*. at 27-28.

103. John Fee, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. CHI. L. REV. 1535, 1557-62 (1994).

104. 121 S. Ct. at 2465.

105. EAGLE, *supra* note 15, §11-7(e)(5).

106. *But see* Echeverria, *supra* note 7, at 11114.

107. 438 U.S. at 104, 8 ELR at 20528.

108. *Id*. at 124, 8 ELR at 20533.

109. 458 U.S. 419 (1982).

110. 505 U.S. at 1003, 22 ELR at 21104.

111. *Id*. at 1064, 22 ELR at 21120 (Stevens, J., dissenting).

112. *Id*. at 1019 n.8, 22 ELR at 21108 n.8.

> taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action.[113]

The *Lucas* reference to partial regulatory takings in *Penn Central* seems quite direct. Yet, Professor Echeverria asserts that, in *Palazzolo*, the Court states "the so-called *Penn Central* test," as he dubs it, "far more clearly than it had in any prior case."[114]

It is true, as Professor Echeverria says, that some lower courts had denied takings claims simply on the basis that the landowner had not suffered a total deprivation.[115] On the other hand, as the Federal Circuit stated in *Florida Rock Industries, Inc. v. United States*,[116] "[n]othing in the language of the Fifth Amendment compels a court to find a taking *only* when the Government divests the total ownership of the property; the Fifth Amendment prohibits the uncompensated taking of private property without reference to the owner's remaining property interests."[117] In a subsequent *Florida Rock* opinion on remand, the U.S. Court of Federal Claims distinguished the partial taking from the total taking of a smaller relevant parcel than the owner's original tract:

> Although what is taken in a partial regulatory taking is both value and property, a specific property interest was nevertheless taken from Florida Rock. . . . The Federal Circuit bases its partial taking inquiry on the existence of a taking of value from the whole parcel ("the Government appears to have destroyed part of the value of Florida Rock's holdings"), which, pursuant to the *Penn Central* test, may result in compensation for the taking of a specific interest ("if the application of the *ad hoc* tests previously described so warrant, the property interest taken belongs to the Government, and the right to just compensation for the interest taken belongs to Florida Rock"), in this case the traditional rights to use land for mining. If it is necessary to name the government's interest post taking, the court would suggest the government now owns a negative easement.[118]

It certainly is true that the reiteration of the *Penn Central* partial takings test in *Palazzolo* raises many doctrinal questions. But the importance of *Palazzolo* lies in large part in its signal that the Court now brings them to the attention of lower courts and, perhaps, that the Court itself is willing to address them and make partial regulatory takings compensation a regularly employed remedy.

Palazzolo Establishes a Leading Role for "Reasonable Investment-Backed Expectations"

The Court rejected the positive notice rule in *Palazzolo*, so preacquisition statutes and ordinances are not automatic bars to the regulatory takings claims of subsequent purchasers. That leaves for later decision the important question of the extent, if any, to which preacquisition regulations should affect the rights of subsequent purchasers.

This issue produced the most interesting fracture on the Court. On the surface, the majority opinion deemed the rule that buyers acquire their sellers' "full property rights," as asserted by the Court in *Nollan*,[119] to be "controlling precedent."[120] However, sharp differences within the majority cloud that result.

The Court's Nominal Affirmation That Purchasers Assume Their Sellers' Rights Under Nollan Appears Bereft of a Majority

In *Nollan*, the Court considered whether it was consistent with the Takings Clause for a state agency to condition a development permit upon the applicants' grant of a public easement along the beach behind their home. As Justice Brennan noted in dissent, the Nollans were subsequent purchasers who were on notice of the California Coastal Commission's policy to require such access.[121] The majority rejected the implications of that analysis and declared: "So long as the 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."[122]

The Court in *Palazzolo* quoted this language.[123] However, it seems clear that Justice Sandra Day O'Connor, whose vote was necessary to achieve a majority, did not subscribe to it. While Justice Kennedy's majority opinion said little more than that *Nollan* was "controlling" and "based on essential Takings Clause principles,"[124] the case's real fervor was in the dueling concurring opinions of Justice Antonin Scalia and Justice O'Connor.

Justice O'Connor declared that the Court's holding "does not mean that the timing of the regulation's enactment relative to the acquisition of title is immaterial to the *Penn Central* analysis. Indeed, it would be just as much error to expunge this consideration from the takings inquiry as it would be to accord it exclusive significance."[125] Instead, she deemed controlling *Penn Central* and subsequent partial regulatory takings cases. These cases, she continued, "treated interference with investment-backed expectations is one of a number of factors that a court must examine. Further, the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations."[126]

Justice O'Connor found the positive notice rule to give the state "far too much power to redefine property rights," and, alternatively, that if existing regulations are disregarded, "some property owners may reap windfalls and an important indicium of fairness is lost."[127] She concluded by expressing her view that the Court's decision "does not remove the regulatory backdrop against which an owner takes

113. *Palazzolo*, 121 S. Ct. at 2457 (citing *Penn Cent*., 438 U.S. at 124, 8 ELR at 20533).

114. Echeverria, *supra* note 7, at 11114.

115. *Id*.

116. 18 F.3d 1560, 24 ELR 21036 (Fed. Cir. 1994).

117. *Id*. at 1568, 24 ELR at 21040 (emphasis in original).

118. Florida Rock Indus. v. United States, 45 Fed. Cl. 21, 43 n.13 (Fed. Cl. 1999) (quoting *Florida Rock*, 18 F.3d at 1572, 24 ELR at 21042) (emphasis in original).

119. 483 U.S. at 833 n.2, 17 ELR at 20920 n.2.

120. Palazzolo v. Rhode Island, 121 S. Ct. 2448, 2463 (2001).

121. *Nollan*, 483 U.S. at 860, 17 ELR at 20927 (Brennan, J., dissenting).

122. *Id.* at 833 n.2, 17 ELR at 20920 n.2.

123. 121 S. Ct. at 2463-64.

124. *Id*. at 2463.

125. *Id.* at 2465 (O'Connor, J., concurring).

126. *Id.* at 2466 (O'Connor, J., concurring).

127. *Id.* at 2467 (O'Connor, J., concurring).

title to property from the purview of the *Penn Central* inquiry. It simply restores balance to that inquiry. . . . The temptation to adopt what amount to per se rules in either direction must be resisted."[128]

Justice Scalia's concurrence argued for the result in Footnote 2 of *Nollan*, but did not cite it. His theoretical argument was, in effect, that Justice O'Connor's approach would bootstrap the validity of otherwise invalid regulations.

> The "investment-backed expectations" that the law will take into account do not include the assumed validity of a restriction that in fact deprives property of so much of its value as to be unconstitutional. Which is to say that a *Penn Central* taking, no less than a total taking, is not absolved by the transfer of title.[129]

Justice Scalia gave short-shrift to Justice O'Connor's concern about windfalls. He compared the gain inuring to a buyer who had the insight or ability to vindicate what had been the seller's legal rights to constitute a "windfall" only in the sense that knowledgeable stock traders or antique auction buyers obtain a profit "at the expense of the ignorant (or risk adverse)."[130] Furthermore, as the seller already parted with title, it makes more sense to leave the windfall with the buyer than to give it to the government that promulgated the invalid regulation. "Justice O'Connor would eliminate the windfall by giving the malefactor the benefit of its malefaction."[131]

Justice Stephen G. Breyer's dissent explicitly agreed with Justice O'Connor's concurrence that the positive notice rule should be rejected, but that preacquisition regulations should be considered "within the *Penn Central* framework."[132] Justices Ruth Bader Ginsburg[133] and Stevens[134] also adopted Justice O'Connor's view.

Thus, while Justice Kennedy was able to retain his majority by referring favorably to *Nollan*, his opinion was not based squarely upon it. The dissenting Justices, joined by Justice O'Connor, appear to be a majority aligned in behalf of a definite (albeit undetermined) role for preacquisition regulations in discerning the investment-backed expectations of purchasers who bring partial regulatory takings claims.[135]

Some Comments on Preacquisition Regulations and Partial Regulatory Takings

As a matter of black-letter property law, "the entire estate or interest of the grantor passes to the grantee, unless there is specific language to the contrary."[136] It seems incongruous for the owner of one parcel to be permitted to assert a regulatory takings claim while the owner of a nearby parcel, who paid full value for his seller's rights but who acquired after a regulation was promulgated, cannot. Aside from the issue of whether the government or the purchaser should benefit from a regulation that would be invalid were it not preacquisition, the very act of rejecting the notice rule in full would itself enhance fairness. Once it is clear that courts would honor a transfer of all of the seller's rights, both buyer and seller would bargain for the transfer of those rights for full value.[137]

Should the Principle That Preacquisition Regulations Affect Investment-Backed Expectations Be Applicable to Lucas Takings Analyses?

Since the Court in *Palazzolo* rejected the landowner's assertion of a total taking,[138] its opinion did not explicitly address the issue of whether expectations engendered by preacquisition regulations should play any role in adjudicating a complete takings claim. However, Justice Scalia's concurrence asserted that "a *Penn Central* taking . . . no less than a total taking, is not absolved by the transfer of title.[139]

Professor Echeverria takes the position, based in part on Justice Kennedy's reference to his concurring opinion in *Lucas*,[140] that Justice Kennedy's opinion for the Court in *Palazzolo* "appears, at a minimum, to leave open the possibility that investment expectations, including preacquisition notice, is a relevant consideration in evaluating a *Lucas*-type claim."[141] In the *Lucas* concurrence, Justice Kennedy stated: "The finding of no value must be considered under the Takings Clause by reference to the owner's reasonable, investment-backed expectations."[142]

However, in the next paragraph, Justice Kennedy added:

> There is an inherent tendency towards circularity in this synthesis, of course; for if the owner's reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority, property tends to become what courts say it is. Some circularity must be tolerated in these matters, however, as it is in other spheres. The definition, moreover, is not circular in its entirety. The expectations protected by the Constitution are based on objective rules and customs that can be understood as reasonable by all parties involved.
>
> In my view, reasonable expectations must be understood in light of the whole of our legal tradition.[143]

These words sound like an invocation of background principles, meaning that Justice Kennedy's foray into the realm of expectations may wind up ensconced in the grounding of Justice Scalia's *Lucas* majority opinion.[144]

At the heart of the problem in this area (as in so many others) is the Court's lack of a coherent theory of takings. On one hand, it seems tenuous to have a different rule for expectations when they relate to partial taking than when they re-

128. *Id.* at 2467 (O'Connor, J., concurring).

129. *Id*. at 2468 (Scalia, J., concurring) (internal citation omitted).

130. *Id*.

131. *Id*.

132. *Id*. at 2477 (Breyer, J., dissenting).

133. *Id*. at 2477 n.3 (Ginsburg, J., dissenting) (joined by Justices Souter and Breyer).

134. *Id*. at 2471 n.6 (Stevens, J., concurring in part and dissenting in part).

135. My conclusion is similar to that of Professor Echeverria. *See* Echeverria, *supra* note 7, at 11117.

136. 9 Thompson on Real Property, Thomas Edition §82.13(c)(2) (David A. Thomas ed., 1994) (citing cases).

137. This point is expanded in Eagle, *supra* note 46, at 391-92.

138. 121 S. Ct. at 2464-65.

139. *Id.* at 2468 (Scalia, J., concurring).

140. *Id*. at 2457 (citing *Lucas*, 505 U.S. at 1034, 22 ELR at 21112 (Kennedy, J., concurring)).

141. Echeverria, *supra* note 7, at 11118.

142. *Lucas*, 505 U.S. at 1034, 22 ELR at 21112 (Kennedy, J., concurring).

143. *Id*. at 1035, 22 ELR at 21112 (Kennedy, J., concurring) (citing Katz v. United States, 389 U.S. 347 (1967) (Fourth Amendment protections defined by reasonable expectations of privacy)).

144. *Id*. at 1003, 1029, 22 ELR at 21104, 21111.

late to total takings. On the other hand, *Lucas* is perhaps grounded on the fact that "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation."[145] It has not been suggested physical appropriations be subject to an "investment-backed expectations" analysis.

The competing views on whether "investment-backed expectations" should play a role in total takings adjudication have been played out recently in the Federal Circuit. One panel, in *Good v. United States*,[146] answered in the affirmative:

> A *Lucas*-type taking . . . is categorical only in the sense that the courts do not balance the importance of the public interest advanced by the regulation against the regulation's imposition on private property rights.
>
> The *Lucas* Court did not hold that the denial of all economically beneficial or productive use of land eliminates the requirement that the landowner have reasonable, investment-backed expectations of developing his land. . . .[147]

On the other hand, another panel, in *Palm Beach Isles Associates*,[148] answered in the negative, citing the Federal Circuit's prior holding in *Florida Rock* "that '[i]f a regulation categorically prohibits *all* economically beneficial use of the land—destroying its economic value for private ownership—the regulation has an effect equivalent to a permanent physical occupation. There is, without more, a compensable taking.'"[149]

This split enhances the likelihood that the Court will settle this issue.

Deprivation of Use Versus Deprivation of Value

The last element mentioned, the meaning of "economic value," was raised in one of the questions upon which certiorari in *Palazzolo* was granted: "Whether the remaining permissible uses of regulated property are economically viable merely because the property retains a value greater than zero."[150]

While the Court did not reach this issue in its *Palazzolo* opinion, it clearly remains on the table. In *Lucas*,[151] the Court explained that, although its prior cases were concerned with "the productive use of, and economic investment in, land, there are plainly a number of noneconomic interests in land whose impairment will invite exceedingly close scrutiny under the Takings Clause."[152] It cited as an example the right to exclude strangers in *Loretto*.[153]

Some of the rights that constitute "property" involve noneconomic use, such as satisfaction derived from the exclusion of others and the right to alienate one's holdings. Does monetary value, as such, constitute property? More specifically, does monetary value derived from the mere expectation that a draconian regulation would be removed at a future date constitute property? Clearly some change is inevitable.[154] Given that it always is possible for a regulation to be removed, and given that this possibility has some value, to equate that value with "economic use" would mean that there never could be a complete taking. A rule that vindicates a regulation based on the possibility of its removal is a perverse form of protection for property rights.

A Final Word

In his earlier *ELR* article on *Del Monte Dunes*,[155] Professor Echeverria observed that "[a]fter more than 20 years of intensive engagement in the issue, one might suppose that the Court would have settled the basic outlines of takings law." He is right, of course.

Nevertheless, the Court is far from contrite, stating in *Palazzolo*:

> In *Pennsylvania Coal Co. v. Mahon*, the Court recognized that there will be instances when government actions do not encroach upon or occupy the property yet still affect and limit its use to such an extent that a taking occurs. In Justice Holmes' well-known, if less than self-defining, formulation, "while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking."
>
> Since *Mahon*, we have given some, but not too specific, guidance to courts confronted with deciding whether a particular government action goes too far and effects a regulatory taking.[156]

Thus, the Court displays its unwillingness or inability to make this area of the law clear or coherent as a badge of honor.

145. *Id*. at 1017, 22 ELR at 21108.

146. 189 F.3d 1355, 30 ELR 20102 (Fed. Cir. 1999).

147. *Id*. at 1361, 30 ELR at 20104 (citations omitted).

148. 208 F.3d at 1379, 30 ELR at 20482-83, *aff'd on reh'g*, 231 F.3d at 1354, *reh'g en banc denied*, 231 F.3d at 1365.

149. *Id*. (quoting *Florida Rock*, 18 F.3d at 1564-65, 24 ELR at 21038) (emphasis in original).

150. Palazzolo v. Rhode Island, 121 S. Ct. 296 (2000) (granting certiorari).

151. 505 U.S. at 1003, 22 ELR at 21104.

152. *Id*. at 1019 n.8, 22 ELR at 21108 n.8.

153. *Id*. (citing *Loretto*, 458 U.S. at 436).

154. *See Florida Rock*, 18 F.3d at 1566, 24 ELR at 21039 (observing that "yesterday's Everglades swamp to be drained as a mosquito haven is today's wetland to be preserved for wildlife and aquifer recharge; who knows what tomorrow's view of public policy will bring, or how the market will respond to it.") (internal citation omitted).

155. Echeverria, *supra* note 6, at 10682.

156. 121 S. Ct. at 2457 (quoting Pennsylvania Coal v. Mahon, 260 U.S. 393, 415 (1922)).