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PALAZZOLO AND THE DECLINE OF JUSTICE SCALIA’S CATEGORICAL TAKINGS DOCTRINE

MICHAEL C. BLUMM*

Abstract: This Article maintains that despite the fact that the Palazzolo decision gave the landowner victories by relaxing ripeness hurdles to filing takings cases and rejecting the government’s “notice rule”—under which the existence of preexisting regulations would defeat takings claims—the chief significance of the case is the Court’s signal that it will reject attempts to expand categorical rules in takings cases. According to this view, Palazollo will be remembered for the decline of Justice Scalia’s categorical approach to takings, as reflected in his Lucas opinion, and for the triumph of multi-factor balancing championed by Justice Brennan’s Penn Central opinion. A postscript to the Article contends that the Court’s Tahoe-Sierra decision, decided while the Article was in press, confirms these predictions.

INTRODUCTION

The Supreme Court’s decision in Palazzolo v. Rhode Island1 was a disappointment for all concerned. Palazzolo, of course, got the satisfaction of knowing that his case liberalized the law of ripeness in takings cases and also destroyed the government defense based on the so-called “notice rule,” the claim that acquisition of property after enactment of a regulation bars a takings claim based on that regulation.

* Professor of Law, Northwestern School of Law of Lewis and Clark College. I thank Dean James Huffman, Professor Bill Funk, and the students at Lewis and Clark for the well-attended debate we had on the significance of the Palazzolo decision in November 2001, which focused my thinking on this issue. I also thank Tim Dowling of the Community Rights Counsel, who provided me several outlines prepared for a Georgetown University Law Center conference on the takings issue, which helped me prepare for the debate. Particularly helpful was the outline of Professor Richard Lazarus, the preeminent environmental law analyst of the Supreme Court. See generally Richard J. Lazarus, Restoring What’s Environmental About Environmental Law in the Supreme Court, 47 UCLA L. Rev. 703 (2000); Richard J. Lazarus, Understanding Palazzolo and Its Significance for Tahoe-Sierra, CONTINUING LEGAL EDUC. (Georgetown Univ. Law Ctr., Washington, D.C.), Oct. 18–19, 2001. Finally, thanks to Bill Warnock, J.D. 2003, Northwestern School of Law of Lewis and Clark College, for help with the footnotes.

But while these results undoubtedly pleased Palazzolo’s Pacific Legal Foundation attorneys, he is unlikely ever to collect a dime, as the question of whether he has a compensable claim is now back in the Rhode Island courts, which were decidedly unenthusiastic about his initial claim.\(^3\)

The State lost on the ripeness issue and, more significantly, on the notice rule, depriving it of an important categorical defense to takings claims.\(^4\) It is unlikely, however, that the State will have to compensate Palazzolo because the Court refused the landowner’s invitation to conceptually sever the wetlands at issue, which were burdened by the State’s regulation, from his adjacent unburdened uplands. Consequently, the Court overwhelmingly rejected Palazzolo’s claim that the State’s denial of a permit to fill the wetlands amounted to a categorical taking under *Lucas v. South Carolina Coastal Council*, because his uplands retained substantial economic value.\(^5\)

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\(^3\) Palazzolo v. Coastal Res. Mgmt. Council, C.A. No. 86-1496, 1997 WL 1526546, at *4–5 (R.I. Super. Ct. Oct. 24, 1997) (finding that the government action was not a taking because the wetlands development would constitute a nuisance; there were adjacent uplands available for development that were not burdened by the regulatory restriction; and there was no interference with the landowner’s reasonable expectations due to his knowledge of the State’s regulations when he acquired the property), aff’d on other grounds sub nom. Palazzolo v. State ex rel Tavares, 746 A.2d 707 (R.I. 2000) (finding that the case was not ripe and thus no taking occurred because: (1) the landowner failed to submit an application for the development for which he sought compensation; (2) notice of the regulations at the time of property acquisition defeated the landowner’s claim; and (3) the uplands provided the landowner with an economically viable use), aff’d in part, rev’d in part, remanded sub nom. Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

\(^4\) See John D. Echeverria, *A Preliminary Assessment of Palazzolo v. Rhode Island*, 31 Envtl. L. Rep. 11,112, 11,113 (2001) (“This ruling represents a setback for government defendants and destroys one of the few bright-line rules in an otherwise muddled area of the law.”); Robert Meltz, *What Role Does the Law Existing When a Property is Acquired Have in Analyzing a Later Taking Claim?: The ‘Notice Rule,’* in *Inverse Condemnation and Related Government Liability* 381, 383, 385 (A.L.I.-A.B.A. COURSE OF STUDY, May 3, 2001), available in Westlaw, SF64 ALI-ABA 381 (“No regulatory taking occurs when the government restricts a property use under a law existing when the property was acquired—or under law whose adoption after acquisition was foreseeable. This government defense has been called the ‘notice rule,’ because the land buyer is seen as being ‘on notice’ as to the possibility of being thwarted, and hence not deserving of compensation. . . . The older a law, the fewer property owners exist who acquired before the law—hence, under the notice rule, the smaller the universe of potential takings plaintiffs.”).

\(^5\) 505 U.S. 1003, 1015 (1992). Under *Lucas*, regulations which completely deprive burdened realty of all economic value are categorical compensable takings. *Id.*
Thus, the Palazzolo result was decidedly a split decision. However, the language in the Court’s six opinions arguably signals that the categorical approach to takings cases championed by Justice Scalia in his Lucas decision no longer commands a majority of the Court. Therefore, the Lucas rule is likely to be confined to a narrow category of cases where landowners can demonstrate that a regulatory restriction unreasonably imposes a complete economic wipeout. The Court’s aversion to deciding takings cases on the basis of categorical rules means that the dominant litmus test for the merits of takings claims will be the balancing test announced by Justice Brennan in Penn Central Transportation Co. v. City of New York. Since government defendants historically fare well under this test, Palazzolo may come to be seen as an important turning point in takings jurisprudence.

This theory will soon be tested. This term, the Court will decide the Lake Tahoe moratorium case. If I am right about the significance of Palazzolo, the Court will reject the landowners’ attempt to obtain compensation due to the moratorium, since it is grounded on a categorical claim. If I am wrong, the validity of this comment will be short-lived. (The Court handed down its decision in the Lake Tahoe case while this Article was in press. The decision, which largely validated the prediction about the decline in Justice Scalia’s approach, is briefly discussed in the Postscript.)

I. JUSTICE SCALIA’S CATEGORICAL RULE IN LUCAS

In the Lucas case, now fifteen years old, Justice Scalia’s majority opinion seemed to herald in a new era for landowners burdened with

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6 See generally 533 U.S. 606 (2001). Justice Kennedy wrote for the majority, which was six to three on the ripeness issue and five to four on the notice issue. Justice Stevens concurred on the ripeness issue but dissented on the notice issue. Id. at 637-45 (Stevens, J., conccurring in part, dissenting in part). Justice O’Connor concurred in the result but made clear that while the notice issue could not categorically defeat a takings claim, it was a relevant consideration under the balancing test for the existence of a taking under the Court’s decision in Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978). Id. at 632-36 (O’Connor, J., concurring). Justice Scalia’s concurrence vigorously disputed the relevance of notice under the Penn Central balancing test. Id. at 636-37 (Scalia, J., concurring). Justice Ginsberg wrote a dissent on the ripeness issue, joined by Justices Souter and Breyer. Id. at 645-54 (Ginsburg, Souter & Breyer, JJ. dissenting). Justice Breyer also wrote a separate dissent cautioning against landowners manufacturing takings claims due to transfers which separate a parcel’s developable portions from its restricted portions. Id. at 654-55 (Breyer, J., concurring).

7 438 U.S. at 135-36.

regulations. As the first decision of the Supreme Court to find a regulatory taking in over sixty years, and only the second ever,9 Lucas held that landowners were due compensation if a regulation deprived them of all economic value.10 Justice Scalia analogized such complete economic wipeouts to permanent physical occupations, which the Court had held to be categorical takings ten years before Lucas in the Loretto v. Teleprompter Manhattan CATV Corp. case, which involved a comparatively insignificant cable television wire that no doubt increased the value of the landowner's property.11 Justice Scalia suggested that from the landowner's point of view a "total deprivation of beneficial use is . . . the equivalent of a physical appropriation."12

The creation of categorical takings is of great benefit to takings plaintiffs because government defendants cannot defeat such claims by a case-specific inquiry into the public interest supporting the regulatory burden.13 In fact, the categories create per se takings. On the other hand, if a claim does not fall within the permanent physical in-

9 The grandfather of regulatory takings cases is, of course, Pennsylvania Coal Co. v. Mahon, in which Justice Holmes wrote for an eight-member majority, concluding that there could be a regulatory taking if a regulation went "too far." 260 U.S. 393, 415 (1922). There was such a taking in Mahon, according to Holmes, although precisely why has never been entirely clear. He suggested that the legislation was protecting only the private interest of a single overlying landowner, but of course the statute aimed to protect many similarly-situated landowners. Id. at 413. He also emphasized that regulations which substantially diminished the value of land went "too far." See id. at 413, 415. I have always thought that Holmes found a taking in Mahon because the state legislation prohibiting subsidence due to mining activities under houses and other vulnerable sites seemed to obliterate a bargain between the coal company and Mahon's predecessor, in which the coal company sold the surface while expressly reserving for itself the mineral and support estates. See id. at 394-95. Thus, the legislation appeared to completely revise private, bargained-for rights. Justice Brandeis wrote a vigorous dissent in Mahon, in which he claimed that there could be no regulatory taking where a regulation merely prevented nuisance-like activity, such as producing subsidence of an overlying dwelling, because the miner lacked the authority to maintain a nuisance. Id. at 417 (Brandeis, J., dissenting).

10 Lucas, 505 U.S. at 1017-18. Restrictions that "inhere[d] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership," were excepted from this "total economic wipeout amounts to a compensable taking" rule. Id. at 1029.


12 Lucas, 505 U.S. at 1017 (citing San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 652 (Brennan, J., dissenting)); id. (quoting 1 EDWARD COKE, THE INSTITUTES of the Laws of England, ch. 1, § 1 (1st Am. ed. 1812) (1797)) ("[F]or what is the land but the profits thereof[?]"). For one response to Justice Scalia's use of Coke's language, see Michael C. Blumm, Property Myths, Judicial Activism, and the Lucas Case, 25 ENVTL. L. 907, 916 (1993), stating that "[m]ost obviously, land involves privacy as well as development rights. And it is those rights that the Supreme Court ought to be concerned about zealously protecting from governmental regulations, not development rights like Mr. Lucas."

13 Lucas, 505 U.S. at 1015.
vasion and complete economic wipeout categories, the *Penn Central* multi-factor balancing governs, in which the general good served by the regulation is balanced against the burden imposed on the landowner.\(^{14}\) Government defendants have generally fared well under *Penn Central* balancing.

Justice Scalia’s opinion in *Lucas* was the subject of spirited commentary.\(^ {15}\) Admirers saw it as a long-overdue recognition of the need to compensate overburdened landowners. Detractors viewed it as a threat to legitimate land use and environmental regulations designed to “adjust[] the benefits and burdens of economic life for the common good.”\(^ {16}\) Despite the predictions that *Lucas* represented a sea-change in takings law, the case had surprisingly little effect on the lower courts, with the exception of the Federal Circuit.\(^ {17}\) I believe that the *Palazzolo* decision means that the *Lucas* legacy will continue to be small, since a clear majority of the Court seems quite uncomfortable with the categorical approach to deciding takings cases.

**II. THE PALAZZOLO DECISION**

Justice Kennedy’s majority opinion addressed three issues: (1) whether the case was ripe; (2) whether Palazzolo’s claim was barred by the fact that he acquired title to the land after the wetland restrictions were in place; and (3) whether there was a *Lucas*-type categorical taking as a result of the State’s denial of a permit to fill the wetlands. I want to emphasize the latter two issues, since they pertain to the decline of the categorical approach to takings analysis. However, the first issue warrants mention, as it concerns how easily takings claimants may access federal courts.

\(^ {14}\) Under *Penn Central* balancing, the Court conducts an ad hoc factual inquiry into the particular circumstances of each case, examining: (1) the character of the governmental action; (2) the economic impact of the regulation on the landowner; and (3) any interference with reasonable investment-backed expectations. See *Palazzolo v. Rhode Island*, 533 U.S. 606, 634 (2001) (O’Connor, J., concurring).


A. The Ripeness Ruling

The majority determined that the case was ripe—the primary reason why the Rhode Island Supreme Court ruled against Palazzolo—because the State had made it clear, to a reasonable degree of certainty, that it would not allow any development on the eighteen acres of wetlands that Palazzolo owned. Thus, there was no need to submit an application for a smaller development of the wetlands, nor was there a need to submit any application at all concerning his two acres of upland property.

The latter ruling drew a sharp dissent from Justice Ginsberg, who accused Palazzolo’s Pacific Legal Foundation attorneys of employing a “bait-and-switch maneuver,” a con game of “mov[ing] the pea to a different shell,” by arguing for the first time before the Supreme Court that there was a taking under the multi-factor Penn Central test. Previously, in the state courts, Palazzolo argued only for a Lucas-type taking, based on denial of all economic use. The effect of this switch was to make highly relevant the amount of development permitted on Palazzolo’s uplands, which previously was not an issue, since all the State had to argue to defeat a Lucas claim was that at least one home could be built on the uplands. Palazzolo’s attorneys disingenuously claimed in their petition for certiorari that Palazzolo was restricted to one home on the uplands. Yet the Supreme Court majority ruled that because the State had not challenged Palazzolo’s inaccurate assertion, the State inadvertently waived any objection to this false claim. This was too much for Justice Ginsberg, who warned, “[t]his Court’s waiver ruling thus amounts to an unsavory invitation to unscrupulous litigants: Change your theory and misrepresent the record in your petition for certiorari; if the respondent fails to note your

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19 Palazzolo v. Rhode Island, 533 U.S. 606, 619 (2001). In fact, Palazzolo never even submitted an application for the seventy-four house development for which he sought compensation. However, the Court ruled that while that failure was relevant to the amount of compensation due Palazzolo, it was irrelevant to the ripeness issue. Id. at 624.
20 Id. at 625–26.
21 Id. at 653 (Ginsberg, Souter & Breyer, JJ., dissenting).
22 Tavares, 746 A.2d at 716.
machinations, you have created a different record on which this Court will review the case."25

Palazzolo's victory on the ripeness issue generated headlines.26 While a disturbing result, since it seemed to authorize litigants to create "facts" through assertions in petitions for certiorari,27 actually the case should affect ripeness doctrine very little.28 The Court observed, for example, that a land use authority may, prior to being subjected to a takings court challenge, "use[…] its own reasonable procedures . . . to decide and explain the reach of a challenged regulation."29 The Court also noted that "[t]he mere allegation of entitlement to the value of an intensive use will not avail the landowner if the project would not have been allowed under other existing, legitimate land use limitations."30 Perhaps more significantly, the Court limited its ruling to federal ripeness principles, acknowledging that state ripeness or exhaustion rules may impose requirements beyond federal rules.31 So, quite conceivably, on remand the Rhode Island Supreme Court could have affirmed its earlier decision and ruled that the case was not ripe, but this time clarify that it was relying on state principles of ripeness, instead of remanding the case to the superior court.32

B. The Notice Ruling

For years government defendants employed two categorical defenses to defeat takings claims without case-specific factual inquiries into the benefits and burdens of challenged regulations. First was the allegation that the proposed development was a nuisance-like activity.

25 Id. at 653 (Ginsburg, Souter & Breyer, JJ., dissenting).
27 One lesson from Palazzolo would of course be that government defendants must carefully peruse the certiorari petitions of takings claimants for factual errors and correct them in their responses. 533 U.S. at 652-54 (Ginsburg, Souter & Breyer, JJ., dissenting).
28 See Echevarria, supra note 4, at 11,115 (noting that the Court reaffirmed Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985)).
29 Palazzolo, 533 U.S. at 620.
30 Id. at 625. John Echevarria concluded that "[t]his language strongly suggests that a regulatory action that might otherwise result in a taking will not be found to be one if the decision is independently supported by the applicant's failure to comply with other, facially valid regulatory requirements." Echevarria, supra note 4, at 11,115.
31 Palazzolo, 533 U.S. at 625-26.
This per se exception for nuisance liability was discarded by Justice Scalia’s 1987 *Lucas* opinion, where he stated:

> When it is understood that “prevention of harmful use” was merely our early formulation of the police power justification necessary to sustain (without compensation) *any* regulatory diminution in value; and that the distinction between regulation that “prevents harmful use” and that which “confers benefits” is difficult, if not impossible, to discern on an objective, value-free basis; it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory “ takings”—which require compensation—from regulatory deprivations that do not require compensation.\(^{33}\)

Thus, government defendants lost one of their categorical defenses.

The second categorical defense was the notice rule, under which notice of preexisting regulations barred takings claims. The thinking was that preexisting regulations “inhered” in the title under *Lucas*, and thus were immune from takings liability. The *Palazzolo* Court rejected the categorical notice rule, by a five to four vote.\(^{34}\) According to Justice Kennedy, the Rhode Island Supreme Court’s endorsement of a “blanket rule” that post-enactment acquisition of property bars takings claim went too far, putting a Hobbesian stick into the Lockean bundle of property rights.\(^{35}\) The Court concluded that such a blanket rule against compensation would create unfair results for older landowners and those who must sell their land (as opposed to those who can afford to retain the land and litigate).\(^{36}\) Although the Court’s rul-


\(^{34}\) Justice Stevens, who provided the sixth vote for the majority on the ripeness issue, dissented on the notice rule. Palazzolo v. Rhode Island, 533 U.S. 606, 637–38 (2001) (Stevens, J., concurring in part and dissenting in part).

\(^{35}\) Id. at 626–27. Perhaps the blanket rule went too far under the unusual facts of the *Palazzolo* case. Denying compensation because of the notice rule seemed harsh because Palazzolo’s corporation owned the wetlands at issue prior to the enactment of the regulation that banned most development. *See id.* Palazzolo acquired the land as an individual due to the dissolution of the corporation after the State promulgated the regulation. *Id.* So he possessed post-enactment title only due to the operation of state law, not due to a traditional conveyance. *Id.* Justice Breyer’s dissent suggested that an inheritance is another kind of transfer that should not always bar a takings claim, since such a transfer—unlike a bargained-for sale—rarely changes expectations. *See id.* at 654–55 (Breyer, J., dissenting). On the other hand, Justice O’Connor noted that sales often change expectations, especially where the sale price is discounted due to regulations, and that expectations are highly relevant to a takings analysis. *See id.* at 632–33 (O’Connor, J., concurring).

\(^{36}\) Id. at 627. The Court noted that “[f]uture generations, too, have a right to challenge unreasonable limitations on the use and value of land.” *Id.*
ing on ripeness may have generated headlines, its rejection of the notice rule was more significant. The result will be to force government defendants to defend their regulations on the merits.

The good news for government defendants is that the Court's rejection of the notice rule does not necessarily mean that pre-acquisition notice is irrelevant in takings analysis. Justice O'Connor's concurrence, which provided the decisive fifth vote on the notice issue, made clear that the time of Palazzolo's acquisition of the wetlands was a relevant consideration in determining whether there was a taking under *Penn Central's* multi-factor analysis. She wrote that it "would be just as much error to expunge this consideration from the takings inquiry as it would be to accord it exclusive significance." This is because, according to Justice O'Connor, the regulatory regime in place at the time of land acquisition "helps to shape the reasonableness of [the claimant's] expectations" under the *Penn Central* test, for "if existing regulations do nothing to inform the analysis, then some property owners may reap windfalls and an important indicium of fairness is lost." Justice O'Connor's perspective is a majority view, as the four dissenters expressly joined her.

Moreover, it is hardly clear that notice of preexisting regulations is not a relevant factor even in the context of *Lucas*-type takings claims. The Court of course did not address this issue since, as discussed below, it rejected Palazzolo's allegation of a *Lucas*-type economic wipeout. But Justice Kennedy's majority opinion seemed to leave the door open by observing that there are qualifications on the notion that regulations producing economic wipeouts require compensation. Citing his own concurrence in *Lucas*, Justice Kennedy further opined that economic wipeouts warranted compensation only where the regulatory deprivation is contrary to reasonable, investment-backed expectations. If, for example, Palazzolo sold only his wetland acres to a purchaser with notice of the regulatory restrictions, the buyer would lack reasonable, investment-backed expectations. Justice O'Connor clearly was concerned about the manufacturing of

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37 See *supra* note 6 and accompanying text.
38 *Palazzolo*, 533 U.S. at 632-33 (O'Connor, J., concurring).
39 Id. at 635 (O'Connor, J., concurring).
40 See *id.* at 633 (O'Connor, J., concurring); *id.* at 643 n.6, 644-45 (Stevens, J., concurring in part, dissenting in part); *id.* 654 n.3 (Ginsburg, Souter & Breyer, JJ., dissenting); *id.* at 654-55 (Breyer, J., dissenting).
41 *Id.* at 617 (citing *Lucas* v. S.C. Coastal Council, 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring)).
such economic windfalls.\textsuperscript{42} And Justice Breyer, the only Justice to address the issue directly, stated that he could not see how such strategic transfers could warrant just compensation.\textsuperscript{43}

Thus, though it will no longer be an absolute bar to takings claims, notice of preexisting regulations will remain a factor in most takings claims. Furthermore, the multi-factor \textit{Penn Central} test will not be reduced to a mere balancing between the importance of the public good served by the regulation and the economic burden imposed on the landowner.\textsuperscript{44} Instead, the test will continue to consider whether the landowner acquired the property with knowledge of the regulatory restrictions.\textsuperscript{45} The Court’s preservation of the notice rule in this context will supply an important governmental defense to takings claims, even if it no longer completely defeats them. Recognizing this fact, Justice Scalia took issue with Justice O’Connor’s siding with the dissenters. He argued that the timing of property acquisition should never be a relevant factor under \textit{Penn Central} unless a preexisting regulation had become part of the “background” principles of state law that, under his \textit{Lucas} opinion, always defeated a takings claim.\textsuperscript{46} Justice Scalia acknowledged that the total demise of the notice rule would enable savvy developers to secure unfair windfalls by buying land at discounted prices due to restrictions they intended to challenge as takings. He viewed this as a price worth paying to ensure against the government’s use of unconstitutional regulations.\textsuperscript{47} No other Justice agreed with Justice Scalia on this issue.

The continued relevance of notice of preexisting regulations, despite the demise of the notice rule, is significant for my purpose because it reflects the Court’s disillusionment with categorical, bright-line rules in the takings context. The Court dispensed with the notice rule as a categorical trump to takings claims, but it was unwilling to endorse Justice Scalia’s notion that notice of preexisting regulations is

\begin{itemize}
  \item \textsuperscript{42} Id. at 632 (O’Connor, J., concurring).
  \item \textsuperscript{43} Id. at 654–55 (Breyer, J., dissenting) (“I do not see how a constitutional provision concerned with fairness and justice could reward any such strategic behavior.”).
  \item \textsuperscript{44} See supra notes 14 (summarizing the \textit{Penn Central} test).
  \item \textsuperscript{45} See supra note 41–43 and accompanying text.
  \item \textsuperscript{46} Palazzolo, 533 U.S. at 637 (Scalia, J., concurring) (quoting \textit{Lucas}, 505 U.S. at 1029); see supra note 10 (explaining the “background principles” exception to \textit{Lucas} takings).
  \item \textsuperscript{47} Palazzolo, 533 U.S. at 636–37 (Scalia, J., concurring).
\end{itemize}
irrelevant. The Court’s dissatisfaction with categorical rules in the takings context extends both to rules favoring the government—like the nuisance exception and the notice rule—and those favoring landowners—like the Lucas economic wipeout rule, which I believe will continue to be narrowly construed. As Justice O’Connor explained, “[t]he temptation to adopt what amounts to per se rules in either direction must be resisted.” It seems to me that this sentiment signals a triumph of Justice Brennan’s Penn Central “ad hocracy” and the demise of Justice Scalia’s categorical approach under Lucas.

C. The Size of the Property Ruling

The size of the property under consideration, also known as the “denominator issue,” is the key remaining unresolved issue in takings jurisprudence. This determination is directly related to the availability of categorical, Lucas-type takings claims, because the smaller the size of the property, the easier it is to allege a regulatory economic wipeout. The size of the property is also relevant in the Penn Central multi-factor claims because the size of the property determines a regulatory restriction’s economic impact, in particular whether there has been a significant diminution of value.

Prior to Palazzolo, the Supreme Court seemed to have adopted a broad view of the relevant property size. In Penn Central, where the Court refused to consider the air space above Grand Central Terminal as relevant property, Justice Brennan’s opinion stated,

“Taking” jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the [government] action and on the nature and extent of the interference with rights in the parcel as a whole . . . .

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48 See id. at 626.
49 Id. at 636 (O’Connor, J., concurring).
51 For the Penn Central factors see supra note 14. Justice Holmes in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 419 (1922), first articulated the “significant diminution of value” test.
Applying this principle later in *Keystone Bituminous Coal Ass'n v. De-Benedictis*, the Court rejected the coal company's takings claim in part by refusing to view the relevant property as merely the restricted coal for purposes of analyzing a regulatory restriction.\(^{53}\) Nevertheless, the Court has not been entirely clear on the issue. In his *Lucas* opinion, Justice Scalia suggested that the state court's view of the relevant size of the property in *Penn Central*—including other property that the claimant owned in the vicinity—was "extreme" and "unsupportable,"\(^{54}\) which seemed to be a direct contradiction of the *Keystone* reasoning.

Palazzolo asked the Court to consider the relevant property to be only his eighteen acres of wetlands, not including his two adjacent acres of wetlands. By "conceptually severing" the property in this manner,\(^{55}\) he hoped to convince the Court that the regulation worked a complete economic wipeout, warranting compensation under *Lucas*. The Court refused.\(^{56}\) According to Justice Kennedy, because Palazzolo's uplands retained substantial development value (the trial court determined the uplands were worth $200,000), there was no deprivation of all economic use.\(^{57}\) With more than a "token" interest retained, there was no categorical taking.\(^{58}\) Since Palazzolo claimed that the developed value of his property was worth $3.15 million,\(^{59}\) a 93.6% loss in value was not sufficient to invoke the *Lucas* categorical rule. In fact, none of the Court's six opinions suggested that this magnitude of loss was sufficient to trigger a *Lucas* taking.

Despite the consistency of the *Palazzolo* result with the reasoning in *Penn Central* and *Keystone* on the relevant size of the property, Justice Kennedy's language was quite ambivalent about the issue.\(^{60}\) He noted that Palazzolo only raised the conceptual severance issue before the U.S. Supreme Court; it was not argued in the state courts.\(^{61}\) For this reason the Court presumed that the entire parcel was the basis for

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\(^{53}\) 480 U.S. 470, 498 (1987) ("The 27 million tons of coal [required to be left in place by the state subsidence control statute] do not constitute a separate segment of property for takings law purposes.").

\(^{54}\) 505 U.S. 1003, 1016 n.7 (1992).


\(^{57}\) Id.

\(^{58}\) Id. at 631.


\(^{61}\) Id. at 631.
the takings claim. Moreover, Justice Kennedy referred to the size of the property issue as a
difficult, persisting question of what is the proper denominator in the takings fraction. Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole, but we have at times expressed discomfort with the logic of this rule, a sentiment echoed by some commentators.

This equivocation may signal that some members of the Court are ready to overturn Penn Central (a six to three decision) and Keystone (a five to four decision) on the size of the property issue. Such a reconsideration would be revolutionary, perhaps ratifying the partial takings theory adopted by Judge Plager of the Federal Circuit, and in the process casting a cloud over much environmental and land use regulation. But given the close link between the size of the property issue and the categorical approach to takings analysis, the Court’s rather clear rejection of the latter in Palazzolo makes a revolution in the size of the property seem unlikely.

III. The Decline of Justice Scalia’s Categorical Approach

Justice Scalia has been advocating revolutionary changes in the takings doctrine since his appointment to the Court in 1986. This is a fairly remarkable development, for it belies his claimed fidelity to

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62 Id. at 631–32.
63 Id. at 631 (citing Richard A. Epstein, Takings: Descent and Resurrection, 1987 SUP. CT. REV. 1, 16–17 (1987) and John E. Fee, Comment, Unearthing the Denominator in Regulatory Takings Claims, 61 U. CHI. L. REV. 1535 (1994)).
64 See supra notes 52–53 and accompanying text. Justice Kennedy did seem to resolve one issue lingering since Justice Scalia’s Lucas opinion, in which he had suggested that “background principles” of state property and nuisance law immune from takings claims were limited to common law rules. 505 U.S. 1003, 1004 (1992); see supra note 10. Justice Kennedy clearly indicated that statutes could form such background principles. Although he declined to suggest when legislation could become a background principle sufficient to defeat a takings claim, he did provide a kind of “equal protection” gloss to takings analysis by positing that “[a] regulation cannot be a background principle for some owners but not for others.” Palazzolo, 533 U.S. at 630.
66 See Kendall & Lord, supra note 2, at 539, 555–58.
originalism. In his first term, Justice Scalia wrote the Court's opinion in *Nollan v. California Coastal Commission*, in which he ruled that a condition in a building permit requiring the landowner to dedicate to the state a beach access easement worked a taking. Thus, he adopted a narrow view of the property at issue, disaggregating the landowner's right to exclude, which the state wanted dedicated, from the development rights the landowner sought from the state. He also suggested, in that opinion, that notice of preexisting regulations was irrelevant to a takings claim.

Five years later, in *Lucas*, Justice Scalia created a new per se categorical taking concerning regulations producing economic wipeouts, as explained in Part I *supra*. What is noteworthy here is that Scalia's opinion was not joined by Justice Kennedy, so Justice Scalia wrote only for five Justices, one of whom, Justice White, has since retired. Justice Kennedy's concurring opinion in *Lucas* complained that Justice Scalia's resurrection of common law nuisance as the paradigm "background principle" insulated from takings compensation would erect a "static body of property law" ill-equipped for protecting fragile ecosystems. Moreover, Justice Kennedy maintained that a categorical taking could not be grounded only on a regulation producing an eco-

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67 Justice Scalia reiterated his professed dedication to original intent in a recent dedication of a new building at my law school. See Shelby Oppel & Paige Parker, *Scalia Sticks with the Original in Constitutional Controversy*, OREGONIAN, Feb. 11, 2002, at B1 (lamenting that originalists like himself are a minority on the bench and discussing several originalist issues but ignoring his takings jurisprudence). Of course, there is no original intent that the Takings Clause would apply to regulations, see generally William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995), a fact that Justice Scalia acknowledged in his *Lucas* opinion. See 505 U.S. at 1028 n.15; see also Kendall & Lord, *supra* note 2, at 515-16 n.16 (collecting other commentary on the nonoriginalist origins of the recent expansion in the Takings Clause).

The irony of Justice Scalia dedicating a building which won environmental awards at a leading environmental law school was not lost on many, as over 450 people from twenty different environmental, civil rights, and social justice groups demonstrated against him and the prospect that President Bush would do as he promised and nominate like-minded Justices. See Rally for Justice, at http://www.rallyforjustice.org/ (last visited Apr. 13, 2002).

69 Id. at 832-33.
70 Id. at 833 n.2; see *supra* note 46.
72 Id. at 1035 (Kennedy, J., concurring) ("In my view, reasonable expectations must be understood in light of our whole legal tradition. The common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society.").
nomic wipeout; the regulation had to frustrate reasonable, investment-backed expectations as well.\(^\text{75}\)

In \textit{Palazzolo}, Justice Kennedy’s opinion for the Court repeatedly emphasized the need to judge regulatory restrictions on a reasonableness basis,\(^\text{74}\) the antithesis of the kind of categorical rule favored by Justice Scalia. Moreover, Justice Kennedy not only made clear that statutes could form background principles,\(^\text{75}\) he also confined the \textit{Lucas} categorical rule to situations in which a regulation left land “economically idle.”\(^\text{76}\) In so doing, he ratified the interpretation of most lower courts that the \textit{Lucas} rule of per se compensation is an extremely narrow one.\(^\text{77}\) For example, one recent court concluded that there was no \textit{Lucas}-type taking where a dune protection law forbade any development but the undeveloped property retained value for “parking, picnics, barbecues, and other recreational uses.”\(^\text{78}\)

Worse, from Justice Scalia’s perspective, Justice O’Connor’s concurrence specifically endorsed the kind of balancing implicit in a reasonableness approach to takings analysis.\(^\text{79}\) And she expressly rejected Justice Scalia’s categorical approach, writing that such “\textit{per se} rules . . . must be resisted.”\(^\text{80}\) Without Justices Kennedy and O’Connor, the coalition of Justices that enabled Justice Scalia to author his \textit{Lucas} opinion has vanished. Only Chief Justice Rehnquist and Justice Thomas remain. On the other hand, there seem to be six votes for using \textit{Penn Central} balancing as the dominant mode of takings analysis. Justice Brennan, the author of \textit{Penn Central}, seems to have triumphed over Justice Scalia from the grave.

\(^{75}\) \textit{Id.} (Kennedy, J., concurring) (“[Background principles are] based on objective rules and customs that can be understood as reasonable by all parties involved.”).

\(^{74}\) 533 U.S. 606, 616, 620 (2001); \textit{see also id.} at 626. “The right to improve property, of course, is subject to the reasonable exercise of state authority. . . . [A] particular exercise of the States’ regulatory power [however, may be] so unreasonable or onerous as to compel compensation.” \textit{Id.} at 627. “Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.” \textit{Id.}

\(^{75}\) \textit{See supra} note 64.

\(^{76}\) \textit{Palazzolo}, 533 U.S. at 631.

\(^{77}\) \textit{See Ronald H. Rosenberg, The Non-Impact of the United States Supreme Court Regulatory Takings Cases on the State Courts: Does the Supreme Court Really Matter?,} 6 \textit{FORDHAM ENVTL. L.J.} 523, 545–48 (1995) (stating that of eighty state court cases citing \textit{Lucas} over a two-and-a-half year period, only three relied on it to find a regulatory taking).


\(^{79}\) \textit{Palazzolo}, 533 U.S. at 635 (O’Connor, J., concurring) (“[O]ur decision today does not remove the regulatory backdrop against which an owner takes title to property from the purview of \textit{Penn Central} inquiry. It simply restores balance to that inquiry.”).

\(^{80}\) \textit{Id.} at 636 (O’Connor, J., concurring). For the full quote, see \textit{supra} text accompanying note 49.
CONCLUSION

The decline of Justice Scalia's categorical approach to regulatory takings jurisprudence, evident in the Palazzolo decision, should mean that the Tahoe Regional Planning Agency will successfully defend its development moratoria in the Lake Tahoe case because the landowners there are claiming a Lucas-type categorical taking. But that does not mean that some of those landowners could not successfully maintain takings claims concerning development restrictions under Penn Central balancing, particularly if the Court revisits the size of the property issue and disavows the broad approach endorsed by both Penn Central and Keystone. The decline of categorical analysis and the rise of balancing in takings analysis will make for less certainty, more litigation, and more case-by-case consideration, not necessarily fewer successful takings claims. But those characteristics would seem to be inevitable for a constitutional provision whose aim is to do justice and produce fairness.

Justice Kennedy's concern for protecting both reasonable regulations and reasonable landowner expectations, as well as Justice O'Connor's concern for avoiding windfalls led both away from Justice Scalia's categorical absolutism. It is no secret that these two Justices, who are at the philosophical center of the current Supreme Court, will decide the future course of Takings Clause litigation. They might decide to expand the scope of the regulatory takings doctrine by contracting the relevant size of the property, but that would seem a unlikely vehicle to ensure full consideration of the reasonableness of both the government's restrictions and the landowner's expectations because it would encourage the kind of strategic behavior that could produce the windfalls against which Justice O'Connor cautioned.

To effectively guard against landowner windfalls, while considering the overall fairness of a regulation's effect on a landowner, a large

82 See supra notes 52-53 and accompanying text.
84 See supra notes 72-74 and accompanying text.
85 See supra note 39 and accompanying text.
86 In fact, Professor Lazarus considers Justice Kennedy to be the "bellwether Justice in environmental cases," with a near 100 percent record for being in the Court majority in such cases. Richard J. Lazarus, Restoring What's Environmental About Environmental Law in the Supreme Court, 47 UCLA L. REV. 703, 715, 733 (2000).
view of the relevant property is necessary. This inevitably will mean that some large landowners must bear some burdens without compensation for which some small landowners receive compensation. But large landowners also derive large benefits from most regulatory schemes. The Takings Clause may demand equality of treatment, but only of similarly situated landowners. Large and small landowners are not similarly situated. As the Court searches for a mechanism to protect the small, non-strategic behaving landowner from unfair regulatory burdens, it ought not to turn away from the *Penn Central/Keystone* view of the size of the property. That large view provides an effective guard against economic windfalls. Whatever direction the Court pursues, *Palazzolo* makes clear that the future of takings doctrine no longer lies with the categorical approach championed by Justice Scalia.

**Postscript**

On April 23, 2002, the Supreme Court ruled, six to three, that there was no categorical taking resulting from the imposition of two moratoria on development totaling thirty-two months to facilitate formulation of a comprehensive land plan for the Lake Tahoe Basin. Justice Stevens' opinion for the six-member majority adopted Justice O'Connor's reluctance, as evident in her *Palazzolo* concurrence, to extend categorical rules in takings cases. In ruling that the case was best analyzed under the multi-factor *Penn Central* framework, the Court consigned Justice Scalia's *Lucas* categorical rule to the "extraordinary case in which a regulation permanently deprives property of all value . . . ." The Court reiterated that even a decline in value of ninety-five percent would require analysis under *Penn Central*.

The Court not only sided with Justice O'Connor's aversion to deciding takings cases according to absolute rules and severely limited Justice Scalia's *Lucas* rule, it also expressly adopted Justice Brennan's large view of the relevant parcel, quoting from his *Penn Central* opinion, as set forth above. This seems to indicate that, as predicted

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88 See *supra* notes 37–40 and accompanying text.
89 *Tahoe-Sierra*, 122 S. Ct. at 1478, 1486–88.
90 See *supra* note 14.
91 *Tahoe-Sierra*, 122 S. Ct. at 1484.
92 Id. at 1483.
93 Id. at 1481. For the quote from *Penn Central*, see *supra* text accompanying note 52.
above,94 the Court will not ratify "conceptually severing" property into discrete segments for takings purposes, despite Justice Kennedy's ambivalence on this issue in Palazzolo.95 Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency thus confirms the assertion that the future of the takings doctrine lies in Justice Brennan's multi-factor balancing, not in Justice Scalia's absolutism.96

94 See supra text following notes 65, 86.
95 See supra text accompanying note 63.
96 See supra text following note 80.