Finding the Third *Penn Central* Prong in the *Palazzolo* Remand: Weighing the Public Purposes of Wetlands Protection after *Palazzolo* and *Tahoe*

Leigh E. Cummings III1

In the continuing wars over property rights and takings jurisprudence, one of the most fascinating salvos was fired on June 28, 2001, in Palazzolo v. Rhode Island, 533 U.S. 606 (2001). On remand, on July 5, 2005, Justice Gale of the Rhode Island Superior Court ultimately held that the state wetlands regulation restricting plaintiff Anthony Palazzolo's right to build a beach club or residential subdivision did not constitute a regulatory taking under the mandated Penn Central analysis.2

The often-cited central Penn Central rubric for determining whether regulatory takings are constitutionally valid or invalid has three prongs:

(1) economic impact, in diminution of private property values,

(2) investment-backed expectations [which analytically is a subset of the first], and

(3) the "character of the governmental action"

It is this third prong of the Penn Central analysis, as articulated by Justice O'Connor in Palazzolo and echoed by the court in Tahoe,3 that is potentially most significant, though it has not received sufficient attention. Without an articulated third prong, the judicial regulatory takings standard lacks overt incorporation of a balancing principle between private and public rights. With it, a significant central dilemma of democracy — "how far can the community impose burdens on private individuals for civic needs?" — can be addressed in tangible, appropriate, and judiciable terms.

On remand, in finding there was no taking under Penn Central, Justice Gale focused on only the first two Penn Central prongs — the limited loss to the plaintiff's property and its remaining value, as well as his limited reasonable investment-backed expectations.4 Justice Gale, however, did not weigh the public purpose of the Rhode Island regulation against its burden to private property interests as Justice O'Connor suggests in Palazzolo and the Supreme Court provides in Tahoe.5

___

1 Boston College Law School, class of 2007; additional text by Z. Plater.

2 Palazzolo v. Rhode Island, Ca. No. WM 88-0297, 32 (Sup. Ct. R.I. 2005); Available at: http://www.law.georgetown.edu/gelpi/news/documents/PalazzolloState_000.pdf.; the Penn Central standard for the mandate derives from Justice Brennan's text in Penn Central, 438 U.S. at 124 (1978).

3 See O'Connor *Palazzolo* concurrence, 533 U.S. at 633-634:

We have "identified several factors that have particular significance" in these "essentially ad hoc, factual inquiries." Penn Central, 438 U.S. at 124. Two such factors are "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." Another is "the character of the governmental action." **The purposes served, as well as the effects produced, by a particular regulation inform the takings analysis**...." See also Yee v. Escondido, 503 U.S. 519, 523 (1992) (Regulatory takings cases "necessarily entail complex factual assessments of the...purposes of government actions").

4 Palazzolo, Ca. No. WM 88-0297 at 20-30. The 2002 edition of the Boston College Environmental Affairs Law Review provides a detailed discussion of the *Palazzolo* decision by the United States Supreme Court and Palazzolo's prospects on remand, See 30 B.C. ENVTL. AFF. L. REV. (2002).

This article examines the third prong of the Penn Central test and argues that the nature and character of the public purpose served in the Palazzolo setting outweighed the burden to Anthony Palazzolo's property under the Penn Central test.6

The History and Procedural Posture of the Palazzolo case

In Palazzolo the U.S. Supreme Court reversed the Rhode Island Supreme Court and rejected the state's argument that Palazzolo's claim was not ripe for adjudication, and his suit was not barred by the fact that he acquired title to the property in question after the promulgation of the state wetlands regulation.7 The Court upheld the state Supreme Court's ruling that the regulation did not constitute a categorical taking under the Lucas framework because Palazzolo's land retained some value.8 The Court remanded the case to the Rhode Island Supreme Court to examine Palazzolo's taking claim under the Penn Central balancing test without further instruction.9

Justice O'Connor, writing in concurrence, joined the Court in rejecting the state's claim that the timing of Palazzolo's acquisition of the property barred a takings finding per se.10 O'Connor, however, made two suggestions as to how the court should apply the Penn Central balancing test on remand.11 First, the state court should consider the

---

5 See *Palazzolo* on remand, Ca. No. WM 88-0297 at 19-20; See also Tahoe-Sierra v. Tahoe Regional Planning Agency, 535 U.S. 302, 337-342 (2002); Palazzolo v. Rhode Island, 533 U.S. 606, 632 (2001) (O'Connor, J., concurring).

6 See Palazzolo, R.I. Sup. Ct. Ca. No. WM 88-0297 at 6-7, 11-12; Patrick A. Parenteau. Unreasonable Expectations: Why Palazzolo has no right to turn a silk purse into a sow's ear. 30 B.C. Envtl. Aff. L. Rev. 101, 103-105, 122 (2002).

7 *Palazzolo*, 533 U.S. at 611-630. Palazzolo's claim was first dismissed by the Rhode Island Superior Court in 1995 because his counsel failed to appear before the court on a number of occasions, but the Rhode Island Supreme Court reversed. Palazzolo v. Coastal Resources Management Council, 657 A.2d 1050 (R.I. 1995). After the Superior Court dismissed Palazzolo's claim on the merits in 1997, The Rhode Island Supreme Court upheld the decision in 2000, accepting the state's argument his claim was not ripe because his application before the Coastal Resources Management Council was not for the same use restriction that formed his taking claim (a 74 lot high-density residential subdivision). See Palazzolo v. State, 746 A.2d 707 (R.I. 2000), rev'd 535 U.S. 606 (2001). For a detailed history of the case, See David Cole, Analytical Chronology of Palazzolo v. Rhode Island, 30 B.C. ENVT. AFF. L. REV 171 (2002).

8 The remaining value was the sale or development of an eighteen acre parcel of land at a higher elevation than the marshland estimated at $200,000. Palazzolo

accepted this valuation found by the state trial court and unsuccessfully argued before the Supreme Court that he suffered a total taking nonetheless. See Palazzolo, 533 U.S. at 630-632. On June 29, 1992, the Court held in Lucas v. South Carolina that a restriction that renders property economically idle constitutes a categorical taking, regardless of its public purpose. See Lucas v. South Carolina, 505 U.S. 1003, 1019 (1992).

9 Id. Penn Central held that in takings claims resulting from restrictions on the use of property, the Fifth Amendment requires just compensation when the restriction goes "too far" and fairness and justice require the burdens of the regulation be borne by the community as a whole. Penn Central Transportation Company v. City of New York, 438 U.S. 104, 123-124 (1978). Determining if a regulation goes too far depends on the particular circumstances of each case, but is guided by the economic impact of the regulation, its interference with distinct investment-backed expectations, and the nature and character of the government regulation. Id. at 124-125.

10 Palazzolo, 533 U.S. at 632.

11 Id. at 633.

"temporal relationship between regulatory enactment and title acquisition" when determining reasonable investment-backed expectations.12 Second, Justice O'Connor noted that because the Fifth Amendment requires weighing all relevant circumstances to determine if a regulation goes so far that fairness requires just compensation, courts must balance the public purpose served against resulting individual economic loss.13 Justice O'Connor therefore instructed the state supreme court to look to "the purposes served, as well as the effects produced" by the wetlands regulation in its Penn Central analysis.14 In Tahoe-Sierra v. Tahoe Regional Planning Agency, decided April 13, 2002, the court adopted Justice O'Connor's requirement to weigh the public purpose of a regulation in rejecting plaintiff's argument that a temporary moratorium on development effectuated a taking.15

Hearing the Palazzolo case on remand, the Rhode Island Supreme Court remanded the case to the Superior Court on September 25, 2001, to conduct evidentiary hearings to determine if a taking had occurred under the Penn Central test.16 On July 5, 2005, Justice Gale of the Superior Court, after first limiting Palazzolo's claim under Lucas background principles, dismissed the claim under Penn Central analysis.17 The Court found that the wetlands regulation did not constitute a taking because the character of the government action was to protect the general welfare and not specifically targeted at Palazzolo, the diminution of the property interest was minimal, and Palazzolo's reasonable investment-backed expectations were modest.18

As to the diminution of Palazzolo's property interest, the Court rejected his claim that the state's refusal to issue him a permit for a high-density residential subdivision resulted in lost profits in excess of three million dollars, crediting the state's loss estimate at likely less than $8,000 and certainly no more than $158,000.19 These prospective losses failed to exceed the residual value of building a single residence on an uplands parcel of

—

12 See Id.

13 See Id. at 632-634.

14 Id. at 634.

15 See Tahoe-Sierra, 535 U.S. at 337-342 (2002).

16 Palazzolo v. Rhode Island, 150 L. Ed. 2d 582; 2001 U.S. Lexis 4910; 121 S. Ct. 2448 (R.I. 2001).

17 Palazzolo, Ca. No. WM 88-0297 at 32. The Court found the proposed development would constitute a public nuisance because of increased sewage runoff, reduction in salt marsh to absorb existing runoff and loss of wildlife habitat. Palazzolo, Ca. No. WM 88-0297 at 10-11. As Lucas notes, if the plaintiff never had the right to develop his land under the common law, there can be no

taking. See Lucas, 505 U.S. 1003 at 1025-1027. As to other "background principles" of state common law, the court held Palazzolo's reasonable investment-backed expectations were further limited because the public trust doctrine in Rhode Island would have barred development on portions of the property below the mean high water mark well before Palazzolo's corporation acquired the property. Palazzolo, Ca. No. WM 88-0297 at 10-11.

18 Palazzolo, Ca. No. WM 88-0297 at 17-30.

19 Determining the diminution of Palazzolo's property interest was a matter of some dispute, since it was unclear what use the state denied Palazzolo. For conflicting accounts of Palazzolo's attempts at development, dating back to his first application in 1959, See James Burling, Private Property Rights and the Environment After Palazzolo, 30 B.C. ENVTL. AFF. L. REV. 1, 6-10 (2002); Timothy Dowling, On History, Takings Jurisprudence, and Palazzolo: A Reply to James Burling, 30 B.C. ENVTL. AFF. L. REV. 65, 77-81 (2002). Ultimately, the trial Court based its diminution estimates on net profits from proposed seventeen or fifty lot subdivisions. Palazzolo, Ca. No. WM 88-0297 at 25.

land ("Lot 19").20 As to Palazzolo's reasonable investment-backed expectations, the Court found them to be limited by the public's title in trust to portions of the land below the mean high water mark.21 The Court also found that the engineering difficulties of building on the site, existing state regulations on the dredging and filing of tidal waters, and his business partner's retreat from investment in the property limited Palazzolo's reasonable investment-backed expectations.22

The remand court only undertook a cursory analysis of the nature and character of the regulation, failing to follow Justice O'Connor's directive, adopted by the court in Tahoe-Sierra, to examine the public purpose of the government action.23 The remand merely distinguished the character of the regulation from a Lucas "wipeout" that deprives a parcel of "all beneficial economic use" or regulatory schemes that fail to benefit the public generally or are directed at a single property owner in particular.24 Because the Court's inquiry turned on the regulation's "economic impact" on the property owner and the degree to which it interfered with reasonable investment-backed expectations, the court had no purpose to weigh against the burden, which it found minimal, imposed on the plaintiff.25

Mostly Missing Penn Central's Third Prong

In the Palazzolo remand, because Justice Gale only distinguished the regulation from one resulting in a categorical taking, the nature and character analysis merely answered the threshold question already decided by the U.S. Supreme Court: a Penn Central takings analysis is the appropriate framework to adjudicate Palazzolo's claim.26 As Justice O'Connor notes, a court must weigh the purpose of a regulation against the burden imposed on individual property to determine if a regulation goes "too far," thereby requiring compensation to the property owner.27 Had the Court considered the public purpose of the Rhode Island statute, it is highly likely that it would have found its character was to promote public health and safety.28 In a public-private rights balance the regulation thus probably would not have constituted a taking, even if the plaintiff

___

20 Id. at 22-24. The court also noted that keeping the marsh in its present state has amenity value to Palazzolo's property, which the plaintiff failed to include in his claim. Id. at 24.

21 Id. at 17.

22 Id. at 30.

23 Id. at 19-20. See Palazzolo, 533 U.S. at 633; See also Tahoe-Sierra, 535 U.S. 302 at 337-342.

24 See Lucas, 505 U.S. 1003 at 1019.

25 Palazzolo, R.I. Sup. Ct. Ca. No. WM 88-0297 at 19-20. See Tahoe-Sierra, 535 U.S. 302 at 337-342; Palazzolo, 533 U.S. at 633.

26 The Palazzolo case before the U.S. Supreme Court was a benchmark in takings jurisprudence in part because the court clarified what constituted a categorical taking and what regulations are appropriately analyzed as "partial takings claims" under Penn Central in finding the plaintiff was not barred from all economically beneficial use of property. See Palazzolo, 533 U.S. at 616; See also Lucas at 505 U.S. 1019. The court found a lot on the uplands portion of the property could be developed and was worth approximately $200,000, and this remaining value did not leave the property economically idle. Palazzolo, 533 U.S. at 616.

27 See Palazzolo, 533 U.S. at 633; See also Tahoe-Sierra, 535 U.S. 302 at 337-342.

28 Palazzolo, R.I. Sup. Ct. Ca. No. WM 88-0297 at 6-7, 11-12, 19-20.

could have shown considerable economic loss and interference with reasonable investment-backed expectations.29

Justice Brennan implicitly instructed courts to weigh the public purpose of a regulation in its Penn Central test, noting that when a use restriction can be characterized as protecting "the health, safety, morals, or general welfare," it typically would not constitute a taking even when it destroys or adversely effects property interests.30 As the Penn Central decision noted, the Court has upheld regulations restricting industrial use, requiring portions of parcels be left unbuilt, and restricting height in zoning cases because planned development regulations embodied substantial public purposes.31

Use of the state's police power to restrict land use without compensating the owner for the purpose of promoting public health and safety was upheld by the court dating back to 1887 in Mugler v. Kansas, where the Supreme Court found that no taking existed when the state enacted prohibition laws that rendered the plaintiff's distillery nearly valueless.32 More recently, in First English Evangelical, Justice Rehnquist, even in positing that a temporary ban on any use of a property could constitute a taking, upheld the state's authority to enact safety regulations without compensating property owners for lost value and directed the court to consider this issue on remand.33 Hearing the case on remand, the California Court of Appeals held that the city ordinance, enacted after a major flood and barring the erection of any new building (at least temporarily) in a flood plain,34 did not constitute a regulatory taking, in part because the ordinance was necessary to promote public safety.35

Lucas clarified the principle that when a government regulation prevents a public nuisance, there can be no compensable taking, since state nuisance claims under the common law serve as background principles removing certain uses from the "bundle of rights" acquired by owners of property.36 Additionally, Lucas held that when a

---

29 See Tahoe-Sierra, 535 U.S. at 337-342; Palazzolo, 533 U.S. at 632-634.

30 See Penn Central, 438 U.S. at 125.

31 See Id. See also Euclid v. Ambler Realty, 272 U.S. 365 (1926); Gorieb v. Fox, 274 U.S. 603 (1927); Welch v. Swasey, 214 U.S. 91 (1909).

32 Justice Harlan, writing for the Court, declared, "The power which the states prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public…cannot be burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain by reason of their not being permitted…to inflict injury upon the community." Mugler v. Kansas, 123 U.S. at 668.

33 See First Evangelical, 482 U.S. 304 at 313. See also Mugler, 123 U.S. at 660-665.

34 In one of the seminal flood control zoning cases, Turnpike Realty Co. Inc. v. Town of Dedham, Mass., the Court found three public purposes for restricting development in flood plane: the safety those who would otherwise live in a flood plane, the safety of other landowners who would be put at risk of flood damage if development was to occur, and the protection of the entire community from expenditures for public works and disaster relief. Turnpike Realty v. Town of Dedham, 284 N.E.2d 891, 897 (Mass. 1972), cert. denied at 409 U.S. 1108.

35 The Court also found that the regulation was only a partial denial of use, since the ordinance was temporary and was soon replaced by a more permissive zoning ordinance. But the Court held in dictum that because the statute protected public safety, it would still not constitute a compensable taking even if it denied all use. First Evangelical v. County of Los Angeles, 210 Cal.App.3d 1353, 1360-1367. (C.A. App. 1989).

36 Lucas, 505 U.S. at 1025-1027.

regulation results in a total loss of value to a parcel of property, otherwise legitimate exercises of police power give rise to a categorical taking.37 Many lower courts, however, had interpreted Lucas as altering the nature and character prong of the Penn Central test to only require distinguishing between prevention of nuisance and the exercise of police power in general.38 Forest Products Inc. v. U.S. is typical of this approach, in holding Lucas had shifted the nature and character prong "from one in which courts, including federal courts, were called upon to make ad hoc balancing decisions, balancing private property rights against state regulatory policy, to one in which state property law, incorporating common law nuisance doctrine

James Burling40 notes a series of Court of Federal Claims takings challenges, which in addition to showing an increased willingness to find a taking in parcels with only a partial loss of value, reveal the limited approach similar to Forest Properties that this particular Court has taken in evaluating nature and character of the government regulations.41 In Florida Rock Industries v. U.S., the court went so far as to rule on remand that a seventy-three percent loss of value resulting from the federal government's refusal to issue a permit to mine limestone in a 1,560 acre parcel comprised mainly of wetlands was a compensable taking per se because the character of the government action did not meet a special set of circumstances such as the abatement of nuisance.42

The court retreated somewhat in Walcek v. United States, finding that a taking did not exist despite a 59.7 percent reduction in the value of the property when the government refused to issue building permits for residential homes in lots comprised principally of wetlands.43 As to the public purpose under Penn Central's nature and character prong, however, the court held the fact the regulation did not prevent a public nuisance counsels against a taking, but that this prong of the test was outweighed by the remaining value of the parcel and the owner's unreasonable investment expectations.44

Notwithstanding the interpretation of the Court of Federal claims, the Lucas decision does not stand for the proposition that a state's police power interests should not be considered in weighing whether a partial taking goes "too far" when a parcel of property retains some value or that failure to prove a public nuisance counsels against a takings claim when Penn Central is the appropriate test.45 O'Connor's instructions to consider the public purposes of the regulation for the Palazzolo remand, and their adoption in the nature and character prong in Tahoe-Sierra, indicate that the Fifth

—

37 Id. at 1019.

38 See e.g. Forest Properties Inc. v. U.S., 177 F.3d 1360, 1367 (1999); Creppel v. U.S., 41 F.3d 627, 631 (1994); Walcek v. U.S. 49 Fed. Cl. 248, 257, 270 (2001).

39 Forest Properties, 177 F.3d at 1366.

40 James Burling, of the Pacific Legal Foundation, argued for Anthony Palazzolo before the United States Supreme Court in 2001.

41 See e.g. Florida Rock Industries Inc. v. U.S. 45 Fed.Cl. 21, 31-33, 40 (1999); Walcek v. U.S. 49 Fed. Cl. 248, 257, 270; See Also Florida Rock Industries v. U.S 18 F.3d 1560, 1569-1572 (1994).

42 Florida Rock Industries Inc., 45 Fed. Cl. at 31-33, 40; Walcek, 49 Fed. Cl. at 257, 270.

43 Walcek, 49 Fed. Cl. at 257-263, 270.

44 Id. At 270-271.

45 Lucas, 505 U.S. at 1019, 1025-1027; See Penn Central, 438 U.S. at 124.

Amendment requires weighing the state's interest and the private burden under Penn Central's three-prong test.46

Had Justice Gale considered the public purpose of the Rhode Island statute, it is highly likely that the Superior Court would have found that it directly prevented serious threats to public health and safety.47 The remand court noted in its public nuisance determination that developing the property as Palazzolo intended would produce sewage drainage into the waters where shellfish were harvested, and eliminate marshland necessary to absorb existing runoff.48 The predictable human and environmental dangers of increased nitrogen levels from such wetland development are noted by Patrick Parenteau, who states that in addition to threatening fragile marine ecosystems, increased nitrogen levels in Winnapaug pond would produce increased nitrates in drinking water, which can interfere with oxygen supplies in the bloodstream, especially in infants (known as "blue baby" syndrome).49 According to Parenteau, many seacoast communities in Rhode Island already exceed EPA's "maximum containment level" for nitrates.50

The Palazzolo remand court dismissed Anthony Palazzolo's takings claim on Lucas background principles because development of the property would have constituted a public nuisance.51 The court also found no compensable taking under Penn Central, since Palazzolo's losses were minimal and he never could reasonably have expected to be allowed to lawfully build a seventy-four lot subdivision in the first place.52 However, because the character of the Rhode Island regulation was directly linked to prevention of public health and safety threats as well as ecological preservation, a finding that no taking occurred would have been amply justified even if Palazzolo could have shown a significant loss of value and significant frustration of reasonable investment-backed expectations.53

—

46 See Palazzolo, 533 U.S. at 633; See also Tahoe-Sierra, 535 U.S. 302 at 337-342.

47 Palazzolo, R.I. Sup. Ct. Ca. No. WM 88-0297 at 6-7, 11-12, 19-20.

48 Palazzolo, R.I. Sup. Ct. Ca. No. WM 88-0297 at 6-7, 11-12.

49 Patrick Parenteau, Unreasonable Expectations: Why Palazzolo Has no Right to Turn a Silk Purse into a Sow's Ear, 30 B.C. ENVTL. AFF. L. REV. 101, 103-105 (2002).

50 Id.

51 See Palazzolo, R.I. Sup. Ct. Ca. No. WM 88-0297 at 6-7, 10-13; See also Lucas, 505 U.S. at 1025-1027.

52 Palazzolo, R.I. Sup. Ct. Ca. No. WM 88-0297 at 20-30; Penn Central, 438 U.S. at 104.

53 See Palazzolo, 533 U.S. at 632-634; 535 U.S. at 337-342; Penn Central, 438 U.S. at 104.