The U.S. Supreme Court’s latest regulatory takings decision, *Palazzolo v. Rhode Island*, is significant for its rejection of what I term the positive notice rule. It also confirms the narrow scope of the categorical rule, developed in *Lucas v. South Carolina Coastal Council*, 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 may have led the Justices themselves to infer facts based upon their conceptions of the Takings Clause.

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. In his Dialogue on *Palazzolo* in a recent issue of ELR, 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 in starkly partisan terms, 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.” As an initial matter, I am not persuaded that the term “judicial activism” is very helpful. 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, it has vindicated property rights at many
points in our history. Indeed, as even critics have recognized, property rights were the “great focus” of the Framers. 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. It further explicates the Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City ripeness rule, and lends some support to the view that the rule is “prudential.” Furthermore, Palazzolo reiterates the importance of the “investment-backed expectations” doctrine in Penn Central Transportation Co. v. City of New York. This provides a glimmer of hope that the chimera of “expectations” might be made comprehensible.

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, and subsequently in the rough proportionality requirement in Dolan v. City of Tigard. Fairness was the leitmotif of the recently decided City of Monterey v. Del Monte Dunes at Monterey, Ltd. 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, 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.

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. 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.

Palazzolo has been president of Shore Gardens, Incorporated (SGI), since its incorporation on July 29, 1959. On December 2, 1959, Palazzolo, with Natalie and Elizabeth Urso, transferred three adjoining parcels in the town of Westerly to SGI. In 1959, while Palazzolo and Natalie 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 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.

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...
Between 1962 and 1985, Palazzolo filed several applications to dredge a pond and fill the property. At the time of these 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. 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. 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 a new 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.

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 $3.15 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. 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.” The court concluded: “[A] regulatory takings claim may not be maintained where the regulation predates the acquisition of the property.”

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 <em>Lucas</em>, which stated that a deprivation of all economically beneficial use of property constituted a taking. However, the rule is not absolute, but rather cabined by limitations on the use of land which “inhere in the title itself.” These include “restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.” The notice rule deemed statutes and local ordinances to be “background principles” for this purpose.

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 <em>Palazzolo</em> and of a number of other jurisdictions. The most significant aspect of the Supreme Court’s opinion in <em>Palazzolo</em> 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...
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.

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 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.”46 But doctrines that are draconian in their destruction of constitutionally protected rights should no more be tolerated because they are tidy 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.”

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,49 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)).
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 demands67 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:

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.

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.” 71 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 retroactively 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 complete de minimis value under the state’s wetlands regulations. 77

Interpreting *Lucas*, it added:

78. *Palazzolo*, 121 S. Ct. at 2459 (citing Del Monte Dunes, 526 U.S. at 698, 29 ELR at 21138).
79. 121 S. Ct. at 2463.
80. Id. at 2463.
82. This approach was advocated in dissent by Justice Stevens, who demanded a “[p]recise specification of the moment a taking occurred” and stated that “[t]he 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).
83. Id. at 2463.
84. 505 U.S. at 1003, 22 ELR at 21104.
86. 121 S. Ct. at 2464.

**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

78. Id. at 2464-65 (quoting *Lucas*, 505 U.S. at 1019, 22 ELR at 21108).
79. Id. at 2465.
80. Id. at 2465.
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.
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.\(^{96}\) In order to prevent such manipulation, *Penn Central* stated that the Court “does not divide a single parcel into discrete segments . . . [I]t 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, unsupported—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


\(^{91}\) 438 U.S. at 130-31, 8 ELR at 20534.


\(^{93}\) 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.

\(^{98}\) 208 F.3d 1374, 1379, 30 ELR 20481, 20482, aff’d on reinh’g, 231 F.3d 1354, reh’g en banc denied, 231 F.3d 1365 (Fed. Cir. 2000).

\(^{99}\) 35 Fed. Cl. 232 (Fed. Cl. 1996), aff’d, 121 F.3d 727, 27 ELR 21516 (Fed. Cir. 1997).

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:

Despite 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

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).

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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 abrogated 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 abrogated 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; 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.” 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*, 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*, 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.”

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*, 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 indicates 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*, 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.

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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).
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)).