Relaxing the Rules: The Supreme Court’s Quest for Balance in *Palazzolo v. Rhode Island*

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Supreme Court takings jurisprudence contains few bright-line rules. The Court has traditionally rejected such rules in favor of balancing tests in its analysis of regulatory takings claims. The Court’s recent decision in *Palazzolo* continues this pattern. In *Palazzolo*, the Court rejected a rule barring regulatory takings claims by property owners who acquire property after the enactment of regulations. The Court also relaxed a rule to determine when takings claims meet ripeness requirements. This decision makes it easier for property owners to bring regulatory takings claims, and gives the courts greater leeway for the exercise of fairness.

CONTENTS

Introduction ........................................................................ 138
I. Background .................................................................. 139
   A. What Constitutes a Taking .................................... 139
   B. The Notice Rule .................................................. 141
   C. Ripeness Doctrine, the Final Decision Rule, and the Futility Exception ........................................... 145
II. Statement of the Case ................................................ 146
   A. Background ....................................................... 146
   B. Decision of the Rhode Island Superior Court .... 148
   C. Decision of the Rhode Island Supreme Court ...... 148
   D. Decision of the United States Supreme Court ..... 149

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ECOLOGY LAW QUARTERLY

E. Justice O'Connor's Concurrence ........................................ 149
F. Justice Scalia's Concurrence ............................................ 150
G. Justice Ginsburg's Dissent (with Justice Souter and, in part, Justice Breyer) ...................................................... 150
H. Justice Stevens' Dissent .................................................... 151

III. Discussion ....................................................................... 151
A. Rejection of the Notice Rule Perpetuates Uncertainty .......... 152
B. Palazzolo Adds Greater Subjectivity into the Ripeness Doctrine ........................................................................ 153
C. Palazzolo Makes It Easier for Property Owners to Seek Compensation ................................................................. 154
D. The Court Appropriately Resisted Imposing Rigid Rules ..................................................................................... 155

Conclusion ............................................................................. 157

INTRODUCTION

Legal practitioners and scholars eagerly anticipated the Supreme Court's decision in Palazzolo v. Rhode Island,1 which many hoped would dissipate some of the confusion that clouds takings jurisprudence. Evoking a sense of déjà vu, however, the Court failed to endorse bright-line rules, and the legal community complained of yet another missed opportunity.2

This Note examines the Court's rejection of rules in Palazzolo. Section I provides a primer on regulatory takings law. Section II describes the facts and holdings of the Palazzolo case. Section III examines Palazzolo's significance in the takings area. The Note concludes that the Court's decision allows a larger pool of property owners to bring takings claims in the future. Palazzolo relaxes a rule and broadens an exception, giving the

courts greater discretion to assess individual cases and promote fairness.

I

BACKGROUND

Under the Takings Clause of the Fifth Amendment, private property cannot be taken for public use without just compensation. The Supreme Court has stated that no "set formula" exists, however, to analyze takings claims. As a result, the legal community has struggled to determine when a "regulation goes too far [and should] be recognized as a taking" and when regulatory takings claims become ripe for review.

A. What Constitutes a Taking

Some of the Supreme Court's clearest guidance on takings appears in *Lucas v. South Carolina Coastal Council*. In *Lucas*, the Court stated that government regulations categorically constitute takings if they: (1) require direct physical invasion of private property, or (2) strip private property of all "economically beneficial or productive use." In the absence of a categorical taking, the Court relies on a three-part test, developed in *Penn Central Transportation Co. v. New York*, to determine when the government has gone "too far" and effected a regulatory taking. Under *Penn Central*, the Court first assesses economic impacts to the owners of property rights. The Court is more likely to find a regulatory taking if a parcel's

8. See *Lucas*, 505 U.S. at 1015 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (finding a taking where state law required landlords to allow the installation of television cable on their property)).
10. In *Hodel v. Irving*, 481 U.S. 704, 717 (1986), the Court identified a third categorical taking: when the government abolishes a basic property right, such as the right to pass on fee simple property at death. No other cases to date fall into this category. SINGER, supra note 9.
property value is substantially devalued, although the Court historically has upheld regulations that cause even very large reductions in value. Second, the Court analyzes the character of the government action. In *Penn Central*, the Court explained that "[a] 'taking' may . . . be found when the interference with property can be characterized as a physical invasion by government. . . ." Third, the Court examines the extent to which regulations interfere with property owners' "investment-backed expectations." Property owners who made substantial investments in reasonable reliance on existing regulations can more readily prove that new regulations are takings. In contrast, "the owner who bought with knowledge of [regulatory] restraint could be said to have no reliance interest, or to have assumed the risk of any economic loss." Furthermore, when new regulations prevent property owners from receiving expected future benefits, the property owners' takings claims are less likely to succeed.

Although categorical takings and the *Penn Central* test provide guidelines for evaluating takings claims, several complications persist. For example, the Court has recognized exceptions to categorical takings. In *PruneYard Shopping Center v. Robins*, the Court created an exception to the direct physical invasion takings category, deeming compensation unnecessary when the invasion is "temporary and limited in nature." In addition, *Lucas* established that even if a regulation denies a

14. *Penn Central*, 438 U.S. at 124 (emphasis added). Cases like *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), have deemed physical invasions to be categorical takings, however, and this prong of the *Penn Central* test now seems redundant. See John D. Echeverria, *A Preliminary Assessment of Palazzolo v. Rhode Island*, 31 ENVTL. L. REP. NEWS & ANALYSIS 11112, 11120 (2001) (explaining the problems with construing the "character" factor as something other than "whether or not the regulation involved a type of physical occupation").
16. See *Singer*, *supra* note 9, at 1259, 1262.
18. See *Singer*, *supra* note 9, at 1259, 1262.
19. *Id.* at 1252-53.
property owner all economically viable use of her land, compensation is not necessary if “background principles of nuisance and property law” precluded the right to use the land in the prohibited manner in the first place.22

Penn Central’s “ad hoc”23 approach faces criticism for being less predictable than a rule-oriented approach. Professor Susan Rose-Ackerman has repeatedly asserted that this unpredictability leads to inefficiency “[t]o the extent that investors are risk averse” and causes government officials to err on the side of conservatism.24 In addition, unpredictability may prevent investors from adequately protecting themselves against the effects of regulatory changes.25

Another problem with the Penn Central test derives from the fact that the Court has never found any regulation to fail the test.26 Without a model case, it is difficult to assess how the Penn Central test should be applied.27 The result, in the view of many commentators on regulatory takings, is “a chaos of confused argument.”28

B. The Notice Rule

Federal and state courts have widely applied the “notice rule” to help resolve disputes between regulators and the regulated.29
Cir. 1995) (rejecting a takings claim because, given the state of the law at the time the property was purchased, the plaintiff did not have reasonable investment-backed expectations to support his claim); Deltona Corp. v. United States, 657 F.2d 1184, 1193 (Ct. Cl. 1981), cert. denied, 455 U.S. 1017 (1982) (rejecting a takings claim because "when Deltona acquired the property in 1964, it knew that the development it contemplated could take place only if it obtained the necessary permits from the Corps of Engineers. Although at that time Deltona had every reason to believe that those permits would be forthcoming when it subsequently sought them, it also must have been aware that the standards and conditions governing the issuance of permits could change."); Adams Outdoor Advertising Co. v. City of East Lansing, 614 N.W.2d 634 (Mich. 2000), cert. denied (Mar. 19, 2001) (rejecting a takings claim where plaintiff was aware of restrictive ordinance that pre-dated property acquisition, stating that plaintiff could have had no reasonable expectation that it could maintain property in violation of ordinance); Shell Island Homeowners Ass'n, Inc. v. Tomlinson, 517 S.E.2d 406 (N.C. 1999) (rejecting the takings claim of a hotel owner who was restricted from erecting erosion control structures under a regulatory scheme that pre-dated the hotel); Wooten v. S.C. Coastal Council, 510 S.E.2d 716 (S.C. 1999) (rejecting takings claims by landowners who were denied permits to fill wetlands based on statutes that preceded the permit applications); City of Virginia Beach v. Bell, 498 S.E.2d 414 (Va. 1998), cert. denied, 525 U.S. 826 (1998) (rejecting a property owner's takings claim related to an ordinance adopted two years before property was acquired); Gazza v. N.Y. State Dep't of Envtl. Conservation, 679 N.E.2d 1035 (N.Y. 1997), cert. denied, 522 U.S. 813 (1997) (rejecting the takings claim of a property buyer who was denied permits to build on wetlands worth $396,000 when unregulated, but purchased for $100,000 after regulations); Kim v. City of New York, 681 N.E.2d 312 (N.Y. 1997), cert. denied, 522 U.S. 809 (1997) (rejecting the takings claim of property owner who likely purchased property at a discounted price, given legal encumbrances in place at the time of purchase); Alegria v. Keeney, 687 A.2d 1249, 1254 (R.I. 1997) (rejecting a takings claim because the property buyer was aware that a substantial portion of the property was considered wetlands subject to regulation, and the awareness affected investment-backed expectations); FIC Homes of Blackstone, Inc. v. Conservation Comm'n, 673 N.E.2d 61, 70 (Mass. App. Ct. 1996), review denied, 676 N.E.2d 55 (Mass. 1997) (rejecting FIC's takings claim because "when FIC purchased the property . . . the Blackstone wetlands by-law was already in effect"); Hunziker v. State, 519 N.W.2d 367 (Iowa 1994) (rejecting a compelled condemnation claim because the property owners knew restrictive statutes were in place before they purchased the land); Namon v. State, 558 So. 2d 504 ( Fla. Dist. Ct. App. 1990) (rejecting takings and inverse condemnation claims where property owners had constructive knowledge of existing land use regulations when they purchased property and actual notice of restrictions that might preclude development); Rowe v. Town of North Hampton, 553 A.2d 1331 (N.H. 1989) (holding that, because the property owner had at least constructive notice of legal impediments to her right to build upon her wetland lot, the government should not be guarantor, via inverse and condemnation proceedings, of her investment risks taken in the face of those impediments); Claridge v. N.H. Wetlands Bd., 485 A.2d 287, 291 (N.H. 1984) (rejecting takings claim of property owner hoping to fill wetlands, stating "[a] person who purchases land with notice of statutory impediments to the right to develop that land can justify few, if any, legitimate investment-backed expectations of development rights which rise to the level of constitutionally protected property rights"). But see Karam v. State, 705 A.2d 1221, 1229 (N.J. Super. Ct. App. Div. 1998), aff'd, 723 A.2d 943 (1999), cert. denied, 528 U.S. 814 (1999) (holding that "the right of a property owner to fair compensation when [regulations restrict property use] passes to the next owner"); Vatalaro v. DER, 601 So. 2d 1223, 1229 (Fla. Dist. Ct. App. 1992) (finding a taking where the land was
This rule prohibits property owners from claiming regulatory takings if they were "on notice" of regulations when they became owners. Similarly, the courts have generally rejected takings claims brought in response to "increasingly stringent restrictions to an existing regulation."

Takings cases and commentators have advanced several justifications for the notice rule. For example, as enunciated in Ruckelshaus v. Monsanto, it seems logical to preclude property owners from challenging conditions on their property that they knew or should have known about before acquiring the property. In addition, as discussed in Loveladies Harbor v. United States, economic theory cuts against the takings claims of post-regulatory buyers of property, because post-regulatory prices should already reflect any regulatory burden. The notice rule also offers "a rare bright-line test in a legal field otherwise fraught with confusion and uncertainty."

Despite the appeal of the notice rule, arguments against it have emerged. First, if property owners "on notice" cannot challenge regulations, regulatory authorities could freely interfere with private property interests by claiming to be interpreting existing law in a new way. Thus, regulators could effectuate takings without passing new regulations, under the guise of "novel interpretations" of existing law. Some also argue that notice does not necessarily lead to a lack of reasonable investment-backed expectations for development, especially when restrictions are imposed by a permitting scheme. The more easily permits can be obtained, this argument goes, the

30. As indicated in note 29, supra, property owners may be "on notice" if they have either actual or constructive knowledge of regulations.


33. 28 F.3d 1171 (Fed. Cir. 1994).

34. Echeverria, supra note 14, at 11117.

35. See, e.g., Kim v. City of New York, 681 N.E.2d 312, 319 (N.Y. 1997), cert. denied, 522 U.S. 809 (1997). But Lucas guards against this concern, because "only those rules derived from an 'objectively reasonable application' of preexisting State law can be said to inhere in a property owner's title." Id. (citing Lucas, 505 U.S. at 1032) (emphasis in original). In addition, where the government's actions wrongfully interfere with economic interests, property owners may bring a tort action in most jurisdictions. See, e.g., Della Penna v. Toyota Motor Sales, U.S.A., Inc., 902 P.2d 740, 746-47 (Cal. 1995).

36. Vatalaro v. DER, 601 So. 2d 1223, 1229 (Fla. Dist. Ct. App. 1992); see also Hurziker v. State, 519 N.W.2d 367, 373 (Iowa 1994) (Snell, J. dissenting) (arguing that restrictions imposed by a permitting scheme are not "self-executing").
more reasonable it is to expect to develop one's land, even if "on notice."\textsuperscript{37}

The Supreme Court has wavered in the extent to which it has factored notice into takings decisions. In \textit{Andrus v. Allard},\textsuperscript{38} the Court held that "[t]he timing of acquisition of [property] . . . is relevant to a takings analysis of . . . investment-backed expectations."\textsuperscript{39} Nevertheless, the \textit{Andrus} Court maintained that property acquisition need not precede regulations in order for a property owner to assert a takings claim.\textsuperscript{40} As long as "the regulation they challenge restricts their ability to dispose of their property, appellees have a personal, concrete, live interest in the controversy."\textsuperscript{41} The \textit{Andrus} Court concluded that "[t]here is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate."\textsuperscript{42}

In \textit{Ruckelshaus},\textsuperscript{43} the Court rejected a takings claim where regulated activity occurred after the effective date of regulations. The Court said that once regulations take effect, parties are "on notice."\textsuperscript{44} Accordingly, if a party chooses to engage in regulated activity despite statutory restrictions, "it can hardly argue that its reasonable investment-backed expectations are disturbed when [the government] acts . . . in a manner that was authorized by law at the time of the [activity]."\textsuperscript{45}

In contrast, in \textit{Nollan v. California Coastal Commission},\textsuperscript{46} the Court upheld a takings claim where property owners sought to engage in restricted activity after the effective date of regulations. In \textit{Nollan}, the claimants acquired beach property more than ten years after the state promulgated beach development

\textsuperscript{37} In contrast, Professor Louis Kaplow calls the reasonableness of such expectations into question, arguing that "to expect laws never to change" is a "perverse assumption." Kaplow, \textit{supra} note 25, at 522. Similarly, \textit{Lucas} stated that any "property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers." \textit{Lucas} v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992). Moreover, "a pattern of weak enforcement of a regulatory program [does not] create any kind of vested right to development." \textit{Echeverria}, \textit{supra} note 14, at 11116.

\textsuperscript{38} 444 U.S. 51 (1979).

\textsuperscript{39} Id. at 64 n.21.

\textsuperscript{40} Id. ("Even assuming that appellees have not sufficiently alleged pre-effectiveness possession, they have standing to urge their constitutional claim.").

\textsuperscript{41} Id.

\textsuperscript{42} Id. at 65.

\textsuperscript{43} 467 U.S. 986 (1984).

\textsuperscript{44} Id. at 1006.

\textsuperscript{45} Id. at 1006-07.

\textsuperscript{46} 483 U.S. 825 (1987).
restrictions. Nevertheless, the Court held that the state needed to provide compensation for the loss in property value caused by the restrictions, even if such loss were not realized until later and by new property owners. Thus, unlike Ruckelshaus, Nollan rejected the notion that subsequent owners were "on notice" simply because restrictions were in effect when they bought property.

C. Ripeness Doctrine, the Final Decision Rule, and the Futility Exception

In the regulatory takings context, the doctrine of ripeness rests upon the idea that courts should not review the merits of a claim until the full extent of a regulation has been established and its impact can be measured. The Court articulated its standards for ripeness in Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City. In that case, the Court held that ripeness requires a takings claimant to receive "a final decision regarding the application of the regulations to the property at issue." This holding is commonly called the "final decision rule."

Since Williamson County, the Court has softened the final decision rule. In the absence of a final decision, the Court suggested in MacDonald, Sommer & Frates v. County of Yolo that a claim may meet ripeness requirements once it becomes apparent that additional applications to permitting authorities would be futile. In Suitum v. Tahoe Regional Planning Agency, the Court reiterated that once the scope of regulatory authority is clear, ripeness does not require the rejection of futile

48. Nollan, 483 U.S. at 860 (Brennan, J., dissenting).
49. Herrington v. County of Sonoma, 834 F.2d 1488, 1494 (9th Cir. 1987), cert. denied, 489 U.S. 1090 (1989).
51. Id. at 186. Williamson County also requires property owners to seek compensation in state court before bringing regulatory takings cases in federal court. Id. at 194.
53. In MacDonald, the Court denied that future applications by the petitioner would be futile, holding that the petitioner's claim was not ripe, but added that requiring futile applications should not be contemplated by the courts. 477 U.S. at 353 n.8.
54. 520 U.S. 725 (1997).
Numerous courts have applied this "futility exception" to assess whether ripeness requirements have been met.56

II

STATEMENT OF THE CASE

A. Background

Anthony Palazzolo and his associates, operating as Shore Gardens, Inc. (SGI), purchased waterfront property in Westerly, Rhode Island, a popular summer resort town, in 1959.57 Palazzolo's associates sold their SGI shares to Palazzolo the following year, making him sole shareholder.58 Over the next six years, SGI filed three separate applications with the state for permission to fill wetlands on the property.59 The third application also included a plan to construct a recreational beach facility.60 Rhode Island agencies rejected the applications because they contained inadequate information and the projects posed the threat of adverse environmental impacts.61

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55. See id. at 739; see also City of Monterey v. Del Monte Dunes, Ltd., 526 U.S. 687 (1999) (upholding a takings claim after the regulatory authority imposed increasingly rigorous demands on a series of development applications).

56. See Bannum, Inc. v. Louisville, 958 F.2d 1354, 1363 (6th Cir. 1992) (discussing the development of the futility exception); see also City Nat'l Bank of Miami v. United States, 30 Fed. Cl. 715, 720 (1994) (allowing rejection of an incomplete application to constitute a final decision and satisfy ripeness requirements because the regulatory agency's rejection "letter expresses unequivocally that the permit was denied because of the effect that the project would have on the wetlands, not because the application was incomplete... Plaintiff is not required to pursue futile means to obtain a final determination."); Hoehne v. County of San Benito, 870 F.2d 529 (9th Cir. 1989) (finding a claim ripe because requiring the plaintiffs to pursue state remedies would be futile. The plaintiff landowners submitted uncontroverted evidence that the county planning director stated he would deny the proposed subdivision application); Herrington v. County of Sonoma, 834 F.2d 1488, 1496 (9th Cir. 1987), cert. denied, 489 U.S. 1090 (1989) (finding a claim ripe because, once the proposed development was found inconsistent with County General Plan, it would have been futile for developers to pursue their application). Cf. Unity Ventures v. Lake County, 841 F.2d 770 (7th Cir. 1988) (acknowledging the futility exception, but holding that a mayor's informal denial of a request for a sewer connection did not render future applications futile); Conant v. United States, 12 Cl. Ct. 689 (1987) (expressing support for the futility exception, but denying that enforcement proceedings against a plaintiff render future permit applications futile).


59. Palazzolo, 533 U.S. at 613-14.

60. Id at 614.

61. Id..
Amid a nationwide environmental movement, Rhode Island enacted legislation in 1971 creating the Rhode Island Coastal Resources Management Council (Council). The Council enacted regulations, known as the Rhode Island Coastal Resources Management Program (CRMP), prohibiting certain development on "coastal wetlands" such as salt marshes. These development restrictions reflected a growing awareness of the ecological and economic functions and values of wetlands.

SGI dissolved in 1978 and Palazzolo — acting as an individual — resurrected development plans for the property. Palazzolo submitted applications to the Council in 1983 and 1985 for permission to fill salt marsh areas on his property. The Council rejected the first application, which simply proposed to fill 18 acres, due to its lack of specificity and adverse environmental impacts. The second application sought to fill approximately 11 acres to allow construction of a parking lot, picnic tables, barbecue pits, and portable toilets. The Council also rejected this application, finding that Palazzolo's property provided valuable ecological functions and that the proposed fill activity did not serve a "compelling public purpose" as required by state law.

After unsuccessfully appealing the Council's last decision, Palazzolo filed an inverse condemnation action against the Council in Rhode Island Superior Court in 1988. He claimed that the Council's decision constituted a total taking under Lucas, depriving him of "all economically beneficial use" of his property. Palazzolo sought $3.15 million in damages, reflecting the net value of the property based on plans to subdivide it and build 74 single-family homes.
B. Decision of the Rhode Island Superior Court

The Rhode Island Superior Court upheld the constitutionality of the Council's decision to deny Palazzolo's 1985 application, and held that Palazzolo was not entitled to compensation.\textsuperscript{74} The trial judge first determined that no categorical takings had occurred, because the CRMP neither compelled physical invasion of Palazzolo's property\textsuperscript{75} nor deprived Palazzolo of all economically viable use of his land.\textsuperscript{76} The trial judge then found no regulatory taking under \textit{Penn Central} because Palazzolo - in his individual capacity - acquired title to the property after the promulgation of the CRMP and thus lacked reasonable investment-backed expectations.\textsuperscript{77}

C. Decision of the Rhode Island Supreme Court

The Rhode Island Supreme Court unanimously upheld the lower court's decision.\textsuperscript{78} First, the court held that Palazzolo's takings claim was not ripe because he had not explored other, less intrusive development proposals.\textsuperscript{79} Second, the court endorsed the notice rule, rejecting Palazzolo's challenge of regulations predating his acquisition of the property because: (1) "the right to fill wetlands was not part of the title he acquired";\textsuperscript{80} (2) allowing such a challenge would encourage "pernicious 'takings claims' based on speculative [land] purchases";\textsuperscript{81} and (3) legal precedent prevents challenges to physical takings predating property acquisition, and "[regulatory] takings should be accorded similar treatment by courts."\textsuperscript{82} Third, the supreme court rejected Palazzolo's \textit{Lucas}-based categorical takings claim because the property retained $200,000 in value under the Council's regulations. Fourth, the court held that Palazzolo's claim failed the \textit{Penn Central} test because the Council's regulations predated Palazzolo's acquisition of title and he

\textsuperscript{74.} Palazzolo v. Rhode Island, 746 A.2d 707, 711 (R.I. 2000).
\textsuperscript{75.} Id. at 714-15.
\textsuperscript{76.} Id. at 715.
\textsuperscript{77.} Id.
\textsuperscript{78.} Id. at 707.
\textsuperscript{79.} Id. at 714. Although the court found that the case was not ripe for review, it nevertheless reviewed the merits of Palazzolo's claim. The other holdings in the case, therefore, may be mere dicta. See Dwight H. Merriam, \textit{The Palazzolo Palaestra}, 23 \textit{ZONING & PLAN. L. REP.} 93, 98 (2000).
\textsuperscript{80.} Palazzolo, 746 A.2d at 716.
\textsuperscript{81.} Id.
\textsuperscript{82.} Id.
therefore could have had no reasonable investment-backed expectation that he could develop his property.

D. Decision of the United States Supreme Court

Represented by the Pacific Legal Foundation, which specializes in property rights and has brought several takings cases to the Supreme Court, Palazzolo filed for certiorari. The Supreme Court granted the petition and published a "splintered" decision on June 28, 2001.

The five-Justice majority overruled three of the four holdings of the Rhode Island Supreme Court. First, the Court held that Palazzolo's takings claim was ripe for review because the Council's regulations clearly prohibited the filling of wetlands on Palazzolo's property. The Court ruled that "once it becomes clear 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." 85

Second, the Court explicitly rejected the notice rule. Failure to protect Palazzolo's right to challenge regulations promulgated before he acquired his property, the Court held, would improperly "put an expiration date on the Takings Clause." 86 The Court also stated that the notice rule was "too blunt an instrument" to assess whether regulations constitute takings. 87

Finally, although the Court agreed with the lower courts that Palazzolo's claim should be barred under Lucas due to the remaining $200,000 property value, the Court disagreed that the claim should be barred under Penn Central simply because he acquired his property after the regulations took effect. 88 The Court remanded the case to Rhode Island to examine the claim under Penn Central. 89

E. Justice O'Connor's Concurrence

Justice O'Connor agreed that notice should not be an absolute bar on takings claims, yet emphasized that notice is

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86. Id. at 627.
87. Id. at 628.
88. Id. at 629-30.
89. Id. at 630.
still relevant to takings analysis. Because notice affects investment-backed expectations, she stated, it should factor into the *Penn Central* test.\(^9\) She asserted that notice may shape investment-backed expectations, although other factors may also come into play.\(^9\) For example, she suggested that investment-backed expectations may also depend upon the force with which regulators control development.\(^9\)

Justice O'Connor further asserted that a takings claim may be valid under *Penn Central* even lacking reasonable investment-backed expectations.\(^9\) As but "one factor" in the three-pronged *Penn Central* analysis, she stated, investment-backed expectations are not "dispositive" or "talismanic."\(^9\)

**F. Justice Scalia's Concurrence**

In contrast with Justice O'Connor, Justice Scalia asserted that notice is irrelevant to takings analysis.\(^9\) In Justice Scalia's view, a property buyer who acquires property after the enactment of regulation has just as valid a takings claim as one who acquires property before the regulation.\(^9\) In cases where such a regulation diminishes property values, Justice Scalia argued, the government is not entitled to benefit from the "windfall."\(^9\)

**G. Justice Ginsburg's Dissent (with Justice Souter and, in part, Justice Breyer)**

Justices Ginsburg, Souter, and Breyer concluded that Palazzolo's takings claim was not ripe for review. They stated that the record contained substantial ambiguities\(^9\) as to Palazzolo's plans for his property. They accused Palazzolo of a "bait-and-switch ploy," in which he submitted applications for relatively modest development projects, but then sought damages related to a large housing project.\(^9\)

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90. See id. at 633-34.
91. Id.
92. Id. at 634. One commentator finds this suggestion "troubling," as it creates an incentive for regulators to use their authority or lose it. Echeverria, supra note 26, at 11116.
93. Palazzolo, 533 U.S. at 634-35.
94. Id. at 634.
95. Id. at 637 (Scalia, J., concurring).
96. Id. at 636.
97. Id.
98. Id. at 654 (Ginsburg, J., dissenting).
99. Id. at 648.
The Justices also opposed using the *Penn Central* test in this case. In the state courts, Palazzolo “pressed only a Lucas-based claim that he had been denied all economically viable use of his property.”100 Allowing Palazzolo to change course and seek compensation under *Penn Central*, the Justices argued, is unfair and “indulges Palazzolo’s bait-and-switch maneuver.”101

Justice Ginsburg stopped short of explicitly endorsing the notice rule, but stated that “at a minimum, ... [she believed] that transfer of title can impair a takings claim.”102 In a separate statement, Justice Breyer discussed the relevance of notice in the *Penn Central* analysis. Justice Breyer asserted that “reasonable investment-backed expectations ... will diminish in force and significance – rapidly and dramatically – as property continues to change hands over time.”103

**H. Justice Stevens’ Dissent**

Justice Stevens endorsed the notice rule. In his view, new property owners cannot bring valid claims for takings of property from their predecessors in interest.104 He contended that a taking is “a discrete event .... Like other transfers of property, it occurs at a particular time, that time being the moment when the relevant property interest is alienated from its owner.”105

In the instant case, Justice Stevens believed that Palazzolo had no standing for his takings claim because SGI — not Palazzolo as an individual — owned the property when the Council’s regulations took effect. Justice Stevens stated that “[i]f the regulations imposed a compensable injury on anyone, it was [SGI].”106 Justice Stevens believed that Palazzolo, in his individual capacity, never possessed the right to fill the wetlands on his property.107

**III**

**DISCUSSION**

Although the Court’s holding in *Palazzolo* perpetuates uncertainty in regulatory takings jurisprudence, the fact-
sensitive analysis demanded by Palazzolo provides greater leeway in the exercise of fairness. The Court rejected the bright lines of the "notice rule" and added a new layer of subjectivity to ripeness requirements by broadening the futility exception. These decisions provide the Court with greater discretion to assess information on a case-by-case basis. In addition, while Palazzolo makes it easier for property owners to bring takings claims, as discussed below, the ruling does not restrict the courts' ability to reject claims that contravene the public interest.

A. Rejection of the Notice Rule Perpetuates Uncertainty

Although the Court agreed that notice should not be an absolute bar on takings claims, Palazzolo leaves uncertain how notice should factor into future takings cases. On one hand, Justice Scalia asserts that notice is irrelevant, building upon the majority's statement that the Takings Clause should have no "expiration date." On the other hand, Justice O'Connor and some the dissenting Justices suggest that notice should be subsumed into the investment-backed expectations prong of the Penn Central test. This idea also harmonizes with the majority, which remanded the case for analysis under Penn Central. As a result, notice, although clearly neither determinative nor irrelevant, is now of uncertain importance.

Palazzolo's peculiar facts may minimize the precedential value of its conclusions about notice. The argument that Palazzolo was "on notice" is somewhat weak. In the bulk of cases in which the courts have applied the notice rule, claimants actively acquired their property by entering the market and making purchases. In his individual capacity, however, Palazzolo did no such thing. Instead, the property transferred to Palazzolo by operation of law upon dissolution of SGI. In addition, Palazzolo acquired the property from himself as sole shareholder of SGI. This is significant because Palazzolo formed SGI before the CRMP existed with investment-backed

108. Id. at 627.
109. See id. at 633-34, 654.
111. See supra note 29.
expectations that he would eventually develop the property. As a result, Palazzolo may be construed to involve a party who purchased property without notice.

B. Palazzolo Adds Greater Subjectivity into the Ripeness Doctrine

Palazzolo relaxes ripeness requirements for takings claims, creating a more subjective test for ripeness. Previous applications of the futility exception allowed property owners to bypass the final decision rule as long as there was "no question" as to the outcome of future permit or project applications. However, Palazzolo allows questions to remain. Palazzolo states that once "the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened." By framing the issue in this manner, the Court took the problematic step of inserting its own predictions into the regulatory process.

It is not the courts' role to anticipate how a regulatory authority might rule on a particular permitting application, especially when they can simply wait for the regulatory outcome. In Palazzolo, the Court weighed the burden of preparing an application against its expectation that the Council would deny it, and inappropriately deemed Palazzolo's claim to be ripe. The courts, outside of extreme cases, should avoid making such inferences. Moreover, property owners should not be able to bypass the land use application process and bring takings claims directly into the courts. Instead, subjective decisions regarding the permissible uses of property should be left to regulatory authorities with relevant expertise and accountability.

112. Petitioner's Brief, supra note 67, at 23.
114. Palazzolo, 533 U.S. at 620 (emphasis added).
115. The Court reached this conclusion because the Council, in rejecting Palazzolo's applications, stated that there was no "compelling public purpose" to allow Palazzolo to fill the wetlands on his property. Id.
116. Some courts have addressed this issue by imposing a "one meaningful application" requirement, whereby futility is only established in satisfaction of ripeness requirements if a claimant has applied at least once for administrative relief. See, e.g., Gilbert v. Cambridge, 932 F.2d 51, 61 (1st Cir. 1991); Herrington v. County of Sonoma, 834 F.2d 1488, 1495 (9th Cir. 1987), cert. denied, 489 U.S. 1090 (1989).
C. Palazzolo Makes It Easier for Property Owners to Seek Compensation

Palazzolo increases the pool of potential takings claimants in two ways. First, Palazzolo acquired his property after regulations took effect, albeit under peculiar circumstances. Thus, the Court's rejection of the notice rule removes an obstacle for similarly situated property owners to initiate takings litigation against the government. Second, landowners who may not have believed their cases were ripe for review prior to Palazzolo now may bring claims. Although the outcome of litigation would still be unpredictable, these landowners might seek resolution through the courts directly, rather than maneuvering through a time-consuming application process predicted to produce unfavorable results.¹¹⁸

Although takings claimants may be eligible for compensation after Palazzolo, the courts should not allow claims associated with "sharp practices" or speculation. By rejecting the notice rule, the Court raised the possibility of an industry of speculators who buy land specifically to challenge its attached regulations and seek compensation under the Takings Clause.¹¹⁹

At oral argument in Palazzolo, one of the Justices proposed the following:

Think of this, there is a poor little old woman who owns [land] and she can't possibly develop it or deal with it and she puts it on the market. And somebody comes along and knows the regulation is there but says, look, that regulation is going to have to be applied in a reasonable manner. I'm going to pay you X amount for this property and then challenge it. I mean, what's the matter with that?¹²⁰

Allowing people to purchase discounted property and sue for compensation is "inconsistent with the basic purpose of takings law, which is to protect the private landowner from unfair fiscal burdens that should be shared by the public as a whole, not to

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¹¹⁸ Delays are commonly perceived to be the primary cause of project suspension or cancellation in the context of real estate development. See, e.g., Dennis Binder, NEPA, NIMBYs and New Technology, 25 LAND & WATER L. REV. 11, 16-17 (1990); Paul J. Culhane, NEPA's Impacts on Federal Agencies, Anticipated and Unanticipated, 20 ENVTL. L. 681, 700 (1990).

¹¹⁹ Guarding against such a situation, however, Justice O'Connor's concurrence stated: "If... some property owners... may reap windfalls[, an important indicium of fairness is lost." Palazzolo, 533 U.S. at 635.

enrich the landowner at the public's expense."121 This proposition also promotes an anachronistic 19th-century view of land as a commodity, or "the profits thereof."122 Professor Eric Freyfogle's views on water speculation apply to land in this context. He stated that allowing speculation

erroneously and dangerously suggests that water is valuable primarily as a tool for one person — the owner — to use to gain economic advantage over other persons. The far different reality . . . is that water is much more than a commodity: It is something else as well, something more that [the law] needs to recognize. A sound [policy] would embody and transmit sensitive, ethical messages about the multiple values of water.123

The Court itself recently acknowledged that "property is more than economic value." 124 For all of these reasons, "pernicious" takings claims by land speculators should be rejected.

D. The Court Appropriately Resisted Imposing Rigid Rules

Although Palazzolo surely disappointed the "great expectations" of observers who hoped the case would "clarify the murky doctrine of investment-backed expectations in regulatory takings law,"125 the Court's serial rejection of rules has been appropriate. As Justice O'Connor remarked, Palazzolo reiterates the "array of relevant factors" that must be considered in takings cases and "restores balance to [the] inquiry."126 The openness of takings jurisprudence allows future opinions to accommodate peculiar conditions of property acquisition, including property inheritance, adverse possession, or other transfers by operation of law. Moreover, it gives regulators flexibility to adjust to changing conditions in scientific understanding, society, and culture. In Palazzolo, for example, the Council's decision to deny Palazzolo's permit applications reflects a modern appreciation of wetlands. This view has changed considerably from past decades

122. See Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1017 (quoting 1 E. COKE, INSTITUTES, ch. 1, § 1 (1st Am. ed. 1812)).
when wetlands were deemed "odorous marshes." By refusing to impose rigid rules in this case, the Court allowed the Council's regulatory decision to stand, resting upon current notions of public and private interests.

While Palazzolo may frustrate property rights advocates by continuing to promote uncertainty, the Court has never suggested that predictability is its goal in takings analysis. In Dolan v. City of Tigard, for example, the Court stated that "a term such as 'rough proportionality' best encapsulates what we hold to be the requirement of the Fifth Amendment." Similarly, in Andrus v. Allard, the Court stated that "[r]esolution of each case... ultimately calls as much for the exercise of judgment as for the application of logic." Citing Penn Central, Justice O'Connor's concurrence in Palazzolo stressed that "the salience of [relevant] facts cannot be reduced to any 'set formula.'" Moreover, the Court's relaxation of rules in Palazzolo may in fact increase predictability by (1) allowing decisions to better accord with ordinary expectations and modern customs, and (2) appealing to the ultimate goals of the legal system, including fairness, instead of perpetuating a confusing system.

The relaxation of rules also has favorable political consequences for the Court. Professor Kathleen Sullivan has observed that rigid rules tend to be more polarizing than flexible standards in Supreme Court jurisprudence. With both sides claiming victory in the Palazzolo case, the Court managed to appeal to a wide political spectrum. Thus, by refusing to impose bright line rules in Palazzolo, the Court avoided political alienation and protected its legitimacy to lay down the "supreme Law of the Land."

127. Id. at 612 (quoting M. Best, The Town That Saved a State – Westerly 192 (1943)).
128. See supra notes 24-25 and accompanying discussion.
131. 533 U.S. at 636 (O'Connor, J., concurring).
CONCLUSION

Takings cases involve many variables, and the Court wisely resists using blunt rules to deal with them. In *Palazzolo*, the Court has given itself, and the courts in general, a greater discretionary role in determining when a takings case meets ripeness requirements. In addition, the Court has allowed notice to remain a factor in takings claims. Whatever the effect of this case on the predictability of takings cases, the Court has reinforced its authority to use precision in this area and provided itself the flexibility to promote justice.