Boston College Environmental Affairs Law Review

Volume 43 | Issue 2 Article 11

5-31-2016

The Intersection of the Takings Clause and Rising Sea Levels: Justice O'Connor's Concurrence in *Palazzolo* Could Prevent Climate Change Chaos

Devon Applegate
Boston College Law School, devon.applegate@bc.edu

THE INTERSECTION OF THE TAKINGS CLAUSE AND RISING SEA LEVELS: JUSTICE O'CONNOR'S CONCURRENCE IN *PALAZZOLO* COULD PREVENT CLIMATE CHANGE CHAOS

DEVON APPLEGATE*

Abstract: Takings Clause jurisprudence is in a state of disarray. The Supreme Court of the United States has not eased the difficult task of determining what constitutes an unconstitutional regulatory taking. Although the Supreme Court provided some guidance by articulating a three-prong test for determining what constitutes such a taking, it failed to define each prong. In a concurring opinion in *Palazzolo v. Rhode Island*, Justice Sandra Day O'Connor defined the character of the governmental act prong by emphasizing the importance of the purposes served by a governmental act. Justice O'Connor's approach is well suited to handle future environmental regulations aimed at protecting coastal regions from rising sea levels. By embracing this approach, the Court can reduce the confusion surrounding takings jurisprudence, provide uniformity at a critical time, swiftly handle the excess of takings claims that will inevitably materialize, and give deferential treatment to important regulations that possess strong public purposes.

INTRODUCTION

Over the next decade and beyond, global warming and climate change will undoubtedly bring important environmental issues before local, state, federal, and foreign governments.[1] Sea level rise, a well-known effect of global warming, has been described as one of the greatest challenges of the twenty-first century and has emerged at the forefront of climate change discussions throughout the world.[2] Sea level rise is primarily the result of the thermal expansion of oceans and increased temperatures that trigger the melting of land glaciers and snow, which subsequently flow into nearby

* Managing Editor, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2015–2016.

[1] *See* Steven J. Eagle, *A Prospective Look at Property Rights and Environmental Regulation*, 20 GEO. MASON L. REV. 725, 725, 760 (2013).

[2] *See* DOUGLAS CODIGA ET AL., CTR. FOR ISLAND CLIMATE ADAPTATION & POLICY, CLIMATE CHANGE AND REGULATORY TAKINGS IN COASTAL HAWAI'I 1 (2011), http://nsgl.gso.uri.edu/hawau/hawaut11003.pdf [perma.cc/B9ZV-B2VE]; John R. Nolon, *Land Use and Climate Change: Lawyers Negotiating Above Regulation*, 78 BROOK. L. REV. 521, 548 (2013).

oceans.[3] How to handle rising sea levels in coastal regions is a pressing question that dominates these climate change discussions.[4] Governments at all levels will be expected to create solutions to, and safeguards against, this environmental problem.[5] In 2008, in light of the widely acknowledged and severe consequences of sea level rise, federal and state officials advised Congress that coastal regions should receive assistance from the federal government to facilitate the planning necessary to cope with the rising sea level phenomenon.[6] This planning, which is well underway, will result in a variety of new environmental regulations.[7]

Because these new regulations will inevitably restrict private property development, the Takings Clause of the Fifth Amendment to the U.S. Constitution will be implicated and act as an obstacle that the regulations will need to overcome.[8] Courts, therefore, will be forced to handle and analyze these novel, numerous, and essential regulations.[9] As it stands today, Takings Clause jurisprudence lacks both uniformity and clarity.[10] The chaotic state of takings jurisprudence will become even more chaotic as climate change-related regulations emerge, unless the United States Supreme Court provides guidance and a clear legal framework through which lower courts can evaluate these claims.[11] Courts need a clear takings test to apply when evaluating takings claims and challenges that will inevitably rise in tandem with rising sea levels.[12] Although courts have tended to focus their takings analysis on the harms *effected* by a particular regulation, a test suitable for the future must also give great weight to the harms *avoided* by the regulation, or in other words, the purposes served by the regulation.[13]

---

[3] BARBARA J. LAUSCHE, MARINE POLICY INST. AT MOTE MARINE LAB., SYNOPSIS OF AN ASSESSMENT: POLICY TOOLS FOR LOCAL ADAPTATION TO SEA LEVEL RISE 5 (2009), https://mote.org/media/uploads/files/Synopsis-Policy_Tools_for_Local_Adaptation_to_Sea_Level_Rise(fin).pdf [https://perma.cc/D38R-488H].

[4] *See* Nolon, *supra* note 2, at 550.

[5] *See* Eagle, *supra* note 1, at 725.

[6] Robin Kundis Craig, *A Public Health Perspective on Sea-Level Rise: Starting Points for Climate Change Adaptation*, 15 WIDENER L. REV. 521, 522 (2010).

[7] *See* Eagle, *supra* note 1, at 760.

[8] *See* U.S. CONST. amend. V (providing in pertinent part, "nor shall private property be taken for public use, without just compensation"); Eagle, *supra* note 1, at 760.

[9] *See* J. Peter Byrne, *Rising Seas and Common Law Baselines: A Comment on Regulatory Takings Discourse Concerning Climate Change*, 11 VT. J. ENVTL. L. 625, 625 (2010); Eagle, *supra* note 1, at 760.

[10] *See* First English Evangelical Lutheran Church of Glendale v. County of Los Angeles (*First English Evangelical I*), 482 U.S. 304, 340 n.17 (1987) (Stevens, J., dissenting).

[11] *See id.*; Eagle, *supra* note 1, at 760 (discussing complex problems that will be presented to courts regarding takings clause challenges arising from climate change).

[12] *See First English Evangelical I*, 482 U.S. at 340 n.17 (Stevens, J., dissenting) (noting the lack of a clear takings clause standard); Eagle, *supra* note 1, at 760 (discussing complex problems that will be presented to courts regarding takings clause challenges arising from climate change).

[13] *See infra* notes 221–288 and accompanying text.

In 2001, in a concurring opinion in *Palazzolo v. Rhode Island*, Justice Sandra Day O'Connor articulated the regulatory takings analysis that should be embraced by courts going forward.[14] Her concurrence focused on the need to examine the purposes served by a regulation.[15] Justice O'Connor's analysis lends itself to giving deferential treatment to important regulations that possess strong public purposes.[16] Because of the serious dangers associated with sea level rise, related regulations will necessitate deferential treatment.[17] Regulations related to sea level rise will easily overcome the obstacles posed by the Takings Clause if courts utilize Justice O'Connor's regulatory takings analysis.[18]

Part I of this Note describes impending environmental regulations that relate to sea level rise to the extent that they have already been proposed or developed.[19] Part II outlines the historical and current regulatory takings jurisprudence.[20] Part III argues that the proper analysis going forward should follow Justice O'Connor's guidance, as articulated in her concurring opinion in *Palazzolo*, because such analysis will allow future environmental regulations—in particular those related to climate change—to survive regulatory takings challenges, modernize takings law, and create much needed uniformity in this area of the law.[21]

I. FUTURE ENVIRONMENTAL REGULATION

Sea level rise is an unpredictable phenomenon because scientists are still uncertain about the extent of the problem.[22] Scientists, for example, remain unsure about how abruptly sea levels will rise in response to rapidly melting land ice sheets.[23] What is certain, however, is that sea level rise is a problem that has predictable impacts on human welfare and the environment.[24] In 2007, the Supreme Court in *Massachusetts v. Environmental Protection Agency* agreed with this sentiment, acknowledging that rising sea

---

[14] *See* Palazzolo v. Rhode Island (*Palazzolo II*), 533 U.S. 606, 633−34 (2001) (O'Connor, J., concurring).

[15] *Id.*

[16] *See id.*; *infra* notes 280–285 and accompanying text.

[17] *See* Craig, *supra* note 6, at 522 (discussing the dangers posed by rising sea levels); *infra* notes 280–285 and accompanying text.

[18] *See Palazzolo II*, 533 U.S. at 633−36 (O'Connor, J., concurring) (emphasizing the importance of weighing the public purpose in takings clause analysis); *infra* notes 280–288 and accompanying text.

[19] *See infra* notes 22–67 and accompanying text.

[20] *See infra* notes 68–220 and accompanying text.

[21] *See infra* notes 221–288 and accompanying text.

[22] *See* Craig, *supra* note 6, at 521.

[23] LAUSCHE, *supra* note 3, at 5.

[24] Craig, *supra* note 6, at 521.

levels have already inflicted serious harms on both the environment and human welfare.[25] Rising sea levels:

> (1) inundate wetlands and lowlands, (2) erode shorelines, (3) exacerbate coastal flooding, (4) increase the salinity of estuaries and aquifers and otherwise impair water quality, (5) alter tidal ranges in rivers and bays, (6) change the locations where rivers deposit sediment, (7) increase the heights of waves, and (8) decrease the amount of light reaching the bottoms.[26]

Rising sea levels not only erode shorelines, but also displace entire coastal communities.[27] Erosion magnifies the effects of sea level rise.[28] For example, if the sea level rises one meter, the amount of land that would disappear as a result would actually be much more than one meter as the shoreline would simultaneously erode.[29]

Shorelines along the East Coast of the United States erode, on average, two to three feet per year.[30] Shorelines along the U.S. Gulf Coast erode at a rate that exceeds four feet per year.[31] If the sea level in Bangladesh rises one meter, seventeen percent of the country will be inundated.[32] Half of the Netherlands is at or below sea level.[33] The largest cities in both China and Nigeria sit less than two meters above sea level.[34] Twenty percent of the population and farmland in Egypt are situated less than two meters above sea level.[35] These problems are not merely future contemplations; rising sea levels have already devastated a native Alaskan village.[36] According to a recent study, ten percent of the world lives in low-lying areas that are sus-

---

[25] Massachusetts v. Envtl. Prot. Agency, 549 U.S. 497, 521 (2007).

[26] Craig, *supra* note 6, at 522.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] Zane Gresham & Miles Imwalle, *Sea Level Rise: Regulatory Responses in San Francisco Bay and Across the Globe*, TRENDS, Jan.–Feb. 2012, at 2, http://media.mofo.com/files/Uploads/Images/120131-Gresham-Imwalle-Trends.pdf [perma.cc/755R-2QCB].

[31] *Id.*

[32] Craig, *supra* note 6, at 522.

[33] Gresham & Imwalle, *supra* note 30, at 2.

[34] Craig, *supra* note 6, at 522.

[35] *Id.*

[36] *Id.* at 522–23. The Native Village and City of Kivalina filed suit seeking damages under the common law claim of public nuisance. Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 853 (9th Cir. 2012). The plaintiffs claimed that oil, energy, and utility companies released excessive amounts of greenhouse gas emissions, which resulted in global warming. *Id.* According to the plaintiffs, global warming has and continues to cause erosion, sea level rise, and the melting of ice that protects their village from storms, which are jointly destroying their land. *See id.* at 853–54; Gresham & Imwalle, *supra* note 30, at 2.

ceptible to the devastating consequences of sea level rise.[37] In the United States alone, models predict that a sea level rise of three to five feet could displace thirteen and a half million people.[38] The regulation of coastlines is inevitable and could occur rapidly because the global average rate of sea level rise has been accelerating since 1993.[39]

There are three distinct approaches taken to combat sea level rise: retreat, accommodation, and protection.[40] The retreat approach attempts to reduce the hazards created by sea level rise by "restricting, prohibiting, or removing development" from susceptible areas.[41] Rolling easements and setback requirements are both examples of retreat policies.[42] The accommodation approach aims to decrease the damage to structures caused by flooding and storms.[43] Examples of accommodation polices include "minimum floor elevations and structural bracing," which protect against dangerous water surges and high-speed winds.[44] Protective policies tend to focus on protecting "individual buildings and sites," rather than whole neighborhoods, from "flooding, damage to infrastructure, shore erosion, salinity intrusion, and the loss of natural resources."[45] Examples of protective strategies include the building of dunes, "dikes, levees, floodwalls," or tidal barriers, beach nourishment, and the construction of "wetlands, reefs, or barrier islands."[46] Some states have aggressively proposed such strategies, while others have failed to develop any strategy at all.[47]

Most coastal regions are currently still in the planning stages, but some are starting to take regulatory action.[48] For example, in 2008, the State Coastal Resources Management Council of Rhode Island added a section in its management program entitled "Climate Change and Sea Level Rise to

---

[37] Gresham & Imwalle, *supra* note 30, at 1.

[38] FLA. DEP'T OF ECON. OPPORTUNITY, HOW COUNTRIES, STATES, AND FLORIDA ADDRESS SEA LEVEL RISE: A COMPENDIUM OF CLIMATE CHANGE ADAPTATION RESEARCH 14 (n.d.), https://content.sierraclub.org/grassrootsnetwork/sites/content.sierraclub.org.activistnetwork/files/teams/documents/CompendiumNationalStateLocalAdaptationProjects.pdf [perma.cc/66XG-8NCA].

[39] *See* LAUSCHE, *supra* note 3, at 6 (noting average sea level rise has been accelerating since 1993); Craig, *supra* note 6, at 526 (noting that the rate of sea level rise appears to be accelerating); John R. Nolon, *Sea-Level Rise and the Legacy of* Lucas*: Planning for an Uncertain Future*, 66 PLAN. & ENVTL. L. 4, 4 (2014) (discussing need for public officials to adopt new approaches to combat sea level rise).

[40] Nolon, *supra* note 2, at 549.

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.* (internal quotation marks omitted).

[45] *Id.* (internal quotation marks omitted).

[46] *Id.*

[47] *Id.* at 549–51.

[48] *See* Gresham & Imwalle, *supra* note 30, at 1 (acknowledging that regulatory agencies are taking note of rising sea levels and certain legislators are initiating action plans).

Rhode Island's Coastal Management Program" in anticipation of rulemaking.[49] Similarly, counties in Maryland have published a series of recommendations in an attempt to protect their lands against sea level rise, such as prohibiting new subdivisions, prohibiting the expansion of already developed lots, restricting major renovations of current structures, and requiring the use of perimeter wall and column foundations.[50] Recommendations proposed by Delaware include limiting new development in floodplains, prohibiting new lots from being created in floodplains, and requiring new structures to be setback adequately from shorelines.[51]

In Florida, although the state does not yet require local governments to protect against sea level rise, the state provides for the use of a number of tools that serve such purposes, including a coastal construction line that requires seaward construction to be subject to additional regulations and a coastal setback line, which prohibits "major habitable structures seaward of the line."[52] In California, the San Francisco Bay Conservation and Development Commission enacted the Bay Plan amendment, which requires shoreline projects to anticipate and plan for sea level rise.[53] The amendment requires regional planning bodies to collaborate with federal, state, and local governments to develop an effective plan.[54] Taking a different approach, New Jersey, as part of its resiliency plan, intends to acquire more than a thousand beachfront easements in order to combat sea level rise.[55] Along the same lines, public beaches in Texas are deemed to be rolling easements that move inland with the shorelines.[56] South Carolina has taken a similar approach.[57]

Some states have asserted a clear regulatory approach to combating sea level rise.[58] North Carolina, for example, requires new structures under 5000 square feet to be built at a distance from the shore that is at least thirty

---

[49] LAND USE LAW CTR., PACE UNIV. SCH. OF LAW, LOCAL LAND USE RESPONSE TO SEA LEVEL RISE 16 (n.d.), http://coast.noaa.gov/digitalcoast/_/pdf/Pace_Final_Report.pdf?redirect=301ocm [perma.cc/VZJ7-3UXW].

[50] *See* ENVTL. RES. MGMT., REGULATORY RESPONSE TO SEA LEVEL RISE AND STORM SURGE INUNDATION 13–14 (2011), http://dnr2.maryland.gov/ccs/Publication/Annapolis_RRSLRnSSI.pdf [perma.cc/C66M-WPK6].

[51] *Id.* at 17.

[52] LAUSCHE, *supra* note 3, at 10.

[53] *See* S.F. BAY CONSERVATION & DEV. COMM'N, SAN FRANCISCO BAY PLAN 31–39 (2008), http://www.bcdc.ca.gov/pdf/bayplan/bayplan.pdf [perma.cc/F5KW-LTLE]; Gresham & Imwalle, *supra* note 30, at 1.

[54] Gresham & Imwalle, *supra* note 30, at 1.

[55] *See* Exec. Order No. 140, 45 N.J.R. 2289(a) (Oct. 21, 2013); Nolon, *supra* note 39, at 4.

[56] *See* Feinman v. State, 717 S.W.2d 106, 110–11 (Tex. App. 1986) (stating that courts have recognized rolling easements for many years and case law approves of the concept of rolling easements); Gresham & Imwalle, *supra* note 30, at 2.

[57] Gresham & Imwalle, *supra* note 30, at 2.

[58] *See* Nolon, *supra* note 39, at 4.

times the annual erosion rate, which continues to accelerate.[59] For larger structures, the distance is at least sixty times the annual erosion rate.[60] In Hawaii, the State Legislature has confirmed that sea level rise causes "chronic coastal erosion, coastal flooding, and drainage problems."[61] To combat this problem and regulate coastal development, Hawaii currently utilizes shoreline setbacks, which establish the closest distance to the shoreline that development is permitted.[62] The setbacks address the hazards posed by inundation.[63] Ultimately, long-term adaption will require new development away from areas vulnerable to inundation and erosion, and a prohibition on new development in high-risk zones.[64] Regulations such as these will only become more demanding and intrusive as the sea levels continue to rise; regulators will be forced to get creative.[65] Lawyers and public officials are constantly brainstorming new ways to limit development along shorelines.[66] Regulating shorelines to protect against rising sea levels presents a daunting problem.[67]

II. TAKINGS CLAUSE JURISPRUDENCE

A. The Takings Clause

The U.S. government, under the power of eminent domain, is entitled to take private property if it has determined that it needs the land for a public use that is within its powers.[68] The power of eminent domain is, however, subject to the limitations set forth in the Takings Clause of the Fifth Amendment to the U.S. Constitution.[69]

The Takings Clause protects private property from government usurpation and use without just compensation.[70] Essentially, the Takings Clause bars the government from forcing individuals to bear public burdens that

---

[59] Gresham & Imwalle, *supra* note 30, at 2.

[60] *Id.*

[61] CODIGA ET AL., *supra* note 2, at 3.

[62] *Id.* at 11.

[63] *Id.* at 10.

[64] FLA. DEP'T OF ECON. OPPORTUNITY, *supra* note 38, at 12.

[65] *See* Eagle, *supra* note 1, at 760 (discussing limitations of the current legal framework to deal with needed regulation).

[66] Nolon, *supra* note 39, at 4.

[67] *See* Gresham & Imwalle, *supra* note 30, at 2 (noting that responding to sea level rise is expensive and complex).

[68] Ann K. Wooster, Annotation, *What Constitutes Taking of Property Requiring Compensation Under Takings Clause of Fifth Amendment to United States Constitution—Supreme Court Cases*, 10 AM. L. REP. FED. 2D 231, § 5 (2006).

[69] *Id.*

[70] U.S. CONST. amend. V (providing in pertinent part, "nor shall private property be taken for public use, without just compensation"); Michael Lewyn, *Character Counts: The "Character of the Government Action" in Regulatory Takings Actions*, 40 SETON HALL L. REV. 597, 597 (2010).

should be borne by the public as a whole, thus protecting individuals from having to bear more than their share of governmental costs.[71] Under the Fifth Amendment, just compensation must be paid when a regulatory taking is effected.[72]

Regulatory takings jurisprudence is notoriously confusing and convoluted.[73] According to the United States Supreme Court, determining what constitutes a taking under the Fifth Amendment has proven to be quite difficult.[74] Critics have described regulatory takings cases as open-ended, not well-settled, and lacking standards.[75] One critic stated that "[t]he chaotic state of taking law makes it especially likely that the availability of the damages remedy will induce land-use planning officials to stay well back of the invisible line that they dare not cross."[76] The general rule is that property may be regulated, but if a regulation goes too far, it constitutes a taking.[77] Nevertheless, the Court has refrained from developing a set formula for determining how far is too far.[78] The Court states that the inquiry turns on whether justice and fairness require that an individual be compensated for injuries caused by a public action.[79] Because the Court has not established an objective set of rules to assess when a regulation becomes a taking, courts must examine the particular circumstances of each case in order to decide whether the action at issue is a taking that will be rendered invalid by the government's failure to compensate the private property owners.[80]

1. Categorical Regulatory Takings

There are two types of regulatory takings: total takings and partial takings.[81] Determining if a governmental act is a *total* regulatory taking, commonly referred to as a categorical taking, is much easier than determining if

---

[71] Penn Cent. Transp. Co. v. City of New York (*Penn Cent. III*), 438 U.S. 104, 123 (1978) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

[72] Lewyn, *supra* note 70, at 597.

[73] *See First English Evangelical I*, 482 U.S. 304, 340 n.17 (1987) (Stevens, J., dissenting) (noting the chaotic state of takings clause jurisprudence).

[74] *See Penn Cent. III*, 438 U.S. at 123.

[75] *See First English Evangelical I*, 482 U.S. at 340 n.17 (Stevens, J., dissenting); First English Evangelical Lutheran Church of Glendale v. County of Los Angeles (*First English Evangelical II*), 210 Cal. App. 3d 1353, 1361 (1989).

[76] *First English Evangelical I*, 482 U.S. at 340 n.17 (Stevens, J., dissenting) (quoting Corwin W. Johnson, *Compensation for Invalid Land-Use Regulations*, 15 GA. L. REV. 559, 594 (1981)).

[77] Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[78] *See Penn Cent. III*, 438 U.S. at 124 (stating that the court has not determined a formula for what justice and fairness require in takings jurisprudence).

[79] *Id.*

[80] *Id.*

[81] Christopher T. Goodin, *The Role and Content of the Character of the Governmental Action Factor in a Partial Regulatory Takings Analysis*, 29 U. HAW. L. REV. 437, 437 (2007).

an act constitutes a *partial* regulatory taking.[82] A total regulatory taking is often defined as an act that strips the property of all economic value and all economically practical uses.[83] In cases involving total regulatory takings, the court employs a *per se* rule awarding just compensation.[84] In such cases, courts need not inquire into any additional considerations.[85]

In 2014, the United States Court of Federal Claims in *Lost Tree Village Corp. v. United States* held that a total taking occurred where the U.S. Army Corps of Engineers denied a land developer's wetland fill permit for the development of a single-family residential home on island land.[86] The court reasoned that the property retained no economically beneficial use without the permit as the diminution in value of the land was more than ninety-nine percent of its total value.[87]

In additional to situations where a property loses all economic value, the Supreme Court has consistently held that the *permanent physical* occupation of property constitutes a categorical taking that requires just compensation.[88] In 1962, the Supreme Court in *Griggs v. Allegheny County, Pennsylvania* held that where a home, located at the end of the runway, was unlivable due to airport noise resulting from aircrafts taking off, a physical invasion constituting a taking had occurred.[89] Courts have also held that where highway route barriers cause an unreasonable and permanent interference with access, a physical invasion that amounts to an unconstitutional regulatory taking has occurred.[90]

---

[82] *See id.* (noting that courts employ a per se rule when evaluating total takings, but that an *ad hoc* approach is required for partial takings).

[83] *See* Am. Pelagic Fishing Co. v. United States, 379 F.3d 1363, 1372 (Fed. Cir. 2004) (quoting Palm Beach Isles Assocs. v. United States, 231 F.3d 1354, 1357 (Fed. Cir. 2000)).

[84] Goodin, *supra* note 81, at 437.

[85] *See Am. Pelagic*, 379 F.3d at 1372 (noting that the court does not have to consider additional items, such as investment-backed expectations in total takings cases). Although courts define investment-backed expectations differently, courts regularly find that an act interferes with a party's investment-backed expectations if it destroys or substantially hinders the party's ability to use its land for a specific and clearly anticipated purpose. *See* R.S. Radford & J. David Breemer, *Great Expectations: Will* Palazzolo v. Rhode Island *Clarify the Murky Doctrine of Investment-Backed Expectations in Regulatory Takings Law?,* 9 N.Y.U. ENVTL. L.J. 449, 456 (2001).

[86] *See* 115 Fed. Cl. 219, 228, 231 (2014).

[87] *Id.* at 231.

[88] *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 432 (1982). A physical invasion is an act "of such unique character that it is a taking without regard to other factors." *Id.*

[89] 369 U.S. 84, 87, 90 (1962).

[90] Stein v. City of Philadelphia, 557 A.2d 1137, 1130–40 (Pa. Commw. Ct. 1989)*; see* Commonwealth v. Appointment of Viewers to Assess Damages to Prop. of Roland A. McCrady, 160 A.2d 715, 720–21 (Pa. 1960); Commerce Land Corp. v. Dep't of Transp., 361 A.2d 469, 470–71 (Pa. Commw. Ct. 1976).

2. Partial Regulatory Takings

When there is no categorical taking, but a regulation partially restricts use of a property, a partial regulatory taking may have occurred.[91] Unlike with total regulatory takings, courts do not employ a *per se* rule with respect to partial takings.[92] There is no set formula that the Supreme Court uses in determining when "justice and fairness" require the government to compensate for harms caused by a public action.[93] The Supreme Court frequently states that this analysis is done on an *ad hoc* basis and depends largely on the circumstances of each case.[94]

The Supreme Court has identified a number of factors, also referred to as the *Penn Central* factors, which play a critical role in this analysis.[95] The three major factors identified by the Court are the economic impact of the regulation on the claimant, the extent that the regulation has affected the claimant's investment-backed expectations, and the character of the governmental action (the "Character Prong").[96] Put more simply, courts weigh the character of the government action against its effects on private property rights.[97] The meaning attributed to the Character Prong has been and remains unclear.[98] In 1978, in *Penn Central Transportation Co. v. City of New York*, the Supreme Court attempted to define this prong by stating that a taking is more readily "found when the interference with property can be characterized as a physical invasion by government . . . [rather] than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[99] The Supreme Court views the three-prong regulatory takings test set out in *Penn Central*, which embodies the aforementioned factors, as the "default rule," but it does not provide lower courts with much guidance on how to perform the test.[100]

---

[91] Goodin, *supra* note 81, at 437.

[92] *Id.*

[93] *Penn Cent. III*, 438 U.S. 104, 124 (1978) (citing Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962)).

[94] *Id.*; *see also* United States v. Cent. Eureka Mining Co., 357 U.S. 155, 168 (1958); United States v. Caltex (Phil.), Inc., 344 U.S. 149, 156 (1952).

[95] *See Penn Cent. III*, 438 U.S. at 124.

[96] *See id.*

[97] Goodin, *supra* note 81, at 437.

[98] *See id.* at 437–38 (noting the multitude of considerations the Court has attached to the Character Prong).

[99] 438 U.S. at 124.

[100] *See* Goodin, *supra* 81, at 438 n.12 (characterizing *Penn Central* as the default rule); Lewyn, *supra* note 70, at 599 (noting the *Penn Central* test gives judges little guidance).

B. Overview of Penn Central

In 1965, New York City (the "City") adopted its Landmarks Preservation Law (the "Law").[101] The Supreme Court in *Penn Central* evaluated whether the Law constituted a regulatory taking requiring just compensation.[102] Similar to many urban landmark laws, instead of requiring the City to acquire historic properties, it encouraged private owners and users to preserve the properties.[103] The Law involved public entities in land-use decisions affecting historic properties and provided services, standards, controls, and incentives for participants.[104] The Landmarks Preservation Commission (the "Commission") was responsible for administering the Law and choosing which properties were to be regulated under the Law.[105] After being designated as a landmark, a property became subject to restrictions that limited the use of the site.[106] The Law required property owners to maintain the exterior of their buildings, keeping these features "in good repair" to assure that the Law's objectives were being upheld and advanced.[107] In addition to the aforementioned duties, the Commission was required to review and approve or reject proposals from owners desiring to alter the exterior features of the landmark or construct any exterior additions.[108]

In 1967, New York's Grand Central Terminal (the "Terminal") became regulated under the Law.[109] In 1968, Penn Central Transportation Company ("Penn Central"), the owner of Grand Central Terminal, contracted with a corporation to construct an office building above the Terminal.[110] Penn Central then applied for a permit to construct the office building from the Commission by submitting two alternative plans.[111] The Commission denied both proposals submitted on behalf of Penn Central.[112] Penn Central then filed suit claiming that the government, under the Law, had taken their property without just compensation.[113] The Appellate Division of the New York Supreme Court found that the restrictions placed on the Terminal were necessary to promote the Law's public purpose of protecting landmarks.[114]

---

[101] N.Y.C. ADMIN. CODE, ch. 8–A, § 205-1.0 (1976); *Penn Cent. III*, 438 U.S. at 108–09.
[102] 438 U.S. at 107.
[103] *Id.* at 109–10.
[104] *Id.*
[105] *Id.* at 110.
[106] *Id.* at 111.
[107] *Id.* at 111–12.
[108] *Id.* at 112.
[109] *Id.* at 115–16.
[110] *Id.* at 116.
[111] *Id.*
[112] *Id.* at 117.
[113] Penn Cent. Transp. Co. v. City of New York (*Penn Cent. I*), 50 A.D.2d 265, 271 (N.Y. App. Div. 1975).
[114] *Id.* at 272.

The Court held that Penn Central could only sustain its claim by establishing that the Law deprived the property of all its beneficial uses.[115] Subsequently, the New York Court of Appeals affirmed this holding.[116] Penn Central appealed the verdict again and the United States Supreme Court reviewed the case to determine whether the restrictions imposed by the Law on the Terminal constituted a taking without just compensation.[117]

Despite acknowledging the Law's proper public purpose, the appellants in *Penn Central* contended that the regulation constituted a taking without just compensation.[118] The appellants challenged the Law on the grounds that it had taken their property and arbitrarily deprived them of their property without due process of law, which violated the Fifth and Fourteenth Amendments.[119] The appellants advanced a number of arguments explaining why the Law constituted a taking.[120] First, the appellants contended that the Law deprived them of any beneficial use of the air rights above the terminal and thus, they deserved just compensation according to the value of the air rights.[121] Second, the appellants asserted that the Law constituted a taking because it substantially reduced the value of their property.[122] Appellants also argued that the Law inherently failed to distribute the benefits and burdens associated with zoning laws and historic district legislation.[123] Lastly, the appellants asserted that the Law was arbitrary or at least subjective because it was simply based on the City's "taste" and that Penn Central was exclusively burdened under the Law.[124]

The Supreme Court found that the Law did not constitute a categorical taking because it did not deprive the appellants of all beneficial uses of their air rights.[125] The Court's inquiry, however, did not end there.[126] The Court

---

[115] *Id.* at 274.

[116] Penn Cent. Transp. Co. v. City of New York (*Penn Cent. II*), 366 N.E.2d 1271, 1279 (N.Y. 1977).

[117] *Penn Cent. III*, 438 U.S. at 107.

[118] *See id.* at 119, 129 (noting that Penn Central recognized a legitimate government interest in the law, but challenged it as a taking without compensation anyway). The plaintiffs stated that the objective of preserving historic, architectural, and cultural structures and areas was a wholly legitimate governmental purpose. *Id.* at 129. The City believed that its position, as a global tourist center, cultural hub, and business capital would be endangered if the Landmarks Preservation Law was not enforced. *Id.* at 109. According to the City, the Law fostered "civic pride in the beauty and noble accomplishments of the past," protected and enhanced the city's attractions, supported and stimulated business, strengthened the economy, and encouraged people to use the landmarks for educational, pleasure and welfare purposes. *Id.*

[119] *Id.* at 119.

[120] *Id.* at 128–29.

[121] *Id.* at 130.

[122] *Id.* at 131.

[123] *Id.* at 133.

[124] *Id.* at 132, 134.

[125] *Id.* at 130–31.

needed to determine whether the Law constituted a partial regulatory taking that required compensation.[127] In making this determination, the Court evaluated the extent to which the regulation interfered with petitioner's rights in the Terminal and emphasized that courts have, on occasion, upheld land-use regulations that have destroyed individual property interests where "health, safety, morals, or general welfare" are promoted.[128]

The Court issued a number of holdings.[129] The Court found that the Law did not interfere with Penn Central's present uses of the Terminal and that the record lacked evidence demonstrating that the Law limited Penn Central's investment-backed expectations.[130] The Court stated that because Penn Central had not submitted a proposal for the construction of a smaller structure, the Court did not know if appellants would be denied all uses of the air space above the Terminal.[131] In addition, according to the Court, the Law did not restrict the air space above all parcels of the Terminal.[132] The Court ultimately held that the Law was not a taking, stating that it promoted the general welfare, permitted viable beneficial use of the property, and allowed appellants to develop the Terminal.[133] With this opinion, the Court established a three-prong test to evaluate regulatory takings claims.[134] Courts must weigh the economic impact of the regulation, the degree of interference with investment-backed expectations, and the character of the governmental act.[135] Unfortunately, the Court failed to elaborate on what aspects of the Character Prong are relevant to such determinations, although Justice William Rehnquist's dissent noted it should be the focal point of future inquiries.[136]

---

[126] *Id.* at 135.

[127] *See id.* at 135–36 (noting that in addition to rejecting broad arguments, the Court must determine whether interference is of such magnitude to require just compensation).

[128] *Id.* at 125, 136.

[129] *Id.* at 136–38.

[130] *Id.* at 136–37.

[131] *Id.* at 137.

[132] *Id.* The Court found that the appellants could utilize the air space above at least eight parcels of the Terminal, one or two of which had already been deemed suitable for construction of new buildings. *Id.*

[133] *Id.* at 138.

[134] *See id.* at 124 (outlining the three factors considered by the Court).

[135] *Id.*

[136] *Id.* at 149–50 (Rehnquist, J., dissenting). The dissent in *Penn Central* emphasized that courts should focus more on the character of the governmental act and less on the extent of damage resulting from the act, reasoning that it is primarily the character of the invasion that determines whether or not the act constitutes a taking. *Id.*; *see* Alan Romero, *Ends and Means in Takings Law After* Lingle v. Chevron, 23 J. LAND USE & ENVTL. L. 333, 361 (2008) (noting that *Penn Central* did not explain what aspects of the character prong are relevant in regulatory takings challenge analyses).

C. Penn Central*'s Murky Character Prong*

Muddled, indeterminate, and lacking standards are words commonly used to describe the Supreme Court's regulatory takings jurisprudence.[137] Because the Court has embraced an *ad hoc* approach to non-categorical regulatory takings cases, the relevant analysis is far from straightforward.[138] *Penn Central* has long been viewed as the landmark regulatory takings case, which established the three-prong test for determining when an unconstitutional regulatory taking has occurred so that just compensation is due.[139] Unfortunately, the third factor put forth in *Penn Central*—the "character of the governmental act" —has remained markedly undefined.[140] The Supreme Court has refrained from attaching any clear meaning to this prong.[141] In 1992, the Supreme Court in *Yee v. City of Escondido, California* stated that the purpose of the government regulation is an essential consideration when determining whether a taking has occurred and if compensation is required.[142] The Supreme Court, however, did not specifically state that the evaluation of a regulation's purpose falls under the Character Prong of the *Penn Central* test.[143] *Penn Central*'s Character Prong, "Always listed, only occasionally deployed, and left largely undefined" remains a mystery.[144] As a result, courts interpret this factor in a variety of ways leading to confusion and a lack of uniformity in the relevant jurisprudence.[145]

---

[137] Mark W. Cordes, *The Fairness Dimension in Takings Jurisprudence*, 20 KAN. J. L. & PUB. POL'Y 1, 16 (2010); Eagle, *supra* note 1 at 750; Mark Fenster, *The Stubborn Incoherence of Regulatory Takings*, 28 STAN. ENVTL. L.J. 525, 546 (2009).

[138] *See* Fenster, *supra* note 137, at 545−46 (noting that the relevant inquiry is broad and indeterminate). Courts that embrace an *ad hoc* approach evaluate cases on a case-by-case basis and look at the circumstances surrounding each case, allowing for a "careful examination and weighing of all the relevant circumstances." *Palazzolo II*, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring).

[139] Timothy J. Dowling, *On History, Takings Jurisprudence, and* Palazzolo*: A Reply to James Burling*, 30 B.C. ENVTL. AFF. L. REV. 65, 89 (2002). Volume 30 of the Boston College Environmental Affairs Law Review includes articles from the 2002 symposium titled "The *Palazzolo* Wetland Regulation Symposium: A Supreme Court case in Boston College's Backyard."

[140] *See* Fenster, *supra* note 137, at 529; Patrick A. Parenteau, *Unreasonable Expectations: Why* Palazzolo *Has No Right to Turn a Silk Purse into a Sow's Ear*, 30 B.C. ENVTL. AFF. L. REV. 101, 130 (2002).

[141] Fenster, *supra* note 137, at 529; Lewyn, *supra* note 70, at 600; Parenteau, *supra* note 140, at 130.

[142] Yee v. City of Escondido, 503 U.S. 519, 522−23 (1992).

[143] *See id.* (absence of discussion of the Character Prong when considering purpose).

[144] Fenster, *supra* note 137, at 529.

[145] *See, e.g.*, Bass Enters. Prod. Co. v. United States, 381 F.3d 1360, 1369 (Fed. Cir. 2004) (stating that based on recent decisions there has been a rejection of earlier pre-*Palazzolo* precedent and a return to the earlier evaluation of the character of the governmental action factor); Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1179 (Fed. Cir. 1994) (holding that federal courts must employ "more familiar and predictable doctrines associated with nuisance laws" in evaluating the Character Prong rather than the *ad hoc* methodology); Leon County v. Gluesenkamp, 873 So. 2d

The lack of clarity surrounding the Character Prong significantly contributes to the broader lack of understanding of regulatory takings analysis.[146] Justice O'Connor attempted to clarify the Character Prong in her concurring opinion in *Palazzolo v. Rhode Island*.[147] She reasoned that courts should weigh the purposes of the statute against the effects it produces.[148] Although it is widely acknowledged that the Supreme Court typically employs some type of balancing test in the *Penn Central* analysis, the Court has refrained from articulating the weight and meaning that should be attributed to the Character Prong.[149]

D. Refining Penn Central *in* Palazzolo v. Rhode Island

1. Initial Interpretation by Rhode Island Supreme Court

In 1959, Anthony Palazzolo purchased three undeveloped neighboring parcels of land along the eastern stretch of Atlantic Avenue, which was the primary point of access to Misquamicut State Beach.[150] In 1971, Rhode Island created the Rhode Island Coastal Resources Management Council (the "Council") in order to protect the State's coastal properties.[151] The Council promulgated regulations that substantially limited development on coastal wetlands.[152] Palazzolo's property, which was designated as coastal wetlands under Rhode Island law, became subject to the Council's 1971 wetlands regulations.[153] In an attempt to develop his property, Palazzolo submitted multiple proposals to the Council for approval.[154] The Council denied all of his proposals.[155] Palazzolo subsequently brought an action, in *Palazzolo v.*

460, 469 (Fla. Dist. Ct. App. 2004) (explaining that the analysis of the character of the government action requires a weighing of appellees' interests against the opponent's need to protect the public); K & K Constr., Inc. v. Dep't of Envtl. Quality, 705 N.W. 2d 365, 384 (Mich. Ct. App. 2005) (evaluating whether a particular regulation causes plaintiffs to bear a burden for the public good and whether the regulation is a "comprehensive, broadly based regulatory scheme that benefits and burdens all citizens relatively equally"). *See* John D. Echeverria, *Making Sense of* Penn Central, 23 UCLA J. ENVTL. L. & POL'Y 171, 186–99 (2005) (listing the Supreme Court's varying interpretations of the Character Prong); Lewyn, *supra* note 70, at 600 (noting confusion among lower courts).

[146] Echeverria, *supra* note 145, at 177.

[147] *See Palazzolo II*, 533 U.S. 606, 634 (2001) (O'Connor, J., concurring) (discussing the Character Prong).

[148] *Id.*

[149] *See* Fenster, *supra* note 137, at 528–29 (noting that the *Penn Central* analysis is a balancing test with an undefined character prong); Lewyn, *supra* note 70, at 600 (noting that the *Penn Central* court balanced economic effects, but failed to make it clear what "character" meant).

[150] *Palazzolo II*, 533 U.S. at 613.

[151] *Id.* at 614.

[152] *Id.*

[153] *Id.*

[154] *Id.* at 614–15.

[155] *Id.*

Rhode Island, against the Council in the Rhode Island Superior Court asserting that the wetlands regulations constituted a taking that required just compensation under the Takings Clause of the Fifth Amendment.[156]

The Superior Court of Rhode Island ruled against Palazzolo and the Rhode Island Supreme Court affirmed the holding.[157] The Rhode Island Supreme Court held that: (1) Palazzolo's claim was not ripe, (2) the investment-backed expectation that he could develop a large subdivision on his property was unreasonable, and (3) he was not deprived of all beneficial use of his property based on the record.[158]

Before examining the *Penn Central* factors to determine if the regulation constituted a partial taking, the court first determined that there was no *per se* taking depriving Palazzolo of all beneficial uses of the property.[159] The court's takings analysis, however, consisted merely of stating that Palazzolo had no reasonable investment-backed expectations and thus, the court need not examine the other *Penn Central* factors, including the Character Prong.[160] The court ultimately held that the petitioner could not recover under the *Penn Central* test.[161]

2. Majority Opinion of the Supreme Court of the United States

The Supreme Court heard the case after granting a writ of certiorari, and found that the Rhode Island Supreme Court blatantly disregarded the *Penn Central* factors.[162] Upon review, the Supreme Court agreed that the petitioner was not deprived of all economic use of his property, but disagreed with the Rhode Island Supreme Court's other conclusions.[163] Although the lower court mentioned the *Penn Central* factors, the Supreme Court stated that the court erred in failing to elaborate upon them and thus remanded the case for further consideration of all of the factors.[164]

3. Justice O'Connor's Concurring Opinion

In her concurrence, Justice O'Connor stressed the importance of the *Penn Central* factors, which the Supreme Court of Rhode Island so blatantly disregarded.[165] She described the test's factors as the principle character-

---

[156] *Id.* at 615.
[157] Palazzolo v. Rhode Island (*Palazzolo I*), 746 A.2d 707, 707 (R.I. 2000).
[158] *Id.* at 717.
[159] *Id.* at 713.
[160] *Id.* at 717.
[161] *Id.*
[162] *Palazzolo II*, 533 U.S. 606, 611, 632 (2001).
[163] *Id.* at 616.
[164] *Id.* at 632.
[165] *See id.* at 632−36 (O'Connor, J., concurring).

istics that must be examined in regulatory takings cases.[166] The Rhode Island Supreme Court found the fact that the appellant lacked reasonable investment-backed expectations to be dispositive.[167] Justice O'Connor emphasized that the second prong of the analysis, the investment-backed expectations, is just one part of the analysis that must be performed in determining if a regulation "goes too far."[168] She noted that the Takings Clause requires a thorough consideration and weighing of all relevant circumstances, including the Character Prong.[169]

In relevant part, Justice O'Connor stated that *Penn Central*'s Character Prong requires courts to weigh "[t]he purposes served, as well as the effects produced . . . ."[170] Justice O'Connor noted the importance of the purposes of a regulation, not only its effects, in evaluating its character.[171] Commentators have noted the significance of this concurrence because it emphasizes that courts must carefully consider the purposes furthered by the regulatory act and also whether these purposes are effectively furthered.[172]

4. Superior Court of Rhode Island

On remand, the Superior Court of Rhode Island focused on all three factors identified in *Penn Central*.[173] The court stated that the regulation, which banned certain uses of the property, is a prime example of an act that may constitute a partial regulatory taking and where such potential exists, the court must apply the fact-based inquiry outlined in *Penn Central*, which includes three principal factors.[174]

The Character Prong, which was addressed only briefly in the case's previous opinions, spanned an entire section in this opinion.[175] The court began its analysis of the Character Prong by establishing that the case was neither a physical takings case nor a regulatory takings case where the property has been stripped of all economically beneficial use.[176] The court noted that the plaintiff did not contest the fact that the environmentally

---

[166] *Id.* at 633.
[167] *Id.* at 634.
[168] *Id.*
[169] *See id.* at 636.
[170] *Id.* at 634.
[171] *Id.*; Romero, *supra* note 136, at 364.
[172] Lewyn, *supra* note 70, at 607 (noting that Justice O'Connor's concurrence suggests that courts should examine the importance of the purpose of the governmental act); Romero, *supra* note 136, at 364 (mentioning Justice O'Connor's concurrence to support the notion that the Character Prong includes consideration of the act's purpose).
[173] Palazzolo v. Rhode Island (*Palazzolo III*), No. WM 88-0297, 2005 WL 1645974, at *8−14 (R.I. Super. Ct. July 5, 2005).
[174] *See id.* at *8–9.
[175] *Id.* at *9.
[176] *Id.*

friendly regulation benefited society as a whole.[177] The regulated land on which Palazzolo's property sat was a salt marsh, which provided a valuable habitat for wildlife.[178] According to experts, the deprecation of the natural purifying salt marsh would have been substantial if Palazzolo developed his property.[179] In light of these findings, the court stressed the importance of regulations promoting "the health, safety, and welfare of the people."[180] The court stated that when these characteristics are present, it militates against finding a regulatory taking.[181]

The court agreed with the Supreme Court of Rhode Island that the regulation did not deprive Palazzolo of all economically beneficial uses of the property and further held that it did not even substantially impact his property in an economically adverse manner.[182] The court also established that Palazzolo's reasonable investment-backed expectations were only modest for it was an unreasonable expectation for Palazzolo to think he could develop his property as he subsequently proposed.[183] Therefore, the court held that the petitioner failed to prove that the government committed a regulatory taking necessitating just compensation.[184]

E. Subsequent Interpretations of Penn Central*'s Character Prong*

Two predominant strands of case law concerning the *Penn Central* factors, in particular, the Character Prong, emerged following the decisions in *Penn Central* and *Palazzolo*.[185] Some courts performed a balancing test that was in line with the approach articulated by Justice O'Connor in her concurrence, by weighing the purpose and harms avoided by a regulation against the harms effected by it.[186] Other courts took a much different approach by comparing each regulation to a physical invasion in an attempt to determine if the regulation was similar enough to a physical invasion that it should be deemed a regulatory taking.[187] Some courts followed neither approach.[188]

---

[177] *Id.*
[178] *Id.* at *3.
[179] *Id.*
[180] *Id.* at *9.
[181] *Id.*
[182] *See Palazzolo I*, 746 A.2d 707, 717 (R.I. 2000) (stating that the regulation did not affect Plaintiff's investment-backed expectations); *Palazzolo III*, 2005 WL 1645974, at *5 n.31, 14 (noting that Plaintiff's proposed development would not be profit producing and that the property had increased in value by $200,000 since the regulation was passed).
[183] *Palazzolo III*, 2005 WL 1645974, at *14.
[184] *Id.* at *15.
[185] *See infra* notes 189–220 and accompanying text.
[186] *See infra* notes 189–212 and accompanying text.
[187] *See infra* notes 213–220 and accompanying text.
[188] *See* Goodin, *supra* note 81, at 437–38 (listing more examples of varied Character Prong interpretations).

1. Examining and Weighing the Purpose of and the Harms Avoided by Regulations

Some courts, without any explicit guidance from the Supreme Court, have employed an analysis in line with Justice O'Connor's *Palazzolo* balancing test, which focuses on purpose when evaluating partial regulatory takings cases.[189] In 1989, even before Justice O'Connor's concurrence, in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, the California Court of Appeals held that a temporary ordinance restricting construction did not constitute a compensable regulatory taking.[190] In 1957, the First English Evangelical Lutheran Church (the "Church") purchased property spanning twenty-one acres in a canyon that ran along the Middle Fork of Mill Creek in the Angeles National Forest.[191] The Middle Fork served as the natural drainage channel for a watershed area owned by the National Forest Service.[192] In 1977, a forest fire destroyed 3860 acres of the watershed area creating a severe flood hazard for the Church's property.[193] A subsequent storm overflowed Mill Creek and flooded the Church's property destroying its buildings.[194] In response, the County of Los Angeles (the "County") adopted interim Ordinance No. 11,855 (the "Ordinance"), which stated that a person shall not construct, renovate, or enlarge any building or structure in the interim flood protection area.[195] The County adopted the ordinance on the grounds that it was necessary for the immediate protection and preservation of the public health and safety.[196] The Church then filed a complaint against the County and the Los Angeles County Flood Control District claiming that the Ordinance denied it all use of the property and sought damages for the deprivation.[197] The Superior Court of California rendered a verdict for the defendant and the

---

[189] *See Palazzolo II*, 533 U.S. 606, 634 (2001) (O'Connor, J., concurring) (noting that courts must weigh the purpose of the regulation in addition to its effects under the Character Prong); Res. Invs., Inc. v. United States, 85 Fed. Cl. 447, 517 (2009) (noting that courts must weigh the benefits of a public act against the burdens it imposes); Brace v. United States, 72 Fed. Cl. 337, 355 (2006) (stating that the character of the government action requires the court to consider the purpose and importance of the public interest of a regulation); Norman v. United States, 63 Fed. Cl. 231, 282 (2004) (noting that the court must balance private property ownership interests against the public need); George Wash. Univ. v. District of Columbia, 391 F. Supp. 2d 109, 113−14 (D. D.C. 2005) (stating that the central question of the Character Prong is whether a regulation advances a common good or public purpose).

[190] *First English Evangelical II*, 210 Cal. App. 3d 1353, 1367, 1374 (1989).

[191] *First English Evangelical I*, 482 U.S. 304, 307 (1987).

[192] *Id.*

[193] *Id.*

[194] *Id.*

[195] *Id.*

[196] *Id.*

[197] *Id.* at 308.

Church appealed.[198] The California Court of Appeals affirmed the holding and the Supreme Court of the United States subsequently accepted the appeal.[199] The Supreme Court ultimately remanded the case for further proceedings to determine if a compensable regulatory taking had occurred.[200]

Without ever mentioning the Character Prong, the California Court of Appeals performed a balancing test and determined that the program did not constitute a regulatory taking.[201] Without categorizing its analysis under the Character Prong, the court emphasized that the Ordinance promoted public health and safety.[202] The public purpose of preserving lives and health advanced by the Ordinance was of the utmost importance.[203] According to the court, it makes "perfect sense" to deny compensation for regulations that promote the health, safety, and general welfare, even if all beneficial uses are destroyed.[204] The court's reasoning was similar to that of other courts in that it recognized that compensation is not required for regulations promoting the health, safety, morals, or general welfare.[205] Compensation, however, will be required for denial of all uses if the governmental act advances lesser public purposes.[206] Because the Ordinance advanced extremely important public purposes, compensation was not required.[207]

Other courts have similarly weighed the harms avoided by a specific regulation against the harms effected in determining if it amounts to a compensable regulatory taking.[208] In 2001, the United States Court of Appeals for the Federal Circuit held in *Rith Energy, Inc. v. United States* that the revocation of a coal mining permit directed at protecting the safety, health, and welfare of the public did not amount to a compensable taking.[209] Five years later, in 2006, the United States Court of Federals Claims in *Brace v. United States* held that wetlands regulations did not constitute a regulatory taking.[210] The court stated that in evaluating the character of the govern-

---

[198] *Id.* at 309.

[199] *Id.* at 309–10.

[200] *Id.* at 313.

[201] *See First English Evangelical II*, 210 Cal. App. 3d 1353, 1356, 1371 (1989) (weighing the purpose and public interest of the regulation, but failing to mention the *Penn Central* Character Prong).

[202] *See id.* at 1366.

[203] *Id.* at 1363, 1366.

[204] *Id.* at 1366.

[205] *See* Garrett v. City of Topeka, 916 P.2d 21, 35 (Kan. 1996).

[206] *First English Evangelical II*, 210 Cal App. at 1366.

[207] *See id.* (stating that compensation is not necessarily required for regulations promoting public health, safety, and welfare).

[208] *See, e.g.*, Rith Energy, Inc. v. United States, 270 F.3d 1347, 1352−53 (Fed. Cir. 2001); Brace v. United States, 72 Fed. Cl. 337, 355−56 (2006).

[209] 270 F.3d at 1352−53. According to the court, this was not the type of regulatory action that has been regarded as compensable despite the burdens it imposes on private parties. *Id.* at 1352.

[210] 72 Fed. Cl. at 339, 366.

mental action, the court must consider "the purpose and importance of the public interest underlying [the] regulatory imposition" which includes examining the act's social value and location.[211] The court reasoned that the preservation of ecologically significant areas outweighed the effects produced by the regulation.[212]

2. Comparing Regulations to Physical Invasions

Conversely, courts that have not employed an analysis similar to Justice O'Connor's balancing test have looked at the nature of the regulation to see if it resembles a physical invasion.[213] In 2004, the United States District Court for the District of Nevada held in *Committee for Reasonable Regulation of Lake Tahoe v. Tahoe Regional Planning Agency* that the Tahoe Regional Planning Agency's adoption of a scenic review ordinance that regulated the appearance of residential housing on littoral and shoreline properties on Lake Tahoe did not constitute a regulatory taking.[214] In evaluating the *Penn Central* factors, in particular the Character Prong, the district court did not even mention the purpose of the ordinance.[215] The court, instead, looked generally at the nature of the intrusion and found that it was unlike a physical invasion by the government.[216]

Similarly, in 2006, the Missouri Court of Appeals found in *Reagan v. County of St. Louis, Missouri* that a county's rezoning of the plaintiff's property from industrial to residential did not constitute a regulatory taking.[217] In analyzing *Penn Central*'s Character Prong, the court stated that the factor was favorable to the county because the rezoning was substantially different from a physical invasion.[218] The court stated in a matter-of-fact fashion that because the county "did not physically invade Landowner's property" but merely rezoned it, no taking had occurred.[219] Numerous courts continue to analyze the Character Prong by determining to what extent the interference caused by the regulation can be characterized as a physical invasion.[220]

---

[211] *Id.* at 355.

[212] *See id.* at 356 (focusing on the extreme importance of the regulations in upholding the regulations).

[213] *See infra* notes 214–220 and accompanying text.

[214] 311 F. Supp. 2d 972, 975, 998 (D. Nev. 2004). A littoral parcel refers to a parcel of land that adjoins or abuts the highwater mark of a lake. *Id.* at 975 n.1.

[215] *See id.* at 997 (focusing only on the physical nature of the invasion and not the regulation's purposes).

[216] *See id.* (finding that the non-physical nature of the invasion weighs against a taking).

[217] 211 S.W.3d 104, 110 (Mo. Ct. App. 2006).

[218] *Id.*

[219] *Id.*

[220] *See, e.g.*, Paradissiotis v. United States, 49 Fed. Cl. 16, 23 (2001) (noting that the government never took physical possession of the property in determining that no taking occurred); Gach v. Fairfield Borough, 921 F. Supp. 2d 371, 378 (M.D. Pa. 2013) (finding that the plaintiffs failed

III. JUSTICE O'CONNOR'S TEST WILL STREAMLINE AND MODERNIZE REGULATORY TAKINGS ANALYSIS JUST IN TIME FOR THE FLOOD OF NEW CLIMATE CHANGE REGULATIONS

Although some courts since *Palazzolo v. Rhode Island* have employed an analysis in line with Justice Sandra Day O'Connor's method, the United States Supreme Court has never addressed, acknowledged, condoned, or rejected Justice O'Connor's approach.[221] The only guidance provided by a majority opinion of the Supreme Court relating to *Penn Central Transportation Co. v. City of New York*'s third consideration, the character of the government action (the "Character Prong"), was articulated in the case itself, where the Court suggested that a taking is more readily found when the interference with property can be characterized as a physical invasion.[222] This *physical invasion test* should not be the test utilized by courts moving forward.[223] This analysis has resulted in a diversity of opinion and lack of uniformity in the relevant body of law, and will not stand the test of time.[224] Some courts have already moved away from the original physical invasion characterization of the Character Prong and are focusing on examining the purposes served by a regulation and weighing its societal benefits against the harms it inflicts.[225]

Other than the brief description provided in *Penn Central*, the Supreme Court has never articulated the meaning of the Character Prong, despite the emerging opinion that the character of the governmental act may be the

---

to assert any physical invasion and none of the defendant's conduct took place on the plaintiffs' property).

[221] *See* Rith Energy, Inc. v. United States, 270 F.3d 1347, 1352 (Fed. Cir. 2001) (emphasizing the importance of the purpose of the regulation in takings analysis); Brace v. United States, 72 Fed. Cl. 337, 355−56 (2006) (focusing on the importance of the purpose of the underlying regulation in takings analysis); Comm. for Reasonable Regulation of Lake Tahoe v. Tahoe Reg'l Planning Agency, 311 F. Supp. 2d 972, 997 (D. Nev. 2004) (focusing solely on the physical nature of the regulation); Fenster, *supra* note 137, at 529 (noting that the Character Prong has been left largely undefined); Lewyn, *supra* note 70, at 600 (noting that the Supreme Court has never made it clear what character means); Parenteau, *supra* note 140, at 130 (stating that there is considerable debate over the intention of the *Penn Central* Court's character prong).

[222] *See Penn Cent. III*, 438 U.S. 104, 124 (1978).

[223] *See supra* notes 213−220 and accompanying text.

[224] *Compare Rith Energy, Inc.,* 270 F.3d at 1352 (emphasizing the importance of the purpose of the regulation in takings analysis), *with Comm. for Reasonable Regulation of Lake Tahoe*, 311 F. Supp. 2d at 997 (focusing solely on the physical nature of the regulation). Others have noticed the same. *See* Echeverria, *supra* note 145, at 199 (noting the lack of clarity in takings analysis); *infra* notes 236−273 and accompanying text.

[225] *Compare Penn Cent. III*, 438 U.S. at 124 (discussing the Character Prong as a physical invasion), *with Rith Energy*, 270 F.3d at 1352−53 (focusing on the purpose of the regulation), *and Brace*, 72 Fed. Cl. at 355−56 (emphasizing the public welfare served by the regulation).

most important factor in takings analysis.[226] The Supreme Court routinely states that regulatory takings cases are decided on an *ad hoc* basis, but the guidance ends there.[227] In her concurring opinion in *Palazzolo v. Rhode Island*, Justice O'Connor took the initiative to define and clarify the *Penn Central* factors; in particular, she defined the Character Prong.[228] Justice O'Connor stated that in evaluating the character of the act, courts must look at the purpose of the statute, in addition to the effects it produces.[229] According to Justice O'Connor, the impact of the governmental act must be viewed in light of its purposes.[230] Justice O'Connor's use of the word "purpose" is critical in defining *Penn Central*'s third prong.[231] Her approach, which focuses on examining an act's *purpose*, is distinct from the approach used by numerous courts, which analyze the Character Prong by comparing the regulation to a physical intrusion.[232] The analysis outlined by Justice O'Connor is essentially a balancing of harms: it involves a weighing of an act's purposes and the harms avoided, against the harms inflicted on the private property owner.[233] Still, the Supreme Court has never acknowledged that this analysis must be done under *Penn Central*'s Character Prong.[234] This clarification is critical in order to rationalize regulatory takings jurisprudence.[235]

---

[226] *See* Fenster, *supra* note 137, at 529 (noting that the Character Prong has been left largely undefined); Lewyn, *supra* note 70, at 600 (noting that the Supreme Court never made it clear what character means); Parenteau, *supra* note 140, at 130 (stating that there is considerable debate over the intention of the *Penn Central* Court's Character Prong). *Compare Penn Cent. III*, 438 U.S. at 124 (discussing the Character Prong solely in context of a physical invasion), *with Penn Cent. III*, 438 U.S. at 149−50 (Rehnquist, J., dissenting) (stating that the Character Prong is the most important part of the analysis).

[227] *See, e.g.*, *Palazzolo II*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring) (noting the proper analysis still involves an *ad hoc* inquiry); *Penn Cent. III*, 438 U.S. at 124 (stating that the takings clause analysis is an *ad hoc* inquiry); Fenster, *supra* note 137, at 529 (noting that the Character Prong has been left largely undefined).

[228] *See* 533 U.S. at 633−34 (O'Connor, J., concurring).

[229] *Id.*

[230] *Id.*

[231] *Id;* Romero, *supra* note 136, at 364 (noting the importance of Justice O'Connor's use of the word purpose).

[232] *Compare Palazzolo II*, 533 U.S. at 633−34 (O'Connor, J., concurring) (emphasizing the importance of a regulation's purpose as it relates to the character), *with* Comm. for Reasonable Regulation of Lake Tahoe v. Tahoe Reg'l Planning Agency, 311 F. Supp. 2d 972, 997 (D. Nev. 2004) (analyzing the Character Prong in the context of a physical invasion), *and* Reagan v. County of St. Louis, 211 S.W.3d 104, 110 (Mo. Ct. App. 2006) (analyzing the regulation as a physical intrusion).

[233] *See* 533 U.S. at 634 (O'Connor, J., concurring) (noting that identifying the public purpose of a regulation is an essential inquiry when evaluating takings claims involving private parties).

[234] *See* Fenster, *supra* note 137, at 529 (stating the Character Prong has been left largely undefined); Lewyn, *supra* note 70, at 600 (noting the Supreme Court never clearly defined what character means); Parenteau, *supra* note 140, at 130 (stating that there is considerable debate over the intention of the *Penn Central* Court's Character Prong).

[235] *See First English Evangelical I*, 482 U.S. 304, 340 n.17 (1987) (Stevens, J., dissenting) (stating that regulators will be slow to act in the face of uncertain regulatory takings jurispru-

A. Justice O'Connor's Test Will Provide Uniformity at a Critical Time

The holding in *Penn Central* and its balancing test delegated a considerable amount of discretion to lower courts and as a result, lower courts have faced significant challenges.[236] When employing the analysis outlined in *Penn Central*, courts must properly weigh the three factors.[237] Courts must give "proper" weight to each factor for the balancing test to be successful.[238] Lower courts, therefore, must thoroughly understand the *Penn Central* factors to perform the proper analysis.[239] It is clear from the relevant case law that courts are unsure about what meaning to give *Penn Central*'s Character Prong.[240] Justice O'Connor's concurrence provides this clarification and will promote consistency in this area of the law.[241] By consistently applying Justice O'Connor's approach, instead of comparing regulations to physical intrusions, non-categorical regulatory takings cases will become less unsettled and provide more predictability for both private property owners and regulators alike.[242]

Regulation that affects shoreline property will only grow more common with time.[243] As these regulations become more common, property owners will be more motivated to bring takings claims.[244] Although some regions may avoid takings challenges in the future through the use of rolling easements,[245] regions that embrace alternative approaches may not be so lucky.[246]

---

dence); Eagle, *supra* note 1, at 760 (stating that new regulations are needed and will challenge traditional understandings of property rights); F. Patrick Hubbard, Palazzolo*,* Lucas*, and* Penn Central*: The Need for Pragmatism, Symbolism, and* Ad Hoc *Balancing*, 80 NEB. L. REV. 465, 478 (2001) (observing that regulators will face severe challenges due to uncertainty).

[236] *See* Hubbard, *supra* note 235, at 477 (discussing the challenges faced by lower courts).

[237] *Id.*

[238] *Id.*

[239] *Id.*

[240] *Compare* Rith Energy, Inc. v. United States, 270 F.3d 1347, 1352 (Fed. Cir. 2001) (emphasizing the importance of the purpose of the regulation in takings analysis), *with* Comm. for Reasonable Regulation of Lake Tahoe v. Tahoe Reg'l Planning Agency, 311 F. Supp. 2d 972, 997 (D. Nev. 2004) (focusing solely on the physical nature of the regulation).

[241] *See Palazzolo II*, 533 U.S. 606, 634 (2001) (O'Connor, J., concurring) (emphasizing the importance of the regulation's purpose in the Character Prong); Eagle, *supra* note 1, at 760 (noting the need for clarification of the Character Prong).

[242] *Compare Palazzolo II*, 533 U.S. at 634 (O'Connor, J., concurring) (emphasizing the importance of the regulation's purpose in the Character Prong), *with Comm. for Reasonable Regulation of Lake Tahoe*, 311 F. Supp. 2d at 997 (focusing solely on the physical nature of the regulation); *see* Eagle, *supra* note 1, at 760 (noting the need for clarification of the Character Prong).

[243] *See* Eagle, *supra* note 1, at 760 (noting that new forms of regulations will be needed to combat global warming and rising sea levels).

[244] *See id.* (observing the potential for novel claims of regulatory takings from new regulations).

[245] *See* LAND USE LAW CTR., *supra* note 49, at 48. Because rolling easements are considered to be strongly rooted in the background principles of the common law and in particular, the public trust doctrine, rolling easements tend to be shielded from takings challenges because "articulating

It is, therefore, imperative that courts understand what the Character Prong means and what the proper balancing test entails in order to perform the appropriate analysis and process the possible abundance of future takings cases.[247] Employing the same analytical approach—ideally employing Justice O'Connor's approach—in all future non-categorical takings cases will encourage uniformity in takings jurisprudence.[248]

Not only will there be an influx of takings challenges in the near future, but the challenges will likely involve many different types of regulations.[249] Because the impact of sea level rise will vary greatly across coastal regions, the corresponding regulations will vary, as well.[250] Courts will need a clear test to use in evaluating takings claims concerning such diverse new regulations.[251] The diversity of future regulation provides an additional reason why uniformity in takings law is extremely critical at this juncture.[252] Recognition and use by the Supreme Court of Justice O'Connor's approach are integral in order to streamline non-categorical regulatory takings case law.[253] Justice

---

such background principles does not change the existence of fundamental property rights enjoyed by a private owner but merely clarifies that owner's existing rights." *Id.* If the private owner did not possess the right in the first place, no taking occurred. *Id.* Rolling easements provide an alternative to prohibiting development, which may in fact be unconstitutional. *Id.*

[246] *See* Eagle, *supra* note 1, at 760 (observing the potential for novel claims of regulatory takings from new regulations).

[247] *See First English Evangelical I*, 482 U.S. 304, 340 n.17 (1987) (Stevens, J., dissenting) (stating that regulators will be slow to act in the face of uncertain regulatory takings jurisprudence); Eagle, *supra* note 1, at 760 (observing the potential for novel claims of regulatory takings from new regulations); Hubbard, *supra* note 234, at 477 (discussing lower courts' need for clarification concerning the three *Penn Central* prongs).

[248] *See Palazzolo II*, 533 U.S. 606, 634 (2001) (O'Connor, J., concurring) (emphasizing the importance of the regulation's purpose in the Character Prong); Eagle, *supra* note 1, at 760 (noting the need for clarification of the Character Prong).

[249] *See* Eagle, *supra* note 1, at 760 (stating that regulations are needed to address economic, environmental, and human risks resulting from sea level rise).

[250] *See* LAUSCHE, *supra* note 3, at 5 (observing that sea level impacts will vary widely across regions); Eagle, *supra* note 1, at 760 (noting that novel regulations will arise in the face of sea level rise).

[251] *First English Evangelical I*, 482 U.S. at 340 n.17 (Stevens, J., dissenting) (stating that regulators will be slow to act in the face of uncertain regulatory takings jurisprudence); Eagle, *supra* note 1, at 760 (stating that new regulations are needed and will challenge traditional understandings of property rights); Hubbard, *supra* note 234, at 477 (discussing the challenges faced by lower courts).

[252] *See First English Evangelical I,* 482 U.S. at 340 n.17 (Stevens, J., dissenting) (stating that regulators will be slow to act in the face of uncertain regulatory takings jurisprudence); Eagle, *supra* note 1, at 760 (stating that new regulations are needed and will challenge traditional understandings of property rights); Hubbard, *supra* note 234, at 477 (discussing the challenges faced by lower courts); Lewyn, *supra* note 70, at 600 (noting the confusion among lower courts in takings clause jurisprudence).

[253] *See Palazzolo II*, 533 U.S at 634 (O'Connor, J., concurring) (emphasizing the importance of the regulation's purpose in evaluating the Character Prong); Eagle, *supra* note 1, at 760 (noting

O'Connor's analysis opens the door to rationality and should serve as the standard for evaluating non-categorical regulatory takings claims.[254] Now, in light of climate change and rising sea levels, regulatory takings case law demands uniformity more than ever.[255]

B. Justice O'Connor's Test Is Practical and Suited for Novel Environmental Regulations

The description of the Character Prong articulated by the Supreme Court in *Penn Central* is unworkable in the modern day.[256] The Court stated that a taking is more readily found "when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[257] This characterization is problematic because potential environmental regulations could be characterized as physical takings and also as public programs that promote the common good.[258] Courts lack guidance when such scenarios arise.[259] As a result, it is clear that the Supreme Court's 1978 definition of the Character Prong is antiquated.[260] This analysis is unsustainable in the face of future environmental regulation concerning not only sea level rise, but also climate change generally.[261] Justice O'Connor's test, on the other hand, pro-

---

the need for clarification of the Character Prong); Echeverria, *supra* note 145, at 172, 177 (noting that the biggest need in this area of the law is resolving the *Penn Central* factors).

[254] *See First English Evangelical I*, 482 U.S. at 340 n.17 (Stevens, J., dissenting); Eagle, *supra* note 1, at 760.

[255] *See Palazzolo II*, 533 U.S. at 634 (O'Connor, J., concurring) (emphasizing the importance of the regulation's purpose in the Character Prong); Eagle, *supra* note 1, at 760 (discussing pending regulation in light of climate change and rising sea levels); Echeverria, *supra* note 145, at 172, 177 (observing that the biggest need in this area of the law is resolving the *Penn Central* factors).

[256] *See Penn Cent. III*, 438 U.S. 104, 124 (1978) (discussing the Character Prong in the context of a physical invasion); Eagle, *supra* note 1, at 760 (stating that traditional law is ill-equipped to deal with upcoming regulations); Nolon, *supra* note 39, at 4 (noting that sea level rise regulations frustrate the application of traditional environmental regulations).

[257] *Penn Cent. III*, 438 U.S. at 124.

[258] *See* Eagle, *supra* note 1, at 760 (stating that new regulations will not fit squarely into traditional notions of private property rights).

[259] *Id.* (stating that new regulations are needed and will challenge traditional understandings of property rights); Hubbard, *supra* note 234, at 477 (discussing the challenges faced by lower courts); Lewyn, *supra* note 70, at 600 (noting the confusion among lower courts in takings clause jurisprudence).

[260] *See Penn Cent. III*, 438 U.S. at 124 (discussing the Character Prong in the context of a physical invasion); Eagle, *supra* note 1, at 760 (stating that new regulations will not fit squarely into traditional notions of private property rights); Nolon, *supra* note 39, at 4 (noting that sea level rise regulations frustrate the application of traditional environmental law).

[261] *See* Eagle, *supra* note 1, at 760 (stating that new regulations will not fit squarely into traditional notions of private property rights); Nolon, *supra* note 39, at 4 (noting that sea level rise regulations frustrate the application of traditional environmental law).

vides a workable and realistic analysis that can effectively handle future takings challenges.[262]

Environmental law and the structure of the U.S. government "create well-known challenges for effective regulation, and climate change is likely to exacerbate those challenges."[263] Environmental law may even lack the capacity to respond to challenges presented by climate change.[264] This is particularly relevant to sea level rise, which requires some form of adaptive management and the ability to swiftly react to changes.[265] Similarly, courts need a legal framework that allows them to adjudicate takings claims brought against novel regulations created to combat sea level rise, which will certainly vary greatly across regions.[266] Courts need guidance in the area of takings law and a clear partial takings test that allows them to give significant weight to the important public purposes served by these diverse and intrusive regulations.[267]

Requiring setbacks, the use of perimeter wall foundations, and prohibiting construction, expansion, and development are all forthcoming intrusive regulations that will ignite takings challenges.[268] The severe threats posed by sea level rise will require new kinds of land-use regulation, which will severely strain traditional property rights.[269] Takings challenges to these new regulations will pose puzzling questions of traditional private property rights "under unprecedented climatic conditions."[270] Any approach, other than an adaptive one, will lead to government inaction in an

---

[262] *See Palazzolo II*, 533 U.S. 606, 634 (2001) (O'Connor, J., concurring) (emphasizing the importance of a regulation's purpose in takings analysis); Eagle, *supra* note 1, at 760 (articulating the need for a workable test outside the traditional legal framework); *infra* notes 263−273 and accompanying text.

[263] Matthew D. Zinn, *Adapting to Climate Change: Environmental Law in a Warmer World*, 34 ECOLOGY L.Q. 61, 82 (2007).

[264] *Id.*

[265] Craig, *supra* note 6, at 525.

[266] *See* Eagle, *supra* note 1, at 760 (stating that new regulations will not fit squarely into traditional notions of private property rights); LAUSCHE, *supra* note 3, at 5 (noting that sea level rise varies across regions); Nolon, *supra* note 39, at 4 (noting that sea level rise regulations frustrate the application of traditional environmental law).

[267] *See Palazzolo II*, 533 U.S. at 634 (O'Connor, J., concurring) (emphasizing the importance of a regulation's purpose in takings analysis); Eagle, *supra* note 1, at 760 (noting that regulations serve a critical purpose in the face of severe threats from climate change and rising seas).

[268] *See* CODIGA ET AL., *supra* note 2, at 2 (discussing regulatory solutions to sea level rise); ENVTL. RES. MGMT., *supra* note 50, at 14 (discussing regulatory solutions to sea level rise); Eagle, *supra* note 1, at 760 (discussing novel claims likely to arise).

[269] *See* CODIGA ET AL., *supra* note 2, at 2 (discussing regulatory solutions to sea level rise); ENVTL. RES. MGMT., *supra* note 50, at 14 (discussing regulatory solutions to sea level rise); Eagle, *supra* note 1, at 760 (discussing novel claims likely to arise).

[270] Eagle, *supra* note 1, at 760.

area that requires diligent acts and regulation.[271] Sea level rise will dictate the need for a new paradigm in the development of coastal lands and regulatory and legal adjustments to accommodate these changes.[272] Given these needs, Justice O'Connor's test, which focuses on regulatory purposes, is adaptive and provides a legal framework in which courts can effectively adjudicate takings challenges concerning new environmental regulations.[273]

C. Justice O'Connor's Test Would Ensure Deference to Critical Environmental Regulations

Agencies are actively investigating the implications of takings law on sea level rise planning.[274] A number of agencies have come together and undertaken a project to address concerns over challenges posed by the current takings law.[275] The project aims to quell the fears surrounding takings law "through (1) legal analysis of existing takings jurisprudence and laws, (2) development of legal arguments that consider the imperative of sea-level rise, and (3) identification and development of specific, innovative land-use policies designed to withstand takings claims."[276] Embodying Justice O'Connor's approach will quell these fears and concerns because all inquiries will focus on the purposes served by regulation, and the regulation of sea level rise serves a vital public purpose.[277] Regulators have been called upon to ensure that new local land regulations tied to sea rise conform to an overall land-use plan, by maintaining specific and targeted purposes that serve a larger objective.[278] According to the agencies' report, a regulation that unambiguously furthers an objective of the comprehensive local plan has a much better chance of surviving a regulatory takings challenge.[279]

---

[271] *See* Craig, *supra* note 6, at 525 (stating that sea level rise will require adaptive management).

[272] *See* Nolon, *supra* note 39, at 4 (discussing the need for significant adjustments in law and legal practice to accommodate changing coastal development).

[273] *See Palazzolo II*, 533 U.S. 606, 634 (2001) (O'Connor, J., concurring) (emphasizing the importance of a regulation's purpose in takings analysis); Eagle, *supra* note 1, at 760 (discussing the need for new approaches in takings jurisprudence to deal with novel regulations from climate change).

[274] *See* FLA. DEP'T OF ECON. OPPORTUNITY, *supra* note 38, at 92.

[275] *See id.* (listing the fears that must be addressed regarding takings law).

[276] *Id.*

[277] *See Palazzolo II*, 533 U.S. at 634 (O'Connor, J., concurring) (emphasizing the importance of a regulation's purpose in takings analysis); FLA. DEP'T OF ECON. OPPORTUNITY, *supra* note 38, at 92 (listing states' fears regarding takings law and sea level rise planning); Eagle, *supra* note 1, at 760 (discussing the dangers posed by sea level rise and need for regulatory planning).

[278] *See* LAND USE LAW CTR., *supra* note 49, at 93 (proposing uniform regulatory responses in line with public purpose).

[279] *Id.*

Courts routinely recognize regulations that protect health, safety, and public welfare as ones that serve legitimate public purposes.[280] Environmental purposes, such as protecting coastlines, are equally important, and thus deserve great deference and should be weighed heavily against environmental acts' effects on private property.[281] There should be a heavy presumption in favor of the government that its environmental regulations serve an important purpose and thus do not constitute regulatory takings.[282] Justice O'Connor's approach will lend itself to this presumption, because an act's widespread and significant environmental purposes will routinely outweigh the act's effects.[283]

Future regulatory action related to climate change will easily sustain takings challenges if Justice O'Connor's analysis is applied.[284] Because regulations related to sea level rise serve important public purposes—such as setbacks that significantly reduce the risk of hazards from inundations—they will likely survive takings challenges in light of the fact that Justice O'Connor approach focuses on examining the purposes served by regulations.[285]

Although some fear the prospect of increased litigation as a result of climate change-related environmental regulation and expect that the uncertainties surrounding takings law will exacerbate the claims, Justice O'Connor's approach may actually have the opposite effect.[286] Widespread recognition

---

[280] *See* Rith Energy, Inc. v. United States, 270 F.3d 1347, 1352 (Fed. Cir. 2001) (recognizing the regulation's purpose of protecting the public health, safety, and welfare); Brace v. United States, 72 Fed. Cl. 337, 355−56 (2006) (stating that the wetlands regulation indisputably serves an important purpose by protecting public welfare).

[281] *See Rith Energy, Inc.,* 270 F.3d at 1352 (recognizing the regulation's purpose of protecting the public health, safety and welfare); *Brace*, 72 Fed. Cl. at 355−56 (stating that the wetlands regulation indisputably serves an important purpose by protecting public welfare); Eagle, *supra* note 1, at 760 (warning of the threats from rising coastlines including severe economic, environmental, and human impacts).

[282] *See Rith Energy, Inc.,* 270 F.3d at 1352 (recognizing the regulation's purpose of protecting the public health, safety, and welfare); *Brace*, 72 Fed. Cl. at 355−56 (stating that the wetlands regulation indisputably serves an important purpose by protecting public welfare); Eagle, *supra* note 1, at 760 (warning of the threats from rising coastlines including severe economic, environmental, and human impacts).

[283] *See Palazzolo II*, 533 U.S. 606, 634 (2001) (O'Connor, J., concurring) (noting the importance of weighing an act's purpose against its effects); Eagle, *supra* note 1, at 751, 760 (stating that property rights might be subordinate to property rights in light of severe threats).

[284] *See Palazzolo II*, 533 U.S. at 634 (O'Connor, J., concurring) (noting the importance of weighing an act's purpose against its effects); Eagle, *supra* note 1, at 751, 760 (stating that property rights might be subordinate to property rights in light of severe threats).

[285] *See Palazzolo II*, 533 U.S. at 634 (O'Connor, J., concurring) (noting the importance of weighing an act's purpose against its effects); CODIGA ET AL., *supra* note 2, at 3 (discussing benefits of setbacks); Eagle, *supra* note 1, at 751, 760 (stating that property rights might be subordinate to property rights in light of severe threats).

[286] *See Palazzolo II*, 533 U.S. at 634 (O'Connor, J., concurring) (emphasizing the importance of a regulation's purpose in takings analysis); Eagle, *supra* note 1, at 760 (noting threats to the

that regulatory acts, which possess strong public purposes, are likely to survive regulatory takings challenges may discourage potential plaintiffs from bringing such suits.[287] The United States is likely to face an increase in regulation due to impending environmental changes, but by employing Justice O'Connor's approach, courts may see a decrease of litigation in this area of the law.[288]

CONCLUSION

Determining what constitutes an unconstitutional regulatory taking is an extremely important and difficult role bestowed upon American courts. By promulgating Justice Sandra Day O'Connor's analysis in *Palazzolo v. Rhode Island* of *Penn Central Transportation Co. v. City of New York*'s third prong, the United States Supreme Court can reduce the complexity of such determinations as well as the confusion surrounding regulatory takings cases. Justice O'Connor's approach is well suited to handle future environmental regulations aimed at protecting coastal regions from rising sea levels. In addition, her approach is more practical than the outdated method of comparing each regulation to a physical invasion. Her approach allows for deference to be given to critical environmental regulations in light of their important purposes. Although some courts have stated that the economic impact of the regulation on the claimant is the most important prong of the *Penn Central* test, the character of the governmental act prong has recently been viewed as the most important. Forthcoming cases and impending climate change regulations mandate that the character of the governmental act be considered more significant. This strand of case law is in dire need of clarification and direction from the Supreme Court, especially in light of looming climate change related regulation. Regulators must not be deterred from promulgating environmental regulations at such a critical time simply because they fear facing continuous takings challenges.

---

public from rising sea levels and the potential for novel claims in light of climate change regulation); Lewyn, *supra* note 70, at 600 (noting the confusion among lower courts in takings clause jurisprudence).

[287] *See Palazzolo II*, 533 U.S. at 634 (O'Connor, J., concurring) (emphasizing the importance of a regulation's purpose in takings analysis); Eagle, *supra* note 1, at 760 (noting the important purpose of regulations in addressing threats posed by rising sea levels).

[288] *See Palazzolo II*, 533 U.S. at 634 (O'Connor, J., concurring) (emphasizing the importance of a regulation's purpose in takings analysis); Eagle, *supra* note 1, at 760 (noting the important purpose of regulations in addressing threats posed by rising sea levels and potential for claims).