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NEWS & ANALYSIS

Palazzolo v. Rhode Island and the U.S. Supreme Court's Increased Support of the Constitutional Protection of Private Property: A Response to Echeverria

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Introduction

On June 28, 2001, the U.S. Supreme Court rendered its long-awaited decision in *Palazzolo v. Rhode Island*.¹ This closely watched case promises to impact many individuals and groups with interests in land development, including landowners with wetlands, mineral rights' owners, landowners with designated "endangered" plants and animals on their lands, farmers, general land developers, environmentalists, and state and local government officials. *Palazzolo* is yet another sign of the general march of the Court toward stricter accountability for governmental land use decisions that adversely impact private property.

In the September 2001 issue of the *Environmental Law Reporter*, John D. Echeverria presented a Dialogue containing his *Preliminary Assessment* of the *Palazzolo* decision.² Echeverria's assessment (which more resembles the work of a haruspex than an objective observer) attempts to turn the Court's ruling on its head. Now, drawing on his candid recognition that he "may think somewhat differently about the case weeks, months, or years from now,"³ we would like to offer Echeverria (and other anti-private property rights advocates) some points to ponder as he (and they) contemplate the real meaning of *Palazzolo*.⁴

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1. 121 S. Ct. 2448 (2001).
2. John D. Echeverria, *A Preliminary Assessment of Palazzolo v. Rhode Island*, 31 ELR 11112 (Sept. 2001).
3. *Id.*
4. Echeverria neglects to inform the reader of his perspective. As the spokesman of an organization that fights against the recognition of private property rights and the payment of compensation for takings—the Environmental Policy Project—his presentation is often less than objective. The present authors represent private property owners on the opposite side of the takings debate and, while we have attempted to remain objective, the reader should be aware that our views are necessarily colored by our experience as counsel to landowners in a number of takings cases, including (along with their co-counsel, Carl A. Belin Jr., Esq.) *Machipongo Land & Coal Co. v. Commonwealth, Dep't of Env'tl. Resources*, 155 Pa. Commw. 72, 624 A.2d 742 (1993) (*Machipongo I*), *rev'd in part*, 538 Pa. 361, 648 A.2d 767 (1994) (*Machipongo II*), *modified*, 544 Pa. 271, 676 A.2d 199 (1996) (*Machipongo III*), *on remand*, 719 A.2d 19 (Pa. Commw. 1998) (*Machipongo IV*).

Development of the Law of Regulatory Takings

It is a fundamental constitutional principle that government cannot take private property for public use without the payment of just compensation.⁵ Over the years, the Court and virtually all other federal and many state courts have interpreted the requirements of the Takings Clause. The Court's first recognition of a "regulatory taking," i.e., a taking which arises from the application of a regulation to private property, as contrasted with a physical appropriation, originated in the 1922 decision, *Pennsylvania Coal Co. v. Mahon*.⁶ There, Justice Oliver Wendell Holmes Jr., writing for the Court, recognized that government must have the ability to enact restrictions on the use of property, but held, however, that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."⁷ Thus was born a principle of constitutional law whose parameters would elude jurists for decades.

For many years following *Mahon*, the Court was not presented with, or refused to rule on, significant regulatory takings cases. In 1978, the Court decided *Penn Central Transportation Co. v. City of New York*,⁸ in which the owners of Grand Central Station sued for compensation when they were denied permission to construct a multi-story office building atop the terminal under the city landmark law. The Court acknowledged that it had not devised a consistent test for analyzing regulatory takings claims:

While this Court has recognized that the "Fifth Amendment's guarantee [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the Government, rather than remain disproportionately concentrated on a few persons.⁹

5. See U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation"); see also PA. CONST. art. 1, §10 ("nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured").
6. 260 U.S. 393 (1922).
7. *Id.* at 415 (emphasis added). Justice Holmes also offered the explicit caution that a "strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Id.* at 416.
8. 438 U.S. 104, 8 ELR 20528 (1978).
9. *Id.* at 123-24, 8 ELR at 20533 (citing *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962)) (internal citation omitted).

Several factors, however, had gained particular significance in previous rulings, notably, “[t]he economic impact of the regulation on the claimant, and particularly, the extent to which the regulation has interfered with distinct investment-backed expectations . . . [and the] character of the governmental action.”¹⁰

The *Penn Central* landowners claimed that the airspace above the terminal was a valuable property interest and that, irrespective of any remaining value of their parcel, i.e., the entire city tax block designated as a landmark, their right to the super-adjacent airspace had been taken.¹¹ The Court, however, refused to analyze the claim in terms of the airspace alone, explaining,

“[t]aking” jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the “landmark site.”¹²

Conceding that the landmark law was reasonably related to promotion of the general good and that mere diminution in value would not support a taking, the landowners argued that a taking had nonetheless occurred because the terminal’s value had been “significantly diminished.”¹³ The Court, however, noted that the law “in no wise impaired the present use of the Terminal” but simply prohibited the occupation of the super-adjacent airspace.¹⁴ Because the property could still be used as it always had been, valuable air rights were transferable and the sum total would provide a reasonable return on investment, interference with use of the terminal by the landmark law did not work a compensable taking.¹⁵

During the 1980s, the Court addressed some of the more technical contours of regulatory takings law. In 1985, in *Williamson County Regional Planning Commission v. Hamil-*

ton Bank,¹⁶ the Court held that a takings claim is not fit for judicial consideration until the governmental entity charged with implementing the regulation has reached a final decision as to its application to the property. *Williamson County* also stressed that a claimant, if suing in federal court, must first seek compensation through any available state procedures.¹⁷ In 1987, the Court released three important decisions. In the first, *Keystone Bituminous Coal Ass’n v. DeBenedictis*,¹⁸ the Court rejected a facial takings challenge to a state law requiring coal owners to leave approximately 50% of the coal located under structures in the ground as support. In the second case, *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,¹⁹ the Court held that a landowner denied all use of property for a period of time prior to invalidation of the regulation by the courts must be compensated for the “temporary taking.” Finally, in the third decision, *Nollan v. California Coastal Commission*,²⁰ the Court recognized the concept of an “unconstitutional condition” and required compensation for the taking where the government conditions the grant of a permit on the owner’s agreement to dedicate some portion of the property to public use.

In 1992, the Court added a critically important decision to its line-up of takings cases when it decided *Lucas v. South Carolina Coastal Council*.²¹ In *Lucas*, the landowner had purchased two residential lots, intending to build homes. The state subsequently enacted a law barring him from erecting any permanent habitable structures on the property.²² A state trial court, finding that the law had rendered the property valueless, granted compensation to the landowner.²³ The state supreme court reversed, reasoning that when a law is designed to prevent “harmful or noxious uses” of property akin to public nuisance (such as any use causing harm to the state’s beaches), no compensation is owed, no

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

11. *Id.* at 130, 8 ELR at 20534.

12. *Id.* at 130-31, 8 ELR at 20534.

13. *Id.* at 131, 8 ELR at 20535. The Court noted that the claimants contended that the only means of ensuring that selected owners are not singled out to endure financial hardship was “to hold that any restriction imposed on individual landmarks pursuant to the New York City scheme is a ‘taking’ requiring the payment of ‘just compensation.’” *Id.* The Court explained, however, that “agreement with this argument would, of course, invalidate not just New York’s law, but all comparable landmark legislation in the Nation. We find no merit in it.” *Id.* The Court also rejected the argument that “the decision to designate a structure as a landmark ‘is inevitably arbitrary or at least subjective, because it is basically a matter of taste.’” *Id.* at 132, 8 ELR at 20535. Finally, the Court rejected that the landmark law was “inherently incapable of producing the fair and equitable distribution of benefits and burdens of government action,” and explained that the law “applies to vast numbers of structures in the city in addition to the Terminal.” *Id.* at 134-35, 8 ELR at 20535.

14. *Id.* at 135, 8 ELR at 20535.

15. *Id.* at 136-37, 8 ELR at 20536. The Court noted that the landowners had yet to submit an application for a lesser use than the multi-story office building and were, moreover, provided valuable transferable air rights correlating to the air space which they could sell to “mitigate whatever financial burdens the [landmark] law has imposed.” *Id.* at 137, 8 ELR at 20536. The Court stressed that its holding was limited to the facts before it. *See id.* at 138, 8 ELR at 20536.

16. 473 U.S. 172, 186-94 (1985). The Court revisited ripeness in *Suitum v. Tahoe Reg’l Planning Agency*, 520 U.S. 725, 27 ELR 21064 (1997), and there found the takings claim ripe because the agency had finally determined that no development was permitted. *Id.*

17. 473 U.S. at 186, 194. This principle derives from the fact that “[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation.”

18. 480 U.S. 470, 17 ELR 20440 (1987).

19. 482 U.S. 304, 17 ELR 20787 (1987). Reasoning that “temporary regulatory takings” are no different in kind from permanent takings, the Court explained that invalidation of a regulatory restriction, if unaccompanied by compensation for the time in which it was in effect, is an insufficient constitutional remedy.

Arguments were recently heard in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg’l Planning Agency*, a case in which the Court is asked to examine the scope and extent of temporary takings in the context of a development moratorium. *See* 121 S. Ct. 2589 (2001) (granting petition for writ of certiorari). In a sense, a temporary taking such as may occur with development moratorium is a hybrid partial and categorical taking (the taking is total but only for a period of time). *See infra* note 49 and accompanying text (explaining the difference between these two discrete categories of takings). The method of analysis used by the Court in *Tahoe-Sierra*, which was argued on January 7, 2002, will be an important aspect of any decision in that case. *See* Steven J. Eagle, *Development Moratoria*, *First English Principles, and Regulatory Takings*, 31 ELR 11232 (Oct. 2001).

20. 483 U.S. 825, 17 ELR 20918 (1987). In *Nollan*, prospective purchasers of a beachfront lot sought a permit under state law for permission to tear down a bungalow and erect a house. The permit was granted on the condition that the public retain an easement across the property to access the beach. *See id.* at 828, 17 ELR at 20918.

21. 505 U.S. 1003, 22 ELR 21104 (1992).

22. *Id.* at 1008-09, 22 ELR at 21105.

23. *Id.* at 1009, 22 ELR at 21105.

matter what the law's effect on the property's value.²⁴ The Court, in turn, used *Lucas* to flesh out the concept of a "categorical taking."

As it had in *Penn Central*, the *Lucas* Court began by decrying its own inability to provide insight on "when, and under what circumstances" a regulation would "go too far" and effect a taking.²⁵ The Court noted, however, that it had already "described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint":

The first encompasses regulations that compel the property owner to suffer a physical "invasion" of his property. In general . . . no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation.

* * *

The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land.²⁶

Thus,

[w]e think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.²⁷

The Court then set forth a defense to a categorical takings claim—"[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."²⁸ States were specifically cautioned, however, that they could not "decree anew" a restriction that effectuates a categorical taking and expect to escape the reach of the Takings Clause:

Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.²⁹

The case was remanded to allow the state to identify background principles of nuisance and property law that could potentially prohibit the landowner from using his property as he wished.³⁰

In 1994, the Court addressed another "unconstitutional condition" case, holding in *Dolan v. City of Tigard*³¹ that the

"required degree of connection between the exactions imposed by the city [or other governmental entity] and projected impacts of the proposed development" was one of "rough proportionality." Five years later, in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,³² the Court ruled that a jury trial to determine damages was available in a regulatory takings case brought pursuant to §1983.

Palazzo was the first takings case addressed by the Court since its decision in *Monterey*. In his *Preliminary Assessment* Dialogue, Echeverria suggests that *Palazzo* "represents another incremental step by an activist court in the direction of a new, libertarian rewrite of the Takings Clause."³³ The authors, however, believe that *Palazzo* represents an affirmation of the purpose of the drafters of the Takings Clause. As a tracing of the development of the high court's regulatory takings jurisprudence reveals, the Court has been steadily defining the parameters of the Takings Clause. Rather than "rewriting" it, the Court is seeking to apply the Takings Clause in light of its original intent: to protect private property from unreasonable governmental restraint.

The Palazzo Decision

Basic Facts

Land developer Anthony Palazzo was the sole shareholder and owner of a company known as Shore Garden, Inc. (SGI). SGI owned land containing, in part, wetlands adjacent to the Atlantic Ocean.³⁴ Efforts to develop the prop-

32. 526 U.S. 687, 29 ELR 21133 (1999) (referring to 42 U.S.C. §1983). *Del Monte Dunes* is also significant for its guidance on ripeness. On a factual record which revealed that the city had imposed ever-escalating demands on the landowner each of the five times that it rejected the landowner's development applications, the Court cautioned government authorities against burdening property with the imposition of repetitive or unfair land use procedures in an effort to avoid a final decision.

33. Echeverria, *supra* note 2, at 11112. Use of the characterization "libertarian" is quite incorrect, but stems, we believe, from Echeverria's additional contention that *Palazzo* exhibits "outright hostility" to, and disengagement from, environmental concerns. *See id.* at 11116. Rhode Island's environmental concerns, however, will be addressed by the state courts on remand under the *Penn Central* balancing test. The issues before the Court in *Palazzo* required attention only to the constitutional dimensions of the case, and thus it would have been entirely inappropriate for the Court to skew its legal analysis to account for the case's environmental context.

Echeverria's use of the term "libertarian," moreover, is a misnomer. Libertarians define themselves in terms of the following principles:

Individuals are moral agents, they have a right to be secure in their life, liberty, and property. These rights are not granted by government or by society; they are inherent in the nature of human beings. It is intuitively right that individuals enjoy the security of such rights; the burden of explanation should lie with those who would take rights away.

DAVID BOAZ, KEY CONCEPTS OF LIBERTARIANISM (Cato Inst. 1999), available at <http://www.cato.org/dailys/01-01-99.html> (last visited Dec. 20, 2001). Echeverria uses the label "libertarian" to suggest that the Court has lost all interest in the public good. Because, however, the Court explicitly holds that the *Penn Central* analysis retains validity, this label is inapt. Echeverria's real point is that he does not like the view of the conservative majority of the Court and he is at pains to call them something both derogatory (in his mind) and scary to those who do not understand them. His use of the term "libertarian" is so off the mark, he might as well have accused the majority of a "vegetarian rewrite of the Takings Clause."

34. *Palazzo*, 121 S. Ct. at 2455. SGI, which was formed to purchase and hold the property, was originally held by Palazzo and his associates, whom Palazzo later bought out, becoming the sole shareholder. *Id.*

24. *Id.* at 1010, 22 ELR at 21106.

25. *Id.* at 1015, 22 ELR at 21107.

26. *Id.*

27. *Id.* at 1019, 22 ELR at 21108 (emphasis in the original) (internal footnote omitted).

28. *Id.* at 1027, 22 ELR at 21110.

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

30. *Id.* at 1031-32, 22 ELR at 21111.

31. 512 U.S. 374, 24 ELR 21083 (1994).

erty had begun as early as 1962. The company desired, in particular, to fill a portion of the wetlands as a precursor to development of the whole property.³⁵ These plans were continuously thwarted, however, by the state of Rhode Island which had, beginning in 1971, enacted comprehensive regulations designed to protect the state's wetlands.³⁶

In 1978, the property was transferred by operation of law from SGI to Palazzolo.³⁷ In the mid-1990s, after numerous attempts at development, Palazzolo brought a regulatory taking action in state court, challenging the wetland restrictions and his inability to obtain a fill permit. The Rhode Island trial court and state supreme court ruled against him. In 2000, the Court agreed to hear the case and on June 28, 2001, largely reversed the decision of the state court. The Court did not hold entirely for Palazzolo,³⁸ but a majority of the Justices did make several important rulings, and, in the process, clarified some of the murkier aspects of regulatory takings law.

Legal Issues Determined in Palazzolo

The Court addressed two main legal issues in *Palazzolo*. The first was "ripeness," or the point in time at which it is appropriate to have the courts determine if a taking has occurred. The second issue was whether a landowner who takes title to the property *after* the challenged regulation takes effect can claim a taking. If, in other words, the landowner knew of the regulation when he purchased, inherited, or otherwise took title to the land, i.e., if he had "notice" that his use of the land was somehow restricted, can he recover compensation for a taking? The Court decided both issues in favor of the property owner.

Ripeness

The state courts had characterized Palazzolo's takings claim as unripe because he had failed to explore "any other use for the property that would involve filling substantially less wetlands."³⁹ In the portion of its opinion holding, by a 6-3 margin, that the case was ripe, the Court explained that while a property owner must first file an application with local or state agencies, "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."⁴⁰

Of concern was the state's suggestion that a property owner, having already filed numerous applications for successively less-intensive land uses, should be required to re-apply for yet a lesser use before the claim would ripen. The Court rejected this argument in the interests of setting a logical limit: "[g]overnment authorities, of course, may not

burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision . . . [and] federal ripeness rules do not require the submission of further and futile applications with other agencies."⁴¹ Thus, under *Palazzolo*, a takings claim is ripe for judicial determination once a property owner files an application with the appropriate government agency and the agency definitively rejects it. As a corollary to this point, if the agency has no discretion to issue the requested permit, it is not necessary for the landowner to re-apply to develop his land. At that point, the aggrieved landowner may bring his takings claim to court.

Notice

The second major ruling in *Palazzolo* concerned the legal impact of prior notice of the regulation to the landowner. The state argued to the Court, as it had successfully done below, that a landowner who takes title to the land *after* the enactment of the challenged regulation cannot assert a takings claim.⁴² The Court rejected this argument, explaining,

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.*⁴³

Nor does the justification of notice take into account the effect on owners at the time of enactment, who are prejudiced as well. Should an owner attempt to challenge a new regulation, but not survive the process of ripening his or her claim (which, as this case demonstrates, will often take years), under the proposed rule the right to compensation may not be asserted by an heir or successor, and so may not be asserted at all. The state's rule would work a critical alteration to the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest which was possessed prior to the regulation. *The State may not by this means secure a windfall for itself.*⁴⁴

Notably, the Court did not use language limited to the type of transfer situation involved—i.e., devolution of title by operation of law—but spoke generally of a "postenactment transfer of title."⁴⁵ Justice Antonin Scalia, never one to mince words, emphasized in a separate concurring opinion, that the State cannot be absolved of its constitutional duty to pay just compensation for an otherwise unconstitutional regulation simply by virtue of transfer activities. As he put it, any other rule would "giv[e] the malefactor the benefit of its malefaction."⁴⁶

There was a second twist to the state's argument in *Palazzolo* which allowed the Court to further clarify the scope of the defense to categorical takings claims set forth in

35. *Id.* at 2455-56. It is important to understand that Palazzolo's property contained an upland parcel (which did not include any wetlands) and a wetlands parcel (which he desired to fill). The way in which the property naturally separated into these two discrete parts is important to understanding why the Court ultimately remanded the case to the state courts. See *infra* note 52 and accompanying text.

36. *Id.* at 2456.

37. *Id.* SGI's corporate charter was revoked and title to the property passed by operation of state law to Palazzolo as the sole shareholder.

38. See *infra* note 52 and accompanying text.

39. *Palazzolo*, 121 S. Ct. at 2458 (citing *Palazzolo v. State*, 746 A.2d 707, 714, 30 ELR 20420 (R.I. 2000)).

40. *Id.* at 2457.

41. *Id.* at 2459 (citing *City of Monterey v. Del Monte Dunes at Monterey Ltd.*, 526 U.S. 687, 698, 29 ELR 21133, 21138 (1999)); *id.* at 2462.

42. See *id.* at 2457.

43. *Id.* (emphasis added).

44. *Id.* at 2462-63 (emphasis added).

45. *Id.* at 2462.

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

Lucas. Often, in attempting to defeat a takings claim, a state will argue that the purported right to develop the land was not part of the landowner's title when he acquired the property or that the desired development would violate the state's law of nuisance. In the phraseology of *Lucas*, the state in *Palazzolo* claimed that the wetlands regulation had become a "background principle of [state] property law which cannot be challenged by those who acquire title after the enactment."⁴⁷ Again, the Court rejected such an artificial cutoff point for a takings claim, stating that

[i]t suffices to say 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 A regulation or common-law rule cannot be a background principle for some owners but not for others A law does not become a background principle for subsequent owners by enactment itself.⁴⁸

Partial Versus Categorical Takings

In the years since *Lucas*, jurists and lawyers alike had been puzzled by the distinction between the *Penn Central* balancing test and the *Lucas* categorical takings analysis. When does one analytical framework apply as opposed to the other? Although the distinction can certainly be teased out of predecessor cases,⁴⁹ *Palazzolo* clarified once and for all that the *Penn Central* balancing test applies to partial takings cases, while the *Lucas* categorical analysis governs claims premised on a total taking. The Court explained:

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. First, we have observed, with certain qualifications, that a regulation which denies all economically beneficial or productive use of land will require compensation under the Takings Clause. [Citing *Lucas*]. 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. [Citing *Penn Central*].⁵⁰

Despite this useful clarification, however, it is critical to note that the Court in *Palazzolo* was not presented with an opportunity to, and did not apply, either of these two tests. This was a function of the posture in which the case reached the Court. While the state courts had determined that the takings claim was not ripe, and further, that the claim was barred by pre-acquisition notice, the Rhode Island Supreme Court had actually offered its opinion on the merits.⁵¹ On the basis of a factual finding that the uplands portion of the property (which did not contain any wetlands necessitating

fill) retained a developmental value of \$200,000, the state court rejected that a categorical taking had occurred. The Court, addressing this portion of the state court's opinion, advised that "[a] regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property 'economically idle.'"⁵²

Significantly, before the Court, *Palazzolo* attempted to recast and revive his *Lucas* claim by arguing that the government had taken 100% of the wetlands parcel, as distinguished from the uplands parcel. The Court refused to explore this issue because

[p]etitioner did not press the argument in the state courts, and the issue was not presented in the petition for certiorari. The case comes to us on the premise that petitioner's entire parcel serves as the basis for his takings claim, and so framed, the total deprivation argument fails.⁵³

The Court remanded the case for consideration as to whether a partial taking had occurred under *Penn Central*.⁵⁴ The fate of *Palazzolo*'s partial takings claim under the *Penn Central* balancing factors remains to be seen.

Understanding *Palazzolo*

As we have just explained, the Court made two essential holdings in *Palazzolo*: one, that a takings case is ripe once a landowner has filed an application with the appropriate government agency and the agency has definitively rejected it, thus making known the extent of development that will be permitted under the restriction; and two, that pre-acquisition notice of the existence of a restriction will not bar a takings claim. The Court can also be understood to have clarified that there are two different types of takings claims (categorical and partial) which are to be analyzed under two distinct tests (*Lucas* and *Penn Central*, respectively), both of which may yield a determination that a taking worthy of compensation has occurred.⁵⁵

52. *Id.* at 2465 (citing *Lucas*, 505 U.S. at 1019, 22 ELR at 21108). *Palazzolo* had tried to raise what we like to call "the crumb issue." This issue derives from footnote 7 in *Lucas*, wherein the Court anticipated that a categorical claim could be made where a landowner had suffered something slightly less than a total taking:

Regrettably, 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. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.

505 U.S. at 1016 n.7, 22 ELR at 21107 n.7. In the years since *Lucas*, litigants and the courts have been understandably confused as to the extent of deprivation that must be shown to support a categorical, as opposed to a partial, takings claim. While *Palazzolo* did not settle this question, the Court certainly elevated the status of the *Lucas* footnote to a principle of law which now requires further definition: "Assuming a taking is otherwise established, a state may not evade the duty to compensate on the premise that the landowner is left with a token interest." *Palazzolo*, 121 S. Ct. at 2464. The Court is poised to rule on "the crumb issue" as soon as the appropriate case is presented.

53. *Palazzolo*, 121 S. Ct. at 2465.

54. *Id.* The Court explicitly noted that the state was aware of the applicability of *Penn Central*, *id.* at 2461, and that "[t]he state court opinions cannot be read as indicating that a *Penn Central* claim was not properly presented from the outset of this litigation." *Id.*

55. See also *id.* at 2474 (Ginsburg, J., dissenting).

47. *Id.* at 2464 (citing *Lucas*).

48. *Id.*

49. See, e.g., *Florida Rock Indus. v. United States*, 18 F.3d 1560, 24 ELR 21036 (Fed. Cir. 1994); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 24 ELR 21072 (Fed. Cir. 1994); *Creppel v. United States*, 41 F.3d 627 (Fed. Cir. 1994); *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 30 ELR 20481 (Fed. Cir. 2000).

50. 121 S. Ct. at 2457 (select citations omitted).

51. *Id.* at 2464.

These are the principles of regulatory takings law that emerge from the majority opinion in *Palazzolo*. When examined in light of the development of regulatory takings jurisprudence set forth earlier in this Dialogue, it is evident that these principles are not radical, and that they do not depart from previous takings jurisprudence. The Court did not establish new law in the area of ripeness (as the Court had already established ripeness principles in *Williamson* and *Del Monte Dunes*) or in the distinction between a *Penn Central* taking and a *Lucas* taking (which has been in place since the Court's decision in *Lucas*). It seems to us that Echeverria's entire analysis of *Palazzolo* is driven by his need, as a proponent of government regulation, to make up ground after a crucial loss in *Palazzolo* on the third issue, i.e., pre-acquisition notice.

Pre-Acquisition Notice

Echiverria appears to accept the Court's holding in *Palazzolo* that one who inherits property by devise or operation of law is not barred from pursuing a taking claim even if the acquisition occurred *after* enactment of the regulation. As he notes, *Palazzolo* "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 or gifts) should not create an absolute bar to the subsequent assertion of takings claims by transferees."⁵⁶

Echeverria bristles, however, at the thought that one who purchases land with notice of a restriction may recover for a taking. He predicts that "the scope of the *Palazzolo* ruling on the notice issue may turn out to be fairly limited," and stresses that "*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."⁵⁷ As Echeverria correctly notes, many courts prior to the *Palazzolo* decision had rejected the concept that one who purchases land at a low price when that price is itself due to the very fact of regulation, should be permitted to reap a "windfall" by recovering compensation for a taking. The pre-*Palazzolo* decision of the Federal Circuit in *Good v. United States*⁵⁸ is perhaps the best example of this reasoning in operation.

The Court, however, has rejected the relevance of *any* distinction based on the manner in which the property was acquired. In addressing the issue of pre-acquisition notice in *Palazzolo*, the Court first distilled the Rhode Island Supreme Court's holding as follows:

The state court held that 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.⁵⁹

The Court then unequivocally rejected this limitation in a single pithy phrase: "The State may not put so potent a Hobbesian stick in the Lockean bundle."⁶⁰

The Court's focus was simply not on the private transactions underlying the transfer of property, but rather, on the actions of government. The Court was determined to ensure that the *government* never reaps a windfall due to transfer activities of any type between private individuals. As the Court explained,

[t]he 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*

59. *Palazzolo*, 121 S. Ct. at 2462 (internal citations omitted). In this passage, the Court is again highlighting that two different tests exist—i.e., *Lucas* and *Penn Central*.

60. *Id.* Compare:

A COMMONWEALTH is said to be instituted when a multitude of men do agree, and covenant, every one with every one, that to whatsoever man, or assembly of men, shall be given by the major part the right to present the person of them all, that is to say, to be their representative; every one, as well he that voted for it as he that voted against it, shall authorize all the actions and judgements [sic] of that man, or assembly of men, in the same manner as if they were his own, to the end to live peaceably amongst themselves, and be protected against other men.

THOMAS HOBBES, *LEVIATHAN* (1651), at Ch. XVIII (Of the Rights of Sovereigns by Institution), with:

31. But the chief matter of property being now . . . [is] the earth itself, as that which takes in and carries with it all the rest, I think it is plain that property in that too is acquired. . . . As much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property. He by his labour does, as it were, enclose it from the common. Nor will it invalidate his right to say everybody else has an equal title to it, and therefore he cannot appropriate, he cannot enclose, without the consent of all his fellow-commoners, all mankind. God, when He gave the world in common to all mankind, commanded man also to labour, and the penury of his condition required it of him. God and his reason commanded him to subdue the earth—i.e., improve it for the benefit of life and therein lay out something upon it that was his own, his labour. He that, in obedience to this command of God, subdued, tilled, and sowed any part of it, thereby annexed to it something that was his property, which another had no title to, nor could without injury take from him. . . .

39. And thus, . . . we see how labour could make men distinct titles to several parcels of it for their private uses, wherein there could be no doubt of right, no room for quarrel.

JOHN LOCKE, *CONCERNING CIVIL GOVERNMENT, SECOND ESSAY, AN ESSAY CONCERNING THE TRUE ORIGINAL EXTENT AND END OF CIVIL GOVERNMENT* (1690), at Ch. V (Of Property).

56. Echeverria, *supra* note 2, at 11114.

57. *Id.*

58. 189 F.3d 1355, 30 ELR 20102 (Fed. Cir. 1999).

*be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.*⁶¹

Thus, while one can certainly attempt to distinguish sale situations from the type of transfer that occurred in *Palazzolo*, we believe that the Court's reasoning makes it clear that the nature of the transfer is irrelevant. This result is, moreover, entirely consistent with the Takings Clause, which operates as a restriction on the *activity of the government*, not on the activity of the landowner.

Reasonable Expectations and Lucas

Echeverria posits that the *Palazzolo* decision "does not preclude consideration of preacquisition notice as a factor in takings analysis."⁶² This is certainly true for partial regulatory takings cases analyzed under *Penn Central*, since "reasonable investment-backed expectations" continues to be a factor in the partial takings analysis and pre-acquisition notice impacts this calculus. Echeverria, however, believes it "reasonable to infer that courts are not absolutely barred from considering preacquisition notice in *Lucas*-type cases after *Palazzolo*."⁶³ We strongly disagree.

The Court in *Lucas* set forth a very simple test for a categorical regulatory taking: "When the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."⁶⁴ The Court did not speak of "reasonable expectations" as a factor in the categorical takings analysis, nor of any other factors, save the defense available to the state for "background principles of state law." When the government has taken all of the value of a landowner's property, *Lucas* requires a court to order compensation for the taking—nothing more, nothing less.

Echeverria, however, divines the addition of "pre-acquisition notice" as a factor to the *Lucas* analysis on the basis of a "see also" signal contained in the *Palazzolo* majority opinion.⁶⁵ This "see also" reference sends the reader to authoring Justice Anthony M. Kennedy's concurring opinion in *Lucas*.⁶⁶ A "see also" signal, however, is nothing more than a suggestion that the "[c]ited authority constitutes addi-

tional source material that supports the proposition."⁶⁷ We refuse to believe that the Court would articulate a new test such a convoluted and obscure manner. Echeverria's speculation also flies in the face of language in *Palazzolo* itself, explicitly advising that categorical takings cases are to be evaluated solely on the basis of the *Lucas* test.⁶⁸ As the Court explicitly refused to analyze *Palazzolo* under *Lucas* (since *Palazzolo* failed to raise such a claim in the Rhode Island courts),⁶⁹ and thereby to further modify *Lucas*, we are left solely with the Court's original "categorical test" which admits of no additional factors, save for the defense of "background principles." Nor do we believe that Justice Sandra Day O'Connor's concurring opinion can be read to support this grafting of an additional factor on the *Lucas* test. She speaks solely with reference to its consideration under the *Penn Central* balancing test.⁷⁰

Even if *Palazzolo* could be understood as unclear on the question of whether factors, such as pre-acquisition notice, can be grafted onto the *Lucas* categorical taking analysis (and it cannot be), we believe that the Court's handling, on June 29, 2001, the very day after *Palazzolo* was released, of the petition for writ of certiorari in *McQueen v. South Carolina Department of Health*⁷¹ puts an end to any debate. In *McQueen*, the South Carolina Supreme Court reversed a lower court decision finding a categorical taking in favor of the landowner who had been denied the permits necessary to bulkhead and fill his lots on a man-made saltwater canal. It was "uncontested [that] the permit denial at issue [] deprives [the landowner] of all economically viable use of his property."⁷² Nonetheless, the state supreme court summarized the issues before it as including "whether [the landowner] had a vested right to backfill his property and whether [he] had investment-backed expectations of developing his property."⁷³

The Court granted the petition for writ of certiorari in *McQueen*, vacated the judgment below and "remanded to the Supreme Court of South Carolina for further consideration in light of *Palazzolo v. Rhode Island*."⁷⁴ We believe that the Court's action in *McQueen* signals the end of its tolerance for courts that attempt to mix and match the *Penn Central* factors in cases that deserve *Lucas* categorical treatment.⁷⁵

61. *Palazzolo*, 121 S. Ct. at 2462-63 (emphasis added); see also *id.* at 2468 (Scalia, J., concurring), responding to Justice Sandra Day O'Connor's unwillingness to allow "sharp" dealing real estate investors to profit by recovering compensation that

there is nothing to be said for giving it instead to the government—which not only did not lose something it owned, but is both the cause of the miscarriage of 'fairness' and the only one of the three parties involved in the miscarriage (government, naive original owner, and sharp real estate developer) which acted unlawfully—indeed unconstitutionally. Justice O'Connor would eliminate the windfall by giving the malefactor the benefit of its malefaction. It is rather like eliminating the windfall that accrued to a purchaser who bought property at a bargain rate from a thief clothed with the indicia of title, by making him turn over the unjust profit to the thief.

(emphasis in the original).

62. Echeverria, *supra* note 2, at 11113 (emphasis in the original).

63. *Id.* at 11118.

64. *Lucas*, 505 U.S. at 1019, 22 ELR at 21108 (emphasis in the original).

65. Echeverria, *supra* note 2, at 11118.

66. *Palazzolo*, 121 S. Ct. at 2457.

67. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 23 (17th ed. 2000) (emphasis in original).

68. *Palazzolo*, 121 S. Ct. at 2457.

69. *Id.* at 2465.

70. *Id.* at 2465 (O'Connor, J., concurring) ("The more difficult question is what role the temporal relationship between regulatory enactment and title acquisition plays in a proper *Penn Central* analysis.")

71. 121 S. Ct. 2581 (2001).

72. *McQueen v. South Carolina Coastal Council*, 340 S.C. 65, 69, 530 S.E.2d 628, 631 (S.C. 2000).

73. *Id.*

74. 121 S. Ct. at 2581.

75. Echeverria is buoyed by the notion that, as he interprets *Palazzolo*, the Court did not reaffirm what he calls the "obverse categorical rule" which he traces to footnote 2 in the *Nollan* majority opinion. See *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 833 n.2, 17 ELR 20918, 20920 n.2 (1987). Echeverria claims that the Court, in the *Nollan* footnote, articulated the view that pre-acquisition notice "is completely irrelevant in a takings analysis." Echeverria, *supra* note 2, at 11117. *Palazzolo*, then, according to Echeverria, suggests that pre-acquisition notice *is* relevant. The Court, however, never espoused such a rigid view. The only objective way to read the *Nollan* footnote is that it applied to the facts of the case and did not pro-

The Future of Penn Central

Echeverria treats the *Penn Central* partial takings test as if it sprung forth fully grown from the head of the Court yesterday. He posits that “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.”⁷⁶ Echeverria’s doubts about *Penn Central* are overstated and a product of his own attempt to confuse the distinction between the partial and categorical takings analyses. We suspect his real goal is to soften the blow to his cause resulting from the Court’s clear acknowledgment that, under the right circumstances, a partial taking, analyzed under *Penn Central*, will yield a compensable taking.

The concept of a partial taking was introduced by the Court in *Penn Central* more than 20 years ago. The Court identified, at that time, the factors that inform the partial takings analysis, i.e., the economic impact of the regulation on the claimant, the extent to which the regulation has interfered with distinct investment-backed expectations and the character of the government action.⁷⁷ The Court in *Palazzolo* reiterated this same “complex of factors” and specifically remanded the case for consideration of the partial takings claim under the *Penn Central* balancing test.⁷⁸ Even Justice Ruth Bader Ginsburg, in her dissenting opinion in *Palazzolo*, notes that a partial taking, analyzed under *Penn Central*, is a “basic form of regulatory taking . . . [and where] a regulation does not leave a property economically idle to establish the alleged taking the landowner may pursue the multifactor inquiry set out in *Penn Central*.”⁷⁹ Rather than confusing the issue, *Palazzolo* clearly reinforces the notion that a partial taking claim may constitute a take worthy of compensation.

Even if the *Penn Central* analysis has form, Echeverria questions whether it has substance. He doubts that a partial taking can ever be the basis for a successful regulatory takings claim.⁸⁰ Despite noting that, “[o]n 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,” Echeverria calls this appearance of distinction “deceiving.”⁸¹ Yet, the Court itself, and various other of the *Palazzolo* opinions, specifically articulate that a partial taking may be the basis for a takings claim.⁸² Although the Court has yet to uphold a partial takings claim, many other courts have done so.⁸³ While a landowner subject to a partial taking has a tougher row to hoe in order to

collect compensation for the action of the government, it is disingenuous to suggest that rejection of a claim is a foregone conclusion if the *Penn Central* analysis applies.

Palazzolo on Background Principles of State Law

In *Lucas*, in addition to setting forth the categorical takings analysis, the Court discussed a viable defense to a categorical claim. As the Court explained, “[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logical antecedent inquiry into the nature of the owner’s estate shows that the proscribed use interests were not part of this title to begin with.”⁸⁴ In his Dialogue, Echeverria suggests that the Court had little to say in *Palazzolo* about background principles of state law, aside from reaffirming the existence of the *Lucas* defense.⁸⁵ While we note, as did Echeverria, that the Court stated in *Palazzolo* that it had “no occasion to consider the precise circumstances when a legislative enactment can be deemed a background principle of state law and whether those circumstances are present here,”⁸⁶ we believe that the Court spoke volumes about the meaning of “background principles of state law” when it stated 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. This relative standard would be incompatible with our description of the concept in *Lucas*, which is explained in terms of those common, shared understandings of permissible limitations derived from a State’s legal tradition. A regulation or common-law rule cannot be a background principle of state law for some owners but not for others. The determination whether an existing, general law can limit all economic use of property must turn on objective factors, such as the nature of the land use proscribed. *A law does not become a background principle for subsequent owners by enactment itself.*⁸⁷

This statement in *Palazzolo*, coupled with the Court’s focus on the activity of the government, will serve as critical guidance for courts grappling with application of the *Lucas* defense. States have been further warned against offering manufactured “background principles of law” as a method of avoiding the duty to pay just compensation for regulatory takings.

Palazzolo on the Relevant Parcel

Before the Court, *Palazzolo* attempted to present an issue critical to regulatory takings law which remains largely unsettled. As we explained above, the case reached the Court on the premise that both the upland and the wetland portions of *Palazzolo*’s property formed the “relevant parcel” for purposes of the takings inquiry.⁸⁸ The Court rejected *Palazzolo*’s attempt to argue that only the wetlands portion of the property should be used as the basis for the analysis because this particular formulation of the property interests

nounce a new rule of takings law. Certainly, the author of *Nollan*—Justice Scalia (never a shrinking violet)—would have had something to say in his concurring opinion in *Palazzolo* if the majority of the Court reversed a rule that he allegedly articulated 15 years earlier.

76. Echeverria, *supra* note 2, at 11121.

77. 438 U.S. at 124, 8 ELR at 20533.

78. *Palazzolo*, 121 S. Ct. at 2457, 2465.

79. *Id.* at 2474 (Ginsburg, J., dissenting) (internal citations omitted).

80. Echeverria, *supra* note 2, at 11119-21.

81. *Id.* at 11120.

82. *Palazzolo*, 121 S. Ct. at 2457; *see also id.* at 2466 (O’Connor, J., concurring); *id.* at 2474 (Ginsburg, J., dissenting).

83. *See, e.g.*, the decisions cited at note 49 *supra*.

84. *Lucas*, 505 U.S. at 1027, 22 ELR at 21110.

85. Echeverria, *supra* note 2, at 11115-16.

86. *Id.* at 11115 (quoting *Palazzolo*, 121 S. Ct. at 2464).

87. 121 S. Ct. at 2464 (internal citations omitted, emphasis added).

88. *Id.* at 2465.

had not been raised in the state courts. In so doing, the Court highlighted the unsettled nature of the issue of relevant parcel, noting that

[t]his contention asks us to examine the difficult, persisting question of what is the proper denominator in the takings fraction. Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole, but we have at times expressed discomfort with the logic of this rule, a sentiment echoed by some commentators.⁸⁹

Echeverria believes this “characterization of the relevant property issue as ‘difficult’ and ‘persisting’” is “wholly disingenuous,” and explains that, from his vantage point

[u]ntil Justice Scalia, in an extraneous footnote in *Lucas*, raised some doubt about the property as a whole rule, the rule represented settled law. Indeed, as Justice Ruth Bader Ginsburg points out in her dissent in *Palazzolo*, the Court had 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.⁹⁰

The issue of the relevant parcel (also known as the “parcel as a whole rule”) had its origin in a statement made in *Penn Central* that “[t]aking’ jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.”⁹¹ One has to be very careful, however, in interpreting that statement; it is a loaded one that must be read in the specific context of *Penn Central* and later cases. We will not take this opportunity to engage Echeverria on the substance of the relevant parcel issue, but merely point out that, contrary to his belief, the “parcel as a whole rule” is far from settled law.

Notably, in his dissent in *Penn Central*, then-Justice William H. Rehnquist identified a number of “[d]ifficult conceptual and legal problems” associated with any rule denying an owner “all reasonable return on his property.”⁹² The future Chief Justice urged that “the Court must define the particular property unit that should be examined [because, up to that point] [t]he Court does little to resolve these ques-

tions in its opinion.”⁹³ In a subsequent dissent in *Keystone*, now speaking as the Chief Justice, he again noted that, “[t]he need to consider the effect of regulation on some identifiable segment of property makes all important the admittedly difficult task of defining the relevant parcel.”⁹⁴ Finally, in *Lucas*, in a pointed critique of one aspect of *Penn Central*, namely the New York Court of Appeal’s “extreme—and, we think, unsupportable—view of the relevant calculus,” the Court identified with disapproval the state court’s “examin[ation of] the diminution in a particular parcel’s value produced by a municipal ordinance in light of total value of the takings claimant’s other holdings in the vicinity.”⁹⁵ Read with this background, it is clear that the issue has persisted since at least *Penn Central* (and probably longer). Further, the recent language in *Palazzolo* strongly signals that the proper identification of the relevant parcel remains an unresolved and critical issue.

In fact, we believe that the relevant parcel issue and the validity of the so-called parcel as a whole rule is certain to come before the Court within its next few terms. It is worthwhile noting that this concern with identifying the relevant parcel began as a footnote in a dissenting opinion in *Penn Central*, grew to a footnote in the majority’s opinion in *Lucas*, and was recently elevated to the main text of the majority’s opinion in *Palazzolo*, with the Court issuing an apparent invitation to bring the issue before it for review. The *Machipongo Land & Coal Co. v. Commonwealth, Department of Environmental Resources*⁹⁶ case, presently before the Pennsylvania Supreme Court, could provide the Court with an opportunity to resolve this critically important takings issue.

Conclusion

The importance of *Palazzolo*, as another decision in a long line of recent Court rulings that protect landowners’ rights, cannot be understated. It represents another step in the march of the Court toward stricter accountability for land use decisions that adversely impact private property. While we wholeheartedly agree with Echeverria’s ultimate conclusion—that “[i]n all events, the future promises to be interesting”⁹⁷—we anticipate that the Court will continue to clarify its regulatory takings jurisprudence and hold government to its constitutional obligation to provide just compensation whenever its action has “gone too far.”

89. *Id.* (citations omitted). We read this portion of the Court’s opinion as endorsing both the Court’s and the commentators’ criticisms of the holding in *Keystone*. The Court likely is signaling its willingness to consider the “relevant parcel” issue in a forthcoming case.

90. Echeverria, *supra* note 2, at 11114 (footnote omitted, emphasis added).

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

92. *Id.* at 149 n.13, 8 ELR at 20539 n.13 (Rehnquist, J., dissenting).

93. *Id.*

94. *Keystone*, 480 U.S. at 514-15, 17 ELR at 20451 (Rehnquist, C.J., dissenting).

95. *Lucas*, 505 U.S. at 1016 n.7, 22 ELR at 21107 n.7.

96. *See supra* note 4.

97. Echeverria, *supra* note 2, at 11122.