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Investment-Backed Expectations and Regulatory Risk in *Good v. United States*

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COMMENTS

INVESTMENT-BACKED EXPECTATIONS AND REGULATORY RISK IN *GOOD V. UNITED STATES*

"And all because of a rat and a rabbit."

—Florida landowner Lloyd Good Jr. on why his case was turned down by the Supreme Court.[1]

INTRODUCTION

When Lloyd A. Good Jr. purchased his property in the Florida Keys in 1973,[2] he got more than he bargained for. According to officials, at play among the mangroves on his newly acquired acreage were the silver rice rat and the Lower Keys rabbit.[3] Both species would eventually be classified as endangered under the Endangered Species Act of 1973 ("ESA"), a piece of legislation that was not yet passed when Good purchased the property,[4] and both would play a key role in thwarting Good's plans to develop his property.

Years later, when Good tried to obtain permits to develop the acreage, he was denied on the grounds that development of his property would threaten the two endangered species that called his land

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[1] *Quote of the Day*, Greenwire, Apr. 4, 2000, *available in* LEXIS, Greenwire File.

[2] *See* Good v. United States, 189 F.3d 1355, 1357 (Fed. Cir. 1999), *cert. denied*, 529 U.S. 1053 (2000).

[3] *See id.* at 1359; Good maintains that no silver rice rat has ever been found on his property. *See Prepared Statement of Lloyd A. Good, Jr., Affected Property Owner, Before the House Committee on Resources Report on Effect of Endangered Species Act on Private Property Rights*, Federal News Service, Mar. 20, 1996, *available in* LEXIS, Federal News Service File [hereinafter *Good Statement*].

[4] On December 28, 1973, nearly three months after Good purchased his property, Congress passed the Endangered Species Act of 1973, Pub. L. No. 93-205, 81 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-1544 (1994)).

home.[5] Good sued the federal government, claiming a regulatory taking of his property.[6] He argued that the denial of his permit to dredge and fill marshland on his parcel was a taking of his property without the payment of just compensation as required by the U.S. Constitution.[7]

In denying Good's claim, the Federal Circuit held that he did not have the reasonable, investment-backed expectation necessary to support a regulatory takings claim.[8] Although the ESA, which eventually caused the denial of his permit, was not enacted until after Good purchased the property, the court reasoned that, given the "regulatory climate" at the time, he should have known that society's increasing environmental awareness would result in the passage of legislation making it impossible to develop the property.[9] The court held, therefore, that Good could not have reasonably expected that he would be permitted to develop the property, and thus his claim failed as a matter of law.[10]

The purpose of this Comment is to analyze this decision and its potential ramifications and to suggest a better way for courts to approach similar problems. In particular, courts should adopt a "specific" theory of regulatory risk, in which the regulatory risk assumed by a purchaser is evaluated only with respect to the challenged regulation. Following this approach would bring investment-backed expectations jurisprudence into line with notions of fairness and justice and would be consistent with case law and commentary in this area of the law. Such an approach would have also yielded a different result in *Good*.

Part I provides a very brief summary of some relevant background principles of regulatory takings jurisprudence, and Part II presents the facts and reasoning of the courts in *Good v. United States*. Analysis of the Federal Circuit's decision, discussion of the difficulties raised by the court's approach, and suggestions for improvements can be found in Part III.

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[5] *See Good*, 189 F.3d at 1359.

[6] *See id.* at 1357.

[7] *See id.*; U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

[8] *See Good*, 189 F.3d at 1363.

[9] *See id.* at 1361-63 ("In view of the regulatory climate that existed when Appellant acquired the subject property, Appellant could not have had a reasonable expectation that he would obtain approval to fill ten acres of wetlands in order to develop the land.").

[10] *See id.* at 1363.

I. REGULATORY TAKINGS

Even though the law of regulatory takings has justifiably been called a "puzzle"[11] and even a "muddle,"[12] it can be argued that the Supreme Court's recent decisions have clarified this area of the law.[13] Because this Comment addresses a relatively small portion of the overall regulatory takings picture, a comprehensive overview of the entire body of regulatory takings law is beyond its scope. But a brief summary of certain portions of the law is necessary to support the argument put forward.[14]

The origin of takings law is the Fifth Amendment of the Constitution, which provides that private property shall not be taken by the government without the payment of just compensation.[15] The purpose of the provision is 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."[16]

Until 1922, the Supreme Court had consistently held that this constitutional provision applied only to physical appropriations of property by the government. Regulations that diminished or extinguished the value of property without actual physical occupation were treated merely as legitimate exercises of the police power not requiring compensation.[17] This changed when the court decided *Pennsylvania Coal Co. v. Mahon*[18] in 1922. In *Mahon*, the Court held for the first time that a regulation could create a compensable taking without physical occupation.[19] Justice Holmes, writing for the *Mahon* Court, summarized the law as follows: "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[20] One might say that the whole of regulatory takings jurisprudence since that time can be characterized as a struggle to determine just exactly "how far is too far."[21]

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[11] Douglas W. Kmiec, *At Last, the Supreme Court Solves the Takings Puzzle, in* TAKINGS: LAND DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS* 107 (David L. Callies ed., 1996).

[12] Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984).

[13] *See, e.g.*, Kmiec, *supra* note 11.

[14] For a more comprehensive treatment of the body of regulatory takings law, *see, e.g.*, STEVEN J. EAGLE, REGULATORY TAKINGS (1996); DOUGLAS T. KENDALL ET AL., TAKINGS LITIGATION HANDBOOK (2000); TAKINGS, *supra* note 11.

[15] *See* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

[16] Armstrong v. United States, 364 U.S. 40, 49 (1960).

[17] *See, e.g.*, Mugler v. Kansas, 123 U.S. 623 (1887) (upholding a state statute outlawing the production of alcoholic beverages that, without the payment of compensation, caused a brewery owner to incur large monetary losses).

[18] 260 U.S. 393 (1922).

[19] *See* KENDALL ET AL., *supra* note 14, at 15.

[20] *Mahon*, 260 U.S. at 415.

[21] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992).

Of course, on the other side of the ledger stands a large body of Supreme Court jurisprudence, represented by *Village of Euclid v. Ambler Realty Co.*,[22] holding that governments possess extensive police power to regulate property without compensating landowners, even when the regulation results in large diminishments in value.[23] This tension between the government's power to regulate and the rights of the private property owner is evident in every takings case. In fact, one of the most important modern regulatory takings cases, *Penn Central Transportation Co. v. City of New York*,[24] has been called "The Culmination of Euclidean Zoning,"[25] and "[t]he high-water mark in the ascendancy of land use regulation."[26]

In *Penn Central* the Court found that no compensable regulatory taking had occurred, even though the regulation in question undeniably prohibited the owner from developing property that would have generated millions of dollars in additional income.[27] In analyzing the case, however, the Court emphasized that regulatory takings are in some instances compensable,[28] and, after cautioning that there is no set formula for such an inquiry,[29] enumerated three factors that are significant in determining whether or not a regulatory taking has occurred:

> In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program ad-

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[22] 272 U.S. 365 (1926).

[23] *See id.* at 384 (upholding the challenged zoning ordinance without compensation even though it reduced the value of Ambler Realty's property from $10,000 per acre to $2,500 per acre).

[24] 438 U.S. 104 (1978).

[25] EAGLE, *supra* note 14, § 6-4.

[26] *Id.*

[27] *See Penn Cent.*, 438 U.S. at 116 (explaining the financial benefit to flow to Penn Central from the proposed development).

[28] *See id.* at 122 n.25 ("As is implicit in our opinion, we do not embrace the proposition that a 'taking' can never occur unless government has transferred physical control over a portion of a parcel.").

[29] *See id.* at 124 ("[T]his Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.") (citations omitted).

> justing the benefits and burdens of economic life to promote the common good.[30]

Courts continue to apply these factors laid out in 1978 by Justice Brennan in regulatory takings cases.[31] Indeed, the Federal Circuit employed these factors in deciding *Good v. United States*.[32]

In 1992, the Court altered the regulatory taking landscape again in *Lucas v. South Carolina Coastal Council*,[33] setting forth a new "categorical" rule for takings when the challenged regulation deprives the owner of all economically viable use of her property.[34] The Court laid down the rule that such a taking is a *per se* taking requiring compensation without further inquiry unless the government can show that the planned use for the property would have been prohibited by "background principles" of the state's common law of property and was therefore never part of the owner's title.[35]

II. *GOOD V. UNITED STATES*—THE FACTS AND THE OPINIONS

On October 8, 1973, Good purchased property on Lower Sugarloaf Key, near Key West, Florida.[36] The property at issue in *Good v. United States* consisted of forty acres of vacant waterfront land included in this purchase. Eight acres of the property were uplands and thirty-two acres were made up of both salt marsh and freshwater marsh.[37] The parcel was part of a larger purchase that included a small resort called the Sugarloaf Lodge, the land surrounding the resort, and other land in the vicinity of the resort. Good intended to "operate and expand" the resort, as well as to develop the balance of the property for a variety of uses.[38]

At the time of the purchase, the forty-acre parcel was already platted in a manner allowing for the construction of seventy-six sin-

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[30] *Id.* (citations omitted).

[31] *See, e.g.*, Creppel v. United States, 41 F.3d 627, 631 (Fed. Cir. 1994) (explaining that the court uses the *Penn Central* factors when presented with a regulatory taking case); Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994) (utilizing *Penn Central* factors); Florida Rock Indus., Inc. v. United States, 18 F.3d 1560, 1564 (Fed. Cir. 1994) (discussing the *Penn Central* factors).

[32] *See* Good v. United States, 189 F.3d 1355, 1360 (Fed. Cir. 1999) (summarizing the *Penn Central* factors).

[33] 505 U.S. 1003 (1992).

[34] *See id.* at 1015 (explaining that "we have found categorical treatment appropriate . . . where regulation denies all economically beneficial or productive use of land").

[35] *See 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.").

[36] *See Good Statement*, *supra* note 3.

[37] *See Good*, 189 F.3d at 1357.

[38] *See Good Statement*, *supra* note 3. Good subsequently developed part of the property into an RV park but was unable to develop any additional property or to expand the resort. *See id.*

gle-family homes, five canals, and four streets. The parcel was located adjacent to other similar subdivisions with canals and streets that had already been developed, although few homes had yet been built.[39] Good says that at the time of the purchase, he intended to develop the parcel "into a first class, single family, waterfront or water oriented community."[40]

When Good bought the land, permits had not yet been obtained to construct the canals or fill other parts of the property.[41] The Army Corps of Engineers ("Corps") was not at that time exercising jurisdiction over property above the mean high tide line,[42] and the ESA had not yet been enacted.[43] Of course, this also means that the Lower Keys rabbit and the silver rice rat were not listed as endangered species at the time of the purchase. In fact, the rabbit and rat were not placed on the endangered species list until 1990 and 1991, respectively.[44] Still, the purchase agreement for the property included an ominous sounding warning: "[t]he Buyers recognize that certain of the lands covered by this contract may be below the mean high tide line and that as of today there are certain problems in connection with the obtaining of State and Federal permission for dredging and filling operations."[45]

According to Good, however, all of the property to be developed was above the mean high tide line and would therefore not have required Corps permits to dredge and fill in 1973. But after the Corps began exercising jurisdiction over property above the mean high tideline, much of the property to be developed was classified as wetlands.[46] This meant that Corps permits would be required for dredging or filling on those portions of the property.[47]

Good's quest for permits to develop the property began in 1980, seven years after he purchased the land.[48] With the passage of the ESA in 1973, and the new Corps jurisdiction over wetlands, the regulatory landscape had changed significantly in the years since his purchase. Good hired Keycology, a land planning and development

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[39] *See id.*

[40] *Id.*

[41] *See id.*

[42] *See id.*

[43] The Act was passed approximately three months after Good bought his property. *See supra* note 4.

[44] *See* Endangered and Threatened Wildlife and Plants; Endangered Status for the Lower Keys Rabbit and Threatened Status for the Squirrel Chimney Cave Shrimp, 55 Fed. Reg. 25,588 (1990) [hereinafter Rabbit Listing]; Endangered and Threatened Wildlife and Plants; Endangered Status for the Lower Keys Population of the Rice Rat (Silver Rice Rat), 56 Fed. Reg. 19,809 (1991) [hereinafter Rat Listing].

[45] Good v. United States, 189 F.3d 1355, 1357 (Fed. Cir. 1999) (quoting the purchase agreement).

[46] *See Good Statement, supra* note 3.

[47] *See id.*

[48] *See Good*, 189 F.3d at 1357.

firm, to assist him in acquiring the necessary permits. Like the purchase agreement, the Keycology contract contained a clause warning that "obtaining said permits is at best difficult and by no means assured."[49]

The initial development plan called for creating a fifty-four lot subdivision and a forty-eight slip marina by filling 7.4 acres of salt marsh and excavating 5.4 acres of marsh.[50] In March of 1981, Good filed his application with the Corps for the permit to dredge and fill according to the development plan. After some modifications, this permit was issued on January 6, 1984.[51]

Good, however, still needed to receive permission from state and county authorities, and this would prove no easy task.[52] After years of conditional approvals, denials, appeals, litigation, and bureaucratic wrangling, Good scaled back his plans.[53] He had obtained approval from every federal, state, and county agency except the South Florida Water Management District ("SFWMD"), which wanted to modify the plan to include "strict conservation easements on all lots."[54] SFWMD suggested that Good instead pursue a plan for the property that would involve only sixteen waterfront lots and the placement of the balance of the land "in preservation."[55] After considering the plan, Good decided that it was acceptable, but this meant reapplying for permits to carry it out.[56] Thus, in July 1990 Good filed a new permit application with the Corps.[57]

In June 1990, however, the Lower Keys rabbit had been listed as an endangered species.[58] This meant that the Corps would have to consult with the U.S. Fish and Wildlife Service ("FWS") before issuing a permit to make sure that the planned development would not jeopardize the endangered species.[59] Initially, FWS issued a biological opinion in February 1991 finding "no jeopardy" to the Lower Keys rabbit as a result of the proposed sixteen-lot development.[60] New information later surfaced, however, regarding a possible further decline in the rabbit population,[61] and in April 1991 the silver rice rat was listed as an endangered species.[62]

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[49] *Id.*
[50] *See id.*
[51] *See id.*
[52] *See id.* at 1357-58.
[53] *See id.* at 1358-59; *Good Statement*, *supra* note 3.
[54] *Good Statement*, *supra* note 3.
[55] *Id.*
[56] *See id.*
[57] *See Good*, 189 F.3d at 1358-59.
[58] *See id.* at 1359; Rabbit Listing, *supra* note 44.
[59] *See* 16 U.S.C. § 1536(a)(2) (1994).
[60] *See Good*, 189 F.3d at 1359.
[61] *See Good Statement*, *supra* note 3.
[62] *See* Rat Listing, *supra* note 44.

The Corps initiated further consultation with FWS, and, on December 18, 1991, FWS issued a new biological opinion finding that the proposed development jeopardized the silver rice rat as well as the Lower Keys rabbit.[63] FWS had changed its mind regarding jeopardy to the rabbit based on the new information about a possible population decline.[64] The new FWS opinion also found that the fifty-five-lot plan for which the Corps had issued a permit in 1988 jeopardized both species.[65] Over two years later, on March 17, 1994, the Corps denied Good's 1990 permit application and refused to extend the time period for the 1988 permit, which had expired.[66] The Corps cited the potential jeopardy to both species posed by the development as its reason for denying the permits.[67]

On July 11, 1994, Good filed suit against the United States in the Court of Federal Claims, alleging that the denial of his permits constituted a taking of his property without the payment of compensation as demanded by the Fifth Amendment to the Constitution.[68]

A. Disposition in the Court of Federal Claims

The Court of Federal Claims granted summary judgment to the United States,[69] holding that Good's claim failed as a matter of law under either *Lucas*[70] or the *Penn Central*[71] balancing test.[72] The court held that Good failed the *Lucas* test—the government was able to show that the property retained value because the ESA did not require him to leave the property in its natural state.[73] Moreover, the government presented evidence showing that the property could still be developed in some fashion or that transferable development rights could be sold, and the court held that Good had not presented evidence sufficient to create an issue of fact as to value.[74]

The court also held that Good's claim fell short under a *Penn Central* analysis.[75] The court reasoned that because there were federal and state regulations restricting his ability to develop the property

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[63] *See Good*, 189 F.3d at 1359; *Good Statement*, *supra* note 3.

[64] *See Good*, 189 F.3d at 1359 n.7. Good disputes the validity of this "new information" about a population decline. He says that the "rabbit population of the Lower Keys was erroneously thought to have been decreased because of a grass burn on my property adjoining Sugarloaf Lodge. (This burn actually helped the habitat.)" *Good Statement*, *supra* note 3.

[65] *See Good*, 189 F.3d at 1359.

[66] *See id.*; *Good Statement*, *supra* note 3.

[67] *See Good*, 189 F.3d at 1359.

[68] *See id.*

[69] *See* Good v. United States, 39 Fed. Cl. 81, 84 (1997).

[70] *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

[71] *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).

[72] *See Good*, 39 Fed. Cl. at 84.

[73] *See id.*

[74] *See id.*

[75] *See id.*

at the time of purchase as well as when he began to pursue development permits seven years later, Good did not have a reasonable, investment-backed expectation that he would be able to develop the property.[76] Finding Good's claim wanting under either the *Lucas* test or the *Penn Central* test, the court held that no taking had occurred and granted summary judgment to the United States.[77] Good appealed to the Federal Circuit.

B. The Federal Circuit Opinion in Good v. United States

The Federal Circuit affirmed the lower court's grant of summary judgment to the United States, focusing almost solely on the reasonable, investment-backed expectation requirement.[78] The Federal Circuit concluded that Good lacked a reasonable, investment-backed expectation that he would be able to develop the property at the time he purchased it.[79] The court reached this conclusion by taking a generalized approach to the type of pre-existing regulations that could have defeated Good's expectations. In other words, the court held that even though a law passed *after* Good's purchase eventually became the insurmountable obstacle to developing the property, *not* regulations in place at the time of purchase, the fact that *some* government restrictions existed at the time he purchased the property, combined with a general societal trend toward greater environmental protection, was enough to defeat Good's expectations.[80]

The court began its analysis by laying out the significant factors in determining whether a regulatory taking has occurred, as enumerated in *Penn Central.*[81] The court summarized those factors in the following way: "(1) the character of the government action, (2) the extent to which the regulation interferes with distinct, investment-backed expectations, and (3) the economic impact of the regula-

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[76] *See id.*

[77] *See id.*

[78] *See* Good v. United States, 189 F.3d 1355, 1360-63 (Fed. Cir. 1999).

[79] *See id.* at 1363. Specifically, the Federal Circuit held:

> We therefore conclude that Appellant lacked a reasonable, investment-backed expectation that he would obtain the regulatory approval needed to develop the property at issue here. We have previously held that the government is entitled to summary judgment on a regulatory takings claim where the plaintiffs lacked reasonable, investment-backed expectations, even where the challenged government action "substantially reduc[ed] the value of plaintiffs' property."

Id. (quoting Avenal v. United States, 100 F.3d 933, 937 (Fed. Cir. 1996)).

[80] *See id.* at 1361-62 ("In view of the regulatory climate that existed when Appellant acquired the subject property, Appellant could not have had a reasonable expectation that he would obtain approval to fill ten acres of wetlands in order to develop the land."). Good did, however, obtain just such an approval from the Army Corps of Engineers, more than once, and he obtained it after wetlands regulations tightened from their 1973 levels. *See id.*

[81] *See id* at 1360; *see also* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).

tion."[82] As in the court below, the Federal Circuit found the expectations factor to be dispositive and therefore did not engage in any analysis involving the other two factors.[83]

Next, the court examined whether Good satisfied the reasonable, investment-backed expectation prong of the *Penn Central* test. In discussing the applicable rules, the court cited another Federal Circuit case, *Creppel v. United States*,[84] as standing for the proposition that "[t]he requirement of investment-backed expectations 'limits recovery to owners who can demonstrate that they bought their property in reliance on the non-existence of the challenged regulation.'"[85] The court explained that reasonable, investment-backed expectations are an essential element of every regulatory takings case, because if the buyer of the property has notice of the restraint before the purchase, then he either assumed the risk of economic loss or, at minimum, will be unable to show loss because the market will have already discounted the property's price to account for the regulation.[86]

Good argued that he had actually had a reasonable, investment-backed expectation that he would be able to develop the property.[87] He argued that the Corps permit requirements that existed at the time of his purchase should be irrelevant to determining his reasonable expectations because he obtained the needed dredge and fill permits three times before being eventually denied the permits after the Lower Keys rabbit and the silver rice rat were listed as endangered species.[88] The court rejected this argument, however.[89] In reaching the conclusion that Good lacked a reasonable, investment-backed expectation, the court emphasized that at the time he purchased the property, regulations were in place that required the permission of

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[82] *Good*, 189 F.3d at 1360 (paraphrasing *Penn Central*, 438 U.S. at 124).

[83] *See id.*

[84] 41 F.3d 627 (Fed. Cir. 1994).

[85] *Good*, 189 F.3d at 1360 (quoting *Creppel*, 41 F.3d at 632).

[86] *See id.* at 1360-61.

[87] *See Good*, 189 F.3d at 1361. Good also made the argument that the Supreme Court had done away with the reasonable, investment-backed expectation requirement in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). The court dealt with this in fairly perfunctory fashion, though, reasoning that the Supreme Court had not eliminated the need for reasonable expectations, but had simply not discussed the requirement because the *Lucas* plaintiff so obviously met the standard. *See Good*, 189 F.3d at 1361. In fact, the Court *did* mention the concept as still viable, and helped to seal the shift in terminology from Justice Brennan's "distinct, investment-backed expectations" formulation from *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978), to Justice Scalia's "reasonable expectations" formulation in *Lucas*, 505 U.S. at 1016 n.7. *See* EAGLE, *supra* note 14, § 8-2; David L. Callies, *After* Lucas *and* Dolan: *An Introductory Essay*, *in* TAKINGS, *supra* note 11, at 9 ("This 'frustration of investment-backed expectations' standard, which the Court chooses not to apply in *Lucas* because it characterized the regulatory taking as total, is clearly not rejected. Indeed, one concurring member of the Court (Justice Kennedy) would have applied it.").

[88] *See Good*, 189 F.3d at 1361.

[89] *See id.* ("Appellant's position is not entirely unreasonable, but we must ultimately reject it.").

several government agencies before development.[90] In addition to the Corps permits, the court explained, any development would have had to have been approved by both Florida and Monroe County officials.[91] Furthermore, the court weighed in the balance the fact that environmental considerations were already a part of the Corps' permit approval process in 1973 and that by then they had denied other permits based strictly on environmental concerns.[92] And Good had acknowledged in the purchase agreement for the property that "[t]he Buyers recognize that . . . as of today there are certain problems in connection with the obtaining of State and Federal permission for dredging and filling operations."[93]

The court also emphasized that Good did not develop the property immediately after buying it, and that a number of regulations, including the ESA, were passed during the time between his purchase in 1973 and the start of his development activities in 1980.[94] A significant portion of the court's analysis is devoted to this issue, and the opinion includes a listing of federal and state environmental regulations enacted between 1973 and 1980.[95] This issue seems to have deeply concerned the court,[96] although it did note that this issue might be irrelevant to a regulatory takings claim: "While Appellant's prolonged inaction does not bar his takings claim, it reduces his ability to fairly claim surprise when his permit application was denied."[97] The court reasoned that Good must have been aware that the requirements for obtaining the permits could change, and that, given the larger societal trend toward increasing environmental awareness, it could become more difficult to obtain the permit.[98]

Based on the foregoing analysis, the court concluded that Good did not have a reasonable, investment-backed expectation that he would be able to develop the property and that his claim therefore failed as a matter of law. Thus, the Federal Circuit affirmed the lower court's decision granting summary judgment to the government.[99]

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[90] *See id.* at 1362 ("In 1973, when Appellant purchased the subject land, federal law required that a permit be obtained from the Army Corps of Engineers in order to dredge or fill in wetlands adjacent to a navigable waterway.").

[91] *See id.*

[92] *See id.*

[93] *Id.* (quoting the purchase agreement).

[94] *See id.* at 1362.

[95] *See id.* (explaining that the ESA was passed in December of 1973, that the Corps tightened regulation of wetlands in both 1975 and 1977, that Florida passed a state version of the ESA in 1977, and that, in 1979, Florida passed the Florida Keys Protection Act, which designated the Keys as an "Area of Critical State Concern").

[96] *See id.* ("The picture emerges, then, of Appellant in 1973 acknowledging the difficulty of obtaining approval for his project, then waiting seven years, watching as the applicable regulations got more stringent, before taking any steps to obtain the required approval.").

[97] *Id.* at 1363.

[98] *See id.*

[99] *See id.*

III. WHY *GOOD V. UNITED STATES* SHOULD HAVE BEEN DECIDED DIFFERENTLY

The bottom line of the *Good* decision is that the property owner was denied relief because of a lack of reasonable, investment-backed expectations, even though the challenged regulation had not been enacted when he had purchased the property. This section of the Comment will analyze the legal basis for this ruling, the public policy considerations surrounding the issue, and implications of this case for other regulatory takings cases. Finally, this section proposes a better approach to the analysis of investment-backed expectations in cases like *Good.*

Given the current state of regulatory takings law and the facts of this case, it is difficult to state unequivocally that the ultimate outcome in *Good* was wrong.[100] The law is particularly unclear when it comes to investment-backed expectations,[101] and there is reason to doubt some of Good's factual assertions.[102] Moreover, the court might have arrived at the same conclusion through other analytical approaches. For instance, in the court of claims proceedings the government presented evidence that the value of Good's property had not been extinguished, and the court below therefore held that there was no *per se* taking under *Lucas.*[103] If this is true, and the remaining value of the land was significant, then the court could simply have held that the economic impact was not severe enough to require compensation[104] and that this was just another example of "adjusting the benefits and burdens of economic life to promote the common good."[105] After all, courts have upheld enormous diminishments in

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[100] One commentator has stated that "[t]he facts in the *Good* case do lend themselves to bad law." Steven J. Eagle, *Under New Ruling, Land Owners Can't Expect Constitutional Protection*, LEGAL OPINION LETTER, Dec. 17, 1999, *available in* LEXIS, Washington Legal Foundation File.

[101] *See* Daniel R. Mandelker, *Investment-Backed Expectations in Takings Law, in* TAKINGS, *supra* note 11, at 119 ("Unfortunately, the Court is confused about the meaning of this term, federal and state courts divide on how to apply it, and its role in takings law remains a puzzle.").

[102] Good argued, for example, that the value of his land was completely extinguished by operation of the ESA, but in the lower court proceedings the government presented evidence that Good's property retained significant value and could still be developed and the court found that Good did not present enough evidence to create an issue of fact on this point. *See* Good v. United States, 39 Fed. Cl. 81, 106 (1997).

[103] *See Good*, 39 Fed. Cl. at 99. The government presented extensive evidence that Good's property retained significant value, and that development was still possible despite the presence of the endangered species. *See id.* at 106-09. The court also found that Good had never received a final approval of needed state and county permits. *See id.* at 90 n.17.

[104] Of course, this might have simply been the result of the procedural posture of the case. Good disputed the government's evidence of value, and since the court was ruling on a motion for summary judgment, it might have chosen to dispose of the case using the investment-backed expectation analysis because the factual predicates for that analysis were not in dispute. Given the facts relating to value as found by the lower court, this seems likely.

[105] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

value without requiring compensation using this rationale.[106] Whether or not one agrees with such an approach, this would have made the case unremarkable and in line with other such cases.[107]

However, this is not the analysis that the court used, and although it may not be possible to determine whether the ultimate outcome was wrong, there is enough information to conclude that the court's analysis was flawed. The court's analysis was flawed because of its focus on events that transpired after Good purchased the property and because it held that regulatory risk created by a regulatory scheme that Good was able to repeatedly satisfy was sufficient to defeat Good's claim that the operation of a different regulation, passed after his purchase, worked a taking of his property. Thus, *Good* could be applied in other cases to arrive at inequitable results. Since this analysis is what now stands as precedent, this Comment is more concerned with the ramifications of the court's analysis than with the issue of whether Good's claim was in fact wrongly denied.

Because the *Good* court found the investment-backed expectation prong of the *Penn Central* test to be dispositive, it focused almost entirely on this factor.[108] The key facts that contributed to Good's lack of reasonable expectations, according to the court, were (1) that there was a regulatory regime in place at the time of Good's purchase that required him to obtain permits for dredging and filling from the Corps, (2) that there was a general societal trend toward increasing environmental awareness, and (3) that during the time between Good's purchase of the land in 1973 and the start of his efforts to develop the property in 1980, regulatory restrictions on the property had become more stringent.[109]

A. The Court's Analysis of After-Purchase Events

One troubling aspect of the *Good* decision is the fact that the court took into account events that transpired after the purchase when evaluating Good's investment-backed expectations. The court placed great importance on this line of reasoning and detailed in its opinion the regulatory tightening that occurred during that period, explaining that "[w]hile Appellant's prolonged inaction does not bar his takings

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[106] *See, e.g., id.* (upholding landmark designation of New York's Grand Central Station without the payment of compensation, costing owner millions in revenue due to lost development opportunity); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (upholding, without compensation to the owner, a zoning ordinance that reduced the value of the owner's property from $10,000 per acre to $2,500 per acre).

[107] *See* cases cited *supra* note 106.

[108] *See* Good v. United States, 189 F.3d 1355, 1360 (Fed. Cir. 1999).

[109] *See id.* at 1361-63.

claim, it reduces his ability to fairly claim surprise when his permit application was denied."[110]

Although the court stopped short of holding that post-purchase events barred Good's claim, they clearly influenced the court's ultimate determination. Moreover, the court used this information in an odd, temporally confused kind of way. The court explained that Good must have been "aware at the time of purchase of the need for regulatory approval to develop his land. He must also be presumed to have been aware of the greater general concern for environmental matters during the period of 1973 to 1980."[111] Therefore, "[i]n light of the growing consciousness of and sensitivity toward environmental issues,"[112] the court concluded that Good "lacked a reasonable, investment-backed expectation that he would obtain the regulatory approval needed to develop the property at issue here."[113] It appears that the court is either charging Good at the time of purchase with knowledge of future events or evaluating Good's investment-backed expectations at the time he applied for his permits rather than at the time that he bought the property. The first alternative simply makes no sense, and the second is not supported by the case law.[114]

There is another glaring flaw in the court's analysis of events after Good's purchase. Although the court considered the trend of tightening environmental regulation from 1973 to 1980, it completely ignored the fact that in the heightened regulatory environment that the court made much of, long after the ESA was passed, Good obtained permits for dredging and filling from the Corps, not just once, but *three times*.[115] Certainly, if one is going to consider events after purchase in evaluating Good's investment-backed expectations, the permits should be considered. When one factors in Good's initial success in obtaining the necessary Corps permits, even in the face of tighter regulation, it seems legitimate to conclude that Good's ability to claim surprise when the Corps eventually denied his permit was in fact *heightened* by events after his purchase rather than reduced.

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[110] *Id.* at 1363.

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] Investment-backed expectations are evaluated as of the time that the property is purchased. *See, e.g.*, Good v. United States, 39 Fed. Cl. 81, 92 (1997) ("The reasonable investment-backed expectations factor of the *Penn Central* test properly limits recovery to property owners who can demonstrate that their investment was made in reliance upon the non-existence of the challenged regulatory regime. . . . This inquiry is informed . . . by whether the specific regulatory restrictions were in place at the time of purchase . . . .") (citations omitted).

[115] Good's first request for a permit was granted in May 1983. Good later modified his request and the modified permit was granted in January 1984. The five-year time limit on these permits was running out while Good was trying to obtain state and county approval, so he applied to the Corps for an extension. The Corps made some changes, "but granted a new permit allowing substantially the same development" in October 1988. *Good*, 189 F.3d at 1358.

However, this whole line of reasoning in *Good* is superfluous because the court had already stated that, given the regulatory climate at the time of his purchase, Good "could not have had a reasonable expectation that he would obtain approval to fill ten acres of wetlands in order to develop the land."[116] If he had no reasonable expectation to start with, it does not matter what the regulatory climate was after he purchased the land.[117] If, on the other hand, Good had a reasonable expectation at the time of the purchase, then the case law simply does not support invalidating that expectation purely because of the government's subsequent actions.[118]

Logically, if the inability to "claim surprise" at the moment that a permit is denied is allowed to defeat otherwise reasonable, investment-backed expectations, the government could take private property for public use with impunity merely by announcing its intentions well ahead of time. Because of the advance notice, owners would not be surprised when the government merely did what it said it would do in denying permits, thus defeating the investment-backed expectations even of owners who purchased their property decades before the challenged regulation was enacted.

Perhaps this is why analysis of investment-backed expectations in the case law focuses on objectively reasonable, rather than actual, expectations at the time of purchase.[119] Considering events after the owner's purchase in evaluating his investment-backed expectations should have no place in a regulatory takings analysis.

B. The Court's Holding That Good Lacked Reasonable, Investment-Backed Expectations

The most troubling aspect of this case is that although Good repeatedly satisfied the regulatory regime that existed at the time of purchase, the Federal Circuit held that the same regime defeated his investment-backed expectations.[120] Good obtained dredge and fill permits from the Corps three different times during the course of his quest to develop his property, and he did so even after the Corps

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[116] *Id.* at 1361-62.

[117] This is assuming that the *Penn Central* test is the operative test, rather than *Lucas*. Investment-backed expectations are not a part of the *Lucas* test. Good argued that his taking was a *Lucas* taking, but the lower court held that *Lucas* did not apply because the value of his property was not extinguished. *See* Good v. United States, 39 Fed. Cl. 81, 84 (1997).

[118] *See supra* note 114.

[119] *See Good*, 39 Fed. Cl. at 92-93 (explaining that in analyzing the investment-backed expectations factor, courts look to, among other things, whether the "plaintiff's investment in purchase and development can be considered objectively reasonable").

[120] *See supra* note 115. Again, for purposes of this analysis, the effect of Good's apparent failure to obtain final state and county approval is being purposely ignored here. The court did not deny relief on this basis.

tightened their regulation of wetlands from their 1973 levels.[121] In fact, it appears that the Corps would have issued the permit even as late as 1994 had it not been for the ESA.[122] Moreover, the ESA was not passed until after Good purchased the property, and even then the species allegedly inhabiting his property were not given endangered status until 1990 and 1991.[123] Nevertheless, the court held that the wetlands regulations in existence at the time of Good's purchase defeated his investment-backed expectations, and therefore Good's claim that the operation of the ESA took his property was barred.

There are at least two discrete issues to be discussed here. One is the court's troubling decision that Good did not have a reasonable expectation that he would be able to obtain permits to dredge and fill, in the face of the fact that he did so repeatedly. The other is the court's holding that this lack of investment-backed expectation due to wetlands regulation insulates the government from liability for a regulatory taking accomplished by different legislation enacted after the owner bought the property.

First, it is inexplicable that the court found that Good could not reasonably have expected that he would obtain the dredge and fill permits from the Corps that he eventually did obtain. It is true that the expectations that are at issue here are not Good's actual expectations, but rather objectively reasonable expectations at the time of purchase.[124] Nevertheless, in a case where a court holds that a regulatory taking plaintiff could not have reasonably expected to do that which he was in fact able to do repeatedly, one might expect to see a fact pattern indicating that the plaintiff's success was somehow unforeseen, or that he succeeded against all odds when no reasonable person would have expected such success. However, this was not the case here.

It is undeniable that there were wetlands regulations in place at the time of Good's purchase in 1973,[125] and it appears that even though the Corps was not at that time exercising jurisdiction over property above the mean high water mark, some of the property to be developed was below that line, despite Good's objections to the contrary.[126] Good acknowledged in his purchase agreement for the prop-

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[121] *See supra* note 115; *Good*, 189 F.3d at 1362 (explaining that the wetlands regulations tightened in 1975 and again in 1977).

[122] *See Good*, 189 F.3d at 1359 ("The Corps based its denial on the threat that either project posed to the endangered rat and rabbit.").

[123] See *supra* note 4 regarding passage of the ESA. See *supra* note 44 regarding the endangered status of the Lower Keys rabbit and the silver rice rat.

[124] *See supra* note 119.

[125] *See Good*, 189 F.3d at 1362.

[126] *See* Good v. United States, 39 Fed. Cl. 81, 97 n.28 (1997) (explaining that Good's "1990 Corps application clearly indicates that he proposed dredging below the [mean high water mark]").

erty the existence of the regulatory regime and unspecified potential difficulties in obtaining permits.[127] And the court of claims also noted in its opinion that Good, an attorney originally from Philadelphia, had worked with wetlands regulations in New Jersey and was therefore aware of the regulations and their ramifications.[128]

Good's background as an attorney working with wetlands regulations could help to explain how his expectations may have been reasonable despite the ominous warning in the purchase agreement. It could easily be that Good knew the regulations well enough to know that, despite the regulations, what he wanted to do would most likely be approved by the Corps.[129]

It is easy to imagine that the seller, perhaps, was less knowledgeable about such matters and did not know enough about the regulations to recognize that the planned development was feasible. Wanting to limit potential liability, perhaps even being over-cautious, the seller may have added the disclaimer clause to the contract, and Good, unconcerned, agreed to the inclusion of the clause. In fact, it could easily be economically advantageous for a purchaser in this situation to exaggerate the risk in order to drive the seller's price down. Clauses in purchase agreements like this one should be evaluated cautiously because there are many potential explanations for their inclusion. Given the above scenario, for instance, or one like it, the fact that Good signed the agreement would not necessarily mean that he agreed with the seller's assessment of the situation, that the seller was correct in that assessment, or that all other purchasers or even regulators would have agreed with the seller at that point in time.

Furthermore, the language of the clause contained in the contract is ambiguous as to the precise nature of the anticipated difficulties. On its face the clause does not state that the parties believed it to be impossible or even difficult to obtain permits, only that there were "certain problems" in getting the permits.[130] This could mean anything from "the permits are impossible to get," to "you now need permits, whereas before you did not, and you may have to pay some fees or modify your plans in some way to get them, but they are always issued."

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[127] *See Good*, 189 F.3d at 1357.

[128] *See Good*, 39 Fed. Cl. at 88.

[129] This is not meant to imply that the courts use, or should use, a "reasonable attorney" standard in determining the reasonableness of an owner's expectations. The nature of the standard for objective reasonableness, as with much of the law in this area, is something that has not been precisely defined by the courts. *See* Mandelker, *supra* note 101, at 119 (explaining that Supreme Court jurisprudence is confused about the meaning of investment-backed expectations, that state and federal courts apply the term inconsistently, and that "its role in takings law remains a puzzle").

[130] *See Good*, 189 F.3d at 1357.

Whether events transpired in precisely this way or not is unknown, but it is known that Good claims that he expected to obtain the permits and that he was right.[131] The court accepted this contract clause as evidence of the existence of an onerous regulatory regime without detailed inquiry into the meaning of the ambiguous phrase or the reasons for its inclusion in the contract.[132] The existence of the disclaimer clause in the purchase agreement is certainly sufficient to prove that Good had notice that there was a regulatory regime affecting the property in place at the time of his purchase, but without additional facts any inference beyond that (about the degree of risk present, for instance) seems unwarranted. Given later events, it seems more likely that the seller was mistaken as to the regulatory risk involved in obtaining permits rather than that Good was simply wildly lucky in obtaining Corps approval three times.

That Good obtained the permits three times, and apparently would have obtained them the fourth time were it not for the ESA, strongly suggests that obtaining the needed permits was not a Herculean task. In looking at events after Good's purchase, however, the court completely ignored Good's success at obtaining permits and instead focused on the environmental legislation enacted after his purchase, concluding that this legislation reduced his expectations that he would be able to develop his property.[133] But, as discussed previously, this is backwards. If regulations became much more strict after his purchase, and Good was *still* able to obtain approval from the Corps repeatedly, this should indicate that his expectations at the time of purchase were more, rather than less, reasonable.

Evidence that a plaintiff's plans were not in fact hindered by a particular regulation should establish a rebuttable presumption that the plaintiff's expectations with regard to that regulation were reasonable. In the extraordinary situation where the plaintiff succeeded in spite of great odds, this would allow the government to present evidence of the regulatory hurdles faced by the owner in an attempt to establish that his expectations were not objectively reasonable at the time of purchase, even though he did eventually succeed in obtaining regulatory approval.[134]

Even if one assumes, however, that the Federal Circuit made the proper decision by holding that Good did not have a reasonable expectation that he would obtain dredge and fill permits from the Corps, there is still the question of whether the court should have held that

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[131] *See supra* note 115.

[132] *See Good*, 189 F.3d at 1362.

[133] *See id.* at 1362-63.

[134] Of course, most of the time, if a plaintiff succeeds in obtaining regulatory approval, there is no regulatory takings issue. It is only in the unusual type of fact pattern found in *Good* that this will be an issue.

this was sufficient to defeat his claim that his property was taken by operation of the ESA. In essence, the court used what might be called a general regulatory risk theory. Although the court did not specifically use the term "regulatory risk," it essentially held that the existing wetlands regulations were enough to establish that Good had assumed regulatory risk associated with the property, and once he assumed *any* regulatory risk, he automatically assumed *every* regulatory risk, including those that arose after his purchase.[135]

Regulatory risk is a theory proposed by Professor Mandelker as a way of making sense of the Supreme Court's confused jurisprudence in the investment-backed expectations area.[136] His proposal is that a property owner's investment-backed expectations vary according to the degree of risk involved in the regulatory environment at the time of purchase.[137] The owner's investment-backed expectations are evaluated as of the time she purchased the property, based upon the information she had at that time.[138] He theorizes that "if a landowner knows at the time she enters a land market that she is, or might be, covered by a regulatory program in which government can deny permission to develop her land, it is only fair that she assume the regulatory risk this program creates."[139] Another facet of the theory is that an owner "should be charged with constructive notice of regulatory barriers when the market sends a signal that regulatory risk is high."[140] A signal of this kind is sent "when a wide divergence in opinion exists about whether the landowner will realize her expectations for development."[141] According to his theory, "[c]ourts should recognize landowner expectations when risks are minimal. They should refuse to recognize landowner expectations when risks are high."[142]

Professor Mandelker explains that not all of the case law supports his theory. Some of the cases support only reliance by an owner on vested rights created by government approval of development plans.[143] Other cases support the regulatory risk theory, typified by the statement in *Good* that "it is common sense that 'one who buys

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[135] *See Good*, 189 F.3d at 1361-63 ("[I]t is common sense that 'one who buys with knowledge of a restraint assumes the risk of economic loss. In such a case, the owner presumably paid a discounted price for the property. Compensating him for a 'taking' would confer a windfall.'") (quoting Creppel v. United States, 41 F.3d 627, 632 (Fed. Cir. 1994)).

[136] *See* Mandelker, *supra* note 101, at 119.

[137] *See id.* at 139.

[138] *See id.* at 129.

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *Id.* at 139.

[143] *See id.* at 131.

with knowledge of a restraint assumes the risk of economic loss.'"[144] Professor Mandelker writes that his theory is not supported by any "monolithic unitary theory," but rather that it "reflects a pragmatic judgment about the property interests that courts decide are worth protecting under the takings clause. Nothing else is possible."[145]

Of course, this theory does not reduce the law of investment-backed expectations to a set formula. It still requires that a court applying this doctrine make determinations about the degree of risk that was present at the time of purchase, as well as what degree of risk the court will deem sufficient to defeat the owner's expectations, and this involves making what are unavoidably subjective judgments. In *Good*, for instance, one could view the fact that the wetlands regulatory program was in existence at the time of the purchase, combined with the existence of the disclaimer clause in the purchase agreement, as evidence that there was a divergence of opinion about the risk involved in trying to develop the property, and thus, under Mandelker's theory, there was a high degree of risk. That Good was able to obtain repeated approvals, on the other hand, could lead one to believe that perhaps the risk was not as high as the seller thought, and that it would be legitimate to conclude that the regulatory risk was not sufficient to defeat Good's investment-backed expectations.

Even if one believes that the regulatory risk was high at the time of Good's purchase, though, there is still the question of whether the risk generated by the wetlands regulation should be sufficient to defeat Good's claim that his property was taken *by operation of the ESA*. Professor Mandelker explains that investment-backed expectations are to be evaluated as of the time of purchase, and that an owner who purchases property with knowledge of a regulatory scheme under which the government could deny permission to develop the property should assume "the regulatory risk *this program* creates."[146] This could be interpreted to mean that the regulatory risk created by a particular program is specific only to that program and would defeat a taking claim based on that regulation, but it would not defeat a taking claim when the challenged regulation was not in existence at the time of the purchase. However, it could also be interpreted to mean that although the regulatory risk is evaluated as of the time of purchase, once a high degree of risk is established, it is sufficient to defeat any subsequent takings claim, regardless of whether the challenged regulation actually created any risk at the time of purchase.

Professor Mandelker's theory clearly contemplates that courts should deny protection of an owner's expectations in some circum-

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[144] Good v. United States, 189 F.3d 1355, 1361 (Fed. Cir. 1999) (quoting Creppel v. United States, 41 F.3d 627, 632 (Fed. Cir. 1994)).

[145] Mandelker, *supra* note 101, at 139.

[146] *Id.* at 129.

stances when a regulation is passed after the purchase of the property.[147] As an illustration, he discusses the case of *McNulty v. Town of Indialantic*,[148] in which a property owner was denied compensation. The challenged regulation, a beach-setback ordinance that prohibited the owner from building a home on his beachfront lot, was not passed until after the lot was purchased, but at the time of purchase building on McNulty's lot required permission of the town.[149] Additionally, the purchase price of the lot was only five percent of the price of other comparable lots in the area.[150] Professor Mandelker explains that the decision of the court in *McNulty* to deny compensation is consistent with the regulatory risk theory because although the beach-setback ordinance had not been adopted at the time of purchase, there was a foreseeable risk that such an ordinance would be passed in the future, and there would have been widely divergent opinions about whether such an ordinance would be enacted.[151]

On its face, this logic could be applied in a situation like *Good* to conclude that the owner should be denied compensation. The facts of *McNulty*, however, can be distinguished from those in *Good.* The beach-setback ordinance involved the same substantive concerns for protection of the beach area that existed at the time of purchase and that created the regulatory risk identified by Mandelker. The rock-bottom purchase price was evidence of this. This would be analogous to *Good* if Good had been denied development permits based on the wetlands regulations that became more strict after his purchase, but that is not what happened in *Good.* For the facts in *McNulty* to be more analogous to *Good*, the owner would have to have been granted a variance to build under the beach-setback ordinance, repeatedly, and then denied permission to develop based on an unrelated concern that was not in existence at the time of purchase.

Given a factual situation like *Good*, the regulatory risk theory, like the current case law, is wanting because it is ambiguous. One solution would be to modify Professor Mandelker's theory somewhat and use a specific rather than a general theory of regulatory risk. Under this theory, regulatory risk would be evaluated at the time of purchase and based on the purchaser's actual or constructive knowledge at that time. The regulatory risk incurred by the purchaser, however, would be specific to the regulations creating the risk at the time of purchase and could not be used to defeat an owner's investment-backed expectations in a takings case involving different regulations.

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[147] See Professor Mandelker's discussion of the constructive notice rule, *id.* at 136-38.

[148] 727 F. Supp. 604 (M.D. Fla. 1989).

[149] *See id.* at 604.

[150] *See id.* at 611 ("McNulty purchased the property in 1963 for $25 a front foot when lots of suitable depth for residential building were selling for $500 a front foot.") (citation omitted).

[151] Mandelker, *supra* note 101, at 137-38.

Applied to *Good*, this would mean that if Good had been denied his permits based on wetlands regulations, the regulatory risk created by the wetlands regulations in place at the time of his purchase would defeat his investment-backed expectations. Because Good was denied permits pursuant to the ESA, however, a court would evaluate the degree of risk present at the time of Good's purchase that the ESA would prevent him from developing his property. Wetlands regulations would be irrelevant to this inquiry, and the regulatory risk created by them would not be sufficient to defeat Good's investment-backed expectations.

Predicting the effect of the ESA on his property would have required Good to make at least a four-step prediction. First, he would have to predict the passage of the law itself. Second, he would have to predict that it would protect species like rats and not just bald eagles, grizzly bears, and the like. Third, he would have to predict that "protection" under the ESA would mean not just protection from hunters but in some cases prohibiting private property owners from building on their own land. And fourth, he would also have to predict that endangered species would be found in his backyard. Bearing in mind that the ESA was not passed until after Good purchased the property, and that the species on his land were not listed as endangered until 1990 and 1991,[152] it seems legitimate to conclude that under a specific regulatory risk theory the government would find it difficult to establish that Good had assumed the regulatory risk associated with the ESA, and that he therefore lacked reasonable investment-backed expectations.

Just as Professor Mandelker's theory is based not on a "single unitary theory" but rather on "pragmatic judgments" about what the law in this area should be, so, too, is this suggestion that the courts adopt a specific rather than a general regulatory risk theory. There are, however, several arguments in favor of adopting such a theory.

First, one can find some support in the case law. The cases refer to the requirement in regulatory takings cases that an owner prove that he purchased his property "in reliance on the non-existence of the challenged regulation,"[153] or, put another way, that an owner who purchases property "with knowledge of a restraint assumes the risk of economic loss."[154] This language could clearly be interpreted to support a specific regulatory risk theory, and the talk of "knowledge," or assumption of risk, dovetails with another consideration in favor of this theory, that of the public's perception of fairness and justice in regulatory takings.

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[152] See *supra* note 4 regarding passage of the ESA. See *supra* note 44 regarding endangered status for the Lower Keys rabbit and the silver rice rat.

[153] Creppel v. United States, 41 F.3d 627, 632 (Fed. Cir. 1994).

[154] *Id.*

Public perceptions of regulatory takings law should be considered by decision-makers when setting policy in this area.[155] What Professor Michelman has called "demoralization costs" arise when property owners, and those who sympathize with them, are disturbed by what they perceive to be the injustice of uncompensated takings, resulting in lost future production.[156] Concluding that an owner assumes at purchase the regulatory risk of a regulation not passed until after his purchase, and that he is therefore not entitled to compensation, is a transaction with a high demoralization cost, unless there are very strong arguments to be made that the purchaser somehow had notice of the regulation before purchase even though it was not passed until later.

The key to the public's perception of fairness in the takings process intuitively seems to be that the owner should have at least some degree of knowledge of the existence of the regulatory scheme before holding that he assumed the risk created by the regulation. This is what makes the holding in *Good* seem unfair. It does not seem reasonable to conclude that Good assumed the regulatory risk associated with the ESA at the time of his purchase, and it feels like judicial sleight-of-hand to hold that his claim is nevertheless defeated because he "assumed the risk" of a regulatory scheme that he was able repeatedly to satisfy. A theory of regulatory risk that is specific to the challenged regulation comports more with general ideas of fairness and justice.

Also, it seems logical to look to the assumption of risk doctrine in tort law for guidance in this area, and there one finds that the doctrine requires specific knowledge of the risk on the part of the party held to have assumed the risk.[157] If tort law controlled in the analysis of the *Good* case, Good would not have been found to have assumed risk that would negate his ESA-based regulatory taking claim. Thus, there is support for a theory of specific regulatory risk in an area of the law that has dealt extensively and thoughtfully with the concept of assumption of risk.

Because a specific theory comports more with traditional ideas of fairness, it is also more intuitive and easily understood by the layperson. This provides more certainty for property owners, and reduces what can be called "search costs,"[158] which arise when pro-

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[155] *See* William W. Fisher III, *The Significance of Public Perceptions of the Takings Doctrine*, 88 COLUM. L. REV. 1774 (1988).

[156] *See* Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214 (1967).

[157] *See* RESTATEMENT (SECOND) OF TORTS § 496D (1965) ("Except where he expressly so agrees, a plaintiff does not assume a risk of harm arising from the defendant's conduct unless he then knows of the existence of the risk and appreciates its unreasonable character.").

[158] *See* Fisher, *supra* note 155, at 1780. In defining search costs, Professor Fisher writes:

spective owners, doubtful about the fairness of the takings compensation system, refuse to act before taking extra time to "look up the rules," and perhaps to research every conceivable risk with regard to the property. Under a regime that follows the *Good* decision, even after exhaustive research a prospective property owner cannot be certain what future risks they have assumed unless the property is completely devoid of all regulatory risk. One would expect that this decision would impede the marketability of properties with low to moderate, but nevertheless significant, regulatory risk. Owners should fear that even if they correctly assess that they can obtain regulatory approval for their plans in a low risk environment, they may be held in the future to have assumed the much larger risk of an as-yet unknown regulation, with ensuing losses that could be quite large. A specific risk theory reduces this problem by enabling prospective owners to base their risk assessment on factors known at that time.

Another reason for making regulatory risk specific to the challenged regulation is that it solves, in some cases, the problem of property value disappearing as a result of extensive regulation, that would otherwise amount to a compensable taking, without compensation being paid to anyone by the government. The situation in *Good* is actually a good example of this problem. Assuming for purposes of discussion that Good would have been able to satisfy all other elements of a regulatory taking claim, the court's holding means that, nevertheless, he may not recover because he assumed the risk of the regulation at the time of purchase, and it is assumed that the market discounted the price of the property to account for this risk. Again assuming all other necessary elements of a takings claim, one might expect that this means that the previous owner would have had a valid claim, because the regulation caused a reduction in the value of his property.

But this is not so in a case like Good's. The previous owner did not have a takings claim because he was not denied permission to develop his property,[159] and Good has shown that, had the prior owner

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> [A] judicial decision denying compensation in defiance of a popular perception that it should be forthcoming risks undermining people's faith that, by and large, the law comports with their sense of justice. Erosion of that faith, in turn, would reduce people's willingness to make decisions-the rationality of which depends upon the content of the pertinent legal rules-without taking the time to 'look up' the rules.

Id. He goes on to explain that many big decisions, such as buying a car or renting an apartment, are routinely made without thoroughly researching the applicable legal rules, on the assumption that those rules generally comport with the decision-maker's sense of justice. This is an efficient state of affairs, and decisions that undermine the willingness of society members to act in this fashion would give rise to costs. *See id.*

[159] *See* Gregory M. Stein, *Who Gets the Taking Claim? Changes in Land Use Law, Pre-Enactment Owners, and Post-Enactment Buyers*, 61 OHIO ST. L.J. 89 (2000) (proposing that courts recognize the previous owner's claim as ripe if he has sold "his property at a reduced

applied to the Corps for permission to develop, it would have been granted, just as permission was granted to Good. Where, then, did the taking go? In a case like Good's, somewhere during the transfer of property a significant portion of its value disappears, leaving both seller and buyer unable to pursue an otherwise valid regulatory taking action and providing a windfall at their expense to the government.

A theory of regulatory risk that is specific to the challenged regulation would address this problem in some cases, as it would in *Good*, but the "government windfall" problem would appear to be a problem with any regulatory risk approach that denies relief in some circumstances when the challenged regulation was passed after the owner purchased the property. In those cases, neither seller nor buyer can recover for what would otherwise be a valid taking, and although a specific theory of regulatory risk would eliminate this scenario in cases like *Good*, it would not eliminate the problem in cases like *McNulty*.

Another problem that would remain despite a specific regulatory risk approach is that of the circularity inherent in the whole doctrine of investment-backed expectations. This problem was discussed by Justice Kennedy in the Supreme Court's *Lucas* decision,[160] and has to do with the phenomenon that, given the nature of investment-backed expectations jurisprudence, to a certain degree "property tends to become what courts say it is."[161] The more intrusive on property rights the courts allow government to become without paying compensation, the less reasonable property owners' expectations become, and the less likely they are to succeed on their claims. *Good* is an excellent illustration of this principle in action, because the court held that that the owner's investment-backed expectations were negated in part by the "regulatory climate" that existed at the time of his purchase.[162]

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price rather than . . . applying unsuccessfully for permission to build"). Note that the factual situation discussed by Professor Stein is not an exact analogy to the facts in *Good*, because he presupposes that the seller would have been denied permission to develop but chose to sell at a reduced price instead. In *Good*, it appears that had the prior owner applied for permission to develop at the time of the sale, the permit would have been granted. Professor Stein's proposal would therefore not help in a situation like that in *Good* unless the court were to recognize a taking caused by a reduction in property value due not to an actual regulation in place at the time, but by regulatory risk that such a regulation might be passed in the future.

[160] *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1034 (1992) (Kennedy, J., concurring) ("There is an inherent tendency towards circularity in this synthesis, of course; for if the owner's reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority, property tends to become what courts say it is.").

[161] *Id.*

[162] *See* Good v. United States, 189 F.3d 1355, 1361-62 (Fed. Cir. 1999) ("In view of the regulatory climate that existed when Appellant acquired the subject property, Appellant could not have had a reasonable expectation that he would obtain approval to fill ten acres of wetlands in order to develop the land."); *see also* Eagle, *supra* note 100 ("Through the marvel of circularity, *Good* stands for the proposition that the more the state intrudes upon property rights, the stronger the 'regulatory climate' becomes, and the fewer property rights remain.").

This is undeniably a problem, but one which the Court has recognized and thus far agreed to accept as a cost of doing business with the investment-backed expectations doctrine.[163]

CONCLUSION

On balance, the *Good* decision is a worrisome precedent. The court's emphasis on the regulatory climate that existed at the time Good purchased the property is deeply troubling,[164] as is the court's holding that the risk assumed by Good with respect to the wetlands regulations defeats his investment-backed expectations with regard to the ESA. For the reasons enumerated above, our takings jurisprudence would be better served by a specific regulatory risk doctrine in which a plaintiff's assumed risk is evaluated only with respect to the challenged regulation.

Some may argue that making it more difficult for property owners to recover from the government is a "win" for environmental causes.[165] This may be true in the short term, but the long-term effects of such "wins" still remains to be seen. As cases mount in which a significant portion of the public perceives an unjust result, the chances of a public backlash against environmental regulations increase.[166] The problem has to do with why cases like *Good* would be considered a win for environmental causes—that the precedent

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[163] *See Lucas*, 505 U.S. at 1034-35 (Kennedy, J., concurring) ("Some circularity must be tolerated in these matters, however, as it is in other spheres. The definition, moreover, is not circular in its entirety. The expectations protected by the Constitution are based on objective rules and customs that can be understood as reasonable by all parties involved.") (citation omitted).

[164] *See* Eagle, *supra* note 100 ("*Good* is an important case because its 'regulatory climate' language is the culmination of a subtle and gradual shift in how some judges view property rights.").

[165] *See, e.g., Florida's New Friends are 'A Rat and a Rabbit,'* PALM BEACH POST, Apr. 9, 2000, at 2E ("After years of setbacks in the Legislature, the effort to preserve Florida's natural environment from mangrove destroyers and land speculators won a crucial victory last week from another branch of government [the Supreme Court].").

[166] In a chapter on the Endangered Species Act with the subtitle, *How to create a monster that causes peasants carrying torches and pitchforks to storm your castle*, Professor DeLong writes:

> The Endangered Species Act . . . is one of two federal programs particularly responsible for stoking outrage over violations of people's right to property. The other is federal control of wetlands. Without these, many problems would arise under many state and federal laws, but wetlands and ESA are heating the boiler to the bursting point . . . . Each program responds to a problem serious enough to justify concern and action. In each case, the response is to conscript private property to national environmental causes with no compensation.

JAMES V. DELONG, PROPERTY MATTERS 91 (1997). *See also More Bad Law*, LAS VEGAS REV. J., Apr. 10, 2000, at 6B ("Last Monday, the U.S. Supreme Court delivered another blow to property owners, as it let stand a Florida ruling that could make it far more difficult for landowners to win compensation when government regulators prevent them from developing their properties.").

established reduces the overall cost of environmental regulation.[167] But that cost reduction comes at the expense of private property owners. If our society as a whole cannot allocate sufficient resources to protect the environment adequately, it is unclear why individual property owners should be expected to bear that public burden alone.

It is possible to believe *both* that the environment should be protected, *and* that the public should pay for this protection.[168] The silver rice rat and the Lower Keys rabbit are protected for the good of all of society, not for the private benefit of Good, and it seems only fair therefore that the burden of that protection be borne by all. In the immortal words of Justice Holmes: "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[169]

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[167] *See Property Rights Advocates Dealt Major Blow by Court*, NAT. WILDLIFE, Feb. 1, 2000, *available in* LEXIS, News Group File ("'This decision is a major setback for special interests that want to use legislation and litigation to make environmental regulations too expensive to enforce,' says Glenn Sugamelli, an NWF attorney.").

[168] *See* Eagle, *supra* note 100 ("[W]hether Congress should enact new environmental laws or the Corps of Engineers should adopt stringent enforcement mechanisms are issues separate from whom should bear the cost."). At least one California county has taken the position that they will purchase land needed for conservation purposes. Riverside County Supervisor Tom Mullen explained that "[t]he county is trying to identify the property it needs for its habitat-conservation plans and buy it, he said. If a purchase is not possible within five years, the county will help property owners develop. 'The Fifth Amendment means something,' he said." Onell R. Soto, *Land Ruling Concerns Inland Observers*, PRESS-ENTERPRISE, Sept. 21, 1999, at B2.

[169] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).