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NEWS & ANALYSIS

A Preliminary Assessment of *Palazzolo v. Rhode Island*

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This short Dialogue is a first stab at trying to unravel the meaning and significance of the U.S. Supreme Court's ruling in *Palazzolo v. Rhode Island*,[1] issued on June 28, 2001, the last day of the Court's Term. One's assessment of major Court rulings—like red wine in a cool cellar, or, if you prefer, milk sitting in the hot sun—tends to ripen over time. Accordingly, these observations are offered with the caveat that I may think somewhat differently about the case weeks, months, or years from now.

This Dialogue begins with a brief summary. It then lays out the essential facts, the issues, and the legal rulings in the case. This is followed by my basic observations about the meaning and significance of the Court's decision. Finally, I conclude with a more detailed discussion of the two central aspects of takings doctrine affected by the case: the "notice issue" and the so-called partial taking theory.

Summary

The state of Rhode Island (and its many amici) lost the case in the Court, by a vote of 5 to 4, with the Justices dividing along the same partisan lines as in *Bush v. Gore*.[2] However, the Court did not actually find a taking. Instead, it sent the case back to the Rhode Island courts for further proceedings. Given the factual record and earlier trial court rulings in the case, Palazzolo's taking claim will probably ultimately be rejected.

The Court resolved certain questions—in particular, the issue of whether an owner's preacquisition notice of a regulation automatically bars a taking claim. The answer is "no." In addition, the Court provided a kind of backhanded endorsement for the partial regulatory taking idea, and in the process created greater uncertainty about when regulations may or may not run afoul of the Takings Clause. Finally, the Court raised new questions about one important aspect of takings law which had previously been regarded as settled, the so-called property as a whole rule.

Overall, the decision represents another incremental step by an activist Court in the direction of a new, libertarian rewrite of the Takings Clause.[3] As a result of *Palazzolo* and other recent Court takings rulings, local, state, and federal government officials attempting to implement land use and environmental laws face the prospect of an increasing number of challenges to their actions under the Takings Clause. This threat will inevitably have a chilling effect on government regulators which, in turn, will further undermine environmental and community protections.

Despite this ruling and a string of other recent defeats for government defendants in Court takings cases, the conservatives on the Court have yet to achieve radical change in takings doctrine. A majority of the present Court may not be prepared to take that step. Furthermore, the direction of the Court's decisionmaking on this issue could change in the future for a number of reasons. Thus, the takings issue will continue to be the focus of controversy. Indeed, the day after issuing its ruling in *Palazzolo*, the Court agreed to review a case in which a federal appeals court rejected a takings challenge to a planning moratorium adopted by the Tahoe Regional Planning Agency. This new case, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[4] raises issues at least as fundamental as those presented by *Palazzolo*.

The Case in a Nutshell

The *Palazzolo* case appeared to pose a number of troublesome factual uncertainties and ambiguities. But, for better or for worse, fairly or unfairly, the Court managed to construe the facts in a relatively simple manner. Palazzolo acquired about 20 acres of coastal property in Westerly, Rhode Island, in 1959 through a corporation he controlled.[5] Most of the 20 acres are tidal wetlands. The property also includes a small upland portion which, as of the date of the alleged taking, had a market value of $200,000 as the site for construction of one (quite valuable) home.[6] In 1971, the state of Rhode Island adopted a stringent new coastal protection law essentially barring any filling of the wetlands.[7] In 1978, Palazzolo's corporation had its charter revoked for nonpayment of taxes and the property was transferred by operation of law to Palazzolo.[8]

In the Court, the case presented three issues: (1) was the case ripe for review?; (2) did the preexistence of the restriction on wetlands filling at the time Palazzolo's corporation was dissolved and he personally acquired title to the property bar his taking claim?; and (3) did Palazzolo establish a taking under *Lucas v. South Carolina Coastal Council*[9]?

First, given its understanding of the facts, the Court had little difficulty ruling that the case was "ripe" for review. It was perfectly clear, the Court stated, what the state would al-

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1. 121 S. Ct. 2448 (2001).
2. 121 S. Ct. 525 (2000).
3. The Fifth Amendment to the U.S. Constitution provides that "no 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.
4. 216 F.3d 764, 30 ELR 20638 (9th Cir. 2000), *reh'g en banc denied*, 228 F.3d 998 (9th Cir. 2000), *petition for cert. granted sub nom.* Palazzolo v. Rhode Island, 121 S. Ct. 2448 (2001).
5. 121 S. Ct. at 2455.
6. *Id.* at 2457.
7. *Id.* at 2456.
8. *Id.*
9. 505 U.S. 1003, 22 ELR 21104 (1992).

low in the wetlands (nothing) and what the state would allow on the uplands (one house).[10] Accordingly, Palazzolo was not required to file any additional applications in order to ripen his claim. The Court concluded that the Rhode Island Supreme Court had erred in concluding that the case was not ripe and reversed on this point. (Justice John P. Stevens joined with the majority on the ripeness question, meaning that the vote was 6 to 3 on this issue.)

Second, the Court rejected the Rhode Island Supreme Court's ruling that Palazzolo's claims were barred as a matter of law because he acquired the property after the restrictions were already in place.[11] This was so, Justice Anthony M. Kennedy said, regardless of whether Palazzolo's case was analyzed as a so-called categorical taking claim under *Lucas* or under the multifactor takings test in *Penn Central Transportation Co. v. City of New York*.[12] More specifically, the Court said that the fact that the coastal law was in place at the time Palazzolo acquired the property did not convert the law into a "background principle" of state property law sufficient to defeat the *Lucas* taking claim.[13] The Court also said that Palazzolo's preacquisition notice was not sufficient, by itself, to demonstrate that he lacked the investment-backed expectations necessary to support a taking claim under *Penn Central*.[14] There is, as discussed below, some language in the majority opinion which arguably supports a broader rule that a claimant's advance notice of regulatory restrictions, far from precluding a taking claim, should be completely irrelevant in takings analysis. But the majority did not go that far.

The depth of the divisions within the majority on the notice issue was exhibited by the concurring opinions of Justices Sandra Day O'Connor and Antonin Scalia. Justice O'Connor, who provided the crucial fifth vote to overturn the Rhode Island Supreme Court, stated that she joined with the majority on the express understanding that advance notice of a regulatory restriction, though not an absolute bar to a taking claim, was a relevant factor in takings analysis.[15] Justice Scalia, on the other hand, expressed the view that advance notice of a regulatory restriction should have no bearing on an owner's entitlement to recovery under the Takings Clause.[16]

Third, the Court affirmed the Rhode Island Supreme Court insofar as it rejected Palazzolo's claim that he had suffered a "categorical" taking under Lucas because he had allegedly been denied "all economically beneficial use" of the property.[17] The Court noted that a taking claimant might be able to establish a taking under *Lucas* if the regulation left the owner with only a "token interest."[18] But the Court said Palazzolo's *Lucas* claim had to be rejected because the $200,000 value of the upland portion clearly removed this case from the "total taking" category.[19] Accordingly, the Court remanded the case to the Rhode Island Supreme Court for further proceedings under the so-called *Penn Central* taking test.[20]

It seems likely that the taking claim will be rejected on remand. The fact that Palazzolo acquired the property subject to the rule against wetlands filling, coupled with evidence that rejection of a permit to fill the wetlands caused Palazzolo little if any economic harm, will probably be sufficient to defeat the claim. In addition, the trial court also rejected the claim on the alternative basis that it was barred by "background principles" of nuisance law,[21] an issue not addressed either by the Court or the Rhode Island Supreme Court. Finally, the state also asserted that the taking claim was barred by the state public trust doctrine, and no court has yet ruled on that defense in this case.

Finally, the Court observed that Palazzolo's Supreme Court counsel tried to interject the argument that Palazzolo should be able to assert a taking claim limited to the restricted wetlands.[22] The Court dismissed the argument on the ground that it could not be raised for the first time in the Supreme Court.[23] Therefore, in accordance with Palazzolo's original theory, the claim had to be evaluated in relation to the whole of Palazzolo's 20-acre property.[24] However, the Court went out of its way to describe the proper definition of the relevant property in a regulatory taking case as a "difficult, persisting question."[25]

Basic Observations About the Case

Demise of the Strict Notice Rule

The Court has rejected the rule adopted by the Rhode Island Supreme Court and a number of lower courts[26] that the existence of the regulatory regime at the time the owner purchased or otherwise acquired the property automatically bars a subsequent taking claim. This ruling represents a setback for government defendants and destroys one of the few bright-line rules in an otherwise muddled area of the law.

On the positive side, however, the Court's decision does not *preclude* consideration of preacquisition notice as a factor in takings analysis. Indeed, in light of Justice O'Connor's crucial concurring opinion, the case is best read as endorsing consideration of preacquisition notice as a rel-

10. 121 S. Ct. at 2458-62.

11. *Id.* at 2462-64; Palazzolo v. State, 746 A.2d 707, 716, 30 ELR Digest 20420 (R.I. 2000).

12. 438 U.S. 104, 8 ELR 20528 (1978). *See* 121 S. Ct. at 2464. While the Court treated a *Lucas* claim and a *Penn Central* claim as well-settled categories of regulatory takings cases, the exact nature of these tests, including whether they in fact represent clearly distinct tests, is far from clear, as discussed below.

13. 121 S. Ct. at 2464.

14. *Id*.

15. *Id*. at 2465-67 (O'Connor, J., concurring).

16. *Id*. at 2467-68 (Scalia, J., concurring).

17. *Id*. at 2464-65.

18. *Id*. at 2464.

19. *Id*. at 2465.

20. *Id*.

21. Palazzollo v. Coastal Resources Mgmt. Council, No. 86-1496, 1995 WL 941370 (R.I. Super. Jan. 5, 1995).

22. Justice Ruth Bader Ginsburg argued that the theory was inconsistent with "numerous holdings of this Court" (citing Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal., 508 U.S. 602, 643-44 (1993)). 121 S. Ct. at 2475 n.2 (Ginsburg, J., dissenting).

23. 121 S. Ct. at 2465.

24. *Id*.

25. *Id.*

26. *See*, *e.g.*, Avenal v. United States, 100 F.3d 933, 937-38 (Fed. Cir. 1996); City of Virginia Beach v. Bell, 255 Va. 395, 498 S.E.2d 414, 417-19 (Va.), *cert. denied*, 575 U.S. 826 (1993); Gazza v. New York State Dep't of Envtl. Conservation, 89 N.Y.2d 603, 679 N.E.2d 1035, 28 ELR 20053 (N.Y. 1997). *See* Robert Meltz, *Wetlands Regulation and the Law of Regulatory Takings*, 30 ELR 10481-82 (June 2000).

evant *factor* in takings cases.[27] This likely means that most long-established environmental and land use regulations will be largely immune from takings challenges. And they should become increasingly immune from challenge as properties change hands and additional time passes.

In addition, the scope of the *Palazzolo* ruling on the notice issue may turn out to be fairly limited. The case involved a technical legal transfer of ownership from a corporation owned by Palazzolo to Palazzolo himself. 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. However, *Palazzolo* and cases involving inheritances or gifts are 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. Justice O'Connor insisted that preacquisition notice must be a relevant factor in takings analysis in order to avoid potential "windfalls."[28] It seems very likely that, following *Palazzolo*, at least as a matter of practice if not strict legal rule, investors who have purchased restricted lands at a deep discount, or who have engaged in other strategic behavior in an attempt to manufacture a taking claim in light of preexisting regulatory restrictions, will continue to be barred from recovering under the Takings Clause.

One issue alluded to but by no means resolved in *Palazzolo* is whether an owner's preacquisition notice also is a relevant factor in a *Lucas*-type case. As discussed below, there appears to be a strong argument that there cannot be a "categorical" bar to consideration of an owner's preacquisition notice in a so-called categorical *Lucas* case.

Backhanded Support for "Partial Takings" Claims

In *Palazzolo*, the Court stated, far more clearly than it had in any prior case, that even if a regulation does not eliminate "all economically beneficial use," and therefore does not result in a taking under *Lucas*, the regulation may still result in a regulatory taking under *Penn Central*.[29] Prior to *Palazzolo*, some lower courts had applied one basic standard: that a regulation results in a taking if it eliminates essentially all of a property's value. *Palazzolo* conflicts with this approach by distinguishing between *Lucas* "total taking" claims and *Penn Central* claims. *Palazzolo* strongly suggests, though it does not decide the issue, that the evidence that Palazzolo's property retained a value of $200,000 was not sufficient, by itself, to defeat the *Penn Central* taking claim.

While *Palazzolo* clearly recognizes the existence of the so-called *Penn Central* test, the Court has not defined with any precision the scope of this type of taking claim or the standards governing its application. If, as discussed above, preacquisition notice must be a relevant factor in both a *Lucas* case and a *Penn Central* case, the differences between these two categories of takings may turn out to be rather slight. In any event, by providing new support for the *Penn Central* test, *Palazzolo* will generate many new questions about this test and how it should be applied, as discussed in greater detail below.

27. 121 S. Ct. at 2466-67.

28. *Id*. at 2467.

29. *Id*. at 2457.

Elevating the "Relevant Property" Question

The Court resolved the case on the premise that the whole of Palazzolo's 20-acre property represented the relevant property for the purpose of takings analysis. Nonetheless, the Court emphasized that the definition of the relevant property is a "difficult, persisting question."[30] This statement seems designed to encourage greater questioning of the property as a whole rule by the lower courts and to set the stage for possible reconsideration of the rule by the Court.

In fairness, the characterization of the relevant property issue as "difficult" and "persisting" is wholly disingenuous. Until Justice Scalia, in an extraneous footnote to his opinion in *Lucas*, raised some doubt about the property as a whole rule,[31] the rule represented settled law. Indeed, as Justice Ruth Bader Ginsburg points out in her dissent in *Palazzolo*,[32] the Court has also applied and strongly reaffirmed the property as a whole rule following *Lucas*. It is impossible to read the Court's language in *Palazzolo* about the property issue without questioning whether the Court is involved in a disingenuous effort to minimize the revolutionary change that repudiation of the property as a whole rule would entail.

The day after the Court's ruling in *Palazzolo*, it granted a petition for certiorari in the case of *Tahoe-Sierra*, to consider the following question: "Whether the court of appeals properly determined that a temporary moratorium on land development does not constitute a taking of property requiring compensation under the Takings Clause of the U.S. Constitution?" The issue whether a moratorium (which does not prevent development but merely postpones it) results in a taking can be viewed as raising the property as a whole issue in the temporal dimension. Thus, *Tahoe-Sierra* could provide the Court a vehicle for providing important guidance on the relevant property issue highlighted by the Court in *Palazzolo*.

Increased Legal Uncertainty

One unfortunate upshot of the *Palazzolo* case is a significant increase in the level of uncertainty about when a regulation will or will not result in a taking. Given the already famously muddy character of takings doctrine,[33] this greater uncertainty is a significant cause for concern. The *Palazzolo* ruling adds to the uncertainty of takings doctrine because the Court's opinion provides a backhanded endorsement for the *Penn Central* test but does essentially nothing to clarify this vague and uncertain test. In addition, Justice O'Connor, in her concurring opinion, emphasized the fact-dependent nature of the *Penn Central* inquiry,[34] increasing the level of un-

30. *Id*. at 2465.

31. Justice Scalia said that "[r]egrettably, the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured." *Lucas*, 505 U.S. at 1016 n.7, 22 ELR at 21107 n.7.

32. 121 S. Ct. at 2474-75.

33. *See, e.g.*, John D. Echeverria, *Revving the Engines in Neutral:* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 29 ELR 10682, 10682 (Nov. 1999) ("The Court's uncertainty about basic elements of regulatory takings doctrine is striking. After 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.").

34. 121 S. Ct. at 2466-67.

predictability. The *Palazzolo* ruling also contributes to increased uncertainty as a result of its rejection of the bright-line "notice rule" and by raising new questions about the property as a whole rule. In sum, landowners, regulators, and members of the public will have greater difficulty after *Palazzolo* predicting whether a particular government action is likely to result in a taking.

A Potential Support for Strong Land Use Controls

While the Court's ruling has moved the bar (slightly) in favor of takings claimants and, equally important, created more uncertainty about when a taking might occur, *Palazzolo* may, ironically enough, come to represent an important precedent supporting the legitimacy of substantial land use restrictions. The Court rejected the argument that Rhode Island effected a taking under *Lucas*. In addition, it appears likely that the *Penn Central* claim will fail as well, for the reasons described above. If Palazzolo's suit ultimately fails, that result could reinforce the idea that the Takings Clause applies only in rare and unusual circumstances. *Palazzolo* may come to be perceived as endorsing the constitutionality of regulatory restrictions that limit the profitability of land development but which nonetheless leave the owner some significant economic value, such as large-lot rural subdivision requirements or strict forest or agricultural zoning.

Confirming the Narrow Scope of Lucas

Another potentially positive aspect of the decision from the perspective of government regulators is the Court's affirmation that a *Lucas*-type claim covers a relatively narrow category of cases. The Court indicated that if a regulation left an owner with a mere "token interest," *Lucas* might apply.[35] But, the Court said, "[a] regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property 'economically idle'"[36] and, therefore, does not effect a taking within the meaning of *Lucas*. The Court specifically rejected Palazzolo's argument that *Lucas* should be expanded to cover this case.[37] As a result, *Palazzolo* will clearly support efforts by government defendants to argue for a narrow reading of the *Lucas* case. One issue raised—but not definitively resolved by *Palazzolo*—is whether *Lucas* applies when a regulation prohibits all development but the property nonetheless retains more than nominal value in the marketplace.[38]

The significance of this narrow reading of *Lucas* depends in part upon how *Lucas* fits into takings doctrine as a whole and exactly when and under what circumstances regulated owners can recover for so-called partial takings. For the reasons discussed elsewhere in this Dialogue, none of the answers to these questions is particularly clear.

Little if Any Change in Ripeness Doctrine

The primary ground for the Rhode Island Supreme Court's rejection of Palazzolo's taking claim was that the claim was not "ripe" for review. The Court reversed on this point. In doing so, however, the Court made little if any change in basic ripeness doctrine. The Court recognized that, in general, land use authorities possess considerable regulatory discretion.[39] In those circumstances, the Court said, reaffirming *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*[40] and other long-standing ripeness precedents, "a landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation."[41] Thus, at least with respect to the ripeness issue, the outcome appears to have turned on the particular facts of the case and the Court has not broken any new ground in terms of basic doctrine.

In one respect, the Court's opinion appears to grant government officials the opportunity to establish added protections against premature litigation. Amicus National Wildlife Federation argued that Palazzolo should not have been permitted to proceed with his taking claim based on the alleged denial of his opportunity to create a 74-unit subdivision because the proposal would not have received zoning approval or the necessary septic permits.[42] While the Court rejected the argument, it also made clear that, in general, it did not intend to prohibit state and local governments from requiring landowners to "follow normal planning procedures" or bar them from "enact[ing] rules to control damages based on hypothetical uses that should have been reviewed in the normal course."[43] The Court stated, "[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."[44] This language strongly suggests that a regulatory action that might otherwise result in a taking will not be found to be one if the decision is independently supported by the applicant's failure to comply with other, facially valid regulatory requirements. This suggests that state and local governments should carefully review their land use regulations to ensure that they clearly state that an authorization is conditional upon meeting other applicable regulatory requirements.

"Background Principles" Left Largely Undefined

The *Palazzolo* Court went out of its way to say "[w]e have no occasion to consider the precise circumstances when a legislative enactment can be deemed a background principle of state law or whether those circumstances are present here."[45] Defining its holding narrowly, the Court said that it

35. *Id*. at 2464.

36. *Id*. at 2465.

37. *Id*.

38. *Cf.* Wyer v. Board of Envtl. Protection, 747 A.2d 192, 30 ELR Digest 20448 (Me. 2000) (rejecting *Lucas* claim where dune protection law prohibited construction on a building lot, but the property retained substantial value for "parking, picnics, barbecues, and other recreational uses").

39. 121 S. Ct. at 2459.

40. 473 U.S. 172 (1985). *See* Thomas E. Roberts, *Procedural Implications of* Williamson County/First English *in Regulatory Takings Litigation: Reservations, Removal, Diversity, Supplemental Jurisdiction,* Rooker-Feldman*, and Res Judicata*, 31 ELR 10353 (Apr. 2001).

41. 121 S. Ct. at 2459.

42. *Id*. at 2461.

43. *Id*.

44. *Id*.

45. *Id*. at 2464.

was merely determining that a simple transfer of title was not sufficient to transform a statutory restriction into a background principle of law that would preclude a taking claim.[46] Thus the Court left it open to the state on remand to argue that, given the tradition of coastal regulation in Rhode Island, the 1971 coastal law was in fact part of what the Court called "those common, shared understandings of permissible limitations derived from a State's legal tradition."[47] In general, without adding much in the way of content to the idea of background principles, the Court reaffirmed that "background principles" can serve as a defense to a taking claim, thereby encouraging the lower courts to explore the contours of this defense.

"Use It or Lose It"

Justice O'Connor's concurring opinion injects the new and troubling idea that public authorities risk losing the ability to regulate uses of private property without effecting a taking if they fail to vigorously exercise their authority. In describing the circumstances when a taking claim may be barred by a lack of investment expectations, Justice O'Connor said that "the nature and extent of permitted development under the regulatory regime vis-à-vis the development sought by the claimant may also shape legitimate expectations without vesting any kind of development right in the property owner."[48] As this language makes clear, O'Connor does not intend that a pattern of weak enforcement of a regulatory program will create any kind of vested right to development. Nonetheless, the implication of this observation seems to be, for example, that Rhode Island coastal authorities would be on weaker ground in defending against a taking claim based on denial of a wetlands permit if they frequently granted such permits to other owners. Justice O'Connor's message to regulators seems to be that if they fail to use their regulatory authority they risk losing it.[49]

This represents a remarkable new version of the usual argument about how political judgments should or should not be permitted to redefine private property rights protected by the Takings Clause. Pro-takings advocates have usually argued that the Takings Clause should be interpreted as protecting some core set of property rights which cannot be altered or redefined by legislative measures designed to protect the environment. The Court's efforts in the takings area over the last decade can be viewed as an attempt to define some core set of private rights immune from revision or amendment through the political process. But Justice O'Connor's statement suggests that this concern may only operate in one direction. For example, if lobbyists for regulated businesses can successfully impede implementation of an environmental regulatory program, her statement suggests, then the likelihood apparently increases that any specific effort to enforce the program will result in a taking.

Does the Environment Matter?

One striking feature common to all the different opinions in *Palazzolo* is the complete lack of recognition that the case has an environmental dimension. Wetlands have long been recognized as a valuable, fragile portion of coastal ecosystems, and the adverse consequences of their destruction are now well documented. It would have been unthinkable for earlier Courts (which included Justices Harry A. Blackmun, William J. Brennan, or William O. Douglas, for example) to decide this case without at least commenting on its implications for the public's ability to protect wetlands and for environmental quality in general. Separate and apart from the specific legal principles it articulates, *Palozzolo* is important because it illustrates the current Court's lack of interest, bordering on outright hostility, to environmental protection concerns. The opening paragraphs of Justice Kennedy's opinion, which contains an utterly irrelevant, almost bizarre recitation of Westerly, Rhode Island's early history,[50] highlights the Court's disengagement from the environmental realties of the case.

A Deeply Divided Court

Finally, *Palazzolo* illustrates how deeply divided the Court is on the takings issue and, therefore, how important the next appointment to fill a vacancy on the Court will likely be for the takings question and environmental issues in general. *Palazzolo* was a 5 to 4 ruling, with a crucial concurring opinion by Justice O'Connor serving to significantly blunt the force of the majority opinion. Other recent Court takings cases have been decided by similarly close votes, e.g., *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*[51] and *Eastern Enterprises v. Apfel*.[52] A difference in one vote in these cases could have meant a significant change in the trajectory of regulatory takings doctrine. Justice Scalia, with the support of Chief Justice William H. Rehnquist and Justice Clarence Thomas, is apparently prepared to make radical changes in the law of takings. The appointment of two new Justices holding similar views could achieve that result.

The Meaning of *Palazollo*

The "Notice" Issue

The *Palazzolo* decision is probably most significant and will be most remembered for its rejection of what Justice Kennedy called the "single, sweeping rule," that "[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."[53] Prior to *Palazzolo*, a number of state and lower federal courts had applied what amounted to what some had termed a "notice rule": that owners who pur-

46. *Id.*

47. *Id.*

48. *Id.* at 2466-67.

49. In *Lucas*, Justice Scalia articulated the related idea that the existence of various programs to acquire land for conservation purposes reinforced the conclusion that regulations which eliminate all of a property's economic use require payment of compensation under the Takings Clause. 505 U.S. at 1018-19, 22 ELR at 21108. One possible interpretation of Scalia's remark is that, if society chooses to pursue conservation objectives through an acquisition strategy, public authorities will lose the constitutional authority to achieve the same or similar objectives through regulation. Justice Scalia's remarks certainly match practical experience. Increasingly widespread efforts to achieve conservation objectives through land acquisition and other programs involving financial incentives appear to have hardened, not reduced, opposition to regulatory measures.

50. 121 S. Ct. at 2454-55.

51. 526 U.S. 687, 29 ELR 21133 (1999).

52. 524 U.S. 498 (1998).

53. 121 S. Ct. at 2462.

chased or acquired property subject to regulatory restrictions are barred from challenging the restrictions as a taking. In the main, this rule seemed to comport with fairness: an owner should not be able to complain about being unfairly burdened by a regulation when he knew what the law was when he acquired the property. The rule also avoided the possibility of windfall recoveries by speculators who purchased heavily regulated property on the cheap and then sought to "sell" the property to the public at a high price through a takings action. Finally, as a practical matter, the notice rule provided a rare bright-line test in a legal field otherwise fraught with confusion and uncertainty. From the perspective of takings advocates, the rejection of the notice rule is a positive step, and from the perspective of those seeking to defend public regulatory authority, the ruling is a loss.

Nollan and Notice

On the other hand, the decision is somewhat positive from the standpoint of government defendants because the decision undermined and probably signals the outright repudiation of an obverse categorical rule, namely that a claimant's preacquisition notice, far from precluding a taking claim, is absolutely irrelevant in takings analysis. In a 1987 case, *Nollan v. California Coastal Commission*,[54] the Court, in an opinion written by Justice Scalia, used language that could be interpreted to have established such a general rule. The Nollans contended that the California Coastal Commission effected a taking by requiring them to grant public beach access as a condition of a development permit. Justice Brennan, in dissent, argued that the taking claim should be rejected because, at the time the Nollans purchased their property, a commission policy to require coastal owners to grant beach access was already in place.[55] Justice Scalia, speaking for the Court, rejected the argument and stated, in a footnote, "[s]o 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 their lots."[56] On its face, this language suggested an absolute rule that preacquisition notice is completely irrelevant in takings analysis. The idea that preexisting regulations should have no bearing on a subsequent takings claim conflicted with the Court's repeated references to the importance of "investment expectations" in takings analysis, both pre-*Nollan*, e.g., *Ruckelshaus v. Monsanto Co.*[57] and post-*Nollan*, e.g., *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*.[58] The rule articulated in *Nollan* was also widely disregarded by the lower courts, which apparently viewed it as a radical and implausible modification of traditional takings law.[59] In any event, when the Court agreed to hear *Palazzolo*, there was, at a minimum, a plausible argument that the notice rule applied by the Rhode Island Supreme Court was barred by binding Court precedent establishing that preacquisition notice is completely irrelevant in takings analysis.

The Court's decision in *Palazzolo* carefully avoided reaffirming the rule articulated in *Nollan* and the line up of the Justices seems to indicate that, if *Nollan* ever represented an accurate statement of the law, a majority of the present Court does not support this categorical rule. To be sure, the Court's opinion, which no doubt was the product of intense internal debate, refers favorably to *Nollan*. Justice Kennedy described *Nollan* as a "controlling precedent" and stated that its holding "is based on essential Takings Clause principles."[60] In addition, the Court rejected the state's position that the Court's *Lucas* decision limited *Nollan* by introducing the concept of "background principles" of state property law into takings analysis.[61] Specifically, the Court refused to accept the argument that a statute becomes a background principle of property law simply as a result of a title transfer.[62] However, the Court did not go so far as to squarely rely upon or to explicitly reaffirm the rule articulated in *Nollan*. It would have been a simple matter for the Court to state that the Rhode Island Supreme Court's notice rule was wrong because advance notice is completely irrelevant in takings analysis. Instead, the Court issued a holding that was much more limited, that a taking "is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction."[63] By taking this narrow approach, the Court took a clear step back from the categorical rule articulated by Justice Scalia in *Nollan*.

The apparently categorical rule articulated in *Nollan* is also undermined by Justice O'Connor's concurring opinion. Her position that advance notice must be a relevant factor in takings analysis[64] is inconsistent with and therefore directly repudiates the *Nollan* rule. Justice O'Connor joined the majority opinion subject to her "understanding" of how the notice issue "must be considered on remand."[65] Because Justice O'Connor's fifth vote decided the case, the majority opinion must be interpreted and applied in light of Justice O'Connor's remarks. Importantly, all of the four Justices in dissent agreed with Justice O'Connor that, at minimum, notice was a relevant factor in takings analysis,[66] meaning that a majority of the present Court clearly rejects Justice Scalia's position in *Nollan*.

There remains the question whether there is a logical way of reconciling the statement by the Court in *Palazzolo* that *Nollan* represents "controlling precedent" and the clear indication in *Palazzolo* that preacquisition notice is a relevant factor in takings analysis. The answer may lie in the difference between a physical occupation of the kind at issue in *Nollan* and a regulatory restriction on use of the kind at issue in *Palazzolo*. In *Loretto v. Teleprompter Manhattan CATV Corp.*,[67] the Court recognized that government action causing a physical occupation of private property is "qualita-

54. 483 U.S. 825, 17 ELR 20918 (1987).

55. *Id*. at 858-60, 17 ELR at 20927 (Brennan, J., dissenting).

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

57. 467 U.S. 986, 14 ELR 20539 (1984).

58. 508 U.S. 602 (1993).

59. *See supra* note 25 (collecting cases ignoring *Nollan*).

60. 121 S. Ct. at 2463.

61. *Id*. at 2464.

62. *Id*.

63. *Id*.

64. *Id*. at 2466-67.

65. *Id*. at 2465.

66. *Id*. at 2471 n.6 (Stevens, J., concurring in part and dissenting in part); *id*. at 2477 n.3 (Ginsburg, J., dissenting); *id*. at 2477 (Breyer, J., dissenting).

67. 458 U.S. 419 (1982).

tively more intrusive" than a restriction on the use of property. The difference in the character of physical occupations and use restrictions arguably supports the conclusion that preacquisition notice should be irrelevant in the physical occupation context but should be relevant in the use restriction context. Furthermore, a physical occupation results in a compensable taking regardless of the magnitude of the intrusion. As a result, advance notice of government policies provides no incentive or opportunity for an investor to engage in strategic behavior in order to manufacture a physical occupation-type taking claim. By contrast, advance notice would foster strategic behavior designed to manufacture claims based on use restrictions. This practical difference, too, may provide a basis for harmonizing *Nollan* and *Palazzolo*.

The Scope of *Palazzolo* on the Notice Issue

The actual scope of the *Palazzolo* ruling on the notice issue will undoubtedly be the subject of future debate. There is language in the majority opinion indicating that the Court intended its ruling to be a broad one, covering transferees of all types, whether they acquired the property through purchase, as a gift, by inheritance, or otherwise.[68] However, it remains to be seen whether the case ultimately has such broad scope. *Palazzolo* involved a purely legal transfer of title in which the owner remained (in substance) the same before and after the transfer. It is difficult to imagine another case that would have provided less favorable ground for attempting to defend the categorical notice rule. In addition, Justice Kennedy's opinion for the Court, as well as the individual opinions of two of the Justices (O'Connor and Stephen Breyer), honed in on the problems created by the notice rule in the context of transfers by inheritance or gift. These Justices were evidently troubled by the prospect that these types of noncommercial property transfers could automatically reduce the bundle of rights being transferred. On the other hand, a different case is arguably presented when a speculator purchases heavily regulated lands and then alleges a taking seeking full market value "compensation" under the Takings Clause.

Recognizing that preacquisition notice is now merely a "factor" in takings analysis, it seems likely, at a minimum, that notice will weigh very heavily against a taking claim when, in contrast to the situation in *Palazzolo*, ignoring preacquisition notice would confer a windfall. Thus, at least as a matter of judicial practice, if not as matter of strict legal rule, investors who purchased restricted lands at a deep discount will almost certainly continue to be barred from recovery under the Takings Clause in every case.

Lucas and the Notice Issue

Another debatable issue left over after *Palazzolo* is whether and to what extent preacquisition notice is or should be a factor in a taking claim under *Lucas*. For example, if a speculator approached Palazzolo tomorrow and negotiated to purchase the wetland acres only, could the speculator then sue for a taking under *Lucas*, and could she contend that her advance notice of Rhode Island's policies ought not bar the claim? Or, alternatively, if a coastal property owner held 100 acres and sold off or developed 98 of them, leaving only 2 restricted acres, could the investor claim a "total taking" of the remaining parcels regardless of the fact that he was on notice of the regulatory restrictions when he started selling off or developing the property?

While the issue is debatable, it seems reasonable to infer that courts are not absolutely barred from considering preacquisition notice in *Lucas*-type cases after *Palazzolo*. The Court did not, of course, explicitly address the issue. The Court's reticence on the issue is understandable. The Court disposed of the *Lucas* claim on the straightforward basis that Palazzolo failed to demonstrate the kind of "denial of all economically viable use" necessary to support a *Lucas*-type claim.[69] Thus, the Court had no occasion to consider whether this claim might fail on some other basis.

However, the Court's opinion contains one passage quite clearly suggesting that preacquisition notice might well be relevant in a *Lucas*-type case. Justice Kennedy, referring to the *Lucas* decision, stated that "we have observed, with certain qualifications . . . , that regulation which 'denies all economically beneficial or productive use of land' will require compensation under the Takings Clause."[70] This statement is followed by a citation to *Lucas* as well as a "see also" reference to Justice Kennedy's concurring opinion in *Lucas*.[71] In that concurring opinion, Justice Kennedy asserted that "background principles" of state property and nuisance law did not provide the only grounds for defending against a "total" taking claim, and that, "[w]here a taking is alleged from regulations which deprive the property of *all value*, the test must be whether the deprivation is contrary *to reasonable, investment-backed expectations*."[72] To similar effect, Justice Kennedy also stated in his *Lucas* opinion: "The Takings Clause does not require a static body of state property law; it protects private expectations to ensure private investment."[73] These statements certainly suggest that preacquisition notice could very well be a relevant factor in a suit under *Lucas*. Justice Kennedy's careful reference in *Palazzolo* to his earlier opinion in *Lucas* 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.

Justice O'Connor, proceeding on the assumption that the only viable claim on remand was a claim under *Penn Central*, did not delve into how advance notice might affect a claim under *Lucas*. On the other hand, Justice Scalia, in his separate concurring opinion, clearly took the position that preacquisition notice should be completely irrelevant in both a *Lucas* and a *Penn Central* case.[74] He also criticized Justice O'Connor's contrary position on the notice issue.[75] Justice Scalia, accurately or not, read Justice O'Connor's opinion as implicitly acknowledging that notice is not relevant in a *Lucas* case. Based on this reading of O'Connor's opinion, he described as inexplicable her position that preacquisition notice is a relevant factor in a *Penn Central*

68. 121 S. Ct. at 2462-64.

69. *Id*. at 2464-65.

70. *Id*. at 2457.

71. *Id*.

72. *Lucas*, 505 U.S. at 1035, 22 ELR at 21112 (Kennedy, J., concurring) (emphasis added).

73. *Id*.

74. 121 S. Ct. at 2467-68 (Scalia, J., concurring).

75. *Id*. at 2468.

case.[76] Finally, Justice Breyer, in dissent, grappled most explicitly with the issue, stating:

> Several amici have warned that to allow complete regulatory takings claims to survive changes in land use ownership could allow property owners to manufacture such claims by strategically transferring property until only a nonusable portion remains. But I do not see how a constitutional provision concerned with fairness and justice could reward any such strategic behavior.[77]

Justice Breyer's common-sense analysis supports the conclusion that preacquisition notice cannot be categorically excluded from consideration in a *Lucas*-type case. Indeed, it seems absurd to suppose that the hypothetical takings claimants described at the beginning of this subsection would be entitled to recover under the Takings Clause. Furthermore, the primary justification Justice O'Connor offered for the conclusion that notice must be relevant in a *Penn Central* case was that investors could otherwise reap unfair windfalls. The concern about windfalls should be even greater in a *Lucas* case, which involves very stringent regulation and, therefore, poses a greater risk that the claimant would receive a windfall at taxpayer expense.

It is worth observing that the concern about windfalls is inextricably linked with the property as a whole rule. The risk of strategic behavior and the concern that claimants could manufacture takings claims arise in part from the possibility owners could sell off pieces of their properties leaving only the restricted portion. If an owner with 100 acres containing 2 acres of wetlands is barred from bringing a taking suit, it would be illogical to conclude that the owner could manufacture a taking claim simply by selling off all but the two restricted acres. On the other hand, if the property as a whole rule were eliminated or substantially cut back, the risk of strategic behavior would be reduced if not eliminated. Using the *Palazzolo* case as example, if the property as a whole rule were eliminated, and Palazzolo were permitted to assert a taking involving only the wetland acres, the concern that he might manufacture a taking claim by first developing the upland portion and then asserting a claim limited to the wetlands would disappear. The idea of jettisoning the property as a whole rule raises, of course, a whole host of very serious concerns, for such a step would expand regulatory takings doctrine by a quantum leap. But, it is sufficient for present purposes to recognize the close logical relationship between the notice issue and the parcel rule, as it exists today and as it may exist in the future.

The Partial Taking Theory

While *Palazzolo* will probably be best remembered for rejecting the "notice rule," the decision may be more significant because of the encouragement it provides for the so-called partial regulatory taking theory. Prior to *Palazzolo*, a number of courts had suggested that one basic standard—whether the regulation eliminated essentially all of the property's value—should govern a taking claim. *Palazzolo* will likely be interpreted by some as supporting the notion that significant but less than total diminutions in value can support takings claims. At the same time, *Palazzolo* provides little guidance on the nature of the "partial taking" test or how it should be applied. Following *Palazzolo* there are actually more questions than answers about the nature of the *Penn Central* test and how it fits into takings doctrine as a whole.

Importantly, the Court has never upheld a "partial" taking claim based on the *Penn Central* analysis.[78] *Palazzolo* does not change this fact. Indeed, neither the validity nor the content of the *Penn Central* test was squarely at issue in *Palazzolo*. The case was litigated on the theory that *Penn Central* offered a distinct test from the so-called *Lucas* test, and neither side before the Court raised any fundamental questions about the coherence or legitimacy of the *Penn Central* test. The only issue in the petition for certiorari relating to the *Penn Central* test was whether preacquisition notice barred a claim under *Penn Central* (and a claim under *Lucas*) as matter of law. As discussed, *Palazzolo* concluded that notice is a relevant factor, but not by itself a dispositive factor, in takings analysis. To this limited extent the *Palazzolo* decision does help define the *Penn Central* analysis.

Apart from its ruling on the notice issue, the Court offered no guidance on how the *Penn Central* test should be applied on remand. Justice Kennedy, speaking for the Court, referred at one point to the "more general test of" *Penn Central*,[79] meaning that it was "more general" in comparison to the *Lucas* test. Later, in a section of the opinion providing a basic description of takings doctrine, Justice Kennedy briefly recited the three familiar *Penn Central* factors.[80] After observing that *Lucas* established, subject to various exceptions, that a taking will generally result when a regulation "denies all economically beneficial or productive use of land," he continued:

> Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a 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.[81]

Justice O'Connor, in her concurring opinion, offered the most detailed description of the *Penn Central* analysis. She first pointedly eschewed any fixed rule, emphasizing that the Court has avoided adopting a "set formula" and repeating the Court's past observations that the outcome of takings litigation depends heavily upon the "particular circumstances" of each case.[82] She then continued:

> We have identified several factors that have particular significance in these essentially ad hoc, factual inquiries. Two such factors are the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations. Another is the character of the governmental action. The purposes served as well as the effects produced by a particular regulation inform the takings analysis. *Penn Central* does not supply mathe-

76. *Id*. at 2467.

77. *Id*. at 2477-78 (citations and other references omitted).

78. *See* District Intown Properties Ltd. Partnership v. District of Columbia, 198 F.3d 874, 886 (D.C. Cir. 1999) (Williams, J., dissenting), *cert. denied*, 121 S. Ct. 34 (2000).

79. 121 S. Ct. at 2457.

80. *Id*.

81. *Id*.

82. *Id*. at 2466.

> matically precise variables, but instead provides important guideposts that lead to the ultimate determination whether just compensation is required.[83]

Justice Scalia, in his concurring opinion, referred briefly to the existence of separate *Lucas* and *Penn Central* tests. Justice Ginsburg, in a dissenting opinion joined in by two other Justices, also recognized the existence of the two tests without elaboration. "[I]f a regulation does not leave the property 'economically idle,'" she said, "to establish the alleged taking the landowner may pursue the multifactor inquiry set out in *Penn Central*."[84]

On their face, the opinion for the Court and various other opinions in *Palazzolo* reinforce the idea that *Lucas* and *Penn Central* represent separate and analytically distinct branches of regulatory takings analysis. This appearance may, however, be deceiving.

In at least one important respect, *Palazzolo* actually seems to have blurred the distinction between these ostensibly separate tests. As discussed above, it appears likely that *Palazzolo* will be interpreted to recognize that preacquisition notice must be a factor in a *Lucas*-type claim in order to avoid unjust windfalls, just as it is a relevant factor in a case under *Penn Central*. If this is correct, then at least with respect to this aspect of takings analysis, there may be no fundamental difference between *Lucas* and *Penn Central* claims.

Justice O'Connor's opinion pointed to several other potential grounds for distinguishing between *Penn Central* and *Lucas* claims. Importantly, however, she was writing for only herself. Thus, her opinion can hardly be taken as an expression of the Court's present view on these questions. Indeed, the reticence of the rest of the Court to comment on the nature of *Penn Central* analysis, while perhaps simply reflecting judicial restraint, may indicate some unease among the other Justices about Justice O'Connor's free-wheeling *Penn Central* test.

First, under the rubric of the *Penn Central* "character" factor, she contends that the "purposes served" by a particular regulation should inform takings analysis.[85] As I have argued elsewhere,[86] it seems clear from the opinion in *Penn Central* that the Court originally used the term "character" to refer to the issue of whether or not the regulation involved a type of physical occupation as opposed to a mere restriction on use. Nonetheless, the idea that the character factor refers to the government's purposes finds some support in *Penn Central* and represents a plausible interpretation. The larger difficulty with the idea that the governmental purpose should be a factor in takings analysis is that this approach is inconsistent with the basic philosophy underlying the Court's takings jurisprudence. Taking claims, it has been repeatedly said, do not question the legitimacy or propriety of the governmental action. Instead, they simply raise the question of whether the economic burdens imposed by the government's pursuit of an otherwise legitimate program are so unfairly concentrated on one or a few individuals that the government must pay compensation as a condition of going forward with the program.[87] Understood in these terms, takings doctrine cannot sensibly accommodate governmental purpose in deciding whether or not compensation should be paid. For example, in *Palazzolo* itself, the fact that wetlands protection will serve important public health and environmental protection objectives cannot sensibly justify not compensating Palazzolo. Indeed, the more valuable and important the purposes the government is trying to pursue, it logically becomes more appropriate, rather than less, that the government pay compensation to those burdened by the government's action.

Equally important, the idea that governmental purpose is a legitimate factor in takings analysis would place the courts in the problematic position of making essentially legislative judgments. Under our system of government, elected representatives are responsible for determining whether government should act to address new and emerging social problems. The traditional role of judges does not include the authority to re-weigh a legislative determination that some public problem requires governmental attention. If the Rhode Island legislature has decided that wetlands protection serves important public purposes, the judge hearing the *Palazzolo* case on remand cannot appropriately decide whether he or she agrees with the legislature's judgment.

At the end of the day, for the two reasons outlined above, it seems implausible that a majority of the Court will embrace Justice O'Connor's view that the purpose of the governmental action represents a legitimate factor to be weighed, along with other factors, in deciding whether a taking has occurred.

Second, Justice O'Connor's description of the *Penn Central* analysis also seems to point in the direction of some kind of due process-like means-ends analysis. The "effects produced" by a governmental action, she writes, should "inform the takings analysis."[88] Also, she quotes from *Penn Central* to the effect that "a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose."[89] While this language is not precise, it seems to contemplate an inquiry into whether a regulatory program is designed to achieve some legitimate public goal. This possible takings test seems to derive from and substantially overlap with traditional means-ends analysis under the Due Process Clause.

Under one possible interpretation, this approach to *Penn Central* analysis could be relatively benign. Justice O'Connor may simply intend that, under the *Penn Central* analysis, the courts should apply the same standard as they would apply in reviewing economic regulation under the Due Process Clause. Ordinary due process review of economic regulation is highly deferential. If this is Justice O'Connor's intent, the *Penn Central* analysis would not create a major new obstacle to governmental action and, in any event, would essentially duplicate existing constitutional constraints.

83. *Id*. (citing *Penn Central*, 483 U.S. at 127, 8 ELR at 20534 ("[A] use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose [citations omitted], or perhaps if it has an unduly harsh impact upon the owner's use of the property") and Yee v. Escondido, 503 U.S. 519, 523 (1992) (regulatory takings cases "necessarily entail complex factual assessments of the purposes and economic effects of government actions")).

84. *Id*. at 2474.

85. *Id*. at 2466.

86. *See* John D. Echeverria, *Is the* Penn Central *Three-Factor Test Ready for History's Dustbin?*, 52 Land Use L. & Zoning Dig. 3 (2000).

87. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 17 ELR 20787 (1987).

88. 121 S. Ct. at 2466.

89. *Id*. (citing *Penn Central*, 438 U.S. at 127, 8 ELR at 20534).

However, the potential melding of due process and takings analysis represents more than a labeling issue. Those who contend that takings analysis should incorporate a due process-like inquiry also contend that the takings means-ends test should be significantly more demanding than the means-ends test under the Due Process Clause. Justice Scalia, in particular, has been a champion of this idea. Thus, transplanting the due process means-ends analysis into regulatory takings doctrine risks transforming the content of the analysis itself.

In any event, Justice O'Connor's approach is highly problematic. As discussed, the Takings Clause has traditionally been interpreted as addressing distributional consequences of governmental action, rather than whether government can legitimately proceed with the action. But a means-ends taking analysis, by focusing on whether the governmental ends are permissible or whether government has selected reasonable means to achieve its goals, raises the question whether the government action should proceed at all. Thus, building means-ends analysis into the *Penn Central* test would, like consideration of the governmental "purpose" for adopting a regulation, conflict with the basic philosophy underlying regulatory takings doctrine.

Moreover, Justice O'Connor's views on this issue seem to have already been rejected by a majority of the Court. O'Connor's language in *Palazzolo* is reminiscent of her plurality opinion in *Eastern Enterprises*, in which she concluded that the Coal Act resulted in a taking under *Penn Central* because it imposed unreasonable retroactive liability on companies formerly engaged in the coal mining business. A majority in *Eastern Enterprises* (Justice Kennedy, who concurred in the judgment but dissented from O'Connor's opinion, and the four dissenting Justices) rejected her takings analysis. They argued that there should be a sharp distinction between due process analysis and takings analysis and that, where violations of both the Due Process and the Takings Clauses are alleged, the courts should proceed first to the due process issue and address the taking issue only if the regulation survives due process review. In sum, despite the fact that she wrote the swing opinion in *Palazzolo*, her suggestion that *Penn Central* analysis should include a due process-like component appears not to have the support of a majority of the Court.

Conclusion

Based on the foregoing, it seems fair to conclude that, apart from a near consensus on the Court that something called a *Penn Central* test exists, there is precious little certainty about the actual content of this test or whether, at the end of the day, it is fundamentally distinct from the *Lucas* test. As discussed, where the claimant purchased the property subject to the regulation, it seems likely that *Penn Central* claims will be routinely rejected. The more interesting and challenging question is how will the courts address claims under *Penn Central* where the claimant is challenging a regulation enacted *after* the purchase of the property. The answer to this question will obviously have a major bearing on the practical ability of government at all levels to adopt new land use and environmental regulations.

In seeking to make sense of the *Penn Central* test, courts will be able to invoke various general propositions of takings law. For example, the Court has, at various times, asserted that takings claims should be confined to "extreme" cases,[90] that a mere diminution in value is insufficient to establish a taking,[91] and that the fact that a regulation renders an investment unprofitable does not mean there has been a taking.[92] While these statements are suggestive, they provide little in the way of definitive guidance in close cases.

One important question will be whether and to what extent an owner's lack of investment-backed expectations may defeat a taking claim, even when the specific restriction being challenged as a taking was adopted *after* the claimant purchased the program. In its discussion of the ripeness issue, the Court said the "finality" requirement helps inform the determination whether a regulation has "defeated the reasonable investment expectations of the landowner to the extent that a taking has occurred."[93] This statement suggests that investment expectations will generally be a consideration in a taking case, even if the owner acquired the property prior to adoption of the specific restriction being challenged as a taking. In addition, the Court has repeatedly recognized that those who enter a heavily regulated field must anticipate that new and more stringent regulatory restrictions may be adopted from time to time.[94] At least for the last 25 years, real estate has been subject to a wide and growing array of environmental and other regulations. Arguably, investors who purchased property after the beginning of the modern era of land use and environmental controls have been on notice that their activities will be subject to regulation and that new restrictions might be imposed. Nothing in *Palazzolo* precludes arguments along these lines.

In addition, the concept of reciprocity of advantage will likely assume greater importance as courts seek to unpack the meaning of *Penn Central*. Perhaps the most fundamental reason most regulatory restrictions should not be found to be takings is that regulations enhance property values, including the property values of those subject to restrictions. While regulations can restrict what an owner can do with her property, they simultaneously benefit the owner by controlling activities by neighbors which would undermine the quality of the community as whole. In addition, restrictions have a scarcity effect, increasing the value of the development opportunities that remain. (The one lot available for development on Palazzolo's property had a market value of $200,000, primarily because of the restriction imposed on development on the rest of Palazzolo's property as well as on neighboring properties.) These kinds of arguments are more persuasive when the regulatory regime applies to a large number of owners than when the regulation can be characterized as singling out one or a few landowners. But even in the *Penn Central* case itself, which involved historic landmark designation of a single building, the Court relied in part on the reciprocal benefits from regulation to reject the taking claim.

Furthermore, alleged regulatory takings, in all fairness, should be considered in a broader context that takes into account the enormous governmental "givings" that landown-

90. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 16 ELR 20086 (1985).

91. Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal., 508 U.S. 602, 645 (1993).

92. Andrus v. Allard, 444 U.S. 51, 9 ELR 20791 (1979).

93. 121 S. Ct. at 2458.

94. *Concrete Pipe*, 508 U.S. at 645.

ers receive at taxpayer expense, in the form of agricultural subsidies, public investments in infrastructure, and so on. The givings issue, too, will likely become more prominent following *Palazzolo*.

Finally, some courts may seek to avoid the many complexities they will confront in interpreting *Penn Central* by attempting to resolve cases on various alternative grounds. For example, courts may in the future more carefully examine whether takings claims are barred by background legal principles, in particular state rules of property law. Courts also may resort to other nontakings-related legal rules, such as statutes of limitations or standing, to decide particular cases.

In all events, the future promises to be interesting.