

# THE RHETORICS OF TAKINGS CASES: IT'S MINE V. LET'S SHARE

Susan Ayres\*

"Possession as the basis of property ownership . . . seems to amount to something like yelling loudly enough to all who may be interested. The first to say, 'This is mine,' in a way that the public understands, gets the prize . . ."

— Carol Rose<sup>1</sup>

"Observe due measure, and proportion is best in all things."

— Hesiod<sup>2</sup>

## I. INTRODUCTION

Regulatory takings cases originated in 1922 when Justice Holmes, in *Pennsylvania Coal Co. v. Mahon*, ruled that "while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking."<sup>3</sup> This simple rule has resulted in over eighty years of case law that Carol Rose states has left takings law to "muddle along."<sup>4</sup> While many legal scholars decry the incoherence and inconsistency of takings case law,<sup>5</sup> this article provides a rhetorical analysis that explains the "muddle" as a result of rhetori-

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\* Associate Professor, Texas Wesleyan University School of Law. B.A. Baylor University, 1982; M.A., University of Texas at San Antonio, 1985; J.D., Baylor University School of Law, 1988; Ph.D. Texas Christian University, 1997. Thanks to my colleagues Stephen Alton, Cynthia Fountaine, Earl Martin, Jr., and Aric Short, and to participants in the 11th Biennial Conference of the Rhetoric Society of America, Austin, Texas, May 2004 for thoughtful comments. I am also grateful to Professors Laura Underkuffler and Nancy Myers for invaluable criticism. My appreciation goes to Adam Plumbley and Dianna Zuniga for excellent research assistance, to Christina Rodriguez for technical assistance, to Ira David for careful reading and editing, and to Texas Wesleyan University School of Law for financial support of this project.

<sup>1</sup> CAROL M. ROSE, PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP 16 (1994).

<sup>2</sup> Phillip Sipiora, *Introduction: The Ancient Concept of Kairos*, in RHETORIC AND KAIROS: ESSAYS IN HISTORY, THEORY, AND PRAXIS 1, 2 (Phillip Sipiora & James S. Baumlin eds., 2002).

<sup>3</sup> Penn. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

<sup>4</sup> ROSE, *supra* note 1, at 65-66; see also, Carol M. Rose, *Property and Expropriation: Themes and Variations in American Law*, 2000 UTAH L. REV. 1, 20 (2000) (describing takings cases as "chaotic").

<sup>5</sup> See, e.g., Louise A. Halper, *Why the Nuisance Knot Can't Undo the Takings Muddle*, 28 IND. L. REV. 329 (1995); John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003, 1006 (2003); Holly Doremus, *Takings and Transitions*, 19 J. LAND USE AND ENVT. L. 1, 1-2 (2003).

cal tensions between a Sophistic approach ("Let's Share") and an Aristotelian approach ("It's Mine").<sup>6</sup>

Part One of this article develops the concept of *kairos* as right timing and due measure. It argues that takings cases inherently concern kairic questions because regulatory takings cases involve constantly changing rules, and the court must determine whether the rules have gone "too far" as to require being treated as a taking.<sup>7</sup> As Holly Doremus and others have observed, regulatory takings cases are "fundamentally conflicts over legal transitions. They arise when the rules change, those changes are costly (in economic or other terms), and the people bearing the costs believe that they are being unfairly singled out. The problem is . . . simply that the rules are different than they once were."<sup>8</sup> Determining how to handle these changing rules involves considerations of *kairos*.

Part Two develops the distinction between Let's Share and It's Mine rhetorics. Let's Share is the Sophistic rhetoric of possibility.<sup>9</sup> Let's Share emphasizes *kairos* (or right timing), the future, and contingency. It's Mine is the Aristotelian rhetoric of actuality<sup>10</sup> that focuses on *chronos* (or linear time), the past, and custom. While It's Mine focuses on custom (or precedent), Let's Share focuses on practical wisdom to solve problems arising from contingency. In addition to defining these competing rhetorics, Part Two discusses the parallels between Let's Share/It's Mine and the dichotomies described by Carol Rose<sup>11</sup> and Laura Underkuffler.<sup>12</sup> Rose's distinction between property as proper and property as utilitarian parallels the distinction between Let's Share and It's Mine.<sup>13</sup> Likewise, Underkuffler's distinction between the operative conception of property and the common conception of property also parallels Let's Share and It's Mine rhetorics.<sup>14</sup>

Part Three of this article analyzes the competing rhetorics in the recent United States Supreme Court decision of *Palazzolo v. Rhode Island*.<sup>15</sup> The Court's majority, concurring, and dissenting opinions display a tension between Let's Share and It's Mine rhetorics. I argue that these competing rhetorics provide an explanation for the "muddle" of takings jurisprudence. This analysis, based on concepts from ancient Greek rhetoric, provides a new way to view

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<sup>6</sup> In teaching property, I have used the labels "It's Mine" and "Let's Share." However, as the epigraph from Carol Rose indicates, other scholars have similarly noted the possessive nature of property rights. See ROSE, *supra* note 1. Kevin Gray has also observed that "we are still not far removed from the primitive, instinctive cries of identification which resound in the playgroup or playground: 'That's not yours' it's *mine*.'" Kevin Gray, *Equitable Property*, 47 CURRENT LEGAL PROBLEMS 157, 158 nn.2-3 (1994), quoted in LAURA S. UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* 1 n.2 (2003).

<sup>7</sup> *Penn. Coal*, 260 U.S. at 415.

<sup>8</sup> Doremus, *supra* note 5, at 3; see also Rose, *supra* note 4, at 18.

<sup>9</sup> See John Poulakos, *Rhetoric, the Sophists, and the Possible*, 51 COMM. MONOGRAPHS 215 (1984). See *infra* text accompanying note 92.

<sup>10</sup> *Id.* See *infra* text accompanying note 92.

<sup>11</sup> ROSE, *supra* note 1, at 49-70.

<sup>12</sup> UNDERKUFFLER, *supra* note 6, at 49-51.

<sup>13</sup> ROSE, *supra* note 1, at 64. See *infra* text accompanying note 108.

<sup>14</sup> UNDERKUFFLER, *supra* note 6, at 49-51. See *infra* text accompanying note 118.

<sup>15</sup> *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

legal discourse and has the possibility of shaping how we think about takings jurisprudence.

## II. KAIROS

The concept of *kairos* had many meanings in ancient Greece, but in essence combines the notions of right-timing and due measure as discussed more fully below.<sup>16</sup> Modern scholars have neglected the concept of *kairos* until fairly recently.<sup>17</sup> While Italian rhetoricians examined *kairos* in the 1920s, their scholarship was not translated into English until 2002.<sup>18</sup> In the 1980s and continuing to the present, American rhetoricians began paying more attention to the work of the pre-Socratics and to the concept of *kairos*.<sup>19</sup> The resurgence of rhetoricians' scholarly interest in *kairos* provides a new and useful approach to examine takings discourse. Even though many contemporary legal scholars have written about the rhetoric of legal discourse, none have focused on *kairos* as an approach for interpretation.<sup>20</sup>

<sup>16</sup> Sipiara, *supra* note 2, at 1.

<sup>17</sup> James L. Kinneavy, *Kairos in Classical and Modern Rhetorical Theory*, in RHETORIC AND KAIROS, *supra* note 2, at 58. Paul Tillich, the theologian, also applied the concept of *kairos* in his writings. See, e.g., Paul Tillich, 3 SYSTEMATIC THEOLOGY: LIFE AND THE SPIRIT: HISTORY AND THE KINGDOM OF GOD 6, 140, 153, 220, 369-74 (1963). Kinneavy summarizes Tillich's distinction between *kairos* and *logos* as follows: "Tillich distinguishes *logos*-thinking as characterized by an emphasis on timelessness, on form, on law, on stasis, on method. . . . Opposing this trend is *kairos*-thinking, characterized by an emphasis on time, on change, on creation, on conflict, on fate, and on individuality." Kinneavy, *supra*, at 63.

<sup>18</sup> Kinneavy, *supra* note 17, at 59-60; see also Augusto Rostagni, *A New Chapter in the History of Rhetoric and Sophistry*, in RHETORIC AND KAIROS, *supra* note 2.

<sup>19</sup> See, e.g., essays collected in RHETORIC AND KAIROS, *supra* note 2.

<sup>20</sup> For a general application of rhetoric to legal discourse, see, e.g., JAMES BOYD WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW (1985); JAMES BOYD WHITE, JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM (1990) (especially chapters 4 and 10); JEROME BRUNER AND ANTHONY AMSTERDAM, MINDING THE LAW 165-66 (2000); LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW (Peter Brooks & Paul Gewirtz eds., 1996). Some recent law articles mention *kairos*, but do so in a fleeting manner. See, e.g., George Anastaplo, *Shakespeare and the Law Collection: Law and Literature and Shakespeare: Explorations*, 26 OKLA. CITY U.L. REV. 1, 6-8 (2001) (discussing *kairos* or "the time or the age" or "ripeness" in Plutarch and Shakespeare's versions of Julius Caesar); George Kamberelis, *Genre as Institutionally Informed Social Practice*, 6 J. CONTEMP. LEGAL ISSUES 115, 143-44 (1995) (discussing *kairos* or "rhetorical timing and opportunity" in the differing receptions of discoveries of DNA); Robert W. Tuttle, *All You Need is Love: Paul Ramsey's Basic Christian Ethics and the Dilemma of Protestant Antilegalism*, 18 J.L. & RELIGION 427, 440 (2002-2003) (discussing Protestant antilegalism in the gambling context and arguing that Tillich's emphasis on *kairos* as involving "the special demands of the historical moment" means that law's rigidity explains why law is "inadequa[te] as the form of Christian love.").

### A. *What is Kairos?*

Although *Kairos* was a Greek God, a young ephebe who represented opportunity,<sup>21</sup> the concept of *kairos* permeated Greek culture and literature and was considered the cornerstone of ancient rhetoric in Greece's Golden Age.<sup>22</sup> *Kairos* had many meanings in ancient Greece, such as "'symmetry,' 'propriety,' 'occasion,' 'due measure,' 'fitness,' 'tact,' 'decorum,' 'convenience,' 'proportion,' 'fruit,' 'profit,' and 'wise moderation.'"<sup>23</sup> However, its primary meaning combines right timing (or a time to) and due measure, as encapsulated in Hesiod's 7th B.C.E. maxim, "Observe due measure, and proportion is best in all things."<sup>24</sup>

The first facet of *kairos* – right timing – can be contrasted with *chronos* or linear time.<sup>25</sup> *Kairos* is qualitative, while *chronos* is quantitative.<sup>26</sup> An example of this distinction is the contrast between the *process* of making wine (*chronos*), and the *right time* to harvest grapes or to allow wine to mature (*kairos*).<sup>27</sup> In a lawsuit, *chronos* is the sequence of events, the procedural and factual history, while *kairos* is the right time or opportunity to settle a lawsuit, to ask a witness a crucial question, or to make a persuasive argument before a jury.<sup>28</sup> Some lawsuits and legal claims are much more kairic than others, and as argued in the next section, takings claims are inherently kairic.

The second facet of *kairos* – due measure – involves the concept of propriety, which was especially important to the Stoics and to Cicero, who merged the idea of *kairos* with *prepon* (propriety or fitness).<sup>29</sup> *Kairos* as propriety was also important to both Plato and Aristotle, who grounded their concept of virtue as the mean between two extremes.<sup>30</sup>

While the concept of *kairos* was important in ancient Greece, it was especially important to the Sophists, such as Isocrates (436-338 B.C.E.)<sup>31</sup> and Gorgias (480-376 B.C.E.).<sup>32</sup> Isocrates made *kairos* the basic concept for his educational system or *paideia*, which strove to turn out socially responsible citizens.<sup>33</sup> The Sophists taught that the contingency of the rhetorical situation was not something one could plan for, so the wise individual needed to be flexible, to rely on practical wisdom (*phronesis*), "with, always, an intense

<sup>21</sup> James L. Kinneavy, *Kairos: A Neglected Concept in Classical Rhetoric*, in RHETORIC AND PRAXIS: THE CONTRIBUTION OF CLASSICAL RHETORIC TO PRACTICAL REASONING 79, 93 (Jean Dietz Moss ed., 1986); Sipiora, *supra* note 2, at 1.

<sup>22</sup> Sipiora, *supra* note 2, at 3.

<sup>23</sup> *Id.* at 1.

<sup>24</sup> *Id.* at 2; Kinneavy, *supra* note 21, at 85-86.

<sup>25</sup> Sipiora, *supra* note 2, at 2.

<sup>26</sup> See John E. Smith, *Time and Qualitative Time*, in RHETORIC AND KAIROS, *supra* note 2, at 46.

<sup>27</sup> *Id.* at 48.

<sup>28</sup> See, e.g., Richard Leo Enos, *Inventional Constraints on the Technographers of Ancient Athens*, in RHETORIC AND KAIROS, *supra* note 2, at 77, 82-84 (discussing the *kairos* of timing by the use of water clock in ancient Athenian speeches).

<sup>29</sup> Kinneavy, *supra* note 17, at 59.

<sup>30</sup> *Id.* at 62.

<sup>31</sup> Sipiora, *supra* note 2, at 7-15.

<sup>32</sup> Rostagni, *supra* note 18, at 23 (tracing Gorgias's views to Pythagoras).

<sup>33</sup> Sipiora, *supra* note 2, at 1, 5.

awareness of occasion, audience, and situational context."<sup>34</sup> *Kairos* can thus be considered as a form of improvisation in which "every rhetorical act becomes a reinvention of theory as well as of the discourse."<sup>35</sup> Doro Levi, one of the Italian scholars of *kairos*, expressed this sense of improvisation when he contrasted the Socratic and pre-Socratic sensibilities as follows: "To the Socratic 'Know thyself,' the pre-Socratic ethic juxtaposed its own 'Know the opportunity.'"<sup>36</sup> *Kairos* is relevant to legal discourse in which lawyers and judges constantly resolve disputes with an awareness of occasion, audience, contingency, and the specifics of the situation.

*Kairos* consists of many dimensions. While Isocrates taught the importance of being flexible and using practical wisdom to resolve contingencies<sup>37</sup> (the rhetorical dimension of *kairos*), the Pythagoreans saw *kairos* as justice, which they viewed "as giving to each according to merit"<sup>38</sup> (the ethical dimension of *kairos*). Aristotle defined equity (*epieikeia*) as kairic law by describing it as "'justice that goes beyond the written law.'"<sup>39</sup> Equity is situational because "it is applied in particular circumstances, at specific times, to specific situations not foreseen by the legislators."<sup>40</sup> As Aristotle states, "'it is equitable to pardon human weaknesses, and to look, not to the letter of the law but to the intention of the legislator; not to the action itself, but to the moral purpose; not to the part, but to the whole.'"<sup>41</sup>

The renewed interest and scholarship by rhetoricians in the many dimensions of *kairos* has intriguing potential for legal scholarship. *Kairos* can inform our analysis of legal discourse through emphasis on situational contexts and the Isocratean emphasis of training socially responsible citizens. As argued in this article, *kairos* has particular relevance to takings jurisprudence.

### B. *Kairos in Takings Cases*

Takings cases ask inherently kairic questions. Before considering the legal issues raised in takings cases, it should be initially pointed out that the cognates of "property" are also kairic. Eric Freyfogle traces these cognates to include "proper," "appropriate," and "propriety" and argues that the linkage between "property" and its cognates suggests the ethical dimension of land ownership.<sup>42</sup> Freyfogle explains that: "To own land within this linguistic tradition is to be charged with the responsibility for using it within the bounds of community norms governing right and wrong land use. Owning land means managing it appropriately, treating it properly, and abiding by local forms of

<sup>34</sup> *Id.* at 8, 14-15.

<sup>35</sup> *Id.* at 6-7.

<sup>36</sup> Kinneavy, *supra* note 17, at 59 (quoting Doro Levi, *Il Kairos Attraverso la Letteratura greca*, in RV 32 RENDICONTI DELLA REALE ACADEMIA NAZIONALE DEI LINCEI CLASSE DI SCIENZA MORALI 275 (1923)).

<sup>37</sup> *Id.*

<sup>38</sup> Kinneavy, *supra* note 21, at 87.

<sup>39</sup> Kinneavy, *supra* note 17, at 68.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Eric T. Freyfogle, *Ethics, Community, and Private Land*, 23 *ECOLOGY L.Q.* 631, 638-39 (1996).

propriety.”<sup>43</sup> Given that the line between *ethos* and *kairos* is often blurred,<sup>44</sup> Freyfogle’s point demonstrates that the cognates of property contain elements of *kairos* in the Ciceronian emphasis on propriety and decorum. Discourse on takings jurisprudence is likewise kairic.

The Fifth Amendment’s Just Compensation Clause prohibits the government from taking private property for public use without just compensation and is applied to the states through the Fourteenth Amendment.<sup>45</sup> Modern takings case law typically involves not the physical taking of property, such as when the government condemns a strip of land by eminent domain for a public highway, but rather, regulatory takings.

Regulatory taking is exemplified by the case of *Lucas v. South Carolina Coastal Council*.<sup>46</sup> David Lucas successfully challenged the Beachfront Management Act, which prohibited him from building a single-family house on the two lots for which he had paid almost a million dollars.<sup>47</sup> The trial court determined that the act had rendered his beachfront lots valueless, and this finding was not challenged.<sup>48</sup> The United States Supreme Court announced a categorical test in *Lucas* that a taking occurs when a regulation “deprives land of all economically beneficial use” and when “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>49</sup>

The United States Supreme Court had earlier announced another categorical rule in the case of *Loretto v. Teleprompter Manhattan CATV Corporation* that if a regulation constitutes a permanent physical invasion, it is a taking.<sup>50</sup> While this categorical rule for permanent physical invasions is rarely applied, the Court applied it in the recent case of *Brown v. Legal Foundation of Washington*.<sup>51</sup> Usually, however, regulations do not fall under either the *Lucas* or *Loretto* categorical tests but are analyzed under the *ad hoc* test announced in *Penn Central Transportation Co. v. City of New York*.<sup>52</sup>

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<sup>43</sup> *Id.* at 639.

<sup>44</sup> See Amelie Frost Benedikt, *On Doing the Right Thing at the Right Time: Toward an Ethics of Kairos*, in RHETORIC AND KAIROS, *supra* note 2, 226, 227 (considering the links between *kairos* and ethics, and pointing out that “the right action at the wrong time is not kairic . . . an action that is morally right at the present moment may not be so in the next”).

<sup>45</sup> U.S. CONST. amend. V. See *Chicago B. & Q. R.R. Co. v. City of Chicago*, 166 U.S. 226, 239 (1897) (applying takings clause to the states via the Fourteenth Amendment).

<sup>46</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

<sup>47</sup> *Id.* at 1007-08.

<sup>48</sup> *Id.* at 1020 n.9.

<sup>49</sup> *Id.* at 1027.

<sup>50</sup> *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 438 n.16 (1982) (in articulating this categorical rule, the Court commented that “whether the installation is a taking does not depend on whether the volume of space it occupies is bigger than a breadbox”).

<sup>51</sup> *Brown v. Legal Found. of Washington*, 538 U.S. 216, 235 (2003) (This is the IOLTA case in which the Supreme Court held that there was a taking because “the transfer of interest from the IOLTA account to the Foundation . . . seems more akin to the occupation of a small amount of rooftop space in *Loretto*.”). The Court held that even though there was a categorical taking, the property owners were not entitled to any compensation because their net loss was zero.) *Id.* at 237-40.

<sup>52</sup> *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

In *Penn Central*, New York City denied Penn Central's application to build a fifty-story building above its Grand Central Terminal because a fifty-story building would be inconsistent with historic landmark preservation laws.<sup>53</sup> When Penn Central challenged the denial, the Supreme Court found no unconstitutional taking.<sup>54</sup> In short, the regulation did not go "too far" because Penn Central still had use of Grand Central and because Penn Central could re-submit plans for something less than fifty stories.<sup>55</sup> Consequently, the Court held that the regulation did not unduly interfere with reasonable investment-backed expectations.<sup>56</sup> Moreover, the character of the regulation was for the public welfare because it encouraged the preservation of historic buildings.<sup>57</sup> The decision pointed out that rarely do zoning laws result in takings, as long as the laws are substantially related to the promotion of the general welfare.<sup>58</sup>

Regulatory takings cases such as *Penn Central* ask whether the government's regulation involving property has gone so far as to be a taking of property requiring just compensation.<sup>59</sup> The rules for analyzing regulatory takings result in frustratingly inconsistent holdings, but these rules are consistently stated case after case. In *Palazzolo*, for instance, the Supreme Court sets forth the following:

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 . . . . 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. These inquiries are informed by the purpose of the Takings Clause, which is to prevent the government from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."<sup>60</sup>

Thus, in determining whether the government's regulation is a taking, the court asks whether the regulation denies all economically beneficial use of the land under the categorical *Lucas* test.<sup>61</sup> If it does not, analysis continues under the three-factor *Penn Central ad hoc* test.<sup>62</sup> Usually, the categorical test is not applied, and as the Court indicated in *Lucas*, "[i]n 70-odd years of succeeding

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<sup>53</sup> *Id.* at 116-18.

<sup>54</sup> *Id.* at 138.

<sup>55</sup> *Id.* at 136-37.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 111.

<sup>58</sup> *Id.* at 129.

<sup>59</sup> This Fifth Amendment takings issue is separate from the substantive due process issue of whether the regulation is a legitimate exercise of police power to begin with. See, e.g., *Palazzolo v. Rhode Island*, 533 U.S. 606, 635 (2001); Doremus, *supra* note 5, at 13 (noting the confusion which occurs when the court "awkwardly intermingle[s] the question of whether compensation is required (the takings issue) and whether the challenged regulation is valid (the substantive due process issue)").

<sup>60</sup> *Palazzolo*, 533 U.S. at 617-18.

<sup>61</sup> As discussed above, fact patterns rarely result in an application of the categorical test which considers whether the regulation constitutes a permanent physical taking. See discussion *supra* at note 52.

<sup>62</sup> See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992).

'regulatory takings' jurisprudence, we have generally eschewed any 'set formula' for determining how far is too far."<sup>63</sup>

The application of these legal tests in regulatory takings results in kairic questions and determinations. The situational aspect of *kairos* is reflected in these cases, which determine whether a changing situation, such as a new regulation, has impinged on a landowner's property rights so much as to constitute a taking. Justice Kennedy makes the point in *Lucas* that:

The State should not be prevented from enacting new regulatory initiatives in response to changing conditions, and courts must consider all reasonable expectations whatever their source. The Takings Clause does not require a static body of state property law; it protects private expectations to ensure private investment.<sup>64</sup>

In other words, the Court must determine whether the case at hand involves a right-timed regulation or whether the landowner is entitled to just compensation (due measure). To determine just compensation or due measure involves kairic notions of propriety: "the question is what has the owner lost, not what has the taker gained,"<sup>65</sup> and "[the owner] must be made whole but is not entitled to more."<sup>66</sup> Additionally, in determining just compensation claims for land that may be divided into discrete parts, the Court has not resolved the kairic issue of conceptual severance which asks, "what is the proper denominator in the takings fraction?"<sup>67</sup>

Although she does not specifically refer to *kairos*, Laura Underkuffler argues that time is one of the necessary dimensions "for any legally cognizable conception of property."<sup>68</sup> For instance, Underkuffler states that one "crucial" question is "when were [the landowner's] rights – defined, as they are by 'existing law' – established? Were they established – and defined by 'existing law' – at the time of purchase, at the time that the use of the land commenced, or at some other time?"<sup>69</sup>

Moreover, once property rights are established, are they forever fixed, or do they change as state law changes?<sup>70</sup> While the first question (when were the landowner's rights established) may be seen as a question of *chronos* because the answer seems to depend on a specific point in time such as when a person acquires property, an analysis of the first question might also involve *kairos*, such as in the determination of whether relevant rights are excluded by background principles of law.<sup>71</sup> The second question (whether these rights are fixed or subject to change) will usually involve a question of *kairos* – because the

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 1035.

<sup>65</sup> *Brown v. Legal Found. of Washington*, 538 U.S. 216, 236 (2003) (quoting *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910)).

<sup>66</sup> *Id.* (quoting *Olson v. United States*, 292 U.S. 246, 255 (1934)).

<sup>67</sup> *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001) (rejecting the claim that the wetlands could be separately considered from the uplands because the issue was not raised below); see also *Lucas*, 505 U.S. at 1016 n.7.

<sup>68</sup> UNDERKUFFLER, *supra* note 5, at 28-29. She describes the four dimensions of property as the theoretical dimension, spatial dimension, stringency of protection dimension, and time dimension. *Id.* at 19-29.

<sup>69</sup> *Id.* at 28.

<sup>70</sup> *Id.* at 29.

<sup>71</sup> See *Lucas*, 505 U.S. at 1030-31.

analysis of whether rights are frozen in linear time (*chronos*) or fluid and subject to change (*kairos*) – and is an underlying premise of takings decisions.<sup>72</sup> Justice Holmes observed the kairic nature of takings in *Pennsylvania Coal*, in which he posed the issue of social and legislative efficiency when he stated: “government could hardly 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>73</sup>

In determining whether a regulation has gone so far as to constitute a taking, courts apply either the categorical or the *ad hoc* tests. The application of these tests involves *kairos*. While the *Lucas* categorical test may seem less kairic than the *ad hoc* test in that the *Lucas* categorical test questions whether *all* economically beneficial use of the property was eliminated, the analysis of whether the regulation is not a taking because it advances a legitimate state interest<sup>74</sup> involves a *kairic* weighing of due measure. As Justice Scalia comments in *Lucas*, “whether one or the other of the competing characterizations [the regulation as “harm-preventing” or “benefit-conferring”] will come to one’s lips in a particular case depends primarily upon one’s evaluation of the worth of competing uses of real estate.”<sup>75</sup> Justice Scalia goes on to argue that the determination cannot rely solely on “whether the legislation has recited a harm-preventing justification . . . [because] this amounts to a test of whether the legislation has a stupid staff.”<sup>76</sup> Thus, the *kairic* consideration built into the *Lucas* categorical test questions whether “the proscribed use interests were not part of [the landowner’s] title to begin with.”<sup>77</sup>

Questions of *kairos* are more transparent in the *Penn Central ad hoc* test which balances considerations. Economic impact and investment-backed expectations factors contain *kairic* elements of right-timing and due measure, as does the character of the government action, especially the consideration of the propriety of the government action.<sup>78</sup>

In *Palazzolo*, a case which involved wetlands regulation,<sup>79</sup> the two issues before the Supreme Court were ripeness and notice,<sup>80</sup> each of which involve

<sup>72</sup> UNDERKUFFLER, *supra* note 5.

<sup>73</sup> *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

<sup>74</sup> *Lucas*, 505 U.S. at 1024.

<sup>75</sup> *Id.* at 1025 (stating that “[w]hether Lucas’s construction of single-family residences on his parcels should be described as bringing ‘harm’ to South Carolina’s adjacent ecological resources thus depends principally upon whether the describer believes that the State’s use interest in nurturing those resources is so important that *any* competing adjacent use must yield”).

<sup>76</sup> *Id.* 1025 n.12.

<sup>77</sup> *Id.* at 1027.

<sup>78</sup> See *supra* text accompanying notes 115, 158.

<sup>79</sup> Beach areas “along the Atlantic and Gulf Coasts always have been unstable, dynamic places.” Dana Beach and Kim Diana Connolly, *A Retrospective on Lucas v. South Carolina Coastal Council: Public Policy Implications for the 21st Century*, 12 SOUTHEASTERN ENVTL. L.J. 1 (2003). Thus, takings involving beach areas are perhaps more kairic than geologically stable areas.

<sup>80</sup> *Palazzolo v. Rhode Island*, 533 U.S. 606, 616 (2001); see also William M. Hof, *Trying to Halt the Procedural Merry-Go-Round: The Ripeness of Regulatory Takings Claims After Palazzolo v. Rhode Island*, 46 ST. LOUIS U. L.J. 833 (2002) (analyzing the ripeness issue in takings cases).

*kairos*. Ripeness, of course, is not limited to takings cases, but is a consideration applicable to all cases. It is the quintessential timing question of a lawsuit. One aspect of ripeness is whether there has been a final judgment or administrative determination.<sup>81</sup> If the case is not ripe because there is no final determination, it is dismissed and the petitioner does not have right-timing to bring a claim. Although ripeness appears to be a simple question of *chronos* (when did the agency make a final determination?), ripeness can also be a question of *kairos* under the futility exception when the court holds that a case is ripe even though there is not a final determination because it would be futile to obtain a final determination.<sup>82</sup> Further, the very issue of ripeness poses the kairic question of the appropriateness of bringing a claim under extant circumstances.

The other issue discussed in *Palazzolo* is notice.<sup>83</sup> This issue asks whether a person who acquires property with notice of a regulation is entitled to make a takings claim based on that regulation.<sup>84</sup> The question of notice raises many kairic questions that courts analyze, as discussed below: does notice destroy the new owner's right-timing and due measure to bring a takings challenge? If the court holds that notice bars a takings claim, does that violate decorum by entitling the state to a windfall? If the claim is allowed, does that usurp wise moderation by allowing a future title-holder to bring a takings claim that is manufactured? So, while takings claims ask questions that involve *kairos*, justices approach these questions employing different rhetorics of It's Mine and Let's Share, which is the second part of the argument.

### III. COMPETING RHETORICS

Rose describes takings cases as a "muddle" and as "chaotic" because they constitute compromises between the competing considerations of common resources and individual expectations.<sup>85</sup> Although takings cases are compromises, the muddle can also be explained by recognizing that judges employ competing rhetorics in resolving cases – arriving at their resolutions by approaching "*invention, structure, style, occasion, [and] audience*" from different perspectives, or rhetorics.<sup>86</sup> Often these competing rhetorics do not acknowledge each other because "we don't see our own rhetoric; it is already normality," much less the competing rhetoric of others.<sup>87</sup> If we acknowledge competing rhetorics at all, "they are likely to seem whimsical, odd, uninformed, selfish, wrong, mad, even alien."<sup>88</sup> Consequently, "[t]he existence of multiple rhetorics entails their competition."<sup>89</sup> The discourse of takings cases consists

<sup>81</sup> See *Palazzolo*, 533 U.S. at 618.

<sup>82</sup> See *id.* at 620.

<sup>83</sup> *Id.* at 618.

<sup>84</sup> *Id.*

<sup>85</sup> Rose, *supra* note 4, at 20.

<sup>86</sup> Jim W. Corder, *From Rhetoric Into Other Studies*, in *DEFINING THE NEW RHETORICS* 95, 98 (Theresa Enos & Stuart C. Brown eds., 1993).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* This may be especially true of Justice Scalia's rhetoric in his dissents. See e.g., Michael Frost, *Justice Scalia's Rhetoric of Dissent: A Greco-Roman Analysis of Scalia's Advocacy in the VMI Case*, 91 KY. L.J. 167 (2002-2003).

<sup>89</sup> Corder, *supra* note 86, at 102.

of the competing rhetorics of It's Mine, which is past-oriented, and Let's Share, which is future-oriented. The emphasis or rejection of *kairos* plays an important role in shaping takings rhetoric, with its Aristotelian and Sophistic roots. This section describes these Greek roots, and also describes two modern parallels in the takings scholarship of Carol Rose and Laura Underkuffler.

#### A. *Let's Share and It's Mine – Rhetorics of Possibility and Actuality*

Let's Share and It's Mine are competing rhetorics in takings jurisprudence. Let's Share is a Sophistic approach that emphasizes *kairos*, the future, and contingency.<sup>90</sup> It's Mine is an Aristotelian approach that emphasizes *chronos*, the past, and custom.<sup>91</sup> Let's Share uses practical wisdom to resolve contingencies and shape the future, while It's Mine uses precedent or custom to freeze the past. Let's Share views property rights as fluid and flexible; It's Mine views property rights as static and immutable.

Before examining these rhetorics in the context of takings cases, it is helpful to consider the distinction between Sophistic and Aristotelian rhetorics. John Poulakos, a well-known scholar in the history of rhetoric, has described the differences between these rhetorics and argues that the Isocratean (or Sophistic) emphasis on *kairos* results in the rhetoric of possibility, in contrast with the Aristotelian rhetoric of actuality.<sup>92</sup> Poulakos also compares the rhetorics' differing emphases on potentiality (*dynamis*) and actuality (*energeia*).<sup>93</sup>

Aristotelian rhetoric emphasizes actuality, "the world as it is . . . in the actuality of facts or events and their proof."<sup>94</sup> Aristotle's system "assumes that the world can be known and reproduced accurately by linguistic means" and that the primary goal of rhetoric is not persuasion, although rhetoric can affect human actions "through the force of relevant factual evidence and valid proof."<sup>95</sup> The rhetoric of actuality "affirms custom and habit as the foundations of social and individual behavior," and sees the future as a "natural extension of the present."<sup>96</sup> "In short, the rhetoric of actuality is a situational rhetoric that approaches man as he is in his present predicament."<sup>97</sup>

The Sophists' rhetoric of possibility, in contrast, is not grounded in the "ability to know the world as it is" or in "any correspondence between objective reality and language," but in potentiality.<sup>98</sup> "Theirs is a constantly changing world, full of ambiguity and uncertainty, always lacking, never com-

<sup>90</sup> See Poulakos, *supra* note 9, at 223-24.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 217. Poulakos points out that it is difficult for us to understand the Sophists in their own terms "because our present views on rhetoric have been conditioned mostly by Aristotle." *Id.* at 216.

<sup>93</sup> *Id.* at 217.

<sup>94</sup> *Id.* at 218. Poulakos describes Aristotle as focusing on matter, facts, on what is there: "Unlike his predecessors, who posit the world as it is not (Sophists) or a world that ought to be (Plato), Aristotle's starting point is the world as it is, in its positive structure and tendencies." *Id.*

<sup>95</sup> *Id.* at 223.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 218.

plete.”<sup>99</sup> A fact, for the Sophists, is not closed and finalized, but subject to perception and interpretation, and thus “remains open, unfinished, recurring each time it is recounted.”<sup>100</sup> The Sophistic rhetoric of possibility “assumes an incomplete universe,” and has persuasion as its primary goal.<sup>101</sup> It strives to present the possible, an absent reality, not through elaborate proofs, but through figurative discourse which seeks to envision what is not known, felt, or understood.<sup>102</sup> The rhetoric of possibility challenges familiar values and beliefs and sees the past as an “obstacle[ ] to the future.”<sup>103</sup> The rhetoric of possibility “underscores the fluid aspects of human existence.”<sup>104</sup> Thus, *kairos* plays a key role in the rhetoric of the Sophists by envisioning the possible through practical wisdom appropriate for the particular circumstances.

Takings discourse employs these competing rhetorics. What I call “Let’s Share” rhetoric is Sophistic because it envisions property rights as open and fluid, and does not rely exclusively on precedent and the past, but on *kairos* and on the contingency of the situation. On the other hand, what I call “It’s Mine” rhetoric is Aristotelian in its emphasis on property rights as frozen in time (*chronos*) and on custom and precedent to shape the future.

Let’s Share rhetoric tends to accept the kairic nature of takings issues, and It’s Mine rhetoric tends to reject this kairic nature. For instance, legal scholars and judges who approach the takings muddle by proposing uniform or categorical rules are more likely to employ It’s Mine rhetoric than are legal scholars and judges who accept (and perhaps contribute to) the muddle.<sup>105</sup> Acceptance of the muddle is illustrated by the characterization of takings jurisprudence as follows: “Understood functionally, when the Court holds that a regulation effects a taking, it is signaling that the legislature has tried to accelerate change faster than the Justices believe fair or wise.”<sup>106</sup> This characterization demonstrates Let’s Share rhetoric because it emphasizes *kairos* and change. The question of what is fair or wise overlaps with the ethical dimension of *kairos* and is an important undercurrent in takings cases. As seen below in the discussion of competing rhetorics in *Palazzolo*, It’s Mine often results in what is fair to *me*, as an individual property owner, while Let’s Share often results in what

<sup>99</sup> *Id.* at 221.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 223.

<sup>102</sup> *Id.* at 223-24.

<sup>103</sup> *Id.* at 224.

<sup>104</sup> *Id.*

<sup>105</sup> See, e.g., Kraig Odabashian, *Investment-Backed Expectations and the Politics of Judicial Articulation: The Reintegration of History and the Lockean Mind in Contemporary American Jurisprudence*, 50 UCLA L. REV. 641, 646-47, 653 (2002). Odabashian criticizes “the Court’s inability to determine a uniform definition of investment-backed expectations” and describes Holmes’ rule set forth in *Pennsylvania Coal* as “achiev[ing] a nearly diabolical level of subtlety,” which should be replaced by Scalia’s proposal for a “baseline definition” of “those expectations rooted in the historical moment at which the Just Compensation Clause was conceived.” *Id.* at 668; see also Daniel J. Hulsebosch, *The Tools of Law and the Rules of Law: Teaching Regulatory Takings After Palazzolo*, 46 ST. LOUIS U. L.J. 713, 715 (2002) (distinguishing rules and regulations in takings cases and pointing out that “[c]lass discussions of the difference between rules and standards illuminates not only takings law but also basic styles of legal reasoning that students will use throughout their careers”).

<sup>106</sup> Hulsebosch, *supra* note 105, at 732.

is fair for the *common good*.<sup>107</sup> The emphasis on the common good follows from the Isocratean view.

### B. *Parallel Tracks: The Views of Carol Rose and Laura Underkuffler*

Two legal scholars, Carol Rose and Laura Underkuffler, have described competing views of property in takings cases, and their views form parallel tracks to Let's Share and It's Mine rhetorics.

#### 1. *Rose's Utilitarian and Historic Views of Property*

In *Property and Persuasion*, Carol Rose argues that the "muddle" or inconsistency in takings law "stems from its reflection of two complete but different ideas about what property is good for:" one idea is the utilitarian idea of property as preference satisfactions and the other is the historical idea of property as propriety.<sup>108</sup> These views are parallel (but not identical) to It's Mine and Let's Share rhetorics.

Under the utilitarian view of property as preference satisfactions, takings are seen to "violate the very purpose of a property regime, namely to increase the size of the bag of goods or . . . the size of the pie."<sup>109</sup> The utilitarian view of property as preference satisfactions employs It's Mine rhetoric when it "call[s] certain things 'property rights' and foster[s] the expectation that owners can control and enjoy the things they have worked for in order to encourage both rich and poor to invest the labor, time, energy, and effort that will make resources more valuable and the total bag bigger."<sup>110</sup> This expectation, like It's Mine rhetoric, freezes property rights in terms of the past.

Even though the utilitarian view primarily parallels It's Mine rhetoric, its justifications for takings also contain a hint of Let's Share rhetoric to the extent that utilitarians view sharing as maximizing the size of the pie, so property rights are not completely frozen, but subject to some change.<sup>111</sup> Thus, the utilitarian view justifies takings "on the understanding that public management of certain projects is more wealth-enhancing than private management would be,"<sup>112</sup> and it "reduces[s] the demoralization" of public takings by providing compensation to property owners.<sup>113</sup> Nonetheless, the utilitarian view primarily uses It's Mine rhetoric because it focuses on past expectations. Property owners resist regulations because they believe their property rights include the right to do what they have done in the past, as Rose points out in what she calls "the Utilitarian Dilemma:" "The dilemma is that the essential goal of securing

<sup>107</sup> See F. Patrick Hubbard et al., *Do Owners Have a Fair Chance of Prevailing Under the Ad Hoc Regulatory Takings Test of Penn Central Transportation Company?*, 14 DUKE ENVTL. L. & POL'Y F. 121, 138 (2003) (describing the shift from *Lucas* to *Palazzolo* and *Tahoe-Sierra* as "a shift from 'regulator bashing' to an endorsement of 'good' planning").

<sup>108</sup> ROSE, *supra* note 1, at 64.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 56.

<sup>111</sup> *Id.* at 53-54.

<sup>112</sup> *Id.* at 57.

<sup>113</sup> *Id.* at 56.

property expectations clashes with the essential goal of managing congested resources.”<sup>114</sup> The landowners’ resistance shows an It’s Mine approach.

Rose contrasts the utilitarian view with a historic view of property as “what is ‘proper’ or appropriate . . . that which is needed to keep good order in the commonwealth or body politic.”<sup>115</sup> The view of property as proper emphasizes the *kairos* of Let’s Share rhetoric. Rose explains that the historic view of property does not necessarily view takings as violating the purpose of a property regime because “the legislature’s imposition on the property may be treated as a legitimate demand on a citizen, so long as the citizen’s decent and proper income is preserved.”<sup>116</sup> The view of property as proper is *kairic* because it emphasizes propriety, or *kairos* as *prepons*.<sup>117</sup> The historic view parallels Let’s Share rhetoric because of its emphasis on *kairos* and its understanding of property rights as flexible, depending on a balance between the needs of the individual and the community.

## 2. Underkuffler’s Common Conception and Operative Conception

Like Rose’s discussion of property as preference satisfactions and property as proper, Laura Underkuffler, in *The Idea of Property*, discusses two competing conceptions of property found in takings cases.<sup>118</sup> Her project develops an approach that explores “what property . . . really is.”<sup>119</sup> She argues that “a legally cognizable conception of property can be constructed” only by considering four dimensions: theoretical, spatial, stringency of protection, and temporal.<sup>120</sup> Her analysis uncovers two conceptions of property: the common conception of property and the operative conception of property, which, respectively parallel It’s Mine and Let’s Share. The common conception of property is based on fixed notions of property.<sup>121</sup> Underkuffler explains:

<sup>114</sup> Rose, *supra* note 4, at 17-19.

<sup>115</sup> ROSE, *supra* note 1, at 58; *see also* Freyfogle, *supra* note 42, at 638-39 (tracing cognates of “property”).

<sup>116</sup> ROSE, *supra* note 1, at 65. Myrl Duncan similarly discusses historic views of property, but contrasts the historic, agrarian view of property as a bundle of sticks (“a priori, unchanging and unchangeable . . . essentially private in nature”) with the older, medieval view of property as connected. Myrl L. Duncan, *Reconceiving the Bundle of Sticks: Land as a Community-Based Resource*, 32 ENVTL. L. 773, 781-783 (2002). Duncan criticizes the bundle of sticks metaphor because it “treats a landowner’s collection of rights only in the abstract. By considering the bundle complete in and of itself, the metaphor ignores the fact that landowners, and thus bundles, interact not only with neighboring landowners but with the public at large in ways that affect society’s desire and need for a healthy environment.” *Id.* at 775. In other words, Duncan might argue that the expectations Rose describes stem from the use of this metaphor. Indeed, Duncan argues that the property class should be restructured to emphasize the interconnectedness – the bundle as part of a cord. *Id.* at 799, 804-5. *See also* Myrl L. Duncan, *Property as Public Conversation, Not a Lockean Soliloquy: A Role for Intellectual and Legal History in Takings Analysis*, 26 ENVTL. L. 1095, 1105-1109 (1996) (tracing the property paradigm common in the middle ages with the view that “the mineral, plant and animal kingdoms were seen as inseparable elements of the web of life” and that property ownership was “limited by social obligations”).

<sup>117</sup> *See supra* text accompanying note 29.

<sup>118</sup> UNDERKUFFLER, *supra* note 6, at 5. Chapters 3 & 4 develop these theories.

<sup>119</sup> *Id.* at 11.

<sup>120</sup> *Id.* at 5.

<sup>121</sup> *Id.* at 45.

Property rights, under this understanding, protect an area of individual autonomy and control. They protect individual interests that are, as an essential matter, defined by dimensions of theory and space; protected equally; and protected from collective change thereafter. The individual interests protected by property are presumptively superior to competing public interests. They can be overridden (without legal consequence) by public interests of a particularly dire or compelling nature, but *only* by interests of that nature. They cannot be overridden by the simple or routine goals of government.<sup>122</sup>

Under this common conception, property rights “have great presumptive power,”<sup>123</sup> are frozen in time and protected against collective change.<sup>124</sup> Moreover, the common conception requires that there must be “*some* moment in time . . . for the establishment of property’s protected rights.”<sup>125</sup> In other words, property rights in this view depend on *chronos*, not *kairos*. Thus, the common conception parallels It’s Mine rhetoric because past visions of property as “It’s Mine” on the bases of *chronos*, custom, and habit, influence future decisions about property.

Underkuffler describes a competing view of property as the operative conception, which “envision[s] change *as part of* the idea of property.”<sup>126</sup> Under the operative conception, “property represents individual interests, fluid in time, established and re-established as circumstances warrant.”<sup>127</sup> The operative conception of property does not give individual property rights presumptive power over collective rights: “[p]roperty,” in this case, does not represent the individual’s interest, alone; rather, it represents the outcome of individual/collective tensions, determined and redetermined as circumstances warrant. As a consequence, individual claims – even if protected in the past – are afforded no special or assumed right to continued legal protection.”<sup>128</sup>

Similar to the historic view of property as proper that Rose describes, the operative conception is consistent with a rhetoric of possibility, a vision of property as the rhetoric of Let’s Share, based on changing, not static, considerations for the larger community.<sup>129</sup> In this view, practical wisdom shapes outcomes based on changing times and needs. The Isocratean emphasis on social justice would mean that a socially responsible individual would not expect his or her property to remain “mine” in the face of greater social need, but would defer to the collective.<sup>130</sup> This would result in due measure, or *kairos*.

Underkuffler’s two conceptions of property more closely parallel Let’s Share and It’s Mine rhetorics than do the historical distinctions drawn by Carol Rose. Underkuffler’s goal is normative;<sup>131</sup> she provides a complex theory “which *explains, predicts, and justifies* the variable power of claimed individ-

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 46.

<sup>124</sup> *Id.* at 50-51.

<sup>125</sup> *Id.* at 40.

<sup>126</sup> *Id.* at 48.

<sup>127</sup> *Id.* at 51.

<sup>128</sup> *Id.* at 62.

<sup>129</sup> *Id.*

<sup>130</sup> See Sipiora, *supra* note 2, at 8; Kinneavy, *supra* note 17, at 65.

<sup>131</sup> UNDERKUFFLER, *supra* note 6, at 33.

ual property rights.”<sup>132</sup> Her thorough analysis develops the common conception and operative conception of property in takings cases.<sup>133</sup> She argues that the use of the common conception is “inappropriate”<sup>134</sup> because “[i]f the common conception of property is used, individual interests are afforded strict protection. If the operative conception is used, individual interests are – as a practical matter – afforded none.”<sup>135</sup> The present approach differs from Underkuffler’s primarily because her goal is to develop a theory of what property “really is,” while the goal here is to examine the rhetoric judges employ to decide takings cases. The next part of this article draws on Underkuffler’s and Rose’s work, but performs a rhetorical analysis of competing It’s Mine and Let’s Share rhetorics in the recent United States Supreme Court decision of *Palazzolo v. Rhode Island*.<sup>136</sup>

This analysis does not offer a normative or a historical approach, but rather examines how judges respond to the situation of a regulatory takings case. *Kairos* is used as a way to read both the issues raised in takings cases and the judicial decisions in those cases. A rhetorical reading complicates and explains the famously inconsistent “muddle” of regulatory takings jurisprudence. Because the issues in takings cases are kairic, judges respond to changing situations inconsistently. Judges pen majority, concurring, and dissenting decisions that illustrate competing tensions of Let’s Share and It’s Mine rhetorics. Moreover, a particular judge might author a decision or a string of decisions that variously employ It’s Mine or Let’s Share rhetoric, or both; however, one rhetoric will dominate over the others in a particular case or decision. Such a rhetorical reading makes room for the complications of takings case law and explains the tension found in these cases.

#### IV. PALAZZOLO V. RHODE ISLAND

##### A. Background of Palazzolo

Before considering the Supreme Court’s analysis of notice and ripeness, a summary of the *chronos* or background facts of the case is in order. In 1959, Anthony Palazzolo bought three undeveloped waterfront lots, approximately twenty acres in total, in Westerly, Rhode Island.<sup>137</sup> Title to the lots was actually held by Shore Gardens, Inc., the corporation which Palazzolo formed.<sup>138</sup> The lots were bordered by the “popular” Misquamicut State Beach, “a lengthy expanse of coastline facing Block Island Sound and beyond to the Atlantic Ocean,” and by Winnapaug Pond, “an intertidal inlet often used by residents for

<sup>132</sup> *Id.* at 4.

<sup>133</sup> *Id.* at Chaps. 3 & 4. Her analysis focuses primarily on *Lucas*.

<sup>134</sup> *Id.* at 53.

<sup>135</sup> *Id.* at 54. She further explains, “[u]nder the operative conception of property, the idea of property, itself, confers no rights; it simply describes, or mediates, the tensions between individual interests and collective goals, which are resolved and re-resolved as circumstances warrant.” *Id.*

<sup>136</sup> *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

<sup>137</sup> *Id.* at 613. The exact acreage was not known because Palazzolo did not have an accurate survey. See *Palazzolo v. State*, 746 A.2d 707, 710 n.1 (R.I. 2000); *Palazzolo*, 533 U.S. at 654 (Ginsburg, J., dissenting).

<sup>138</sup> *Palazzolo*, 533 U.S. at 613.

boating, fishing, and shellfishing.”<sup>139</sup> The three lots were primarily wetlands (“salt marsh subject to tidal flooding”) and would require up to six feet of fill before the land could support structures.<sup>140</sup> “[A] substantial amount” of the land was “under the waters of Winnipaug Pond” or “subject to daily tidal inundation.”<sup>141</sup> Approximately two acres consisted of uplands.<sup>142</sup>

Over the next twenty-five years, Shore Gardens or Palazzolo made five applications to state agencies for permission to fill and develop all or part of the property.<sup>143</sup> Each application was denied.<sup>144</sup> The first three applications were denied in the 1960s.<sup>145</sup> The third application was initially approved by the Department of Natural Resources, but it withdrew approval within a year.<sup>146</sup>

Before the fourth application, two important events occurred. First, the federal and state governments passed legislation to protect coastal wetlands and salt marshes (such as the land in this case) in 1971.<sup>147</sup> Second, Shore Gardens failed to pay corporate income taxes in 1978 and its corporate charter was revoked.<sup>148</sup> Thus, by operation of law, Palazzolo became title owner of the three lots and, more significantly, he acquired title *after* the passage of, and with notice of, the wetlands legislation.<sup>149</sup> Palazzolo’s fourth application to fill the entire property was denied in 1983 and he did not appeal the determination.<sup>150</sup>

His last application in 1985 was for permission to fill eleven wetland acres to build a beach club.<sup>151</sup> Again, the agency denied the application, but this time Palazzolo challenged the determination, and when the decision was

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 613-14.

<sup>141</sup> *Palazzolo*, 746 A.2d at 710.

<sup>142</sup> *Palazzolo*, 533 U.S. at 616.

<sup>143</sup> *Id.* at 613-15.

<sup>144</sup> *Id.* Initially, there were no wetlands regulations; however, there were regulations regarding dredging the pond, the action which Palazzolo originally requested. See *Palazzolo*, 746 A.2d at 710.

<sup>145</sup> *Palazzolo*, 533 U.S. at 613-14.

<sup>146</sup> *Id.* at 614. In a speech given after the decision was issued, Palazzolo’s attorney, James Burling, humorously gave a practice tip: “when you have a client . . . and your client has a permit, you must tell that client to exercise that permit . . . quickly. . . . And Mr. Palazzolo made the great mistake . . . he sat on his rights for too long, and he did not immediately rush in with the bulldozers . . . .” Symposium, *Property Rights After Palazzolo*, 24 U. HAW. L. REV. 455, 460 (2002).

<sup>147</sup> *Palazzolo*, 533 U.S. at 614. When Palazzolo bought the land, it was common to fill the wetlands “as a means of putting ‘waste’ areas to beneficial agricultural use”; but ecological concerns drove state and federal legislation when it became apparent that wetlands “provided valuable ecosystem services including water filtration and flood control.” See Doremus, *supra* note 5, at 18. A few houses had been built on the wetlands adjacent to Palazzolo’s land. See James S. Burling, *Eminent Domain and Land Valuation Litigation: Implications of Palazzolo on Eminent Domain*, SG059 A.L.I.-A.B.A. 351, 354-55 (2002).

<sup>148</sup> *Palazzolo*, 533 U.S. at 614. Palazzolo’s attorney at the Supreme Court, James S. Burling, explained during a symposium that “Mr. Palazzolo was tired of paying \$100 a year corporation registration fee, so he stopped paying the money.” Symposium, *supra* note 146, at 461.

<sup>149</sup> *Palazzolo*, 533 U.S. at 614.

<sup>150</sup> *Id.* at 614-15. The Council cited vagueness and impact on the wetlands as basis for denial. *Id.*

<sup>151</sup> *Id.* at 615.

affirmed, he brought an inverse condemnation action claiming damages in excess of three million dollars.<sup>152</sup> He claimed that the agency's action constituted a total taking of his property without just compensation under a *Lucas* analysis.<sup>153</sup> The Rhode Island Superior Court held that his taking claim was not ripe for review and, in the alternative, denied Palazzolo's claim.<sup>154</sup> The Rhode Island Supreme Court affirmed.<sup>155</sup> However, the United States Supreme Court reversed and remanded in a decision containing a majority opinion, three concurring opinions, and two dissenting opinions.<sup>156</sup> Although it did not hold that there had been a total taking, the Court remanded to the state court to determine whether there had been a taking under the *Penn Central* test.<sup>157</sup> An analysis of the Court's decision shows *kairos* in the Court's description of the land and the competing Let's Share/It's Mine rhetorics in the Court's ruling on the issues of notice and ripeness.

*B. Kairic Land Use: "a most disagreeable 'beach club' "*<sup>158</sup>

The decision displays a sense of *kairos* as propriety or decorum in describing the land. Justice Kennedy's interesting description of the history and natural features of the land<sup>159</sup> can be contrasted with his and Justice Ginsburg's disapproving description of the proposed beach club.<sup>160</sup>

Justice Kennedy begins the majority decision with the "precarious, though colorful, early history" of Westerly, Rhode Island.<sup>161</sup> This history is an example of both *chronos* (the historical progression of events) and *kairos* (the town's progression toward order and decorum). Justice Kennedy explains that in the seventeenth century, Rhode Island, Connecticut, and Massachusetts all fought over land boundaries, including the ownership of Westerly, and that these "jurisdictional squabbles" were not settled until a 1728 compact, when "the town's development was more orderly, and with some historic distinction."<sup>162</sup> Kennedy goes on to note the strategic importance of Westerly's Watch Hill Point in the Revolutionary War and The War of 1812, and the later importance of Westerly as a "popular vacation and seaside destination" due to its geographic features,<sup>163</sup> described in the "happy account" given by "[o]ne of the town's historians":

The broad beaches of clean white sand dip gently toward the sea; there are no odorous marshes at low tide, no railroad belches smoke, and the climate is unrivalled

<sup>152</sup> *Palazzolo v. Coastal Res. Mgmt. Council*, C.A. No. 86-1496, 1995 WL 941370, at \*1 (R.I. Super. Ct. Jan. 5, 1995); *Palazzolo*, 533 U.S. at 615-16.

<sup>153</sup> *Palazzolo*, 533 U.S. at 615.

<sup>154</sup> *Coastal Res. Mgmt. Council*, 1995 WL 941370, at \*7; *Palazzolo*, 533 U.S. at 616.

<sup>155</sup> *Palazzolo*, 746 A.2d at 717.

<sup>156</sup> *Palazzolo*, 533 U.S. at 632.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 647 n.1 (Ginsburg, J., dissenting).

<sup>159</sup> *Id.* at 612-13.

<sup>160</sup> *Id.* at 615; *id.* at 647 (Ginsburg, J., dissenting).

<sup>161</sup> *Id.* at 612.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

on the coast, that of Newport only excepted . . . . When Providence to the north runs a temperature of 90, the mercury in this favored spot remains at 77.<sup>164</sup>

Westerly, as depicted by Justice Kennedy, is a Norman Rockwell vision of decorum.

In contrast to the decorum of the land's natural resources, both Justice Kennedy and Justice Ginsburg find a striking lack of decorum in Palazzolo's proposed beach club, which formed the basis of two of his applications, including the one ultimately appealed.<sup>165</sup> Justice Kennedy describes the proposed beach club as follows: "The details do not tend to inspire the reader with an idyllic coastal image, for the proposal was to fill 11 acres of the property with gravel to accommodate '50 cars with boat trailers, a dumpster, port-a-johns, picnic tables, barbecue pits of concrete, and other trash receptacles.'" <sup>166</sup> Kennedy's picture of the beach club shatters the Rockwell vision of the area's natural resources. Likewise, Justice Ginsburg contrasts "[a]pproximately 18 acres . . . [of] wetlands that sustain a rich but delicate ecosystem" with the proposal for "a most disagreeable 'beach club.'" <sup>167</sup>

The negative reaction to Palazzolo's intended use raises the speculation of whether the outcome would have differed had Palazzolo applied for a more idyllic or modest beach club. Although this question cannot be answered, Justice Kennedy's and Justice Ginsburg's opinions emphasize the propriety dimension of *kairos*.<sup>168</sup>

### C. The Notice Issue

In analyzing the issue of notice, Justice Kennedy,<sup>169</sup> Justice Scalia,<sup>170</sup> and Justice Stevens<sup>171</sup> write opinions that employ It's Mine rhetoric. All three decisions are metaphorical,<sup>172</sup> formalistic and inflexible, and rely on custom and the past to shape the future. It's Mine rhetoric views property rights as

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 614-15. James Burling jokes about Ginsburg's and Kennedy's ideas of the ideal beach club, and at one points jests that Kennedy does not seem likely to be one to take a six pack of beer to the beach club. Symposium, *supra* note 146, at 461-62.

<sup>166</sup> *Palazzolo*, 533 U.S. at 615.

<sup>167</sup> *Id.* at 646-47 (Ginsburg, J., dissenting).

<sup>168</sup> Similarly, Justice Stevens emphasized the propriety dimension of *kairos* in his description of Lake Tahoe. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 307 (2002) ("All agree that Lake Tahoe is 'uniquely beautiful,' that President Clinton was right to call it a 'national treasure that must be protected and preserved,' and that Mark Twain aptly described the clarity of its waters as 'not merely transparent, but dazzlingly, brilliantly so.'" (citation omitted)).

<sup>169</sup> *Palazzolo*, 533 U.S. at 611. Chief Justice Rehnquist and Justice Thomas joined in Kennedy's majority opinion, but did not file concurring opinions. However, in other recent cases, such as *Tahoe-Sierra*, Rehnquist and Thomas have employed It's Mine rhetoric. Focusing on the *chronos* of the case, Chief Justice Rehnquist argued that "denial of all viable use of land for six years is a taking." *Tahoe-Sierra*, 535 U.S. at 351 (Rehnquist, C.J., dissenting).

<sup>170</sup> *Palazzolo*, 533 U.S. at 636-37 (Scalia, J., concurring).

<sup>171</sup> *Id.* at 637-45 (Stevens, J., concurring in part and dissenting in part).

<sup>172</sup> Poulakos, *supra* note 9, at 223. The use of figurative speech is traditionally more closely associated with the rhetoric of possibility rather than actuality; however, almost all of the opinions in *Palazzolo* contain figurative speech, and takings cases seem to inspire metaphor and simile, such as Justice Blackmun's initial sentence in his *Lucas* dissent that

frozen in time. In contrast, Justice O'Connor's concurrence<sup>173</sup> uses Let's Share rhetoric, emphasizing contingency and *kairos*, and viewing property rights as fluid and shaped by circumstances. As this section also argues, part of Justice Stevens' dissent may be read as employing Let's Share rhetoric.<sup>174</sup>

*1. Justice Kennedy's Opinion: "The State may not put so potent a Hobbesian stick into the Lockean bundle."*<sup>175</sup>

Justice Kennedy's majority decision holds that acquiring property with notice of the wetlands regulations did not estop Palazzolo from filing a takings claim.<sup>176</sup> This section argues that Kennedy's It's Mine rhetoric is informed by a traditional view of property as a bundle of sticks or rights that cannot be taken by the state unless dire circumstances exist.<sup>177</sup> He views property rights as fixed in the past, and places importance on custom when he says that it would unacceptably alter the "nature of property" to hold that notice barred a takings claim.<sup>178</sup>

Before *Palazzolo*, jurisdictions were split on the issue of whether acquiring property with notice of a regulation would bar a takings claim.<sup>179</sup> The Rhode Island Supreme Court followed the view that notice barred Palazzolo's *Lucas* claim because when Palazzolo acquired the lots in 1978, the regulations were already in effect. Accordingly, the bundle of rights acquired "did not include the right to develop the lots without restrictions."<sup>180</sup> The Rhode Island court also held that notice barred a takings claim under the *ad hoc* test because Palazzolo "had no reasonable investment-backed expectations that were affected by this regulation."<sup>181</sup>

The *Palazzolo* holding resolved lower court uncertainty about the effect of notice on a takings claim. Justice Kennedy reasons that holding that notice barred Palazzolo's takings claim would give the state a windfall by allowing it "to put an expiration date on the Takings Clause."<sup>182</sup> Thus, he rejects a kairic vision of property rights, and of the state's authority as fluid, and rejects the notion of a time-bar for a takings claim. Kennedy labels the Rhode Island court's holding as "quixotic," meaning "caught up [like Don Quixote] in the

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"[t]oday the Court launches a missile to kill a mouse." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1036 (1992) (Blackmun, J., dissenting).

<sup>173</sup> *Palazzolo*, 533 U.S. at 632-36 (O'Connor, J., concurring).

<sup>174</sup> *Id.* at 637 (Stevens, J., dissenting).

<sup>175</sup> *Id.* at 627.

<sup>176</sup> *Id.* at 632.

<sup>177</sup> See Duncan, *supra* note 116, at 787 (discussing the static nature of bundle of sticks metaphor); UNDERKUFFLER, *supra* note 6, at 45 (arguing that under the common conception, property rights cannot "be overridden" except "by public interests of a particularly dire or compelling nature").

<sup>178</sup> *Palazzolo*, 533 U.S. at 627.

<sup>179</sup> See Mark W. Cordes, *The Effect of Palazzolo v. Rhode Island on Takings and Environmental Land Use Regulation*, 43 SANTA CLARA L. REV. 337, 347-51 (2003).

<sup>180</sup> *Palazzolo v. State*, 746 A.2d 707, 716 (R.I. 2000). The Rhode Island Supreme Court noted that "Palazzolo was unable to cite a single case in which a court has ordered compensation for a regulatory taking when the claimant became the owner of the property after the regulation became effective." *Id.*

<sup>181</sup> *Id.* at 717.

<sup>182</sup> *Palazzolo*, 533 U.S. at 627.

romance of noble deeds or unreachable ideals; romantic without regard to practicality."<sup>183</sup> Justice Kennedy calls the holding of the Rhode Island court "quixotic" because it would impractically change the "nature of property."<sup>184</sup> However, Kennedy's holding is arguably just as "quixotic" because either rule about notice is fraught with practical concerns about who may reap a windfall. As Justice O'Connor argues, Kennedy's holding could also result in impracticalities and windfalls if a new owner of land could claim a taking based on an already-existing regulation.<sup>185</sup>

Perhaps the real reason Kennedy rejects the Rhode Island Supreme Court's ruling is not because it is "quixotic," but because it is contrary to It's Mine rhetoric, which Kennedy metaphorically expresses as: "The State may not put so potent a Hobbesian stick into the Lockean bundle."<sup>186</sup> This metaphor somewhat cryptically expresses his natural law view of frozen property rights that must be protected from the sovereign's potent stick.<sup>187</sup> He offers his metaphor in response to what he summarizes as the opposing view: "Property rights are created by the State . . . . So . . . by prospective legislation the State can shape and define property rights and reasonable investment-backed expectations, and subsequent owners cannot claim any injury from lost value."<sup>188</sup> In rejecting this view as giving the State too much power, Kennedy's metaphor alludes to the polarized stances of Hobbes and Locke.<sup>189</sup>

Thomas Hobbes' *Leviathan*, published in 1651, describes the necessity of an all-powerful state or sovereign, "the great LEVIATHAN called a COMMONWEALTH."<sup>190</sup> The distribution of property lies in the sovereign's power,<sup>191</sup> and individuals may not "exclude their sovereign" from their land, although they may "exclude all other subjects."<sup>192</sup> Hobbes gives the sovereign a potent stick over property rights.

<sup>183</sup> AMERICAN HERITAGE DICTIONARY 1073 (New College ed. 1980).

<sup>184</sup> *Palazzolo*, 533 U.S. at 628.

<sup>185</sup> See *Palazzolo*, 533 U.S. at 634-35 (O'Connor, J., concurring); *Palazzolo*, 746 A.2d at 716. Justice Breyer, in his dissenting opinion, acknowledges the possibility of "manufacture[d]" takings claims, but dismisses this possibility because "I do not see how a constitutional provision concerned with 'fairness and justice' . . . could reward any such strategic behavior." *Palazzolo*, 533 U.S. at 655 (Breyer, J., dissenting); see also Doremus, *supra* note 5, at 37-39 (arguing that the Rhode Island court decided the notice issue correctly because to hold otherwise would give the buyer a windfall; she also analyzes the notice issue using a kairic emphasis on "the passage of time").

<sup>186</sup> *Palazzolo*, 533 U.S. at 627.

<sup>187</sup> *Id.* at 627.

<sup>188</sup> *Id.* at 626 (citations omitted).

<sup>189</sup> *Id.* at 627. Justice Kennedy's metaphor also contains phallic imagery in both the "potent . . . Hobbesian stick" and in the "Lockean bundle." See Jeanne L. Schroeder, *Chix Nix Bundle-O-Six: A Feminist Critique of the Disaggregation of Property*, 93 MICH. L. REV. 239, 241-44, 254-55 (1994) (arguing that the bundle of sticks metaphor is an inevitable phallic symbol because of our "psychoanalytic tendency to collapse the Symbolic into the Real . . . we envision property in terms of the archetype of the penis and the female body. In the former manifestation, we imagine property as a physical object we see, hold, and wield. In the latter manifestation, we imagine it as a physical object we either protect from invasion or occupy and enjoy").

<sup>190</sup> THOMAS HOBBS, *LEVIATHAN* 3 (Edwin Curley ed., Hackett Publ'g Co. 1994).

<sup>191</sup> *Id.* at 160.

<sup>192</sup> *Id.* at 161.

In contrast, Locke does not give the sovereign such a potent stick. John Locke's *Two Treatises of Government*, published in 1689, contains the classic definition of property in Chapter Five of the *Second Treatise*:

Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joined to it something that is his own, and thereby makes it his *Property*. It being by him removed from the common state Nature placed it in, it hath by this *labour* something annexed to it, that excludes the common right of other Men. For this *Labour* being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others.<sup>193</sup>

Locke argues that the concept of a sovereign state arose through a social compact motivated by the need to protect private property. He writes:

[T]hough in the state of nature he hath such a right [of absolute freedom over his person and property], yet the enjoyment of it is very uncertain and constantly exposed to the invasion of others . . . the enjoyment of the property he has in this state is very unsafe, very insecure . . . This makes him willing to . . . join in society with others . . . for the mutual preservation of their lives, liberties, and estates, which I call by the general name "property."<sup>194</sup>

Even though people join together in a state, the traditional reading of Locke emphasizes that the state does not have absolute power over property because property existed before the social contract.<sup>195</sup>

Kennedy's metaphorical reference to Hobbes and Locke follows this traditional reading of the rejection of a potent sovereign in favor of individualism. Thus, Kennedy's majority decision regarding notice demonstrates an It's Mine rhetoric grounded in the view of property based not on *kairos* and change, but on inflexible and timeless principles.<sup>196</sup>

<sup>193</sup> JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 287-88 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

<sup>194</sup> *Id.* at 350.

<sup>195</sup> See Burling, *supra* note 147, at 359 (Burling, who represented Palazzolo at the Supreme Court, summarizes this traditional view of Locke and Hobbes as follows: "Locke was emphatic that property remained the right and prerogative of the people, and that government may not take property . . . Hobbes supported his view that property and liberty resided in the government with an argument of necessity, noting that without government there would be no property and not much to life"). But see Duncan, *supra* note 116, at 1097-98 (providing an alternative view). Duncan discusses the interpretation of "neo-Lockeans" who "would have us believe that Locke's theory of individualism was so central to the thought of the Founders that, more than two hundred years later, it acts to make virtually every uncompensated restriction on the use of private property a 'taking.'" *Id.* at 1097. Duncan observes that the "neo-Lockeans" use Locke's theories in their "agenda to disarm the regulatory state." *Id.* However, Duncan argues that the interpretation of Locke that emphasizes individualism is subject to debate, and "that numerous political theorists reject the traditional reading of Locke. These modern scholars of Locke read him as arguing that once humans have entered into society, property becomes conventional, to be defined by the positive law." *Id.* at 1098.

<sup>196</sup> Justice Kennedy's view in *Palazzolo* indicates a shift from his view in *Lucas* that "[t]he Takings Clause does not require a static body of state property law" and that it "does not eliminate the police power of the State to enact limitations on the use of their property" "in a complex and interdependent society." *Lucas v. South Carolina Coastal Council*, 505 U.S.

## 2. Justice Scalia's Opinion: The "government-as-thief"<sup>197</sup>

Justice Kennedy's It's Mine rhetoric pales in comparison to Justice Scalia's concurring decision, which places even more emphasis on individual property rights that are frozen in time.<sup>198</sup> Justice Scalia pens what Justice O'Connor calls his "government-as-thief" simile.<sup>199</sup> Justice Scalia is not as disturbed by the potential windfall an individual owner with notice might accrue in winning a takings claim, as he is by the government's potential windfall.<sup>200</sup> He writes:

there is nothing to be said for giving it [the windfall] instead to the *government* – which not only did not lose something it owned, but is both the *cause* of the miscarriage of "fairness" and the only one of the three parties involved in the miscarriage (government, naïve original owner, and sharp real estate developer) which *acted unlawfully* – indeed *unconstitutionally*.<sup>201</sup>

Justice Scalia's "government-as-thief" simile is grounded in It's Mine rhetoric similar to that of Justice Kennedy – both reject notice as barring a takings claim because that would give the government a windfall and usurp the landowner's fixed property rights. However, Justice Scalia goes even further than Justice Kennedy by holding that notice should have no bearing whatsoever on a takings analysis.<sup>202</sup> While Justice Kennedy remands the case for a *Penn Central ad hoc* test,<sup>203</sup> he does not hold, as Scalia would, that notice has no bearing on an *ad hoc* analysis.<sup>204</sup> Rather, Kennedy merely holds that notice does not bar Palazzolo's *Penn Central* claim.<sup>205</sup> Thus, even more so than Justice Kennedy, Justice Scalia performs a rhetoric of actuality which freezes the future in terms of the past, and rejects considerations of *kairos*. Once a landowner has title, It's Mine, and the individual's interest should be protected at all costs against the government-thief.

Justice Scalia hones his simile in a takings case decided two years later, in which he metaphorically describes the Just Compensation Clause as "the Robin Hood Taking."<sup>206</sup> Justice Scalia pens this metaphor in *Brown v. Legal Founda-*

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1003, 1034 (1992) (Kennedy, J., concurring); see also Duncan, *supra* note 116, at 1157 (analyzing Kennedy's opinion in *Lucas* as a rejection of the Lockean view expressed by Scalia in the majority opinion).

<sup>197</sup> Palazzolo v. Rhode Island, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring).

<sup>198</sup> *Id.* at 636-37 (Scalia, J., concurring). Numerous legal scholars have analyzed Justice Scalia's rhetoric. See, e.g., Frost, *supra* note 88, at 204 (arguing that "Justice Scalia's dissent [in *VMI*] only partly succeeds as an example of effective advocacy. While he does succeed in arousing readers' emotions, he consistently squanders his emotional capital with gratuitous attacks that compromise his credibility"); Yury Kapgan, *Of Gold and Ghouls: The Prose Style of Justice Scalia*, 9 LEGAL WRITING: J. LEGAL WRITING INST. 71 (2003); David M. Zlotnick, *Battered Women & Justice Scalia*, 41 ARIZ. L. REV. 847 (1999).

<sup>199</sup> Palazzolo, 533 U.S. at 635 (O'Connor, J., concurring).

<sup>200</sup> *Id.* at 636-37 (Scalia, J., concurring).

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 637.

<sup>203</sup> *Id.* at 632.

<sup>204</sup> *Id.* at 637.

<sup>205</sup> *Id.* at 630.

<sup>206</sup> *Brown v. Legal Found. of Washington*, 538 U.S. 216, 252 (2003) (Scalia, J., dissenting). Justice Kennedy joined in Scalia's dissent, which supports the observation that Kennedy's

tion of Washington, the IOLTA takings case.<sup>207</sup> In *Brown*, Justice Scalia dissented from the majority holding that no compensation was due and postulated:

[p]erhaps we are witnessing today the emergence of a whole new concept in Compensation Clause jurisprudence: the Robin Hood Taking, in which the government's extraction of wealth from those who own it is so cleverly achieved, and the object of the government's larcenous beneficence is so highly favored by the courts (taking from the rich to give to indigent defendants) that the normal rules of the Constitution protecting private property are suspended.<sup>208</sup>

Justice Scalia's "Robin Hood Taking" metaphor demonstrates the extension of his It's Mine rhetoric. Moreover, his comments about the purpose of the IOLTA accounts – to fund "tax-exempt law-related charitable and educational purposes"<sup>209</sup> – also demonstrate It's Mine rhetoric and a rejection of an Isocratean sense of social responsibility.<sup>210</sup> Regarding the purpose of the account, Justice Scalia sarcastically writes: "Surely it cannot be that the Justices look more favorably upon a nationally emulated uncompensated taking of clients' funds to support (hurrah!) legal services to the indigent than they do upon a more local uncompensated taking of clients' funds to support nothing more inspiring than the . . . circuit courts."<sup>211</sup>

His sarcastic It's Mine comment is in response to the majority opinion's characterization of the purpose of the IOLTA funds, in which Justice Stevens conveys a Let's Share rhetoric that incorporates Isocrates' sense of the importance of social responsibility.

Even though there may be occasional misuses of IOLTA funds, the overall, dramatic success of these programs in serving the compelling interest in providing legal services to literally millions of needy Americans certainly qualifies the Foundation's distribution of these funds as a "public use" within the meaning of the Fifth Amendment.<sup>212</sup>

Justice Stevens also quotes the comments of the Ninth Circuit dissenters that the programs were "'an exceedingly intelligent idea'" and that they "'serve[d] a salutary purpose, one worthy of our support.'"<sup>213</sup> Once again, the justices employ competing rhetorics, and the tension builds in *Palazzolo* with Justice O'Connor's concurrence.

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rhetoric has shifted from the Let's Share rhetoric of *Lucas* to an It's Mine rhetoric in both *Palazzolo* and *Brown*. See discussion *infra* notes 258-61.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 224.

<sup>210</sup> See discussion *supra* note 33.

<sup>211</sup> *Brown*, 538 U.S. at 247 (Scalia, J., dissenting). This is an illustration of the point made by Jim Corder, that we are often so steeped in our own rhetorics that we cannot see the rhetoric of others. Corder, *supra* note 86, at 98. On the other hand, I may be so steeped in my own rhetoric that I cannot see that perhaps Justice Scalia is concerned with an Isocratean sense of social responsibility.

<sup>212</sup> *Brown*, 538 U.S. at 232.

<sup>213</sup> *Id.* at 232 n.7 (quoting *Washington Legal Found. v. Legal Found. of Washington*, 236 F.3d 1097, 1115 (9th Cir. 2001) (Kozinski, J., dissenting)); 271 F.3d 835, 867 (*en banc*) (Kozinski, J., dissenting).

### 3. Justice O'Connor's Opinion: Penn Central as "polestar"<sup>214</sup>

In contrast to Justices Kennedy and Scalia, Justice O'Connor's concurrence demonstrates the Let's Share rhetoric of possibility. While Justice Kennedy remanded the case to the state court for a *Penn Central* analysis, he did not elucidate how notice factored into reasonable investment-backed expectations. Other justices opined on this issue, however. Thus, although Justice O'Connor agrees with Justice Kennedy that notice does not totally bar a takings claim, she disagrees with Justice Scalia, who believes that notice is irrelevant to a takings claim.<sup>215</sup>

Justice O'Connor uses Let's Share rhetoric when she insists that notice is a factor to consider in determining whether investment-backed expectations are reasonable.<sup>216</sup> Her analysis focuses on the contingency and situational context of takings cases: "Accordingly, we have eschewed '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>217</sup> She notes that investment-backed expectations are just one factor in the *ad hoc* test and "are not talismanic,"<sup>218</sup> consequently, "[o]ur polestar instead remains the principles set forth in *Penn Central* itself."<sup>219</sup> By focusing on the balancing test, Justice O'Connor relies on *kairos* and the rhetoric of possibility, because she joins practical wisdom with the contingencies of a situation rather than on a discrete event, or *chronos*. She states that this approach "simply restores balance to that inquiry [concerning] the regulatory backdrop against which an owner takes title to property."<sup>220</sup>

The "justice and fairness" of O'Connor's Let's Share rhetoric allows compensation for takings of private property when it would be unfair for the individual "to bear public burdens, which, in all fairness and justice, should be borne by the public as a whole."<sup>221</sup> Thus, unlike Justice Scalia, Justice O'Connor does not see property rights as frozen in time, but as fluid, depending on the particular circumstances of a case.

Justice O'Connor makes a kairic argument for the propriety or balance of her position. She urges that factoring notice into the analysis is more just than the approach of either the Rhode Island Supreme Court or of Justice Scalia. It is more just than the Rhode Island Supreme Court's holding which gives "investment-backed expectations . . . exclusive significance in the *Penn Central* analysis" because that results in giving the State "far too much power to redefine property rights upon passage of title."<sup>222</sup> Likewise, O'Connor argues that

<sup>214</sup> Palazzolo v. Rhode Island, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring).

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* In dissent, Justices Ginsburg, Souter, Breyer and Stevens agree with O'Connor's view. *Id.* at 654 n.3 (Ginsburg, J., dissenting); *id.* at 654-55 (Breyer, J., dissenting); *id.* at 643, n.6 (Stevens, J., concurring in part and dissenting in part).

<sup>217</sup> *Id.* at 633 (O'Connor, J., concurring).

<sup>218</sup> *Id.* at 634.

<sup>219</sup> *Id.* at 633.

<sup>220</sup> *Id.* at 635.

<sup>221</sup> *Id.* at 633.

<sup>222</sup> *Id.* at 635.

her approach is more just than Scalia's approach of not giving investment-backed expectations any significance because that results in "some property owners . . . reap[ing] windfalls and an important indicium of fairness is lost."<sup>223</sup> Thus, Justice O'Connor displays the rhetoric of Let's Share because she focuses not on possible "windfalls" to the government, but on the *Penn Central* balancing test, which requires a "careful examination and weighing of all the relevant circumstances in this context."<sup>224</sup> Under Justice O'Connor's Let's Share approach, the state's wetland regulations may very well affect the use of property, but determining whether the regulation is a taking requires a flexible determination based on the contingency of the situation.

#### 4. Justice Stevens' Dissent: "A taking is a discrete event"<sup>225</sup>

Justice Stevens' opinion takes a different tack by considering standing, rather than notice.<sup>226</sup> His dissent demonstrates both It's Mine and Let's Share rhetorics. Justice Stevens uses It's Mine rhetoric when he reasons that Palazzolo has no standing because he did not own the property in 1971 – the year the wetlands regulations were adopted, and thus when the taking occurred.<sup>227</sup> He accuses the majority of "oversimplify[ing] a complex calculus,"<sup>228</sup> which is the *chronos* of a taking: "A taking is a discrete event . . . . Like other transfers of property, it occurs at a particular time, that time being the moment when the relevant property interest is alienated from its owner."<sup>229</sup>

In Palazzolo's case, Justice Stevens concludes that the taking occurred in 1971 when the regulations were adopted<sup>230</sup> because "the regulations encumbered the title which was purchased."<sup>231</sup> The regulations provided that "there 'can be no fill for any likely or foreseeable use,'" and thus diminished the property value when they were adopted.<sup>232</sup> His decision emphasizes the *chronos* of the discrete taking, and employs the Aristotelian rhetoric of It's Mine to con-

<sup>223</sup> *Id.* Justice O'Connor also criticizes Justice Scalia's "government-as-thief" simile as confusing two separate questions: whether the state acted within its police powers, and whether the landowner is entitled to just compensation. She sees Justice Scalia's analysis as improperly focusing on whether the state acted within its police powers, an issue not relevant to this case. *Id.* at 636.

<sup>224</sup> *Id.* at 636.

<sup>225</sup> *Id.* at 637 (Stevens, J., concurring in part and dissenting in part).

<sup>226</sup> *Id.* at 641-42.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 638.

<sup>229</sup> *Id.* at 638-39.

<sup>230</sup> *Id.* at 641-42.

<sup>231</sup> Eric D. Albert, *If the Shoe Fits, [Don't] Wear It: Preacquisition Notice and Stepping Into the Shoes of Prior Owners in Takings Cases After Palazzolo v. Rhode Island*, 11 N.Y.U. ENVTL. L.J. 758, 795 (2003). Albert reads the majority decisions to allow Palazzolo standing because he "'stepped into the shoes' of the prior owner upon transfer of title . . . and thus did, in a technical sense, hold the property right before the government acted to take it away." *Id.* at 796. This explanation of the majority holding is kairic because it considers notice and timing to be on a fluid and flexible scale.

<sup>232</sup> *Palazzolo v. Rhode Island*, 533 U.S. 606, 641 (2001) (Stevens, J., concurring in part and dissenting in part). Stevens distinguishes these facts from those in *Nollan* because in that case the taking (a public access exaction) occurred after the property was transferred. *Id.* at 642-43. Stevens reasons that notice of the possibility of a future taking does not bar a landowner's claim, but is relevant to an *ad hoc* determination. *Id.* at 643 n.6.

clude that "it is pellucidly clear" that Palazzolo lacked standing.<sup>233</sup> However, his decision also contains an element of Sophistic Let's Share rhetoric in his discussion about Palazzolo's prospective rights.

Stevens analogizes the prospective rights to the situation of trespass in a fruit orchard: "A new owner may maintain an ejectment action against a trespasser who has lodged himself in the owner's orchard but surely could not recover damages for fruit a trespasser spirited from the orchard before he acquired the property."<sup>234</sup> Thus, Justice Stevens' rhetoric of actuality focuses primarily on *chronos*. However, his analysis has a hint of *kairos* in the use of his fruit orchard analogy, which appeals to the justice of right timing – the injustice in allowing Palazzolo to recover for a wrong done to another, but the justice of allowing him to prevent a continuing harm, such as an invalidly enacted regulation.<sup>235</sup>

It is also important to point out that although Justice Stevens primarily relies on *chronos* and It's Mine rhetoric in *Palazzolo*, in other recent takings cases he employs Let's Share rhetoric.<sup>236</sup> For instance in *Tahoe-Sierra*, which involved a challenge to a building moratorium on Lake Tahoe, Justice Stevens, who authored the majority decision, viewed property rights not as frozen in time, but as flexible, and he emphasized that takings should be determined by a pragmatic weighing of all factors.<sup>237</sup> He rejected a view of takings that would emphasize *chronos* by treating temporal segments as distinct property interests.<sup>238</sup> Rather, he stated: "In our view the answer to the abstract question whether a temporary moratorium effects a taking is neither 'yes, always' nor 'no, never,' the answer depends upon the particular circumstances of the case."<sup>239</sup>

#### D. The Ripeness Issue: "Ripeness is peculiarly a question of timing."<sup>240</sup>

Ripeness was the other issue the Supreme Court addressed in *Palazzolo v. Rhode Island*.<sup>241</sup> This issue asks whether there was a final determination by the agency that the court can review. In order to ripen his claim, Palazzolo was required to "obtain[ ] a final decision from the Council determining the permit-

<sup>233</sup> *Id.* at 641-42.

<sup>234</sup> *Id.* at 642.

<sup>235</sup> *Id.* However, Stevens also indicates that if the taking did not occur in 1971, Stevens says he would agree with Justice Ginsburg that the case was not ripe. *Id.* at 644.

<sup>236</sup> See *supra* text accompanying notes 212-13 (discussing *Brown v. Legal Found. of Washington*, 538 U.S. 216 (2003)).

<sup>237</sup> See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002). Stevens authored the majority opinion in which landowners challenged the moratoria on building in the region surrounding Lake Tahoe. Justice Stevens' decision held that the moratoria did not constitute categorical takings under a *Lucas* analysis. *Id.* at 320.

<sup>238</sup> *Id.* at 318. The landowners argued that their land should be viewed in temporal segments. Moreover, Justice Rehnquist, in his dissent, also urged a rule governed by *chronos*. *Id.* at 346-51 (Rehnquist, C.J., dissenting).

<sup>239</sup> *Id.* at 321.

<sup>240</sup> *Blanchette v. Conn. Gen. Ins. Corp.*, 419 U.S. 102, 140 (1974), quoted in Hof, *supra* note 80, at 836.

<sup>241</sup> See *supra* text accompanying note 80; see also Hof, *supra* note 80 (reviewing doctrine of ripeness in takings cases).

ted use for the land,"<sup>242</sup> because "[a] court cannot determine whether a regulation goes "too far" unless it knows how far the regulation goes."<sup>243</sup> However, under the futility exception, "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>244</sup> and the landowner is not required to submit "further and futile applications with other agencies."<sup>245</sup> The kairic nature of ripeness determinations in general is discussed above;<sup>246</sup> this section considers the competing rhetorics used in the Court's analysis.

The court in *Palazzolo* separately considered the question of ripeness for the wetlands portion and the uplands portion.<sup>247</sup> Justice Kennedy's majority decision begins with Let's Share rhetoric, but ends with It's Mine. In contrast, Justice Ginsburg's dissent consistently uses Let's Share rhetoric.

### 1. *The Wetlands: An Exercise in Futility*

First, was the denial for building on the wetlands portion ripe? *Palazzolo* filed the 1985 application to fill eleven of the eighteen wetland acres for a beach club; the Council denied this application for a special exception on the ground that a beach club was not a "compelling public purpose."<sup>248</sup> Was this denial ripe, or should *Palazzolo* have requested a more modest public use as the Rhode Island Supreme Court held?<sup>249</sup>

Even though, as discussed above, Justice Kennedy did not find the beach club aesthetically pleasing, in determining that the claim was indeed ripe, Justice Kennedy relied on kairic practical wisdom when he reasoned that it was not necessary for *Palazzolo* to file a more modest application for the wetlands portion because the outcome could be predicted: the Council would not allow any development whatsoever.<sup>250</sup> His reasoning employs Let's Share or Sophistic rhetoric of possibility by applying the futility exception to these facts, rather than requiring the certainty of a final judgment (*chronos*). Justice Kennedy's *kairic* discourse on this point verges on hyperbole when he states:

On the wetlands there can be no fill for any ordinary land use. There can be no fill for its own sake; no fill for a beach club, either rustic or upscale; no fill for a subdivision; no fill for any likely or foreseeable use. And with no fill there can be no

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<sup>242</sup> *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001) (citing *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985)).

<sup>243</sup> *Macdonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986), *cited in Palazzolo*, 533 U.S. at 622.

<sup>244</sup> *Palazzolo*, 533 U.S. at 620.

<sup>245</sup> *Id.* at 626.

<sup>246</sup> See *supra* text accompanying notes 80-82.

<sup>247</sup> *Palazzolo*, 533 U.S. at 621.

<sup>248</sup> *Id.* at 620. Under the agency rules, a landowner was generally prohibited from filling or building on wetlands, but could request a special exception to do so, "only where a 'compelling public purpose' is served." *Id.* at 619.

<sup>249</sup> *Palazzolo v. State*, 746 A.2d 707, 714 (R.I. 2000) (holding that the claim was not ripe because *Palazzolo* had not sought permission to develop a subdivision and because "he has not sought permission for less ambitious development plans").

<sup>250</sup> *Palazzolo*, 533 U.S. at 621.

structures and no development on the wetlands. Further permit applications were not necessary to establish this point.<sup>251</sup>

Rather than adopting the inflexibility and *chronos* of the final determination requirement, Kennedy considers the contingency and practicality (futility) of the situation. This holding and rationale may be contrasted with Justice Stevens' formalistic emphasis on *chronos*, discussed above, in which Stevens argues that Palazzolo had no standing to bring the takings claim.<sup>252</sup>

## 2. The uplands: A "bait-and-switch ploy"?<sup>253</sup>

The second ripeness issue concerned the uplands portion of the land. This land was not wetlands, and presumably, Palazzolo could have built on this portion, but, significantly, he did not submit an application to build on the uplands.<sup>254</sup> Thus, the Rhode Island Court held that his claim was not ripe.<sup>255</sup> The ripeness issue for the uplands centered on whether there was a known value for the land.<sup>256</sup> If "the value of the uplands [was] in doubt," as the state claimed, then a court could not rule on a takings claim.<sup>257</sup>

Once again, in holding that the uplands claim was ripe, Justice Kennedy emphasized the Let's Share rhetoric of possibility. However, his analysis has threads of It's Mine rhetoric, which becomes apparent only when his decision is contrasted with Justice Ginsburg's. Justice Kennedy reiterates the rule that "[a] court cannot determine whether a regulation goes 'too far' unless it knows how far the regulation goes."<sup>258</sup> He goes on to reject the state's contention that the value of the uplands portion was "in doubt" by ruling that the state waived the ability to controvert the \$200,000 value pled by Palazzolo when the state accepted this value at trial.<sup>259</sup> Kennedy's analysis again shows the practical wisdom of *kairos* that allows him to hold that "there is no genuine ambiguity in the record as to the extent of permitted development on petitioner's property, either on the wetlands or the uplands."<sup>260</sup>

However, Justice Kennedy's analysis is haunted by possible inequities, which Justice Ginsburg raises in her dissent. Reading Kennedy's analysis in light of Ginsburg's dissent suggests that Kennedy's It's Mine rhetoric dominates over his Let's Share rhetoric because his reasoning relies on *chronos*,

<sup>251</sup> *Id.* Kennedy used this same reasoning to overrule the Rhode Island Supreme Court's holding that the case was not ripe because Palazzolo had not submitted an application to build a subdivision, and yet, used the subdivision as a basis for damages. *Palazzolo*, 746 A.2d at 714. Justice Kennedy again applies Let's Share rhetoric to hold that Palazzolo was not required to submit a plan for a subdivision on the wetlands, because the agency would not allow a subdivision. *Palazzolo*, 533 U.S. at 624-26. "Petitioner was informed by the Council that he could not fill the wetlands; it follows of necessity that he could not fill and then build 74 single-family dwellings upon it." *Id.* at 624.

<sup>252</sup> See *supra* text accompanying notes 226-33.

<sup>253</sup> *Palazzolo*, 533 U.S. at 648 (Ginsburg, J., dissenting).

<sup>254</sup> *Id.* at 622.

<sup>255</sup> *Palazzolo*, 746 A.2d at 714.

<sup>256</sup> *Palazzolo*, 533 U.S. at 622-23.

<sup>257</sup> *Id.* at 622.

<sup>258</sup> *Id.* (quoting *Macdonald v. Yolo County*, 477 U.S. 340, 348 (1986)).

<sup>259</sup> *Id.* at 623.

<sup>260</sup> *Id.*

rather than *kairos*. This notion that the dissenting decision changes our reading of the majority decision is consistent with Paul Gewirtz's observation that:

[t]he existence of multiple opinions [in contemporary judicial opinions] defeats the ability of any single opinion to enshrine any particular version of reality as the undoubted truth . . . . Multiple opinions are also reminders that the sources of law at hand are far richer than any one account exhausts, that each account contains the shaping mind of its describer, and that judges come to different understandings about what the law means.<sup>261</sup>

In her dissenting decision, Justice Ginsburg employs the Sophistic rhetoric of possibility, or Let's Share. Justice Ginsburg's dissent makes a compelling argument that the lower court's value should not be binding, and that Kennedy's analysis is "inequitable."<sup>262</sup> Her argument is that Palazzolo used a "bait-and-switch ploy" regarding the \$200,000 value<sup>263</sup> because at the lower court level, Palazzolo claimed that the regulation was a *Lucas* total taking claim, and in order to defeat the total taking claim, the state needed merely to show that *some* valuable use of the land still existed.<sup>264</sup> The state's showing that the uplands would support at least one \$200,000 home defeated Palazzolo's claim that the regulation deprived him of all economically beneficial use of the land.<sup>265</sup> The state had no need to show whether more than one house could be built on the uplands or whether it had a value greater than \$200,000 because Palazzolo was not making a *Penn Central* claim.<sup>266</sup> From Ginsburg's view, the state did "not foreclose the possibility that [it] would *also* approve another home," but rather, "the State's submissions established only a floor, not a ceiling, on the value of permissible development."<sup>267</sup>

Justice Ginsburg called Palazzolo's maneuver a "bait-and-switch" ploy because at the Supreme Court level, Palazzolo asserted that the regulation was a taking under the *Penn Central* test and that only one house in the uplands would be approved.<sup>268</sup> Ginsburg thus questioned the ethics of the majority's waiver decision, resulting in a holding that the state had waived a claim that the uplands property was worth more than \$200,000, and opining that the value of the uplands was not known.<sup>269</sup>

Reading Justice Kennedy's majority opinion in light of Justice Ginsburg's criticism raises a question about which rhetoric his ripeness analysis employs. Reading Kennedy's decision first and in isolation from the other decisions sup-

<sup>261</sup> Paul Gewirtz, *Narrative and Rhetoric in the Law*, in *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 11-12 (Peter Brooks & Paul Gewirtz, eds., 1996).

<sup>262</sup> *Palazzolo*, 533 U.S. at 648 (Ginsburg, J., dissenting). Souter and Breyer joined in Ginsburg's dissent, and Breyer authored a separate dissent agreeing that the Palazzolo's claim was not ripe. *Id.* at 654 (Breyer, J., dissenting). Moreover, Stevens' dissent on the notice issue states that if Palazzo could somehow come up with an argument that would give him standing (such as the agency applying unforeseen interpretations or extensions of regulations), then Stevens would agree with Ginsburg's analysis that Palazzolo's claim was not ripe. *Id.* at 644, n.7 (Stevens, J., concurring in part and dissenting in part).

<sup>263</sup> *Palazzolo*, 533 U.S. at 648 (Ginsburg, J., dissenting).

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* at 648-49 (Ginsburg, J., dissenting).

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* at 651-52.

<sup>268</sup> *Id.* at 652.

<sup>269</sup> *Id.* at 648-49.

ports a characterization of his decision as Let's Share rhetoric. However, reading his decision along with Justice Ginsburg's decision supports a characterization of his decision as It's Mine rhetoric because he has focused on the *chronos* of the proceedings to hold that the state waived the argument that the value of the uplands was in doubt. This is a particularly good example of how our interpretation of discourse shifts based on the given context.

Justice Ginsburg's dissenting decision has other indications of her discontent with the ethical dimension of *kairos* in Palazzolo's case. For instance, there is a suggestion that Palazzolo evidenced bad *ethos*, not only by the "bait-and-switch ploy," but also in his application to develop that land at all. Ginsburg quotes his "sworn 1983 answer to the question why he sought to fill uplands" as: "'Because it's my right to do if I want to to [sic] look at it [sic] is my business.'" <sup>270</sup> Ginsburg thus uses Let's Share rhetoric by focusing on the due measure aspect of *kairos* and on the particular circumstances of this case and of Palazzolo's claim. Justice Kennedy uses Let's Share rhetoric in analyzing the wetlands, and he uses both It's Mine or Let's Share rhetoric, with It's Mine dominating, in analyzing the uplands – depending on whether we read his decision in isolation or in conjunction with Justice Ginsburg's decision.

#### V. CONCLUSION: TAKINGS JURISPRUDENCE AS "A MODE OF 'IMPROVISATION'" <sup>271</sup>

The Takings Clause raises inherently kairic questions of timing and due measure, and courts resolve these questions using different rhetorical approaches. Thus, one way to explain the "muddle" <sup>272</sup> of takings cases is as the natural result of the collision between Let's Share and It's Mine rhetorics. Its Mine rhetoric sees property rights as fixed, analyzes situations using *chronos*, and emphasizes individual rights and custom over "the government-as-thief." <sup>273</sup> On the other hand, Let's Share rhetoric sees property rights as fluid and provisional. Let's Share rhetoric emphasizes *kairos* and the contingency of the situation. The recent case of *Palazzolo v. Rhode Island* <sup>274</sup> provides an example of these different rhetorics. *Palazzolo* also constitutes part of a body of kairic discourse, or takings case law as "a mode of 'improvisation.'" <sup>275</sup> A rhetorical analysis of takings case law opens up the tension between It's Mine and Let's Share rhetorics and thus both explains and complicates the "muddle."

<sup>270</sup> *Id.* at 647 n.1. Palazzolo's comment echoes the It's Mine rhetoric of the "Wise-Use" movement which believes "people have a right to do with their land as they damn well please." See Duncan, *supra* note 116, at 1097.

<sup>271</sup> Sipiora, *supra* note 2, at 6-7.

<sup>272</sup> ROSE, *supra* note 1, at 65-66.

<sup>273</sup> *Palazzolo*, 533 U.S. at 636 (O'Connor, J., concurring).

<sup>274</sup> *Id.* at 606.

<sup>275</sup> Sipiora, *supra* note 2, at 6-7.