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The Strategic Alternative: How State Takings Statutes May Resolve the Unanswered Questions of Palazzolo

Michael A. Culpepper
University of Richmond

COMMENTS

THE STRATEGIC ALTERNATIVE: HOW STATE TAKINGS STATUTES MAY RESOLVE THE UNANSWERED QUESTIONS OF *PALAZZOLO*

I. INTRODUCTION

In a world of "Hobbesian stick[s]"[1] and "Lockean bundle[s],"[2] analytical confusion should be expected. Indeed, critics describe the world of federal takings jurisprudence as "an unworkable muddle,"[3] as "a jumble of confusing holdings,"[4] and as a body of law existing in "doctrinal and conceptual disarray."[5] Since the United States Supreme Court first considered the regulatory takings issue in *Mugler v. Kansas*,[6] the Court's inconsistent application of the doctrine has largely conformed to criticism.[7] Governed

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1. Palazzolo v. Rhode Island, 121 S. Ct. 2448, 2462 (2001).

2. *Id.*

3. J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 ECOLOGY L.Q. 89, 102 (1995).

4. James L. Huffman, Dolan v. City of Tigard: *Another Step in the Right Direction*, 25 ENVTL. L. 143, 144 (1995).

5. Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles*, 77 CAL. L. REV. 1299, 1304 (1989).

6. 123 U.S. 623 (1887).

7. In *Mugler*, the Court immunized "valid" police power regulations of the state. *Id.* at 668–69. Yet in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) the Court recognized a taking for *any* regulation that went "too far." *Id.* at 415. Four years later, the Court virtually ignored the *Mahon* holding in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), and continued to do so until deciding the 1978 case of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). In *Penn Central*, the Court proposed a three-factor test to determine whether a taking had been committed. *Id.* at 124. Later, in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) the Court proposed an "economically beneficial use[ ]" test. *Id.* at 1019. For a discussion of regulatory takings, see WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY § 9.4 (3d ed. 2000).

by abstruse metaphors[8] and ad hoc analysis, the Court acknowledges its imprecision[9] and often relies upon it.[10]

In *Palazzolo v. Rhode Island*,[11] however, the Court reordered at least some of the discontinuity that previously troubled critics in three ways. First, by bifurcating the approaches of previous case law, the Court provided takings plaintiffs with two distinct regimes.[12] Second, by doing so, the Court opened the courthouse door to landowners who purchased properties with knowledge of the burdensome regulation, whereas previous cases had left the issue undecided.[13] Third, by clarifying the final action requirement, the Court provided further guidance into the ripeness consideration.[14] Yet while *Palazzolo* helped to alleviate the "unworkable muddle"[15] of precedent, the Court failed to provide a "set formula" for the takings determination.[16] Questions remain as to application and degree.

However, as the case slowly climbed the appellate ladder,[17] a peculiar legislative phenomenon began to take hold in state legislatures—the property rights statute. By 1995, over sixty "Private Property Protection Acts" had been introduced by state officials.[18] The bills generally appeared in one of two forms: "as 'assessment' statutes or 'compensation' statutes."[19] While the former required

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8. *See supra* note 1 and accompanying text.

9. "[T]his Court, quite simply, has been unable to develop any 'set formula'. . . ." *Penn Cent.*, 438 U.S. at 124 (quoting Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962)).

10. "[W]hether a particular restriction will be rendered invalid . . . depends largely 'upon the particular circumstances [in that] case.'" *Id.* (quoting United States v. Cent. Eureka Mining Co., 357 U.S. 155, 168 (1958)) (second alteration in original).

11. 121 S. Ct. 2448 (2001).

12. As later analysis will make apparent, *Palazzolo* examined the facts at issue under both the *Lucas* test and the *Penn Central* test. *See infra* Part III.B–C.

13. In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) the petitioners had notice of the regulation at the time of purchase, but the actual taking occurred after the petitioners acceded to ownership. Id. at 827–28. Therefore it was left unclear as to whether the owner could recover for a regulatory taking that occurred before transfer of ownership. *See Palazzolo*, 121 S. Ct. at 2471 (Stevens, J., concurring in part and dissenting in part).

14. *Palazzolo*, 121 S. Ct. at 2458.

15. Byrne, *supra* note 3, at 102.

16. *Palazzolo*, 121 S. Ct. at 2466 (O'Connor, J., concurring) (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)).

17. *See* Palazzolo v. Coastal Res. Mgmt. Council, 657 A.2d 1050 (R.I. 1995).

18. Nancie G. Marzulla, *State Private Property Rights Initiatives as a Response to "Environmental Takings"*, 46 S.C. L. REV. 613, 633 (1995).

19. Lynda J. Oswald, *Property Rights Legislation and the Police Power*, 37 AM. BUS. L.

state agencies to assess the impact of future regulation on property rights,[20] the latter went further, establishing trigger levels to determine takings compensation.[21] Later bills proposed prelitigation procedures to resolve takings disputes.[22] Labeled by some as "the worst anti-environmental law[s] ever passed in the United States,"[23] many of these bills survived heated criticism from environmentalists; in 2000, almost half of the states maintained some form of property rights legislation.[24]

Along with *Palazzolo*, state private property rights statutes provide a workable and complimentary framework for takings determinations. While state statutes cannot necessarily supplement the body of federal law, they may nevertheless provide federal lawmakers with a template to help delineate the previously blurred contours of case law. Further, these state statutes provide landowners with a *strategic* advantage, during both the administrative and litigation stages of takings disputes, which is unavailing to the federal takings plaintiff. In the realm of economic analysis, "strategic behavior" is defined as "acting inconsistently with one's true preferences in order to obtain some short-term collateral advantage."[25] While considerations of strategic behavior provide a subtext for the dissent's criticism in *Palazzolo*,[26] these concerns are more explicitly borne out in the policy criticisms of statutory takings analysis. Thus, "strategic advantage" provides a backdrop for the discussion of both approaches to takings law.

This comment explores these questions and criticisms, and attempts to resolve them by reference to recent state statutes. Part II of this comment provides a constitutional context for the law of regulatory takings and describes the two initial analytical approaches taken by the Supreme Court. Part III examines the recent *Palazzolo* decision and poses four basic questions left unresolved by Supreme Court jurisprudence. Next, Part IV surveys

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J. 527, 540 (2000).

20. *Id.* at 542–43.

21. *Id.* at 544–45.

22. These include both alternative dispute resolution statutes and mandatory negotiation statutes. *See infra* Part IV.B; *see, e.g., infra* note 125.

23. Marianne Lavelle, *The 'Property Rights' Revolt*, NAT'L L.J., May 10, 1993, at 1, 34.

24. Oswald, *supra* note 19, at 538.

25. Brief of Amicus Curiae Institute for Justice at 16, Tahoe Sierra Pres. Council, Inc. v. Tahoe Reg. Planning Agency, No. 00–1167 (U.S. filed Jan. 29, 2002).

26. *See* 121 S. Ct. at 2462–64 (Breyer, J., dissenting).

several notable state property rights statutes and attempts to piece together a comprehensive approach to the regulatory takings issue. Part IV also examines the basic criticisms of the state property acts, particularly those relating to the notion of "strategic advantage," and comments upon their relative merits by reference back to issues explored in *Palazzolo*. Finally, Part V concludes that the convergence of the two bodies of law forms a patchwork solution to the regulatory takings issue.

II. THE CONTEXT OF THE TAKINGS DILEMMA

The Takings Clause of the Fifth Amendment precludes the taking of property without just compensation,[27] and this prohibition is made applicable to the states by the Fourteenth Amendment.[28] While the Takings Clause most obviously prevents the state from physically taking private property without compensation, the seminal case of *Pennsylvania Coal Co. v. Mahon*[29] similarly prevents state regulation from over-burdening property without compensation.[30] Subsequent case law is directed by Justice Holmes's admonition that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[31] This has since become known as a regulatory taking.

In recent years, courts have utilized two distinct approaches to determine whether a regulatory taking has occurred. The first is the three-factor test delineated in *Penn Central Transportation Co. v. New York City*,[32] and the second is the "economically viable use" standard established by *Lucas v. South Carolina Coastal Council*.[33] Both inform the outcome of the latest and perhaps most far-reaching Supreme Court takings decision, *Palazzolo v. Rhode Island*.

27. U.S. CONST. amend. V.

28. U.S. CONST. amend. XIV, § 1; Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 241 (1897).

29. 260 U.S. 393 (1922).

30. *Id.* at 414–16.

31. *Id.* at 415.

32. 438 U.S. 104, 124 (1978).

33. 505 U.S. 1003, 1019 (1992).

A. *The Three Factors of* Penn Central

Before 1992, courts analyzed regulatory takings cases under the approach in *Penn Central Transportation Co. v. New York City*.[34] To determine whether the landowner deserved compensation for burdensome regulation, *Penn Central* examined three distinct factors: (1) "[t]he economic impact of the regulation"; (2) "the extent to which the regulation has interfered with [the owner's] investment-backed expectations"; and (3) "the character of the governmental action."[35]

As to the first factor, *Penn Central* made clear that a diminution of property value, standing alone, will not effect a taking.[36] In various pre-*Penn Central* cases, the Court determined that a diminution exceeding seventy-five percent would not alone establish a taking.[37] As a consequence, the examination of the economic impact of the property required by this first factor considers not only the percentage of devaluation but also whether the economic effects disproportionately impact the particular owner.[38]

The investment-backed expectations of the second factor focus upon whether the owner purchased the property with actual or constructive knowledge that the regulation existed.[39] If the purchaser knew that the regulation existed, then the owner may be estopped from claiming that the regulation harmed the property.[40] However, where the regulation is enacted after the purchase, the owner may seek compensation for the frustration of her investment-backed expectation.[41]

As the third and final factor, the Court examined the character of the state action.[42] While this factor lacks definition, *Penn Central* noted that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical in-

34. *See, e.g.*, Hodel v. Va. Surface Mining & Reclamation Assoc., 452 U.S. 264 (1981) (applying *Penn Central* factors to the Surface Mining Act).

35. *Penn Cent.*, 438 U.S. at 124.

36. *Id.* at 131.

37. *See* Euclid v. Ambler Realty Co., 272 U.S. 365, 384, 397 (1926) (approximately 75% diminution in value); Hadacheck v. Sebastian, 239 U.S. 394, 405, 414 (1915) (87.5% diminution in value).

38. *See Penn Cent.*, 438 U.S. at 131.

39. *See id.* at 127–28.

40. *See id.*

41. *Id.*

42. *Id.* at 124.

vasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[43] Therefore, the greater the physical impact on the property, the more likely the Court would construe the regulation as a taking.[44]

B. Lucas *and the Deprivation of All Economically Beneficial Use*

In 1992, *Lucas v. South Carolina Coastal Council* established a new conceptual framework for analyzing takings cases. Under *Lucas*, the Court collapsed the three factors of *Penn Central*, holding that a state must compensate owners for deprivations of "all economically beneficial uses" of real property.[45] Though the general standard employed by the Court appears somewhat vague, it is nevertheless clear that the state may not leave the owner with merely a "token interest" in the property.[46]

Under *Lucas,* the denominator (or the yardstick by which the deprivation is measured)[47] is shaped by (1) the traditional understanding of the "bundle of rights" that makes up real property ownership, and (2) the state's power over that bundle of rights.[48] Since denial of all economically viable use violates the traditional understanding of real property ownership, the regulation that so deprives the property shall be considered a taking.[49] As a consequence, the state may regulate only to the extent that it may do so under the "background principles" of state property law.[50]

III. *PALAZZOLO'S* CONTRIBUTION TO TAKINGS JURISPRUDENCE

In *Palazzolo*, the Supreme Court altered traditional takings analysis by reinforcing the viability of *both* approaches. At issue

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43. *Id.* (citations omitted).

44. *See id.*

45. 505 U.S. 1003, 1019 (1992).

46. *See Palazzolo*, 121 S. Ct. at 2464.

47. For a discussion of the "denominator problem," see Frank I. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1190–93 (1967).

48. *Lucas*, 505 U.S. at 1027.

49. *Id.* at 1016.

50. *Id.* at 1029. Examples include laws concerning the common law tort of nuisance or those passed pursuant to the general police powers of the state.

in *Palazzolo* are three fundamental hurdles in litigating regulatory takings claims: ripeness considerations, the investment-backed expectations of the owner, and the extent of the economic deprivation needed to constitute a taking.[51]

The significance of each of the issues is evident upon examination of the facts of *Palazzolo*. In 1959, Palazzolo's corporation, Shore Garden, Inc. ("SGI"), purchased a property in Rhode Island and filed several applications to fill low-lying coastal properties for use as a beach club.[52] Each proposal was rejected by the appropriate state agency.[53] In 1971, Rhode Island established an administrative council to implement regulations restricting development of wetland areas.[54] Subsequently, SGI transferred title to the property to Palazzolo.[55] In 1983 and again in 1985, Palazzolo sought permission to construct a bulkhead, fill the low-lying areas, and construct a beach club.[56] The Council denied the applications, stating that the proposed activity did not serve a "compelling public purpose" so as to justify a special exception from the strict land use requirements.[57]

Consequently, Palazzolo filed suit for violation of the Fifth and Fourteenth Amendments. He alleged that the agency's "action deprived him of 'all economically beneficial use' of his property."[58] Palazzolo sought $3.15 million in damages—a number derived from the estimated value of a seventy-four-lot subdivision on the low-lying portion of the property.[59]

A. *Ripeness*

As a general matter, a landowner may only proceed with a takings claim where "'the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.'"[60] That

51. *Palazzolo*, 121 S. Ct. at 2457.
52. *Id.* at 2455–56.
53. *Id.* at 2456.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at 2458 (quoting Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186 (1985)).

is, where the claim is *ripe* for review. In *Palazzolo*, the state contended that Palazzolo's claim was unripe since: (1) the owner did not submit an application calling for development of only the upland parcel; (2) the value and use of the upland parcel was unknown; and (3) Palazzolo failed to submit an application based on a seventy-four-lot subdivision.[61]

First, the Court answered that the "[r]ipeness doctrine does not require a landowner to submit applications for their own sake. Petitioner is required to explore development opportunities . . . *only if there is uncertainty as to the land's permitted use.*"[62] At trial, the Agency admitted that they would have allowed the development of a single residence on the upland parcel.[63] Therefore, the permitted use of the property was reasonably certain.[64]

Second, since the state did not raise the issue at trial, the Court disallowed any contest of Palazzolo's valuation of the property.[65] Moreover, the Court pointed out that the state relied upon Palazzolo's valuation in its brief, as well as Palazzolo's expert during trial.[66] The state also argued that Palazzolo's use was unknown, since the $200,000 value of the upland parcel was based upon a *Lucas* claim—not a *Penn Central* claim.[67] Since the approaches are educated by separate factors, the state contended that Palazzolo's reliance on *Lucas* precluded the state from arguing at trial that it may have allowed more than one residence to be built on the property—thereby rendering uncertain the Agency's permissible uses.[68] However, the Court answered that both *Lucas* and *Penn Central* factors are applicable to takings cases, regardless of which factors the parties rely upon at trial.[69]

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61. *Id.* at 2460–61.

62. *Id.* at 2460 (emphasis added).

63. *Id.*

64. *Id.* at 2460–61.

65. *Id.* at 2460.

66. *Id.*

67. *Id.* at 2461.

68. *Id.*

69. *Id.* The dissenters took issue with the Court's use of both factors, despite the petitioner's reliance on *Lucas*:

> The critical point, however, underplayed by the Court, is that Palazzolo never raised or argued the *Penn Central* issue in the state system: not in his complaint; not in his trial court submissions; not—even after the trial court touched on the *Penn Central* issue—in his briefing on appeal. The state high court decision, raising and quickly disposing of the matter, unquestionably

Finally, the Court dismissed the state's ripeness concern regarding Palazzolo's failure to submit a seventy-four-lot subdivision plan.[70] The state contended that Palazzolo employed a "hide-the-ball" strategy to submit applications for more conservative uses, thereby circumventing the process of obtaining zoning approval.[71] Thus, the state concluded that Palazzolo would subsequently be allowed to claim damages upon development plans that would not have been approved by the municipality.[72] The Court found this inquiry to be irrelevant to the ripeness consideration, reasoning that a more extensive development plan would not have affected the Agency's determination of whether a landowner could fill the property.[73]

Thus, the Court in *Palazzolo* held that where a state agency that enforces a land use regulation "entertains" and denies an application, and it "makes clear the extent of development permitted," a petitioner may not be prevented from bringing a cause of action by federal ripeness rules.[74] Additionally, federal ripeness rules do not require a petitioner to submit "further and futile applications with other agencies."[75] Yet this leaves open a significant question: What constitutes "further and futile applications"?

In *Lucas*, the Court did not require the Petitioner to submit a formal application where the regulation prevented the use on its face.[76] In contrast, the Court in *City of Monterey v. Del Monte Dunes*[77] found that the Petitioner's five submitted applications sufficed.[78] The resulting ambiguity leaves landowners with a difficult risk analysis. To determine whether to engage in the costly application process, owners must balance the significant burdens and expenses of "playing the agency's game" with the uncertainty of pursuing a potentially unripe claim. While *Palazzolo* does not

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permits us to consider the *Penn Central* issue. *But the ruling below does not change the reality essential here: Palazzolo litigated his takings claim, and it was incumbent on the State to defend against that claim, only under Lucas.*

Id. at 2475 (Ginsberg, J., dissenting) (emphasis added) (citations omitted).

70. *Id.* at 2461 (Kennedy, J.).

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 2462.

75. *Id.*

76. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1012–13 (1992).

77. 526 U.S. 687 (1999).

78. *See id.* at 698.

require landowners to "submit applications for their own sake,"[79] it certainly does not provide a bright-line test for ripeness.

B. *The Post-Regulation Purchaser*

Similarly, *Palazzolo* leaves open a question regarding the necessity of an owner's investment-backed expectations. In *Palazzolo*, the state asserted that since Palazzolo accepted title to the property with knowledge of the relevant regulations, he was deemed to have notice of the restrictions and was therefore barred from claiming a taking under *Lucas*.[80]

In arguing that Palazzolo should be precluded from bringing a takings claim, the state relied upon the holdings of the two benchmark constitutional takings cases. First, the state contended that under *Penn Central*, a post-regulation purchaser has certain investment-backed expectations that include an understanding that the property is subject to restrictions.[81] This factor, along with the regulation's economic effect and character of the governmental action, "inform[s] the takings analysis," and may therefore prove fatal to a takings claim.[82] Second, the state pointed to the holding in *Lucas* to support its assertion that a state may shape property rights and ostensibly create the yardstick by which regulatory takings are measured.[83] Thus, the state contended that since (1) it was permitted to shape property rights, and (2) the buyer took the property with notice of the restrictions, the buyer may not bring a takings claim.[84]

The Court dismissed this argument, determining that a state's duty to shape property rights is tempered by a reasonableness standard.[85] While it has long been held that the Takings Clause of the Fifth Amendment allows an owner to assert that a regulatory action is so unreasonable as to amount to a compensable deprivation, it is also true that the passage of title cannot cure an unreasonable restriction.[86] That is, a state may not "put an expiration

79. *Palazzolo*, 121 S. Ct. at 2460.
80. *Id.* at 2462.
81. *Id.*
82. *Id.* at 2466 (O'Connor, J., concurring).
83. *Id.* at 2462 (Kennedy, J.).
84. *Id.*
85. *Id.*
86. *Id.*

date on the Takings Clause."[87] Though it is clear that a state may shape the contours of property rights, it may not unreasonably burden the defining characteristic of property ownership—the right to transfer.[88] Preventing owners who purchase with notice of the regulation from receiving compensation would therefore infringe upon the owner's ultimate right—transferability.[89]

Thus, the Court determined that a property owner's notice of a particular regulation would not bar that owner from bringing a takings claim under *Lucas*.[90] What is unclear, however, is the extent to which the owner's investment-backed expectations may affect the takings analysis. Particularly, the concurring opinions took issue as to whether this consideration is still essential to the *Penn Central* claim. While Justice O'Connor maintained that the owner's constructive notice of regulation was significant in the *Penn Central* approach,[91] Justice Scalia found the issue to be wholly irrelevant to both inquiries.[92] The concern, according to Justice Scalia, may be that a shrewd real estate investor might purchase property with the hopes of litigating a takings claim and receive a windfall.[93] However, by denying compensation for lack of an investment-backed expectation, Justice Scalia argued that the approach would "giv[e] the malefactor the benefit of its malefaction."[94] Therefore, while *Palazzolo* states that the expectations of the owner are not dispositive to the inquiry, it leaves open the question of whether and to what extent his expectations factor into either approach.

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87. *Id.* at 2463.

88. *Id.* (citing Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1368–69 (1993) (noting that the right to transfer interest in land is a defining characteristic of the fee simple estate)).

89. *Id.*

90. *Id.* at 2464.

91. *Id.* at 2465 (O'Connor, J., concurring) (explaining that "today's holding does not mean that the timing of the regulation's enactment relative to the acquisition of title is immaterial to the *Penn Central* analysis").

92. *Id.* at 2468 (Scalia, J., concurring).

> [T]he fact that a restriction existed at the time the purchaser took title (other than a restriction forming part of the 'background principles of the State's law of property and nuisance') should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking.

Id. (citation omitted).

93. *Id.* at 2467–68.

94. *Id.* at 2468.

C. *Deprivation of All Economically Beneficial Use*

Palazzolo alleged that the $200,000 value remaining in the upland parcel constituted token interest and asserted that he was entitled to compensation under *Lucas*.[95] The Court refused to uphold this argument, finding that Palazzolo was not deprived of all economically viable use of the property.[96] While the Court left the precise amount of the total deprivation undecided, it concluded that $200,000 was simply too much value to be considered a "token interest."[97]

However, Palazzolo framed the claim at the state court level as a total deprivation of the economic value of the parcel *as a whole*—including both the lowland and upland areas.[98] The Court ignored Palazzolo's contention on brief that the deprivation suffered by the lowland areas singularly constituted a total taking compensable under *Lucas*.[99] Thus, the Court expressly left unanswered the question, explored in a rather famous footnote in *Lucas,* of what is the precise denominator to be used in such takings claims.[100] For instance, could a landowner such as Palazzolo claim a total deprivation of *solely the wetland areas* of the property as a separate and severable interest in the whole? Interestingly, the Court analyzed the Agency's rulings as to the upland and lowland areas separately in Part II.A of the opinion, which may lend credibility to the severability argument.[101] Nevertheless, the issue remains unresolved.

D. *Remaining Questions*

Palazzolo goes a long way toward alleviating the confusion of federal takings jurisprudence. It provides: (1) that landowners who purchase property with notice of a regulation are not categorically barred from bringing a takings claim;[102] (2) that a cause

95. *Id.* at 2464 (Kennedy, J.).
96. *Id.* at 2465.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016–17 n.7 (1992)).
101. *Id.* at 2458–62.
102. *See supra* Part III.B.

of action will ripen when a state agency entertains the application and denies it, making clear the extent of development permitted;[103] and (3) that $200,000 of remaining value is not a "token interest" under the *Lucas* analysis.[104] However, despite each of its holdings, *Palazzolo* leaves open four significant questions:

1. When is the use of the parcel reasonably certain for ripeness considerations?
2. To what extent do investment-backed expectations now affect the takings analysis?
3. How much value must be taken to result in a compensable taking?
4. What is the proper denominator for determining the percentage of value taken?

The answers, it appears, may already have been written.

IV. THE NEW TAKINGS ALTERNATIVE: STATE PRIVATE PROPERTY RIGHTS STATUTES

In recent years, property rights advocates have sought legislative solutions to cure the federal takings confusion.[105] The 104th Congress entertained two bills in 1995 that provided mandatory trigger levels for compensation at twenty and thirty-three percent.[106] Though the bills failed to pass, state legislators took notice. To date, twenty states have enacted some form of private property rights legislation.[107] These statutes provide landowners

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103. *See supra* Part III.A.

104. *See supra* Part III.C. *But see* Michael Allan Wolf, *Pondering* Palazzolo: *Why Do We Continue to Ask the Wrong Questions?*, [2002] 32 Envtl. L. Rep. (Envtl. L. Inst.) 10367, 10367 (Mar. 2002) (arguing that *Palazzolo* merely expands already "highly problematic and unnecessarily confusing" approach to takings).

105. For an examination of the history of compensation clauses in state constitutions, see CHARLES M. HAAR & MICHAEL ALLAN WOLF, LAND-USE PLANNING: A CASEBOOK ON THE USE, MISUSE, AND RE-USE OF URBAN LAND 832–34 (4th ed. 1989).

106. H.R. 925, 104th Cong. (1995); S. 605, 104th Cong. (1995). Five years later, Congress made another unsuccessful attempt with the Private Property Rights Implementation Act. H.R. 232, 106th Cong. (2000). The texts of these bills are available online at CIS Congressional Universe, http://web.lexis-nexis.com/cis (last visited Apr. 4, 2002).

107. *See* ARIZ. REV. STAT. ANN. §§ 41-1311 to -1313 (West 1999 & Supp. 2001); COLO. REV. STAT. §§ 29-20-201 to -205 (2001); DEL. CODE ANN. tit. 29, § 605 (1997); FLA. STAT. ANN. § 70.001 (West Supp. 2002); IDAHO CODE §§ 67-8001 to -8004 (Michie 2001); KAN. STAT. ANN. §§ 77-701 to -711 (Supp. 2000); LA. REV. STAT. ANN. §§ 3:3609 to :3622.1 (West Supp. 2002); ME. REV. STAT. ANN. tit. 5, § 3341 (West Supp. 2001); MICH. COMP. LAWS ANN. §§ 24.421 to .425 (West 1994); MISS. CODE ANN. §§ 49-33-1 to -15 (1999); MO. ANN.

with tools to prevent burdensome regulation, accelerate the administrative appeals process, and obtain just compensation from state regulatory agencies. Thus they may be categorized into one of three general types: assessment statutes, conflict resolution statutes, and compensation statutes.[108]

A. *Assessment Statutes: Avoiding the Question*

Assessment statutes require states to more closely scrutinize actions that may affect a taking.[109] These statutes are often referred to as "look before you leap" statutes, requiring governmental entities to assess the regulatory impact on property rights before agency action.[110] If the regulations do in fact burden private landowners, many of the statutes "require [the state] to either pay just compensation or to refrain from action."[111] While assessment statutes do not specifically address the issue raised in *Palazzolo*, they at least provide states with a mechanism to prevent takings squabbles before litigation.

Most statutes require the state attorney general to create a checklist or process to determine whether the landowner has been burdened with a compensable taking.[112] Often, state legislatures provide a litany of basic factors to be considered when creating the checklist, such as the purpose to be served by such regulation and the alternatives available to the governmental agency.[113]

STAT. § 536.017 (West 2000); NEV. REV. STAT. ANN. § 533.425 (Michie 1995); N.M. STAT. ANN. § 74-6-12 (Michie 2000); OR. REV. STAT. § 197.772 (2001); TENN. CODE ANN. §§ 12-1-201 to -206 (1999); TEX. GOV'T CODE ANN. §§ 2007.002 to .043 (Vernon 2000); UTAH CODE ANN. §§ 63-90-1 to -4 (2001); WASH. REV. CODE ANN. § 36.70A.370 (West Supp. 2002); W. VA. CODE ANN. §§ 22-1A-1 to -6 (Michie 1998); WYO. STAT. ANN. §§ 9-5-301 to -305 (Michie 2001).

108. Oswald, *supra* note 19, at 540 & n.53.

109. *See id.* at 541–43. These statutes are often modeled after President Reagan's Executive Order 12,630, which required federal agencies to assess agency impact on private property rights before promulgating regulations. *See* Exec. Order No. 12,629, 53 Fed. Reg. 8,859 (Mar. 15, 1988).

110. Oswald, *supra* note 19, at 542.

111. *Id.* at 542–43.

112. Such states include Idaho, Kansas, Tennessee, Texas, Washington, and Wyoming. *See* sources cited *supra* note 107.

113. *See, e.g.*, WYO. STAT. ANN. § 9-5-303(b) (Michie 2001).

More lenient statutes require agencies to simply "use the guidelines" when making regulatory decisions.[114]

Other states, however, require the agency to fasten the attorney general's guidelines into a takings impact assessment.[115] According to Kansas's Private Property Protection Act, the state agency must prepare a written report using the guidelines that require it to: (1) clearly identify the public health, safety or welfare risk created by the use of the property; (2) describe the public purpose for such regulation; (3) set forth a justification for the action; (4) analyze the likelihood that the action may result in a taking; (5) identify any alternatives; and (6) ensure that a direct relationship exists between the action and the public purposes to be substantially furthered.[116] The "direct relationship" requirement imposes a stricter standard for state agencies to follow, and it therefore weighs against the traditional degree of discretion granted to state agencies.

Arizona forged another creative approach to the assessment statute by establishing a state advocate for private property rights.[117] The advocate is appointed by the director of the Arizona legislative council to "represent the interests of private property owners in proceedings involving governmental action."[118] The advocate represents residential, noncommercial, small business, and agricultural property owners before state agencies or judicial bodies, as well as receives complaints from any other property owners.[119]

According to some authors, these statutes provide "merely a symbolic reiteration" of existing takings law, and have "little or no impact on existing doctrine."[120] However, like the National Environmental Policy Act ("NEPA"),[121] assessment statutes impose an overarching procedural obligation into the decision-making

114. *Id.* § 9-5-304. The Idaho statute indicates that state agencies "shall" use the guidelines, yet expressly prohibits a landowner from suing the agency for failure to use the guidelines. IDAHO CODE § 67-8003 (Michie 2001).

115. These states include Kansas, Louisiana, and Texas. *See* sources cited *supra* note 107.

116. KAN. STAT. ANN. § 77-706 (Supp. 2000).

117. ARIZ. REV. STAT. ANN. § 41-1312 (Supp. 2001).

118. *Id.*

119. *Id.* § 41-1313(B).

120. Oswald, *supra* note 19, at 548.

121. 42 U.S.C. §§ 4321–4370d (1994).

process, requiring states to "stop and think" about proposed impacts.[122] In particular, takings impact reports make apparent the extent to which the state agency may have relied on the attorney general's factors, and may therefore reveal the attenuated nexus between the state's stated purpose and the state's action. Thus, assessment statutes provide both a statutory incentive to avoid intrusive regulations and a means to circumvent litigating through the unanswered questions of *Palazzolo*.

B. *The Conflict Resolution Statute*

1. Q: When Is the Use Reasonably Certain?
   A: Upon Issuance of Ripeness Decision.

For the landowner, the costs of conducting a protracted administrative appeal often outweigh the relative compensation to be received for a taking—particularly where the governmental adversary enjoys superior resources and lacks similar market constraints.[123] The costs of litigation may even further burden a deprived landowner.[124] It is for these reasons that some states have enacted conflict resolution statutes.[125] These statutes provide set procedures for negotiation between the landowner and the state to accelerate the administrative process and provide finality. Such statutes may (1) establish set administrative procedures for negotiation, or (2) provide for alternative dispute resolution.

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122. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 411-1312, -1313 (Supp. 2001); IDAHO CODE § 67-8003 (Michie 2001); KAN. STAT. ANN. §§ 77-704, -706 (Supp. 2000); LA. REV. STAT. ANN. §§ 3:3609, :3622.1 (West Supp. 2002); TENN. CODE ANN. § 12-1-203 (1999); TEX. GOV'T CODE ANN. § 2007.043 (Vernon 2000); WASH. REV. CODE ANN. § 36.70A.370 (West Supp. 2002); WYO. STAT. ANN. §§ 9-5-303, -304 (Michie 2001).

123. *See* STEVEN J. EAGLE, REGULATORY TAKINGS 1068–69 (2d ed. 2001).

> [T]he enjoyment of property rights through the development of land into socially useful projects . . . is fraught with risk. In particular, delay is potentially ruinous to developers, since interest charges and taxes tick away, attorney fees pile up, and risks of weather, strikes, and changing markets are ever present. On the other hand, planners and municipal attorneys are paid from tax revenues. While not downplaying the legitimate governmental concern about takings liability, in almost all cases municipalities have far superior resources to withstand delays than landowners.

Id.

124. *Id.* at 1070.

125. *See, e.g.*, FLA. STA. ANN. § 70.001 (West Supp. 2002); ME. REV. STAT. ANN. tit. 5 § 3341 (West Supp. 2001).

Florida, for example, maintains both such provisions. The Bert J. Harris, Jr., Private Property Rights Act ("Harris Act")[126] provides a mandatory 180-day negotiation process as a condition precedent to litigation.[127] Under the Harris Act, the aggrieved landowner must file a claim with the governmental entity that adopted the regulations that resulted in the loss in market value of the property.[128] If the landowner fails to comply with the notice requirement, the landowner is barred from bringing a claim under the Harris Act's compensation provisions.[129]

More significantly, the statute further indicates that the governmental entity must make a written settlement offer within the 180-day notice period.[130] In the event that the landowner does not accept the entity's settlement offer, the entity must issue a written ripeness decision that identifies the allowable uses of the property.[131] The statute explicitly provides that "[t]he ripeness decision, as a matter of law, constitutes the last prerequisite to judicial review, and the matter shall be deemed ripe or final for the purposes of the judicial proceeding created by this section, notwithstanding the availability of other administrative remedies."[132] The Harris Act therefore provides landowners with a "free pass" to court, without regard to the administrative status of the case.

While the Harris Act applies only to those regulations which became effective after May 11, 1995,[133] the Florida Land Use and Environmental Dispute Resolution Act ("FLUEDRA")[134] provides an alternative for landowners to resolve disputes arising from any agency decision made after October 1, 1995, regardless of whether that decision relied upon a pre-1995 regulation.[135] FLUEDRA provides for the appointment of a "special master" for

126. FLA. STAT. ANN. § 70.001 (West Supp. 2002). This statute applies to land use regulations that came into effect after May 11, 1995. *See id.* § 70.001(12).

127. *Id.* § 70.001(4)(a).

128. *Id.*

129. *See* Sosa v. City of West Palm Beach, 762 So. 2d 981, 982 (Fla. Dist. Ct. App. 2000) (dismissing amended complaint for failing to comply with the prerequisities for bringing suit under the Harris Act).

130. FLA. STAT. ANN. § 70.001(4)(c) (West Supp. 2002).

131. *Id.* § 70.001(5)(a).

132. *Id.*

133. *Id.* § 70.001(12).

134. *Id.* § 70.51.

135. *Id.* § 70.51 (30).

"[a]ny owner who believes that a development order . . . or an enforcement action . . . is unreasonable or unfairly burdens the use of the owner's real property . . . ."[136] The special master is directed to facilitate a resolution to the conflict "to the end that some modification of the owner's proposed use of the property or adjustment in the development order or enforcement action or regulatory efforts by one or more of the governmental parties may be reached."[137] The Act provides eight examples of circumstances to be evaluated in the negotiations, including the history of the property and its development, the history of the relevant land use controls, the present nature of the property, the reasonable expectations of the owner either at the time of acquisition or regulation (whichever is later), the public purpose sought by the development order or enforcement action, uses authorized on comparable properties, and any other "relevant information."[138]

The special master must prepare a recommendation within fourteen days of the conclusion of the hearing.[139] The responsible governmental entity may either accept, reject, or modify the special master's recommendations.[140] If the parties do not agree on the recommendations, or if the entity modifies the recommendations, then the entity must issue a ripeness decision within thirty days that describes all possible uses available to the property.[141]

2. Ripeness in 180 Days

Thus the Florida statutes effectively resolve the issue left open in *Palazzolo* concerning whether the designated use of the property is "reasonably certain" for ripeness considerations.[142] While

136. *Id.* § 70.51(3)–(4).
137. *Id.* § 70.51(17)(a).
138. *Id.* § 70.51(18).
139. *Id.* § 70.51(19).
140. *Id.* § 70.51(21).
141. *Id.* § 70.51(22).
142. Florida's statute stands in contrast to that of Maine, which established its land use mediation program in 1995 to "provide eligible private landowners with a prompt, independent, inexpensive and local forum for mediation of governmental land use actions as an alternative to court action." ME. REV. STAT. ANN. tit. 5, § 3341(1) (West 2001). Maine's Alternative Dispute Resolution Service selects mediators with knowledge in land use issues. *Id.* § 3341(2)(A). Mediators are directed to conduct negotiations in the municipality where the conflict is located and to facilitate a "mutually acceptable solution." *Id.* § 3341(6). The mediator must file the findings with the Superior Court clerk within ninety

in *Palazzolo* the Court engaged in an analysis of the procedural admissions and reliance of the state,[143] the Florida statutes provide landowners with evidentiary proof of the total existing uses of the burdened parcel of land.[144] Armed with the statutorily required ripeness decision, landowners gain a procedural advantage that is unavailable to the federal plaintiff. Where previous plaintiffs held their property in administrative limbo for years, the Florida statutes impose a 180-day limit and grant landowners an absolute right to litigate the outcome in a state court.[145] Thus, Florida provides that the use allowed by the state is "reasonably certain," using the verbiage of *Palazzolo*, upon the issuance of the ripeness decision.

3. The Ripeness Decision and Strategic Behavior: Is It Leveling the Playing Field or Just Bait-and-Switch?

The "ripeness decisions" of the Florida statutes alleviate a considerable burden upon landowners—the final decision requirement.[146] As the dissent in *Palazzolo* made clear, this prerequisite is no small obstacle;[147] it requires that the landowner exhaust her administrative appeals so that the court may "'know the nature and extent of permitted development.'"[148] Thus, conflict resolution statutes not only resolve the "reasonably certain" language of *Palazzolo*, but they also serve to provide landowners with a strategic advantage during the administrative appeals process.

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days of the agreement. *Id.* § 3341(12). What the statute does not provide, however, is a notice of ripeness.

Under the Maine approach, landowners are eligible to participate in the mediation process if they have either: (1) suffered "significant" harm resulting from governmental regulation; (2) failed to obtain a permit, variance or special exception, and pursued reasonable avenues of appeal (for municipal land use action); or (3) sought and failed to obtain state approval due to a final agency action or refusal of agency to act. *Id.* § 3341(3). The landowner must pay an amount not exceeding $175 for the initial four hours of mediation, with both parties sharing the costs for any additional time. *Id.* § 3341(2)(C), (9).

143. *See supra* Part III.A.

144. *See supra* notes 130–31.

145. *See supra* notes 130–32.

146. Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 191 (1985).

147. *Palazzolo*, 121 S. Ct. at 2472–73 (Ginsburg, J., dissenting) (citing MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 348 (1986); *Williamson County*, 473 U.S. at 191).

148. *Id.* at 2472 (Ginsburg, J., dissenting) (quoting *MacDonald*, 477 U.S. at 348).

Under traditional ripeness considerations, the exhaustion requirement would provide regulatory agencies with the procedural upper hand, namely, the threat of administrative delay.[149] By exposing petitioners to greater risk and greater financial hardship, agencies are able to "freeze out" landowners before litigation of their claims.[150] Administrative delay has therefore become a prime tool for regulatory agencies to defeat the rights of landowners, particularly during the discretionary permit process.[151]

In *Palazzolo*, the Court undercut the state's ability to "freeze out" landowners when the Court determined that Palazzolo could proceed with his takings claim despite the fact that he had not submitted plans to develop solely the upland parcel.[152] In its criticism of the Court's ripeness rationale, the dissent characterized Palazzolo's submitted plans as a "bait-and-switch ploy."[153] The dissent argued that Palazzolo submitted a "'highly ambitious'" and "'grandiose'" plan that considered only alternatives requiring wetland filling.[154] Presumably, the dissent concluded that Palazzolo knowingly submitted an impermissible plan for the purpose of bringing suit; thereafter, Palazzolo sought compensation for a lesser taking.[155] The result is "inequitable," according to the dissent, because the state is precluded from examining alternatives that did not require filling.[156]

While such results may appear inequitable to the dissenters in *Palazzolo*, under the Florida conflict resolution statutes, such "bait-and-switch" is not only tolerable, but sanctioned. Although the apparent purpose of the dispute resolution statutes is to prohibit state agencies from "stalling" property owners from taking their claims to court, the acts also implicitly encourage owners to present "grandiose" plans and valuations. As stated by one commentator, the mandatory negotiation required by the legislation provides the landowner with a distinct procedural advantage, particularly in the valuation stages of administrative appeal:

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149. *See* EAGLE, *supra* note 123, at 1004.

150. For examples of administrative delay tactics, see *id.* at 1006-10.

151. *See id.* at 1004.

152. *Palazzolo*, 121 S. Ct. at 2465.

153. *Id.* at 2474 (Ginsburg, J., dissenting).

154. *Id.* at 2473 (quoting MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 353 n.9 (1986)).

155. *Cf. MacDonald*, 477 U.S. at 352–53.

156. *Palazzolo*, 121 S. Ct. at 2473–74 (Ginsburg, J., dissenting).

> The property owner will present her most optimistic evaluation of the property's value in the real estate appraisal that accompanies her initial claim. Since the property owner will be selecting the real estate appraiser and paying for her fee, the incentive is for the property owner to select an appraiser who will produce a favorable report. In addition to this "objective" valuation, the land also has a "subjective" value to the landowner, an amount the landowner would actually require to part with her property. This figure might be either higher or lower than the parcel's objective value. The property owner's minimum acceptable value is, then, her private information and would not generally be known to the land use entity.[157]

As illustrated by the "informational advantage" described above, the fee owner is granted considerable discretion during the administrative process to pursue her development objectives. Thus, the concern of the dissenters in *Palazzolo* is a non-issue under the statutes: after the statutorily mandated negotiation period, the ripeness decision provided by the state agency will nevertheless provide the landowner with the key to the courthouse door—freeing her to "bait" at her discretion. Though this strategic behavior may or may not run consistent with contemporary takings jurisprudence,[158] the result may be necessary to level the procedural playing field and prevent the bureaucratic treadmill of administrative delay.

C. *Compensation Statutes*

> Headline: Developer Threatens to Sue County
>
> Stuart [Fla.] – A developer's lawyer vowed Thursday to sue Martin County if commissioners reject plans to fill two wetlands during construction of a long-delayed motel near Palm City's turnpike exchange.
>
> ....
>
> "We're going to sue the county under the Bert Harris (Property Rights) Act for whatever damages we suffer as a result of putting [this] condition on us, for sure. That's where we're headed."[159]

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157. Sylvia R. Lazos Vargas, *Florida's Property Rights Act: A Political Quick Fix Results in a Mixed Bag of Tricks*, 23 FLA. ST. U. L. REV. 315, 390 (1995).

158. *See Palazzolo*, 121 S. Ct. at 2477–78 (Breyer, J., dissenting).

159. George Andreassi, *Developer Threatens to Sue County*, THE STUART NEWS/PORT ST. LUCIE NEWS, Jan. 18, 2002, at B1.

Compensation statutes may provide the greatest weapon for landowners seeking compensation for state regulation of private property. These statutes typically require the state to compensate the landowner for loss in the value of property beyond a certain percentage (usually between ten and fifty percent).[160] Currently, only four states have enacted compensation statutes: Florida, Texas, Mississippi, and Louisiana.[161]

1. Florida's Inordinate Burden Standard

a. Q: To What Extent Do Investment Expectations Affect the Analysis?

A: As an Isolated Criterion for a Separate Cause of Action.

While the Harris Act mandates state agency assessment of regulations affecting property rights, the statute more significantly provides landowners with a separate and distinct cause of action from the law of takings.[162] The Act states that the Florida legislature recognizes "an important state interest in protecting the interests of private property owners from . . . inordinate burdens."[163] The statute therefore provides relief for landowners when state regulations unfairly affect their property.[164]

The keystone of the Act is subsection two, which states that where a governmental entity has "inordinately burdened an existing use of real property or a vested right to specific use of real property, the property owner . . . is entitled to relief."[165] Such relief may include compensation for the actual loss to the fair market value of the property.[166] The use of property is "inordinately burdened" when

> an action of one or more governmental entities has directly restricted or limited the use of real property such that the property owner is permanently unable to attain the reasonable, investment-backed expectation for the existing use of the real property or a vested right to

160. *See* Oswald, *supra* note 19, at 544.
161. *Id.* at 544–45.
162. FLA. STAT. ANN. § 70.001(1) (West Supp. 2002).
163. *Id.*
164. *Id.*
165. *Id.* § 70.001(2).
166. *Id.*

> a specific use of the real property as a whole, or that the property owner is left with existing or vested uses that are unreasonable such that the property owner bears permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large.[167]

Thus, the "inordinate burden" standard applies two lines of existing takings jurisprudence: (1) the frustration of the owner's reasonable investment-backed expectations, and (2) the disproportionate burden upon the landowner for a public benefit. The definition then excludes temporary impacts, impacts occasioned by governmental abatement, remediation of public nuisance, and acts taken to grant relief to property owners.[168] The statute thus shies away from the "deprivation of all economically beneficial use" standard of *Lucas*,[169] and requires a lower threshold for state takings claims.[170]

State takings claims under the Harris Act are applicable only to "vested right[s]" and "existing use[s]."[171] Vested rights derive from three sources: principles of equitable estoppel, substantive due process under common law, and state statutory provisions.[172] Existing uses are defined as "actual, present use[s] or activit[ies]."[173] As defined, these uses may exclude such state action as variances, conditional use permits, and other municipal land use actions which could be actionable under the "disproportionate burden" prong of the "inordinate burden" standard. Due to the limited litigation of the Act, however, the full scope of its reach remains unclear.[174]

Thus, if the governmental action falls within the scope of the Act and inordinately burdens the property, the Harris Act pro-

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167. *Id.* § 70.001(3)(e).

168. *See id.*

169. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1972); *see also* discussion *supra* Part II.B.

170. FLA. STAT. ANN. § 70.001(9) (West Supp. 2002) ("This section provides a cause of action for governmental actions that may not rise to the level of a taking under the State Constitution or the United States Constitution.").

171. *Id.* § 70.001(2).

172. *Id.* § 70.001(3)(a).

173. *Id.* § 70.001(3)(b).

174. For an examination of cases that address the Harris Act, see generally Ronald L. Weaver & Nicole S. Sayfie, *Environmental and Land Use Law: 1999 Update on the Bert J. Harris Private Property Rights Protection*, 73 FLA. B.J. 49 (1999).

vides a civil remedy to compensate landowners.[175] Compensation is determined by calculating the difference between the fair market value of the property as though the owner could retain his investment-backed expectation, or was not left with unreasonable uses, with the fair market value of the property as inordinately burdened.[176]

b. Expectations Made Easy

In federal takings jurisprudence, the extent to which the investment-backed expectations of the owner affect the outcome is now a debatable issue. In *Palazzolo*, the Court held that the owner with knowledge of the imposing regulation at purchase was not categorically barred from bringing a federal takings claim—most specifically under the *Lucas* approach.[177] However, the Justices differed as to whether the investment-backed expectations of the owner were relevant to the *Penn Central* approach.[178]

The Harris Act resolves this ambiguity by providing an alternative cause of action[179] that is based, in part, on the *sole criterion* of whether the regulation frustrated the owner's reasonable investment-backed expectations.[180] Unlike the three-factored analysis of *Penn Central*,[181] the Florida statute provides a disjunctive takings standard that may allow the owner to proceed under either an expectations approach or a general fairness approach.[182] Thus, by separating and isolating factors of previous case law, the Harris Act avoids the complications of *Penn Central*, and correspondingly resolves the conflict between the Justices in *Palazzolo*.

175. *See* FLA. STAT. ANN. § 70.001(6)(a) (West Supp. 2002).

176. *See id.* § 70.001(6)(b).

177. *Palazzolo*, 121 S. Ct. at 2463.

178. *See supra* notes 90–94 and accompanying text.

179. *See* FLA. STAT. ANN. § 70.001(1) (West Supp. 2002).

180. *See id.* § 70.001(3)(e).

181. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); *see also* discussion *supra* Part II.A.

182. FLA. STAT. ANN. § 70.001(3)(e) (West Supp. 2002).

c. Risks, Windfalls, and Malefactors

Yet by basing a cause of action solely on the expectations of the investor, the Harris Act raises significant questions regarding ownership and investment in real property. For example, does a cause of action based *solely* on the expectations of the owner provide a publicly funded subsidy for land-speculators by insuring that their expectations will be satisfied?[183] Rather, shouldn't the *purchaser* be the appropriate risk-taker?[184] The issue is thus whether the "inordinate burden" standard provides an incentive for strategic behavior via land speculation.

In what appears to be a growing number of cases, this issue has come to the forefront of the debate over the Harris Act.[185] In one recent case pending in a Florida state court, developers who received approval for a high-rise Miami Beach condominium sued Miami-Dade County for a subsequent rezoning ordinance.[186] The ordinance truncated their tower from thirty-two floors to six floors, and allegedly slashed the fair market value by $5 million.[187] The developers, who were clearly left with some viable economic value remaining in the six-story condo, pursued a Harris Act claim and asserted that their investment-backed expectations were frustrated.[188]

The criticism with claims like this one, as stated by one Miami-Dade County attorney, is that "[t]here is nothing written in any law anywhere that just because you invest in land you are entitled to a return on your investment. . . . People lose money all the time in the stock market."[189] Presumably, then, the real estate investor who receives compensation under the Harris Act for the frustration of his expectations receives a "windfall," where he

183. *See* James M. McElfish, Jr., *Property Rights, Property Roots: Rediscovering the Basis for Legal Protection of the Environment*, [1994] 24 Envtl. L. Rep. (Envtl. L. Inst.) 10,231, 10,247 (May 1994) (arguing for the proposition that under a traditional property scheme, ownership does not extend to speculative uses).

184. *See* Tyson Smith, *Investment-Backed Expectations, Background Principles, and the Public Interest:* Palazzolo *and Beyond, in* TRENDS IN LAND USE LAW FROM A TO Z 1, 17–18 (Patricia E. Salkin ed., 2001).

185. *See* Terry Sheridan, *Putting the Bert Harris Act to the Test*, BROWARD DAILY BUS. REV., Nov. 5, 2001, at A1.

186. *See id.*

187. *See id.*

188. *See id.*

189. *Id.*

would normally suffer the deprivation as a natural consequence of his investment risk. Indeed, investment in real property, as in any other commodity, requires investor risk assessment.[190] As such, critics argue that property owners have an obligation to investigate state statutes and local regulations before purchase; to provide otherwise would be to shift the investor's burden of risk to the state.[191]

The proper response to such criticism complements Justice Scalia's discussion of "windfalls" in *Palazzolo,* arguing, ironically, that the investment-backed expectations of the owner ought *not* to bear on the constitutional takings analysis.[192] The concern that underlies the expectations criterion, according to Justice Scalia, is the fear that real estate speculators will gamble on the unconstitutionality of a particular regulation, purchase the property at a deflated price, and litigate the taking to receive full-value, thereby receiving a "windfall."[193]

> This can, I suppose, be called a windfall—though it is not much different from the windfalls that occur every day at stock exchanges or antique auctions, where the knowledgeable (or the venturesome) profit at the expense of the ignorant (or the risk averse). There is something to be said (though in my view not much) for pursuing abstract "fairness" by requiring part or all of that windfall to be returned to the naive original owner . . . . But there is nothing to be said for giving it instead to the *government*—which not only did not lose something it owned, but is both the *cause* of the miscarriage . . . . It is rather like eliminating the windfall that accrued to a purchaser who bought property at a bargain rate from a thief clothed with the indicia of title, by making him turn over the "unjust" profit *to the thief.*[194]

Thus, Justice Scalia rebuts the assertion that the property-owner ought not to benefit from a previous taking, arguing that to provide otherwise would be to allow the "malefactor the benefit of its malefaction."[195] Stated differently, to preclude the owner from recovery would allow the "taker" to benefit from its "taking."

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190. *See* Smith, *supra* note 184, at 17.

191. *Id.*

192. *Palazzolo*, 121 S. Ct. at 2467–68 (Scalia, J., concurring).

193. *See id.*; *see also* Anello v. Zoning Bd. of Appeals, 678 N.E.2d 870, 871 (N.Y. 1997) (arguing that to allow the post-regulation purchaser to challenge the regulation would provide a windfall for speculators at the expense of the public).

194. *Palazzolo*, 121 S. Ct. at 2467–68 (Scalia, J., concurring).

195. *Id.* at 2468.

Clearly, the argument criticized by Justice Scalia differs significantly from the arguments opposing the expectations-based "inordinate burden" standard of the Harris Act. Yet both are educated by a similar bias—a belief that property ownership is subject to changing societal interests.[196] The former argument states that a property owner should not receive a windfall for a taking preceding her ownership, for such a claim would invite "venturesome" speculation;[197] the latter argument states that a property owner should not receive a windfall for takings subsequent to transfer of ownership, for the risk of regulation ought to be inherent in speculative transactions.[198] Each of these arguments seeks to allocate the burden away from the government and onto the speculator for the reason stated above: that the public ought not subsidize land speculation, and thus, the buyer ought to be the appropriate risk-taker.[199]

Yet in allocating the risk and expense of the regulatory taking from the public to the private owner, these arguments undermine not only the intent of *Palazzolo* and the Harris Act, but also our most basic notions of takings and our most basic understanding of property rights. As the Court states in *Palazzolo*, "[takings] inquiries are informed by the purpose of the Takings Clause, which is to prevent the government from 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'"[200] The notion that the public interest may determine the extent of one's property right runs counter to our post-*Lucas* sensibilities: the public interest *may* affect the bundle of rights, *but only* to the extent that it may do so under the police powers of the state.[201] To extend this right any

196. *See* Mark W. Cordes, *Leapfrogging the Constitution: The Rise of State Takings Legislation*, 24 ECOLOGY L.Q. 187, 233 (1997); *see also* Carol M. Rose, *A Dozen Propositions on Private Property, Public Rights and the New Takings Legislation*, 53 WASH. & LEE L. REV. 265, 268–82 (1996).

197. *Palazzolo*, 121 S. Ct. at 2467–68 (Scalia, J., concurring).

198. It is of note, though only peripherally, that the right of fee simple ownership traditionally included the right to speculate thereupon. The right, recognized by eighteenth-century common law, is explicitly recognized in the dictum of Lord Coke: "for what is the land but the profits thereof[?]" 1 EDWARD COKE, THE INSTITUTES OF LAWS OF ENGLAND, ch. 1 § 1 (Garland Publ'g 1979) (1628).

199. *See supra* notes 183–84 and accompanying text.

200. *Palazzolo*, 121 S. Ct. at 2457–58 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

201. *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND EMINENT DOMAIN 58–59 (1985).

further would be to allow Justice Scalia's malefactor to continue to violate the takings principles in the name of an amorphous and indeterminate "public good."

2. The Texas Trigger

a. Q: How Much Value Must be Taken to Affect a Compensable Taking?
A: Twenty-five Percent.

The Private Real Property Rights Preservation Act (the "Texas Act") also provides a cause of action for governmental actions resulting in a taking.[202] The approach of this statute differs significantly from the Harris Act, however. Under the Texas Act, "taking" is defined in two ways. First, the statute defines "taking" as "a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments . . . ."[203] This definition provides landowners with an expanded constitutional takings claim, yet also includes the constitutionally uncompensable temporary taking.

Second, the statute defines "taking" as a governmental action that limits the owner's right to use the property absent the regulation and reduces the market value of the property by twenty-five percent.[204] The value of the diminution is established by comparison of the market value before and after the governmental action.[205]

The statute applies to four categories of governmental actions: (1) adoption of ordinances, rules, regulations, resolutions, policy guidelines, or similar measures; (2) actions imposing physical invasions or exaction of property; (3) actions having extraterritorial effects; and (4) actions listed in (1) through (3) where the enforcement is accomplished with permits, citations, orders, judicial

202. TEX. GOV'T CODE ANN. § 2007.021 (Vernon 2000).
203. *Id.* § 2007.002(5)(B).
204. *Id.*
205. *Id.*

or quasi-judicial proceedings, or other similar means.[206] The Texas Act does retain a number of exceptions, however, including regulations that restrict nuisance, prevent waste of oil and gas, and promote water safety, hunting, and fishing.[207] Also, the statute exempts actions taken by political subdivisions to regulate construction in designated floodplains and regulate on- site sewage facilities, to protect rights of groundwater, and to prevent subsidence.[208]

b. The Good and the Bad

Despite the expansive exceptions, the Texas Act provides the formula that *Lucas* and *Penn Central* failed to establish: a benchmark trigger to determine a compensable taking. *Palazzolo's* forebearers make apparent the benefits of the compensation statute in two respects. First, the bright line test introduces much needed analytical clarity into the takings calculus.[209] Under *Lucas*, the "deprivation of all economically viable use" determination often requires an ad hoc and ambiguous factor-analysis that is alleviated by the statutory trigger.[210] Second, by providing compensation for all applicable takings beyond twenty-five percent, the Texas statute significantly expands the traditional takings definition to include mere diminutions of property value.[211]

Unlike the risk-allocation and incentive issues considered earlier, the concern over strategic behavior is unavailing in the percentage-based compensation context since determining the diminution of property values is largely the appraiser's game. Still, commentators typically offer three frequent criticisms of the Texas Act that are generally applicable to all compensation statutes.[212] First, critics warn that takings compensation resulting from the Texas Act could cost local governments severely.[213] Often cited in support of this proposition is a University of Washington study estimating that a similar compensation statute in Wash-

206. *Id.* § 2007.003(a).
207. *Id.* § 2007.003(b).
208. *Id.*
209. Cordes, *supra* note 196, at 226.
210. *Id.*
211. *Id.*
212. *Id.* at 227–28.
213. *Id.* at 227.

ington would cost local governments as much as $11 million.[214] Second, critics argue the related proposition that it would be fundamentally unfair for the public to bear the costs of compensation.[215] This notion again implicates the burdens of allocation mentioned previously: for those who find that the benefits of property ownership ought to be tempered by prevailing public interests (whatever they may currently be), this is an especially resonant claim.[216] However, under a post-*Lucas* schema, where one's property rights extend to the limits of the state's police powers, this proposition is naturally untenable.[217] Third, critics argue (perhaps most frequently) that the compensation statute will tend to chill states from enacting environmental legislation.[218] These criticisms remain largely untested, however, as the considerable exclusions provided by the statute have thwarted its most significant challenges.[219]

Nevertheless, an unencumbered statutory trigger mechanism could resolve the apparent unfairness illustrated in *Palazzolo*. Under the federal scheme, the owner who retains a value greater than "token interest" may not proceed with a *Lucas* claim.[220] Consequently, Palazzolo was denied compensation under *Lucas*, even though his parcel suffered $2.95 million of deprivation.[221] Clearly, the nearly $3 million devaluation would trigger compensation under a twenty-five percent trigger, thereby alleviating the need to prove all three *Penn Central* factors in the alternative.

214. *Id.*

215. *Id.*

216. *Id.* at 228.

217. *See supra* notes 200–01 and accompanying text.

218. Cordes, *supra* note 196, at 228.

219. *See* Edwards Aquifer Auth. v. Bragg, 21 S.W.3d 375, 380 (Tex. App. 2000) (holding that the plain language of the Texas Act excluded permit applications mandated by state law); McMillan v. Northwest Harris County Mun. Util. Dist., 988 S.W.2d 337, 342 (Tex. App. 1999) (holding that the plain language of the Texas Act excluded standby fees levied against property).

220. *Palazzolo*, 121 S. Ct. at 2464.

221. *Id.* at 2464–65.

3. Mississippi's and Louisiana's Fractions

a. Q: What is the Proper Denominator?
A: Any Part or Portion of the Property.

Two other compensation statutes directly address the final question of the proper denominator, albeit on a scope considerably more limited than the Texas statute. Mississippi's Agricultural and Forestry Activity Act (the "Mississippi Act") compensates owners of agricultural and forestry land for state regulations that "prohibit[] or severely limit[]" agricultural and forestry activities.[222] The Mississippi Act recognizes this deprivation as a statutory "inverse condemnation,"[223] and establishes a forty percent devaluation to trigger compensation.[224] The statute further defines "taking" to include actions under the United States and Mississippi Constitutions, where the owner is "entitled to compensation for the fair market value of the owner's property or *some part thereof*."[225] Thus, the Mississippi Act provides a fractional denominator for farm and forestry land takings.[226]

The Louisiana statute operates similarly. Louisiana provides that owners of private agricultural properties may bring takings claims where governmental action "caused a diminution in value" in the property.[227] "Diminution in value" is defined by statute as a twenty percent reduction in market value of "the affected *portion of any parcel* of private agricultural property."[228]

b. A Footnote Resolved

> It is a monument to the Supreme Court's continuing inability to discern the denominator in the "takings fraction" that "footnote seven" is entering the pantheon of telling footnotes in American law. . . . [O]ne could hardly expect the Court to profess such an inability in establishing a doctrine in which the answer will be so outcome determinative.[229]

222. MISS. CODE ANN. § 49-33-3 (1999).
223. *Id.* § 49-33-7(e).
224. *Id.* § 49-33-7(h).
225. *Id.* § 49-33-7(l) (emphasis added).
226. *Id.*
227. LA. REV. STAT. ANN. § 3:3610(A) (West Supp. 2002).
228. *Id.* § 3:3602(11) (emphasis added).
229. EAGLE, *supra* note 123, at 792.

As the rhetoric of *Palazzolo* makes clear, the "difficult, persisting question of what is the proper denominator in the takings fraction"[230] has remained unsettled since *Lucas's* famous footnote.[231] The Supreme Court has nevertheless traditionally and consistently analyzed the amount of deprivation in comparison to the entire parcel.[232] In the context of the Mississippi and Louisiana statutes, however, the answer is statutorily prescribed: courts may recognize a taking of any divisible portion of the property that reaches the compensation trigger.

Clearly, the use of the fractional denominator substantially increases the likelihood that regulations may be found to effectuate a taking.[233] Critics challenge that the use of the fractional denominator, as well as compensation statutes generally, will result in incalculable administrative and compensation costs.[234] However, the utility of identifying the appropriate denominator in a takings action, whether fractional or whole, is unquestionable.

c. Fraction Strategy

Yet it is here, regarding the takings fraction, that the dissent in *Palazzolo* most explicitly rails against the promotion of strategic behavior in takings determinations.[235] Justice Breyer restates the criticisms of several amici warning against validation of the takings fraction, reasoning that

> to allow complete regulatory takings claims to survive changes in land ownership could allow property owners to manufacture such claims by strategically transferring property until only a nonusable portion remains. *But I do not see how a constitutional provision con-*

230. *Palazzolo*, 121 S. Ct. at 2465.

231. The Court stated that

> [r]egrettably, 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. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.

Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016–17 n.7 (1992).

232. Cordes, *supra* note 196, at 214.

233. *Id.* at 215.

234. *Id.* at 227–28.

235. *Palazzolo*, 121 S. Ct. at 2477–78 (Breyer, J., dissenting).

> *cerned with "fairness and justice" could reward any such strategic behavior.*[236]

Thus, by "conceptually severing" the property interest at issue in the takings claim,[237] Justice Breyer argues that a takings plaintiff may skew the scope of the taking to his strategic advantage.[238]

This criticism, sans the constitutional subtext, applies with equal force to the Mississippi and Louisiana statutes. Each narrow the scope of the takings question to "the affected portion of any parcel"[239] and "any part or parcel" of the affected area.[240] Like the percentage-based compensation statute of Texas, these fractional takings statutes dramatically increase the likelihood that a taking may be found.[241] Because these statutes only apply to agricultural and forestry lands, however, the strategic advantage is minimized considerably.[242]

Like previous strategy analysis, the viability of fraction strategy depends upon one's conception of the property right at issue. Under the traditional "bundle of rights" understanding of property, which the Court referenced in *Palazzolo*,[243] the notion that interests of the bundle may be severed and "taken" by regulation is (at least conceptually) palpable.[244] At least one commentator suggests that the interests bundled by common law include five "axes": (1) temporal; (2) vertical extensiveness; (3) horizontal extensiveness; (4) freedom from intensive regulation; and (5) the commercial unit.[245] If these interests are divisible from the fee simple, then fractional takings statutes may be permitted to extend beyond the limited scope endorsed by Mississippi and Louisiana. Counterposed against the public interest, however, the owner's strategic interests may be correspondingly outweighed. The success of the fractional taking strategy may thus hinge on

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236. *Id.* (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123–24 (1978)) (emphasis added).

237. For a discussion of severable interests, see EAGLE, *supra* note 123, at 805–14.

238. *Palazzolo*, 121 S. Ct. at 2477 (Breyer, J., dissenting).

239. LA. REV. STAT. ANN. § 3:3602(11) (West Supp. 2002).

240. MISS. CODE ANN. § 49-33-7(h) (2001).

241. Cordes, *supra* note 196, at 215.

242. *Id.*

243. *Palazzolo*, 121 S. Ct. at 2462.

244. EAGLE, supra note 123, at 83.

245. *Id.* at 805–14.

whether the common law of each state recognizes such a populist stick in its Lockean bundle.

VI. CONCLUSION

The search for an adequate takings formula has been described as "the lawyer's equivalent of the physicist's hunt for the quark."[246] Perhaps it began with Justice Holmes' cryptic guidance in *Pennsylvania Coal*.[247] Or perhaps it derives simply from the contentiousness of the parties to the question. Nevertheless, it is clear that the field of takings jurisprudence remains decidedly unclear, even in the aftermath of *Palazzolo*.

While *Palazzolo* does bring lawyers closer to discovering "the quark," an adequate takings formula remains absent. As evidenced by this comment, state private property rights statutes may make clear the contours of regulatory takings law by resolving the ripeness, expectations, compensation, and denominator issues left undecided by *Palazzolo*. Undoubtedly, the answers posed by state legislatures in the form of private property statutes remain highly controversial: each provide landowners with strategic advantage in staking their claim of compensation. Yet these answers may provide federal lawmakers with the template necessary to fasten a legislative solution to the takings dilemma. As states continue to legislate answers to their own takings questions, and as federal case law converges thereupon, the patchwork of federal case law and state statutory law continues to give form to the long sought formula. A solution to the takings dilemma, to the delight of the takings claimant, may therefore be at hand.

Michael A. Culpepper

246. HAAR & WOLF, *supra* note 107, at 875.

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