Palazzolo v. Rhode Island: A Decision Worth Noticing?

Mary Blatch
NOTE

PALAZZOLO V. RHODE ISLAND: A DECISION WORTH NOTICING?

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The Fifth Amendment’s Takings Clause protects private property from government appropriation by requiring governments to compensate owners for land taken.1 The Takings Clause is “a tacit recognition” of governments’ power of eminent domain,2 which allows governments to take private property for public uses.3 In 1922, the Supreme Court

* J.D. Candidate, May 2003, The Catholic University of America, Columbus School of Law.


Debate over whether the Fifth Amendment’s Takings Clause applies to the states via the Fourteenth Amendment may be considered largely moot because every state except North Carolina and New Hampshire has constitutional provisions similar to the Takings Clause in the U.S. Constitution. See WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 65 (1995). These state takings clauses are not redundant, however, because the U.S. Supreme Court has insisted that property owners seek remedies in the state courts before bringing claims in federal court. Williamson County Reg’l Planning Comm’n v. Hamilton Bank of Johnson City, 473 U.S. 172, 194-95 (1985).

2. United States v. Carmack, 329 U.S. 230, 241-42 (1946) (stating that the Fifth Amendment’s language is “a tacit recognition of a preexisting power to take private property for public use, rather than a grant of new power”). There is no grant of the eminent domain power in the Constitution itself, as the power is considered to have existed at common law before the ratification of the Constitution. See Kohl v. United States, 91 U.S. 367, 372 (1876) (holding that the use of eminent domain by the government was recognized well before the Constitution was ratified).

3. Kohl, 91 U.S. at 372. The Fifth Amendment imposes two requirements on the government’s exercise of its eminent domain power. First, the property must be taken for a public use, which the Court has defined as any objective that is within the state’s police power. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 240-41 (1984) (upholding Hawaii’s use of eminent domain to take property from large landowners and transfer it to tenants on the land in order to effect a redistribution of real property in the state). Second, the owner of the property must be given just compensation by the government. See United
expanded the reach of the Takings Clause when it recognized that a government regulation can diminish the economic value of land so much that it effects a taking, giving the owner a legal right to compensation, even though the government is not occupying the land physically.\textsuperscript{4} By expanding the Takings Clause, the Court provided a check on the state's police power to regulate private property for the common good.\textsuperscript{5}

When a landowner claims that a regulation diminishes the value of his or her property so much that it effects a taking of private property for a public use, the landowner may bring an inverse condemnation proceeding against the appropriate government entity to demand compensation.\textsuperscript{6} Landowners have used inverse condemnation

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\textsuperscript{4} Pennsylvania Coal Co. v. Mahon, 360 U.S. 393, 414-15 (1922). In many instances, a government objective, such as preserving coastal wetlands, could be achieved through eminent domain, but presumably seeking to avoid compensating each landowner, the government instead regulates the land through its police power. See id. at 430 ("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.")

A state's police power is its inherent authority to make all laws necessary "to preserve the public security, order, health, morality, and justice." BLACK'S LAW DICTIONARY 1178 (7th ed. 1999). The Tenth Amendment formally recognizes and protects this power of the states from federal infringement. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.") The use of the police power to regulate private property generally has been upheld when the regulation serves a valid state purpose. See, e.g., Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 390 (1926) (upholding a zoning ordinance as a valid exercise of state police power).

\textsuperscript{5} See Pennsylvania Coal, 260 U.S. at 414 (stating that the statute in question cannot be upheld as an exercise of the state's police power).

\textsuperscript{6} See Agins v. City of Tiburon, 447 U.S. 255, 258 n.2 (1980) ("Inverse condemnation is 'a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted.'") (citation omitted); see also 27 AM. JUR. 2D Eminent Domain § 826 (1996) (defining an inverse condemnation as an eminent domain proceeding initiated by the property owner rather than the condemnor, deemed to be available when private property has been taken for public use without formal condemnation proceedings). A property owner may bring an inverse condemnation proceeding against a state government or the federal government, under the state's constitution or under the U.S. Constitution. Id.
proceedings successfully to challenge newly enacted regulations, but courts have been reluctant to allow landowners to challenge regulations that were already in existence when they purchased or otherwise acquired the land. Using principles from the Supreme Court’s regulatory takings jurisprudence, some courts developed a “notice rule,” whereby landowners who have notice of the regulation affecting their land cannot challenge it as a taking.

7. See, e.g., Cooley v. United States, 46 Fed. Cl. 538, 554 (2000) (finding that a taking existed where the federal government, pursuant to the Clean Water Act, denied plaintiffs’ permit to fill wetlands); Fla. Rock Indus., Inc. v. United States, 45 Fed. Cl. 21, 42 (1999) (finding that a mining company’s land was taken when it was denied a mining permit because of the subsequent enactment of the Clean Water Act); Garret v. City of Topeka, 916 P.2d 21, 35-36 (Kan. 1996) (holding that the city’s traffic diversion plan effected a taking of plaintiff’s property because it blocked access and decreased the plaintiffs’ property value).

8. See, e.g., Outdoor Graphics v. City of Burlington, 103 F.3d 690, 694 (8th Cir. 1996) (explaining that the Takings Clause does not require compensation when the challenged regulation prohibits a use already proscribed by existing laws); Namon v. State Dep’t of Env’tl. Regulation, 558 So.2d 504, 505 (Fla. Dist. Ct. App. 1990) (denying a takings claim because landowners had actual and constructive notice that regulations might impede their development plans); Gazza v. N.Y. State Dep’t of Env’tl. Conservation, 679 N.E.2d 1035, 1039 (N.Y. 1997) (noting that a regulation forms part of the title to property as a pre-existing rule of state law); City of Virginia Beach v. Bell, 498 S.E.2d 414, 417-18 (Va. 1998) (holding that the regulatory restriction was in the chain of title and therefore no taking had occurred).

9. See Steven J. Eagle, *The Regulatory Takings “Notice Rule”: Sources and Implications*, SF64 ALI-ABA 365 (ALI-ABA Course of Study, May 3, 2001). Still more novel than customary, the term “notice rule” has appeared in fewer than forty law review articles and sets of continuing legal education materials, and it has not appeared in the case law. *Id.* at 367. Court opinions applying the notice rule typically use different language but use the same theory to bar takings claims. See Robert Meltz, *What Role Does the Law Existing When a Property Is Acquired Have in Analyzing a Later Taking Claim?: The “Notice Rule”,* SF64 ALI-ABA 381, 383 (ALI-ABA Course of Study, May 3, 2001). This Note will use “notice rule” for convenience.

Notice has traditionally been an important aspect of property law. Landowners are assumed to have notice of any land-use regulations affecting their land. *Namon*, 558 So.2d at 505 (“Appellants are deemed to purchase the property with constructive knowledge of the applicable land use regulations.”); 58 AM. JUR. 2D Notice § 27 (1989) (stating that all persons having property within a state must take note of the statutes affecting the control or disposition of property). Therefore, when land is purchased, the owner takes with “notice” of any regulation in place at that time. 58 AM. JUR. 2D Notice § 27 (1989) (noting that one is charged with notice as to the time when a statute took effect). Similarly, the notice rule applies when a landowner purchases land and holds it for some time before subdividing it, and new regulations are in effect at the time of subdivision. See, e.g., Dist. Intown Props. Ltd. P’ship v. District of Columbia, 198 F.3d 874, 883 (D.C. Cir. 1999). The notice rule also applies when the land is acquired by operation of law rather than by purchase. See, e.g., *Bell*, 498 S.E.2d at 415-16.

As Eagle conceives it, the notice rule is the result of a convergence of legal and equitable constraints on property rights. Eagle, *supra*, at 2. The legal component is derived from the background principles concept in *Lucas v. South Carolina Coastal*
Two Supreme Court regulatory takings concepts led to the development of the notice rule. The first concept, the "reasonable investment-backed expectations" of the landowner, is part of a balancing test the Court developed to determine whether a private landowner is unfairly bearing a burden that should be borne by the public as a whole. Courts have held that when a landowner is aware of a regulation at the time of purchase, that regulation cannot frustrate the reasonable investment-backed expectations of a landowner, and therefore no taking has occurred.

The second concept is based on the "background principles" of a state's property law. In 1992, the Supreme Court declared that a regulation that deprives land of all economic value is a categorical taking that requires compensation. The Court then created an exception to this rule: if the landowner is prohibited from using the land in a manner already limited by the background principles of the state's property law, then a taking has not occurred even when all economic value has been lost due to the regulation. Some courts have understood a pre-existing regulation to be part of these background principles and, therefore, have held that the landowner never received the right to the desired development at the time he acquired the land. Some lower courts have

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10. See generally Eagle, supra note 9.
12. See, e.g., Dist. Intown Props. Ltd. P'ship, 198 F.3d at 884 (noting that businesses that operate in highly regulated industries can have no reasonable expectation that a particular regulation will not be strengthened by further regulations); Good v. United States, 39 Fed. Cl. 81, 109 (1997) (finding that the reasonable investment-backed expectations concept limits recovery to property owners who can show their investments were made in reliance upon the absence of the challenged regulations); Sucesion Suarez v. Gelabert, 541 F. Supp. 1253, 1260 (D.P.R. 1982) (holding that plaintiffs' investment-backed expectations were unreasonable to the extent that they ignored the law of Puerto Rico); Mayhew v. Town of Sunnyvale, 964 S.W.2d 922, 937-38 (Tex. 1998) (ruling that plaintiffs had no reasonable investment-backed expectations when the town's zoning ordinances had limited the type of development sought for twelve years prior to the plaintiffs' purchase of the property).
14. Id. at 1015-16.
15. See id. at 1027-29.
16. See, e.g., Hunziker v. State, 519 N.W.2d 367, 371 (Iowa 1994) (finding that at the time plaintiffs acquired title to the land, the challenged regulation was in effect and therefore the limitation on the use of the land inhered in the plaintiffs' title); Shell Island Homeowners Ass'n v. Tomlinson, 517 S.E.2d 406, 416 (N.C. Ct. App. 1999) (ruling that
effectively barred an owner with notice of a regulation from challenging it as a taking by relying upon the "reasonable investment-backed expectations" theory and/or the "background principles" theory.\textsuperscript{17}

Courts applying the notice rule often couch their holdings in terms of striking a fair balance between public and private interests.\textsuperscript{18} In developing its regulatory takings jurisprudence, the Supreme Court has grappled with balancing public and private interests so that individual landowners do not unjustly bear burdens that should be distributed among the public as a whole.\textsuperscript{19} Requiring the government to compensate landowners when it takes land to serve a public purpose shifts the cost of achieving that goal from the individual landowner to the public as a whole.\textsuperscript{20} On the other hand, the public should not have to compensate

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\textsuperscript{17} See, e.g., Outdoor Graphics, Inc. v. City of Burlington, 103 F.3d 690, 694 (8th Cir. 1996) (explaining that an inquiry into the landowner's "bundle of rights" under \textit{Lucas} considers the reasonable investment-backed expectations of the landowner); Gazza v. N.Y. State Dep't of Envtl. Conservation, 679 N.E.2d 1035, 1037, 1042 (N.Y. 1997), (considering notice fatal to petitioner's claim under both \textit{Lucas} and \textit{Penn Central}). This practice of the lower courts has stirred controversy among commentators, as takings law in general is not considered one of the clearer areas of constitutional law. For general commentary on the confusing state of Takings Clause jurisprudence, see, for example, Michael M. Berger & Gideon Kanner, The Need for Takings Law Reform: A View from the Trenches -- A Response to Taking Stock of the Takings Debate, 38 SANTA CLARA L. REV. 837 (1998); J. Peter Byrne, Ten Arguments for the Abolition of the Regulatory Takings Doctrine, 22 ECOLOGY L.Q. 89 (1995); Gideon Kanner, Hunting the Snark, Not the Quark: Has the U.S. Supreme Court Been Competent in Its Efforts To Formulate Coherent Regulatory Takings Law?, 30 URB. LAW. 307 (1998); James E. Krier, The Takings-Puzzle Puzzle, 38 WM. & MARY L. REV. 1143 (1997).

\textsuperscript{18} See, e.g., Outdoor Graphics, 103 F.3d at 695 (recognizing the need to balance the city's interest in prohibiting certain billboards against claimant's economic interest in the billboards).

\textsuperscript{19} See Armstrong v. United States, 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens, which in all fairness and justice, should be borne by the public as a whole."); see also PruneYard Shopping Center v. Robins, 447 U.S. 74, 82-83 (1980).

\textsuperscript{20} Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) ("The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest."). This cost-shifting occurs because when the government is forced to compensate individual landowners, it presumably passes the cost along to the public through taxes. See Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 139 (1978) (Rehnquist, J., dissenting) ("The question in this case is whether the cost associated with the city of New York's desire to preserve a limited number of 'landmarks' within its
individual landowners who purchase regulated land at a bargain price with the hope that they will be able to sell or develop the land later at a higher price. 21

The Court's most recent takings law decision, Palazzolo v. Rhode Island, 22 addressed the balance between public and private interests against the background of the notice rule. 23 In Palazzolo, the Supreme Court considered whether notice of a land-use regulation at the time of acquisition bars the landowner from challenging the regulation. 24 The Court's holding suggests that notice of a pre-existing regulation cannot be a per se bar to a takings claim. 25 However, because Palazzolo does not provide guidance on the underlying substantive determination of whether a taking occurred, the decision does little to guide lower courts in the proper consideration of the landowner's interests vis-à-vis the public interest. 26

In Palazzolo, the petitioner challenged a wetlands regulation that severely limited the development permitted on his property. 27 Anthony Palazzolo owned parcels of coastal land in Rhode Island. 28 Before Palazzolo obtained individual legal ownership of the property, the state

borders must be borne by all of its taxpayers or whether it can instead be imposed entirely on the owners of the individual properties."

21. See Olson v. United States, 292 U.S. 246, 255 (1934) ("The public may not by any means confiscate the benefits, or be required to bear the burden, of the owner's bargain."). In determining the just compensation for a taking, the landowner ought to be returned to as good a position as he would have occupied had his property not been taken. Id.; see also discussion infra Part III.C.


24. Id. at 618. The Court granted review to two other issues in Palazzolo. Petitioner's Brief on the Merits at i, Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (No. 99-2047). The three questions presented for review were: 1) Is a regulatory takings claim categorically barred when the enactment of the regulation predates the claimant's acquisition of the property?; 2) Must a property owner file additional applications seeking approval for "less ambitious uses" of the land in order to ripen a takings claim when a land-use agency has denied a particular use of the property?; and 3) When regulated property retains a value greater than zero, are the remaining permissible uses of that property necessarily economically viable? Id.

25. See Palazzolo, 533 U.S. at 628 (calling the notice rule "a blanket rule" that is "too blunt an instrument" to apply to takings claims).

26. See id. at 629-30 (noting the state's argument that a pre-existing regulation can be a background principle under Lucas but refusing to decide the issue).

27. Id. at 614-16.

28. Id. at 613-15. Palazzolo owned three undeveloped and adjoining parcels along Atlantic Avenue, the main access road to a popular state beach. Id. at 613. The north side of the property borders upon Winnapaug Pond, and the south side of the property faces Atlantic Avenue, and beyond that the beach. Id. at 613-15.
passed regulations that prohibited the filling of coastal wetlands without a special exception from the state’s Coastal Resources Management Council. Over a period of years, Palazzolo applied for exceptions from the Council to permit him to fill and develop his land. His requests were denied and he filed suit claiming that the Council’s denial of his application was a taking of his property without just compensation.

The trial court found for the state. Sitting without a jury, the judge issued a thirteen-page decision ruling that Palazzolo’s claim was not ripe for judicial review and, in the alternative, that there was no taking to support his claim. Palazzolo appealed, and the Supreme Court of Rhode Island affirmed the trial court’s judgment.

When the Rhode Island Supreme Court examined Palazzolo’s claim, it relied on the background principles of law concept to determine that even if Palazzolo were denied all economic use of his property, there still would not be a taking. Because the regulation was in existence when Palazzolo obtained the land, the court held that his ownership of the land never included the right to develop the wetlands. The court briefly addressed Palazzolo’s investment-backed expectations and found that because the regulations were in place before Palazzolo owned the property, he could

29. *Id.* at 614-15. In 1978, Palazzolo became the sole owner of property by operation of state law. *Id.*; see also infra notes 151-53, 158-59, and accompanying text. The challenged regulations, created by Rhode Island’s Coastal Resources Management Council, designated land such as Palazzolo’s as wetlands subject to restricted development. *Palazzolo*, 533 U.S. at 614. To fill the wetlands so that the land could be developed, regulations required Palazzolo to get a special exception from the Coastal Resources Management Council. Petitioner’s Brief on the Merits at 4, *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) (No. 99-2047). The regulations further stated that a special exception would only be granted if certain public interest requirements were met. *Id.*

30. *Palazzolo v. State ex rel. Tavares*, 746 A.2d 707, 711 (R.I. 2000). Palazzolo, acting on behalf of his corporation, filed two permit applications in the 1960s, before he became the individual legal owner of the property and before the state created the Coastal Resources Management Council in 1971. *Id.* at 710. In March of 1983, Palazzolo sought approval to build a bulkhead on the shore of Winnapaug Pond and to fill approximately eighteen acres of the wetlands. *Id.* at 711. In January of 1985, Palazzolo applied to fill wetlands so that he could build a beach club. *Id.*

31. *Id.*; see also discussion infra Part II for more on the facts of *Palazzolo*.

32. *Palazzolo*, 746 A.2d at 711.

33. *Id.* at 711, 714, 717.

34. *Id.* at 717.

35. See *id.* at 715. The Rhode Island court did not specifically refer to the regulations as background principles of state law, but it cited similar language from the Supreme Court case from which that concept originated. *Id.* The court noted: “The government ‘may resist compensation only if the logically antecedent inquiry into the nature of the owner’s estate shows that the proscribed use interests were not part of his [or her] title to begin with.’” *Id.* (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992)).

36. *Id.*
not have reasonably expected to develop the property and thus no taking had occurred.\textsuperscript{37}

Palazzolo appealed the Rhode Island Supreme Court’s decision, and the Supreme Court granted certiorari.\textsuperscript{38} In a five-to-four decision, the Supreme Court overturned the Rhode Island Supreme Court’s holding that notice of the regulation was fatal to Palazzolo’s claim that he was deprived of the economic value of his property.\textsuperscript{39} Justice Kennedy’s opinion noted the state court’s reliance on both the background principles of law concept and the investment-backed expectations concept.\textsuperscript{40} However, Justice Kennedy wrote that the effect of the state court’s formulation amounted to “a single, sweeping, rule: [a] purchaser or a successive title holder . . . [with] notice of an earlier-enacted restriction . . . is barred from claiming that it effects a taking.”\textsuperscript{41} The Court said that such a rule would relieve the state of its obligation to defend the validity of land-use regulations and would “put an expiration date on the Takings Clause.”\textsuperscript{42} The Court concluded that such a rule would be too “capricious” to be sustained.\textsuperscript{43}

This Note explores the development of the notice rule and Palazzolo’s impact on it. First, this Note examines the Supreme Court’s Takings Clause jurisprudence and the development of the related notice rule. Then, this Note discusses Palazzolo, focusing specifically on the Court’s attempt to define an investment-backed expectation and a background principle of state property law. Finally, this Note demonstrates that although the Palazzolo decision lifts the procedural bar of the notice rule, it did not change the substantive law that determines when a taking has occurred. As a result, the decision may do nothing more than increase the number of takings claims filed without increasing the number of cases in which a taking is actually found to have occurred. For this reason, this Note suggests that further refinement of the role that notice plays in takings jurisprudence is necessary.

I. REGULATORY TAKINGS AND NOTICE

Few Supreme Court cases directly address a property owner’s ability to challenge a regulation that was in effect prior to the date that the

\begin{thebibliography}{43}
\bibitem{37} Id. at 717.
\bibitem{40} Id. at 626.
\bibitem{41} Id.
\bibitem{42} Id. at 627.
\bibitem{43} Id. at 628.
\end{thebibliography}
property was acquired. While many regulatory takings decisions do not explicitly require notice as a factor in the takings analysis, some key cases have left room for the lower courts to conclude that notice should play a role.

A. The Early Approach to Regulatory Takings

In *Pennsylvania Coal Co. v. Mahon*, the Supreme Court first recognized that government regulation can so severely impair the use of land that it has been "taken" in violation of the Fifth Amendment. Writing for the majority, Justice Holmes stated the general principle underlying the notion of a regulatory taking: "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." The Court concluded that the regulation in question, which limited coal mining, had the effect of making it "commercially impracticable" for the company to mine coal or use the land at issue in any valuable way. To the Court, the loss in economic

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44. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 833-34 n.2 (1987) (discussing the effect of the landowners' constructive notice of a land-use requirement on their property rights); Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 226-27 (1986) (finding that a law regulating pension plans did not effect a taking, in part because pension plans had long been regulated and employers were on notice that they might be further regulated); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1006 (1984) (ruling that notice of the statute defeated Monsanto's reasonable investment-backed expectations and defeated its takings claim).


46. 260 U.S. 393 (1922).

47. Id. at 415. In recognizing a regulatory taking, the Pennsylvania Coal Court noted the balancing problem that future courts would struggle with in this context:

   Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.

   As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone.

Id. at 413.

48. Id. at 414-15. The facts of Pennsylvania Coal do not present the typical inverse condemnation situation where the plaintiff brings an action against the government, alleging that a taking has occurred. See id. at 412-13. The plaintiffs in this case lived on land under contract to the coal company. Id. at 412. The contract allowed the company to remove coal from underneath the land, while the plaintiffs retained rights to the surface. Id. The plaintiffs waived all claims for damages arising from the coal mining. Id. In 1921, Pennsylvania passed the Kohler Act, which prohibited the mining of coal in such a way that would cause the subsidence of any structure used as a human habitation. Id. The plaintiffs claimed the Kohler Act extinguished the coal company's right to mine the land because such operations would cause unlawful subsidence of the surface. Id. at 412-13.
value had the same effect as the government physically destroying or otherwise appropriating the land.⁴⁹

*Pennsylvania Coal*'s regulatory taking concept expanded the Fifth Amendment's Takings Clause from a defense against government confiscation or invasion of private property to a much broader check on the state's power to regulate private property.⁵⁰ In *Armstrong v. United States*,⁵¹ the Court explained the rationale for this broader view of the Takings Clause.⁵² The goal was to prohibit 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."⁵³ Such language implies that the court must balance the public interests against the private interests to achieve an equitable result.⁵⁴ However, the Court did not elaborate on the method by which this balance should be achieved. Likewise, in *Goldblatt v. Hempstead*,⁵⁵ the Court acknowledged that state regulation can effect a taking⁵⁶ but again left lower courts without

⁴⁹. *Id.* at 414. The dissent, written by Justice Brandeis, found that the law was not a taking because it was a restriction imposed to "protect the public health, safety, or morals from dangers threatened." *Id.* at 417 (Brandeis, J., dissenting).

⁵⁰. See DANIEL R. MANDELMER, LAND USE LAW § 2.11 (4th ed. 1997). *Pennsylvania Coal* is considered to be the first regulatory takings case. *Id.* Before that decision, the Court had not found a taking unless the government had physically invaded or occupied the land. See STEVEN J. EAGLE, REGULATORY TAKINGS § 1-1, at 2 (1996). Justice Holmes saw the case as one that probed the limits of the state's police power. *Pennsylvania Coal*, 260 U.S. at 413 (recognizing that the statute destroyed existing property and contract rights and asking "whether the police power can be stretched so far").


⁵². *Id.* *Armstrong* involved a shipbuilding corporation that defaulted on its contract with the federal government. *Id.* at 41. Exercising an option in the contract, the government forced the shipbuilder to transfer to the government the titles to the unfinished boats and the materials on hand for the boats' construction. *Id.* This made it impossible for the petitioners, suppliers to the shipbuilder, to assert their liens, which had attached under state law to the boats and materials. *Id.*

⁵³. *Id.* at 49.

⁵⁴. See *id.* at 48 (suggesting that the government, in acquiring property for public use, unfairly benefitted at the expense of the petitioners).

⁵⁵. 369 U.S. 590 (1962). The Town of Hempstead enacted an ordinance regulating dredging and pit excavating. *Id.* at 590. Appellants claimed that the regulations prevented them from continuing business and therefore constituted a taking. *Id.* at 590-91.

⁵⁶. *Id.* at 592.
concrete guidance on deciding takings claims, stating that "[t]here is no set formula to determine where a regulation ends and taking begins." \(^{57}\)

**B. Penn Central Transportation Co. v. New York: The Court Formulates a Balancing Test**

Fifty-six years after *Pennsylvania Coal* first recognized regulatory takings, \(^{58}\) the Supreme Court provided a test to determine whether one had occurred in *Penn Central Transportation Co. v. City of New York*. \(^{59}\) *Penn Central* centered around New York's Landmarks Preservation Law, which required the owner of a designated landmark building to obtain approval from a preservation commission before altering the building's exterior. \(^{60}\) The commission had designated Grand Central a landmark. \(^{61}\) The owner sought the commission's approval to build a multi-story office building on top of the terminal. \(^{62}\) The commission denied the request because the new construction would affect the aesthetics of the terminal's facade. \(^{63}\) The terminal's owner brought suit, claiming that the commission's decision constituted a taking under the Fifth Amendment. \(^{64}\)

Echoing the statement in *Goldblatt* that the line between a regulation and a taking can be found through "no set formula," \(^{65}\) Justice Brennan's majority opinion in *Penn Central* stated that the Court must decide takings claims on a case-by-case basis, relying on "ad hoc, factual inquiries." \(^{66}\) The Court then identified three factors to consider when determining whether a regulation has exceeded constitutional limits and thus constitutes a taking. \(^{67}\) First, a court must consider the regulation's economic impact on the claimant. \(^{68}\) Second, a court must evaluate the regulation's interference with the owner's distinct investment-backed

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57. *Id.* at 594.
58. 260 U.S. 393; see also *Mandelker*, *supra* note 50, at § 2.11.
60. *Id.* at 112. The Landmark Preservation Commission must approve alterations to the exterior architectural features of the landmark and any construction for external improvements to the landmark's site. *Id.* at 112. The commission's role was to consider both the public's interest in the maintenance of the landmark and the landowner's interest in the use of the property. *Id.*
61. *Id.* at 115-16.
62. *Id.*
63. *Id.* at 117-18.
64. *Id.* at 119.
67. *Id.*
68. *Id.*
expectations. Finally, a court must consider the "character of the governmental action." The Court then ruled that New York's landmarks law did not effect a taking of Penn Central's property.

Of the three Penn Central factors, the inquiry into the landowner's investment-backed expectations is the one that most frequently determines the outcome of a case. The term "investment-backed expectations" originated in an influential law review article by Harvard University law professor Frank I. Michelman. Michelman proposed a

69. Id. The Court cited Pennsylvania Coal as the leading case for the proposition that a regulation may so frustrate distinct investment-backed expectations that it amounts to a taking. Id.

70. Id.

71. Id. at 138. The dissent focused on what it considered to be the unfair burden of requiring Penn Central to bear the cost of the landmarks law. Id. at 148-49 (Rehnquist, J., dissenting) ("If the cost of preserving Grand Central Terminal were spread evenly across the entire population of the city of New York, the burden per person would be in cents per year . . . . Instead, however, appellees would impose the entire cost of several million dollars per year on Penn Central.").

72. See, e.g., Good v. United States, 39 Fed. Cl. 81, 114 (1997) (finding plaintiff's lack of reasonable investment-backed expectations to be "determinative of his takings claims"); State of N.H. Wetlands Bd. v. Marshall, 500 A.2d 685, 690 (N.H. 1985) (evaluating only defendants' "substantial, justified expectations" in deciding takings claim); Mayhew v. Town of Sunnyvale, 964 S.W.2d 922, 937 (Tex. 1998) (concluding that plaintiffs had no reasonable investment-backed expectation to pursue planned development and therefore the town did not unreasonably interfere with their right to use and enjoy the property). But see Dist. Intown Props. L'td P'ship v. District of Columbia, 198 F.3d 874, 883 (D.C. Cir. 1999) (stating that there are three main factors to consider under Penn Central); McNulty v. Town of Indialantic, 727 F. Supp. 604, 607 (M.D. Fla., 1989) (applying "the three-factor Penn Central test" to plaintiff's claim).


73. Frank I. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 HARV. L. REV. 1165, 1172 (1967). Michelman's article has been a dominant force in the academic discussion of takings law. FISCHEL, supra note 1, at 141-42 ("No other area of constitutional law has such a durable leading article."). Michelman's article is a philosophical exploration of takings law that endorses a utilitarian approach to the issue. Id. at 142-44. According to Michelman, there are three factors to consider when determining whether a compensable taking has occurred: efficiency gains, demoralization costs, and settlement costs. Id. at 144. These terms have very distinctive definitions that are best expressed in Michelman's own language. Id. Efficiency gains are the
takings test that emphasized the nature of the property interest impacted by government regulation, rather than one that limited the examination to the extent to which the regulation diminished the property’s value.\(^4\) Although Justice Brennan incorporated the term into the *Penn Central* majority opinion, he did not assign an explicit legal definition to “investment-backed expectations.”\(^5\)

The Court developed its own definition of Michelman’s distinct investment-backed expectations concept in subsequent cases.\(^6\) Just one year after *Penn Central*, the Court in *Kaiser Aetna v. United States*\(^7\) rephrased the *Penn Central* factors as “the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action.”\(^7\) The use of “reasonable” instead of “distinct” has significant implications.\(^8\)

Michelman, *supra*, at 1214. Demoralization costs are “(1) the dollar value necessary to offset disutilities which accrue to losers and their sympathizers specifically from the realization that no compensation is offered, and (2) the present capitalized dollar value of lost future production . . . caused by demoralization of uncompensated losers . . . .” *Id.* (footnote omitted). Settlement costs “are measured by the dollar value of the time, effort, and resources which would be required in order to reach compensation settlements adequate to avoid demoralization costs.” *Id.* Evaluation of these factors results in the general rule that “[a]n imposition [upon property] is compensable if not to compensate would be critically demoralizing; otherwise, not.” *Id.* at 1213, 1215 (stating that under utilitarian theory, compensation is due whenever demoralization costs exceed settlement costs; if settlement costs, while lower than demoralization costs, are higher than efficiency gains, the measure is improper regardless of compensation). Investment-backed expectations are a way to measure the property owner’s expected suffering were the taking not to be compensated and, as such, are a measure of demoralization costs. *Id.* at 1215-16, 1229-34.

74. Radford & Breemer, *supra* note 72, at 453 (citing Michelman’s article). According to Michelman, this is not a test of degree. “[I]t does not ask ‘how much,’ but rather . . . whether or not the measure in question can easily be seen to have practically deprived the claimant of some distinctly perceived, sharply crystallized, investment-backed expectation.” Michelman, *supra* note 73, at 1233.


76. Radford & Breemer, *supra* note 72, at 460.
78. *Id.* at 175 (emphasis added).
79. See Radford & Breemer, *supra* note 72, at 460.
“Reasonable” implies an objective standard that requires the court to determine whether a landowner’s development expectations were within reason given the circumstances – regardless of the landowner’s actual beliefs.80 “Distinct” implies a subjective analysis, inquiring whether the landowner took actions that evidenced his or her concrete expectations regarding the economic potential of the land and whether those expectations were adversely affected by the regulation.81 This shift from a subjective test to an objective test allowed the fact finder’s analysis of the reasonableness of the landowner’s expectation of economic benefit – as opposed to an analysis of the regulation’s actual impact on the landowner’s expectations of economic benefit – to determine the outcome.82

In applying the Penn Central test, some lower courts incorporated the landowner’s notice of the regulation into the evaluation of the reasonableness of the landowner’s investment-backed expectations.83

80. See id.; see also Washburn, supra note 72, at 67-71 (noting that “reasonable” replaced “distinct” in later cases – possibly reflecting a shift to an objective standard, which courts may define in various ways).

81. See Radford & Breemer, supra note 72, at 460. Alternately, Justice Brennan’s interpretation of “distinct” investment-backed expectations could be interpreted to mean “well-defined” or “explicit.” Washburn, supra note 72, at 67. Some courts still use the term “distinct” investment-backed expectations. See, e.g., Szymkowicz v. District of Columbia, 814 F. Supp. 124, 128 (D.D.C. 1993). In Penn Central, when looking at the distinct expectations of the property owner, the Court noted that the landmarks law did not interfere with the present and past use of the property as a railroad terminal and office space and concluded that it did not interfere with Penn Central’s primary expectation regarding the use of the property. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 136 (1978).

82. See Radford & Breemer, supra note 72, at 460. Professor and real property litigator Michael M. Berger has identified twelve factors that lower courts have used, either alone or in combination, to determine whether a property owner’s expectations are reasonable:

1. the severity and extensiveness of regulations at the time the property was purchased; 2. the past regulatory history of the specific property; 3. the degree of impairment of the uses of the property; 4. the uses available before enactment of the challenged regulation; 5. the novelty or expectedness of the governmental action; 6. whether specifically (and traditionally) recognizable ‘sticks’ were removed from the owner’s bundle of property rights; 7. whether any rights . . . were substituted for those impaired; 8. whether existing uses were permitted to continue; 9. whether government representations were formal or informal; 10. the ability to sell the property to others at a fair price; 11. the general power of government to regulate; and 12. the harshness of the local regulatory and legal climate.


83. See supra note 12.
For example, in *Sucesion Suarez v. Gelabert*, the District Court of Puerto Rico considered the landowners’ claim that the government’s denial of a permit to continue extracting sand from their land was a taking. A Puerto Rico regulation required a special permit for the extraction of sand. The permit was temporary and could be revoked upon finding that the extraction threatened the public interest. The landowners obtained these permits and mined sand from the property for several years before the government denied a permit for their operations. The district court held that because the regulatory scheme was in place one year prior to the plaintiffs’ operations, they “should have known . . . that the operations they chose to conduct were subject to constant regulation . . . . Whatever ‘investment-backed expectations’ plaintiffs had in their land were unreasonable if they ignored the law of Puerto Rico on the exploitation of natural resources.” Thus, prior notice of the regulation barred a successful regulatory taking claim.

C. Ruckelshaus v. Monsanto and Its Progeny: The Supreme Court’s Notice Rulings

Lower courts are not alone in holding that notice of a regulation can defeat a claim of a regulatory taking because the property owner did not have reasonable investment-backed expectations; the Supreme Court did so in *Ruckelshaus v. Monsanto Co.* *Monsanto* dealt with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), which allowed the Environmental Protection Agency (EPA) to publicly disclose data submitted by an applicant for registration of a pesticide. Such data

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84. 541 F. Supp. 1253 (D.P.R. 1982).
85.  *Id.* at 1255.
86.  *Id.* at 1259.
87.  *Id.*
88.  *Id.* at 1256-58.
89.  *Id.* at 1260 (citation omitted).
90.  *See id.*
92.  *Id.* at 990. Specifically, FIFRA required all pesticides to be registered with the Department of Agriculture. *Id.* at 991. The process required the pesticide manufacturer to submit information about the pesticide’s manufacture and efficacy. *Id.* In 1972, Congress amended FIFRA, requiring that the EPA determine that a pesticide would not have adverse effects on the environment before the pesticide could be registered. *Id.* at 991-92. The EPA was prohibited from disclosing information that was considered to be trade secrets. *Id.* at 992. Under certain circumstances, the EPA was allowed to consider data submitted by an applicant for registration to support the registration of a subsequent application. *Id.* at 992.
included information that could be characterized as trade secrets.\textsuperscript{93} Monsanto, a manufacturer of pesticides, sued on the theory that the data-disclosing provisions of FIFRA authorized a taking of private property.\textsuperscript{94}

The Supreme Court first determined that Monsanto had a property interest in the data it submitted to the EPA.\textsuperscript{95} In applying the Penn Central factors to the case, the Monsanto Court focused its entire analysis on the investment-backed expectations prong because it found the force of that factor to be "overwhelming."\textsuperscript{96} In addition, the Court found that with respect to any data Monsanto submitted after the relevant FIFRA provisions went into effect, Monsanto could not have had a reasonable, investment-backed expectation that the EPA would keep the data confidential.\textsuperscript{97} In the Court's opinion, Monsanto had notice of the manner in which the EPA could use the data and therefore was barred from claiming that a taking had occurred.\textsuperscript{98} The Court further held that Monsanto had no reasonable expectation that data submitted before the regulation went into effect would be kept confidential because the "possibility was substantial that the Federal Government... would find disclosure to be in the public interest."\textsuperscript{99} Thus, the Monsanto Court found that Monsanto had notice of the regulations because there was a general regulatory scheme in this area that was subject to change as the government deemed necessary.\textsuperscript{100} Although Monsanto and subsequent Supreme Court case law applied this constructive notice rule in cases

\textsuperscript{93} Id. at 998.

\textsuperscript{94} Id. at 999. Unlike other cases discussed up to this point, Monsanto involved a claim that personal property -- specifically trade secrets -- was being taken by the government. Id. Although this Note primarily discusses real property, the Fifth Amendment's Taking Clause applies equally to personal property, and there have been many regulatory takings claims alleging a taking of personal property. See, e.g., Vesta Fire Ins. Corp. v. Florida, 141 F.3d 1427 (11th Cir. 1998) (involving a taking claim as a result of an insurance regulation); Outdoor Graphics, Inc. v. City of Burlington, 103 F.3d 690 (8th Cir. 1996) (involving a taking claim challenging a regulation that prohibited billboards); Rudolph v. Cuomo, 916 F. Supp. 1308 (S.D.N.Y. 1996) (considering inmates' challenge to changes in prison regulations involving wages and fines); Student Loan Marketing Assoc. v. Riley, 907 F. Supp. 464 (D.D.C. 1995) (considering a takings challenge to a regulation that imposed a fee on certain student loans).

\textsuperscript{95} Monsanto, 467 U.S. at 1003-04.

\textsuperscript{96} Id. at 1005.

\textsuperscript{97} Id. at 1006.

\textsuperscript{98} Id. at 1007 ("Thus, as long as Monsanto is aware of the conditions under which the data are submitted, and the conditions are rationally related to a legitimate Government interest, a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking.").

\textsuperscript{99} Id. at 1008-09.

\textsuperscript{100} See id. at 1007 (noting that the pesticide industry has long been subject to government regulation).
dealing with personal property, some lower courts have extended the notion of constructive notice to real property.

Subsequent Supreme Court interpretation in Nollan v. California Coastal Commission limited the Monsanto constructive notice rule to takings of personal property. In Nollan, the landowners applied for a permit to replace the residence on their coastal property. The California Coastal Commission conditioned the issuance of a permit upon the landowners' conveying an easement to the state that would allow for public passage on the beachfront portion of their property. The California Court of Appeals upheld the commission's demand for an easement. Despite the fact that the commission had imposed similar conditions on forty-three of the Nollans' neighbors, effectively putting the Nollans on notice of the easement requirement, the Supreme Court reversed the California court.

In a footnote, Justice Scalia's majority opinion distinguished Monsanto from Nollan. Monsanto involved the right to a conditional government benefit dependent on the registration of pesticide, whereas Nollan involved a condition on the right to build on one's own property — a

101. See, e.g., Bowen v. Gilliard, 483 U.S. 587 (1987) (holding that legislation reducing child support was foreseeable and thus did not effect a taking); Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211 (1986) (holding that a federal statute that increased the liability provisions of a pension fund did not effect a taking given that the fund's trustees could have anticipated the new financial obligations).

102. See, e.g., Dist. Intown Props. Ltd. P'ship v. District of Columbia, 198 F.3d 874, 884 (D.C. Cir. 1999) (noting that the real estate business has a history of being regulated “for the purpose of preserving historic sites”); Good v. United States, 39 Fed. Cl. 81, 112-13 (1997) (finding no frustration of reasonable investment-backed expectations where a developer continued to invest in growing regulatory limitations); State Dep't of Health v. The Mill, 887 P.2d 993, 1000 n.4 (Colo. 1994) (applying Monsanto to a case involving real property because the property became subject to “tight controls more analogous to personal property regulation than to the limited levels of regulation traditionally applied to real property”).


104. Radford & Breemer, supra note 72, at 467; see also Bowles v. United States, 31 Fed. Cl. 37, 50 n.15 (1994) (discussing the Nollan footnote and stating that “one could argue that prior ‘notice’ has no relevance in cases involving land use regulations”); Hymas, supra note 72, at 452 n.119; Tom Pierce, Comment, A Constitutionally Valid Justification for the Enactment of No-Growth Ordinances: Integrating Concepts of Population Stabilization and Sustainability, 19 HAW. L. REV. 93, 141 n.306 (1997).

105. Nollan, 483 U.S. at 828.

106. Id.

107. Id. at 830.

108. Id. at 842, 858 (Brennan, J., dissenting).

109. Id. at 833-34 n.2.
right afforded a higher level of protection. The Court found it irrelevant that the Nollans acquired the land after the commission began to require the easements, stating that "[s]o long as the [c]ommission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot." Commentators point to this language when arguing that Nollan limits Monsanto to personal property because Nollan implies that a landowner's right to challenge a regulation as a taking transfers with title to a subsequent landowner. However, the Court did not overrule Monsanto outright. The fact that the distinction between Nollan and Monsanto was relegated to a footnote shows that the Supreme Court did not intend to be explicit on this point. Even after Nollan, lower courts continued to find notice a dispositive factor in determining a landowner's reasonable investment-backed expectations.

**D. Lucas v. South Carolina Coastal Commission: The Court Recognizes a New Kind of Taking**

Before 1992, there had been two types of regulatory takings: one in which a regulation caused a loss of value in the property, analyzed according to Pennsylvania Coal Co. v. Mahon, and another in which a regulation caused a physical occupation of the land. The second type is considered a categorical taking, meaning that once a physical invasion of the property is found, the inquiry ends, and the property owner is entitled to

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110. See id.
111. Id.
112. See, e.g., Radford & Breemer, supra note 72, at 469.
113. See id. at 468-69.
116. See supra notes 46-48, 59-62, and accompanying text. The first kind is the type of regulatory taking established by Pennsylvania Coal Co. v. Mahon, and subsequently analyzed according to Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), and subsequently analyzed according to Pennsylvania Coal Co. v. Mahon. See supra notes 46-48, 59-62, and accompanying text. The second type, where a regulation causes a physical occupation of the land, was considered by the Court to be more akin to a traditional physical taking by the government. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (stating that "we have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause" in a case where a government regulation authorized a physical intrusion on the property owner's land).
compensation.\textsuperscript{117} The Court addressed this bright-line rule in \textit{Loretto v. Telepromter Manhattan CATV Corp.},\textsuperscript{118} holding that any physical occupation constituted a per se taking regardless of the breadth of physical occupation authorized by the regulation.\textsuperscript{119} The Court's finding of a categorical taking in the economic context was presaged in \textit{Agins v. City of Tiburon.}\textsuperscript{120} In \textit{Agins}, the Court found that "[t]he application of a general zoning law to particular property effects a taking if the ordinance . . . denies an owner economically viable use of his land."\textsuperscript{121} The Court would later cite this language when it recognized a new type of categorical taking based on a loss of \textit{all} economic value.\textsuperscript{122}

In \textit{Lucas v. South Carolina Coastal Council,}\textsuperscript{123} the Court declared a per se taking when a regulation denies an owner \textit{all} economically viable use of his land.\textsuperscript{124} \textit{Lucas} involved a regulation barring permanent habitable structures in the state's coastal area.\textsuperscript{125} Petitioner Lucas owned two residential lots on a South Carolina barrier island upon which he intended to build single-family homes similar to others on the island.\textsuperscript{126} At the time of his purchase, the challenged regulation did not exist, and his property was not subject to the state's coastal building permit requirements.\textsuperscript{127} When Lucas challenged the regulation as a taking, the trial court found that the regulation rendered the lots valueless and

\textsuperscript{117} Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992) (identifying "regulations that compel the property owner to suffer a physical 'invasion' of his property" as a category of regulatory action that requires compensation without case-specific inquiry).

\textsuperscript{118} 458 U.S. 419 (1982). In \textit{Loretto}, the Court held that a New York law requiring landlords to allow cable companies to put cable facilities in their apartment buildings was a taking. \textit{Id.} at 435-40. The cable facilities occupied no more than 1.5 cubic feet of the buildings. \textit{Id.} at 438 n.16.

\textsuperscript{119} \textit{Id.} at 435-40.

\textsuperscript{120} 447 U.S. 255 (1980).

\textsuperscript{121} \textit{Id.} at 260 (citations omitted).

\textsuperscript{122} \textit{Lucas}, 505 U.S. at 1015-16. Although the Court cited \textit{Agins} as the source of the \textit{Lucas} rule, the concept of a categorical taking in the economic context is generally considered to have been established for the first time in \textit{Lucas}. Brittany Adams, Note, \textit{From Lucas to Palazzolo: A Case Study of Title Limitations}, 16 J. LAND USE & ENVTL. LAW 225, 232 (noting that it is not clear that \textit{Agins} supports the \textit{Lucas} rule); see also Meltz, \textit{supra} note 9, at 388 (describing \textit{Lucas} as introducing the "total takings" concept). Most notably, although the \textit{Lucas} Court referred to a regulation that denies "all economically beneficial" uses of the land, the cited portion of the \textit{Agins} opinion does not use the word "all." \textit{Lucas}, 505 U.S. at 1015, 1019; \textit{Agins}, 447 U.S. at 260.

\textsuperscript{123} 505 U.S. 1003 (1992).

\textsuperscript{124} \textit{Id.} at 1016, 1019.

\textsuperscript{125} \textit{Id.} at 1007.

\textsuperscript{126} \textit{Id.} at 1008.

\textsuperscript{127} \textit{Id.}
ordered that Lucas be compensated.128 The South Carolina Supreme Court reversed, but the U.S. Supreme Court deemed the trial court’s finding that the land had no economic value dispositive and established the categorical taking rule.129 Under this rule, when a regulation deprives land of all “economically beneficial or productive use,” it is a regulatory taking requiring compensation without “case-specific inquiry into the public interest advanced in support of the restraint,” meaning that the Court will not consider the particular facts of the case in light of the public purpose that the regulation is supposed to serve.130

The Lucas rule stands independent from the Penn Central takings analysis.131 If a Lucas categorical taking is found to exist, compensation is automatic; it is not dependent on the Penn Central factors.132 Conversely, if a categorical taking is not found under Lucas, the landowner may still be compensated under Penn Central.133 Thus, the Lucas Court created two types of takings based on a reduction of economic value.134 Regulations that deprive the land of all economic value are a per se or categorical taking, and compensation is automatic.135 Regulations that leave some economic value effect a partial taking, and the right to compensation is determined by applying the Penn Central factors.136

Lucas also created an exception to its categorical takings rule.137 When a regulation deprives land of all economic value, it will not be considered a taking if the regulation prohibits uses that would be prohibited anyway

128. Id. at 1009.
129. See id. at 1015-16, 1020-22, 1026-32. The Court described such a value-depriving regulation as a “confiscatory regulation.” Id. at 1029.
130. Id. at 1015. For an example of a categorical taking under Lucas, see Cooley v. United States, 46 Fed. Cl. 538, 547 (2000) (finding that a permit denial that destroyed 98.8 percent of the property’s value was a “categorical taking” under Lucas).
131. See Lucas, 505 U.S. at 1019 n.8.
132. See id.
133. See id.; Rith Energy, Inc. v. United States, 247 F.3d 1355, 1364 (Fed. Cir. 2001) (stating that the consequence of concluding that no categorical taking had occurred was that the plaintiff had to prove it had investment-backed expectations in order to claim there was a taking); Dist. Intown Props. Ltd. P’ship v. District of Columbia, 198 F.3d 874, 877 (D.C. Cir. 1999) (affirming the district court’s finding that plaintiff did not establish a “total taking” under Lucas, nor did plaintiff show that its investment-backed expectations were frustrated).
134. See Lucas, 505 U.S. at 1019-20 n.8.
135. See id.
136. See id.
137. Id. at 1027 (“Where the state seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner’s estate shows that the proscribed use interests were not part of his title to begin with.”).
by the "background principles of the State's law of property and nuisance already [in] place upon land ownership."\textsuperscript{138} Applied to the facts in \textit{Lucas}, the regulation would not be a taking if South Carolina could "identify background principles of nuisance and property law that prohibit the uses [Lucas] intends in the circumstances in which the property is presently found."\textsuperscript{139} If the government can make this showing, then a court cannot find that a regulation takes anything new from the landowner.\textsuperscript{140}

The scope of the background principles exception to the \textit{Lucas} rule is unclear because the Court did not explicitly identify the source(s) of these background principles of property and nuisance law.\textsuperscript{141} Although \textit{Lucas} seems to imply that the common law is the proper source of these principles, many lower courts have considered land-use regulations to be background principles.\textsuperscript{142} For example, in \textit{City of Virginia Beach v. Bell},\textsuperscript{143} the Virginia Supreme Court found a background principle

\begin{itemize}
\item\textsuperscript{138} \textit{Id.} at 1029-30.
\item\textsuperscript{139} \textit{Id.} at 1031-32. On remand, the Supreme Court of South Carolina found that the Coastal Council did not have the ability under common law to prohibit Lucas from building on his land. \textit{Lucas v. South Carolina Coastal Council}, 424 S.E.2d 484, 486 (S.C. 1992). The South Carolina Supreme Court then remanded the case to the circuit court because finding that the regulation effected a taking gave Lucas a cause of action for the temporary deprivation of the use of his property. \textit{Id.} The South Carolina Supreme Court held that the sole issue for the circuit court was the actual damages Lucas sustained as a result of being temporarily deprived of the use of his property. \textit{Id.}
\item\textsuperscript{140} \textit{Lucas}, 505 U.S. at 1031-32.
\item\textsuperscript{141} \textit{See id.} at 1027-28. Although the Court did not explicitly define the principles that can limit the property owner's rights, the \textit{Lucas} decision hinted at what constitutes a background principle of state property or nuisance law. Some possible characteristics of a background principle are: it inheres in the title itself, \textit{id.} at 1029; it arises under the state's law of private nuisance, \textit{id.}; it arises under the state's power to abate nuisances that affect the public generally, \textit{id.}; it is a result that could have been achieved in the courts by adjacent landowners, \textit{id.}; it is a particular use long engaged in by similarly situated landowners, \textit{id.} at 1031; it is a common-law prohibition or principle, \textit{id.} Toward the end of the opinion, the Court stated that the inquiry under \textit{Lucas} would require analysis of, among other things,
\begin{itemize}
\item the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, the social value of the claimant's activities and their suitability to the locality in question, and the relative ease with which the alleged harm [could] be avoided through measures taken by the claimant and the government.
\end{itemize}
\textit{Id.} at 1030-31 (citations omitted).
\item\textsuperscript{142} \textit{See, e.g.}, Hunziker v. State, 519 N.W.2d 367, 371 (Iowa 1994) (finding regulations that were in existence ten years before the land was purchased to be part of the state's property law); Kim v. City of New York, 681 N.E.2d 312, 315-16 (N.Y. 1997) (explicitly refusing to limit the background principles concept to the common law).
\item\textsuperscript{143} 498 S.E.2d 414 (Va. 1998).
\end{itemize}
exception to the Lucas rule.\textsuperscript{144} The court interpreted Lucas as requiring that South Carolina prove its regulation was based on principles of nuisance and property law only because Lucas had taken title to the land prior to the enactment of the regulation.\textsuperscript{145} The court went on to find that because the Virginia regulation predated the Bells’ acquisition of the land, it was possible to define the regulation as a background principle of the state’s property law and find that there was no taking.\textsuperscript{146} The court’s decision was not framed in terms of whether the Bells had notice of the regulation because it was not examining whether the Bells had reasonable investment-backed expectations.\textsuperscript{147} However, the result is similar to those cases where a court finds that notice of a regulation defeats investment-backed expectations. In both situations, courts determine that, because a regulation existed before the landowner obtained the property, the regulation cannot be challenged as a taking as a matter of law.\textsuperscript{148}

II. PALAZZOLO V. RHODE ISLAND: THE COURT TAKES NOTICE OF NOTICE

In 1959, Anthony Palazzolo invested in three undeveloped, adjoining parcels of coastal land in Rhode Island.\textsuperscript{149} The land was wetlands subject to tidal flooding and required considerable filling before it could be

\begin{itemize}
  \item \textsuperscript{144} Id. at 416-18. In Bell, the land in question passed to the Bells as individuals from a corporation they had partially owned. Id. at 415. Between the time that the corporation owned the land and the time that ownership passed to the Bells, the city passed the ordinance restricting dune development, which affected the Bells’ land. Id. Like Palazzolo, the Bells succeeded to the interest in their land after the regulation was enacted, but they had an interest in the land's development before the regulation was enacted. For discussion of the facts in Palazzolo, see infra notes 149-61 and accompanying text.
  \item \textsuperscript{145} Bell, 498 S.E.2d at 417-18; accord Hunziker, 519 N.W.2d at 371 (noting the “important distinction” between the Lucas case, where the regulation was passed after plaintiffs acquired title, and Hunziker, where the regulations existed before plaintiffs acquired title); Kim, 681 N.E.2d at 314-15 (maintaining that “in identifying the background rules of State property law that inhere in an owner’s title, a court should look to the law in force, whatever its source, when the owner acquired the property”) (emphasis added).
  \item \textsuperscript{146} Bell, 498 S.E.2d at 417-18.
  \item \textsuperscript{147} Id. at 417. Bell only sought relief for a categorical taking under Lucas, claiming that the denial of the permit eliminated the property’s only economically beneficial use. Id. The court did not examine the claim under Penn Central and therefore did not address investment-backed expectations. See id.
  \item \textsuperscript{149} Palazzolo v. Rhode Island, 533 U.S. 606, 613 (2001).
\end{itemize}
developed. Palazzolo and his associates formed Shore Gardens, Inc. (SGI) to purchase and hold the property. Palazzolo eventually bought out his associates and became the sole shareholder in the corporation. Between 1959 and 1966, SGI subdivided the property and submitted applications to state agencies to fill large portions of the property. These applications were eventually denied, and SGI did not contest the rulings.

Palazzolo did not attempt to develop the property again until 1983. However, two important intervening events occurred in the meantime. First, in 1971, Rhode Island enacted legislation creating the Coastal Resources Management Council, the purpose of which was to protect the state's coastal land. The Council enacted regulations greatly restricting

150. Id. at 613-14. Generally, wetlands are land areas that are either permanently or seasonally wet. Paul D. Cylinder, et al., Wetlands regulation: a complete guide to federal and California programs 1 (1995). Examples of wetlands include marshes, bogs, and tidal areas. Nancie G. Marzulla & Roger J. Marzulla, Property rights: understanding government takings and environmental regulation 43 (1997). Wetlands protect against erosion, control flooding, and filter pollutants that would otherwise enter the nation's waterways. Id. However, human activity has greatly reduced the amount of wetlands covering the country, and by some estimates, fifty-three percent of the wetlands in the forty-eight contiguous states has been lost over the last 200 years. Cylinder, supra, at 12. Most wetlands loss is due to conversion to farms, urban development, flood control projects, and water diversion projects. Id. at 17.


152. Palazzolo, 533 U.S. at 613.
153. Id. at 613-14.
154. Id. at 614.
155. Id.

(b) No person, either as principal, agent, or servant, or any firm, corporation or any other entity, shall within the tidal waters of the state, conduct or cause to conduct dredging, transportation and/or disposal of dredge materials without a permit issued by the coastal resources management council, a water quality certification issued by the department of environmental management pursuant to chapter 12 of this title and any permit required by the army corps of engineers. In addition, no person, either as principal, agent or servant, nor any firm, corporation or any other entity, shall dispose of dredge materials other than in tidal waters without any permit, approval or certification that may otherwise be required.

Id. § 46-23-18.
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development on coastal wetlands like the land owned by SGI.157 Second, in 1978, SGI's corporate charter was revoked for failure to pay taxes.158 Title to the property passed to Palazzolo because he was SGI's sole shareholder.159 When Palazzolo revived efforts to develop the property in 1983, he submitted requests similar to those denied in the 1960s.160 The Council denied the requests, citing regulations that allowed land like Palazzolo's to be filled only under special circumstances.161

After unsuccessfully appealing the Council's decision in court,162 Palazzolo filed an inverse condemnation action in Rhode Island Superior Court.163 Palazzolo claimed that the Council's denials had deprived the property of all economic value, resulting in a total taking under Lucas.164 After a bench trial, the judge ruled against Palazzolo.165

On appeal, the Rhode Island Supreme Court affirmed.166 Addressing the impact of Palazzolo's notice of the regulation on his takings claim,

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157. See Palazzolo, 746 A.2d at 710-11. The Coastal Resources Management Council's regulations required a permit to fill coastal wetlands. Id. Section 130(A) of the Coastal Resources Management Program states:

A. Special exceptions may be granted . . . only if and when the applicant has demonstrated that:

(1) The proposed activity serves a compelling public purpose which provides benefits to the public as a whole as opposed to individual or private interests. The activity must be one or more of the following: (a) an activity associated with public infrastructure such as utility, energy, communications, transportation facilities; (b) water-dependent activity that generates substantial economic gain to the state; and/or (c) an activity that provides access to the shore for broad segments of the public.


158. Palazzolo, 746 A.2d at 710-11.

159. Id. at 710. Despite the fact that Palazzolo had, for practical purposes, been the sole owner of the land since he bought out his SGI associates, he never challenged the assertion that the regulations predated his acquisition of the property. See Steven J. Eagle, Recent Developments in Wetlands Regulations: Waiting for Palazzolo, SF92 ALI-ABA 191, 194 (ALI-ABA Course of Study, May 31, 2001).

160. Palazzolo, 533 U.S. at 614.

161. Id. at 614-15. Under Council regulations, Palazzolo needed a "special exception" from the Council to fill his land. Id. at 615. A special exception would only be granted when the proposed development benefitted the public as a whole as opposed to serving individual or private interests. Id.

162. Id. Palazzolo challenged the Council's decision as contrary to principles of state administrative law. Id.

163. Id.

164. Id. at 615-16.

165. Id. at 616.

166. Id.
the court held that Palazzolo had no right to challenge regulations that were enacted before he acquired the property.\textsuperscript{167} The court examined Palazzolo’s claim under both \textit{Lucas} and \textit{Penn Central}.\textsuperscript{168} The court cited \textit{Lucas} for the proposition that there cannot be a taking when a regulation denies a use that was not originally part of the owner’s title.\textsuperscript{169} The court affirmed the trial court’s finding that the right to fill the wetlands was not part of Palazzolo’s estate because the regulations limiting that right were already in place when he acquired the property.\textsuperscript{170} Under the \textit{Penn Central} test, the court again agreed with the trial court’s finding and held that in light of the Council’s regulations, Palazzolo could not have reasonably expected to develop the property as he had planned.\textsuperscript{171} The court found Palazzolo’s lack of reasonable investment-backed expectations dispositive and did not consider the other \textit{Penn Central} factors.\textsuperscript{172} The U.S. Supreme Court reversed in part and affirmed in part the Rhode Island Supreme Court’s ruling.\textsuperscript{173}

\textbf{A. The Majority Opinion Rejects a Per Se Notice Rule}

After finding that Palazzolo’s takings claim was ripe for adjudication,\textsuperscript{174} the majority opinion addressed the state court’s finding that notice of the regulation defeated Palazzolo’s takings claim.\textsuperscript{175} Justice Kennedy characterized the state court’s holding on the notice issue as amounting to “a single, sweeping rule”\textsuperscript{176} that, if accepted, would allow states “to put

\begin{itemize}
\item \textsuperscript{167} \textit{Id.} The Rhode Island Supreme Court also held that Palazzolo’s claim was not ripe for review and that his claim for deprivation of all economically beneficial use of the property was contradicted by evidence that there was still development value in a parcel of upland property. \textit{Palazzolo v. State ex rel. Tavares}, 746 A.2d 707, 714-15 (R.I. 2000).
\item \textsuperscript{168} \textit{Palazzolo}, 746 A.2d at 712-13.
\item \textsuperscript{169} \textit{Id.} at 715-16.
\item \textsuperscript{170} \textit{Id.} at 715-27.
\item \textsuperscript{171} \textit{Id.} at 717.
\item \textsuperscript{172} \textit{Id.} Some commentators argue that state courts have tended to favor regulation more so than federal courts. See ROBERT MELTZ, ET AL., THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND USE CONTROL AND ENVIRONMENTAL REGULATION 375 (1999). State courts generally allow “modest residual uses” to defeat a landowner’s claim of a total taking under \textit{Lucas} and require a loss of virtually all economic use of the parcel under the frustration of investment-backed expectations principle. \textit{Id.}
\item \textsuperscript{173} \textit{Palazzolo}, 533 U.S. at 616. The Court reversed the Rhode Island Supreme Court’s ruling that Palazzolo’s claim was not ripe and also reversed the holding that Palazzolo could not challenge regulations predating his acquisition of the land. \textit{Id.} The Court affirmed the state court’s finding that there was no categorical taking under \textit{Lucas} and remanded for further proceedings under \textit{Penn Central}. \textit{Id.}
\item \textsuperscript{174} \textit{Id.} at 616-26.
\item \textsuperscript{175} \textit{Id.} at 626.
\item \textsuperscript{176} \textit{Id.}
\end{itemize}
an expiration date on the Takings Clause.\footnote{177} The majority found such a notice rule inherently unfair.\footnote{178} An inverse condemnation proceeding imposes upon the state a duty to justify a land-use regulation.\footnote{179} A rule barring a property owner from challenging a regulation because it was enacted before the owner acquired the property would relieve the state of its duty to justify the regulation, simply because the property had changed hands, no matter how extreme or unreasonable the regulation.\footnote{180}

According to the Court, the rule was also “capricious in effect” and “quixotic” because landowners would be treated differently depending upon their circumstances.\footnote{181} For example, because an inverse condemnation action cannot be brought until a claim is ripe,\footnote{182} the Court reasoned that a notice rule unfairly punishes a current landowner “where the steps necessary to make the claim ripe were not taken, or could not have been taken, by a previous owner.”\footnote{183} As a result, a notice rule would put current landowners in different positions based on the action or inaction of previous landowners.\footnote{184}

The majority relied upon \textit{Nollan} as controlling precedent for its holding.\footnote{185} The Court cited \textit{Nollan} for the proposition that notice of a regulation is not sufficient to defeat a takings claim if the underlying regulation does indeed effect a taking of land.\footnote{186} The majority disputed the argument that \textit{Lucas’} discussion of background principles of property

\footnote{177} Id. at 627.

\footnote{178} Id. at 628 (“It would be illogical, and unfair, to bar a regulatory takings claim because of post-enactment transfer of ownership.”); see also id. at 627 (stating that “[t]he state may not put so potent a Hobbesian stick into the Lockean bundle”).

\footnote{179} See supra notes 6-7 and accompanying text.

\footnote{180} \textit{Palazzolo}, 533 U.S. at 627. Other courts have expressed similar concerns. See, e.g., Store Safe Redlands Assoc. v. United States, 35 Fed. Cl. 726, 735 (1996) (“Congress could pass a law that stated that no one could build on their [sic] property. After all property had passed hands once, the right to build on one’s property would be lost to everyone.”).

\footnote{181} \textit{Palazzolo}, 533 U.S. at 628 (noting the different positions of “[t]he young owner contrasted with the older owner, the owner with the resources to hold [the land] contrasted with the owner with the need to sell”).

\footnote{182} See id. at 627 (implying that the case demonstrates that the ripeness process can take years). For a discussion of ripeness, see infra note 201.

\footnote{183} Id. at 628.

\footnote{184} See supra note 181 and accompanying text.

\footnote{185} \textit{Palazzolo}, 533 U.S. at 629.

\footnote{186} Id. The relevant language from \textit{Nollan} states: “So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot.” \textit{Nollan} v. Cal. Coastal Comm., 483 U.S. 825, 833-34 n.2 (1986); see also supra notes 103-15 and accompanying text.
law limited the Nollan holding by incorporating a consideration of pre-existing regulations into the takings test.\textsuperscript{187} While the majority refused to decide when a law can be deemed a background principle of state law, it recognized that a law does not become a background principle by enactment alone.\textsuperscript{188} The Court reasoned that fairness demanded this view of the background principles concept because a law cannot be a background principle for some landowners and not for others.\textsuperscript{189}

\section*{B. The Concurrences: Differing Opinions on Notice}

While the majority opinion barely touched on the state court's evaluation of the claim under Penn Central,\textsuperscript{190} Justice O'Connor's concurrence dealt with precisely that question.\textsuperscript{191} O'Connor stated that, in her opinion, the Court's Palazzolo holding does not mean that notice is irrelevant in a Penn Central analysis.\textsuperscript{192} She began with the proposition that courts are in error when they find the investment-backed expectations prong of Penn Central to be dispositive of a claim.\textsuperscript{193} O'Connor urged that Penn Central requires consideration of all three factors in evaluating a partial taking claim.\textsuperscript{194} According to O'Connor, when considering investment-backed expectations, "the state of regulatory affairs at the time of acquisition is not the only factor."\textsuperscript{195} Justice O'Connor dismissed the notion that it is not a factor at all, stating that the Court's decision in Palazzolo does not remove the notice aspect from a Penn Central analysis but "simply restores balance to that

\begin{itemize}
\item \textsuperscript{187} Palazzolo, 533 U.S. at 629 ("It is asserted here that Lucas stands for the proposition that any new regulation, once enacted, becomes a background principle of property law which cannot be challenged by those who acquire title after the enactment.").
\item \textsuperscript{188} Id. at 629-30 ("It suffices to say that a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title."). The Court described the background principles concept as those "common, shared understandings of permissible limitations derived from a State's legal tradition." Id. at 630.
\item \textsuperscript{189} Id.
\item \textsuperscript{190} Id. at 630, 632.
\item \textsuperscript{191} Id. at 632-33 (O'Connor, J., concurring) ("The more difficult question is what role the temporal relationship between regulatory enactment and title acquisition plays in a proper Penn Central analysis.").
\item \textsuperscript{192} Id. at 633 (O'Connor, J., concurring).
\item \textsuperscript{193} See id. at 633-34 (O'Connor, J., concurring) ("Investment-backed expectations, though important, are not talismanic under Penn Central.").
\item \textsuperscript{194} Id.
\item \textsuperscript{195} Id. at 634-35 (O'Connor, J., concurring). Justice O'Connor suggested that the extent of the development permitted, in contrast to the extent of development sought by the claimant, is another factor to be considered in investment-backed expectations. Id.
inquiry." The relevant facts and circumstances dictate the amount of weight that each factor should be given.

Although Justice Scalia concurred in the majority opinion, he specifically disagreed with Justice O'Connor's understanding of the notice issue. According to Scalia, a pre-existing land-use regulation should not have any role in determining whether a taking has occurred. He reasoned that the determination of whether a taking has occurred should not depend upon the transfer of title but on the validity of the restriction that deprives the individual of full use of the land.

C. The Dissenting Opinions: Ripeness, Standing, and a Mention of Notice

Justice Ginsburg's dissent, joined by Justices Breyer and Souter, argued that Palazzolo's claim was not ripe for adjudication and that the merits of the case were not properly presented. Believing that the

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196. Id. at 635 (O'Connor, J., concurring).
197. Id. at 635-36 (O'Connor, J., concurring).
198. Id. at 636 (Scalia, J., concurring) ("I write separately to make clear that my understanding of how the issues . . . must be considered on remand is not Justice O'Connor's.").
199. Id. at 637 (Scalia, J., concurring).
200. See id. Scalia excludes from this statement a restriction that forms part of the background principles described in Lucas. See id.
201. See id. at 647-48 (Ginsburg, J., dissenting). Ginsburg's main contention was that Palazzolo did not take the steps necessary to ripen his takings claim. Id. at 646-47. Ripeness is a procedural bar to bringing a takings claim in federal courts. See MANDELKER, supra note 50, at 40-41. Requirements must be met before a takings claim becomes ripe, including submitting any information the regulation requires for development approval, such as a development plan, and the issuing of a final judgment from the state court. Id. at 41. The state court determined that Palazzolo failed to meet two ripeness requirements. First, the government entity responsible for implementing the challenged regulation had not reached a final decision as to the application of the regulations to Palazzolo's property. Palazzolo v. State ex rel. Tavares, 746 A.2d 707, 714 (2000) (noting that Palazzolo claimed a taking because he was denied permission to develop a subdivision, but that none of his permit applications sought permission to build a subdivision). Second, after being denied approval for his development plan, Palazzolo did not seek permission for less ambitious uses before filing a takings claim. Id. (noting that Palazzolo never sought permission for less ambitious plans for the wetlands or for plans to develop his upland property).

Central to Justice Ginsburg's argument that the merits of the case were not properly presented at the state level was the fact that Palazzolo only asserted a Lucas-based claim, but then, at the Supreme Court, he also argued that there was a taking under Penn Central. Palazzolo, 533 U.S. at 650-51 (Ginsburg, J., dissenting). Therefore, the record reflected only the state's defense against a Lucas claim, where the state demonstrated that Palazzolo had not sought to develop the upland parcel, which retained an economically beneficial use. Id. at 650 (Ginsburg, J., dissenting).

Justice Ginsburg found the majority's rejection of the state court's findings on ripeness "inaccurate and inequitable." Id. at 648 (Ginsburg, J., dissenting). She called the ruling
Court should not have reached the merits of the case, Justice Ginsberg did not address the issue of notice in the body of her opinion; she did, however, give a glimpse of her view in a footnote at the end of her opinion. In the footnote, Ginsburg stated that she would, “at a minimum,” agree with Justices O’Connor, Stevens, and Breyer that notice can play a role in a takings analysis.

Justice Breyer also thought that Palazzolo’s claim was not ripe for adjudication, but his dissent directly addressed the notice issue. Breyer agreed with O’Connor that the existence of a regulation before the time of acquisition should not be dispositive in a takings analysis. Breyer urged consideration of how the timing and circumstances of a change in ownership after the enactment of a regulation affect the reasonable investment-backed expectations of the new landowner. Breyer stated that these expectations diminish as property changes hands over time, and Penn Central allows for consideration of this tendency.

Justice Stevens concurred in part and dissented in part. He agreed with the majority’s opinion that Palazzolo’s claim was ripe for adjudication but dissented from the Court’s discussion of notice. According to Stevens, Palazzolo had no standing to demand compensation for a taking, but he could have sought to enjoin the enforcement of the land-use regulations. If the regulations effected a taking, it was a taking of SGI’s property because SGI was the owner of

inaccurate because, in her view, the record was ambiguous as to whether, and to what extent, development of the upland parcel of land was possible. Id. at 654 (Ginsburg, J., dissenting) (noting conflicting opinions about the possible extent of development). She called the ruling inequitable because, given that Palazzolo’s claim at the state level was based on a deprivation of all economic value, Rhode Island only had to establish that development of the land was possible, but the state did not have to show the extent of possible development. Id. (“Ambiguities . . . persist in part because their resolution was not required to address the claim Palazzolo presented below.”). According to Ginsburg, by finding Palazzolo’s claim ripe for adjudication and allowing him to argue that a Penn Central taking occurred, the Court turned the state’s legitimate defense against Palazzolo’s original Lucas claim into a weapon against the state. Id. at 648 (Ginsburg, J., dissenting).

202. Id. at 654 n.3 (Ginsburg, J., dissenting).
203. Id. (stating that “transfer of title can impair a takings claim”).
204. See id. at 654-55 (Breyer, J., dissenting).
205. Id.
206. Id. at 655 (Breyer, J., dissenting) (explaining that “much depends upon whether, or how, the timing and circumstances of a change of ownership affect whatever reasonable investment-backed expectations might otherwise exist”).
207. Id.
208. Id. at 637 (Stevens, J., concurring in part and dissenting in part).
209. See id. at 638 (Stevens, J., concurring in part and dissenting in part).
210. Id. at 642 (Stevens, J., concurring in part and dissenting in part).
the land when the regulations went into effect. Stevens described a taking as a “discrete event” that can only be compensated at the time that it happens. However, he did not think this limitation was related to whether the landowner had notice of the regulation.

III. ANALYSIS

Although commentators were hopeful that the Palazzolo Court would clarify the proper role of notice in regulatory takings law, the decision will not have such an enlightening impact. The Palazzolo decision clearly tells lower courts that notice of a regulation alone should not defeat a regulatory takings claim, but it offers only minimal clarification of the role notice should play in a regulatory takings analysis.

A. Palazzolo’s Effect on Claims Under Lucas

One important effect of Palazzolo is that lower courts may no longer automatically consider a land-use regulation as a background principle of state property law and therefore a bar to a categorical takings claim under Lucas. The Court stated that a regulation does not become a background principle of state law simply by its enactment or the fact that title to the land has passed since its enactment. The Court also added that whether a law is a background principle must depend upon objective factors, such as the nature of the land use prohibited. However, other than that caveat, the Court merely repeated language from Lucas. Because the Court found no Lucas taking in Palazzolo, it did not decide whether the regulations at issue would qualify as background principles.

Palazzolo tells lower courts that a pre-existing regulation is not a per se background principle, but it does not tell lower courts how to

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211. See id. (noting that Palazzolo could have sought enjoinment of the regulations, but he had no right to compensation for the value of property taken from someone else).
212. Id. at 638-39 (Stevens, J., concurring in part and dissenting in part).
213. Id. at 642 (Stevens, J., concurring in part and dissenting in part).
214. See, e.g., Radford & Breemer, supra note 72, at 452; Eagle, supra note 159, at 193.
215. See Palazzolo, 533 U.S. at 632.
216. See id. at 629-30 (“It suffices to say that a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State’s law by mere virtue of the passage of title.”).
217. Id.
218. Id. at 630.
219. Id. (citing Lucas’ definition of background principles as “those common, shared understandings of permissible limitations derived from a State’s legal tradition”).
220. Id. at 629.
complete the analysis of when a pre-existing regulation is a background principle.\textsuperscript{221} This shortcoming of the \textit{Palazzolo} decision means that the notice rule may still have life when the pre-existing regulation can fit into the still-vague definition of a background principle. For example, in the 1994 case of \textit{Hunziker v. State},\textsuperscript{222} the Supreme Court of Iowa held that a state law prohibiting disinterment of ancient human remains did not effect a taking of plaintiffs' land under \textit{Lucas}.\textsuperscript{223} The law at issue had been in effect more than ten years before plaintiffs bought the land, and its purpose was to preserve ancient human remains with historical or scientific significance to the state or the country.\textsuperscript{224} Given that the law had been in effect for a decade and that Iowa is not the only state to pass a law protecting buried human remains with historical significance,\textsuperscript{225} the Iowa law could be within \textit{Palazzolo}'s definition of a background principle as "common, shared understandings of permissible limitations derived from a State's legal tradition."\textsuperscript{226}

A similar problem is raised by \textit{Kim v. City of New York},\textsuperscript{227} where the Court of Appeals of New York held that the city's placing side fill on more than 2,000 square feet of the plaintiffs' property did not constitute a taking.\textsuperscript{228} The court found that the regulation authorizing the city's action had its roots in New York's common law.\textsuperscript{229} It is not unusual for a land-use regulation to have a common-law basis.\textsuperscript{230} Such common-law based regulation would arguably fit within the \textit{Palazzolo} Court's definition of a background principle of state law.\textsuperscript{231} Although \textit{Palazzolo} may dictate a different result where the regulation challenged is relatively new and is not derived from some common understanding of

\begin{itemize}
\item \textsuperscript{221} \textit{Id.} at 629-30.
\item \textsuperscript{222} 519 N.W.2d 367 (Iowa 1994).
\item \textsuperscript{223} \textit{Id.} at 371.
\item \textsuperscript{224} \textit{Id.} at 370.
\item \textsuperscript{226} \textit{Palazzolo}, 533 U.S. at 630 (citing \textit{Lucas}, 505 U.S. at 1029-30).
\item \textsuperscript{227} 681 N.E.2d 312 (N.Y. 1997).
\item \textsuperscript{228} \textit{Id.} at 314 (concluding that plaintiff's title did not encompass the alleged property taken because there was an obligation of lateral support to the public roadway).
\item \textsuperscript{229} \textit{Id.} at 316 (applying rules of common law and New York City's charter).
\item \textsuperscript{230} See, e.g., Colo. Dep't of Health v. Mill, 887 P.2d 995, 1002 (Colo. 1994) (stating that regulations regarding radioactive materials would be lawful under Colorado's common law of nuisance); Stevens v. City of Cannon Beach, 854 P.2d 449, 456-57 (Ore. 1993) (finding that a regulation, under which the city denied a permit to build a privacy wall on oceanfront property, was based on the common law public trust doctrine).
\item \textsuperscript{231} See \textit{Palazzolo}, 533 U.S. at 630.
\end{itemize}
the state's power to regulate private property, lower courts will be able to continue to apply the notice rule in many cases.

B. Effect on the Penn Central Analysis

The Court's opinion in Palazzolo barely touches on investment-backed expectations, except to say that Palazzolo's claim under Penn Central is not barred solely by the fact that he acquired title after the challenged regulations went into effect. The only extensive discussion of the Penn Central takings analysis appears in Justice O'Connor's concurrence. It is unfortunate the Court did not include O'Connor's analysis in the majority opinion because most of the Justices noted that they agreed with O'Connor's understanding of the role of notice in investment-backed expectations. Thus, the consensus seemed to be that notice is relevant but not dispositive to a Penn Central taking analysis. Justice O'Connor also urged that the investment-backed expectations factor cannot be dispositive in a Penn Central analysis. She reaffirmed that courts must also consider the economic impact of the regulation on the claimant and the character of the governmental action. Including such comments in the majority opinion would have given lower courts clearer direction in appraising the role that notice should play in the landowner's reasonable investment-backed expectations.

Even if O'Connor's analysis had been incorporated into the majority decision, courts would not be prevented from finding that notice of a regulation prevents the landowner from challenging the regulation as a taking because O'Connor's opinion still leaves room for notice to be a prevailing consideration. For example, in District Intown Properties Limited Partnership v. District of Columbia, the court found that the

232. See id.
233. See id. at 632-33 (O'Connor, J., concurring).
234. See id. at 654 n.3 (Ginsburg, J., dissenting) ("I would, at a minimum, agree with Justice O'Connor . . . that transfer of title can impair a takings claim."); id. at 654-55 (Breyer, J., dissenting) (noting his agreement with Justice O'Connor that notice cannot "always and automatically bar a takings claim" and arguing that Penn Central takes such factors into account) (emphasis in the original); id. at 643 n.6 (Stevens, J., concurring in part, dissenting in part) (stating that had the standing issue been resolved differently, he would have treated the owner's notice as relevant, but not necessarily dispositive).
235. See supra note 234.
236. Id. at 634 (O'Connor, J., concurring) ("The state of regulatory affairs at the time of acquisition is not the only factor that may determine the extent of investment-backed expectations.").
237. Id. at 634-35 (O'Connor, J., concurring).
238. See id. at 635-36 (O'Connor, J., concurring).
239. 198 F.3d 874 (D.C. Cir. 1999).
appellant did not argue that the character of the government’s action demanded a finding of a taking, nor did the appellant put forth “striking evidence” of the adverse economic effects of the challenged regulation.\textsuperscript{260} That left the court to consider the appellant’s reasonable investment-backed expectations, and although notice was an important factor in that analysis, it was not the sole factor considered in finding that the regulation did not frustrate the appellants’ reasonable investment-backed expectations.\textsuperscript{241} District Intown Properties demonstrates how courts can consider all the factors mentioned in Justice O’Connor’s concurrence, yet still find notice of the regulation to be a prevailing factor in finding that no taking has occurred.\textsuperscript{242}

### C. Fairness Considerations

Although the majority opinion relies on considerations of fairness in reaching the holding that post-regulation acquisition of land is not fatal to a takings claim, it fails to fully consider the balancing of public and private interests this issue raises.\textsuperscript{243} The majority states that it is unfair to bar landowners from challenging a regulation but does not consider whether it is fair to require the public to compensate landowners who

\begin{itemize}
\item \textsuperscript{240} Id. at 883.
\item \textsuperscript{241} Id. (considering the facts that the regulation did not interfere with appellants’ “primary expectation” of property use because the regulation allowed appellants to continue to use the property as it had been used for the last twenty-eight years; the proposed development was a departure from the property’s traditional use; and the amount of time passing between purchase of the property and the moment of subdivision).
\item \textsuperscript{242} Id. at 883-84. Another case that examined all the Penn Central factors but still found notice to be a prevailing concern is McNulty v. Town of Indialantic, 727 F. Supp. 604 (M.D. Fla. 1989). In McNulty, at the time the plaintiff bought his beachfront property, regulations required government permission before the property could be developed. Id. at 605. In subsequent years, the regulations were strengthened to make development much more difficult, and plaintiff claimed his property had been taken. Id. at 605-06. Analyzing plaintiff’s claim under Penn Central, the court made a detailed examination of the economic impact of the regulations, the plaintiff’s investment-backed expectations, and the character of the government action. Id. at 608-13. Within the investment-backed expectations factor, the court considered that the plaintiff had not attempted to develop his land for fifteen years and that his current ability to develop the land was the same as his neighboring landowners. Id. at 610-12. However, the court paid special attention to the fact that the plaintiff purchased the land with notice of the regulations, giving that consideration its own heading in the opinion. Id. at 611-12 (noting that the reasonableness of plaintiff’s expectation was undermined by the fact that his land had been subject to land-use regulation since its purchase).
\item \textsuperscript{243} See Palazzolo, 533 U.S. at 635 (O’Connor, J., concurring) (stating that if existing regulations play no role in a takings analysis, then “an important indicium of fairness is lost”).
\end{itemize}
purchase strictly regulated land, hoping to secure a windfall by claiming the regulations are a taking.244

The windfall issue arises from the assumption that land subject to development restrictions has a lower market value than land not subject to such restrictions.245 A person could purchase the land at the lower price, challenge the regulations as a taking, and if successful, either develop the land without the restrictions or receive compensation for the lost value of the land.246 If the state decided to repeal the regulation and

244. Compare Palazzolo, 533 U.S. at 628 (noting the unfairness of a rule that would bar a takings claim where the steps necessary to make the claim ripe had not been taken by a previous owner), with id. at 635 (O'Connor, J., concurring) (arguing that if existing regulations are not taken into account in a takings analysis, some owners may “reap windfalls” unfairly).

The windfall to the owners would come in the form of the “just compensation” required by the Fifth Amendment. U.S. Const. amend. V. The Takings Clause is unique among constitutional protections because it not only defines when there is a cause of action — when a taking of private property for public use occurs — but also identifies the remedy, just compensation. Jan G. Laitos, Law of Property Rights Protection: Limitations on Governmental Powers § 17.02, at 17-3 (1999). Since the 1987 case of First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987), it has been clear that the duty to compensate exists in a regulatory taking just as it does when the government exercises its eminent domain power. Id. at 17-5. Because most laws being challenged as regulatory takings do not provide for compensation to the property owner, the courts must compute the amount of compensation that is “just.” Id. §§ 17.03, 17-5, 17-6. The constitutional standard for compensation is the fair market value of the property at the time of the taking. Id. at 17-7 (noting that the value is determined by the trier of fact). When there is a partial taking — a substantial diminution in value as opposed to a complete deprivation of value — the “before and after” rule applies, and the owner receives the difference between the fair market value of the entire property before the taking and the fair market value of the remainder after the taking. Id. at 17-8. If the taking is total, i.e., a Lucas taking, then the property owner receives the fair market value for the highest and the best use of the property before the government regulation. See id. at 17-10.

245. See Palazzolo, 533 U.S. at 636 (Scalia, J., concurring). An example of the windfall situation is presented in Professor Michelman’s article:

Suppose I buy scenic land along the highway during the height of public discussion about the possibility of forbidding all development of such land, and the market clearly reflects awareness that future restrictions are a significant possibility. If restrictions are ultimately adopted, have I a claim to be compensated in the amount of the difference between the land’s value with restrictions and its value without them? Surely this would be a weak claim. I bought land which I knew might be subjected to restrictions; and the price I paid should have been discounted by the possibility that restrictions would be imposed. Since I got exactly what I meant to buy, it perhaps can be said that society has effected no redistribution so far as I am concerned, any more than it does when it refuses to refund the price of my losing sweepstakes ticket.

Michelman, supra note 73, at 1238 (footnote omitted).

246. See Palazzolo, 533 U.S. at 636 (Scalia, J., concurring). When a court finds that a regulation effects a taking and the property owner is due compensation, the government
the landowner was able to develop the property, this transaction would not be unlike other speculative investments where an investor took a risk that turned out to be profitable. However, if the state chose to keep the regulation in place and compensate the landowner, the landowner would be compensated for the value of his land without the regulations, which presumably would be higher than what he originally paid. As a result, the landowner would be enriched at the public’s expense. Forcing the public to bear a burden that may be more properly borne by the individual landowner goes against the basic rationale underlying regulatory takings. Under Palazzolo, this imbalance between the public as a whole and an individual landowner remains a possibility.

IV. CONCLUSION

In Palazzolo, the Supreme Court had the opportunity to make clear the role that notice should play in regulatory takings determinations. By instead promulgating a “notice should not be dispositive” rule, the Court missed its chance to clarify the issue. Aside from the questions of fairness that such a rule raises, removing notice as a dispositive factor in takings claims will foster inefficiency. Because the Supreme Court refused to further define the background principle exception to Lucas, or state whether notice of a regulation is a consideration in the property owner’s investment-backed expectations, lower courts will likely continue to apply the notice rule, albeit not as a per se bar to a takings claim.

has the choice of either leaving the offending regulation in place, thereby making the taking permanent and compensating the property owner accordingly, or repealing the regulation as applied and limiting the compensation owed to the property owner to the value lost while the regulation was in place. First English Evangelical Lutheran Church, 482 U.S. at 319.

247. See Palazzolo, 533 U.S. at 636 (Scalia, J., concurring) (describing such an occurrence as similar to “the windfalls that occur every day at stock exchanges or antique auctions, where the knowledgeable . . . profit at the expense of the ignorant”).

248. See discussion of compensation principles, supra note 244. For a discussion of possible windfalls in the regulatory takings context, see Outdoor Graphics, Inc. v. City of Burlington, 103 F.3d 690, 695 (8th Cir. 1996) (noting that the plaintiff bought the property, which was subject to a nonconforming use, at a bargain price and has made considerable profit off of it); Kim v. City of New York, 681 N.E.2d 312, 319 (N.Y. 1997) (identifying the possibility that plaintiffs could receive a reduction in the purchase price of the property because of the regulation and then receive compensation because the regulation was enforced).

249. Kim, 681 N.E.2d at 319.

V. ADDENDUM

Since this Article was written, courts have had an opportunity to interpret Palazzolo's impact on regulatory taking claims in which landowners had notice of regulations at the time of purchase. True to the spirit of Palazzolo, courts have not allowed notice of a regulation to bar the landowner's taking claim.251

However, some courts, especially the Federal Circuit, have incorporated Justice O'Connor's concurrence into their analyses of plaintiffs' reasonable investment-backed expectations.252 In Rith Energy, Inc. v. United States,253 the Federal Circuit specifically refused to ignore the fact that plaintiff purchased its mining leases with notice that the government could revoke plaintiff's mining permit.254 As O'Connor advised, the court examined all three Penn Central factors but ultimately found that there was no taking under Penn Central.255

Palazzolo's impact on categorical Lucas takings is less clear. In Esplanade Properties, LLC v. City of Seattle, decided about a year after Palazzolo, the court found that a pre-existing regulation was a background principle of law.256 The regulations and laws pursuant to which the city denied plaintiffs' plans to develop shoreline were a reflection of the state's public trust doctrine, and thus they did not effect

252. Rith Energy, Inc. v. United States, 207 F.3d 1347, 1350 (Fed. Cir. 2001) (noting that the Palazzolo Court did not suggest that the reasonable investment-backed expectations of persons operating in a highly regulated endeavor are not relevant to the Penn Central analysis); Commonwealth Edison Co. v. United States, 271 F.3d 1327, 1350 n.23 (Fed. Cir. 2001) ("As Justice O'Connor's concurring opinion in Palazzolo makes clear... the regulatory environment at the time of the acquisition of the property remains both relevant and important in judging reasonable expectations.").
253. 207 F.3d 1347 (Fed. Cir. 2001).
254. Id. at 1350-51. Rith Energy, decided in November of 2001, was a petition for the rehearing of a case decided before Palazzolo was issued. Id. at 1348. Rith Energy owned coal mining leases and, under federal law, needed to have a permit to mine the coal. Id. at 1348-49. The government suspended and ultimately revoked Rith Energy's mining permit, causing the value of its mining leases to decrease by ninety-one percent. Id. at 1349. In the original hearing of the case, the court considered the fact that Rith Energy acquired the leases after 1977, the date the relevant legislation was passed. Id. at 1350. On the petition for rehearing, Rith Energy argued that under Palazzolo, it was improper for the court to have considered this fact in determining Rith Energy's investment-backed expectations. Id. The court rejected this argument, citing Justice O'Connor's Palazzolo concurrence. Id.
255. Id. at 1352.
256. Esplanade Props., LLC v. City of Seattle, 307 F.3d 978, 985 (9th Cir. 2002).
a taking of plaintiffs' property. While the case illustrates how a pre-existing regulatory scheme can be considered a background principle, the case itself does not cite to Palazzolo or discuss whether the fact that plaintiffs' land was subject to regulation at the time of purchase was relevant in its analysis.

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257. *Id.* at 986.
258. See supra notes 216-32 and accompanying text.
259. See Esplanade Properties, 307 F.3d at 985-87.