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ON HISTORY, TAKINGS JURISPRUDENCE, AND *PALAZZOLO*: A REPLY TO JAMES BURLING

TIMOTHY J. DOWLING*

Abstract: The so-called property rights movement has hailed *Palazzolo v. Rhode Island* as a landmark win for landowners, a blockbuster breakthrough that will end “smart growth,” curtail other land use controls, and lead to manifold victories for claimants under the Takings Clause of the Fifth Amendment. James Burling’s piece on *Palazzolo* is more of the same, proclaiming the ruling to be a decisive win in an age-old, ideological battle. This Article shows that Burling’s take on the ruling is wishful thinking. He errs in his description of history, takings jurisprudence, and *Palazzolo*. *Palazzolo* is but a small, incremental development in the case law from which both takings claimants and defendants may draw support. The Court’s most recent takings ruling, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, reaffirms that the vast bulk of land use controls and other community protections do not implicate the Takings Clause.

Those who want skill to use those evidences they have of probabilities; who cannot carry a train of consequences in their heads; nor weigh exactly the preponderancy of contrary proofs and testimonies, making every circumstance its due allowance; may be easily misled to assent to positions that are not probable.¹

INTRODUCTION

In *Private Property Rights and the Environment After Palazzolo*,² James Burling commits three fundamental errors. He misreads history, misinterprets takings jurisprudence, and misapprehends the

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¹ 2 JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING bk. IV, ch. XX, § 5, at 299 (J.M. Dent & Sons Ltd. 1961) (1690).

² 30 B.C. ENVTL. AFF. L. REV. 1 (2002).

meaning of *Palazzolo v. Rhode Island*.³ In this reply, I describe his three errors in turn.

Regarding *Palazzolo* in particular, Burling calls the ruling perhaps “the most significant skirmish” in an overarching ideological war.⁴ He concludes that *Palazzolo* has removed “some of the more pernicious governmental defenses to regulatory takings claims” and “injected new life in the doctrine of regulatory takings.”⁵ These dramatic characterizations are of a piece with similar assertions by Burling and his colleagues at Pacific Legal Foundation (PLF) at the time of the ruling, which proclaimed *Palazzolo* a “landmark victory” for landowners,⁶ predicted that smart growth is now “doomed,”⁷ and pontificated that “[t]he notice rule is dead, except in what remains of [Justice] Stevens’ mind.”⁸

The reaction to *Palazzolo* by Burling and his colleagues is plainly hyperbolic. As shown below, *Palazzolo* is not a major jurisprudential breakthrough in favor of takings claimants, but instead yet another modest, incremental development in takings case law. Indeed, there is much good news for government officials in *Palazzolo*. For instance, the ruling emphatically reaffirms the Court’s ripeness precedent, which largely pays appropriate deference to the role of local officials in land-use planning. To be sure, the *Palazzolo* majority bends over backwards to resuscitate a claim that has no business being in court, falling victim to a bait-and-switch perpetrated by PLF.⁹ But it does not, as Burling argues, impose new requirements on government officials in the land-use negotiation process.¹⁰

Nor is the so-called notice rule dead. *Palazzolo*’s ruling on the timing of a claimant’s acquisition of property is quite narrow, rejecting only the absolute rule that acquisition prior to enactment of the

³ 533 U.S. 606 (2001).

⁴ Burling, *supra* note 2, at 3.

⁵ *Id.* at 62.

⁶ Press Release, Pacific Legal Foundation, Pacific Legal Foundation Scores Landmark Victory for Private Property Rights Advocates in the U.S. Supreme Court (June 28, 2001), available at http://pacificlegal.org/press_releases/pr-palazzolo.htm.

⁷ Paul Mulshine, *Supreme Court Decision Changes a Lot*, STAR LEDGER (N.J.), July 3, 2001, at 21 (quoting Burling as saying that “smart growth is dumb takings” and “incompatible” with constitutional protections for property rights).

⁸ This churlish comment was made in a June 29, 2001 email communication by PLF attorney R.S. Radford on a public listserv moderated by the State and Local Government Section of the American Bar Association (copy on file with author).

⁹ *Palazzolo v. Rhode Island*, 533 U.S. 606, 646–48 (2001) (Ginsburg, Souter & Breyer, JJ., dissenting).

¹⁰ See *infra* notes 147–155 and accompanying text.

challenged regulation *always* defeats takings liability.¹¹ At least five Justices agree that the timing of a claimant's acquisition of property is relevant to the analysis in most takings cases.¹² Moreover, *Palazzolo* clarifies that background principles of law that defeat takings claims include not just common law nuisance principles, but also positive laws, such as statutes and regulations, in appropriate circumstances.¹³

Palazzolo also unambiguously rejects the argument that per se liability attaches where regulation denies a landowner a reasonable return on investment.¹⁴ In fairness to Burling, it must be acknowledged that *Palazzolo* contains a brief and thoroughly confused discussion of the Court's parcel-as-a-whole rule, but because the Court just recently reaffirmed the rule,¹⁵ *Palazzolo's* vague dicta is not nearly as significant as Burling suggests.¹⁶

I. "THE TRADITIONAL AMERICAN VIEW" OF THE TAKINGS CLAUSE

Burling begins his article by attempting to cast *Palazzolo* as part of a vast philosophical battle between competing visions of property rights. One side of the debate is what Burling calls "the traditional American view," a view in which property rights and other individual rights are "sacrosanct over the needs of the group."¹⁷ The other side, Burling tells us, consists of those who suggest that this purported traditional view "is an anachronism in this Age of the Environment."¹⁸ This side of the debate, we are told, consists of new-fangled theorists (Professor Joseph Sax receives special mention) who use a riparian model to argue for "the adoption of a legal philosophy that would make the use and ownership of property subject to common consent."¹⁹ John Locke plays a central role in Burling's version of history,

¹¹ See *infra* notes 156–167 and accompanying text.

¹² See *infra* notes 168–176 and accompanying text.

¹³ See *infra* notes 180–185 and accompanying text.

¹⁴ See *infra* notes 190–197 and accompanying text.

¹⁵ See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 122 S. Ct. 1465, 1481 (2002) ("[E]ven though multiple factors are relevant in the analysis of regulatory takings claims, in such cases we must focus on 'the parcel as a whole.'"); *id.* at 1483–84.

¹⁶ See *infra* notes 211–234 and accompanying text.

¹⁷ Burling, *supra* note 2, at 2.

¹⁸ *Id.*

¹⁹ See *id.* at 2, 37, 38 n.226. Burling's description of Sax's work is, to say the least, simplistic. Sax's view of the Takings Clause is indisputably more accommodating of government protections in the public interest than Burling's, but Sax's writings do not espouse the absolutist philosophy that Burling attributes to him. For example, Sax recommends a plethora of government actions designed to reduce the impact of regulation on individual landowners, hardly the kind of recommendations one would expect from someone argu-

for it was Locke who first described property as predating sovereign power.²⁰ Because, in Burling's view, the Framers of the Constitution were "firmly predisposed" to Locke's philosophy,²¹ he suggests that "a vibrant Lockean tradition" compels an aggressive application of the Takings Clause to the regulation of private property in the public interest.²²

This description of the takings debate is a fairy-tale, for it has the relevant history exactly backwards. The "traditional" view of the Takings Clause—the view shared by the founding generation and the view that predominated for the first 130 years of our nation's history—was that the Clause does not extend to government regulation at all. The founding generation and several succeeding generations understood the Takings Clause as applying only to the appropriation or physical invasion of property. Justice Antonin Scalia, one of the Court's staunchest advocates of property rights, has noted that "early constitutional theorists did not believe that the Takings Clause embraced regulations of property at all."²³ In the words of Justice Scalia, "[p]rior to Justice Holmes's exposition in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), it was generally thought that the Takings Clause reached only a 'direct appropriation' of property . . . or the functional equivalent of a 'practical ouster of [the owner's] possession.'"²⁴

Historical research overwhelmingly supports Justice Scalia's assertions in this regard.²⁵ So do the Court's rulings prior to *Mahon*. In

ing that the use and ownership of property is subject to common consent. See Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433, 1450–51 (1993). Sax also makes clear that he would "have no quarrel" with a rule requiring heightened judicial scrutiny where regulation deprives a landowner of all economic value. *Id.* at 1455. Elsewhere, Sax has argued for the payment of compensation to landowners under the Takings Clause where the government imposes undue regulatory burdens when acting in an entrepreneurial capacity. See generally Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964). A full rebuttal of Burling's mischaracterization of Sax's views is beyond the scope of this Article.

²⁰ See Burling, *supra* note 2, at 3–5, 40, 51, 62.

²¹ *Id.* at 3.

²² *Id.* at 5.

²³ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028 n.15 (1992).

²⁴ *Id.* at 1014 (citations omitted) (last alteration in original).

²⁵ See, e.g., FRED BOSSELMAN ET AL., *THE TAKING ISSUE: AN ANALYSIS OF THE CONSTITUTIONAL LIMITS OF LAND USE CONTROLS* 105–23 (1973) (showing that the Takings Clause did not originally apply to land-use controls); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 782 (1995) (As originally understood, the Takings Clause "required compensation when the federal government physically took property, but not when government regulations limited the ways in which property could be used.").

the *Legal Tender Cases*, for instance, the Court explained that “[the Takings Clause] has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals.”²⁶ Nor is it correct to suggest that the Framers were uniformly, or even predominantly, predisposed to Locke’s views on property. In fact, the Framers’ views on property were very much a mixed bag. Benjamin Franklin, one of the few Framers who signed both the Declaration of Independence and the Constitution, asserted in unequivocal terms that property is created by the State and thus subject to extensive state control:

Private Property therefore is a Creature of Society, and is subject to the Calls of that Society, whenever its Necessities shall require it, even to its last Farthing; its Contributions therefore to the public Exigencies are not to be considered as conferring a Benefit on the Publick, entitling the Contributors to the Distinctions of Honour and Power, but as the Return of an Obligation previously received, or the Payment of a just Debt.²⁷

Franklin’s views on property evidence the emerging consensus among historians that both republican and liberal ideas, i.e., Lockean as well as Hobbesian philosophy and other competing worldviews, had a profound influence on the Framers. After a survey of the relevant authorities, one scholar recently concluded that “[w]hile historians are sharply divided on a host of interpretive matters concerning republicanism and liberalism in the revolutionary era and the first years of the early republic, there is now a near consensus that both republican and liberal ideas powerfully influenced American politics during the 1780s and 1790s.”²⁸

²⁶ *The Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551 (1870); *accord* *N. Transp. Co. v. City of Chicago*, 99 U.S. 635, 642 (1879) (“[A]cts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision.”).

²⁷ BENJAMIN FRANKLIN, *Queries and Remarks Respecting Alterations in the Constitution of Pennsylvania* (1789), in 10 *THE WRITINGS OF BENJAMIN FRANKLIN* 59 (Albert H. Smyth ed., 1970).

²⁸ Treanor, *supra* note 25, at 823; *see also* Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. ENVTL. AFF. L. REV. 509, 522 (1998) (citing authorities).

Moreover, Locke himself believed that private property rights could be exercised only “where there is enough and as good left in common for others.”²⁹ In other words, Locke’s theory of property recognized the right of each person to an equal share of property and precluded private acquisitions of property that deprived others of this right.³⁰ This severe limitation on the acquisition of property stemmed from Locke’s view that God originally gave all property to humankind to be held in common.³¹ Although Professor Richard Epstein relies on Locke to bolster his call for a breathtakingly expansive application of the Takings Clause,³² even Epstein recognizes that this key aspect of Locke’s philosophy is in severe tension with an aggressive theory of regulatory takings.³³ Epstein addresses this tension by “correct[ing]” Locke and discarding the notion of original ownership in common,³⁴ a correction that prompted one critic to write that “Locke himself . . . was insufficiently Lockean” for Epstein.³⁵ Burling, too, would have difficulty reconciling Locke’s views on property acquisition with a broad vision of the Takings Clause, but, unlike Epstein, Burling fails to acknowledge the issue.

Nor is it accurate to suggest that property rights were sacrosanct over the needs of the community in colonial America and the early years of our Republic. Both eras saw extensive land-use controls, none of which were considered to implicate the compensation requirement of the Takings Clause.³⁶ For instance, the Massachusetts Bay Colony prohibited dwellings from being located more than one-half mile

²⁹ JOHN LOCKE, *The Second Treatise of Civil Government* § 27, at 134, in *TWO TREATISES OF GOVERNMENT* (Thomas I. Cook ed., 1947) (1690).

³⁰ *See id.*

³¹ *Id.* §§ 25–27, at 133–34.

³² *See generally* RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985) (arguing for a reading of the Takings Clause and parallel clauses that “render[s] infirm or constitutionally suspect many of the heralded reforms and institutions of the twentieth century: zoning, rent control, workers’ compensation laws, transfer payments, progressive taxation”).

³³ *Id.* at 10–11 (acknowledging that Locke “did consider it a breach of duty for one person to take everything from the common pool, to the necessary exclusion of others” and “correct[ing]” Locke’s account).

³⁴ *Id.* at 11.

³⁵ *See* Charles Fried, *Protecting Property—Law and Politics*, 13 HARV. J.L. & PUB. POL’Y 44, 48–49 (1990). Professor Fried continued: “Professor Epstein is moved to complete not only the text of the Constitution by reference to the Lockean spirit, but Locke’s text itself.” *Id.* For an excellent discussion of the scholarly criticisms of Professor Epstein’s reading of the Takings Clause, see Kendall & Lord, *supra* note 28, at 520–28.

³⁶ *See* John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1257–59 (1996).

from town meeting houses without judicial approval.³⁷ Connecticut land-use controls limited not only the amount but also the sequence of new development, much as modern smart-growth initiatives seek to avoid “leapfrog development.”³⁸ These land-use restrictions during the colonial era were “so numerous and varied, so widely distributed, that they cannot be viewed as anomalous.”³⁹ Likewise, during the early years of our Republic, American legislatures extensively regulated land use.⁴⁰ Yet those who push for an expansive application of the Takings Clause have unearthed no evidence in the ratification debates or other founding documents to suggest that anyone in the founding generation contemplated application of the Takings Clause to these land-use controls.

Thus, the traditional view of the Takings Clause supports those who call for a restrained application of regulatory takings doctrine. The new-fangled theorists in the debate are those who push for a far more aggressive application of the Clause to land-use restrictions and other community protections.

II. THE SCOPE AND CONTENT OF MODERN REGULATORY TAKINGS JURISPRUDENCE

Burling’s broad outline of regulatory takings jurisprudence contains both general and specific errors. As a general matter, he asserts that “private property owners have been winning the debate before the United States Supreme Court”⁴¹ and suggests that lower courts are beginning to fall into line.⁴² It is not entirely clear what he means by the phrase “winning the debate,” but if he intends to suggest that takings jurisprudence is moving toward his vision of individual property rights as preeminent over the public interest, he is thoroughly mistaken.

Just as Burling fails to acknowledge that the narrow original meaning of the Takings Clause precluded application of the Clause to land-use controls, he does not appreciate how that narrow meaning

³⁷ *Id.* at 1273.

³⁸ *Id.* at 1274.

³⁹ *Id.* at 1281.

⁴⁰ John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 Nw. U. L. REV. 1099, 1100 (2000) (asserting that land use was extensively regulated “between the time America won its independence and the adoption of the property-protecting measures of the Constitution and the Bill of Rights”).

⁴¹ Burling, *supra* note 2, at 64.

⁴² Burling, *supra* note 2, at 4–5, 18–19.

continues to act as a severe restraint on modern regulatory takings jurisprudence, limiting application of the Clause to those rare situations in which regulation constitutes the functional equivalent of an appropriation of property. In the landmark *Mahon* decision, the Court found a taking only because the challenged restraint had “very nearly the same effect for constitutional purposes as appropriating or destroying” private property.⁴³ More recently, the Court has stated unequivocally that in regulatory takings cases, its task is “to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession.”⁴⁴ Not surprisingly, land-use regulation rarely rises to this level.⁴⁵ In establishing its two per se rules of takings liability, the Court used functional equivalency to appropriation as a benchmark.⁴⁶ It described those rules as “very narrow”⁴⁷ and as applying in only “extraordinary” circumstances.⁴⁸

The recent ruling in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*⁴⁹ confirms these basic precepts and shows that property owners are hardly winning any argument to the contrary. In *Tahoe-Sierra*, the Court emphasized the analytical divide between physical and regulatory takings,⁵⁰ observing that the distinction

⁴³ Pa. Coal Co. v. Mahon, 260 U.S. 393, 414 (1922). One scholar has made a compelling case that *Mahon* is not a takings case at all, but a due process case. See generally Robert Brauneis, “The Foundation of Our ‘Regulatory Takings’ Jurisprudence”: *The Myth and Meaning of Justice Holmes’s Opinion in Pennsylvania Coal Co. v. Mahon*, 106 YALE L.J. 613 (1996). It is indisputable that *Mahon* is widely viewed as having given birth to the doctrine of regulatory takings, and I do not challenge that view here.

⁴⁴ Williamson County Reg’l Planning Comm’n v. Hamilton Bank of Johnson City, 473 U.S. 172, 199 (1985).

⁴⁵ See United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126 (1985) (acknowledging that under “extreme circumstances,” “land use regulation may . . . amount to a ‘taking’”).

⁴⁶ See Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1017 (1992) (regulation that denies a landowner all economically viable use may be a per se taking because such land-use controls are “from the landowner’s point of view, the equivalent of a physical appropriation”); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 428 (1982) (citing Sanguinetti v. United States, 264 U.S. 146, 149 (1924), stating that physical occupations are per se takings where they “constitute an actual, permanent invasion of the land, amounting to an appropriation of, and not merely an injury to, the property”) (citation omitted).

⁴⁷ Loretto, 458 U.S. at 441.

⁴⁸ Lucas, 505 U.S. at 1017, 1018 (stating that a per se rule for regulation that denies all economically viable use applies only in “relatively rare” situations).

⁴⁹ 122 S. Ct. 1465 (2002).

⁵⁰ *Id.* at 1478–79.

flows directly from the text of the Takings Clause.⁵¹ It described regulatory takings as occurring where restrictions are “so severe that they are tantamount to a condemnation or appropriation.”⁵² And it rejected a takings challenge to a thirty-two-month moratorium, stressing the importance of careful land-use planning in protecting our communities from “inefficient and ill-conceived growth.”⁵³ *Tahoe-Sierra* stands as an emphatic reaffirmation that the vast bulk of land-use controls do not trigger the compensation requirement set forth in the Takings Clause.

As for the lower courts, Burling cites six cases to support his suggestion that landowners now are winning the takings debate in the courts and reaping substantial judgments in their favor. But all six cases involve rulings against the federal government by the U.S. Court of Appeals for the Federal Circuit, the U.S. Court of Federal Claims, or its predecessor, the U.S. Claims Court.⁵⁴ This exceedingly narrow focus is odd and distortive for three reasons. First, those on both sides of the takings debate view these courts as among the most politicized tribunals in the country on takings issues.⁵⁵ Second, these courts have no jurisdiction over state and local agencies,⁵⁶ the institutions that impose virtually all of our nation’s land-use controls. A review of state court rulings in takings cases in recent years shows that state and local officials continue to win the vast majority of regulatory takings cases, including many cases in which the challenged restriction was substantial.⁵⁷ Third, even if one focuses exclusively on takings claims against

⁵¹ *Id.* at 1478 (“The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings.”).

⁵² *Id.* at 1478 n.17.

⁵³ *Id.* at 1488.

⁵⁴ See Burling, *supra* note 2, at 18–19.

⁵⁵ Compare Kendall & Lord, *supra* note 28, at 533–38 (describing the establishment and politicization of these two courts), with James L. Huffman, *Judge Plager’s “Sea Change” in Regulatory Takings Law*, 6 FORDHAM ENVTL. L.J. 597, 599 (1995) (“[B]ecause the Federal Circuit was a new court in 1982, most of its members were appointed during the Reagan and Bush Administrations. Thus, there is somewhat more philosophical agreement among its members than there is on other Courts of Appeals.”), and W. John Moore, *Just Compensation*, NAT’L JURIST, June 13, 1992, at 1406 (quoting the libertarian Institute for Justice’s Clint Bolick as saying, “The Claims Court is a place where the Reagan and Bush Administrations have been able to place top-notch conservative judges without getting much attention. That is a result of liberals being somewhat asleep at the switch and the Administration’s being extremely sophisticated in their selection and placement of judges.”).

⁵⁶ See 28 U.S.C. §§ 1346, 1491 (2001).

⁵⁷ See, e.g., *Wash. Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835, 841 (9th Cir. 2001) (en banc) (rejecting takings challenge to Washington State’s “Interest on Lawyers’ Trust Account” Program), *cert. granted*, 122 S. Ct. 2355 (June 10, 2002) (No. 01-1325); *Dist.*

the federal government, from 1991 to 1997 courts found a taking in only thirty-one of 230 cases that resulted in a ruling on the merits (excluding cases dismissed on standing, ripeness, jurisdictional, or other procedural grounds)—hardly cause for celebration among the claimants' bar.⁵⁸ In fact, the so-called property rights movement elsewhere has argued that we need federal takings legislation precisely because landowners are losing the overwhelming majority of takings

Intown Props. Ltd. P'ship v. District of Columbia, 198 F.3d 874, 876–77 (D.C. Cir. 1999) (rejecting takings challenge to historic preservation protections); *Stern v. Halligan*, 158 F.3d 729, 734 n.7 (3d Cir. 1998) (rejecting takings challenge because challenged regulation did not result in “the total destruction of value”); *Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 286 n.5 (4th Cir. 1998) (rejecting takings challenge where regulation did not prevent recreational uses of the land such as camping or picnicking); *San Remo Hotel L.P. v. City of San Francisco*, 41 P.3d 87, 89 (Cal. 2002) (rejecting takings challenge to affordable-housing protections); *Animas Valley Sand & Gravel, Inc. v. Bd. of County Comm'rs of La Plata*, 38 P.3d 59, 65–66 (Colo. 2001) (en banc) (noting that per se takings liability may attach only where land is left valueless or with only *de minimis* value and non-per se liability only where regulation leaves a landowner with “value that is slightly greater than *de minimis*”); *State, Dep't of Envtl. Prot. v. Burgess*, 772 So. 2d 540, 543 (Fla. Dist. Ct. App. 2000) (rejecting takings challenge to development restrictions because land retained recreational uses), *review denied*, 791 So. 2d 1095 (Fla. 2001), *cert. denied*, 122 S. Ct. 615 (2001); *Wyer v. Bd. of Envtl. Prot.*, 747 A.2d 192, 193 (Me. 2000) (rejecting takings challenge to a variance denial under a sand dune protection law due to remaining recreational uses); *Karam v. State*, 723 A.2d 943 (N.J. 1999) (adopting the lower court's rejection of a takings challenge under the public trust doctrine), *aff'g* 705 A.2d 1221 (N.J. Super. Ct. App. Div. 1998); *R.W. Docks & Slips v. State*, 628 N.W.2d 781, 787–88 (Wis. 2001) (rejecting takings challenge to denial of permission to convert boat slips to private, condominium-style ownership, using the public trust doctrine), *cert. denied sub nom. R.W. Docks & Slips v. Wisconsin*, 122 S. Ct. 617 (2001); *Zealy v. City of Waukesha*, 548 N.W.2d 528, 529 (Wis. 1996) (rejecting takings challenge to wetland restrictions).

⁵⁸ See ROBERT MELTZ, CONGRESSIONAL RESEARCH SERV., COURT RULINGS DURING 1997 ON CONSTITUTIONAL TAKINGS CLAIMS AGAINST THE UNITED STATES 2 (1998). A review of last year's rulings from the Federal Circuit and the U.S. Court of Federal Claims shows that they continue to hand property owners many noteworthy defeats in takings cases. *E.g.*, *Bay View, Inc. v. United States*, 278 F.3d 1259 (Fed. Cir. 2001) (rejecting takings challenge to amendments to the Alaska Native Claims Settlement Act), *reh'g denied and reh'g en banc denied*, 285 F.3d 1035 (Fed. Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3021 (U.S. June 20, 2002); *Commonwealth Edison Co. v. United States*, 271 F.3d 1327 (Fed. Cir. 2001) (finding that legislation requiring the payment of money cannot give rise to a taking), *cert. denied*, 122 S. Ct. 2293 (2002); *Wyatt v. United States*, 271 F.3d 1090 (Fed. Cir. 2001) (rejecting takings challenge to mining regulations and associated delays), *cert. denied*, 122 S. Ct. 1960 (2002); *Rith Energy, Inc. v. United States*, 270 F.3d 1347 (Fed. Cir. 2001) (on petition for rehearing) (rejecting takings challenge to mining restrictions), *cert. denied*, 122 S. Ct. 2260 (2002); *Maritrans, Inc. v. United States*, 51 Fed. Cl. 277 (2001) (rejecting takings challenge to restrictions on oil tankers); *Walcek v. United States*, 49 Fed. Cl. 248 (2001) (rejecting takings challenge to wetland protections); *Banks v. United States*, 49 Fed. Cl. 806 (2001) (rejecting takings challenge to federal actions that allegedly eroded claimants' shoreline property); *Paradissiotis v. United States*, 49 Fed. Cl. 16 (2001) (rejecting takings challenge where federal foreign policy sanctions on Libya prohibited the exercise of claimant's stock options).

cases on procedural grounds.⁵⁹ Any suggestion that landowners are winning the takings debate in the courts is a victory of PLF's hope over reality.

When Burling turns to the specifics of regulatory takings jurisprudence, his analysis fares no better. His errors and oversimplifications are too numerous to explicate comprehensively, and so this reply focuses on two representative examples.

First, Burling tells us that a compensable taking occurs where land-use regulation fails to substantially advance a legitimate public interest, citing *Agins v. City of Tiburon*.⁶⁰ This substantially-advance standard is sometimes referred to as a means-end test because it requires a court to determine whether the legislatively chosen means adequately advance a legitimate end. In discussing this standard, Burling fails altogether to note that in recent years, five U.S. Supreme Court Justices expressly disavowed the *Agins* means-end test as an appropriate standard of takings liability,⁶¹ and every other member of the Court has written or joined opinions at least questioning its continued role in takings jurisprudence.⁶²

Second, Burling tells us that under *Lucas v. South Carolina Coastal Council*,⁶³ a taking occurs where regulation denies all economically

⁵⁹ See John Delaney & Duane Desiderio, *Who Will Clean Up the "Ripeness Mess"? A Call for Reform So Takings Plaintiffs Can Enter the Federal Courthouse*, 31 *URB. LAW.* 195, 196 (1999) (arguing that courts dismiss the vast majority of takings claims on procedural grounds).

⁶⁰ 447 U.S. 255 (1980).

⁶¹ See *E. Enters. v. Apfel*, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring in the judgment, dissenting in part) (observing that the *Agins* means-end test "is in uneasy tension with our basic understanding of the Takings Clause" and concluding that "the more appropriate constitutional analysis [for a means-end inquiry] arises under general due process principles rather than under the Takings Clause"); *id.* at 554 (Breyer, Stevens, Souter & Ginsburg, JJ., dissenting) (concluding that "the plurality views [the means-end inquiry in] this case through the wrong legal lens" because "at the heart of the [Takings] Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing *compensation* for legitimate government action that takes 'private property' to serve the 'public' good").

⁶² See *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 704 (1999) (acknowledging that the Court has never given "a thorough explanation of the nature or applicability" of the *Agins* means-end test, but declining to revisit the test because the city failed to challenge the standard in the lower courts); *id.* at 732 n.2 (Scalia, J., concurring in part, concurring in the judgment) ("express[ing] no view" as to the propriety of the *Agins* means-end test as a standard of takings liability); *id.* at 753 n.12 (Souter, O'Connor, Ginsburg & Breyer, JJ., concurring in part, dissenting in part) (offering no opinion as to "whether *Agins* was correct in assuming that this prong of liability was properly cognizable as flowing from the Just Compensation Clause of the Fifth Amendment, as distinct from the Due Process Clauses of the Fifth and Fourteenth Amendments").

⁶³ 505 U.S. 1003 (1992).

viable use of land unless it “merely codifies the existing ‘common law nuisance’ limitations on property.”⁶⁴ Here, Burling is referring to what the *Lucas* Court called the background-principles inquiry. The *Lucas* majority explained that no taking occurs where background principles of law “show[] that the proscribed use interests were not part of [the claimant’s] title to begin with.”⁶⁵ In other words, the claimant does not possess the property interest alleged to have been taken because the constraint “inhere[s] in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.”⁶⁶ Ever since *Lucas*, PLF and others who represent takings claimants have striven mightily to confine the background-principles inquiry to common law nuisance.⁶⁷ On this view, neither positive laws such as statutes and regulations nor non-nuisance common law doctrines, such as the public trust doctrine,⁶⁸ may constitute background principles that defeat takings liability.

This crabbed view of the background-principles defense is plainly contradicted by *Lucas* and other authorities.⁶⁹ *Lucas* describes background principles no less than four times as embracing not only nuisance law, but the full range of state property law.⁷⁰ Most of *Lucas*’s references to state property law are unqualified, i.e., without regard to whether that law is embodied in common law or statute.⁷¹ And *Lucas* specifically discusses a non-nuisance doctrine, the navigational servitude, as an example of a background principle that defeats takings

⁶⁴ Burling, *supra* note 2, at 13 (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029–30 (1992)).

⁶⁵ *Lucas*, 505 U.S. at 1027.

⁶⁶ *Id.* at 1029.

⁶⁷ E.g., Eric Grant, *Taking Scalia Seriously: A Conservative View of the Lucas “Background Principles” Exception*, 1 (paper delivered at the Oct. 28–29, 1999 Georgetown University Law Center Conference on Litigating Regulatory Takings Claims) (on file with author) (“[B]ackground principles are a static category of essentially nineteenth-century rules that prohibit landowners from imposing direct harm on the real and personal property of others, usually their neighbors.”); see Burling, *supra* note 2, at 13–14.

⁶⁸ See generally Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

⁶⁹ See *Lucas*, 505 U.S. at 1029; see also, e.g., *Rith Energy, Inc. v. United States*, 247 F.3d 1355 (Fed. Cir. 2001), *reh’g denied and reh’g en banc denied*, 270 F.3d 1347 (Fed. Cir. 2001), *cert. denied*, 122 S. Ct. 2660 (2002); *Keshbro, Inc. v. City of Miami*, 801 So. 2d 864 (Fla. 2001).

⁷⁰ See *Lucas*, 505 U.S. at 1029, 1030, 1031 (referring to the “background principles of the State’s law of property and nuisance”).

⁷¹ *Id.*

liability.⁷² Moreover, in noting that property interests generally are defined by state law, *Lucas* relies on *Board of Regents of State Colleges v. Roth*,⁷³ which recognized that state statutes, rules, and other sources of state law define property interests.⁷⁴ Thus, *Lucas* provides strong support for the argument that the background-principles defense extends beyond common law nuisance, and lower courts have been quite expansive in their application of the defense to statutes, regulations, and non-nuisance common-law doctrines.⁷⁵ As discussed below, *Palazzolo* resolves any ambiguity by confirming that background principles may include statutes, regulations, and the full range of common law doctrines in appropriate circumstances.⁷⁶

III. PALAZZOLO: GOOD NEWS AND BAD NEWS FOR STATE AND LOCAL OFFICIALS

A. *The Facts and Equities*

Although my principal quarrels with Burling's account of *Palazzolo* concern the legal effect of the ruling, before turning to those disagreements it is important to clarify three factual nuances that color the equities of the case. First, Burling tells us that the property near Palazzolo's site has been developed with homes.⁷⁷ The discussion appears designed to suggest that the State unfairly singled out Palazzolo for development restrictions while allowing others to build.⁷⁸ Although there are houses in the general vicinity, no one on Winnapaug Pond has been permitted to destroy wetlands on the scale desired by Palazzolo. The key question is not whether others have built houses in the area, but whether they have done so on similar terrain on the scale proposed by Palazzolo. Palazzolo proposed to fill all eighteen

⁷² *Id.* at 1028–29.

⁷³ 408 U.S. 564 (1972).

⁷⁴ *Id.* at 577–78.

⁷⁵ See, e.g., DOUGLAS T. KENDALL, TIMOTHY J. DOWLING & ANDREW W. SCHWARTZ, TAKINGS LITIGATION HANDBOOK 130–43 (2002). See generally Glenn Sugameli, *Lucas v. South Carolina Coastal Council: The Categorical and Other "Exceptions" to Liability for Fifth Amendment Takings of Private Property Far Outweigh the "Rule,"* 29 ENVTL. L. 939 (1999).

⁷⁶ Even the Justices most inclined to rule in favor of takings claimants acknowledge that statutes and other positive laws may constitute background principles of law that preclude takings claims. See *Tahoe-Sierra*, 122 S. Ct. at 1494–95 (Rehnquist, C.J., Scalia & Thomas, JJ., dissenting) (noting that zoning regulations and state statutes governing moratoria may constitute background principles under *Lucas*).

⁷⁷ Burling, *supra* note 2, at 6.

⁷⁸ See *id.*

acres of intertidal wetlands on his property to build a seventy-four house subdivision.⁷⁹ As shown in the photo below,⁸⁰ the south (ocean-side) shore of Winnapaug Pond remains largely undeveloped, and the existing houses are concentrated on the ridge of uplands along the road between the beach and the marsh.⁸¹



The salt marshes along the pond are largely unbuildable because the soil is unsuitable for sanitary facilities, the compressible nature of the mucky peat is ill-suited for permanent structures, and the development costs would be extraordinary.⁸² In this regard, Palazzolo stands in stark contrast to the landowner in *Lucas*, who proposed to do to his property precisely what his immediately adjacent neighbors had done to their property.⁸³

⁷⁹ *Palazzolo v. State ex rel. Tavares*, 746 A.2d 707, 714 (R.I. 2000), *aff'd in part, rev'd in part, remanded sub nom. Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

⁸⁰ The Rhode Island Attorney General's Office provided this photograph to the author.

⁸¹ See Testimony of Grover Fugate, Coastal Resources Management Council Director, Trial Transcript at 187, *Palazzolo v. Coastal Res. Mgmt. Council*, No. C.A. 88-0297 (R.I. Super. Ct. June 18, 1997) (noting that development on the south side of Winnapaug Pond is confined to the upland portion) [hereinafter *Trail Transcript*].

⁸² See State's Memorandum Regarding Remand at 10-11, *Palazzolo v. State*, (No. 98-333-A) (citing record evidence) [hereinafter *State's Memorandum*].

⁸³ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1008 (1992).

Second, Burling asserts that Palazzolo intended to fill 11.4 acres of wetlands to build a “family beach recreational area” on the site.⁸⁴ Although Palazzolo’s 1985 application to fill the land set forth this proposal, Palazzolo’s takings claim *as litigated* had nothing to do with the proposed beach club.⁸⁵ At the heart of the case as tried in state court was Palazzolo’s desire to destroy all eighteen acres of wetlands on the site to build a seventy-four-home subdivision.⁸⁶ In his opening statement to the trial court, Palazzolo’s attorney referred to the proposed development as “need[ing] fill to be able to construct homes.”⁸⁷ Palazzolo’s valuation evidence was based exclusively on the subdivision plan,⁸⁸ and the record is silent as to the economic viability of the beach club. Following Palazzolo’s lead, the state trial court and state supreme court naturally found that his takings claim was rooted in his proposal to destroy all eighteen acres of wetlands to build a subdivision, and they resolved the case on this basis.⁸⁹ In seeking review by the U.S. Supreme Court, Palazzolo cited these very rulings to emphasize that his claim is based on the State’s denial of permission to destroy all eighteen acres of wetlands.⁹⁰

One might legitimately question whether Palazzolo ever intended to build a beach club on the property. As noted by Justice Kennedy, writing for the Court, “[t]he details [of the proposed beach club] do not tend to inspire the reader with an idyllic coastal image.”⁹¹ Justice Ginsburg was less forgiving, calling the proposal “most disagreeable” and noting that “to get to the club’s water, *i.e.*, Winnapaug Pond rather than the nearby Atlantic Ocean, ‘you’d have to . . . work your

⁸⁴ Burling, *supra* note 2, at 8.

⁸⁵ See Palazzolo v. State *ex rel.* Tavares, 746 A.2d 707, 709-11 (R.I. 2000), *aff’d in part, rev’d in part, remanded sub nom.* Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

⁸⁶ *Id.*

⁸⁷ Opening Statement of John Webster, Counsel for Plaintiff, Trial Transcript, *supra* note 81, at 12.

⁸⁸ Joint Lodging tab 7, at 14, 17, 24, Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (No. 99-2047).

⁸⁹ See Tavares, 746 A.2d at 714; Palazzolo v. Coastal Res. Mgmt. Council, C.A. No. 88-0297, 1997 WL 1526546, at *1 (R.I. Super. Ct. Oct. 24, 1997), *aff’d on other grounds sub nom.* Palazzolo v. State *ex rel.* Tavares, 746 A.2d 707 (R.I. 2000), *aff’d in part, rev’d in part, remanded sub nom.* Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

⁹⁰ Petitioner’s Reply Brief, 2001 WL 57593, at *5-6, Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (No. 99-2047).

⁹¹ Palazzolo v. Rhode Island, 533 U.S. 606, 615 (2001) (noting that the so-called beach club proposal was for a parking lot, port-a-johns, trash cans, picnic tables, and concrete barbecue pits).

way through approximately 70, 75 feet of marshland or conservation grasses.’”⁹²

After having litigated his claim based on the subdivision proposal, Palazzolo switched gears in the U.S. Supreme Court and argued instead that the takings claim is rooted in the beach club proposal. Evidently, Palazzolo was concerned that his failure to apply for permission to build a subdivision might sink his claim as unripe, as it had in the state supreme court.⁹³ The State understandably argued that courts should prohibit such “sandbagging” by landowners who submit one land-use proposal and then use the denial as the basis for a takings claim based on a much more extravagant proposal.⁹⁴ As discussed below, the U.S. Supreme Court ruled that while federal ripeness law did not prevent him from doing so, States may design their land-use processes to preclude this kind of chicanery.⁹⁵

Third, Burling fails to mention that the trial court found that Palazzolo’s proposed destruction of eighteen acres of wetlands, which constitute twelve percent of the existing salt marsh around Winnapaug Pond, would constitute a public nuisance.⁹⁶ The proposed wetland destruction would reduce the ability of the salt marsh to filter out harmful pollutants, resulting in higher levels of nitrates in the groundwater, which is the sole source of drinking water for the surrounding community.⁹⁷ Moreover, the proposed fill would significantly reduce commercial and recreational shellfish and finfish populations.⁹⁸ Based on these facts, the trial court found that the proposed fill would be a public nuisance because it would “not be suitable for the locality of the subject property.”⁹⁹ The state supreme court did not rely on the nuisance finding to support its rejection of Palazzolo’s takings claim,¹⁰⁰ and thus the U.S. Supreme Court had no occasion to refer to it. Nevertheless, the finding might well prove to

⁹² *Id.* at 647 n.1 (quoting trial transcript testimony).

⁹³ *See Tavares*, 746 A.2d at 714.

⁹⁴ *Palazzolo*, 533 U.S. at 624.

⁹⁵ *See infra* notes 150–151 and accompanying text.

⁹⁶ *Palazzolo v. Coastal Res. Mgmt. Council*, C.A. No. 88-0297, 1997 WL 1526546, at *5 (R.I. Super. Ct. Oct. 24, 1997), *aff’d on other grounds sub nom. Palazzolo v. State ex rel. Tavares*, 746 A.2d 707 (R.I. 2000), *aff’d in part, rev’d in part, remanded sub nom. Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Tavares*, 746 A.2d at 713–17.

be dispositive in the remand proceedings, and it certainly colors the equities of the case.¹⁰¹

B. *The Palazzolo Ruling on Ripeness*

The state supreme court ruled that Palazzolo's takings claim is unripe for two reasons. First, the court concluded that the record failed to show the extent to which the State would permit development on the property because Palazzolo failed to apply for permission to use the land in ways that would involve filling substantially less wetlands or building only on the upland portion.¹⁰² Second, the court relied on Palazzolo's failure to submit even one application for the seventy-four-home subdivision proposal that formed the heart of his claim as litigated in state court.¹⁰³

The broader implications of the ripeness issue in *Palazzolo* may be best understood by examining existing ripeness precedent as well as the debate that took place during the consideration of federal ripeness legislation in the 105th Congress.

Under *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*,¹⁰⁴ a takings challenge to a land-use regulation is not ripe until the government has reached a final decision regarding the application of the regulation to the claimant's property.¹⁰⁵ Obtaining a final decision might require the landowner to seek a variance or waiver from an initial determination.¹⁰⁶ In *McDonald, Sommer & Frates v. County of Yolo*,¹⁰⁷ the Court made clear that it also might well require the landowner to submit multiple applications because the rejection of one development plan does not necessarily mean that the govern-

¹⁰¹ See State's Memorandum, *supra* note 82, at 7-15 & Addendum I. The Rhode Island Supreme Court recently remanded the case to the trial court for further findings on several issues, including the nuisance issue. See *Palazzolo v. State ex rel. Tavares*, 785 A.2d 561, 561 (R.I. 2001) (order remanding the case to the superior court and directing counsel to submit further memoranda).

¹⁰² *Palazzolo v. State ex rel. Tavares*, 746 A.2d 707, 714 (R.I. 2000), *aff'd in part, rev'd in part, remanded sub nom.* *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

¹⁰³ *Id.*

¹⁰⁴ 473 U.S. 172 (1985).

¹⁰⁵ *Id.* at 186; *accord* *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (ruling that a takings claim is unripe where the claimant fails to submit a development application).

¹⁰⁶ See *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 (1981) (holding that a takings claim was unripe where the owner failed to seek a variance or waiver).

¹⁰⁷ 477 U.S. 340 (1986).

ment will not permit less intensive development of the property.¹⁰⁸ In other words, a takings claim is unripe where there remains “the potential for . . . administrative solutions” to the dispute.¹⁰⁹ A takings claim ripens only when the record from the land-use negotiations reveals “the nature and extent of permitted development.”¹¹⁰

This ripeness requirement flows from the very nature of the takings inquiry. Under *Mahon*, a regulation becomes a taking where it “goes too far,”¹¹¹ but a court cannot determine whether regulation goes too far until it knows how far the regulation goes.¹¹² Ripeness rules also stem from the flexibility and discretion of local agencies in addressing land-use issues,¹¹³ and the reluctance of courts to second-guess local land-use agencies.¹¹⁴ A landowner need not continue to pursue relief from the local land-use agency, however, where the record makes clear that doing so would be futile.¹¹⁵

The national developers’ lobby, the National Association of Home Builders (NAHB), does not like existing ripeness doctrine, and in the 105th Congress, NAHB drafted and lobbied for a bill that would have changed ripeness rules dramatically.¹¹⁶ The Private Property Rights Implementation Act of 1997 was designed to authorize developers and other landowners to file takings claims in federal court

¹⁰⁸ *Id.* at 353 n.9 (finding that a rejection of application to build 159 homes on claimant’s land did not ripen takings claim).

¹⁰⁹ *Williamson County*, 473 U.S. at 187; *accord MacDonald*, 477 U.S. at 352 (holding that a takings claim is unripe where the government’s action “leave[s] open the possibility that some development will be permitted.”).

¹¹⁰ *MacDonald*, 477 U.S. at 351; *accord Suitum v. Tahoe Reg’l Planning Agency*, 520 U.S. 725, 738 (1997) (holding that a takings claim is unripe unless the agency has no further discretion to allow additional development).

¹¹¹ *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

¹¹² *Suitum*, 520 U.S. at 734 (citing *MacDonald* and *Mahon*).

¹¹³ *Id.* at 738 (noting local agencies’ “high degree of discretion,” and observing that they are “singularly flexible institutions”) (quoting *MacDonald*, 477 U.S. at 350).

¹¹⁴ *Williamson County*, 473 U.S. at 191 (observing that a takings claim “simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question”).

¹¹⁵ *MacDonald*, 477 U.S. at 350 n.7 (noting that a landowner need not resort to unfair procedures to obtain a final decision); *Landmark Land Co. of Okla. v. Buchanan*, 874 F.2d 717, 721 (10th Cir. 1989) (discussing the futility exception to the ripeness requirement); *Shelter Creek Dev. Corp. v. City of Oxnard*, 838 F.2d 375, 379 (9th Cir. 1988) (ruling that a landowner need not pursue additional local processes where doing so would be an “idle and futile act”) (quoting *Martino v. Santa Clara Valley Water Dist.*, 703 F.2d 1141, 1146 n.2 (9th Cir. 1983)).

¹¹⁶ See Glenn P. Sugameli, “*Takings*” *Bills Threaten People, Property, Zoning, and the Environment*, 31 *URB. LAW.* 177, 177–84 (1999) (describing NAHB’s role in drafting and lobbying for the bill, including \$173,000 in NAHB campaign contributions made the day after the Judiciary Subcommittee held the first hearing on the bill in the House).

without pursuing available opportunities to resolve land-use conflicts at the local level.¹¹⁷ Deemed a “hammer to the head” of state and local officials by NAHB’s chief lobbyist,¹¹⁸ the bill would have radically shifted the balance of power in land-use negotiations to developers by allowing them to threaten a federal court lawsuit far earlier in the land-use planning process.¹¹⁹

Among other things, the bill would have required local officials to specify the permitted intensity of development after the denial of a single application.¹²⁰ Failure to do so would have allowed the landowner to proceed immediately to federal court without continuing to pursue available local processes.¹²¹ In other words, a landowner could file a single, extravagant land-use proposal, and upon denial the burden would shift to local officials to determine precisely how the property would be used. Local officials objected to this provision because it would have imposed costly and unwarranted new burdens.¹²²

Virtually every national organization that represents state and local officials opposed the bill.¹²³ So too did federal cabinet-level officials, federal judges, state judges, planners, religious groups, labor groups, environmental groups, and various other groups, largely due to concerns that developers already dominate the land-use planning process in many communities, and that a further across-the-board shift of power to them would come at the expense of neighboring property owners and the public interest.¹²⁴ Due to the tremendous

¹¹⁷ H.R. 1534, 105th Cong. § 2 (1997). In addition to allowing developers to bypass local land-use procedures, the bill purported to authorize them to file immediately in federal court, without seeking compensation in state court first, as required by *Williamson County*. See *id.*; cf. *Williamson County*, 473 U.S. at 195 (“[A] property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State . . .”). *Palazzolo* did not implicate this aspect of *Williamson County* or the ripeness debate because *Palazzolo* filed his claim in state court.

¹¹⁸ Brody Mullins, *Property Takings Bill Set For House Fight*, CONGRESSDAILYAM, Mar. 14, 2000, available at <http://nationaljournal.com/pubs/congressdaily>.

¹¹⁹ S. REP. NO. 105-242, at 32, 43–44 (1998).

¹²⁰ H.R. 1534 § 2; S. REP. NO. 105-242, at 38.

¹²¹ H.R. 1534 § 2; S. REP. NO. 105-242, at 38.

¹²² See S. REP. NO. 105-242, at 44, 56–57.

¹²³ H.R. REP. NO. 105-323, at 23–25 (1997) (dissenting views) (describing the opposition by forty Attorneys General, the National League of Cities, the U.S. Conference of Mayors, the National Conference of State Legislatures, the International Municipal Lawyers Association, and other state and local groups).

¹²⁴ S. REP. NO. 105-242, at 55–57 (minority views) (listing the many organizations that opposed the bill). The Senate Report on the bill notes that while the top four residential developers in the nation have revenues exceeding \$1 billion per year, ninety percent of cities and towns in the country have less than 10,000 people and cannot afford even one

opposition to the bill, it never went to the Senate floor for a vote.¹²⁵ Undeterred, NAHB filed an *amicus* brief in *Palazzolo* asking the Court to abandon its existing ripeness doctrine and adopt rules that were in great part similar to its failed legislative agenda.¹²⁶

The *Palazzolo* Court rejected this request. The Court reversed the state supreme court and ruled that *Palazzolo's* case was ripe, but in so ruling it emphatically reaffirmed its existing ripeness doctrine as set forth in *Williamson County*, *MacDonald*, and other leading ripeness precedents.¹²⁷ In particular, the Court stressed that a takings claim is not ripe “until a court knows ‘the extent of permitted development’ on the land in question”¹²⁸ at least to a “reasonable degree of certainty.”¹²⁹ The Court continued to recognize the critical role of local land-use officials in the planning process by confirming “the important principle that a landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation.”¹³⁰ The Court emphasized the need to allow local officials “to exercise their full discretion,” including procedures that allow for variances and waivers.¹³¹

The specific ripeness ruling is tied to the facts of the case and is thus unlikely to have much precedential effect adverse to government officials. The Court held that the case is ripe because the record shows the extent of permitted development on the property: one single-family home.¹³² In this regard, the Court emphasized that the applicable regulation unequivocally banned *Palazzolo* from filling the wetlands on the property.¹³³ Although the State contended that *Palaz-*

full-time municipal attorney. *Id.* at 44–45. These cities and towns can ill-afford the threat of lawsuits by large corporate developers. *Id.*

¹²⁵ Senator Patrick Leahy (D-Vt.) described the bill as one of the most “arrogantly special interest” bills he had ever seen and declared that it “wouldn’t pass the smell test in any town in America,” Sugameli, *supra* note 116, at 180 (quoting Nathan Arbitman, *Takings Proponents at It Again—Developer Bill Passes House; Action Moves to Senate*, ENVIROACTION (Nat’l Wildlife Fed’n), Feb. 1998, at 11, 13.

¹²⁶ Brief of the National Association of Home Builders as Amicus Curiae in Support of the Petitioner. 2000 WL 1742027, at *14–28, *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) (No. 99-2047).

¹²⁷ *Palazzolo v. Rhode Island*, 533 U.S. 606, 618–26 (2001).

¹²⁸ *Id.* at 618 (quoting *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 351 (1986)).

¹²⁹ *Id.* at 620.

¹³⁰ *Id.*

¹³¹ *Id.* at 620–21.

¹³² *Id.* at 618–26.

¹³³ *Palazzolo*, 533 U.S. at 618–26.

zolo might be able to build more than one house on the upland portion of the site, the Court held that the State waived this argument by failing to contest Palazzolo's assertion to the contrary in its opposition to Palazzolo's petition for *certiorari*.¹³⁴ By limiting its ripeness ruling to "this circumstance,"¹³⁵ the Court provided an easy basis for government officials to distinguish *Palazzolo* in future cases.

The *Palazzolo* Court went on to indicate that in its view there was no genuine ambiguity in the record regarding the extent of permitted development on the uplands,¹³⁶ but in a dissent joined by Justices Souter and Breyer, Justice Ginsburg took issue with this conclusion.¹³⁷ Noting that Palazzolo pursued only a *Lucas* per se claim in state court, she observed that the State had no incentive to flesh out the full extent of permitted development.¹³⁸ In her view, the State's submissions establish only a floor, not a ceiling, on permissible development.¹³⁹

In a highly unusual condemnation of Supreme Court counsel, Justice Ginsburg showed that PLF changed the nature of Palazzolo's claim from a per se claim under *Lucas* to a non-per se claim, thereby elevating the significance of whether he could build more than one house, and then misrepresented the record regarding the extent of permissible development.¹⁴⁰ Responding to the majority's conclusion that it was now too late for the State to suggest that additional development might be allowed because it failed to raise this possibility in its opposition to *certiorari*, Justice Ginsburg observed that the Court's ruling "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 machinations, you have created a different record on which this Court will review the case."¹⁴¹ Justice Ginsburg concluded that the record was ambiguous on this issue because Palazzolo never submitted a survey of his land, and she argued against "step[ping] into the role of supreme topographical fact finder to resolve ambiguities in Palazzolo's favor."¹⁴²

¹³⁴ *Id.* at 622 (explaining that the State's argument in this regard "comes too late in the day").

¹³⁵ *Id.* at 622.

¹³⁶ *Id.* at 623.

¹³⁷ *Id.* at 652–54 (Ginsburg, Souter, Breyer, JJ., dissenting).

¹³⁸ *Id.* at 648–49 (Ginsburg, Souter, Breyer, JJ., dissenting).

¹³⁹ See *Palazzolo*, 533 U.S. at 651–52 (Ginsburg, Souter, Breyer, JJ., dissenting).

¹⁴⁰ See *id.* at 648 (Ginsburg, Souter, Breyer, JJ., dissenting).

¹⁴¹ *Id.* at 653 (Ginsburg, Souter, Breyer, JJ., dissenting).

¹⁴² *Id.* at 654 (Ginsburg, Souter, Breyer, JJ., dissenting).

With respect to the state supreme court's second ripeness ground—Palazzolo's failure to submit an application for the seventy-four-home subdivision proposal—the Court ruled that his failure went only to damages, not to ripeness under the federal Constitution.¹⁴³ Because the extent of permitted development was (in the Court's view) manifest, further applications would not provide additional clarification that would assist the ripeness inquiry.¹⁴⁴ In good news for state and local government officials, however, the Court recognized the State's "valid concern" that a landowner might attempt to use a hide-the-ball strategy by applying for a modest proposal and then using a denial as the basis for a takings claim for an exorbitant sum based on a much more extensive proposal.¹⁴⁵ Although federal ripeness rules do not preclude this abuse, the Court made clear that state ripeness rules may do so, stating that it did "not intend to cast doubt" on local planning procedures and state ripeness rules designed to prevent takings claims based on hypothetical uses that would not pass muster under local law.¹⁴⁶

Notwithstanding the Court's clear reaffirmation of its existing ripeness precedent, Burling tells us that perhaps the most significant aspect of *Palazzolo's* ruling on ripeness is that once the government denies a single permit application, the denial shifts the burden to the government to indicate what other uses are available to the landowner.¹⁴⁷ This, of course, is exactly what the developers' lobby wanted to accomplish through its now-moribund federal ripeness legislation.¹⁴⁸ *Palazzolo* does nothing of the sort.

As support, Burling first quotes the Court as saying that before a claim is ripe, a local land-use agency must have "the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation."¹⁴⁹ The quoted language says exactly the opposite of what Burling would like it to say, making clear that local officials may use the full range of local procedures to flesh out the extent of permitted development. The very next sentence notes the importance of allowing local officials to exercise "their full discretion"

¹⁴³ *Id.* at 608.

¹⁴⁴ *Id.*

¹⁴⁵ See *Palazzolo*, 533 U.S. at 625.

¹⁴⁶ See *id.*

¹⁴⁷ Burling, *supra* note 2, at 23.

¹⁴⁸ See *supra* notes 117–127 and accompanying text.

¹⁴⁹ Burling, *supra* note 2, at 23 (quoting *Palazzolo*, 533 U.S. at 606) (emphasis removed).

and permitting local procedures for variances, waiver, and the like to play out before landowners may proceed to court.¹⁵⁰ Burling also cites to the Court's assertion that there was no indication that the State would have approved a development application to fill less than 11.4 acres,¹⁵¹ and the observation that "there is no indication that any use involving any substantial structures or improvements would have been allowed."¹⁵² The Court's point here, however, is not that government officials have the burden to specify permitted development upon the denial of a single application, but rather that the unambiguous nature of the wetland regulations plainly ruled out any such approval.¹⁵³ If the wetland rules had not been unequivocal, there is little doubt from the ruling that the Court would have found the case to be unripe until the extent of permitted fill could be determined.¹⁵⁴ It is wishful thinking by Burling to infer the establishment of a significant new burden on local governments in the planning process from a ruling that so plainly reaffirms the core of the Court's existing ripeness precedent.¹⁵⁵

C. *The Palazzolo Ruling on Expectations and Background Principles*

In the wake of *Palazzolo*, PLF declared "dead" what Burling calls the notice rule.¹⁵⁶ With apologies to Mark Twain, rumors of the notice

¹⁵⁰ See *Palazzolo*, 533 U.S. at 620–21.

¹⁵¹ Burling, *supra* note 2, at 23 (quoting *Palazzolo*, 533 U.S. at 625).

¹⁵² *Id.*

¹⁵³ See *Palazzolo*, 533 U.S. at 607 (emphasizing the "unequivocal nature of the wetland regulations"); *id.* at 625 (emphasizing that "the limitations the wetland regulations imposed were clear").

¹⁵⁴ See *id.* at 623–26.

¹⁵⁵ In describing finality ripeness, Burling refers to what he calls "the one meaningful application standard," a term that suggests that a takings claim is ripe upon the disposition of a single application. Burling, *supra* note 2, at 25–26. There is no such standard. Although courts have held that a takings claim is unripe until the landowner files *at least one* meaningful application, no court has held that a takings claim is ripe once a single application is denied. *E.g.*, *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401, 405 (9th Cir. 1996) (noting that in order to satisfy *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), a takings claimant "must submit to local decision-makers at least one meaningful application for a development project and a variance"); *Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84, 97–98 (2d Cir. 1992) (claim unripe where application denial did not preclude approval of modified application); *Gilbert v. City of Cambridge*, 932 F.2d 51, 61 (1st Cir. 1991) ("[T]he filing of one meaningful application will ordinarily be a necessary, although not alone sufficient, precondition for invoking the futility exception [to the finality ripeness requirement]."); see also *Unity Ventures v. Lake County*, 841 F.2d 770, 775–76 (7th Cir. 1988).

¹⁵⁶ See *supra* note 8 and accompanying text.

rule's death have been greatly exaggerated.¹⁵⁷ The Court's ruling regarding the relevance of the timing of a claimant's acquisition vis-à-vis the enactment of the challenged regulation is very narrow.

The *Palazzolo* Court viewed the state supreme court's ruling as having established a "sweeping" and "blanket rule" that acquisition of title after enactment of the challenged regulation automatically bars a takings claim in every case.¹⁵⁸ The Court rejected this rule of per se non-liability as "too blunt an instrument,"¹⁵⁹ stating that "[t]he State may not put so potent a Hobbesian stick into the Lockean bundle" of property rights.¹⁶⁰ The Court concluded that precluding all post-enactment purchasers from prevailing on a takings claim would improperly "put an expiration date on the Takings Clause."¹⁶¹ "Future generations, too, have a right to challenge unreasonable limitations on the use and value of land," the Court wrote.¹⁶² The Court expressed concern that the process of ripening a claim might prevent the owner at the time of enactment from bringing a claim.¹⁶³ Moreover, a blanket rule against recovery would create unfair results for older property owners and those who need to sell, as opposed to those with the resources to hold title.¹⁶⁴

In so ruling, the Court noted that *Palazzolo* acquired the land personally by operation of state law upon dissolution of his corporation.¹⁶⁵ It is not an ideal posture for a government defendant to argue that the pre-transfer existence of the challenged law precludes liability. Justice Kennedy, writing for the Court, Justice O'Connor in concurrence, and Justice Breyer in dissent all mention inheritance as another kind of transfer that should not always preclude challenge to a pre-existing law.¹⁶⁶ In these circumstances, it might be difficult to ar-

¹⁵⁷ *Palazzolo*, 533 U.S. at 627–28.

¹⁵⁸ *Id.* at 628.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 627.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Palazzolo*, 533 U.S. at 627.

¹⁶⁴ *Id.* at 628.

¹⁶⁵ *Id.* at 625.

¹⁶⁶ *Id.* at 627 (observing that under the proposed blanket rule, "the right to compensation may not be asserted by an heir or successor"); *id.* at 635 (O'Connor, J., concurring) ("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."); *id.* at 654–55 (Breyer, J., dissenting) ("[T]he simple fact that a piece of property has changed hands (for example, by inheritance) does not always and automatically bar a takings claim.").

gue that the transfer greatly changes anyone's expectations about the property. On the other hand, acquisition of title by purchase often affects reasonable expectations associated with property, particularly where the purchase price is discounted due to laws in effect at the time of the transfer.¹⁶⁷

In fact, five Justices made clear that post-enactment purchase remains relevant to non-per se claims brought under the multi-factor test of liability set forth in *Penn Central Transportation Co. v. City of New York*,¹⁶⁸ the test that governs the vast bulk of regulatory takings claims.¹⁶⁹ Justice O'Connor wrote a separate concurrence specifically to emphasize that the timing of a takings claimant's acquisition is relevant to the *Penn Central* analysis, stating: "[I]t would be just as much error to expunge this consideration from the takings inquiry as it would be to accord it exclusive significance."¹⁷⁰ The regulatory regime in place at the time of acquisition "helps to shape the reasonableness of [the claimant's] expectations" under *Penn Central*.¹⁷¹ She expressed concern that "if existing regulations do nothing to inform the analysis, then some property owners may reap windfalls and an important indicium of fairness is lost."¹⁷² In other words, where a buyer purchases land at a discount due to restrictions in place at the time of purchase, courts should consider those reduced expectations (as reflected in the reduced purchase price) in evaluating a takings challenge to those restrictions. Significantly, all four dissenters ex-

¹⁶⁷ *E.g.*, *Creppel v. United States*, 41 F.3d 627, 632 (Fed. Cir. 1994) (takings recoveries should be limited to landowners who bought their property in reliance on a regulatory scheme that excluded the challenged regulation); *Leonard v. Town of Brimfield*, 666 N.E.2d 1300, 1303 (Mass. 1996) (rejecting a takings challenge to flood plain development restrictions in place when the claimant bought the land due to her constructive notice of the controls). The Federal Circuit in *Loveladies Harbor, Inc. v. United States* stated:

In legal terms, the owner who bought with knowledge of the restraint could be said to have no reliance interest, or to have assumed the risk of any economic loss. In economic terms, it could be said that the market had already discounted for the restraint, so that a purchaser could not show a loss in his investment attributable to it.

28 F.3d 1171, 1177 (Fed. Cir. 1994).

¹⁶⁸ 438 U.S. 104, 124 (1978) (ruling that takings claims should be considered by analyzing the economic impact on the landowner, the extent to which the regulation interferes with distinct investment-backed expectations, and the character of the government action).

¹⁶⁹ *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1017-18 (1992) (stating that the per se rule in regulatory takings cases applies only in "extraordinary" circumstances).

¹⁷⁰ *Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring).

¹⁷¹ *Id.* (O'Connor, J., concurring).

¹⁷² *Id.* at 635 (O'Connor, J., concurring).

pressly agreed with Justice O'Connor regarding the relevance of the timing of acquisition to the *Penn Central* analysis.¹⁷³ At least one commentator argues that expectations are relevant even to a per se claim under *Lucas*.¹⁷⁴

In a typically biting separate opinion, Justice Scalia took issue with Justice O'Connor's approach and argued that the timing of acquisition is never relevant to takings analysis unless the pre-existing regulation constitutes part of the background principles of law that preclude a taking.¹⁷⁵ But because no other member of the Court joined Justice Scalia's opinion, it is clear that Justice O'Connor has a controlling majority that will treat the timing of the claimant's acquisition as relevant to most takings claims.¹⁷⁶

The *Palazzolo* Court cites *Nollan v. California Coastal Commission*¹⁷⁷ as "controlling precedent" for its ruling.¹⁷⁸ In *Nollan*, the Court found a taking where the State conditioned a development permit on a compelled dedication of lateral beach access, even though the claimants acquired the land after the State had announced its policy to require such dedications.¹⁷⁹ Although *Nollan* served as a counterexample to the sweeping, blanket rule of non-liability rejected by the Court, it provides little guidance for future cases since it addressed acquisition after the adoption of a policy, not a regulation or statute. As noted above, a majority of the Justices joined Justice O'Connor in declining to view *Nollan* as precluding consideration of the timing of a claimant's acquisition in most takings cases.

In a portion of *Palazzolo* largely ignored by Burling, the Court clarified that background principles of law under *Lucas* are not lim-

¹⁷³ *Id.* at 643 n.6, 644-45 (Stevens, J., concurring in part, dissenting in part) (agreeing that notice of a regulation at the time of purchase is relevant to the takings inquiry); *id.* at 654 n.3 (Ginsburg, Souter & Breyer, JJ., dissenting) (citing separate opinions of Justices O'Connor, Stevens, and Breyer, Justice Ginsburg states that "at a minimum, . . . transfer of title can impair a takings claim"); *id.* at 654-55 (Breyer, J., dissenting) (agreeing with Justice O'Connor that the timing of a claimant's acquisition remains relevant to takings analysis).

¹⁷⁴ See John D. Echeverria, *A Preliminary Assessment of Palazzolo v. Rhode Island*, 31 ENVTL. L. REP. 11,112, 11,118-19 (2001).

¹⁷⁵ *Palazzolo*, 533 U.S. at 636-37 (Scalia, J., concurring).

¹⁷⁶ 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 645-55 (Breyer, J., dissenting).

¹⁷⁷ 483 U.S. 825 (1987).

¹⁷⁸ *Palazzolo*, 533 U.S. at 629.

¹⁷⁹ *Nollan*, 483 U.S. at 833 n.2 ("[T]he prior owners must be understood to have transferred their full property rights in conveying the lot.").

ited to common law.¹⁸⁰ Although not every pre-existing law is “transformed into a background principle of the State’s law by mere virtue of the passage of title,”¹⁸¹ the Court went so far as to suggest that the very Rhode Island statute before it might be a background principle, stating: “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 presented here.”¹⁸² The Court described background principles “in terms of those common, shared understandings of permissible limitations derived from a State’s legal tradition.”¹⁸³ This “derived from” language—perhaps the two most important words in the opinion—strongly suggests that background principles include not only pre-existing statutes and regulations that codify common law doctrines of nuisance and property law, but also those that represent a reasonable extension of those doctrines.¹⁸⁴ Lower courts undoubtedly will be called upon to apply this “derived from” standard in future cases where government officials argue that a pre-existing statute or regulation constitutes a background principle of law.¹⁸⁵

Finally, Burling suggests that no background principle of law prohibits the proposed destruction of the intertidal salt marsh, citing “centuries of tradition wherein landowners freely reclaimed tidelands.”¹⁸⁶ In fact, Rhode Island’s public trust doctrine appears to prevent precisely that.¹⁸⁷ Although early public policy sometimes encouraged wharfing, long-standing precedents in Rhode Island hold that coastal filling must be done with the State’s permission or acquies-

¹⁸⁰ It would be unfair to Burling to assert that he completely ignores this passage. He quotes three sentences from the relevant paragraph, but through the use of ellipses he strategically omits the language discussed above. See Burling, *supra* note 2, at 31 (quoting *Palazzolo*, 533 U.S. at 629–30).

¹⁸¹ *Palazzolo*, 533 U.S. at 629–30.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *See id.*

¹⁸⁵ *See id.*

¹⁸⁶ *See* Burling, *supra* note 2, at 27–28.

¹⁸⁷ *See* *New England Naturalist Ass’n v. Larsen*, 692 F. Supp. 75, 78 (D.R.I. 1988) (“The lands between [the high-water] line and the low-water line constitute the intertidal zone and are owned by the State of Rhode Island. Under the Rhode Island Constitution, the intertidal zone is held, in trust, for the use of the people”); *Town of Warren v. Thornton-Whitehouse*, 740 A.2d 1255, 1259 (R.I. 1999) (“the state holds title to all land below the high water mark in a proprietary capacity for the benefit of the public”) (quoting *Greater Providence Chamber of Commerce v. State*, 567 A.2d 1038, 1041 (R.I. 1995)); *Bailey v. Burges*, 11 R.I. 330, 331 (1876) (“In this state, at common law, fee of the soil in tide waters below high-water mark is in the state.”).

cence.¹⁸⁸ The State's brief on remand sets forth a compelling argument that the public trust doctrine in Rhode Island precludes Palazzolo from ever having owned a property interest in destroying the coastal wetlands that he alleges has been taken.¹⁸⁹

D. *The Palazzolo Ruling on the Lucas Per Se Rule*

The clearest victory for government officials in *Palazzolo* comes in the Court's rejection of Palazzolo's per se claim under *Lucas*. *Lucas* holds that a per se taking may occur where regulation denies a landowner all economically viable use of the land.¹⁹⁰ Although Palazzolo's land was worth at least \$200,000¹⁹¹ (more than thirteen times his original purchase price of \$13,000),¹⁹² he argued that the challenged wetland regulations denied him all economically viable use of the property. Alleging that the land would be worth \$3,150,000 if he were allowed to develop,¹⁹³ Palazzolo argued that the remaining value, roughly six percent of the alleged unregulated value, should not be enough to defeat a per se claim under *Lucas*.¹⁹⁴ He also argued that in determining whether a regulation denies all economically viable use,

¹⁸⁸ *E.g.*, *Thompson v. Sullivan*, 148 A.2d 130, 136 (R.I. 1959) (stating that coastal filling by a yacht club was "contingent upon the yacht club receiving permission from the state"); *Bailey*, 11 R.I. at 331 (noting that coastal filling is done "by permission or acquiescence of the state"). Even the case *Burling* cites to support an alleged long-standing tradition of coastal filling by private land owners recognizes that such filling is conducted pursuant to "a license to him to fill out" from the State. *Providence Steam-Engine Co. v. Providence & Stonington S.S. Co.*, 12 R.I. 348, 355 (1879); see *Burling*, *supra* note 2, at 27–28 (citing *Providence Steam-Engine*, 12 R.I. at 363–64).

¹⁸⁹ See State's Memorandum, *supra* note 82, at 16–25. The Rhode Island Supreme Court's recent remand order directs the trial court to make further findings on the public trust issue. See *Palazzolo v. State ex rel. Tavares*, 785 A.2d 561, 561 (R.I. 2001) (order remanding the case to the superior court and directing counsel to submit further memoranda).

¹⁹⁰ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015–19 (1992).

¹⁹¹ *Palazzolo v. Rhode Island*, 533 U.S. 606, 608 (2001).

¹⁹² *Palazzolo v. Coastal Res. Mgmt. Council*, C.A. No. 88-0297, 1997 WL 1526546, at *1 (R.I. Super. Ct. Oct. 24, 1997) (describing Palazzolo's initial \$13,000 investment in the property), *aff'd on other grounds sub nom. Palazzolo v. State ex rel. Tavares*, 746 A.2d 707 (R.I. 2000), *aff'd in part, rev'd in part, remanded sub nom Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

¹⁹³ *Palazzolo*, 533 U.S. at 616 (observing that Palazzolo sought \$3,150,000 in compensation, "a figure derived from an appraiser's estimate as to the value of a 74-lot residential subdivision").

¹⁹⁴ *Id.* at 631 (noting that Palazzolo argued that a per se claim is not defeated "by the simple expedient of leaving a landowner a few crumbs of value") (quoting Palazzolo's brief).

the Court should consider whether the regulation allows the owner to realize a reasonable return on investment.¹⁹⁵

The *Palazzolo* Court rejected this argument, stating that “[a] regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property ‘economically idle’” under *Lucas*.¹⁹⁶ Although the State may not avoid a per se claim under *Lucas* by leaving the landowner with “a token interest,” the \$200,000 value of Palazzolo’s parcel defeated his *Lucas* claim.¹⁹⁷

Palazzolo also speaks to another important aspect of the *Lucas* per se rule. Plaintiff’s counsel argued that for the government to avoid application of the *Lucas* per se rule, a landowner must be able to derive value from the land by developing it.¹⁹⁸ On this view, the *Lucas* per se rule applies even where the land retains significant “speculative” value (the value speculators might pay in the hope that the restrictions will be lifted), or where a neighboring property owner offers to purchase the land to acquire a permanent view shed or a buffer zone for adjacent property, or where recreation or other non-development uses exist and lend value to the land.

This argument is unpersuasive. The *Lucas* Court made clear that its per se rule turns on remaining value, regardless of its source.¹⁹⁹ *Lucas* states unequivocally that if land retains as little as five percent of its unregulated value, the per se rule does not apply.²⁰⁰ This ruling came in response to a hypothetical posed by Justice Stevens in his dissent regarding a landowner whose property is diminished in value ninety-five percent.²⁰¹ In language that could not be clearer, the *Lucas* majority held that “in at least *some* cases the landowner with 95% loss [in value] will get nothing” under the Takings Clause because such an owner would “not be able to claim the benefit of [the *Lucas*] categorical formulation.”²⁰² Both the *Lucas* majority and Justice Stevens in dissent agreed that only “the landowner who suffers a complete elimination of value” recovers under the per se rule.²⁰³ This exchange shows that the per se rule is inapplicable where land may be sold for five

¹⁹⁵ Petitioner’s Brief on the Merits, 2000 WL 1742033, at *37–40, *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) (No. 99-2047).

¹⁹⁶ *Palazzolo*, 533 U.S. at 631.

¹⁹⁷ *Id.* (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992)).

¹⁹⁸ *Id.*

¹⁹⁹ *Lucas*, 505 U.S. at 1019.

²⁰⁰ *Id.* at 1019–20 n.8.

²⁰¹ *See id.*

²⁰² *Id.*

²⁰³ *Id.* at 1019 n.8 (citing Justice Stevens’ dissent).

percent of its original value, even where the land is unbuildable.²⁰⁴ In fact, the *Lucas* Court expressly reaffirmed the common sense notion that the sale of property for value is an economically beneficial use of that property.²⁰⁵ Because *Lucas*'s per se rule applies only where regulation denies all beneficial use, it is inapplicable where the owner is able to sell the land for value. The inquiry that drives the per se rule is value, not the ability to build.²⁰⁶

Palazzolo confirms that the *Lucas* per se rule is inapplicable where land retains more than nominal value, rejecting *Palazzolo*'s per se claim because he "failed to establish a deprivation of all economic value"²⁰⁷ Indeed, *Palazzolo* serves as a real-world illustration of the exchange between the *Lucas* majority and dissent regarding the inapplicability of the per se rule to a ninety-five percent value loss. In one of the first interpretations of *Palazzolo*, the U.S. Court of Appeals for the Federal Circuit ruled that *Palazzolo* reaffirms that no per se taking occurs unless regulation leaves land valueless or with only nominal value: "The [*Palazzolo*] Court held that because Mr. Palazzolo retained some economic value in the regulated property, the denial of a building permit in Mr. Palazzolo's case did not constitute a categorical tak-

²⁰⁴ See *id.*

²⁰⁵ *Lucas*, 505 U.S. at 1027–28 (emphasis added) (discussing situations where "the property's only economically productive use is sale or manufacture for sale").

²⁰⁶ Indeed, the critical role of value to the per se rule permeates the entire *Lucas* opinion. The first paragraph recites the trial court's finding that the challenged development ban rendered Mr. Lucas's land "valueless," and it then asks whether the development ban effects a taking due to its "dramatic effect on the economic value of Lucas's lots." *Id.* at 1007. The Court describes Lucas's complaint as rooted in the government's "complete extinguishment of his property's value." *Id.* at 1009. It characterizes the state supreme court's ruling as finding no taking "regardless of the regulation's effect on the property's value." *Id.* at 1010. In delineating its per se rule, the *Lucas* opinion once again emphasizes the key factual predicate that underlies the per se rule: the trial court's finding that the lots had been "rendered valueless" by the regulation at issue. *Id.* at 1020. The pivotal nature of this finding is evidenced by the majority's specific justification for accepting it, see *id.* at 1020 n.9, as well as the skepticism regarding its accuracy expressed by each of the four separate opinions in the case. *Id.* at 1034 (Kennedy, J., concurring) ("I share the reservations of some of my colleagues about a finding that a beachfront lot loses all value because of a development restriction."); *id.* at 1043–44 (Blackmun, J., dissenting) ("The Court creates its new takings jurisprudence based on the trial court's finding that the property had lost all economic value. This finding is almost certainly erroneous."); *id.* at 1065 n.3 (Stevens, J., dissenting) (the "land is far from 'valueless'"); *id.* at 1076 (Souter, J., separate statement) (noting the trial court's finding that the development ban rendered the land valueless is "highly questionable").

²⁰⁷ *Palazzolo v. Rhode Island*, 533 U.S. 606, 632 (2001); see also *id.* at 652 (Ginsburg, Souter & Breyer, JJ., dissenting) (stating that "a floor value was all the State needed to defeat *Palazzolo*'s simple *Lucas* claim").

ing.”²⁰⁸ *Tahoe-Sierra*, too, confirms that “[a]nything less than a ‘complete elimination of value,’ or a ‘total loss,’ . . . would require the kind of analysis applied in *Penn Central*.”²⁰⁹

Palazzolo does not explain precisely what the Court means by “token” value, which would be insufficient to defeat a *Lucas* per se claim. But because both *Palazzolo* and *Lucas* reject the suggestion that a ninety-five percent value loss may support a per se claim, *Palazzolo*’s assertion regarding token value must refer to truly *de minimis* value, something significantly less than five percent.²¹⁰

E. *The Palazzolo Dicta on the Parcel-as-a-Whole Rule*

In disposing of the *Lucas* claim, the Court expressly declined to address *Palazzolo*’s argument that the wetland portion of his property should be considered separately from the upland portion because *Palazzolo* failed to make this argument in the state courts.²¹¹ In other words, the Court refused *Palazzolo*’s invitation to revisit its prior rulings that a regulation’s economic impact should be evaluated by considering its effect on the claimant’s entire parcel.²¹²

Burling argues that the Court’s treatment of this parcel-as-a-whole rule “has been mixed, hopelessly contradictory, and defiant of synthesis,”²¹³ but he greatly overstates the alleged confusion in the law

²⁰⁸ See *Rith Energy, Inc. v. United States*, 270 F.3d 1347, 1349 (Fed. Cir. 2001), *cert. denied*, 122 S. Ct. 2260 (2002).

²⁰⁹ *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 122 S. Ct. 1465, 1483 (2002) (quoting *Lucas*, 505 U.S. at 1012).

²¹⁰ See *Animas Valley Sand & Gravel v. Bd. of County Comm’rs*, 38 P.3d 59, 65–67 (Colo. 2001) (en banc) (noting that *Palazzolo* shows that the *Lucas* per se rule applies only where land is left valueless or with only *de minimis* value, and that a non-per se taking may occur only where regulation leaves a landowner with “a value slightly greater than *de minimis*”). In another instance of exaggeration, Burling asserts that “some commentators continue to suggest that *Lucas* makes it *harder* for a court to find a taking,” citing a publication that I co-authored as support. Burling, *supra* note 2, at 60 & n.382 (citing KENDALL, DOWLING & SCHWARTZ, *supra* note 75, at 194–204). The cited publication says no such thing. It simply demonstrates that the per se rule under *Lucas* is driven by value, not by any purported right to build. See KENDALL, DOWLING & SCHWARTZ, *supra* note 75, at 196–204. Far from suggesting that *Lucas* makes it harder for a court to find a taking, my co-authors and I observed that *Lucas*’s treatment of value and the economically-viable-use test in this regard “reflects the Court’s historic understanding of these concepts in takings analysis.” *Id.* at 197. *Tahoe-Sierra* reaffirms that to prevail on a per se taking under *Lucas*, a landowner must show a complete loss of value. *Tahoe-Sierra*, 122 S. Ct. at 1483 (a claim based on less than a total value loss “would require the kind of analysis applied in *Penn Central*”).

²¹¹ See *Palazzolo*, 533 U.S. at 631–32.

²¹² See *id.*

²¹³ Burling, *supra* note 2, at 51.

on this score. In fact, the parcel-as-a-whole rule is one of the few firmly entrenched, bright lines in takings jurisprudence. The Court articulated this parcel-as-a-whole rule more than twenty years ago in *Penn Central*. There, the City of New York applied historic preservation laws to deny the owners of Grand Central Terminal permission to build an office building atop the terminal.²¹⁴ The Court rejected the owners' argument that takings analysis should focus solely on the air rights above the terminal, stating:

"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 . . . on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the "landmark site."²¹⁵

Because the owners could still operate the Terminal and the surrounding contiguous properties that they owned, the challenged regulation did not deny them all economically viable use of their entire parcel, and the Court rejected the takings claim.²¹⁶

The Court has reaffirmed the parcel-as-whole rule time and again.²¹⁷ The overwhelming majority of lower courts that have addressed the issue have followed *Penn Central* and other binding precedent to hold that the relevant parcel for takings analysis consists of at

²¹⁴ *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 137–38 (1978).

²¹⁵ *Id.* at 130–31.

²¹⁶ *Id.* at 136–38.

²¹⁷ *E.g.*, *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 498–502 (1987) (ruling that "the 27 million tons of coal do not constitute a separate segment of property for takings law purposes" in a takings challenge to mining restrictions); *Andrus v. Allard*, 444 U.S. 51, 66–67 (1979) ("At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."). The Court in *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust* stated:

[A] claimant's parcel of property [may] not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable. To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question.

508 U.S. 602, 643–44 (1993).

least all of the claimant's contiguous property, not just the affected portion.²¹⁸

In view of this long-standing precedent it is puzzling that Justice Kennedy, writing for the *Palazzolo* Court, would refer to the matter as a "difficult, persisting question."²¹⁹ Although Justice Kennedy cited cases applying the rule, he did not describe these cases as holding that courts should look to the parcel as a whole, but instead used more tepid language, stating that "[s]ome 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."²²⁰ Justice Kennedy also cited to footnote seven of *Lucas* for the proposition that the Court "at times expressed discomfort with the logic of this rule."²²¹ He further observed that certain commentators have also criticized the parcel-as-a-whole rule.²²² As Burling's article portends, the plaintiff's bar probably will use this discussion in an attempt to persuade lower courts to abandon the parcel-as-a-whole rule.

Several responses present themselves. First, the parcel-as-a-whole rule is based not on mere "indicat[ions]" as suggested by Justice Kennedy, but instead on long-standing, binding rulings promulgated by the Supreme Court, including *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust*, a unanimous post-*Lucas* rul-

²¹⁸ *E.g.*, *Dist. Intown Props. Ltd. P'ship v. District of Columbia*, 198 F.3d 874, 881 (D.C. Cir. 1999) (finding that the relevant parcel includes both the affected and unaffected portions of the owner's parcel); *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 802 (Fed. Cir. 1993) ("[T]he quantum of land to be considered is not each *individual* lot containing wetlands or even the combined area of wetlands. If that were true, the Corps' protection of wetlands via a permit system would, *ipso facto*, constitute a taking in every case where it exercises its statutory authority."); see *Penn Cent.*, 438 U.S. 104, 130-31 (1978); *City of Annapolis v. Waterman*, 745 A.2d 1000, 1022 (Md. 2000) ("[T]he property to be assessed for economically viable use is, as we have said, the entire tract of land . . ."); *K & K Constr., Inc. v. Dept. of Natural Res.*, 575 N.W.2d 531, 537 (Mich. 1998) ("[C]ontiguity and common ownership create a common thread tying these three parcels together for the purpose of the takings analysis."); *Zealy v. City of Waukesha*, 548 N.W.2d 528, 530 (Wis. 1996) (finding that the relevant parcel included about 8.2 acres zoned as wetlands and 2.1 acres of contiguous property zoned for residential and commercial development); *E. Cape May Assocs. v. State, Dep't of Env'tl. Prot.*, 693 A.2d 114, 125 (N.J. Super. Ct. App. Div. 1997) ("The majority of out-of-state cases which have considered the [relevant parcel question] have held that it consists of all of the claimant's contiguous acreage in the same ownership.")

²¹⁹ *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001).

²²⁰ *Id.* (emphasis added).

²²¹ *Id.* (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016-17 n.7 (1992)).

²²² *Id.* (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)).

ing.²²³ In her dissent, Justice Ginsburg points out the majority's failure to acknowledge *Concrete Pipe*.²²⁴ Burling tries to downplay the significance of *Concrete Pipe* by noting that it did not involve real property,²²⁵ but *Concrete Pipe* cites and relies on both *Penn Central* and *Key-stone*, both real property cases, in its reaffirmation of the parcel-as-a-whole rule.²²⁶

Second, Justice Kennedy's description of *Lucas's* footnote seven is inaccurate, for footnote seven does not "express discomfort with the logic" of the parcel-as-a-whole rule. Indeed, it does not discuss the "logic" of the rule at all. Instead, footnote seven observes that the deprivation-of-all-economically-feasible-use rule does not, by itself, offer guidance on how to define the relevant parcel,²²⁷ and it then notes that the relevant parcel might be defined by considering either the affected portion or the parcel as a whole. Footnote seven then expresses disagreement with the particular relevant-parcel definition used by the New York Court of Appeals in *Penn Central*.²²⁸ It is noteworthy that the *Lucas* Court did not question its own use of the parcel-as-a-whole rule in its *Penn Central* ruling. Footnote seven then notes that uncertainty regarding the denominator has led to disparate results on occasion, and it suggests that state law might be relevant to the proper definition of the relevant parcel.²²⁹ However, footnote seven nowhere analyzes, much less criticizes, the "logic" of the parcel-as-a-whole rule.

Third, the discussion of the relevant-parcel issue by the *Palazzolo* majority is gratuitous dicta because the *Palazzolo* Court expressly declined to address the issue. So too is footnote seven of *Lucas* because, as indicated in that footnote, *Lucas* alleged a taking of his entire parcel.²³⁰

²²³ See *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 644 (1993).

²²⁴ See *Palazzolo*, 533 U.S. at 651 n.2 (Ginsburg, Souter & Breyer, JJ., dissenting) (stating that *Palazzolo's* proposed parcel definition conflicts with "numerous holdings" of the Supreme Court, including *Concrete Pipe*).

²²⁵ Burling, *supra* note 2, at 55.

²²⁶ See *Concrete Pipe*, 508 U.S. at 644.

²²⁷ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992) ("Regrettably, the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured.")

²²⁸ 366 N.E.2d 1271, 1276-77 (N.Y. 1977), *aff'd*, 438 U.S. 104 (1978).

²²⁹ *Lucas*, 505 U.S. at 1016 n.7.

²³⁰ *Id.* at 1017 n.7.

Finally, and most importantly, the *Tahoe-Sierra* Court resoundingly reaffirmed the parcel-as-a-whole rule, setting forth a comprehensive discussion of the decades of precedent that support the rule²³¹ and stating that the Court has “consistently rejected” any other approach.²³² The Court rejected both geographic and conceptual severance, insisting that “[a]n interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner’s interest.”²³³ Even the dissent acknowledges that the majority concludes that the parcel-as-a-whole rule is settled law,²³⁴ and thus there can be no question that *Tahoe-Sierra* puts to rest any confusion created by *Palazzolo* regarding the rule.

CONCLUSION

State and local officials won a clear victory with a holding that significantly cabins the scope of liability under the *Lucas* per se rule. On ripeness, the Court ruled for Palazzolo on the facts but reaffirmed its basic ripeness doctrine and the right of state and local officials to fashion their land-use procedures as they see fit. On post-enactment acquisition, the Court rejected a blanket rule of per se non-liability, but it recognized that regulations may serve as background principles where they are “derived from” a state’s legal tradition. Five Justices reaffirmed that pre-existing regulations are relevant to the issue of whether a non-per se *Penn Central* taking has occurred.

The State of Rhode Island is likely to prevail on remand, particularly given the trial court’s findings that the proposed fill would constitute a nuisance, the State’s compelling argument that the public-trust doctrine precludes liability, the absence of evidence as to the viability of Palazzolo’s beach club proposal, and the speculative nature of Palazzolo’s subdivision proposal. Regardless of the outcome on remand, however, *Palazzolo* stands not as a landmark victory for property owners, but instead as yet another modest, incremental development in takings jurisprudence, one from which both sides may draw support.

²³¹ 122 S. Ct. 1465, 1481, 1483–84 (2002).

²³² *Id.* at 1483.

²³³ *Id.* at 1484.

²³⁴ *Id.* at 1496 n.* (Thomas & Scalia, JJ., dissenting).

