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The Odyssey of Palazzolo: Public Rights Litigation and Coastal Change

Laura J. Hatcher, Ph.D.

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Cover Page Footnote

Department of Political Science, Southern Illinois University. I wish to thank Jesse Rapport-Herbert and Alex Rapport Herbert for their research assistance during archival research done on the hurricanes in Rhode Island during the summer of 2009. In addition, some of the primary source material here comes courtesy of Special Collections, University of Rhode Island Library. I have spent many hours there, researching the papers of Governor Frank Licht, Senator John Chafee, and Senator Claiborne Pell. That work informs this essay even when not directly pertinent to the argument made here. I have, of course, cited documents from that collection where appropriate.

THE ODYSSEY OF *PALAZZOLO*: PUBLIC RIGHTS LITIGATION AND COASTAL CHANGE

*Laura J. Hatcher, Ph.D.**

Introduction	849
I. <i>Palazzolo's</i> Regulatory Odyssey	851
II. The Ocean State	856
Conclusion	861

INTRODUCTION

The questions of how responsible and how effective litigation on behalf of public rights is complicated in any of law, but perhaps issues involving property rights on long coastlines in an era of sea rise and climate changes presents an especially difficult problem. First and foremost, there are many forms of property in contemporary society, which already makes determining the contents of the “bundle of sticks” making up property rights complicated. Property structures relations not only between individuals and their government, but also individuals and individuals, individuals and businesses, businesses and businesses, etc., and changes in those relationships have long term consequences. With regard to the case study I will discuss here, the relationship between individuals and their natural environment enters into this mix in ways that, while not at all uncommon to property rights disputes involving land, certainly can provide us with an exemplary case for understanding how complex these relations are.

One can imagine moments when property rights litigation along the coast would be both ethical and responsible. Hypothetically, if a regulating agency is favoring permits from a particular type of business or particular individuals, while denying similar permit requests from similar business or

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individuals, a closer look at the permitting process is clearly merited. In such circumstances, having a court review the process to ensure that the rules are being followed makes very good sense, indeed. At other times, when the law has been in a process of change for a time, asking a court to determine the rights of disputants in order to clarify the law also makes a good deal of sense. There clearly are other instances that make litigation in this arena important as an avenue for ensuring rights of individuals. Yet, because property rights cases can often take years or even decades to gestate in the administrative process and lower courts, it seems likely that, like *Palazzolo*, judgments about ethics and responsibilities may very much depend upon where in the timeline of the dispute you look, the particular exercises of state police powers in question, as well as a consideration of the broader contextual factors giving shape to the dispute and litigation.

Unfortunately, this is a much abbreviated version of the story, as space will not allow a full telling of a dispute that took nearly four decades to develop and resolve. Even so, I hope to persuade my readers that the complexities of these problems deserves much more attention than litigation often affords them; and so, I suggest, we need to think about them away from the litigative process to better understand what litigation does to our understanding of rights claims. And I do this, even as I hold to the possibility that at times going to court makes sense while simultaneously asserting that takings litigation aimed at broader social or political change may not be the most responsible and ethical way of ensuring individual rights in the face of natural disasters and coastal change.

This essay will proceed as follows. First, I will briefly recap the story of the court case and the key moments in the decision that, I think, exemplify the problems with this litigation. The goal, here, will not be to produce a careful recounting of the facts of the case. Rather, I want to point out the moments in a well known narrative that deserve some special attention given the broader issues of governance the state of Rhode Island was facing and the changing legal background in which Mr. Palazzolo was operating. In the section following, I will rework the tale of the dispute by placing it into a broader narrative involving the changing regulatory landscape in Rhode Island and the state's goals in making those changes. Here, we find a state struggling in the wake of natural disasters and attempting to create a new administrative response that both draws on but resists certain federal level activities. Focusing on the beginnings of coastal management, and the decision to grant (then revoke) of permits brings to light the messiness of changing regulatory environments and the confusions that result from them. Finally, I suggest that a review of the dispute in this context suggests that the ethics of litigating coastal takings cases may be complicated by the possibilities of natural disasters and sea level change.

I. PALAZZOLO'S REGULATORY ODYSSEY

The odyssey that produced *Palazzolo v. Rhode Island*¹ has been recounted in various articles and books.² The story of the dispute begins in the late 1950's, when Anthony Palazzolo, a lifelong resident of Westerly (located along the southern shore of the state) and owner of a junkyard, joined in corporate partnership that had bought 18 acres of land along the southern coast of Rhode Island in his native county.³ The land had been zoned several years earlier for a residential subdivision. The property itself is on a thin bar of land sitting between Winnepaug Pond and the Atlantic Ocean. Mr. Palazzolo was aware that the land was marshy ponds and would require dredging and filling in order to develop for residential use.⁴ However, in 1959 and throughout much of the 1960's, the areas adjacent were filled in and dredged back so that in Mr. Palazzolo's mind at the time of purchase, he believed that if he went through the appropriate permitting processes, he would be able to use the land as he hoped.⁵ After several years struggling with the permitting process, in 1971, the Division of Harbor Regulation approved an application he had made in 1963, and an application made in 1966, and told Mr. Palazzolo to decide between the two (he could only build according to one of the two plans).⁶ However, a few

1. 533 U.S. 606 (2001).

2. See generally David E. Cole, *Analytical Chronology of Palazzolo v. Rhode Island*, 30 B.C. ENVTL. AFF. L. REV. 171 (2002); H. David Gold, *Relaxing the Rules: The Supreme Court's Quest for Balance in Palazzolo v. Rhode Island*, 29 ECOLOGY L.Q. 137 (2002).

3. This date is somewhat misleading; the issue of whether Mr. Palazzolo owned all the land in 1959 was something the Court had to decide. The corporate partnership in which Mr. Palazzolo initially participated acquired the land in 1959. In 1978, however, he became sole owner when the partnership dissolved. Based upon the various dealings he made, the state argued that he did not own the land in full title until 1978, after the regulations were in place, and therefore he could have no expectations of building along the original plans. The Pacific Legal Foundation ("PLF") lawyers argued before the Court that the ownership rights were handed down from partner to partner, and that since, historically, building had been permitted in the area, Mr. Palazzolo had every right to expect he would be able to build. See Transcript of Oral Argument at 17, *Palazzolo*, 533 U.S. 606 (No. 99-2047). During oral arguments, however, it became clear that this would not be the take of at least some of the justices. Justice Souter asked, "If the rights to land use pass from owner to owner, how far back does it go? There is no logical stopping place until you get back to Roger Williams and the 17th-century settlement." *Id.*; see also Linda Greenhouse, *Supreme Court Roundup: Justices Press for Clarity in a Property Rights Dispute*, N.Y. TIMES, Feb. 27, 2001, at A18.

4. See Anthony Flint, *Landlocked on the Coast for 40 Years, Anthony Palazzolo Has Battled RI Over Property Rights, All the Way to the Supreme Court*, BOSTON GLOBE, Nov. 3, 2002, at B1.

5. *Id.*

6. Cole, *supra* note 2, at 177.

months later the DHR revoked their assent. Mr. Palazzolo never appealed this revocation.⁷

His difficulties became worse in 1971 after the establishment of the Coastal Resource Management Council (“CRMC”). As discussed below, the state legislature gave the CRMC power to regulate the area, with the two-fold and contradictory mandate to both preserve and regulate development of the coast line.⁸ Moreover, the CRMC was granted authority, “over land areas (those areas above the mean high water mark)” and limited “to that necessary to carry out effective resources management.”⁹ Because the CRMC’s jurisdiction is defined by the mean high water mark (i.e., think of the scum line that forms after high tide in tidal zones—this is roughly the line that is used to determine the CRMC’s jurisdiction), the state legislature had created one of the most powerful organizations in the state. Since there are 420 miles of coastline in Rhode Island, and tidal waters include parts of the rivers running into various bays, the CRMC is responsible for permitting and regulating a very large portion of the land in our smallest state.

Over the course of the next decade and a half, while Rhode Island began to work to solve its coastal erosion and pollution problems within the frameworks of federal laws and state regulations, the CRMC’s power grew. Mr. Palazzolo, at times with long periods between permit applications, continued to try to develop his land. Finally, in the wake of a state level decision, *Annicelli v. Town of South Kingstown*,¹⁰ Mr. Palazzolo filed a complaint alleging inverse condemnation, and demanded that the state pay him \$3 million for the property.¹¹ As his case made its way through the Rhode

7. *Id.*

8. See R.I. GEN. LAWS § 46-23-1 (1956). The goals of the program are: [to carry out the] policy of this state to preserve, protect, develop, and where possible, restore the coastal resources of the state for this and succeeding generations through comprehensive and coordinated long-range planning and management designed to produce the maximum benefit for society from such coastal resources; and that preservation and restoration of ecological systems shall be the primary guiding principle upon which environmental alteration of coastal resources will be measured, judged, and regulated.

Id. § 46-23-1(a)(2).

9. *Id.* § 46-23-6(2)(iii). The statute continues, “This shall be limited to the authority to approve, modify, set conditions for, or reject the design, location, construction, alteration, and operation of specified activities or land uses when these are related to a water area under the agency’s jurisdiction, regardless of their actual location.” *Id.*

10. *Annicelli v. Town of South Kingstown*, 463 A.2d 133 (R.I. 1983).

11. *Palazzolo v. Coastal Res. Mgmt. Council of State*, WC No. 88-927, 1988 WL 1017232, at *1 (R.I. Super. Ct. Oct. 31, 1988).

Island courts, Mr. Palazzolo's arguments were rejected again and again, and more than once for lack of ripeness.¹²

In reviewing a the decision by the Coastal Resources Management Council's ("CRMC") to deny Palazzolo's request to fill in the salt marsh on his land. The decision was upheld by the Superior Court.¹³ The CRMC had denied his permit arguing that the eighteen acres of land that Mr. Palazzolo wanted to fill in amounted to 12% of the marshes surrounding the pond – filling this area in would jeopardize the future of Winnapaug Pond. Ultimately, the Rhode Island Supreme Court rejected his appeal, finding that the case was not ripe as Mr. Palazzolo had not yet "explored development options less grandiose than filling eighteen acres of salt marsh."¹⁴

The case made its way to the U.S. Supreme Court after the Pacific Legal Foundation stepped in and sponsored the case. The Court decided the case in 2001 and its decision was hailed as a victory by both the State Attorney General and the Pacific Legal Foundation.¹⁵ Much of the decision is focused upon the issue of ripeness, and indeed, if any part of the majority opinion is important for future cases, it is this section of the opinion. For our purposes, one of the more interesting moments in the case had to do with the state's contention that Palazzolo had not become sole owner of the land until *after* the wetlands regulations were in place. Thus, reasoned Rhode Island, he could not have expectations of filling the wetlands. The state relied upon two different standards: one, based in *Lucas*,¹⁶ relied heavily on the background principles of the state's property law; and second, grounded in an understanding of investment-backed expectations based upon the ruling in *Penn Central*.¹⁷ The Court, reading these two together, found that they produced one "sweeping" rule: "A purchaser or a successive title holder like petitioner is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking."¹⁸

The Court disagreed with Rhode Island's reading of the case law. In an oft quoted passage, Kennedy wrote, "The State may not put so potent a

12. Palazzolo v. State *ex rel.* Tavares, 785 A.2d. 561, 561 (R.I. 2001); Palazzolo v. State *ex rel.* Tavares, 746 A.2d 707, 717 (R.I. 2000); Palazzolo v. State, No. WM 88-0297, 2005 WL 1645974, at *15 (R.I. Super. Ct. 2005); Palazzolo v. Coastal Res. Mgmt. Council, No. C.A. 88-0297, 1997 WL 1526546, at *7 (R.I. Super. Ct. 1997); Palazzolo v. Coastal Res. Mgmt. Council, C.A. No. 86-1496, 1995 WL 941370, at *7 (R.I. Super. Ct. 1995).

13. *Palazzolo*, 2005 WL 1645974, at *15.

14. *Palazzolo*, 746 A.2d at 714.

15. See, e.g., Peter B. Lord, *Turf Battle Supreme – Property Rights Affirmed; Payment Denied*, PROVIDENCE J. BULL., June 29, 2001, at 1A (discussing the state's claim to victory).

16. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

17. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

18. *Palazzolo v. Rhode Island*, 533 U.S. 606, 626 (2001).

Hobbesian stick into the Lockean bundle.”¹⁹ He went on to argue that, while states are within their authority to set rules for the improvement of land and valid zoning and land-use restrictions, the takings clause provides owners with the right to claim that the state is exercising its authority in an unreasonable or onerous way, creating circumstances compelling compensation.²⁰ If Rhode Island’s interpretation of the case law were correct, than future owners would not be able “to challenge unreasonable limitations on the use and value of land.”²¹ Kennedy appeared to find this especially problematic because, in takings cases, a claim may take years to ripen. An heir to land that has such a claim going through this process would not be able to press the claim and assert a taking. “The State’s rule,” wrote Kennedy, “would work a critical alteration to the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest which was possessed prior to the regulation. The State may not by this means secure a windfall for itself.”²² Moreover, Kennedy found this proposed rule to be “capricious in effect”:

The young owner contrasted with the older owner, the owner with the resources to hold contrasted with the owner with the need to sell, would be in different positions. The Takings Clause is not so quixotic. A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken.²³

Kennedy then distinguished the type of taking presented in *Palazzolo* with direct condemnation. In direct condemnation cases or in a physical taking, the extent of the taking is already known.²⁴ The case ripens quickly and so the award goes to the owner at the time of the taking.²⁵ However, as *Palazzolo* demonstrates, a takings case can ripen slowly over years when regulations are in question. Kennedy relied upon the decision in *Nollan v. California Coastal Commission*²⁶ in finding that in land-use regulation cases, it is not only illogical, but also unfair to stop takings claims because there was a post-enactment transfer of ownership and the previous owner had not been able to take the steps to ripen the claim.²⁷ The state, in press-

19. *Id.* at 627

20. *Id.* at 627-30.

21. *Id.* at 627.

22. *Id.*

23. *Id.* at 628

24. *Id.*

25. *Id.* at 629.

26. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987).

27. *Palazzolo*, 533 U.S. at 629.

ing their reading of the case, relied upon *Lucas* and the idea that the background principles of the state's property law determine what expectations can be shaped.²⁸ Kennedy rejects this as an argument because, he says, the state seems to want to say, "any new regulation, once enacted, becomes a background principle"²⁹

The decision itself was murky in places, and did not produce a clear win for either side of the argument. The decision was perhaps not as important to either side as both sides tried to claim at the time, what seems important here is that the decision itself did not do what property rights advocates had hoped, nor did it do what the state of Rhode Island wanted it to do.³⁰ The property rights movement did not receive a ruling that bolstered or clarified *Lucas*. Nor did the State Attorney General receive a decision that provided clear direction concerning the reach of the state's ability to regulate coastal lands. Instead, Kennedy chose a solomonic approach, focusing his decisions on elements of the case that did not reach the issue of a regulatory taking. Yet, the understanding of ripeness may well have opened the door to the introduction of more of these cases entering the courts generations after the land was originally purchased. Kennedy likely had good reasons for this choice. During oral arguments, it became clear that the Palazzolo claim could not conform to the definition of a "total takings" in regulatory takings law.³¹ There were two acres of useable upland, and it was clear that because of this the Court was not willing to use the case to make a clear statement about regulatory takings.

At the same time, however, it is important to note that a claim that has taken decades to ripen (even generations) may become deeply problematic in part because the changing context in which the dispute is understood may change the very nature of the disagreement.³² For example, the deci-

28. *Id.*

29. *Id.*

30. See Lord, *supra* note 15.

31. Transcript of Oral Argument at 7, *Palazzolo*, 533 U.S. 606 (No. 99-2047).

32. As one contemplates the possibility of property cases taking decades to ripen, and families being affected, one is painfully reminded of the warning that Charles Dickens gave us in his novel, *Bleak House*. CHARLES DICKENS, *BLEAK HOUSE* 5-6 (Pollard & Moss, London 1884) (1853). In it, a court case involving family inheritance takes, quite literally, generations to resolve. In the meantime, the lawyers become rich and the family members move on, in some cases to disrepute while other members simply leave the case to run its own course. Ultimately, more lives are destroyed by the case than are helped. As Dickens writes in the first chapter:

How many people out of the suit Jarndyce and Jarndyce has stretched forth its unwholesome hand to spoil and corrupt, would be a very wide question. From the master, upon whose impaling files reams of dusty warrants in Jarndyce and Jarndyce have grimly writhed into many shapes; down to the copying clerk in the Six Clerk's Office who has copied his tens of thousands of Chancery-folio pages

sion did not address some of the broader issues that were playing themselves out in the state during the entire period of time from Mr. Palazzolo's purchase to the present day. Before considering these matters, we will take a step back and try to understand (however briefly) what some of those broader issues were and continue to be. The goal in the following section of this paper is to demonstrate that the dispute in which Mr. Palazzolo found himself mired had much to do with the changing notions of "coasts," "wetlands," and, quite importantly, the political status of the CRMC. What we, today, call "coastal zone management" has always been an element of law in Rhode Island, though it had a much different character in other periods of the state's history.³³ One final note: the administrative developments discussed below form part of a rich primordial soup in which the dispute finds its genesis. In order to understand some of those changes, I will back up a little further in time in an attempt to show that the production of the space we call "wetlands" along this coast is, as Lefebvre has suggested, "a set of relations between things."³⁴ Those "things" include people, governments, as well as the changing conditions of the coast.

II. THE OCEAN STATE

Palazzolo v. Rhode Island took over thirty years to make its way to the U.S. Supreme Court, and was not fully resolved until nearly three years after the its ruling in 2001. This very long period of time was filled with many decisions made by the leaders of the state that, ultimately, set the stage for the Supreme Court case. Yet, looking at the longer period of time provides us with a better sense of how this local dispute was part of a historical process that ultimately shaped an element of our national law.

Divided by rivers making their way to the ocean, the State of Providence Plantations and Rhode Island has always depended upon the ocean and the coast for its very existence. Indeed, from its earliest days, the importance

under that eternal heading; no man's nature has been made better by it. In trickery, evasion, procrastination, spoliation, botheration, under false pretences of all sorts, there are influences that can never come to good . . . and even those who have contemplated its history from the outermost circle of such evil, have been insensibly tempted into a loose way of letting bad things alone to take their own bad course, and a loose belief that if the world go wrong, it was, in some off-hand manner, never meant to go right.

Id. at 5-6. In the novel, when the case is finally decided, there is no inheritance left and the family members who may be able to inherit are left sick and destitute.

33. See Dennis W. Nixon, *Evolution of Public and Private Rights to Rhode Island's Shore*, 24 SUFFOLK U. L. REV. 313 (1990)

34. HENRI LEFEBVRE, *THE PRODUCTION OF SPACE* 83 (Donald Nicholson-Smith trans., Wiley-Blackwell 1991) (1974).

of the ocean to the economics and culture of the state cannot be overstated. As one historian has written, “From its founding through the Colonial Era, Rhode Islanders founded the bulk of their towns on the Narragansett Bay. Geography provided a physical setting for extensive maritime commerce, and Rhode Island came to be known as New England’s ‘ocean colony.’”³⁵ Even today, Newport, Jamestown and the communities on the Narragansett Bay perform a vital role in the state’s economic health as tourist attractions.

From a legal standpoint, the ocean’s importance has played a role in the history of the state by not only constructing some of its boundaries, but also as the site of legal disputes and administrative contestations. In its early days, the state allowed development of navigable waterways, for example, wharf construction, to promote economic development.³⁶ However, in the twentieth century, the notion that the swampy, marshy coastal lands were not “wastelands,” as stated in the King’s colonial charter, but rather “wetlands” that have an importance all their own, was one that came from learning more about the relationship of the ocean to storm surges and the growing need to regulate development in the form of housing, tourism, and fisheries. The politics of the legal dispute as it worked its way through the regulatory processes was one part of the constitution of wetlands in the state. These were politics that, in many ways remained distinct from the final arguments made to the U.S. Supreme Court by the lawyers for the Pacific Legal Foundation who represented Mr. Palazzolo. They were, however, lurking in the background of the Attorney General’s position.³⁷ More importantly, if one only considers the court cases, they certainly predated the Supreme Court decision by over a decade; and by two decades, if one looks beyond the cases and into the administrative process.

From the State’s perspective, the problems with coastal and land management began in 1938 when a powerful hurricane hit the eastern seaboard, causing massive devastation to the area. This hurricane, horrific in its speed and force, has never received a name beyond the designation of “the Great Hurricane of 1938.” In the Ocean State, it resulted in 262 deaths, and property damage of approximately \$100 million 1938 dollars (approximately \$1 billion 2008 dollars). In 1944, another hurricane hit the eastern coast and also caused enormous damage. Then, again, in 1954, Hurricane Carol wreaked devastation on a level with the 1938 hurricane; though

35. JOSEPH A. CONFORTI SAINTS AND STRANGERS: NEW ENGLAND IN BRITISH NORTH AMERICA 68 (2006).

36. Nixon, *supra* note 33, at 313.

37. See Brief for Respondents, *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) (No. 99-2047); see also Transcript of Oral Argument at 43-45, *Palazzolo*, 533 U.S. 606 (No. 99-2047) (discussing Rhode Island’s legal past).

unlike that earlier hurricane, it caused only 19 deaths, while destroying twice as many structures and causing \$200 million dollars in damage.³⁸ Cumulatively, the damage caused by these three hurricanes—one a decade for three decades—forced state governments in the northeast to move to deal with the economic difficulties that arose in the wake of floods and high winds. Damaged and ruined homes, businesses that were destroyed, and flooded land that was expensive to drain and fill, were all parts of the state government's concerns. Along with these issues, a growing body of science pointed out that the marshy areas along the coast were quite likely necessary for protecting the land and its inhabitants during these storms.

Each hurricane hit the southern coast of Rhode Island very hard. This reality meant that Rhode Island, in particular, needed to act to protect its citizens as well as the land within its borders, a core element of its sovereignty and part of its state police powers. In direct response to Hurricane Carol, the Rhode Island Development Council published a study of the Rhode Island Coastal Region.³⁹ The report's aim was to consider ways to minimize damage not only along the coast but in the state as a whole from future storms. In 1956, the state passed the "Shore Development Act of 1956" in the hopes of assisting municipalities in protecting the beach areas from further erosion and damage.⁴⁰ The agency within the state assigned with implementation of this act was the Department of Natural Resources, Division of Harbors and Rivers. It was from this agency that Palazzolo and his business partners would, initially, need to apply for permits to build on their land. But already we see with this early activity the state was working toward solving a serious problem, and in so doing, was beginning a process that would at the shift some of the property relations along the coast.

Increasing regulation at the national level made it more difficult to get permits to build in local areas coming to be known as the coastal zone because it also is subject to flooding, and even more difficult to have flood

38. UNIV. OF R.I. SEA GRANT PROGRAM, COASTAL RES. CTR., HURRICANES IN RHODE ISLAND, <http://nsgl.gso.uri.edu/riu/riug97006.pdf> (last visited Feb. 11, 2009).

39. Information concerning this report and early regulatory efforts is drawn heavily from Lee R. Whitaker, A Review and Evaluation of the State of Rhode Island Coastal Resources Management Program (1981) (unpublished Master's Thesis, Univ. of R.I., on file with author). Whitaker's master's thesis, I discovered while doing field work, is both widely known and frequently cited in reports about the Coastal Resource Management Council and statewide planning. Whitaker discusses the Development Council's 1956 report entitled *The Rhode Island Shore, a Regional Guide Plan Study, 1955-1970*, that attempted to establish a fifteen year plan for regulation along the coast. See Whitaker, *supra*, at 23-24. The Development Council was, according to Whitaker, a precursor to the Department of Economic Development. *Id.*

40. R.I. GEN. LAWS §§ 46-3-1 to -30 (1956).

insurance cover new construction.⁴¹ Rhode Island, with its extensive coastline was part of this national trend. While it was possible to build without a permit, to do so meant that they would have to build without a mortgage or bank financing.⁴² This was prohibitive, to say the least, for anyone who was not already wealthy; moreover, it was truly high risk because clearly based upon recent experience, the area *was* at risk for storm damage and flooding. Rhode Island (and other coastal states) continued to struggle with these issues through the 1960's.

In March of 1969, just a few months after taking office, Governor Frank Licht set up a committee to look into and consider how best to regulate the coastal area. The Technical Committee on the Coastal Zone released its preliminary findings and recommendations a year later, in March of 1970. In part, the creation of the committee was a response to two other documents that had been published in early 1969: a report written by the Natural Resources Group, and the report of the Commission on Marine Science, Engineering and Resources.⁴³ The latter was commissioned by the U.S. Congress, and was known as the Stratton Commission.⁴⁴ Together, they highlighted for the Governor and his staff the need to manage the coastal zone more effectively in order both make use of the coast for a variety of economic activities, while also seeking out funding through a promising federal level commitment to coastal zone management.

With these documents in the background, Governor Licht charged the Technical Committee to consider what "effective management" of the Nar-

41. Dan R. Anderson, *The National Flood Insurance Program—Problems and Potential*, 41 J. RISK & INS. 579 (1974); Robert S. Felton et al., *A Mid-1970 Report on the National Flood Insurance Program*, 38 J. RISK & INS. 1 (1971).

42. See Anderson, *supra* note 41, at 589 (discussing this from an historical perspective).

43. NATURAL RES. GROUP, REPORT ON THE ADMINISTRATION OF NARRAGANSETT BAY (1969); see also COMM'N ON MARINE SCI., ENG'G & RES., OUR NATION AND THE SEA (1969), available at <http://www.lib.noaa.gov/noaainfo/heritage/stratton/title.html>.

44. The Stratton Commission was a blue ribbon commission established in 1966 through the Marine Resources and Engineering Development Act. Among the commission members was John Knauss, Dean of the Graduate School of Oceanography, University of Rhode Island. Knauss would go on to play a significant role at URI by establishing the Coastal Research Center, which serves as main scientific resource for Rhode Island's Coastal Resource Management Council. For a discussion of the Stratton Commission and relevant historical information pertaining to its formation, see William J. Merrell et al., *The Stratton Commission: The Model for a Sea Change in National Marine Policy*, 14 OCEANOGRAPHY 11 (2001), available at http://www.tos.org/oceanography/issues/issue_archive/issue_pdfs/14_2/14.2_merrell_et_el.pdf. For a broader discussion of ocean policy and the politics around the changing federal environmental framework, see EDWARD WENK, JR., *THE POLITICS OF THE OCEANS* (1972).

ragansett Bay would require.⁴⁵ The Technical Committee, by all appearances, seems to have taken this charge very seriously indeed. After a series of meetings with a variety of citizen groups, industry groups, and individuals involved in land management, it wrote an extensive report about both the challenges and the opportunities involved in coastal management. Opportunities included increased tourism, more effective use of land for other economic development, as well as the opportunity to gain a foothold in the research funded through governmental agencies and industry into use of the bay for fishing as well as various forms of environmental science.⁴⁶ Among the challenges delineated by the group was coordinating the various environmental and land use planning agencies at the local and state levels, coordinating with other states through interstate compacts, as well as coordinating with the federal government where jurisdictions overlapped and in instances where the federal government could provide resources for state-level planning programs.⁴⁷

Within a few years, and largely because of the Technical Committee's recommendations, the state legislature passed the Rhode Island Coastal Resources Management Act of 1971.⁴⁸ This statute established the CRMC, which originally had close ties to the Department of Natural Resources. Yet it also remained distinct from that division and was provided with much broader powers of Coastal Management than the Division of Harbors and Rivers ever had. Thus, while Mr. Palazzolo's odyssey began with one regulatory agency, as of 1971 he was dealing with a new agency – and it

45. GOVERNOR'S TECHNICAL COMM. ON NARRAGANSETT BAY & COASTAL ZONE, REPORT OF THE GOVERNOR'S COMMITTEE ON THE COASTAL ZONE 2 (1970) [hereinafter COASTAL ZONE REPORT].

46. Indeed, one of the pieces of the story of environmental regulation in Rhode Island as well as various other coastal states is the desire for fostering oceanography as a science and bringing funding into their institutions of higher education. One of the key figures in this activity at the national level was Senator Warren Magnuson of Washington. He was intensely concerned with establishing a Sea Grant Program (analogous to the Land Grant Program that helped build up many of the universities in the Midwest). For a more detailed discussion of these activities, see SHELBY SCATES, WARREN G. MAGNUSON AND THE SHAPING OF TWENTIETH-CENTURY AMERICA 178 (1997) (discussing integrating ocean research and funding into Cold War discussions).

47. *Id.* at n.38. A lengthy discussion of the "activities and problems" involved in the coastal zone is contained in Part 3 of the Coastal Zone Report. See COASTAL ZONE REPORT, *supra* note 45, at 56-100. The Committee took pains to discuss these matters with reference to specific areas of the state and how management could affect various activities in them at the local level. For a discussion of the state-level coordination, see *id.* at 6-14, 36-48. See *also id.* at 49-55 (discussing local matters); *id.* at 32-35 (discussing interstate compacts); *id.* at 15-31 (discussing coordination issues).

48. R.I. GEN. LAWS § 46-23-1 (1956).

was an agency that was just beginning to understand both its power and its limitations.

The Coastal Resource Management Council came into being, then, in part as a response to the growing needs of the government to regulate its coast for both safety and economic development reasons. Unfortunately, organizing its offices and staff, as well as determining the reach of its own powers destabilized the property relations along the coast for quite some time. It was this tangled mess that Mr. Palazzolo stepped into when he began, once again, to file permits to develop his land. One could describe this situation as “changing expectations” in the way that property scholars sometimes describe changes to property rights law. I think, however, it is more accurately described as a changed and still changing political setting. Mr. Palazzolo had been granted, for a period of several months, applications he’d filed years before.⁴⁹ However, the CRMC rescinds those grants as soon as it has had time to review them. Eventually, Mr. Palazzolo throws up his hands and decides to go to court. The rest, as they say, is history. But that the situation was both frustrating and difficult to deal with from both Mr. Palazzolo’s perspective as well as from the state’s, cannot really be doubted. Clarity was needed in the law, but the politics were making that clarity difficult to achieve.

CONCLUSION

When the land is slowly eroding into the Atlantic Ocean, the very real possibility that the state itself will eventually disappear becomes shockingly apparent and, over the course of several decades, a narrative strategically deployed to control and define the space adjacent to the ocean. This increasingly real possibility made the necessity of protecting its coast very clear to the Rhode Island government. Sovereign power has a strong interest in ensuring the integrity of the land within its boundaries. “The problem of security”, as Foucault explained in his lecture of 11 January 1978, is the “problem of predicting a series of events.” He explained that “the management of these series that, because they are open series can only be controlled by an estimate of probabilities is pretty much the essential characteristic of the mechanism of security.”⁵⁰ The probabilities of a hurricane, of coastal erosion, and possible repercussions to watersheds all play a role in the story of wetlands in Rhode Island, and ultimately shape both the wet-

49. *In re* Application of Anthony Palazzolo (R.I. Dep’t of Natural Res., Div. of Harbors & Rivers Apr. 2, 1971) (admin. decision) (on file with papers of Governor Frank Licht, Box 75, File 1078, Special Collections, Univ. of R.I. Library).

50. MICHEL FOUCAULT, SECURITY, TERRITORY, POPULATION: LECTURES AT THE COLLEGE OF FRANCE, 1977-1978, at 20 (2007).

lands themselves and the rights claims made by Anthony Palazzolo over the course of forty years.

Rhode Island, in part because it has so much coast line to protect, began to reformulate its laws out of necessity to protect its own coast. The answers as to how one ought to proceed (i.e., what is responsible and what is ethical) may not rest in rights claims made in courts alone. Such an assertion flies in the face of an understanding of the takings clause that would either preclude such regulation altogether, or make it exceedingly difficult in situations where the economic stability of a state is already in question (i.e., the state won't be able to afford to pay "just compensation" for regulations).

The question of whether the state has the right to "take" (in the form of regulation) land in its coastal zones is a much more complex question that the courts, to date, have not been able to manage adequately. The problems faced along the coasts are difficult problems, and will likely not be settled by asking judges to determine the "rightness" of claims made through an adversarial process that tends to oversimplify situations in the process of constructing winnable legal arguments. Nor can we rely simply on administrative agencies or legislatures to protect the rights of individuals or protect them adequately from natural disasters. Clearly, the citizenry needs to be more active in these matters, and the administrative process needs to be both transparent and simplified. Quite frankly, it makes as much sense to have these cases drag out over decades as it does to have them framed in a way that oversimplifies the complex political challenges facing the governments attempting to regulate their coasts.

The courts should stand ready to engage in oversight of these processes; but, if we can learn anything from *Palazzolo*, it may be that litigating with an overly simple goal of increasing private property rights could, in fact, only make matters more difficult because it will force the courts to continue muddling the waters of the takings clause. From a social science perspective, the longer the resolution, the more complicated and difficult the situation becomes. Prolonging the process into decades, then, is the last thing that should happen.