

# The Law of Regulatory Takings: Part I

*Development of the Law*

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### I. INTRODUCTION

It is a fundamental constitutional principle that government cannot take private property for public use without the payment of just compensation.<sup>1</sup> When a government agency files an eminent domain action to take title to a parcel of private property, it is required to pay “just compensation” to the property owner. Likewise, if a government agency puts a road through private property or otherwise occupies private land, even if it does not initially file an eminent domain action, the agency must pay just compensation for the “taking.” A more difficult case is presented, however, where government enacts a statute, issues a regulation or refuses to authorize an activity requiring a government-issued permit, thereby reducing or eliminating the value of the privately owned land. State and federal courts have held that, in certain circumstances, such regulatory action constitutes a taking of private property for which the government must pay just compensation. How this law developed, largely through decisions of the United States Supreme Court over the past 80 years, and the current state of this law, is the subject of this White Paper.

While most takings involve the actual physical occupation of private land,<sup>2</sup> it has long been recognized that private property may also be taken as a result of the enactment of statutes and regulations.<sup>3</sup> In the seminal case of *Pennsylvania Coal Co. v. Mahon*, Justice Oliver Wendell Holmes, Jr., speaking for the Court, specified that “while property may be regulated to a certain extent, if regulation *goes too far* it will be recognized as a ‘taking.’”<sup>4</sup>

Since the Supreme Court’s identification of a regulatory taking in *Mahon*, courts have attempted to clarify when a statute or regulation “goes too far,” thus resulting in a taking. What makes this area of the law so complicated is the fact that it is based entirely on twelve words of the Fifth Amendment to the United States Constitution (“Takings Clause”) and the continual development and refinement of applicable judicial principles. Although, over the years, efforts have been made in Congress to enact a law governing regulatory takings,<sup>5</sup> no such law exists. Rather, the entire body of regulatory takings jurisprudence is based on judicial interpretations of the Fifth Amendment.<sup>6</sup>

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Further complicating the analysis are the strong political overtones that tend to inhibit any objective view of the issues related to takings law. Parties seeking to restrict or limit a landowner's private property rights often do so in an attempt to facilitate government regulation of private property, particularly in the areas of land use planning and environmental protection. In the United States, this viewpoint is often associated with a politically liberal perspective. On the other hand, parties who seek to limit government's ability to restrict the use of private property are often associated with political conservatism.<sup>7</sup> Despite the ever-present political overtones that accompany takings issues, the authors have made every effort to present this White Paper on the development of regulatory takings law in an objective manner.

This White Paper is Part I of a series of papers aimed at making some sense of this complicated area of law. Part I examines the essential background cases, with a special focus on the seminal decisions of the United States Supreme Court. Subsequent papers will examine particularly vexing issues in takings law which tend to proliferate as courts are asked to address varying factual circumstances. Part II will examine the differences in analysis depending on the extent and value of property taken by the government (i.e., "partial taking" v. "total taking" or "categorical taking"). Part III will examine the defense to categorical takings identified by the Supreme Court in the important case of *Lucas v. South Carolina Coastal Council*.<sup>8</sup> Finally, Part IV will examine the lingering question of how to define the property to be scrutinized in the regulatory takings analysis (the so-called "denominator," "regulated parcel," or "parcel as a whole" issue). This paper, Part I, provides essential background upon which Parts II-IV will draw.

## II. DEVELOPMENT OF THE LAW OF REGULATORY TAKINGS

### A. Constitutional Provisions

Several provisions of the United States Constitution protect private property rights. The Takings Clause of the Fifth Amendment states simply, "nor shall private property be taken for public use, without just compensation."<sup>9</sup> The Due Process Clause of the Fifth Amendment provides, "[n]o person shall . . . be deprived of . . . property, without due process of law[]." <sup>10</sup> The Fourteenth Amendment, which applies the limitations of the United States Constitution to the States, specifies in its Due Process and Equal Protection Clauses that, "[n]o state . . . shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."<sup>11</sup> Although takings claimants often invoke both clauses of the Fifth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to support their claims, courts have analyzed most takings cases under the Fifth Amendment Takings Clause.<sup>12</sup>

Like the federal Constitution, many state constitutions also provide a limitation on government's use or regulation of private property, albeit some in slightly different terms. For example, the Constitution of the Commonwealth of Pennsylvania provides, "nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured."<sup>13</sup> The Constitution of Alaska provides that, "[p]rivate property shall not be taken or damaged for public use without just compensation."<sup>14</sup> The Texas Constitution states that, "[n]o person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made . . ."<sup>15</sup>

Although the States may provide rights and protection to their citizens greater than those provided by similar provisions of the United States Constitution,<sup>16</sup> many States have decided to read the takings provisions of their state constitutions similarly to the interpretations imposed on the Takings Clause. In Pennsylvania, for example, courts of the Commonwealth have “turned to federal precedent for guidance in [their] ‘taking’ jurisprudence, and indeed ha[ve] adopted the analysis used by the federal courts.”<sup>17</sup> Many States are apparently reluctant to extend their own constitutional takings provisions beyond the protection offered by the federal Constitution.<sup>18</sup> It is also significant that federal courts have dominated the takings issue, thus allowing many States to simply follow their lead. Federal cases, especially those from the United States Supreme Court, thus provide the best insight into the development of this area of the law.

## **B. Police Power**

An exposition on the origins and operation of the “police power” is essential to any discussion of regulatory takings law. Government regulation of private property is premised on the existence of an implied constitutional power of government to protect the “public safety, health, and morals” of the government’s citizens.<sup>19</sup> This power to protect is commonly referred to as the “police power.” While there is no “police power clause” in the United States Constitution, the power is inferred from the necessity of government taking action to protect its citizens.<sup>20</sup> The “classic statement” of the police power is as follows:

To justify the State in... interposing its authority in behalf of the public, it must appear, first, that the interests of the public... require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.<sup>21</sup>

When the police power is applied to private property, the result is often a reduction in the property’s value. Courts have justified this resulting diminution in very practical terms:

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power.<sup>22</sup>

In an early case upholding the constitutionality of the exercise of zoning by governmental entities, the Supreme Court established that zoning and other land use laws “must find their justification in some aspect of the police power, asserted for the public welfare.”<sup>23</sup>

The police power, however, is not absolute. As the Supreme Court explained:

[The police power] must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. . . . The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.<sup>24</sup>

Thus, the Supreme Court has acknowledged, and to a large extent facilitated, the constitutional tension between government’s exercise of the police power and those instances in which government’s efforts to regulate private property have “gone too far,” thus resulting in an unconstitutional taking.

The “police power” nonetheless continues to elude precise definition. In his excellent treatise on regulatory takings, Professor Steven Eagle quotes Justice William O. Douglas’s statement for the Court

“that [a comprehensive] attempt to define [the police power’s] reach or trace its outer limits is fruitless.”<sup>25</sup> Professor Eagle extends the thought by declaring that “the preservation of individual rights requires a breathing space in which government does not intrude. The limits of the police power must be ascertained with some precision. Alas, this task has proved too daunting.”<sup>26</sup>

Perhaps the task is too daunting because the concept of “police power” is derived from the basic unenumerated power that the Supreme Court believes government must have in order to govern, rather than from any particular provision of the Constitution itself. If ascertaining the contours of the police power is too daunting, then ascertaining the requirements of the Takings Clause in the regulatory takings context is only slightly less so. Nevertheless, the Supreme Court has been repeatedly challenged to define the reach and breadth of the Takings Clause and has attempted to do so with increasing vigor.

### C. Takings Cases

#### 1. *Pennsylvania Coal Co. v. Mahon*

As noted above, the Supreme Court’s first recognition of a regulatory taking originated in the 1922 decision of *Pennsylvania Coal Co. v. Mahon*.<sup>27</sup> In *Mahon*, Justice Oliver Wendell Holmes, Jr., writing for the Court, recognized that government must have the ability to enact restrictions on the use of property, but held, however, that “while property may be regulated to a certain extent, if regulation *goes too far* it will be recognized as a ‘taking.’”<sup>28</sup> Thus was born a principle of law whose parameters would elude jurists for decades.

In *Mahon*, a coal company claimed that the enactment of the Kohler Act by the Commonwealth of Pennsylvania had taken its property interest in certain coal. The Kohler Act required coal companies to leave in place 100 percent of the coal under houses overlaying deep mines.<sup>29</sup> The legislation did not take

into account Pennsylvania real property law which allowed separate deeds to be conveyed for the surface, minerals and surface support. The Kohler Act prohibited the coal company from removing coal beneath a house where the coal company held a deed to both the minerals and support as a result of a prior severance of the property title. The homeowners had, in fact, purchased only the surface rights from the coal company; they did not own the minerals or the right of support.<sup>30</sup> To sustain the Act, the Commonwealth of Pennsylvania argued that it was a legitimate exercise of the state’s police power.

The Court, however, found the Kohler Act to be an excessive exercise of the police power. Justice Holmes, writing for the Court, recognized that, “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”<sup>31</sup> Then, in language that has been echoed by the courts in subsequent years, the Supreme Court acknowledged that the result in each case depended on the facts.<sup>32</sup> Justice Holmes admonished that: “We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.”<sup>33</sup>

From the 1922 ruling in *Mahon* until 1978, the Supreme Court was not presented with, or refused to rule on, any significant regulatory takings cases. The one potentially meaningful case presented to the Court – *Goldblatt v. Town of Hempstead* – did not advance the development of the law in any significant way.<sup>34</sup>

#### 2. *Penn Central Transportation Co. v. City of New York*

Finally, in 1978, the Supreme Court released its ruling in *Penn Central Transportation Co. v. City of New York*, a very important police power case, the contours of which are still being explored.<sup>35</sup> The Court had

been asked to evaluate whether restrictions imposed on Grand Central Station (“Terminal”) by New York City’s Landmarks Preservation Law effected a regulatory taking. Penn Central, which owned the Terminal, had entered into a lease and sublease with Union General Properties, Ltd. (“UGP”), under which UGP would construct a multi-story office building atop the Terminal.<sup>36</sup> Together, the landowners sought permission to construct the office building. When the Landmarks Preservation Commission denied the proposals, Penn Central and UGP brought suit for a regulatory taking.

At the outset, the Supreme Court acknowledged that it had yet to devise a consistent test for analyzing regulatory takings claims:

While this Court has recognized that the ‘Fifth Amendment’s guarantee . . . [is] designed to bar 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,’ this Court, quite simply, has been unable to develop any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.<sup>37</sup>

Several factors, however, had gained particular significance in previous rulings, notably “[t]he economic impact of the regulation on the claimant, and particularly the extent to which the regulation has interfered with distinct investment-backed expectations . . . [and the] character of the governmental action.”<sup>38</sup> The Court then drew on these factors in assessing the claim before it.

The landowners first argued that the airspace above the Terminal was a valuable property interest and that, irrespective of the value of the remainder of their parcel (i.e., the entire city tax block), their right to the super-adjacent airspace had been taken.<sup>39</sup> The Court, however, refused to analyze the taking in

terms of the airspace alone, explaining that:

‘[t]aking’ jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole – here, the city tax block designated as the ‘landmark site.’<sup>40</sup>

Next, conceding that the landmark law was reasonably related to promotion of the general welfare and that mere diminution in value is insufficient to support a taking, the landowners argued that a taking had nonetheless occurred because the value of the Terminal was significantly diminished.<sup>41</sup> As the Court distilled the landowners’ argument:

[their] position appears to be that the only means of ensuring that selected owners are not singled out to endure financial hardship for no reason is to hold that any restriction imposed on individual landmarks pursuant to the New York City scheme is a ‘taking’ requiring the payment of ‘just compensation.’ Agreement with this argument would, of course, invalidate not just New York City’s law, but all comparable landmark legislation in the Nation. We find no merit in it.<sup>42</sup>

The Court also rejected the landowners’ argument that “the decision to designate a structure as a landmark ‘is inevitably arbitrary or at least subjective, because it is basically a matter of taste.’”<sup>43</sup> Finally, the Court refused to accept that New York City’s landmark law was “inherently incapable of producing the fair and equitable distribution of benefits and burdens of government action,” explaining that the law “applies to vast numbers of structures in the city in addition to the Terminal.”<sup>44</sup>

The Court found it very significant that the law “in nowise impaired the present use of the Terminal” but simply prohibited the landowners or anyone else from occupying portions of the airspace above the Terminal.<sup>45</sup> Because the property could be used as it always had been, and could provide a reasonable return on investment, any interference by the Landmark Preservation Law with use of the Terminal did not “go too far” so as to effect a taking under *Mahon*.<sup>46</sup> The Court pointed out that Penn Central and UGP had yet to submit an application for a lesser use and were, moreover, provided valuable transferable air rights correlating to the air space which could be sold to “mitigate whatever financial burdens the [Landmarks] law has imposed.”<sup>47</sup> Thus,

[o]n this record, we conclude that the application of New York City’s Landmarks Law has not effected a ‘taking’ of [the landowners’] property. The restrictions imposed are substantially related to the promotion of the general welfare and not only permit reasonable beneficial use of the landmark site but also afford [the landowners] opportunities further to enhance not only the Terminal site proper but also other properties.<sup>48</sup>

### **3. *Williamson County Regional Planning Commission v. Hamilton Bank***

During the 1980s, the Supreme Court addressed some of the more technical contours of regulatory takings law. In 1985, for example, the Court released *Williamson County Regional Planning Commission v. Hamilton Bank*, a ripeness decision which remains of critical importance to every takings claim.<sup>49</sup> In *Williamson*, the Court held that a taking claim is not fit for judicial consideration until “the government entity charged with implementing the regulation[] has reached a final decision regarding the application of the regulation[] to the property at issue” and that, before bringing a taking claim to federal court, a claimant must first seek compensation through

procedures provided by the State.<sup>50</sup> This latter principle derives from the fact that “[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation.”<sup>51</sup>

### **4. *First English Evangelical Lutheran Church of Glendale v. Los Angeles County***

In 1987, the Court explored the temporal dimension of takings law in *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, holding that the government must compensate a landowner denied all use of his property for a period of time prior to invalidation of the regulation by the courts.<sup>52</sup> Reasoning that “temporary regulatory takings” are no different in kind from permanent takings, the Court held that invalidation of a regulatory restriction unaccompanied by compensation for the time in which the regulation was in effect is an insufficient constitutional remedy.<sup>53</sup>

### **5. *Nollan v. California Coastal Commission***

In another decision released in 1987, the Supreme Court addressed what has come to be known as an “exaction” or “unconstitutional conditions” case. In *Nollan v. California Coastal Commission*, prospective purchasers of a beachfront lot sought to fulfill a condition on their option to purchase by tearing down an old bungalow on the lot and erecting a larger house.<sup>54</sup> As required by state law, the purchasers sought a permit for development from the California Coastal Commission. The permit was granted on the condition that the public be given an easement across the property to access the beach.<sup>55</sup> The Supreme Court, reversing the California Supreme Court, held that conditioning the grant of a permit on such an easement resulted in a taking.<sup>56</sup>

## **6. *Keystone Bituminous Coal Association v. DeBenedictis***

Also in 1987, the Court decided *Keystone Bituminous Coal Association v. DeBenedictis*, a case presenting a facial takings challenge to the Pennsylvania Bituminous Mine Subsidence and Land Conservation Act.<sup>57</sup> Under that Act, coal owners were required to leave approximately 50% of the coal located under structures in the ground as support. Stressing the facial nature of the challenge, the Court noted that the Coal Association had not claimed that the Act made it commercially impracticable to mine nor had they shown that any of their mines could no longer be operated at a profit.<sup>58</sup>

A central component of the Court's rejection of the claim was the Court's refusal to allow the Coal Association to define its property interests in such a way so as to contend that the Act took 100% of the specific coal claimed or 100% of the support estate. Drawing on *Penn Central*, the Court explained that the coal required to be left in place throughout the state was not an estate separate from the rest of the coal estate and thus could not be separately analyzed (in other words, the Coal Association could not be said to have lost 100% of the 2% of coal).<sup>59</sup> The Court also ruled that, under Pennsylvania law, the support estate had no value separate and apart from either the surface estate or the coal estate. Thus, the Court refused to analyze the support estate separately.<sup>60</sup> Viewing the case as presenting a partial takings claim under *Penn Central*, the Court found that, on balance, the regulation had not "gone too far" and, thus, had not effected a taking.

## **7. *Lucas v. South Carolina Coastal Council***

In 1992, the Court decided *Lucas v. South Carolina Coastal Council*, a critically important regulatory takings case.<sup>61</sup> In *Lucas*, the landowner had purchased two residential lots in South Carolina, intending to build homes. The State then enacted the Beachfront Management Act, which effectively barred the

landowner from erecting any permanent habitable structures on the property.<sup>62</sup> A state trial court, finding that the law had rendered the property valueless, granted the landowner compensation for the taking.<sup>63</sup> The state supreme court reversed, reasoning that when a law is designed to prevent "harmful or noxious uses" of property akin to public nuisance (such as any use causing harm to the state's beaches), no compensation is owed, no matter what the law's effect on the property's value.<sup>64</sup> The United States Supreme Court, in turn, used *Lucas* to add a new dimension to takings law – the concept of a "categorical taking."

As it had in *Penn Central*, the Court began by decrying its own inability to provide insight on "when, and under what circumstances" a regulation would "go too far" under *Mahon* and effectuate a taking.<sup>65</sup> The Court noted, however, that it had already "described at least two discrete categories of regulatory action as compensable without case specific inquiry into the public interest advanced in support of the restraint:"

[t]he first encompasses regulations that compel the property owner to suffer a physical 'invasion' of his property. In general . . . no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation.

■ ■ ■

The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land.<sup>66</sup>

After exploring the justifications for always finding a taking in the second situation,<sup>67</sup> the Court concluded: "We think, in short, that there are good reasons for our frequently expressed belief that, when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."<sup>68</sup>

The *Lucas* Court then set forth a defense to a categorical takings claim which could be asserted by the State to avoid paying just compensation: “[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner’s estate shows that the proscribed use interests were not part of his title to begin with.”<sup>69</sup> States were cautioned, however, that they could not “decree anew” a restriction that effectuates a categorical taking and expect to escape the reach of the Takings Clause:

Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts - by adjacent landowners (or other uniquely affected persons) under the State’s law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.<sup>70</sup>

The case was remanded to allow the State to identify background principles of nuisance and property law that would prohibit the landowner from making his desired use of the property.<sup>71</sup>

### **8. *Dolan v. City of Tigard***

In 1994, in *Dolan v. City of Tigard*, the Supreme Court addressed another “exaction” case, deciding an issue explicitly left open in *Nollan* – i.e., “the required degree of connection between the exactions imposed by the city [or other governmental entity] and projected impacts of the proposed development.”<sup>72</sup> The Court had avoided this question in *Nollan* by concluding that the connection therein “did not meet even the loosest standard”

between the development and the easement demanded.<sup>73</sup>

In *Dolan*, the City of Tigard required Petitioners to dedicate a strip of their land along a creek for public use. The City wished to keep the flood plain open and free from development to guard against flooding, but it also sought use of the land for its “greenway system,” which attracted recreational users.<sup>74</sup> The Supreme Court determined that “rough proportionality” encapsulated the requirement of the Takings Clause: “[n]o precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”<sup>75</sup> The Court remanded for findings under its newly stated standard.

### **9. *Suitum v. Tahoe Regional Planning Agency***

In 1997, the Supreme Court released *Suitum v. Tahoe Regional Planning Agency*.<sup>76</sup> In that case, the planning agency had determined that the landowner’s undeveloped lot near Lake Tahoe was ineligible for development but that she was entitled to transferable development rights (TDRs) which could be sold to recoup her investment.<sup>77</sup> The landowner’s regulatory taking claim premised on 42 U.S.C. § 1983 was dismissed as unripe by the federal district court and affirmed on appeal. Both the trial court and the court of appeals had reasoned that the landowner must first try to sell the TDRs before a court could assess whether the agency’s decision had frustrated her reasonable expectations.<sup>78</sup>

The Supreme Court reversed. The case was ripe for judicial determination because the planning agency had already finally determined that absolutely no development was permitted.<sup>79</sup> It was of no moment that the value of the TDRs was not yet known since the parties agreed that the landowner was entitled to them and that no discretionary

decision by the agency was required before she could obtain and sell them. Valuation of the TDRs, moreover, was simply an issue of fact to be found by the district court and then addressed when analyzing the claim.<sup>80</sup>

#### **10. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.***

In 1999, in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, the Supreme Court ruled that a jury trial to determine damages was available in a regulatory takings action brought pursuant to 42 U.S.C. §1983.<sup>81</sup> While the case is focused on the jury trial issue, it also provided much needed guidance on the issue of ripeness. On a factual record which revealed that the City of Monterey had imposed ever-escalating demands on the landowner each of the five times it rejected the landowner's development applications, the Court cautioned government authorities against burdening property with the imposition of repetitive or unfair land-use procedures in an effort to avoid a final decision.<sup>82</sup>

#### **11. *Palazzolo v. Rhode Island***

The Supreme Court's decision, in 2001, in *Palazzolo v. Rhode Island*, was the first takings case released by the Supreme Court following *Del Monte Dunes*.<sup>83</sup> In it, the Supreme Court clarifies three important principles: the distinction between the *Penn Central* and *Lucas* takings, ripeness and the effect of notice to the landowner of the challenged regulatory restriction. *Palazzolo* may signal a resolve by certain of the Justices to clarify the Court's own regulatory takings jurisprudence.

The landowner in *Palazzolo* was the sole shareholder and owner of a company known as Shore Garden, Inc. ("SGI"). SGI owned land that contained, in part, wetlands adjacent to the Atlantic Ocean.<sup>84</sup> Efforts to develop SGI's property had begun as early as 1962. It desired, in particular, to fill a portion of the wetlands as a precursor to development

of the whole property.<sup>85</sup> These plans were continuously thwarted, however, by the state of Rhode Island that had, beginning in 1971, enacted comprehensive regulations designed to protect the state's wetlands.<sup>86</sup>

In 1978, the property was transferred by operation of law from SGI to the landowner.<sup>87</sup> In the mid-1990s, after numerous attempts at development, the landowner instituted a regulatory taking action in state court, challenging the wetland restrictions and his inability to obtain a fill permit. The Rhode Island trial court and state supreme court ruled against him. On June 28, 2001, the United States Supreme Court largely reversed. While the Supreme Court did not rule entirely for the landowner in *Palazzolo*, a majority of the Justices made several important rulings and, in the process, clarified some of the murkier aspects of regulatory takings law.

The first major issue addressed was ripeness. The state courts had characterized the landowner's takings claim as unripe because he had failed to explore "any other use for the property that would involve filling substantially less wetlands."<sup>88</sup> In that portion of the opinion finding, by a 6:3 margin, that the case was ripe, the Supreme Court explained that while a landowner must first file an application with local or state agencies, "once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened."<sup>89</sup>

The State argued that a landowner, having already filed numerous applications for successively less-intensive land uses, should be required to reapply for yet a lesser use before the claim would ripen.<sup>90</sup> This argument was rejected, however, in the interests of setting a logical limit. As the Court explained: "[g]overnment authorities, of course, may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision...

federal ripeness rules do not require the submission of further and futile applications with other agencies.”<sup>91</sup> Thus, under *Palazzolo*, a takings claim is ripe once a landowner files an application with the appropriate government agency and the agency definitively rejects it. As a corollary to this point, if the agency has no discretion to issue the requested permit, it is not necessary for the landowner to reapply to develop his land. The aggrieved landowner may, at that juncture, take his takings claim to court.

The second major issue addressed in *Palazzolo* concerned the legal impact of prior notice of the regulation to the landowner. The State argued to the Supreme Court, as it had successfully done below, that a property owner who takes title to the land *after* the enactment of the challenged regulation cannot assert a takings claim.<sup>92</sup> The Supreme Court, however, rejected the relevance of *any* distinction based on the manner in which the property was acquired. In addressing the issue of pre-acquisition notice, the Supreme Court first distilled the Rhode Island Supreme Court’s holding as follows:

The state court held that the post-regulation acquisition of title was fatal to the claim for deprivation of all economic use, and to the *Penn Central* claim. While the first holding was couched in terms of background principles of state property law, and the second in terms of petitioner’s reasonable investment-backed expectations, the two holdings together amount to a single sweeping rule: A purchaser or a successive title holder like petitioner is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking.<sup>93</sup>

The *Palazzolo* Court then unequivocally rejected this limitation in a single pithy phrase: “The State may not put so potent a Hobbesian stick in the Lockean bundle.”<sup>94</sup> The Court’s focus was simply not on the nature of the private transaction underlying the transfer of property, but, rather, on the action of the government. The Court was determined to

ensure that the *government* never reaps a windfall due to transfer activities of any type between private individuals. As the Court explained,

The right to improve property . . . is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions. The Takings Clause, however, in certain circumstances allows a landowner to assert that a particular exercise of the State’s regulatory power *is so unreasonable or onerous as to compel compensation*. Just as a prospective enactment, such as a new zoning ordinance, can limit the value of land without effecting a taking because it can be understood as reasonable by all concerned, *other enactments are unreasonable and do not become less so through passage of time or title*. Were we to accept the State’s rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. *This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.*

Nor does the justification of notice take into account the effect on owners at the time of enactment, who are prejudiced as well. Should an owner attempt to challenge a new regulation, but not survive the process of ripening his or her claim (which, as this case demonstrates, will often take years), under the proposed rule the right to compensation may not be asserted by an heir or successor, and so may not be asserted at all. The State’s rule would work a critical alteration to the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest which was possessed prior to the regulation. *The State may not by this means secure a windfall for itself.*<sup>95</sup>

It is notable that the Court did not use language limited to the type of transfer situation involved in *Palazzolo* – i.e., devolution of title by operation of law - but spoke generally of a “postenactment transfer of title.”<sup>96</sup> Justice Scalia, never one to mince words, emphasized in a separate concurring opinion that the State cannot be absolved of its constitutional duty to pay just compensation for an otherwise unconstitutional regulation simply by virtue of transfer activities, whether by purchase, devise or, as in this case, transfer between trusts having the same family-member beneficiaries. As he put it, any other rule would “giv[e] the malefactor the benefit of its malefaction.”<sup>97</sup>

A second twist in the State’s argument in *Palazzolo* allowed the Supreme Court to further clarify the scope of the defense to categorical takings claims set forth in *Lucas*. Recall that to defeat a takings claim, a State may argue that the purported right to develop the land was not part of the landowner’s title when he acquired the property or that the desired development would violate the State’s law of nuisance. In the phraseology of *Lucas*, the State claimed in *Palazzolo* that the wetlands regulation had become a “background principle of [state] property law which cannot be challenged by those who acquire title after the enactment.”<sup>98</sup> Again, the Court rejected such an artificial cut-off point for a takings claim:

[i]t suffices to say that a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State’s law by mere virtue of the passage of title... A regulation or common-law rule cannot be a background principle for some owners but not for others . . . A law does not become a background principle for subsequent owners by enactment itself.<sup>99</sup>

The Supreme Court in *Palazzolo* also clarified an issue which has puzzled jurists and lawyers alike in the years since *Lucas*: when does the analytical framework of the *Penn Central* balancing test apply as

opposed to the *Lucas* categorical takings test? Although the distinction can certainly be teased out of predecessor cases,<sup>100</sup> *Palazzolo* determined once and for all that the *Penn Central* balancing test applies to partial takings cases, while the *Lucas* categorical analysis governs claims premised on a 100% or total taking. The Court explained:

Since *Mahon*, we have given some, but not too specific, guidance to courts confronted with deciding whether a particular government action goes too far and effects a regulatory taking. First, we have observed, with certain qualifications that a regulation which denies all economically beneficial or productive use of land will require compensation under the Takings Clause [citing *Lucas*]. Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation’s economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action [citing *Penn Central*].<sup>101</sup>

Despite this useful clarification, however, it is critical to note that the Supreme Court in *Palazzolo* was not presented with an opportunity to, and did not, apply either of these two tests. This was a function of the posture of the case as it reached the Supreme Court. While the state courts had determined that the landowner’s takings claim was not ripe, and, further, that the claim was barred by pre-acquisition notice of the restriction, the state supreme court had actually offered its opinion on the merits.<sup>102</sup> On the basis of a factual finding that the uplands portion of the property (which did not contain any wetlands necessitating fill) retained a developmental value of \$200,000, the state supreme court rejected that a categorical taking had occurred. The Supreme Court, addressing this portion of the state court’s opinion, advised that “[a] regulation permitting a landowner to build a substantial

residence on an 18-acre parcel does not leave the property ‘economically idle.’”<sup>103</sup>

Significantly, before the Supreme Court, the landowner attempted to recast and revive his *Lucas* claim by arguing that the government had taken 100% of the wetlands parcel, as distinguished from the uplands parcel. The Court refused to explore this issue because,

[the landowner] did not press the argument in the state courts, and the issue was not presented in the petition for certiorari. The case comes to us on the premise that [the landowner’s] entire parcel serves as the basis for his takings claim, and so framed, the total deprivation argument fails.<sup>104</sup>

The Court remanded the case for consideration as to whether a partial taking had occurred under *Penn Central*.<sup>105</sup> The fate of the landowner’s partial takings claim under the *Penn Central* balancing factors remains to be seen.

### **12. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency***

On January 7, 2002, arguments were heard in the case of *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*.<sup>106</sup> The parties in *Tahoe-Sierra* have asked the Supreme Court to determine whether a temporary taking occurred as a result of a temporary moratorium, implemented by a planning agency to halt all development while a new regional land use plan was being devised. The “temporary” moratorium, instituted in 1981 and technically in effect for three years, has never been removed.<sup>107</sup> The landowners affected by the moratorium brought suit alleging a regulatory taking.

The federal trial court ruled that the planning agency could be liable for a taking for only a portion of the period in which the moratorium was in effect. A panel of the Court of Appeals for the Ninth Circuit

reversed, stating, “[i]n short, we reject [the landowners’] contentions that *First English* applies to temporary moratoria and that it works a radical change to takings law by requiring that property interests be carved up into finite temporal segments.”<sup>108</sup> The Court of Appeals noted the several dimensions encompassed by property interests, but rejected the temporal interest as the basis for compensable taking:

Property interests may have many different dimensions. For example, the dimensions of a property interest may include a physical dimension (which describes the size and shape of the property in question), a functional dimension (which describes the extent to which an owner may use or dispose of the property in question), and a temporal dimension (which describes the duration of the property interest). . . . A planning regulation that prevents the development of a parcel for a temporary period of time is conceptually no different than a land-use restriction that permanently denies all use of a discrete portion of a property, or that permanently restricts a type of use across all of the parcel. Each of these three types of regulation will have an impact on the parcel’s value. . . . There is no plausible basis on which to distinguish a similar diminution in value that results from a temporary suspension of development.<sup>109</sup>

What is particularly remarkable about *Tahoe-Sierra* is the vehemence of the dissent to the petition for rehearing in the Court of Appeals and the petition for rehearing en banc, which was endorsed by five appellate judges.<sup>110</sup> The dissent explicitly took the merits panel to task, asserting that, “[t]he panel does not like the Supreme Court’s Takings Clause jurisprudence very much, so it reverses *First English Evangelical Lutheran Church v. County of Los Angeles*, and adopts Justice Stevens’s *First English* dissent.”<sup>111</sup> The dissenters went on to state that, “[o]f course, the panel doesn’t admit that its opinion aligns itself with Justice Stevens’s dissent, so it must pretend that *First English* said nothing relevant to this case. And so the panel does, claiming that *First English* does not

address whether a temporary moratorium is a taking because it was ‘not even a case about what constitutes a taking.’”<sup>112</sup>

Against this background, the Supreme Court granted certiorari on the following issue in *Tahoe-Sierra*: “Whether the Court of Appeals properly determined that a temporary moratorium on land development does not constitute a taking of property requiring compensation under the Takings Clause of the United States Constitution?”<sup>113</sup> *Tahoe-Sierra* offers the Supreme Court an opportunity to clarify its jurisprudence on temporary takings, an opportunity which, if *Palazzolo* is any indication, a majority of the Justices will readily grasp. A decision is anticipated by the end of June 2002.

### III. CONCLUSION

The famous question posed in *Mahon* – i.e., when has government action “gone too far” and effected a taking – has generated significant and complicated litigation before virtually every court in the nation. Except where a complete deprivation of the value of property has occurred, there is no bright line to distinguish between a compensable taking and a non-compensable exercise of the police power. This White Paper and subsequent Parts of our series on the Law of Regulatory Takings, aided by the Supreme Court’s most recent pronouncements in *Palazzolo* and hopefully by the resolution of *Tahoe-Sierra*, tries to make some order out of the persisting disarray. We suspect, however, that many additional judicial decisions - and many more years - will come to pass before the law of regulatory takings is settled.

1 U.S. CONST. amend. V; *see also* PA. CONST. art. 1, §10 (“nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured”).

2 Takings law may be divided into two basic categories: condemnation and inverse condemnation. Both types of takings require compensation under the Fifth Amendment. In condemnation cases, the government has utilized its formal power of eminent domain to take private property. The federal government and most states have elaborate procedures governing condemnation and the payment of compensation. In inverse condemnation cases, the government takes property, but fails to institute formal condemnation proceedings. The typical inverse condemnation case occurs where the government lays a road across private property or directs storm water onto private land without first having secured the right to do so. Many state and federal courts have directed the government to compensate landowners for such takings. Increasingly, however, the courts have also had to deal with the other facet of inverse condemnation, i.e., regulatory takings, where a statute, regulation or permit decision has the same effect as a condemnation (i.e., it “takes” private property for public use). It is this latter type of inverse condemnation with which this series of White Papers is concerned.

3 *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

4 260 U.S. at 415 (emphasis added).

5 *See, e.g.*, H.R. 992, 105th Cong. (1997).

6 The due process clauses of the Fifth and Fourteenth Amendments provide an alternative basis for recovery that have only slightly been utilized by the courts. U.S. CONST. amends. V, XIV. The due process implication of regulatory takings is beyond the scope of these White Papers.

7 In the interests of full disclosure, the authors note that they represent landowners seeking compensation from the government for excessive regulation of private property. In particular, the authors are counsel to landowners in a number of takings cases, including (along with their co-counsel, Carl A. Belin, Jr., Esq.) *Machipongo Land & Coal Co. v. Commonwealth, Department of Environmental Resources*, 155 Pa. Cmwlth. 72, 624 A.2d 742 (1993) (*Machipongo I*), *rev'd in part*, 538 Pa. 361, 648 A.2d 767 (1994) (*Machipongo II*), *modified*, 544 Pa. 271, 676 A.2d 199 (1996) (*Machipongo III*), *on remand*, 719 A.2d 19 (Pa. Cmwlth. 1998) (*Machipongo IV*), appeal pending in the Pennsylvania Supreme Court. Despite our attempts at objectivity, we recognize that our views are necessarily informed by our involvement in those cases.

8 505 U.S. 1003 (1992).

9 U.S. CONST. amend. V.

10 *Id.*

11 U.S. CONST. amend. XIV. Prior to enactment of the Fourteenth Amendment, the Supreme Court held that the Fifth Amendment Takings Clause did not apply to the States. *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 24, 250-51 (1833) (“We are of opinion, that the provision in the fifth amendment to the constitution, declaring that private property shall not be taken for public use, without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states.”)

Subsequent to the enactment of the Fourteenth Amendment, the Supreme Court has held that the federal Takings Clause is applicable to the actions of State and local governments. *See, e.g., Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226 (1897).

12 Professor Eagle argues effectively that if the courts were to more fully utilize the Substantive Due Process Clause of the Fourteenth Amendment in conjunction with the Takings Clause, this would resolve some of the more vexing issues in takings jurisprudence and provide greater protection for property owners. Steven J. Eagle, *Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 ALA. L. REV. 977 (2000).

13 PA. CONST. art. I, §10.

14 ALASKA CONST. art I, §18.

15 TEX. CONST. art. I, §17. *See also* OR. CONST. art. I, § 18 (“Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation; nor except in the case of the state, without such compensation first assessed and tendered”); CONN. CONST. art. I, § 11 (“[t]he property of no person shall be taken for public use, without just compensation therefor”).

16 *See, e.g., R & Y, Inc. v. Municipality of Anchorage*, 34 P.3d 289, 293 (Alaska 2001) (“Property owners enjoy broader protection under the Alaska Constitution than under the Fifth Amendment of the United States Constitution”).

17 *United Artists’ Theater Circuit, Inc. v. City of Philadelphia*, 535 Pa. 370, 377, 635 A.2d 612, 616 (1993).

18 It is worth noting that the United States Supreme Court recently cautioned that it will closely monitor the States in their application of federal constitutional rights. *Bush v. Gore*, 121 S. Ct. 525, 535 n.1 (2000) (Rehnquist, J., concurring) (citing *Lucas*); *id.* at 547 n.1 (Ginsburg, J., dissenting) (citing *Lucas*).

19 *Lawton v. Steele*, 152 U.S. 133, 136 (1894).

20 The term “police power” can be traced back to Chief Justice John Marshall’s opinion for the Court in *Brown v. State of Maryland*, 25 U.S. (12 Wheat.) 419, 443-44 (1827) (“the police power . . . unquestionably remains, and ought to remain, with the States . . . . The removal or destruction of infectious or unsound articles is, undoubtedly, an exercise of that power, and forms an express exception to the prohibition [regulation of foreign trade by the States] we are considering.”)

21 *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962) (quoting *Lawton*, 152 U.S. at 137) (ellipsis in the original).

22 *Mahon*, 260 U.S. at 413.

23 *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926).

24 *Mahon*, 260 U.S. at 413, 415.

25 Steven J. Eagle, REGULATORY TAKINGS 218 (2d ed. 2001) (quoting *Berman v. Parker*, 348 U.S. 26, 32 (1954))(brackets in the original).

26 Eagle, *supra* at 218.

27 260 U.S. 393 (1922).

28 *Id.* at 415.

29 *Id.* at 412.

30 *See id.*

31 *Id.* at 413.

32 260 U.S. at 413.

33 *Id.* at 416.

34 *See Goldblatt*, 369 U.S. 590. In *Goldblatt*, a landowner, prevented from continuing his quarry operation as a result of a local ordinance, filed a suit against the Township, alleging a taking. The regulation was upheld and no taking found because the landowner failed to establish that the regulation prevented all economic use of his property.

35 438 U.S. 104 (1978).

36 *Id.* at 116.

37 *Id.* at 123-24 (citing *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *Goldblatt*, 369 U.S. at 594) (internal citation omitted; ellipsis in the original).

38 *Id.* at 124.

39 *Id.* at 130.

40 *Id.* at 130-131.

41 *Penn Central*, 438 U.S. at 131.

42 *Id.* at 131.

43 *Id.* at 132.

44 *Id.* at 134-35.

45 *Id.* at 135.

46 *Penn Central*, 438 U.S. at 136-37.

47 *Id.* at 137.

48 *Id.* at 138. The Court emphasized that its holding was on the present record and acknowledged that if, at some future point, Penn Central and UGI could demonstrate that “circumstances have so changed that the Terminal ceases to be ‘economically viable,’” relief may be available. *Id.* at 138 n.36.

49 473 U.S. 172 (1985). “Ripeness” refers to that point in time at which it is appropriate for a court to consider the merits of a takings claim.

50 *Id.* at 186, 194. The Court revisited ripeness in 1997 in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997). *See infra* Section II.C.9.

51 *Williamson County*, 473 U.S. at 194.

52 482 U.S. 304 (1987).

53 *Id.* at 319. On January 7, 2002, oral arguments were heard in a case which asks the Court to examine the scope and extent of temporary takings in the context of a development moratorium. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 216 F.3d 764 (9th Cir. 2000), *cert. granted*, 121 S. Ct. 2589 (2001). In a sense, a temporary taking like that effected by a development moratorium is a hybrid of a partial taking and a categorical taking - the taking is total but only for a period of time. The method of analysis used by the Supreme Court in *Tahoe-Sierra* promises to be an important aspect of any decision in that case. *See infra* Section II.C.12; *see also* Joel R. Burcat & Julia M. Glencer, *The Law of Regulatory Takings, Part II*, forthcoming.

54 483 U.S. 825 (1987).

55 *Id.* at 828.

56 *Id.* at 841-42.

57 480 U.S. 470 (1987).

58 *Id.* at 493, 496.

59 *Id.* at 498.

60 *Id.* at 500-501.

61 505 U.S. 1003 (1992).

62 *Id.* at 1008-09.

63 *Id.* at 1009.

64 *Id.* at 1010.

65 *Id.* at 1015.

66 *Lucas*, 505 U.S. at 1015.

67 The Court explained:

We have never set forth the justification for this rule. Perhaps it is simply . . . that total deprivation of beneficial use is, from the landowner’s point of view, the equivalent of a physical appropriation . . . Surely, at least, in the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply ‘adjusting the benefits and burdens of economic life,’ in a manner that secures an ‘average reciprocity of advantage’ to everyone concerned. And the *functional basis* for permitting the government, by regulation, to affect property values without compensation - that ‘Government hardly could go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law,’ does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses.

[A]ffirmatively supporting a compensation requirement is the fact that regulations that leave the owner of land without economically beneficial or productive options for its use - typically, as here, by requiring land to be left substantially in its natural state - carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.

*Id.* at 1017-1019 (internal citations omitted and emphasis in the original).

68 *Id.* at 1019 (emphasis in the original).

69 *Id.* at 1027. This defense is the subject of Joel R. Burcat & Julia M. Glencer, *The Law of Regulatory Takings, Part III*, forthcoming.

70 *Lucas*, 505 U.S. at 1029.

71 *Id.* at 1031-32.

72 512 U.S. 374, 377 (1994).

73 *Id.* at 386 (citing *Nollan*, 483 U.S. at 838).

74 *Id.* at 379-382.

75 *Id.* at 391.

76 520 U.S. 725 (1997).

77 *Id.* at 737.

78 *Id.* at 732-33.

79 *Id.* at 739-40.

80 *Id.* at 740-42.

81 526 U.S. 687 (1999).

82 *Id.* at 698.

83 121 S. Ct. 2448 (2001).

84 *Id.* at 2455. SGI, which was formed to purchase and hold the property, was originally held by the landowner and his associates, whom he later bought out, becoming the sole shareholder. *Id.*

85 *Id.* at 2455-2456. It is important to understand that the landowner's property contained an upland parcel which did not include any wetlands, and a wetlands parcel which he desired to fill. The way in which the property naturally separated into these two parts is important to understanding why the Supreme Court ultimately remanded the case to the state courts.

86 *Id.* at 2456.

87 *Palazzolo*, 1215 S. Ct. at 2456. SGI's corporate charter was revoked and title to the property passed by operation of state law to the landowner as the sole shareholder.

88 *Id.* at 2458.

89 *Id.* at 2459.

90 *Id.* at 2460.

91 *Id.* at 2459.

92 *See Palazzolo*, 121 S. Ct. at 2462.

93 *Id.* at 2462. Note that, in this passage, the Court is again highlighting that two different tests exist – *Lucas* and *Penn Central*.

94 *Id.* Compare:

A COMMONWEALTH is said to be instituted when a multitude of men do agree, and covenant, every one with every one, that to whatsoever man, or assembly of men, shall be given by the major part the right to present the person of them all, that is to say, to be their representative; every one, as well he that voted for it as he that voted against it, shall authorize all the actions and judgements of that man, or assembly of men, in the same manner as if they were his own, to the end to live peaceably amongst themselves, and be protected against other men.

Thomas Hobbes, *LEVIATHAN* (1651), at Chapter XVIII (Of the Rights of Sovereigns by Institution), with:

31. But the chief matter of property being now ...[is] the earth itself, as that which takes in and carries with it all the rest, I think it is plain that property in that too is acquired.... As much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property. He by his labour does, as it were, enclose it from the common. Nor will it invalidate his right to say everybody else has an equal title to it, and therefore he cannot appropriate, he cannot enclose, without the consent of all his fellow-commoners, all mankind. God, when He gave the world in common to all mankind,

commanded man also to labour, and the penury of his condition required it of him. God and his reason commanded him to subdue the earth- i.e., improve it for the benefit of life and therein lay out something upon it that was his own, his labour. He that, in obedience to this command of God, subdued, tilled, and sowed any part of it, thereby annexed to it something that was his property, which another had no title to, nor could without injury take from him....

39. And thus,...we see how labour could make men distinct titles to several parcels of it for their private uses, wherein there could be no doubt of right, no room for quarrel.

John Locke, *CONCERNING CIVIL GOVERNMENT, SECOND ESSAY, AN ESSAY CONCERNING THE TRUE ORIGINAL EXTENT AND END OF CIVIL GOVERNMENT* (1690), at Chapter V (Of Property).

95 121 S. Ct. at 2462-63 (emphasis added).

96 *Id.* at 2462.

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

98 *Id.* at 2464 (citing *Lucas*).

99 *Id.* at 2464.

100 *See, e.g., Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994); *Creppel v. United States*, 41 F.3d 627 (Fed. Cir. 1994); *Palm Beach Isles Associates v. United States*, 208 F.3d 1374 (Fed. Cir. 2000).

101 121 S. Ct. at 2457 (internal citations omitted).

102 *Id.* at 2464.

103 *Id.* at 2465 (citing *Lucas* 505 U.S. at 1019).

104 *Id.* at 2464.

105 The Court explicitly noted that the State was aware of the applicability of *Penn Central*, *id.* at 2461, and that “[t]he state court opinions cannot be read as indicating that a *Penn Central* claim was not properly presented from the outset of this litigation.” *Id.* For a more detailed description of *Palazzolo*, *see*, Joel R. Burcat and Julia M. Glencer, *Palazzolo v. Rhode Island and the U.S. Supreme Court's Increased Support of the Constitutional Protection of Private Property: A Response to Echeverria*, 32 *Envtl. L. Rep.* 10245 (2002).

106 216 F.3d 764 (9th Cir. 2000), *cert. granted* 121 S. Ct. 2589 (2001).

107 216 F.3d at 768.

108 *Id.* at 778.

109 *Id.* at 774, 776-77 (internal citations omitted).

110 228 F.3d 998 (9th Cir. 2000) (Kozinski, J., dissenting).

111 *Id.* at 999 (internal citation omitted).

112 *Id.* at 1002 (internal citation omitted).

113 *Tahoe-Sierra*, 121 S. Ct. at 2590.

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