SUPREME COURT OF THE UNITED STATES

No. 99–2047

ANTHONY PALAZZOLO, PETITIONER *v.*
RHODE ISLAND ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF RHODE ISLAND

[June 28, 2001]

JUSTICE SCALIA, concurring.

I write separately to make clear that my understanding of how the issues discussed in Part II–B of the Court's opinion must be considered on remand is not JUSTICE O'CONNOR's.

The principle that underlies her separate concurrence is that it may in some (unspecified) circumstances be "[un]fai[r]," and produce unacceptable "windfalls," to allow a subsequent purchaser to nullify an unconstitutional partial taking (though, inexplicably, not an unconstitutional total taking) by the government. *Ante*, at 4. The polar horrible, presumably, is the situation in which a sharp real estate developer, realizing (or indeed, simply gambling on) the unconstitutional excessiveness of a development restriction that a naïve landowner assumes to be valid, purchases property at what it would be worth subject to the restriction, and then develops it to its full value (or resells it at its full value) after getting the unconstitutional restriction invalidated.

This can, I suppose, be called a windfall– though it is not much different from the windfalls that occur every day at stock exchanges or antique auctions, where the knowledgeable (or the venturesome) profit at the expense of the ignorant (or the risk averse). There is something to be said (though in my view not much) for pursuing abstract

"fairness" by requiring part or all of that windfall to be returned to the naïve original owner, who presumably is the "rightful" owner of it. But there is nothing to be said for giving it instead to the *government*– which not only did not lose something it owned, but is both the *cause* of the miscarriage 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*. JUSTICE O'CONNOR would eliminate the windfall by giving the malefactor the benefit of its malefaction. It is rather like eliminating the windfall that accrued to a purchaser who bought property at a bargain rate from a thief clothed with the indicia of title, by making him turn over the "unjust" profit *to the thief*.*

In my view, the fact that a restriction existed at the time the purchaser took title (other than a restriction forming part of the "background principles of the State's law of property and nuisance," *Lucas* v. *South Carolina Coastal Council,* 505 U. S. 1003, 1029 (1992)) should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking. The "investment-backed expectations" that the law will take into account do not include the assumed validity of a restriction that in fact deprives property of so much of its value as to be unconstitutional. Which is to say that a *Penn Central* taking, see *Penn Central Transp. Co.* v. *New York City,* 438 U. S. 104 (1978), no less than a total taking, is not absolved by the transfer of title.

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*Contrary to JUSTICE O'CONNOR's assertion, *post,* at 4, n., my contention of governmental wrongdoing does not assume that the government exceeded its police powers by ignoring the "public use" requirement of the Takings Clause, see *Hawaii Housing Authority* v. *Midkiff,* 467 U. S. 229, 240 (1984). It is wrong for the government to take property, *even* for public use, without tendering just compensation.