PALAZZOLO v. RHODE ISLAND

___ U. S. ___ , 121 S. Ct. 2448, 69 U.S.L.W. 4605 (2001)

Map of Site

JUSTICE KENNEDY delivered the opinion of the Court.

I

[Anthony Palazzolo owns approximately 20 acres in Westerly, Rhode Island, consisting primarily of wetlands with a small amount of upland area. The land was purchased in 1959 by a corporation that Palazzolo controlled as sole shareholder, but in 1978 title passed to him personally when the corporation was dissolved for non-payment of taxes. In 1971, while ownership was in corporate form, Rhode Island enacted legislation regulating wetlands. The effect of this, the state conceded before the Supreme Court, was to make it impossible to build on the wetlands portion of Mr. Palazzolo's property. In 1983 and 1985, two development applications presented by Palazzolo were denied under the wetlands statute, one to fill all of the wetlands without stating the subsequent use for the filled land, and the other to create an 11-acre "beach club" within the tidelands. After the 1985 denial, Mr. Palazzolo brought an inverse condemnation action, relying on *Lucas* and claiming the loss of $3,150,000, based on a hypothetical 74-unit subdivision of the site. The state Supreme Court ruled that Palazzolo's claim was not ripe under *Williamson County* (5th edition, page 158), and that in any event he had no right to challenge regulations predating 1978, when he succeeded to legal ownership of the property from the predecessor corporation.]

II

The Takings Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, prohibits the government from taking private property for public use without just compensation. The clearest sort of taking occurs when the government encroaches upon or occupies private land for its own proposed use. Our cases establish that even a minimal "permanent physical occupation of real property" requires compensation under the Clause. *Loretto*. In *Pennsylvania Coal Co. v. Mahon*, the Court recognized that there will be instances when government actions do not encroach upon or occupy the property

yet still affect and limit its use to such an extent that a taking occurs. In Justice Holmes' well-known, if less than self-defining, formulation, "while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking."

Since *Mahon*, we have given some, but not too specific, guidance to courts confronted with deciding whether a particular government action goes too far and effects a regulatory taking. First, we have observed, with certain qualifications, that a regulation which "denies all economically beneficial or productive use of land" will require compensation under the Takings Clause. *Lucas*; see also *id*. (Kennedy, J., concurring); *Agins v. City of Tiburon*. Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action. *Penn Central*. These inquiries are informed by the purpose of the Takings Clause, which is to prevent the government from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. U. S.*.

Petitioner seeks compensation under these principles. At the outset, however, we face the two threshold considerations invoked by the state court to bar the claim: ripeness, and acquisition which postdates the regulation.

A

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The central question in resolving the ripeness issue, under *Williamson County* and other relevant decisions, is whether petitioner obtained a final decision from the Council determining the permitted use for the land. . . . The [R.I..] court reasoned that, notwithstanding the Council's denials of the applications, doubt remained as to the extent of development the Council would allow on petitioner's parcel. We cannot agree.

The court based its holding in part upon petitioner's failure to explore "any other use for the property that would involve filling substantially less wetlands." 746 A.2d at 714. It relied upon this Court's observations that the final decision requirement is not satisfied when a developer submits, and a land use authority denies, a grandiose development proposal, leaving open the possibility that lesser uses of the property might be permitted. See *MacDonald,* [*Sommer &*

Frates]. The suggestion is that while the Council rejected petitioner's effort to fill all of the wetlands, and then rejected his proposal to fill 11 of the wetland acres, perhaps an application to fill (for instance) 5 acres would have been approved. Thus, the reasoning goes, we cannot know for sure the extent of permitted development on petitioner's wetlands.

This is belied by the unequivocal nature of the wetland regulations at issue and by the Council's application of the regulations to the subject property. Winnapaug Pond is classified under the [regulations] as a Type 2 body of water. A landowner, as a general rule, is prohibited from filling or building residential structures on wetlands adjacent to Type 2 waters, but may seek a special exception from the Council to engage in a prohibited use. The Council is permitted to allow the exception, however, only where a "compelling public purpose" is served. The proposal to fill the entire property was not accepted under Council regulations and did not qualify for the special exception. The Council determined the use proposed in the second application (the beach club) did not satisfy the "compelling public purpose" standard. There is no indication the Council would have accepted the application had petitioner's proposed beach club occupied a smaller surface area. To the contrary, it ruled that the proposed activity was not a "compelling public purpose."

Williamson County's final decision requirement "responds to the high degree of discretion characteristically possessed by land-use boards in softening the strictures of the general regulations they administer." *Suitum*. While a landowner must give a land-use authority an opportunity to exercise its discretion, once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened. . . . With respect to the wetlands on petitioner's property, the Council's decisions make plain that the agency interpreted its regulations to bar petitioner from engaging in any filling or development activity on the wetlands, a fact reinforced by the Attorney General's forthright responses to our questioning during oral argument in this case. See Tr. of Oral Arg. 26, 31. The rulings of the Council interpreting the regulations at issue, and the briefs, arguments, and candid statements by counsel for both sides, leave no doubt on this point: On the wetlands there can be no fill for any ordinary land use. There can be no fill for its own sake; no fill for a beach club, either rustic or upscale; no fill for a subdivision; no fill for any likely or foreseeable use. And with no fill there can be no structures and no development on the wetlands. Further permit applications were not necessary to establish this point.

As noted above, however, not all of petitioner's parcel constitutes protected wetlands. The trial court accepted uncontested testimony that an upland site located at the eastern end of the property would have an estimated value of $ 200,000 if developed. While Council approval is required to develop upland property which lies within 200 feet of protected waters, the strict "compelling public purpose" test does not govern proposed land uses on property in this classification. Council officials testified at trial, moreover, that they would have allowed petitioner to build a residence on the upland parcel.. The State Supreme Court found petitioner's claim unripe for the further reason that he "has not sought permission for any . . . use of the property that would involve . . . development only of the upland portion of the parcel." 746 A.2d at 714.

In assessing the significance of petitioner's failure to submit applications to develop the upland area it is important to bear in mind the purpose that the final decision requirement serves. Our ripeness jurisprudence imposes obligations on landowners because "[a] court cannot determine whether a regulation goes 'too far' unless it knows how far the regulation goes." *MacDonald.* Ripeness doctrine does not require a landowner to submit applications for their own sake. Petitioner is required to explore development opportunities on his upland parcel only if there is uncertainty as to the land's permitted use.

The State asserts the value of the uplands is in doubt. It relies in part on a comment in the opinion of the Rhode Island Supreme Court that "it would be possible to build at least one single-family home on the upland portion of the parcel." 746 A.2d at 714. It argues that the qualification "at least" indicates that additional development beyond the single dwelling was possible. The attempt to interject ambiguity as to the value or use of the uplands, however, comes too late in the day for purposes of litigation before this Court. It was stated in the petition for certiorari that the uplands on petitioner's property had an estimated worth of $200,000. The figure not only was uncontested but also was cited as fact in the State's brief in opposition. In this circumstance ripeness cannot be contested by saying that the value of the nonwetland parcels is unknown. See *Lucas*. [Justice Kennedy refused to consider testimony about a second upland parcel because it was an "island" which required construction of a road across wetlands, for which Justice Kennedy concluded that a special exception would not be permitted.]

Nonetheless, there is some suggestion that the use permitted on the uplands is not known, because the State accepted the $200,000 value for the upland parcel on the premise that only a *Lucas* claim was raised in the pleadings in the state trial court. Since a *Penn Central* argument was not pressed at trial, it is argued, the

State had no reason to assert with vigor that more than a single-family residence might be placed on the uplands. We disagree; the State was aware of the applicability of *Penn Central*. The issue whether the Council's decisions amounted to a taking under *Penn Central* was discussed in the trial court, the State Supreme Court, and the State's own
post-trial submissions. The state court opinions cannot be read as indicating that a *Penn Central* claim was not properly presented from the outset of this litigation.

A final ripeness issue remains. In concluding that *Williamson County*'s final decision requirement was not satisfied the State Supreme Court placed emphasis on petitioner's failure to "apply for permission to develop[the] seventy-four-lot subdivision" that was the basis for the damages sought in his inverse condemnation suit. 746 A.2d at 714. The court did not explain why it thought this fact significant, but respondents and amici defend the ruling. The Council's practice, they assert, is to consider a proposal only if the applicant has satisfied all other regulatory preconditions for the use envisioned in the application. The subdivision proposal that was the basis for petitioner's takings claim, they add, could not have proceeded before the Council without, at minimum, zoning approval from the town of Westerly and a permit from the Rhode Island Department of Environmental Management allowing the installation of individual sewage disposal systems on the property. Petitioner is accused of employing a hide the ball strategy of submitting applications for more modest uses to the Council, only to assert later a takings action predicated on the purported inability to build a much larger project.

It is difficult to see how this concern is relevant to the inquiry at issue here. Petitioner was informed by the Council that he could not fill the wetlands; it follows of necessity that he could not fill and then build 74 single-family dwellings upon it. Petitioner's submission of this proposal would not have clarified the extent of development permitted by the wetlands regulations, which is the inquiry required under our ripeness decisions. The State's concern may be that landowners could demand damages for a taking based on a project that could not have been constructed under other, valid zoning restrictions quite apart from the regulation being challenged. This, of course, is a valid concern in inverse condemnation cases alleging injury from wrongful refusal to permit development. The instant case does not require us to pass upon the authority of a state to insist in such cases that landowners follow normal planning procedures or to enact rules to control damage awards based on hypothetical uses that should have been reviewed in the normal course, and we do not intend to cast doubt upon such rules here. The 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. When a taking has occurred, under accepted condemnation principles the owner's damages will be based upon the property's fair market value, [citations omitted] – an inquiry which will turn, in part, on restrictions on use imposed by legitimate zoning or other regulatory limitations.

The state court, however, did not rely upon state law ripeness or exhaustion principles in holding that petitioner's takings claim was barred by virtue of his failure to apply for a 74-lot subdivision; it relied on *Williamson County*. As we have explained, *Williamson County* and our other ripeness decisions do not impose further obligations on petitioner, for the limitations the wetland regulations imposed were clear from the Council's denial of his applications, and there is no indication that any use involving any substantial structures or improvements would have been allowed. Where the state agency charged with enforcing a challenged land use regulation entertains an application from an owner and its denial of the application makes clear the extent of development permitted, and neither the agency nor a reviewing state court has cited non-compliance with reasonable state law exhaustion or pre-permit processes, federal ripeness rules do not require the submission of further and futile applications with other agencies.

B

We turn to the second asserted basis for declining to address petitioner's takings claim on the merits. When the Council promulgated its wetlands regulations, the disputed parcel was owned not by petitioner but by the corporation of which he was sole shareholder. When title was transferred to petitioner by operation of law, the wetlands regulations were in force. The state court held the postregulation acquisition of title was fatal to the claim for deprivation of all economic use, 746 A.2d at 716, and to the *Penn Central* claim, id. at 717. While the first holding was couched in terms of background principles of state property law, see *Lucas*, and the second in terms of petitioner's reasonable investment-backed expectations, see *Penn Central*, the two holdings together amount to a single, sweeping, rule: A purchaser or a successive title holder like petitioner is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking.

The theory underlying the argument that post-enactment purchasers cannot challenge a regulation under the Takings Clause seems to run on these lines: Property rights are created by the State. See, e.g., *Phillips v. Washington Legal Foundation*, 524 U.S. 156(1998). So, the argument goes, by prospective legislation

the State can shape and define property rights and reasonable investment-backed expectations, and subsequent owners cannot claim any injury from lost value. After all, they purchased or took title with notice of the limitation.

The State may not put so potent a Hobbesian stick into the Lockean bundle. The right to improve property, of course, is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions. *Pennsylvania Coal* ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law"). The Takings Clause, however, in certain circumstances allows a landowner to assert that a particular exercise of the State's regulatory power is so unreasonable or onerous as to compel compensation. Just as a prospective enactment, such as a new zoning ordinance, can limit the value of land without effecting a taking because it can be understood as reasonable by all concerned, other enactments are unreasonable and do not become less so through passage of time or title. Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.

Nor does the justification of notice take into account the effect on owners at the time of enactment, who are prejudiced as well. Should an owner attempt to challenge a new regulation, but not survive the process of ripening his or her claim (which, as this case demonstrates, will often take years), under the proposed rule the right to compensation may not by asserted by an heir or successor, and so may not be asserted at all. The State's rule would work a critical alteration to the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest which was possessed prior to the regulation. The State may not by this means secure a windfall for itself. [citations omitted.] The proposed rule is, furthermore, capricious in effect. The young owner contrasted with the older owner, the owner with the resources to hold contrasted with the owner with the need to sell, would be in different positions. The Takings Clause is not so quixotic. A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken.

. . .

There is controlling precedent for our conclusion. *Nollan* presented the question whether it was consistent with the Takings Clause for a state regulatory

agency to require oceanfront landowners to provide lateral beach access to the public as the condition for a development permit. The principal dissenting opinion observed it was a policy of the California Coastal Commission to require the condition, and that the Nollans, who purchased their home after the policy went into effect, were "on notice that new developments would be approved only if provisions were made for lateral beach access." (Brennan, J., dissenting). A majority of the Court rejected the proposition. "So long as the Commission could not have deprived the prior owners of the easement without compensating them," the Court reasoned, "the prior owners must be understood to have transferred their full property rights in conveying the lot." *Id.* at 834, n. 2.

It is argued that *Nollan*'s holding was limited by the later decision in *Lucas*. . . . It is
asserted here that *Lucas* stands for the proposition that any new regulation, once enacted, becomes a background principle of property law which cannot be challenged by those who acquire title after the enactment.

We have no occasion to consider the precise circumstances when a legislative enactment can be deemed a background principle of state law or whether those circumstances are present here. It suffices to say that a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title. This relative standard would be incompatible with our description of the concept in *Lucas*, which is explained in terms of those common, shared understandings of permissible limitations derived from a State's legal tradition. A regulation or common-law rule cannot be a background principle for some owners but not for others. The determination whether an existing, general law can limit all economic use of property must turn on objective factors, such as the nature of the land use proscribed. See *Lucas* at 1030 ("The 'total taking' inquiry we require today will ordinarily entail . . . analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities"). A law does not become a background principle for subsequent owners by enactment itself. *Lucas* did not overrule our holding in *Nollan*, which, as we have noted, is based on essential Takings Clause principles.

For reasons we discuss next, the state court will not find it necessary to explore these matters on remand in connection with the claim that all economic use was deprived; it must address, however, the merits of petitioner's claim under *Penn Central*. That claim is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction.

III

As the case is ripe, and as the date of transfer of title does not bar petitioner's takings claim, we have before us the alternative ground relied upon by the Rhode Island Supreme Court in ruling upon the merits of the takings claims. It held that all economically beneficial use was not deprived because the uplands portion of the property can still be improved. On this point, we agree with the court's decision. Petitioner accepts the Council's contention and the state trial court's finding that his parcel retains $ 200,000 in development value under the State's wetlands regulations. He asserts, nonetheless, that he has suffered a total taking and contends the Council cannot sidestep the holding in Lucas "by the simple expedient of leaving a landowner a few crumbs of value."

Assuming a taking is otherwise established, a State may not evade the duty to compensate on the premise that the landowner is left with a token interest. This is not the situation of the landowner in this case, however. A regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property "economically idle." *Lucas* at 1019.

In his brief submitted to us petitioner attempts to revive this part of his claim by reframing it. He argues, for the first time, that the upland parcel is distinct from the wetlands portions, so he should be permitted to assert a deprivation limited to the latter. This contention asks us to examine the difficult, persisting question of what is the proper denominator in the takings fraction. See Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation Law," 80 Harv. L. Rev. 1165, 1192 (1967). Someof our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole, see, e.g., *Keystone Bituminous*; but we have at times expressed discomfort with the logic of this rule, see *Lucas* at 1016-1017, n. 7, a sentiment echoed by some commentators, see, e.g., Epstein, Takings: Descent and Resurrection, 1987 Sup. Ct. Rev. 1, 16-17 (1987); Fee, Unearthing the Denominator in Regulatory Takings Claims, 61 U. Chi. L. Rev. 1535 (1994). Whatever the merits of these criticisms, we will not explore the point here. Petitioner did not press the argument in the state courts, and the issue was not presented in the petition for certiorari. The case comes to us on the premise that petitioner's entire parcel serves as the basis for his takings claim, and, so framed, the total deprivation argument fails.

. . .

The judgment of the Rhode Island Supreme Court is affirmed in part and reversed in part, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

O'CONNOR, J., concurring.

I join the opinion of the Court but with my understanding of how the issues discussed in Part II-B of the opinion must be considered on remand.

. . .

The Rhode Island Supreme Court concluded that, because the wetlands regulations predated petitioner's acquisition of the property at issue, petitioner lacked reasonable investment-backed expectations and hence lacked a viable takings claim. 746 A.2d 707, 717 (2000). The court erred in elevating what it believed to be "[petitioner's] lack of reasonable investment-backed expectations" to "dispositive" status. Ibid. Investment-backed expectations, though important, are not talismanic under Penn Central. Evaluation of the degree of interference with investment-backed expectations instead is one factor that points toward the answer to the question whether the application of a particular regulation to particular property "goes too far." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415, 67 L. Ed. 322, 43 S. Ct. 158 (1922).

Further, the state of regulatory affairs at the time of acquisition is not the only factor that may determine the extent of investment-backed expectations. For example, the nature and extent of permitted development under the regulatory regime vis-a-vis the development sought by the claimant may also shape legitimate expectations without vesting any kind of development right in the property owner. We also have never held that a takings claim is defeated simply on account of the lack of a personal financial investment by a postenactment acquirer of property, such as a donee, heir, or devisee. Cf. Hodel v. Irving, 481 U.S. 704, 714-718, 95 L. Ed. 2d 668, 107 S. Ct. 2076 (1987). Courts instead must attend to those circumstances which are probative of what fairness requires in a given case.

If investment-backed expectations are given exclusive significance in the Penn Central analysis and existing regulations dictate the reasonableness of those expectations in every instance, then the State wields far too much power to redefine property rights upon passage of title. On the other hand, if existing regulations do nothing to inform the analysis, then some property owners may reap windfalls and an important indicium of fairness is lost.[1] As I understand it, our

decision today does not remove the regulatory backdrop against which an owner takes title to property from the purview of the Penn Central inquiry. It simply restores balance to that inquiry. Courts properly consider the effect of existing regulations under the rubric of investment-backed expectations in determining whether a compensable taking has occurred. As before, the salience of these facts cannot be reduced to any "set formula." Penn Central, 438 U.S. at 124 (internal quotation marks omitted). The temptation to adopt what amount to per se rules in either direction must be resisted. The Takings Clause requires careful examination and weighing of all the relevant circumstances in this context. The court below therefore must consider on remand the array of relevant factors under Penn Central before deciding whether any compensation is due.

JUSTICE SCALIA, concurring.

I write separately to make clear that my understanding of how the issues discussed in Part II-B of the Court's opinion must be considered on remand is not Justice O'connor's.

The principle that underlies her separate concurrence is that it may in some (unspecified) circumstances be "unfai[r]," and produce unacceptable "windfalls," to allow a subsequent purchaser to nullify an unconstitutional partial taking (though, inexplicably, not an unconstitutional total taking) by the government. The polar horrible, presumably, is the situation in which a sharp real estate developer, realizing (or indeed, simply gambling on) the unconstitutional excessiveness of a development restriction that a naive landowner assumes to be valid, purchases property at what it would be worth subject to the restriction, and then develops it to its full value (or resells it at its full value) after getting the unconstitutional restriction invalidated.

This can, I suppose, be called a windfall – though it is not much different from the windfalls that occur every day at stock exchanges or antique auctions, where the knowledgeable (or the venturesome) profit at the expense of the ignorant (or the risk averse). There is something to be said (though in my view not much) for pursuing abstract "fairness" by requiring part or all of that windfall to be returned to the naive original owner, who presumably is the "rightful" owner of it. But there is nothing to be said for giving it instead to the government – which not only did not lose something it owned, but is both the cause of the miscarriage of "fairness" and the only one of the three parties involved in the miscarriage (government, naive original owner, and sharp real estate developer) which acted unlawfully – indeed unconstitutionally. Justice O'connor would eliminate the windfall by giving the malefactor the benefit of its malefaction. It is rather like

eliminating the windfall that accrued to a purchaser who bought property at a bargain rate from a thief clothed with the indicia of title, by making him turn over the "unjust" profit to the thief.[2]

In my view, the fact that a restriction existed at the time the purchaser took title (other than a restriction forming part of the "background principles of the State's law of property and nuisance," *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992)) should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking. The "investment-backed expectations" that the law will take into account do not include the assumed validity of a restriction that in fact deprives property of so much of its value as to be unconstitutional. Which is to say that a *Penn Central* taking, no less than a total taking, is not absolved by the transfer of title.

JUSTICE GINSBURG, dissenting.

[She reviewed the record at length.] The ambiguities in the record thus are substantial. They persist in part because their resolution was not required to address the claim Palazzolo presented below, and in part because Palazzolo failed ever to submit an accurate survey of his property. Under the circumstances, I would not step into the role of supreme topographical factfinder to resolve ambiguities in Palazzolo's favor. Instead, I would look to, and rely on, the opinion of the state court whose decision we now review. That opinion states: "There was undisputed evidence in the record that it would be possible to build *at least* one single-family home on the existing upland area." 746 A.2d at 714 (emphasis added). This Court cites nothing to warrant amendment of that finding.[3]

In sum, as I see this case, we still do not know "the nature and extent of permitted development" under the regulation in question, *MacDonald*, 477 U.S. at 351. I would therefore affirm the Rhode Island Supreme Court's judgment.

JUSTICE BREYER, dissenting.

I agree with Justice Ginsburg that Palazzolo's takings claim is not ripe for adjudication, and I join her opinion in full. Ordinarily I would go no further. But because the Court holds the takings claim to be ripe and goes on to address some important issues of substantive takings law, I add that, given this Court's precedents, I would agree with Justice O'Connor that the simple fact that a piece of property has changed hands (for example, by inheritance) does not always and automatically bar a takings claim. Here, for example, without in any way suggesting that Palazzolo has any valid takings claim, I believe his postregulatory

acquisition of the property (through automatic operation of law) by itself should not prove dispositive.

As Justice O'connor explains, under *Penn Central*, much depends upon whether, or how, the timing and circumstances of a change of ownership affect whatever reasonable investment-backed expectations might otherwise exist. Ordinarily, such expectations will diminish in force and significance – rapidly and dramatically – as property continues to change hands over time. I believe that such factors can adequately be taken into account within the *Penn Central* framework.

Several *amici* have warned that to allow complete regulatory takings claims, see *Lucas*, to survive changes in land ownership could allow property owners to manufacture such claims by strategically transferring property until only a nonusable portion remains. But I do not see how a constitutional provision concerned with "'fairness and justice,'" *Penn Central* at 123-124 (quoting *Armstrong*) could reward any such strategic behavior.

JUSTICE STEVENS, concurring in part and dissenting in part.

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II

Much of the difficulty of this case stems from genuine confusion as to when the taking Palazzolo alleges actually occurred. According to Palazzolo's theory of the case, the owners of his Westerly, Rhode Island, property possessed the right to fill the wetland portion of the property at some point in the not-too-distant past. In 1971, the State of Rhode Island passed a statute creating the Rhode Island Coastal Resources Management Council (Council) and delegating the Council the authority to promulgate regulations restricting the usage of coastal land. The Council promptly adopted regulations that, *inter alia*, effectively foreclosed petitioner from filling his wetlands. . . .

The most natural reading of petitioner's complaint is that the regulations in and of themselves precluded him from filling the wetlands, and that their adoption therefore constituted the alleged taking. This reading is consistent with the Court's analysis in Part II-A of its opinion (which I join) in which the Court explains that petitioner's takings claims are ripe for decision because respondents' wetlands regulations unequivocally provide that there can be "no fill for any likely or foreseeable use." If it is the regulations themselves of which petitioner complains, and if they did, in fact, diminish the value of his property, they did so when they were adopted.

To the extent that the adoption of the regulations constitute the challenged taking, petitioner is simply the wrong party to be bringing this action. If the regulations imposed a compensable injury on anyone, it was on the owner of the property at the moment the regulations were adopted. Given the trial court's finding that petitioner did not own the property at that time, in my judgment it is pellucidly clear that he has no standing to claim that the promulgation of the regulations constituted a taking of any part of the property that he subsequently acquired.

His lack of standing does not depend, as the Court seems to assume, on whether or not petitioner "is deemed to have notice of an earlier-enacted restriction." If those early regulations changed the character of the owner's title to the property, thereby diminishing its value, petitioner acquired only the net value that remained after that diminishment occurred. Of course, if, as respondent contends, even the prior owner never had any right to fill wetlands, there never was a basis for the alleged takings claim in the first place. But accepting petitioner's theory of the case, he has no standing to complain that preacquisition events may have reduced the value of the property that he acquired. If the regulations are invalid, either because improper procedures were followed when they were adopted, or because they have somehow gone "too far," *Pennsylvania Coal Co. v. Mahon*, petitioner may seek to enjoin their enforcement, but he has no right to recover compensation for the value of property taken from someone else. A new owner may maintain an ejectment action against a trespasser who has lodged himself in the owner's orchard but surely could not recover damages for fruit a trespasser spirited from the orchard before he acquired the property.

The Court's holding in *Nollan* is fully consistent with this analysis. In that case the taking occurred when the state agency compelled the petitioners to provide an easement of public access to the beach as a condition for a development permit. That event – a compelled transfer of an interest in property – occurred after the petitioners had become the owner of the property and unquestionably diminished the value of petitioners' property. Even though they had notice when they bought the property that such a taking might occur, they never contended that any action taken by the State before their purchase gave rise to any right to compensation. The matter of standing to assert a claim for just compensation is determined by the impact of the event that is alleged to have amounted to a taking rather than the sort of notice that a purchaser may or may not have received when the property was transferred. Petitioners in *Nollan* owned the property at the time of the triggering event. Therefore, they and they alone could claim a right to

compensation for the injury.[4] Their successors in interest, like petitioner in this case, have no standing to bring such a claim.

NOTES AND QUESTIONS

1. *Doctrinal background.* Justice Kennedy's "boilerplate" summary of regulatory takings doctrine is noteworthy despite its brevity. The more regulation-friendly balancing test of the *Penn Central* case, eclipsed in recent years first by *Agins* and later by the *per se* rule of *Lucas*, has been brought to center stage again. *Agins*, which harkened back to substantive due process with its "legitimate state interest" language, see 5th edition at page 118, is ignored altogether, except for an exchange of footnotes between Justices O'Connor and Scalia. (Who has the better of that volley?) Additionally, Justice Kennedy describes *Lucas* as subject to "qualifications," citing his own concurring opinion in *Lucas*, which uses wetlands regulation as an example, and Justice O'Connor also cautions against the "temptation" to rely on *per se* tests.

2. *Ripeness.* Is the majority's analysis of ripeness consistent with either the letter or the spirit of the *Williamson County* line of cases (5th edition, pages 157-169)? Note that in the earlier cases, ripeness analysis usually served to prevent the Supreme Court from reaching the merits, whereas in *Palazzolo* the opposite is true. Note also that, in *Palazzolo*, the majority relies almost exclusively on pleading rules rather than a substantive review of the entire record to determine ripeness. (The state, for instance, is held to have conceded the extent of developable uplands because it failed to object to petitioner's assertions in the petition for certiorari.) What is the underlying purpose of the strict ripeness rules established by *Williamson County*? (Recall that these rules apply only in takings cases.) Is that purpose relevant after *Palazzolo*?

3. *Pleading and practice.* If *Palazzolo* were to be relitigated from the beginning, knowing now how the majority would analyze ripeness, could the state prevail on the same facts by pleading differently or by making a more careful record? In pleading as it did, the state was apparently trying to avoid a fatal concession on the *per se* theory of *Lucas*? Should the state have anticipated the *Penn Central* claim more aggressively?

4. *Choice of theory.* In an omitted part of her dissent, Justice Ginsburg reveals that petitioner was "aided by new counsel" before the Supreme Court, and she refers caustically to the appellate theory of the case as "bait and switch." Why didn't Mr. Palazzolo rely more explicitly on *Penn Central* in the initial complaint? Could he

have won on a *Penn Central* theory? Can he on remand? One of appellate counsel's new strategies was to argue that the 18 acres of wetlands were a distinct parcel that had been "totally taken" under *Lucas.* See Note 9 below. Before the Supreme Court, Mr. Palazzolo was represented by the Pacific Legal Foundation, a property-rights advocacy organization that has handled a number of significant takings cases, including *Lucas.*

5. *Measure of compensation*. Review *Williamson County*, which establishes two tests for ripeness, finality and pursuit of a state compensation remedy. Why wasn't Mr. Palazzolo's failure to pursue the 74-unit subdivision relevant to whether the state made compensation available? Suppose, for instance, that Westerly, R.I., had zoned the property for a density of one dwelling unit per 20 acres, and could properly have turned down the 74-unit application on that basis. (Compare the *Gardner* case, 5th edition at page 727.) Is it consistent with *Williamson County* to treat the state as having "waived" that review? Will the Court now hold the state to have conceded that the measure of compensation is $3.2 million, should a taking be found?

6. *Ripeness and standing*. Justice Stevens, characteristically, offers his own distinctive analysis, which none of the other justices joins. Is it logically possible to allow subsequent owners to enjoin a statute that "takes" their property but deny them compensation for that unconstitutional act? Justice Stevens in effect relies on market pricing, while Justice Scalia indirectly counters with a market failure rationale. Who has the better of it?

7. *Transfer of title.* Although in the end ripeness occupied much of the Justices' attention, review was granted in the *Palazzolo* case primarily to test whether a takings claim survives sale of the property to a new owner, who purchases with knowledge of the burdensome regulation. How realistic is it to treat Mr. Palazzolo as a "new" owner, given his control of the corporation that was the prior owner? The theory that a takings claim is cut off traces back to both *Penn Central* and *Lucas*. Can you identify how? Is the majority correct to treat the *Nollan* footnote as controlling?

8. *Avoiding windfalls*. Does Justice O'Connor's qualification of the majority opinion contain any meaningful guidance about how change of ownership should affect the outcome? Is she stating the "holding" of the case on this issue? How should *Palazzolo* be decided on remand? Does the O'Connor analysis apply to *Lucas* cases as well, or only when a *Penn Central* balance is to be struck? (Consider Justice Scalia's concurring opinion in this regard.) And is there an answer to Justice Scalia's observation that there is no meaningful difference

between making a “windfall” in a takings case and making a killing in the stock market, or at an auction house?

9. *The whole parcel rule.* Although the Justices agreed that Mr. Palazzolo could treat the wetlands as a separate parcel for *Lucas* purposes, not having raised the issue below, it is instructive to note the different tones taken by Justices Kennedy and Ginsburg. Justice Kennedy describes the issue as “difficult” and cites commentators who have expressed “discomfort” with the “whole parcel” approach. Justice Ginsburg, by contrast, describes the “separate parcel” theory as “in tension with numerous holdings of this court.” Justice Breyer also fires a warning shot that manipulation of title to sculpt a sub-parcel for purposes of a *Lucas* claim would call into question the legitimacy of the owner’s investment backed expectations. The battle lines seem to be forming.

[1] Justice Scalia's inapt “government-as-thief” simile is symptomatic of the larger failing of his opinion, which is that he appears to conflate two questions. The first question is whether the enactment or application of a regulation constitutes a valid exercise of the police power. The second question is whether the State must compensate a property owner for a diminution in value effected by the State's exercise of its police power. We have held that “"the ‘public use’ requirement [of the Takings Clause] is . . . coterminous with the scope of a sovereign's police powers.” *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984). The relative timing of regulatory enactment and title acquisition, of course, does not affect the analysis of whether a State has acted within the scope of these powers in the first place. That issue appears to be the one on which Justice Scalia focuses, but it is not the matter at hand. The relevant question instead is the second question described above. It is to this inquiry that “investment-backed expectations” and the state of regulatory affairs upon acquisition of title are relevant *under Penn Central*. Justice Scalia's approach therefore would seem to require a revision of the *Penn Central* analysis that this Court has not undertaken.

[2] Contrary to Justice O'connor's assertion, my contention of governmental wrongdoing does not assume that the government exceeded its police powers by ignoring the “public use” requirement of the Takings Clause, *see Hawaii Housing Authority v. Midkiff*. It is wrong for the government to take property, even for public use, without tendering just compensation.

[3] If Palazzolo's claim were ripe and the merits properly presented, I would, at a minimum, agree with Justice O'Connor, Justice Stevens, and Justice Breyer, that transfer of title can impair a takings claim.

[4] In cases such as *Nollan* – in which landowners have notice of a regulation when they purchase a piece of property but the regulatory event constituting the taking does not occur until after they take title to the property – I would treat the owners' notice as relevant to the evaluation of whether the regulation goes “too far,” but not necessarily dispositive. (See O'Connor, J., concurring).