Takings: An Introduction and Overview*

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I. INTRODUCTION

In *Palazzolo v. Rhode Island*,[1] the Rhode Island Supreme Court found that the case was not ripe because the plaintiff landowner had not received a "final decision" from the state.[2] Secondly, the court held that the unfilled wetlands portion of plaintiff's land had "value" of $157,000 as an open space "gift."[3] Therefore, there was no deprivation of all economically beneficial use as required to meet the categorical total taking rule in *Lucas v. South Carolina Coastal Council*.[4] Third, the Court held that the plaintiff acquired the property with notice that it might be undevelopable, and consequently could not bring a takings claim.[5] Thus, the U.S. Supreme Court had before it the issues of ripeness, denominator, whether value is relevant in determining that there is no economically beneficial use left in the property, and the relevance of purchasor notice in total takings cases and determining distinct or reasonable investment-backed expectations in partial takings cases. This symposium discusses how the U.S. Supreme Court dealt with those issues.

The law of takings is divided into two principal parts: physical and regulatory. In the first category is that which we call eminent domain or compulsory purchase. With one exception (inverse condemnation), physical

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[1] 746 A.2d 707 (R.I. 2000). For a detailed summary of the facts and holdings in this case, see David L. Callies & Calvert G. Chipchase, Palazzolo v. Rhode Island: *Ripeness and 'Notice' Rule Clarified and Statutory 'Background Principles' Narrowed*, 33 URB. LAW. 907 (2001).

[2] *Palazzolo*, 746 A.2d at 713-14.

[3] *See id.* at 715.

[4] *See id.* at 713-14 (citing Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992)).

[5] *See id.* at 714-17.

taking occurs when government intends to take land or an interest in land. A regulatory taking occurs when government, through the exercise of the police or regulatory power, so burdens land, or an interest in land, with land use regulations that courts treat the action as if government had intended physically to exercise eminent domain. United States Supreme Court cases govern most aspects of takings on the theory that either the Fifth Amendment to the U.S. Constitution (nor shall private property be taken for public use without the payment of just compensation) or the Fourteenth Amendment (nor shall private property be taken without due process of law) applies to physical and regulatory takings. What follows is a general description and analysis of the types of takings, together with recent trends in each.

II. PHYSICAL TAKINGS: THE EXERCISE OF EMINENT DOMAIN, OR THE POWER TO CONDEMN

The power to take land, or an interest in land, is generally regarded as an inherent power of the state and federal governments as sovereign entities, and a delegated power (usually through enabling legislation) to local governments and public utilities. The Fifth Amendment to the U.S. Constitution is a limitation on that general power to take land, requiring that (1) the taking be for a public use or purpose (one and the same in most jurisdictions); and (2) the landowner receive just compensation for land taken by the government. Most state constitutions have similar limitations on physical takings by government.

A. The Taking Must Be for a Public Purpose

The U.S. Supreme Court has, for the most part, eliminated the public use limitation on physical takings by declaring that virtually any legislative declaration that is "conceivable" and not an "impossibility" will support such a taking, even if the purpose turns out later to be unachievable or impossible.[6] Most states subscribe to the same theory—although some, like Michigan, judicially scrutinize declarations of public purpose with a more jaundiced eye.[7] There is increasing public concern of late that government has run amuck in taking property for barely conceivable public purposes, such as casinos, automobile plants, and even a football franchise.[8] So far, however, successful

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[6] Hawai'i Hous. Auth. v. Midkiff, 467 U.S. 229 (1984); *see also* Berman v. Parker, 348 U.S. 26 (1954).

[7] *See, e.g.*, City of Lansing v. Edward Rose Realty, 502 N.W.2d 638 (Mich. 1993).

[8] *See Eminent Thievery*, WALL ST. J., Jan. 17, 2001, at A26; *For the Greater Good*, PLAN., Oct. 20, 2000, at 10-13.

challenges to physical takings claims based on lack of public use or purpose grounds have been few and far between.[9]

B. The Landowner Must Receive Just Compensation

Absent rare exercise of emergency powers, virtually any physical interference with private land requires compensation to the landowner. The principal case on the subject is *Loretto v. Manhattan Teleprompter CATV Corp.*,[10] in which the U.S. Supreme Court required that the owner of an apartment building be compensated for a small cable box and wires compulsorily attached to her building pursuant to a local ordinance. The majority of the Court turned aside the arguments of the minority that de minimis invasions of property could be uncompensated. What constitutes just compensation is well beyond the scope of this introduction. It involves the use of various forms of valuing property and interests in property that is usually the prerogative of expert appraisers, generally Members of the Appraisers Institute ("MAI").

III. REGULATORY TAKINGS

Simply stated, if a land use regulation (zoning, subdivision, and so forth) goes "too far" in reducing the use of a parcel of land, then it is a taking requiring compensation, as if the government physically took or condemned an interest in (or all of) the land. The U.S. Supreme Court established this basic principle in the 1922 case of *Pennsylvania Coal Co. v. Mahon.*[11] The question then becomes, of course, what is "too far"? In *Pennsylvania Coal*, the Court made it abundantly clear that the decision was not an attack on all land use controls. Indeed, just a year later, the same Court upheld local zoning regulations against a Fourteenth Amendment challenge (taking of property without due process of law).[12] Many times over the past dozen years, the Court has reiterated its understanding that state and local government may regulate the use of land under the police power, for the health, safety, and welfare of the people, without violating constitutional proscriptions against the taking of property without compensation.[13] At the same time, however, the Court has laid down guidelines for when a regulation takes property. These

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[9] *See, e.g.*, 99 Cents Only Store v. Lancaster Redevelopment Agency, CV 00-07572 SVW (AJWx), 2001 WL 811056 (C.D. Cal. June 26, 2001) (holding that condemning a viable store to allow the expansion of another was not a taking of property for a public use).

[10] 458 U.S. 419 (1982).

[11] 260 U.S. 393 (1922).

[12] *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[13] *See, e.g., id.*

fall into two categories: total or per se takings, and partial takings.[14] However, either category of cases must first be "ripe."

A. Ripeness

In *Williamson County Regional Planning Commission v. Hamilton Bank*,[15] the Court erected its infamous "ripeness" barrier to applied, as compared to facial, regulatory takings lawsuits. Its two-part requirement—(1) a final decision under government regulatory laws; and (2) a seeking of just compensation under the state's eminent domain procedures—makes it very difficult for landowners to bring takings challenges.[16] The Court in *Palazzolo* emphasized the "futility" defense to the ripeness barrier: a landowner is not required to futilely seek endless "final decisions" when the factual circumstances demonstrate that no development of any kind will be permitted on the subject property. Here, because fill would be required for any economically beneficial use of Palazzolo's land and no fill permit was available from the state, the takings claim was ripe. Professor Roberts analyzes the *Williamson* requirement and the futility exception in his article.

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[14] *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374 (1994); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987).

[15] 473 U.S. 172 (1985).

[16] *See id.* at 186. For critical commentaries on *Hamilton Bank*, see Michael M. Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning*, 20 URB. LAW. 735 (1988); Michael M. Berger, *"Ripeness" Test for Land Use Cases Needs Reform: Reconciling Leading Ninth Circuit Decisions is an Exercise in Futility*, 11 ZONING & PLAN. L. REP. 57 (1988); Michael M. Berger, *The Civil Rights Act: An Alternative Remedy for Property Owners Which Avoids Some of the Procedural Traps and Pitfalls in Traditional "Takings" Litigation*, 12 ZONING & PLAN. L. REP. 121 (1989); Michael M. Berger, *The "Ripeness" Mess in Federal Land Use Cases or How the Supreme Court Converted Federal Judges into Fruit Peddlers*, 1991 INST. ON PLAN. ZONING & EMINENT DOMAIN § 7; Brian W. Blaesser, *Closing the Federal Courthouse Door on Property Owners: The Ripeness and Abstention Doctrines in Section 1983 Land Use Cases*, 2 HOFSTRA PROP. L.J. 73 (1988); Douglas W. Kmiec, *Disentangling Substantive Due Process and Taking Claims*, 13 ZONING & PLAN. L. REP. 57 (1990); R. Jeffrey Lyman, *Finality Ripeness in Federal Land Use Cases from* Hamilton Bank *to* Lucas, 9 J. LAND USE & ENVTL. L. 101 (1993); Daniel R. Mandelker & Michael M. Berger, *A Plea to Allow the Federal Courts to Clarify the Law of Regulatory Takings*, LAND USE L. & ZONING DIG., Jan. 1990, at 3; Daniel R. Mandelker & Brian W. Blaesser, *Applying the Ripeness Doctrine in Federal Land Use Litigation*, 11 ZONING & PLAN. L. REP. 49 (1988); Gregory Overstreet, *The Ripeness Doctrine of the Taking Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go to Avoid Adjudicating Land Use Cases*, 10 J. LAND USE & ENVTL. L. 91 (1994); Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. LAND USE & ENVTL. L. 37 (1995); Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1 (1995).

B. Total Takings

A land use regulation totally "takes" property when it leaves the owner without any "economically beneficial use" of the land. The land may still have value. It may even retain some limited uses. It makes no difference what the landowner knew or should have known about the regulatory climate when the landowner acquired the land. If it has no beneficial economic use, then government must pay for the land or rescind the regulation (and possibly pay compensation for the time during which the illegal regulation affected the relevant land), unless, however, the regulation falls within two exceptions: nuisance, or background principles of a state's law of property. All these rules come from the U.S. Supreme Court's 1992 decision in *Lucas v. South Carolina Coastal Council*,[17] confirmed and explained in *Palazzolo v. Rhode Island*,[18] together with some gloss added by recent decisions of the U.S. Federal Circuit. It is worth examining the elements of total takings in a bit more detail, to fully understand the reach of what the Court calls this categorical or per se rule.

1. *Taking of all economically beneficial use*

The *Lucas* case presented the Court with an ideal vehicle in which to set out criteria for deciding both total and partial takings cases. It did so in the first category—total takings—in the opinion itself. It did so in the latter category in footnotes, described further below. With only two exceptions (discussed below), a regulation "takes" property when the landowner is left with no economically beneficial use of the land.[19]

Ultimately, that is what happened to David Lucas.[20] After developing a waterfront residential project, Lucas purchased the remaining two lots on his own account, intending to build upscale single-family residences on them.[21] However, before he could commence construction, the South Carolina Coastal Council moved the beach line (seaward of which construction was prohibited) so that Lucas's lots were now in a construction-free zone.[22] The original line, the new line, and the coastal protection statute by which authority the Council

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[17] 505 U.S. 1003 (1992).

[18] 533 U.S. 606 (2001).

[19] *See Lucas*, 505 U.S. at 1019. For collective comment on *Dolan* and *Lucas*, see TAKINGS: LAND DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS* (David L. Callies ed., 1996), and ROBERT MELTZ ET AL., THE TAKINGS ISSUE (1999).

[20] *See generally* DAVID LUCAS, LUCAS VS. THE GREEN MACHINE (1995) (providing the historical narrative of this landmark case).

[21] *See Lucas*, 505 U.S. at 1006-08.

[22] *See id.* at 1007-09.

acted were designed to further a host of health, safety, but primarily welfare purposes largely unique to coastal areas.[23] Figuring predominately in the list of public purposes was the protection of habitat (plant, animal, and marine species), dunes, natural environment, and the tourist industry.[24]

Lucas claimed that the moving of the line, together with the development restrictions imposed by the statute and its regulations, took his property without compensation by denying him a permit to construct anything but walkways, and permitting no uses but camping and walking on the two lots.[25] The South Carolina Supreme Court upheld the statute largely on the grounds of the paramount governmental purposes set out in the Beachfront Management Act, and Lucas appealed.[26]

The U.S. Supreme Court reversed.[27] The Court announced that a regulation that removes all productive or economically beneficial use from a parcel of land is a taking requiring compensation under the Fifth Amendment.[28] Note that the Court writes of *use* and not *value*. Clearly, two beachfront lots have value even if a regulation prevents all economic use. "Salvage" uses like camping and picnicking do not count as "economically beneficial," like building a house. It is a taking regardless of how or when the property was acquired, regardless of the "expectations" of, or notice to, the landowner, and regardless of the public purpose or state interest which generated the regulation. For too long, according to the Court, police power regulations have primarily conferred "public benefits."[29] For this the *public* must pay, rather than the landowner upon whom the burden of such regulation falls:

> 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.[30]

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[23] *See id.*

[24] *See id.* at 1010.

[25] *See id.* at 1007-10.

[26] *See id.* at 1009-10.

[27] *See id.* at 1004.

[28] *See id.* at 1016-19. Note that this is not the same as rendering the lots or parcels *valueless*, as some commentators would have it. *See, e.g.*, MELTZ, *supra* note 19, at 140, 218.

[29] *See Lucas*, 505 U.S. at 1024.

[30] *Id.* at 1027. For a historical argument that most private use of wetlands is not part of such title, see Fred P. Bosselman, *Limitations Inherent in the Title to Wetlands at Common Law*, 15 STAN. ENVTL. L.J. 247 (1996).

2. Exceptions to the per se or categorical rule

Herein lie the *Lucas* exceptions to the per se rule of total takings: the Court requires compensation for taking of all economically beneficial use unless there can be identified "background principles of nuisance and property law that prohibit the uses [the landowner] now intends in the circumstances in which the property is presently found."[31] Such "background principles" are the subject of Jim Burling's article on the pages that follow. But briefly:

(a) If the common law of the state would allow neighbors or the state to prohibit the two houses that Lucas wants to construct because they are either public or private nuisances, then the state can prohibit them under the coastal-zone law without providing compensation. This result occurs because such nuisance uses are always unlawful and are never part of a landowner's title, so prohibiting them by statute would not take away any property rights. The Court gives as an example a law that might prohibit a landowner from filling his land to flood his neighbor's land.[32]

(b) If the background principles of the state's property law would permit such prohibition of use as the two houses Lucas proposed to construct, then again no compensation is required. However, the Court did not fully describe these principles, nor did it discuss them except in a nuisance context. Custom and public trust are increasingly relevant to the background principles inquiry,[33] as discussed by Jim Burling and Steve Eagle in their articles.

In determining whether the proposed use is a public or private nuisance and therefore forbidden without payment of compensation, the following three factors are critical, but *only* within the nuisance context: (1) the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities; (2) the social value of the claimant's activities and their suitability to the locality in question; and (3) the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners).[34]

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[31] *Lucas*, 505 U.S. at 1031. For the argument that only nuisance is a background principle exception, see MELTZ, *supra* note 19, at 377. For extended commentary on the *Lucas* exceptions, see Louise A. Halper, *Why the Nuisance Knot Can't Undo the Takings Muddle*, 28 IND. L. REV. 329 (1995); Todd D. Brody, Comment, *Examining the Nuisance Exception to the Takings Clause: Is There Life for Environmental Regulations After* Lucas*?*, 4 FORDHAM ENVTL. L. REP. 287 (1993).

[32] *See Lucas*, 505 U.S. at 1029.

[33] David L. Callies, *Custom and Public Trust: Background Principles of State Property Law?*, 30 ENVTL. L. REP. 10,003 (2000); David L. Callies & J. David Breemer, *Background Principles*, *in* TAKING SIDES ON TAKINGS ISSUES (Thomas E. Roberts ed., 2002).

[34] *Lucas*, 505 U.S. at 1030-31 (citations omitted).

3. Notice

The *Lucas* court made it clear that when a property owner learned of a land use regulation's effect on the subject property was irrelevant to a total regulatory takings challenge, just as it would be irrelevant in an eminent domain proceeding. While the Rhode Island Supreme Court attempted to engraft such a notice requirement on total takings jurisprudence, the U.S. Supreme Court in *Palazzolo* firmly rejected that attempt, as discussed by Professor Eagle and Jim Burling in their articles. However, at least one member of the Court's majority—Justice O'Connor—finds notice important in analyzing a landowner's investment-backed expectations under a *Penn Central* partial takings analysis, while another member—Justice Scalia—finds notice irrelevant to that analysis, as well as to the total takings analysis.

C. Partial Takings

A partial taking occurs whenever a land use regulation deprives a landowner of sufficient use and value that goes beyond necessary exercise of the police power for the health, safety, and welfare of the people, but stops short of depriving the landowner of all economically beneficial use. Indeed, the *Palazzolo* Court ultimately decided that Palazzolo suffered only a *partial* taking, as discussed in Robert Freilich's article. Partial takings by regulation are far more common than total takings, and the standard is not so easy to apply.

1. The rule: distinct investment-backed expectations of the landowner

In *Penn Central Transportation Co. v. City of New York*,[35] the Court set out rules for partial takings. The Court upheld New York City's Landmarks Preservation Law, which effectively prohibited Penn Central from constructing a fifty-five story office building in the air rights above Grand Central Station, a designated landmark under the law.[36] Penn Central claimed both the designation and the prohibition constituted a facial and applied taking of its property under the Fifth and Fourteenth Amendments.[37] The Court held that "landmarking" itself was broadly constitutional, and that the individual application of the law to Grand Central Station left sufficient remaining use of the property so as to be neither a total nor a partial taking.[38]

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[35] 438 U.S. 104 (1978).

[36] *See id.* at 115-16, 138.

[37] *See id.* at 128-29.

[38] *See id.* at 128-38.

Before reaching the merits of the case, however, the Court discussed in some detail the standards that applied in partial takings cases. The Court suggested "several factors" that have "particular significance" when it engages in "these essentially ad hoc, factual inquiries."[39] The factors are:

1. 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 (later also called the "reasonable expectations of the claimant").

2. 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 adjusting the benefits and burdens of economic life to promote the common good.[40]

A number of cases pick up this theme of "investment-backed expectations," including the *Lucas* decision discussed infra, although the Court discussed it largely in footnotes. While the notes are often devoted to answering the blistering barrage directed at the *Lucas* Court by the dissent (the dissent's opening salvo is: "Today the Court launches a missile to kill a mouse"[41]), they evince a clear intention to allow compensation for taking of less than all economic use, if and when such a taking is before the Court. At footnote 8, the *Lucas* Court responds to a criticism by the dissent that compensation for regulatory taking of all economic use is inconsistent with lack of compensation for a regulatory taking of, for example, ninety percent of economic use:

> This analysis errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation. Such an owner might not be able to claim the benefit of our categorical formulation, but, as we have acknowledged time and again, "[t]he economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations" are keenly relevant to takings analysis generally.[42]

This "frustration of investment-backed expectations" standard, which the Court chose 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.[43] Moreover, in an earlier footnote, the Court had already alluded to the utility of the "reasonable

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[39] *See id.* at 123-28.

[40] *Id.* at 124 (citations omitted).

[41] *Lucas*, 505 U.S. at 1036 (Blackmun, J., dissenting).

[42] *Id.* at 1019 n.8 (alteration in original) (quoting Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)).

[43] *See id.* at 1034 (Kennedy, J., concurring).

expectations standard," though in a slightly different context—that of deciding how thin to slice property interests (or, alternatively, how many sticks in the Holfeldian bundle) for purposes of deciding whether property has been taken:

> Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole. [The note then criticizes that portion of the New York state court's decision in *Penn Central Transportation Co. v. City of New York*, which suggested nearby property of the owner could be amalgamated with that portion he claimed was unusual in deciding whether a taking by regulation had occurred.] . . . The answer to this difficult question may lie in *how the owner's reasonable expectations* have been shaped by the State's law of property — i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value.[44]

2. *Investment-backed expectations are limited to partial takings*

It is critical at this stage to observe that the investment-backed expectations rule of the *Penn Central* case has no applicability to the *Lucas* per se rule. You will search in vain for any such implication. Indeed, the Federal Circuit so held in late 2000:[45]

> In sum, we conclude that, in accord with *Lucas*, and not inconsistent with any prior holding of this court, when a regulatory taking, properly determined to be "categorical," is found to have occurred, the property owner is entitled to a recovery without regard to consideration of investment-backed expectations. In such a case, "reasonable investment-backed expectations" are not a proper part of the analysis, just as they are not in the physical takings cases.[46]

The *Palazzolo* Court discussed this issue, as noted by Professor Eagle, Bob Frielich, and Jim Burling in their articles.

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[44] *Id.* at 1016 n.7 (emphasis added). For a different perspective on the "investment-backed expectations" standards, see Daniel R. Mandelker, *Investment-Backed Expectations in Taking Law*, 27 URB. LAW. 215 (1995); Lynda J. Oswald, *Cornering the Quark: Investment-Backed Expectations and Economically Viable Uses in Takings Analysis*, 70 WASH. L. REV. 91 (1995).

[45] Palm Beach Isles Assoc. v. United States, 231 F.3d 1354 (Fed. Cir. 2000).

[46] *Palm Beach Isles*, 231 F.3d at 1364; *see also* R.S. Radford & J. David Breemer, *Great Expectations: Will* Palazzolo v. Rhode Island *Clarify the Supreme Court's Murky Doctrine of Investment-Backed Expectations in Regulatory Takings Law?* 9 N.Y.U. ENVTL. L.J. 449 (2001).

D. The Denominator Issue

Common to both total and partial takings analyses is the redoubtable "denominator issue." We have already seen how the Supreme Court framed the issue in the *Lucas* footnotes discussed previously. The Court also notes, but does not resolve, the critical impact of this issue (also called the "relevant parcel" issue) in *Palazzolo*. As discussed in Steve Eagle's and Jim Burling's articles, however, Palazzolo raised this issue too late in the course of litigation for the Supreme Court to resolve. The principle issue is: What is the extent of the landowner's property interest to be considered in deciding whether the interest allegedly damaged is partially taken? Both *Florida Rock Industries, Inc. v. United States*[47] and *Loveladies Harbor, Inc. v. United States*[48] discussed the denominator issue in the context of denials of section 404 (Clean Water Act) dredge and fill permits by the Army Corps of Engineers.[49] These courts were willing to follow the rationale of *Lucas*, and consider a portion of the plaintiff's entire property in assessing deprivation of all economically beneficial use.[50] For example, in *Loveladies*, out of 250 acres the court was willing to consider only the devaluation of the 12.5 acres for which the Corps denied a permit.[51] With the difference being $2.7 million before the permit denial and $12,500 thereafter, the trial court awarded the $2.7 million, which the Federal Circuit affirmed.[52] Similarly, in *East Cape May Associates v. State*,[53] the court held that the denominator of the parcel would not include adjacent property that was subdivided and sold many years prior to the enactment of the regulations at issue.[54]

Some courts, however, have reached the opposite conclusion. For example, in *Corn v. City of Lauderdale Lakes*,[55] the Eleventh Circuit cited *Penn Central* in rejecting a landowner's claim to the taking of a particular property right, rather than looking at his land as a whole, since he possessed a "full bundle."[56]

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[47] 18 F.3d 1560 (Fed. Cir. 1994).

[48] 28 F.3d 1171 (Fed. Cir. 1994).

[49] *See id.* at 1173, 1179-82; *Florida Rock*, 18 F.3d at 1562, 1567-71.

[50] *See Loveladies*, 28 F.3d at 1179-82; *Florida Rock*, 18 F.3d at 1568-69.

[51] *See Loveladies*, 28 F.3d at 1180-81.

[52] *See id.* at 1173-75, 1183.

[53] 693 A.2d 114 (N.J. Super. Ct. App. Div. 1997).

[54] *See id.* at 124-25. To the same effect is *Palm Beach Isles Assoc. v. United States*, 208 F.3d 1374 (Fed. Cir. 2000), in which the Federal Circuit held that the relevant parcel for takings analysis purposes was 50.7 acres, rather than 311 acres. *Id.* at 1380-81. The court later separated out a 1.4 acre parcel in a subsequent decision of the same name. *See* Palm Beach Isles Assoc. v. United States, 231 F.3d 1354, 1364-65 (2001).

[55] 95 F.3d 1066 (11th Cir. 1996).

[56] *See id.* at 1074.

Similarly, the Tenth Circuit in *Clajon Production Corp. v. Petera*[57] rejected the so called "single stick" argument in holding that the right to hunt on one's own property could not be analyzed as a taking, separate from other property rights and values on the same property, citing *Penn Central* and specifically rejecting *Florida Rock*.[58] In *FIC Homes of Blackstone, Inc. v. Conservation Commission of Blackstone*,[59] the court, also citing *Penn Central*, declared that takings jurisprudence requires a consideration of the parcel as a whole rather than by individual segments, and accordingly, appraised the effect of the regulation on plaintiff's property based on all thirty-eight of plaintiff's lots to hold that plaintiff was not completely deprived of all economically beneficial use.[60] Following the same approach, the court in *Karam v. State*[61] considered factors such as whether the parcels involved were always bought and sold as a single unit, whether the plaintiffs bought both parcels under a single contract and sold it as a single unit, and whether the parcels were assessed for tax purposes as a single lot.[62]

This application of the "nonsegmentation" principle was followed with a vengeance by the Supreme Court of Michigan in *K & K Construction, Inc. v. Department of Natural Resources*.[63] Here, plaintiffs were denied a permit to fill a portion of their property that was designated as wetlands.[64] Although most of the wetlands were located on one parcel in particular, the property consisted of four parcels in total.[65] Both the trial court and court of appeals only considered the one parcel that was affected by the regulation, and held that the plaintiffs were entitled to compensation since the denial of the permits resulted in a deprivation of plaintiffs' interest in developing the property.[66] The supreme court, however, reversed and remanded, holding that the relevant denominator included all four parcels located on the property.[67] Specifically, the court reasoned, "[i]n this case it is neither realistic nor fair to consider only parcel one for purposes of the taking analysis. Parcels one, two, and four are bound together through their contiguity, the unity of J.F.K's ownership interest

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[57] 70 F.3d 1566 (10th Cir. 1995).

[58] *See id.* at 1577.

[59] 673 N.E.2d 61 (Mass. App. Ct. 1996).

[60] *See id.* at 67.

[61] 705 A.2d 1221 (N.J. Super. Ct. App. Div. 1998).

[62] *See id.* at 1228; *see also* Daddario v. Cape Cod Comm'n, 681 N.E.2d 833, 837 (Mass. 1997) (holding that "restrictions on a landowner's right to extract minerals . . . is not necessarily a regulatory taking when the property as a whole retains substantial value.") (citing Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 496-97 (1987)).

[63] 575 N.W.2d 531 (Mich. 1998).

[64] *See id.* at 534.

[65] *See id.*

[66] *See id.*

[67] *See id.* at 536, 540.

in all three of these parcels, and plaintiffs' proposed comprehensive development scheme."[68] That these and other cases continue to apply the denominator theory in takings cases is probably a sufficient response to the post-*Lucas* language in *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust*,[69] where the Court rejected segmentation of property interests for takings purposes in a non-land use context,[70] though occasionally a judge will read *Concrete Pipe* to reject the argument that there is a denominator issue involved in a nonphysical property rights case.[71]

IV. CONCLUSION

Palazzolo represents a critical addition to the jurisprudence of regulatory takings. The case clarifies the rules on ripeness, emphasizes the notice and background principles rules for total or per se categorical takings inherent in *Lucas*, and suggests avenues of dealing with investment-backed expectations for partial takings under *Penn Central*. What's left for the Court to decide is how it will deal with the segmentation or relevant parcel issue in regulatory takings, and (now that we know what is *not* a background principle exception to the *Lucas* categorical or total taking rule) what does in fact constitute such a background principle so as to permit a total regulatory taking without compensation.

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[68] *Id.* at 537.

[69] 508 U.S. 602 (1993).

[70] *See id.* at 643-44.

[71] *See, e.g.*, Stupak-Thrall v. United States, 89 F.3d 1269, 1295 n.30 (6th Cir. 1996) (Boggs, J., dissenting). While *Concrete Pipe* has been cited several times for the proposition that real property rights must be aggregated for takings analysis purposes, *see, e.g.*, Marshall v. Bd. of County Comm'rs, 912 F. Supp. 1456, 1472 (D. Wyo. 1996); Villas of Lake Jackson, Ltd. v. Leon County, 906 F. Supp. 1509, 1516 (N.D. Fla. 1995); Broadwater Farms Joint Venture v. United States, 35 Fed. Cl. 232, 239 (1996); Stephenson v. United States, 33 Fed. Cl. 63, 69-70 (1995); Zealy v. City of Waukesha, 548 N.W.2d 528, 532-33 (Wis. 1996), other courts have dismissed the case in a real property context on the ground that "[t]he Ordinance at issue here is not federal economic legislation, and [therefore] the *Concrete Pipe* rationale does not apply," Guimont v. City of Seattle, 896 P.2d 70, 79 n.10 (Wash. Ct. App. 1995). For the view that *Concrete Pipe* is dispositive, see MELTZ, *supra* note 19, at 146-47. For various theories on resolving the "segmentation" problem, see John A. Humbach, *"Taking" the Imperial Judiciary Seriously: Segmenting Property Interests and Judicial Revision of Legislative Judgments*, 42 CATH. U. L. REV. 771 (1993); Marc R. Lisker, *Regulatory Takings and the Denominator Problem*, 27 RUTGERS L.J. 663 (1996); Daniel R. Mandelker, *New Property Rights Under the Taking Clause*, 81 MARQ. L. REV. 9 (1997). For sharp and fundamentally philosophical criticism of recent segmentation/partial takings opinions, see Gerald Torres, *Taking and Giving: Police Power, Public Value, and Private Right*, 26 ENVTL. L. 1 (1996).