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Changing the Past- The Right of a Post-Regulation Acquirer to Challenge a Regulation

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NOTE

CHANGING THE PAST: THE RIGHT OF A POST-REGULATION ACQUIRER TO CHALLENGE A REGULATION

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A landowner can make a takings challenge of a statute or regulation that interferes with his right to develop his land. The success of this challenge will depend on one of two things or sometimes both: the extent to which the regulation interferes with his investment-backed expectations ("IBE") at the time of acquisition and whether the right that is being interfered with is one that he acquired at the time of his acquisition in the owner's bundle of rights ("OBR"). The extent of the right to challenge a statute is unclear when the owner challenging the regulation acquired the land *after* the regulation became law. In 2001, the Supreme Court decided *Palazzolo v. Rhode Island*[1] in which the Court both further defined and left open to further debate the IBE and OBR of a subsequent acquirer.

This note attempts to explain the history of IBE and OBR, what the Court did in *Palazzolo,* and where the law stands today. Part I lays out the evolution of IBE and OBR in the Supreme Court leading up to the *Palazzolo* case. Part II highlights some important lower court cases before *Palazzolo* that suggest a split in how to apply the Supreme Court guidelines. Part III will explain the *Palazzolo* decision. It will go through the basic facts and the different opinions. Part IV looks at the lower courts that have had a chance to apply the *Palazzolo* decision to new cases. The Conclusion discusses where the law is now and where it is headed.

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

I. HISTORY OF IBE AND OBR THROUGH LUCAS

The takings clause of the Fifth Amendment[2] requires the federal government to compensate an individual when the government takes his or her property. The Court later incorporated this part of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment[3] and made it similarly applicable against the states.[4] Until 1922, the takings clause only applied when the government actually took title or possession of the land.

The landmark case of *Pennsylvania Coal Co v. Mahon*[5] changed the boundaries of the takings clause. Many believe that here the court first acknowledged the concept of regulatory takings.[6] The Court, in *Pennsylvania Coal*, acknowledged that the government cannot work without having an incidental affect on property values, but noted that when a regulation goes so far as to deny some core property rights then the regulation will be considered a taking.[7]

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2. U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation").

3. *Id.* at amend. XIV, § 4 ("nor shall any state deprive any person of life, liberty, or property, without due process of the law").

4. *See* Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 160 (1980). Noting in Justice Blackmun's decision, "That prohibition, of course, applies against the States through the Fourteenth Amendment" (citing Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226 (1897) as the source of this application of the Fourteenth Amendment.). In *Chicago,* Justice Harlan, writing for the Court, explained that if the Due Process Clause of the Fourteenth Amendment was to have any real meaning, the states must provide for a fair process and fair compensation before property may be taken. *Chicago*, 166 U.S. at 235.

5. 260 U.S. 393 (1922).

6. *See, e.g.,* Lucas v. South Carolina Costal Council, 505 U.S. 1003, 1014 (1992); *but see* William Michael Treanor, *Jam For Justice Holmes*, 86 Geo. L.J. 813 (1998)(arguing that although the popular conception of *Mahon* is that is was the beginning of regulatory takings, that is a misreading of the case and what Justice Holmes really meant).

7. *Mahon*, 260 U.S. at 415. The exact words of the court were, "The general rule at least is that while property may be regulated to a

In 1978, the Court decided the case of *Penn Central v. City of New York*.[8] Here the Court established a new way to evaluate regulatory takings. The Court recognized three main factors that were to be used when evaluating a regulatory takings cases: (1) "the economic impact of the regulation on the claimant"[9]; (2) the extent to which the regulation "interfered with distinct investment backed expectations"[10]; and (3) the "character of the government action."[11] These factors became the backbone of what has now become known as the "*Penn Central* test."

A year later the Court decided *Kaiser Aetna v. United States*.[12] In this case, then Justice Rehnquist, writing for the Court, changed the wording in *Penn Central* from "*distinct* investment backed expectations"[13] to "*reasonable* investment backed expectations."[14] This difference in wording has had a significant impact on how the courts would later apply the IBE factor of the *Penn Central* test.[15]

In 1987, the Court decided *Nollan v. California Coastal Commission*.[16] In *Nollan*, the Court and Justice Brennen disagreed over whether knowledge of a regulation should affect the Nollans' right to compensation. The Court ruled, "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

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certain extent, if regulation goes too far it will be recognized as a taking."

8. 438 U.S. 104 (1978).

9. *Id.* at 124.

10. *Id.*

11. *Id.*

12. 444 U.S. 164 (1979).

13. *Penn Central*, 438 U.S. at 124 (emphasis added).

14. *Kaiser Aetna*, 444 U.S. at 175 (emphasis added).

15. The courts can second-guess an owner's expectations because the standard is reasonableness. *See, e.g.*, Good v. United States, 189 F.3d 1355 (1999) (describing the owner expectations as unreasonable in light of the regulatory winds blowing at the time of investment); *see also* Deltona Corp. v. United States, 657 F.2d 1184 (Ct. Cl. 1981) (describing the owner's expectations to receive a permit under the standards then in use as too broad because the government could at anytime raise what the standards for granting a permit will be).

16. 483 U.S. 825 (1987).

their full property rights in conveying the lot."[17] Thus the right to keep that property free from the state's easement was part of the new owners' - the Nollans - bundle of rights. This precedent would later be relied on by the Court to decide the *Palazzolo* case. Justice Brennen dissented, saying knowledge of the restriction should have precluded any compensation.[18]

In 1992, the Court decided *Lucas v. South Carolina Coastal Council.*[19] The Court decided that when a regulation depletes all value there is a *per se* taking.[20] *Lucas* also said that anything that is part of the background principles of the property laws of the state - and therefore not part of the OBR - may be regulated without paying compensation.[21]

II. IBE AND OBR BEFORE *PALAZZOLO*

After *Penn Central* and *Lucas*, lower courts were divided as to when a regulation would became part of the background principles mentioned in *Lucas.* In some jurisdictions, prior notice by a buyer was sufficient for a regulation to be considered a background principle for that buyer. Many courts would apply *Penn Central* and *Lucas* as one test and once a regulation was found to be part of the background principles – and therefore not part of the owner's OBR – the court would deny compensation without discussing IBE.[22]

Other courts recognized that *Penn Central* and *Lucas* were two distinct tests for different factual circumstances, but they would still deny compensation based on a lack of IBE or a right missing from the OBR.[23] The courts would apply a *Lucas* test where the regulation

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17. *Id.* at 834 n.2.

18. *Id.* at 866 (Brennen, J., dissenting).

19. 505 U.S. 1003 (1992).

20. *Id.* at 1019.

21. *Id.* at 1023.

22. *See* Hunzicker v. State, 519 N.W.2d 367 (Iowa 1994). This talismanic approach concerned Justice O'Connor. *See Palazzolo*, 533 U.S. at 634 (O'Connor, J., concurring).

23. *See, e.g.*, Adams Outdoor Advertising Co. v. City of East Lansing, 614 N.W.2d 634 (Mich. 2000) *cert. denied* 532 U.S. 920 (2001).

claimed to take away all economical use of the parcel in question.[24] However, if the regulation did not take away all economical use, but rather it was just alleged that the regulation took too much, then they would apply a *Penn Central* balancing test.[25] The difference between the two tests would lay where the trial court makes an individual analysis of each case: in a *Lucas* situation, so long as the claimant could establish he had lost all economic value, he would recover without a balancing of the governmental interests.[26] If the land had not lost all economic value then each case would get a case-specific balancing test.[27]

I will call these courts that denied compensation whenever the new owner had notice of the regulation "Notice Courts."

Other jurisdictions held that mere knowledge at the time of purchase does not make a regulation part of the background principles and have required more than just notice to make law part of the background principles. These jurisdictions will be referred to as "No-Notice Courts."

A. *"Notice Courts" Generally Find That Acquisition with Notice of the Regulation is Fatal to a Property Owners' Suit*

Before *Palazzolo*, several appellate courts ruled that notice of the regulation meant that the owner had no reasonable IBE because the law was part of the background property principles.[28]

Claridge v. New Hampshire Wetlands Board[29] is a good example of the IBE factor from a *Penn Central* test. *Claridge* was decided six years before *Lucas*, and the language the court uses is that of IBE. The Claridges wanted to fill in wetlands on their property, which they had purchased after the regulations were enacted. When they were denied a permit they filed an inverse condemnation suit

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In *Palazzolo* the Supreme Court definitively decided that *Penn Central* and *Lucas* are two different tests for two different factual situations. *Palazzolo*, 530 U.S. at 632.

24. *Id.* at 638.

25. *Id.*

26. *Id.*

27. *Id.*

28. These include cases from Iowa, New Hampshire, Michigan, New York, Rhode Island, South Carolina, and Virginia.

29. 485 A.2d 287 (N.H. 1984).

against the New Hampshire Wetlands Board. The New Hampshire Supreme Court ruled, "[a] person who purchases land with *notice* of statutory impediments to the right to develop that land can justify few, if any, legitimate investment backed expectations of developmental rights which rise to the level of constitutionally protected rights."[30] The court further stated that if compensation was allowed, the state would be de facto guaranteeing investment risks through the inverse condemnation process.[31] The court, therefore, denied compensation for a lack of IBE under the *Penn Central* test because of notice.

In *Grant v. South Carolina Coastal Commission*,[32] the South Carolina Supreme Court ruled that because the regulation predated Grant's ownership of the parcel, he never had the right to fill in the land.[33] Because this right was not part of Grant's OBR, under *Lucas* there was no taking.[34] The court did not mention *Penn Central*, much less differentiate between the *Penn Central* test and the *Lucas* test. The court, in denying compensation, relied solely on the right to fill not being in Grant's OBR under *Lucas*.[35]

In *Adams Outdoor Advertising Co v. City of East Lansing*,[36] the Michigan Supreme Court recognized that *Penn Central* and *Lucas* were separate tests. But, because Adams obtained its lease after the regulation was in place, they never obtained the property interest that had been regulated by the City of East Lansing, which therefore was not part of Adams' OBR.

In *Good v. United States*,[37] the Federal Circuit found that because at the time that Good acquired the property there already was an extensive regulatory system in place, Good should have foreseen stricter rules and therefore he had no reasonable IBE.[38] The Court then added, "[b]ecause we find the expectations factor dispositive,

30. *Id.* at 291 (emphasis added).
31. *Id.*
32. 461 S.E.2d 388 (S.Ct. 1995).
33. *Id.* at 391.
34. *Id.*
35. *Id.*
36. 614 N.W.2d 634 (Mich. 2000).
37. 189 F.3d 1355 (Fed Cir. 1999).
38. *Id.* at 1361.

we will not further discuss the character of the government action or the economic impact of the regulation."[39]

These four cases illustrate how one school makes the property-acquisition where a regulation is in place fatal to any future takings claim. Several states filed an amici brief in the *Palazzolo* case in support of Rhode Island, setting out a reason for why this should be so.[40] The brief explains that this bright line rule is the "flipside to the Takings Doctrine's proscription against singling out landowners to bear societal burdens – landowners, not society at large, must bear the consequences of their own actions."[41] The amicus means that the risk the owner took in purchasing such property should not be subsidized by the state later paying the difference between the value at the time the property was purchased and what it could be worth absent the regulation.[42] The amicus wants to limit IBE to only those development rights that would actually be legal at the time of purchase – irrespective of what economic effect those regulations had on the developmental potential of that parcel.[43] This was the prevailing view of IBE and OBR in most jurisdictions until the *Palazzolo* decision.[44]

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39. *Id.* at 1360. Compare this last quote from *Good* to Justice O'Connor's concern with the courts lifting IBE to dispositive status. *Palazzolo*, 533 U.S. at 618 (O'Connor, J., concurring).

40. Brief of the States of California, Alaska, Colorado, Connecticut, Georgia, Hawaii, Maine, Massachusetts, Montana, Nevada, New Hampshire, New Jersey, New York, Ohio, Oklahoma, South Dakota, Vermont and Washington, the District of Columbia and the United States Virgin Islands as Amici Curiae in support of the respondents. 1999 U.S. Briefs 2047.

41. *Id.* at 23.

42. They distinguish Nollan as a physical taking and therefore inapposite. *Id.* at 24 n.9.

43. *Id.* at 24.

44. Robert Meltz, *What Role Does the Law Existing When a Property is Acquired Have in Analyzing a Later Taking Claim?: The "Notice Rule"*, 384 AMERICAN LAW INSTITUTE -AMERICAN BAR ASSOCIATION CONTINUING LEGAL EDUCATION ALI-ABA COURSE OF STUDY (May 3, 2001)(contrasting ten state final courts of appeal and three federal circuits holding for the Notice Rule to one Supreme Court decision, one concurrence and one dissent from a federal cir-

B. *No-Notice Courts Do Not Deny Suits Merely Because of Prior Notice*

In a 1965 pre-*Penn Central* case, the Minnesota Supreme Court stated the best explanation as to why post-regulation acquisition should not affect the new owner's right to compensation.[45] *Filister v. City of Minneapolis* involved a plaintiff who purchased property 13 years after the zoning ordinance was enacted and then sued, claiming that the residential zoning denied him all economic use of the land.[46] The lower court denied compensation in part because Filister had knowledge of regulation when he purchased the property.[47] While affirming the denial of compensation on other grounds, the Minnesota Supreme Court explicitly declined to use the knowledge as grounds to deny compensation. The court stated "[W]e tend to the view that knowledge of the restriction does not in itself create an estoppel if the ordinance has at the time of its adoption deprived the property of all practical use. There is no logical reason why one who purchases with notice of such an ordinance but has sufficient vision and initiative to believe that the property is illegally zoned should not have the same standing he would have enjoyed had he been the owner at the time the ordinance was adopted. Nor do we believe the amount of the consideration is entitled to any weight. There should not be one rule for a purchaser who drives a hard bargain and a different rule for one who pays a more substantial price."[48] This opinion offers the clearest statement of why an owner should be allowed to challenge a regulation in place when he purchased the property.

In a more recent case, the Appellate Division of the New Jersey Superior Court relied on *Nollan* to allow a new owner to press the same claims and IBE as his predecessor in interest.[49] The court said that so long as the original owners had the requisite IBE, then the

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cuit and two state midlevel appellate courts to dismiss the Notice Rule).

45. Filister v. City of Minneapolis, 133 N.W.2d 500 (Minn. 1965).

46. *Id.* at 501.

47. *Id.* at 502.

48. *Id.* at 504.

49. East Cape May v. State of New Jersey, 300 N.J.Super. 325 (1997).

subsequent owner could use those IBEs to pursue an inverse condemnation claim against the state.[50] The court still required the rest of the *Penn Central* analysis to be satisfied in the lower court before a taking could be established.[51]

There is a similar decision from the Court of Appeals of Michigan. In *K & K Construction, Inc. v. Department of Natural Resources*,[52] the court relied on *Nollan* to allow a subsequent owner to use the previous owner's IBE to press an inverse condemnation claim.[53] The court ruled that the timing of the regulation and ownership should not preclude just compensation that would otherwise be due.[54]

In *Outdoor Graphics, Inc. v. City of Burlington*,[55] the Eighth Circuit distinguished the *Penn Central* test from the *Lucas* test. The court also made a distinction between IBE and OBR.[56] The court stated that IBEs only applied in a *Penn Central* analysis while OBR was relevant in *Lucas* tests.[57] The court explained that the *Lucas* test was for a categorical taking and therefore the IBE of the owner did not matter as long as the right was in the owner's OBR the regulation would cause a taking.[58] The *Penn Central* test, however, is for a balancing test where IBE plays a major role in determining if there has been a taking.[59] Of course, if the right in question was not part of the owner's OBR then the IBE would be very unreasonable.[60] The court found that because Outdoor Graphics had known of the regulation and obtained a profit, its IBE had been met. While Outdoor Graphics was denied any compensation the court did not outright dismiss the IBE claim because the regulation predated the ac-

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50. *Id.* at 337.

51. *Id.* at 338.

52. 217 Mich.App. 56 (1996) (overruled by Adams Outdoor Advertising Co. v. City of East Lansing, 614 N.W.2d 634 (Mich. 2000); *cert. denied* 532 U.S. 920 (2001)).

53. *Id.* at 64.

54. *Id.*

55. 103 F.3d 690 (8th Cir. 1996).

56. *Id.* at 695.

57. *Id.* at 694.

58. *Id.*

59. *Id.*

60. *See id.*

quisition of title. The court viewed it as only one factor in the greater *Penn Central* analysis.

It is these two competing views about the role of IBE and OBR of a subsequent purchaser which the Supreme Court addressed in the *Palazzolo* case. It was hoped that the court would provide a definite answer as to which view should predominate.

III. THE *PALAZZOLO* CASE

A. *Case History*

In 1978, Anthony Palazzolo obtained the parcel in question, after the state revoked Shore Gardens Inc.'s (SGI) corporate charter.[61] Palazzolo was the sole shareholder and became the new owner.[62] When SGI owned the land, they made three applications to develop the land, all of which were denied, and the Rhode Island legislature passed two new statutes affecting the property.[63] After Palazzolo obtained the land, he twice applied for permits to fill in part of the wetlands on his property and was rejected both times, after which he filed an inverse condemnation suit in Rhode Island state court under a *Lucas* theory.[64] Palazzolo claimed that his property was worth $3.35 million absent the new regulations and it had been devalued to $200,000. In *Lucas*, the Court said that when the regulation deprives the owner of "all economically viable use" then compensation is warranted. Palazzolo claimed the state could not circumvent that rule by leaving him such a small fraction of value and claim that not *all* use was lost.[65] The trial court ruled against Palazzolo, finding that no compensable taking had occurred.[66]

The Rhode Island Supreme Court affirmed the trial court's judgment on four grounds: (1) the claim was not ripe; (2) Palazzolo had no right to contest the regulations that predate his ownership because it was not part of his OBR; (3) because Palazzolo was left with

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61. *Palazzolo*, 533 U.S. at 616.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. Palazzolo v. State ex rel. Tavares, 746 A.2d 707, 711 (R.I. 2000).

$200,000 there was no *Lucas* claim; and (4) that because he acquired the property after the regulation was passed he had no reasonable IBE claims under *Penn Central*.[67] Palazzolo then appealed to the Supreme Court.

B. *The Supreme Court Decision*

The Court's decision dealt primarily with two of the four grounds on which the Rhode Island Supreme Court relied in its decision – ripeness, and that the regulation predated Palazzolo's title was fatal to a takings claim. Justice Kennedy first explained why the case was ripe for review.[68] The Court then addressed the issue of whether the fact that Palazzolo obtained the property after the regulation was in effect precludes any regulatory takings claims.[69] The Court affirmed the dismissal of the *Lucas* claim saying there was not a complete taking. The Court reversed the holding that the *Penn Central* test was not applicable to cases where the property was acquired *after* the regulation, and remanded the case for further evaluation under *Penn Central*.[70] On the application of *Penn Central*, there were three different opinions from the court. The final outcome on the role that post-regulation acquisition of title has on the *Penn Central* analysis is not definitive because there is no clear majority holding from the Court on the point.[71]

Justice Kennedy, writing for the majority, explained that the state should not be allowed to put an expiration date on the takings clause by barring any claims after the transfer of title in part II B of the opinion.[72] While the Court acknowledged that the state has a right to use its police powers to put restrictions on property rights, they may

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67. *Id.* at 714.

68. *Palazzolo*, 533 U.S. at 626. Justice Stevens also joined this section of the Court's opinion. *Id.* at 638 (Stevens, J., concurring in part and dissenting in part).

69. *Id.*

70. *Id.* at 617.

71. As will be explained later, the four dissenting Justices said that at most they would join Justice O'Connor's view so the next time the Court visits the issue Justice O'Connor's opinion could become the clear holding of a majority of the Court.

72. *Palazzolo*, 533 U.S. at 627.

not enact onerous and unreasonable regulations.[73] Allowing the notice rule would enable the state to enact such regulations and then pay off some people and wait out the rest.[74] People would be forced to choose between finding money to fight the regulation or putting the property up for sale at a steep discount.[75] This would put an expiration date on the takings clause.[76] Justice Kennedy used *Nollan*[77] as precedent for the idea that transfer of title does not bar a claim.[78]

He also added that for a regulation to become part of the background principles of a parcel's property rights there must be something more objective than one individual's purchase after the transfer of title.[79] The court failed, however, to articulate any criteria for what would make a regulation part of the background principles of a state's property laws by claiming that this was not the "occasion to consider" that issue.[80]

The Court's opinion does not explain what role post-regulation acquisition should have in determining IBE. That question is the subject of debate between the two concurring opinions of Justices O'Connor and Scalia.

While O'Connor joins the Court's opinion in its entirety, she explains her understanding of the role post-regulation acquisition should have in the *Penn Central* test.[81] She says that a post-enactment purchaser of a parcel cannot have his claim blocked merely because his purchase was subsequent to the regulation. However, the *Penn Central* IBE must be viewed in light of this condition at the time of purchase.[82] She points out that that, in her view, the error of the Rhode Island Supreme Court was that it raised IBE to a "dispositive status".[83] The *Penn Central* test is "essentially an

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73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).
78. *Palazzolo*, 533 U.S. at 629. The Nollans had purchased the property with notice of the regulation and were still allowed to press their claim that the regulation was an unconstitutional taking. *Id.*
79. *Id.* at 630.
80. *Id.*
81. *Id.* at 632 (O'Connor, J., concurring).
82. *Id.* at 633 (O'Connor, J., concurring).
83. *Id.*

ad hoc, factual inquiry" of which IBE is only one of the factors the Court said should be weighed.[84] However, the existence of a regulation at the time of the purchase of the property will have a major impact on the reasonableness of those expectations, which is one of the major parts of the *Penn Central* test. Justices Stevens and Ginsburg, joined by Justices Breyer and Souter, stated in their dissents that at the least they would join this view.[85]

Justice Scalia wrote his own concurrence to note that he disagrees with Justice O'Connor's view of part II B of the Court's opinion.[86] He was bothered by the perception of fairness that is, in his view, was the basis of Justice O'Connor's opinion.[87] He understood the concept as that it is "unfair" for the new owner to reap such a big profit on land he paid so little for. However he contends that this is part of the way our economy works, people profit when they are willing to take risks.[88]

According to Justice Scalia, the fact that the purchaser had notice of the regulation has no bearing on the analysis.[89] Except where the regulation has already become part of the background principles the change of title should have no bearing on the claim.[90] He explained that the right to sue belonged to the first owner and that when the new owner takes over, the windfall should go to either one of the owners (usually the new one who bargained for this right when he purchased the property) but certainly not the government that enacted the unconstitutional regulations.[91]

Justice Stevens opinion concurred that the case was ripe for review, but dissented from part IIB, the finding of a taking.[92] He explained that what is lacking from the Court's opinion is an under-

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84. *Palazzolo*, 533 U.S. at 633.

85. *Id.* at 643 n.6 (Stevens, J., concurring in part and dissenting in part) and at 654 n.3 (Ginsburg, J., dissenting).

86. *Id.* at 636 (Scalia, J., concurring).

87. *Id.*

88. *Id.*

89. *Id.* at 637 (Scalia, J., concurring).

90. *Palazzolo*, 533 U.S. at 637 (Scalia, J., concurring).

91. *Id.*

92. *Id.* at 639 (Stevens, J., concurring in part and dissenting in part).

standing of when the actual "taking" took place.[93] He defined a taking as a distinct event that takes place at a definite time and therefore only the owner of record at that moment has standing to sue.[94] Under the facts of this case, Justice Stevens defines the moment as the time when the regulation was enacted, as that is the point when the owner of the property lost the right to fill the wetlands.[95] "To the extent that the adoption of the regulations constitute the challenged taking, [the] petitioner is simply the wrong party to be bringing this action."[96]

He then addressed what the law would be if the taking only took place before Palazzolo obtained title to the property. He said that in that instance, the title Palazzolo received lacked the right to fill the wetlands and therefore he has no standing to sue because he did not lose any rights.[97] What Justice Stevens failed to explain is if the right to sue belongs to the original owner – in this case SGI – property?

Justice Ginsburg's dissent, joined by Justices Souter and Breyer, deals primarily with why the case was not ripe for review. She did say, however, that had this case been ripe and properly presented on the merits, she would join Justice O'Connor's opinion at the minimum.[98]

The final opinion is that of Justice Breyer. He started by saying he agrees with Justice Ginsburg but felt the need to expand because the Court addressed some issue that he thought should be commented on.[99] He stated that he generally would agree with Justice O'Connor's view of how post-regulation acquisition should affect a takings claim.[100] He noted that it should be one of the factors "within the *Penn Central* framework."[101]

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93. *Id.* at 640 (Stevens, J., concurring in part and dissenting in part).

94. *Palazzolo*, 533 U.S. at 641 (Stevens, J., concurring in part and dissenting in part).

95. *Id.*

96. *Id.*

97. *Id.* at 644 (Stevens, J., concurring in part and dissenting in part).

98. *Id.* at 654 n.3 (Ginsburg, J., dissenting).

99. *Id.* at 654 (Breyer, J., dissenting).

100. *Palazzolo*, 533 U.S. at 654 (Breyer, J., dissenting).

101. *Id.* at 655 (Breyer, J., dissenting).

C. *Secondary Analysis of the Court's Opinion*

Soon after the case was handed down, John Echeverria wrote an article in the Environmental Law Reporter.[102] He states that his views expressed therein are only based on a preliminary view of what *Palazzolo* stands for. Stephen Eagle wrote another article a few months later as a rebuttal of what Echeverria wrote about the case.[103] These two articles offer two divergent views of *Palazzolo.* For the purposes of this paper I will only discuss the parts of their articles that deal with IBE and OBR.

Echeverria attempts to view the case in light of the best way to protect environmental legislation. He first acknowledges the demise of the notice rule and is somewhat disappointed by it as it was one of the few bright line rules in regulatory takings law.[104] He then limited the holding only to those transactions where the transfer is by the rule of law, but not to cases where the transfer was from an arms-length business deal.[105] The point of this limitation on the holding of *Palazzolo* is that in most cases the change of ownership is from an arms-length deal and most of the time the new owner will not get the benefit of *Palazzolo.* He also points out that the new notice rule is not strictly applied against the government, as the wording in *Nollan* suggests, allowing for the denial of some claims because the regulation is so old or well-entrenched. These three observations are Echeverria's hope that even with the strengthening of the rights of property owners the government will still have room to deny people the right to use their property in order to protect the environment. His argument is supported by the vote counting: he notes that the four dissenting Justices said they would support Justice O'Connor's opinion; thus he says these five justices will read *Palazzolo* in a limited manner.[106]

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102. John D. Echeverria, *A Preliminary Assessment of Palazzolo v. Rhode Island,* ENVIRONMENTAL LAW REPORTER VOLUME YEAR XXXI, September 2001[hereinafter Echeverria].

103. Steven J. Eagle, *Palazzolo v. Rhode Island: A Few Clear Answers and Many New Questions,* ENVIRONMENTAL LAW REPORTER VOLUME YEAR XXXII, January 2002 [hereinafter Eagle].

104. Echeverria, *supra* note 71, at 27.

105. *Id.*

106. *Id.*

Eagle takes a different view of the case, and makes a clear argument for a more straightforward reading of the case He strongly supports the rejection of the notice rule. He says that if the rule was allowed to stand it would have the effect of turning various property rights from ones held in fee simple to life estates.[107] He also comments that just because a rule is a bright line does not mean we should not reject it if it has draconian results.[108] He next points out that, while Echeverria argues that the rule is limited to transactions that take place as a matter of law, nowhere in the opinions of the Court or various Justices is there a hint that the rule is so limited.[109] While Eagle acknowledges that Justice O'Connor and the dissenting Justices do make up a majority of the Court to reject a strict no notice rule, he points out that the opinion of the Court is based in a large part on *Nollan* and that the question was left open in the opinion of the Court.[110] This is an observation Eagle makes with no clear argument to support a stronger reading of the case.[111]

While both Echeverria and Eagle agree there is a great deal of room for interpretation in the *Palazzolo* case, each one leans a different way, and tries to push the decision in favor of the social goals he wishes to achieve.

D. *Justices O'Connor and Scalia*

The real question about the holding of *Palazzolo* is the difference between the opinions of Justices O'Connor and Scalia. Because the four dissenting justices all said that at the least they would agree with Justice O'Connor, it would seem that when this issue is next addressed by the Court, Justice O'Connor's opinion will become the view of the Court. However, it is far from certain.

While the area in which Justices O'Connor and Scalia disagree is quite wide, there are areas where they would agree. I will give a few different scenarios and apply their respective opinions and explore their argument.

To start, take a case where the regulation is relatively new. According to Justice O'Connor, we would add the fact that the regula-

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107. Eagle, *supra* note 103, at 45.
108. *Id.* at 47.
109. *Id.* at 48.
110. *Id.* at 134.
111. *Id.*

tion was new to the evaluation of the investment-backed expectations.[112] The timing of the regulation would be another factor in the *Penn Central* analysis.[113] From here there are two possibilities. If the new owner is allowed to assume that because the regulation is new he is allowed to challenge the law, his IBE will still be reasonable. Then, under Justice O'Connor's opinion, you would do the rest of the *Penn Central* analysis because she emphasized that IBE it to be one part of the analysis but not dispositive in either direction. However, if you use the reasoning of the Federal Circuit in the *Good* case, under which the owner must foresee possible future government regulation,[114] then even though the law is new the owner might still lack reasonable IBE. If the reasoning of the Federal Circuit in *Good* is followed, then the next logical step is that even though the owner is allowed to fight the regulation, because he must foresee possible new regulation, so unless the new regulation was a complete surprise, he would have no reasonable IBE and therefore IBE would once again be almost dispositive. Due to Justice O'Connor's concern with giving IBE a talismanic power, it is unlikely she would agree with the reasoning from the *Good* case. She is concerned about the savvy investor buying property just to sue for a regulatory taking. However, when the regulation in question is new there is less of a worry of the savvy investor procuring property at discount rates because the old owner has not yet ruled out fighting the regulation. She also points out that the courts should look to what surrounding owners are allowed to do with their property, so if the ability to sue for the taking was part of the deal making considerations, and the regulation is new so surrounding owners might also still be attempting to fight it, she probably would allow the new owner enough IBE to press a claim. However, her view would not let the analysis stop there – one would still need to engage the remaining

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112. Rith Energy v. U.S., 270 F.3d 1347 (2001). In the *Rith* case the Federal Circuit looked to the industry in general, not just the exact statute. The difference is when an industry has a history of regulation but the exact action here was not previously proscribed, under a *Rith* approach this would be enough to put an owner on notice that the regulation might be forthcoming and therefore lessen his IBE. This case shows how O'Connor's opinion can be read more expansively. *Id.*

113. *Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring).

114. *Good*, 189 F.3d at 1361.

elements of the *Penn Central* test. The reasonableness of the IBE is only one part of that test. There still remains the other two factors to consider before deciding if there was a taking. Only under a full *Penn Central* analysis could the claim be granted.[115]

In the same situation, Justice Scalia would give no value to the timing of the regulation in terms of the expectations of the owner. Whatever the owner planned to do when he purchased the property would be his IBE. A *Penn Central* analysis would then be completed. At the end of his concurrence, Justice Scalia explicitly embraces *Penn Central*, but says that when evaluating IBE "the assumed validity of a restriction" has no bearing.[116]

Under Justice O'Connor's opinion, the Court would give more leeway to the new owner's IBE because the regulation has not had time to become entrenched, and the owner has a reasonable expectation to fight the regulation. Justice Scalia is not concerned with the timing of the regulation. In this situation, the outcome would likely be the same and the new owner could press an inverse condemnation claim with reasonable expectations of challenging the regulation.

When the regulation question is one from the mid-19th century, it would be unreasonable to base your expectations on such an old accepted statute being declared unconstitutional according to Justice O'Connor. Her approach is one of looking at the larger picture. It is a much larger windfall when decades of owners have accepted a regulation, and then some speculator is able to receive all the money from the taking years after it happened. Justice O'Connor would therefore find no reasonable IBE, which would weigh heavily on the rest of the *Penn Central* analysis.

Justice Scalia's approach to such a situation is harder to appraise. With an old and entrenched statute, it would possibly fall under the "background principles of the state's law of property and nuisance",[117] and therefore be part of the equation of the reasonableness of the expectations according to Justice Scalia. He said, "In my view, the fact that a restriction existed at the time the purchaser took title, *other than* a restriction forming part of the background principles of the State's law of property and nuisance."[118] However, there is also

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115. *Id.*

116. *Palazzolo*, 533 U.S. at 637 (Scalia, J., concurring).

117. *Lucas*, 505 U.S. at 1023.

118. *Palazzolo*, 533 U.S. at 637 (Scalia, J. concurring) (emphasis added).

language in Justice Scalia's opinion in *Nollan* that no matter how long after the regulation was enacted any subsequent owner can always challenge the constitutionality of the regulation.[119] Yet, Justice Scalia does join the opinion of the Court, which implicitly says that at some point legislative acts would become part of the background principles.[120]

It is possible that with a regulation so entrenched in the legal system, Justice Scalia might consider it a background principle. If so, there would be no argument between Justice Scalia and Justice O'Connor in such a situation. It is almost as likely, however, that Justice Scalia would say that the new owner could challenge the regulation and then here is a situation where the two justices would argue.

Another area where there definitely would be a disagreement arises when the statute was already old (in terms of expectations), but not yet a background principle.[121] However, even in this situation, anytime the transfer of title was by operation of law and not a sale or gift, the subsequent owner's expectations to develop might still be reasonable according to Justice O'Connor. Justice Scalia would say the expectations are still inapposite.

This situation is quite broad. Many of the cases that arise today are from environmental legislation from the 1970s. On the facts of *Palazzolo*, the statute in question is already 30 years old, yet Justice O'Connor still joins the Court's opinion to say Palazzolo should possibly receive compensation for a taking. She says the fact that he acquired the property post-regulation is only used to evaluate the reasonableness of his expectations, so any case where he acquired title by operation of law it will add to the reasonableness of his ex-

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119. "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." *Nollan*, 483 U.S. at 834 n.2.

120. "We have no occasion to consider the precise circumstances *when* a legislative enactment can be deemed a background principle of state law or whether those circumstances are present here." *Palazzolo*, 533 U.S. at 619 (emphasis added).

121. This is not a small period of time. The Court has thus far declined to explain when a rule will become a background principle, so exactly how much time this encompasses is very much an open question.

pectations because he really did not have notice of the regulation when he decided to acquire the property. It was forced on him as is. Justice O'Connor talks about investment-backed expectations being only *one* factor. She also wants to look at the extent of the regulation and the general "fairness" of compensating in this particular situation. However, had Palazzolo purchased the property from a random owner, she would be less inclined to find a taking. Also, had Palazzolo made money off other property in the area, she might view the fairness differently because then he would have at least received a partial return on his investment and it would not be as unfair just because he did not make as much he had hoped.

Justice Scalia would strongly disagree. He sees the government as a thief unless the law is constitutional. Therefore, any subsequent owner should be allowed to challenge the statute. He is not worried about the fairness as between the two owners but rather of the fairness between government regulations and a private landowner. He points out in a footnote that even where the taking is for the best reasons the government still has a responsibility to compensate the owner that lost his property.

The final outcome will only be decided when the Court revisits the issue.

IV. POST-*PALAZZOLO* LOWER COURT RULINGS

There were only been five cases that addressed post-regulation acquisition since *Palazzolo,* at the time this note was written.[122] Each dealt with the subject differently, and some only mentioned the doctrine in passing. I will state the holding of the two that elaborate on the issue:

In *Rith,*[123] the Federal Circuit distinguished the facts of that case from the holding of *Palazzolo.* In *Rith,* a mining company had its mining permit revoked because continued mining would have an

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122. Rith Energy v. U.S., 270 F.3d 1347 (2001); Cole v. County of Santa Barbara, 2001 WL 1613856 (Cal.App. 2 Dist. Dec 17, 2001); ABKA Ltd. P'shp. v. Wis. Dep't of Natural Res., 635 N.W.2d 168 (Wis.App. 2001); Alviani v. Dixon, 365 Md. 95 (2001); E. Cape May Assocs. v. Dep't of Envtl. Protection, 343 N.J. Super. 110 (2001).

123. Rith Energy v. U.S., 270 F.3d 1347 (2001).

adverse impact on the environment. As a result, Rith was only able to mine about 9% of the available coal.

The court gave great weight to O'Connor's opinion and found that reasonable investment-backed expectations is still quite relevant to a takings analysis. They implicitly rejected Justice Scalia's position without mentioning his concurrence, by using the Court's "blanket rule" rejection on behalf of property owners to cover the states as well. The court said that the Supreme Court wanted reasonable IBE to be part of the equation, and as proof, the opinion cites Justice O'Connor's concurring opinion as the explanation as to what the majority meant.[124] In accordance with the rest of Justice O'Connor's opinion, the court also looked at the other factors of the *Penn Central* test and found that Rith had still made a profit and the type of harm the government was protecting was a traditional governmental concern, and the court denied any takings claim.[125]

In *AKBA*,[126] the Court of Appeals of Wisconsin accepted as settled the idea that a successor in title completely fills the shoes of his predecessor. The case came to the court as a review of an Administrative Law Judge's decision allowing a marina to convert a limited amount of boat slips to "dockominiums" under a Department of Natural Resources permit. The court said that it seems that if at any point in the future the state wanted to change the conditions of the ownership of the slips held under public trust, any subsequent owner could challenge the states right to make those changes.[127] The dissent makes a strong point that *Palazzolo* is inapposite because the original owner never had any rights in the water to transfer to the new owners because it was held in public trust.[128]

These two cases are not enough evidence on how post-regulation acquisition affects investment-backed expectations in light of *Palazzolo*. However, *Rith* and *AKBA* do give two very different ways of interpreting *Palazzolo*.

Rith relies heavily on Justice O'Connor's opinion. The Federal Circuit examined the general coal mining industry and said that such is a highly regulated industry. The court then looked at the fact that

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124. *Id.* at 1350.

125. *Id.* at 1352.

126. ABKA Ltd. P'shp. v. Wis. Dep't of Natural Res., 635 N.W.2d 168 (Wis.App. 2001).

127. *Id.* at 181 n.6.

128. *Id.* at 184 n.2 (Brown, J., dissenting).

Rith acquired the property after the regulations were in force. With these two factors together, the court decided that his reasonable investment-backed expectations were not high. The court also looked at the money invested and the profit made on the land and said that, although Rith did not achieve his goals, the transaction was profitable. This second part of the analysis is significant because it demonstrates the court relied on more than the expectations of the owner, but looked to the impact of the regulation as well. This is addressing the concern of Justice O'Connor that lower courts were relying on expectations and not looking at the other factors in the *Penn Central* test. She wanted to ensure that IBE were not given talismanic powers but rather they were one factor of the greater *Penn Central* test. By looking at the other factors and making them part of the evaluation, the *Rith* court heeded Justice O'Connor advice.

In *AKBA,* the majority addresses *Palazzolo* in a footnote.[129] The majority expresses the fear that allowing the transfer would lead the new owners to sue if the state should ever exercise its right to the area under the public trust doctrine.[130] They seem to pay no attention to how long that time would extend. The dissent does not disagree on this point; rather, he disagrees as to the application of *Palazzolo* to this case.[131] Here, the owner never had rights to the water. His rights extended only to the land at the edge with the limited right to establish a marina subject to the public trust.[132] The public-trust riparian owner never had any property rights in the water. This rule is considered part of the background property rights of the state and therefore *Palazzolo* is inapposite.[133] It seems that both opinions are following Justice Scalia's approach. Consequently, can the current owner challenge the 1993 act limiting property owner's rights to place structures in the water?

These decisions illustrate the two most likely ways *Palazzolo* will be interpreted by lower courts. It is too early to tell which of the two – if either – will become the prevailing view. As mentioned before, the prevailing view amongst courts that had dealt with the issue was

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129. *Id.* at 181 nt. 6.

130. *Id.*

131. *Id.* at 184 n.2 (Brown, J., dissenting).

132. *Id.*

133. *ABKA Ltd. P'shp*, 635 N.W.2d at 184 n.2 (Brown, J., dissenting).

that notice of the regulation was fatal to a takings claim. It is doubtful those courts would turn 180 degrees and now decide new cases in accordance with Justice Scalia's opinion. The *AKBA* case shows, there will be courts that agree with Justice Scalia. As more cases are decided, a more clear picture of where the doctrine is headed shall emerge.

V. CONCLUSION

IBE and OBR will remain an extremely important factor in the *Penn Central* analysis. How they will be evaluated after *Palazzolo* remains to be seen. Justice Scalia's approach is a simple, straightforward way to view the role of post-regulation acquisition. He rightly notes the government acts as a thief when it fails to compensate the property owner. However, one may argue Justice Scalia's opinion favors too greatly the interests of the property owner as well. Justice O'Connor's approach demonstrates the more middle ground. Her opinion, however, grants the government too much latitude to regulate without compensation. The only certainty is that post-regulation acquisition is no longer immediately fatal to an inverse condemnation claim. The most likely scenario is that Justice O'Connor's opinion will become the consensus; however, as the *AKBA* case demonstrates, there may be certain courts that will embrace Justice Scalia's opinion.