Palazzolo v. Rhode Island: Ripeness and "Notice" Rule Clarified and Statutory "Background Principles" Narrowed

David L. Callies

Kudo Professor of Law,
William S. Richardson School of Law,
The University of Hawaii;
LL.M., Nottingham University;
J.D., University of Michigan;
A.B., De Pauw University;
Member, ALI, AICP;
Past Chair, ABA Section of State
and Local Government Law;
Life Member, Clare Hall, Cambridge University.

Calvert G. Chipchase

Dean's Scholar, Law Review Editor,
William S. Richardson School of Law,
University of Hawaii.
B.A., Colorado State University.

I. Introduction

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), a physical 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 or "take" the land. U.S. Supreme Court cases govern most aspects of takings on the theory that either the Fifth Amendment to the U.S. Constitution ("[n]or shall private property be taken for public use without the payment of just compensation")[1] or the Fourteenth Amendment ("[n]or shall private property be taken without due process of law")[2] applies to both physical and regulatory takings.

1. U.S. CONST. amend. V.
2. U.S. CONST. amend. XIV.

In regulatory takings, 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, just as if the government physically took or condemned an interest in (or all of) the land.[3] This basic principle was established in 1922 in the Supreme Court case of *Pennsylvania Coal Co. v. Mahon.*[4] The question, of course, is what is "too far"?

Many times in the past dozen years, the Court has reiterated its understanding that state and local governments 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.[5] However, the Court has also laid down guidelines for when a regulation takes property.[6] These fall into two categories: total or per se takings and partial takings.[7]

In *Palazzolo v. Rhode Island,*[8] the Supreme Court addressed the effect that "notice" of an existing regulation has on both classes of regulatory takings. The Court held that the "acquisition of title after the effective date of [a] regulation" does not automatically bar either type of regulatory taking claim.[9] In the opinion, the Court also softened the ripeness barrier[10] and clarified the meaning of "economically viable use."[11] Equally important are the issues that *Palazzolo* foreshadowed but left undecided. Specifically, the Court indicated a willingness to revisit the denominator issue[12] and the concurring opinions revealed an ideologi-

3. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). The Court in *Pennsylvania Coal* 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 against a Fourteenth Amendment attack (taking of property without due process of law). *See, e.g.*, Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

4. 260 U.S. 393 (1922).

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

6. *See generally* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

7. *See, e.g., id.*

8. 121 S. Ct. 2448 (2001).

9. *Id.* at 2465. Justice Kennedy authored the opinion in which the Chief Justice and Justices Thomas, Scalia, and O'Connor joined. In addition, Justice Stevens concurred that the taking was ripe for review. *See id.* at 2468. For the section discussing the *Palazzolo* facts and procedural history, *see id.* at 2454–55.

10. In *Williamson County Reg'l Planning Comm'n v. Hamilton Bank,* 473 U.S. 172 (1985), the Court held that a regulatory taking claim is not ripe and cannot be brought "until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Id.* at 186 (emphasis added). For the section discussing the ripeness requirement, see *Palazzolo,* 121 S. Ct. at 2458–62.

11. A total or "per se" taking occurs when a regulation denies a property owner all "economically viable or beneficial use" of her land. *See, e.g., Lucas,* 505 U.S. at 1016. For the section applying this test, *see Palazzolo,* 121 S. Ct. at 2464–65.

12. *See id.* at 2465.

cal split regarding the meaning of "investment-backed expectations," the resolution of which will have a profound impact on partial takings jurisprudence.[13]

II. The Case

In 1959, Anthony Palazzolo and some associates formed Shore Gardens, Inc. to purchase and hold three undeveloped parcels on Winnapaug Pond in Westerly, Rhode Island.[14] Palazzolo soon became the sole shareholder and Shore Gardens commenced efforts to develop its property.[15] Since much of the land was salt marsh, considerable fill was needed to stabilize the land for building.[16] Shore Gardens therefore submitted several development proposals to the Rhode Island Division of Harbors and Rivers beginning in 1962,[17] all of which the division denied.[18]

The property sat idle for over a decade.[19] During that time, Rhode Island designated all salt marshes as "coastal wetlands."[20] That designation significantly limited the scope of permissible development.[21] Indeed, any filling of or building on Winnapaug Pond or adjacent lands required a "special exemption" from the council.[22] To qualify for such an exemption, "the proposed activity must serve 'a compelling public purpose which provides benefits to the public as a whole as opposed to individual or private interests.'"[23]

13. *See id.* at 2465–68. Justice O'Connor and Justice Scalia filed separate concurring opinions in which each attacked the other's conclusion as to the impact a preexisting regulation has on investment-backed expectations. *Compare id.* at 2465–67 (O'Connor, J., concurring), *with id.* at 2467–68 (Scalia, J., concurring).

14. *Id.* at 2455. For an extensive discussion of the *Palazzolo* facts and procedural history, *see* Tyson Smith, *Investment-Backed Expectations, Background Principles and the Public Interest: Palazzolo and Beyond, in* TRENDS IN LAND USE LAW FROM A TO Z (Patricia E. Salkin ed., 2001).

15. *Palazzolo,* 121 S. Ct. at 2455.

16. *Id.*

17. *Id.* at 2455–56. Shore Gardens filed the first application in 1962; however, that application was denied for clerical reasons. *Id.* at 2455. Shore Gardens soon filed a second and then a third application. *Id.* After initially indicating its approval, the Rhode Island Department of Natural Resources rejected the proposals, "citing adverse environmental impacts." *Id.* at 2456.

18. *Id.* The third and final application was referred to the Rhode Island Department of Natural Resources, which issued a conclusive denial in 1966. *Id.*

19. *Id.* at 2455.

20. *Palazzolo,* 121 S. Ct. at 2454. In 1971, the state created "the Council," which is "an agency charged with the duty of protecting the State's Coastal properties." *Id.* at 2456. The Council promulgated the regulation that designated saltwater marshes as "coastal wetlands." *Id.*

21. *Id.* at 2456.

22. *Id.* at 2456. Winnapaug Pond was classified "Type 2 water," and all Type 2 waters were so restricted. *Id.* at 2458–59.

23. *Id.* at 2456.

In 1978, title to the property passed by operation of law to Palazzolo individually.[24] Palazzolo quickly resumed development efforts and in 1983, he filed an application to dredge and fill eighteen acres.[25] The council denied that application as being too substantial.[26] In 1985, Palazzolo submitted a new and significantly smaller development proposal.[27] This application was also rejected by the council. The council concluded that the proposed development could not proceed under any circumstances because it did not serve a "compelling public purpose" and was therefore inconsistent with the regulatory standard for a special exemption.[28]

Finding no relief in his appeal of the administrative decision, Palazzolo filed a takings claim.[29] Palazzolo alleged that the regulation had deprived him of all economically viable use of his property.[30] The Rhode Island Supreme Court rejected his takings claim.[31] The court held that Palazzolo's claim was not ripe; that he was precluded from challenging any regulations enacted before he acquired title to the property; and finally, that the parcel retained economically viable use.[32]

III. Majority Opinion

A. *Ripeness*

In *Williamson County Regional Planning Commission v. Hamilton Bank,*[33] the Court established its infamous "ripeness" barrier to applied (as compared to facial) regulatory takings lawsuits. The ripeness barrier

24. *Id.* at 2456. In 1978, Shore Gardens' corporate charter was revoked for failure to pay income taxes, and title to the property passed to Palazzolo as sole shareholder. *Id.*

25. *Palazzolo,* 121 S. Ct. at 2455. This application was to dredge and fill the entire parcel for development.

26. *Id.*

27. *Id.* This application was to dredge and fill eleven acres for a private beach club.

28. *Id.*

29. *Id.* at 2456. The courts held that the Council's decision was consistent with state administrative law.

30. *Palazzolo,* 121 S. Ct. at 2456. Palazzolo claimed damages of $3,150,000, the estimated value of a seventy-four lot subdivision. The trial court found for the state. *Id.* at 2547.

31. *Id.* at 2457–58.

32. *Id.* at 2458. As to ripeness, the claim was premature, the court held, because Palazzolo had not demonstrated that a more modest proposal would also have been rejected. *Id.* The court also rejected Palazzolo's claim because it reasoned that neither a total nor a partial takings claim could be sustained for any regulation enacted before he acquired title. *Id.* at 2457. As to the merits of the total takings claim, Palazzolo conceded that he had $200,000 in development value remaining, and the court held that this defeated any total taking claim. *Id.* The court did not reach the partial taking claim because of the time bar it erected. *See id.*

33. 473 U.S. 172 (1985).

has a 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.[34] The ripeness issue was a significant element of the *Palazzolo* majority's analysis because the inability to bring takings challenges has made it difficult to reach the takings questions.[35] As there was no question that Palazzolo had pursued and been denied compensation in state court, the second requirement was clearly met.[36] The first requirement—the finality element—however, needed to be addressed.

The finality element of the ripeness barrier was erected, the Court reasoned, because the determination of whether a regulation has effected a taking cannot be made "until a court knows 'the extent of the permitted development' on the land in question."[37] Thus, "the central question in resolving the ripeness issue," the Court concluded, "is whether [Palazzolo] obtained a final decision from the Council determining the permitted use for the land."[38]

Applying this test, the Court held that the Council had in fact made a final decision with respect to development on Palazzolo's property.[39]

34. *See id.* at 186. For a critical commentary 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).

35. *See, e.g., Williamson County,* 473 U.S. at 186.

36. *Palazzolo,* 121 S. Ct. at 2458.

37. *Id.* (quoting MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 351 (1986)).

38. *Id.*

39. *Id.*

To reach this conclusion, the Court relied upon the "unequivocal nature of the wetland regulations at issue and . . . the Council's application of the regulations to the subject property."[40] That is, no development would ever be permitted on or near Winnapaug Pond, or any other "Type 2 water," without a special exemption from the Council, and the Council refused to grant such an exemption unless a "compelling public purpose" would be served.[41] Given this stringent regulation and the Council's clear ruling that neither of the proposed developments qualified for the exemption, the Court easily concluded that Palazzolo's claim was ripe for review.[42]

The state had argued that because "a landowner must give a land-use authority an opportunity to exercise its discretion," Palazzolo was required to submit another, more modest proposal before bringing a takings claim.[43] The Court, however, found that this would be futile because the "ripeness doctrine does not require a landowner to submit applications for their own sake."[44] Rather, once "the permissible uses of the property are known to a reasonable degree of certainty, a taking case is likely to have ripened."[45] Because the limitations imposed by the wetland regulations were clear and there was no indication that any substantial development would have been permitted, the claim was ripe without further applications.[46]

B. *Passage of Title*

Having disposed of the ripeness barrier, the Court turned its attention to the notice issue.[47] Before *Palazzolo,* a number of courts had reasoned that a preacquisition regulation precluded both total and partial taking

40. *Id.*

41. *Palazzolo,* 121 S. Ct. at 2458–59.

42. *Id.* at 2459. The Court concluded that the evidence established that the Council had interpreted its regulations as prohibiting fill for any purpose. *Id.* Without fill, no development could proceed and consequently, further applications would have been pointless. *See id.*

43. *Id.* The state also argued that the value of the upland parcel was uncertain. *See id.* at 2460–61. The Court disagreed, noting that the state accepted a valuation of $200,000 for the upland parcel at trial and on appeal, and therefore could not now attempt to manufacture a new controversy. *See id.*

44. *Id.* at 2460.

45. *Id.* at 2459.

46. *See Palazzolo,* 121 S. Ct. at 2462. In a final ripeness argument, the state asserted that because Palazzolo based his valuation on the value of his property with the seventy-four lot subdivision, he was required to submit another proposal for that development, have that rejected, and then bring his takings claim. *Id.* at 2461. The Court held that the state's argument lacked merit, because no fill was permitted and no development could occur without fill. *Id.* at 2461–62. Therefore, the extent of permissible development was clear. *See id.* at 2462.

47. *Id.* at 2462.

challenges.[48] Applying various analytical theories, these courts essentially concluded that because the landowner had notice of the regulation or regulatory framework when she purchased the property, she would reap an impermissible windfall if allowed to challenge the regulation as unconstitutional.[49] The Rhode Island Supreme Court applied this rule to Palazzolo's claim.[50] Specifically, the court had held that "the postregulation acquisition of title was fatal to the claim for deprivation of all economic use, and to the *Penn Central* claim."[51] That decision, the Court reasoned, amounted to "a single, sweeping rule: A purchaser or successive title holder like [Palazzolo] is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking."[52]

The Court quickly found such a rule indefensible. The Court concluded that certain land-use restrictions are "unreasonable and do not

48. *See* Good v. United States, 189 F.3d 1355, 1361 (Fed. Cir. 1999) ("One who buys with the knowledge of a restraint assumes the risk of economic loss."); Outdoor Graphics, Inc. v. City of Burlington, 103 F.3d 690, 695 (8th Cir. 1996) (holding that an inquiry into whether a regulation is a background principle of state law requires an examination of the owner's investment-backed expectations); Gazza v. New York State Dep't of Envtl. Conservation, 679 N.E.2d 1035, 1037–40 (N.Y. App. Div. 1997) (holding that no taking occurred because Gazza purchased the property with the knowledge that he would need a variance, and thus he had no right to build anything and no cognizable property interest); Grant v. South Carolina Coastal Council, 461 S.E.2d 388, 391 (S.C. 1995) (denying a permit to fill tideland to prevent another washout of the plaintiff's property was not a taking because when he purchased the property, a permit to fill tidelands was required); Brotherton v. Dep't of Envtl. Conservation, 675 N.Y.S.2d 121, 122–23 (N.Y. App. Div. 1998) (holding that denying permission to reconstruct washed-out bulkheads was not a taking because permit requirement predated the plaintiff's acquisition of the property).

49. *See* Gazza v. New York State Dep't of Envtl. Conservation, 679 N.E.2d 1035, 1038–40 (N.Y. App. Div. 1997) (holding that no taking occurred because Gazza purchased the property with the knowledge that he would need a variance, and thus he had no right to build anything and no cognizable property interest); Grant v. South Carolina Coastal Council, 461 S.E.2d 388, 391 (S.C. 1995) (denying a permit to fill tideland to prevent another washout of the plaintiff's property was not a taking because when he purchased the property, a permit to fill tidelands was required); Brotherton v. Dep't of Envtl. Conservation, 252 A.D.2d 498, 499 (N.Y. App. Div. 1998) (holding that the denial of permission to reconstruct washed-out bulkheads was not a taking because permit requirement predated the plaintiff's acquisition of the property); *see also* David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from* Penn Central *to* Dolan, *and What State and Federal Courts Are Doing About It*, 28 STETSON L. REV. 523, 556–57 (1999) (discussing other cases that have misapplied the total and partial takings rules—sometimes flagrantly).

50. *Palazzolo*, 121 S. Ct. at 2467.

51. *Id.* at 2462 (internal citations omitted). The state courts reasoned that such a purchaser is deemed to have had notice of the regulation. *Id.* The regulation had therefore become a background principle of state law, which barred a total taking. *Id.* at 2462–63. Notice of the regulation, according to the state courts, also precluded investment-backed expectations, which barred a partial taking. *Id.* at 2463.

52. *Id.*

become less so through the passage of time or title."[53] Under the state court's rule, however, "the post enactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. . . . A State would be allowed, in effect, to put an expiration date on the Takings Clause."[54] To the Court, that result was untenable, because"[f]uture generations, too, have a right to challenge unreasonable limitations on the use and value of land."[55]

In rejecting Palazzolo's total taking claim, the state court had concluded that a preacquisition regulation became a background principle of state law upon the transfer of title.[56] Of course, the Court noted, the *Lucas* "background principles" could save an otherwise total taking.[57] The Court, however, concluded that it had "no occasion to consider the precise circumstances when a legislative enactment can be deemed a background principle of state law or whether those circumstances are present here."[58] To the Court, it was sufficient for the disposition of the case to hold that "a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of State's law by mere virtue of the passage of title."[59]

Having held that the preacquisition regulation did not bar Palazzolo's total taking claim, the Court examined whether such a taking had in fact occurred.[60]

C. *No Total Deprivation of Economically Viable Use*

1. THE *LUCAS* RULE

A land-use regulation totally "takes" property when it leaves the owner without any "economically beneficial use" of the land.[61] The land may

53. *Id.*

54. *Id.* at 2462–63.

55. *Palazzolo,* 121 S. Ct. at 2463. The Court relied on *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987), for precedent. In that case, the Court, in response to an argument posed by the dissent, noted that so long as the state could not have deprived the prior owners of the property without compensation, "the prior owners must be understood to have transferred their full property rights in conveying the lot." *Id.* (citing *Nollan,* 483 U.S. at 833 n.2).

56. *Palazzolo,* 121 S. Ct. at 2462.

57. *Id.* at 2464.

58. For a discussion of such "background principles," *see* David L. Callies & J. David Breemer, *Background Principles: Custom, Public Trust and Preexisting Statutes As Exceptions To Regulatory Takings, in* PERSPECTIVES ON REGULATORY TAKINGS: SEARCHING FOR COMMON GROUND, Ch. 6 (Thomas Roberts ed., 2001).

59. *Palazzolo,* 121 S. Ct. at 2464. The Court concluded that whether a restriction or regulation is in fact a background principle of state law will "turn on objective factors, such as the nature of the land use proscribed." *Id.* (citing *Lucas,* 505 U.S. at 1030).

60. *See id.* at 2464–65.

61. *See, e.g.,* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015–16 (1992).

still have value or even retain some limited uses.[62] It makes no difference what the landowner knew or should have known about the regulatory climate when the landowner acquired the land.[63] Instead, the rule is utterly simple: if the owner is left with no beneficial economic use of the land, then the 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 the regulation falls within two exceptions: nuisance or background principles of a state's law of property.[64]

All these rules come from the U.S. Supreme Court's 1992 decision in *Lucas v. South Carolina Coastal Council,*[65] together with some gloss added by recent decisions of the Federal Circuit.[66] 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.

In *Lucas,* the Court was presented 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.[67] It did so in the second category in footnotes.[68] The rule with respect to total takings that the *Lucas* Court announced is a narrow one: a regulation that removes all productive or economically beneficial use from a parcel of land is a taking requiring compensation under the Fifth Amendment.[69] Note that the Court writes of use and not value.[70] "Salvage" uses, such as camping and picnicking, do not count as "economically-beneficial" uses, such as building a house.[71] It is a taking regardless of how or when the property was acquired, regardless of the "expectations" of, or notice to, the landowner, and, of course, regardless of the public purpose or state interest that generated the regulation.[72] For too long, according to the Court, police power regulations have primarily

62. *See, e.g., id.* at 1018.
63. *See, e.g., id.* at 1027.
64. *See, e.g., id.* at 1032.
65. 505 U.S. 1003.
66. *See* Palm Beach Isles Ass'n v. United States, 208 F.3d 1374 (Fed. Cir. 2000) (holding that defendant's denial of a dredging permit was a categorical taking because it rendered plaintiffs' submerged land valueless, but remanding for a factual determination as to whether defendant's purpose provided a nuisance defense based on the navigable servitude), *reh'g granted,* 231 F.3d. 1354, 1364 (Fed. Cir. 2000) (holding that when a categorical regulatory taking occurs, the property owner is entitled to recovery without consideration of investment-backed expectations).
67. *Lucas,* 505 U.S. at 1015–16.
68. *See, e.g., id.* at 1016, n. 7.
69. *See id.* at 1016–19. Note this is not the same as rendering the lots or parcels valueless, as some commentators would have it. *See, e.g.,* ROBERT MELTZ et al., THE TAKINGS ISSUE 140, 218 (1999).
70. *Lucas,* 505 U.S. at 1016–19.
71. *See, e.g., id.* at 1050.
72. *Id.* at 1019.

conferred "public benefits."[73] For this the public must clearly 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."[74]

Herein lie the *Lucas* exceptions to the per se rule—relied upon by the state court in *Palazzolo*—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."[75]

2. PALAZZOLO'S CLAIM

Applying this test to Palazzolo's claim, the Court held that the proscription had not denied him all economically viable use of his property.[76] The parties agreed that the property retained $200,000 in devel-

73. *Id.* at 1024.

74. *Id.* at 1027. For a historical argument that much 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).

75. *Lucas,* 505 U.S. at 1031. Therefore, 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. *Id.* at 1029. Alternatively, 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. *Id.* For commentary arguing that only nuisance is a background principle exception, *see* Meltz, *supra* note 69, 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. J. 287 (1993); J. Bradley Horn, Case Note, *Eminent Domain—Loss of All Economically Beneficial Use of Real Property Constitutes a "Taking" Within Meaning of Fifth Amendment Unless Principles of State Property and Nuisance Law Give Rise to Restrictions on Land's Use*—Lucas v. South Carolina Coastal Council, *112 S. Ct. 2886 (1992),* 43 DRAKE L. REV. 227 (1994); Brian D. Lee, Note, *Constitutional Law—Fifth Amendment—Regulatory Takings Depriving All Economically Viable Use of a Property Owner's Land Require Just Compensation Unless the Government Can Identify Common Law Nuisance or Property Principles Furthered by the Regulation*—Lucas v. South Carloine [sic] Coastal Council, 23 SETON HALL L. REV. 1840 (1993).

76. *Palazzolo,* 121 S. Ct . at 2464.

opment value.[77] Therefore, the Court held that while leaving the landowner with a "token interest" does not defeat a total taking claim, a regulation that permits "a landowner to build a substantial residence on an 18-acre parcel does not leave the property 'economically idle.'"[78]

3. THE DENOMINATOR ISSUE

In his brief to the Court, Palazzolo had argued that the upland parcel was distinct from the wetlands and therefore, it should not be considered when determining whether the property retains an economically viable use.[79] Common to both total and partial takings analyses, this raised the redoubtable "denominator issue." We have already seen how the Supreme Court framed the issue in *Lucas.* The principle question 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*[80] and *Loveladies Harbor, Inc. v. United States*[81] 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.[82] 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.[83] For example, out of 250 acres, the court was willing to consider only the devaluation of 12.5 acres for which the Corps denied a permit in *Loveladies.*[84] 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.[85] Similarly, in *East Cape May Associates v. State,*[86] the court held that the denominator of the parcel would not include adjacent property subdivided and sold many years before the enactment of the regulations at issue.[87] Again in *Palm Beach Isles v. United States,*[88] the Federal Circuit held that the relevant parcel for takings analysis purposes was 50.7 acres rather than 311 acres, then later separated out a 1.4-acre parcel in its subsequent decision.[89]

77. *Id.* at 2460. This value represents the value of a single family home that Palazzolo could develop on the upland portion of his property. *Id.* at 2457.
78. *Id.* at 2465 (citing *Lucas,* 505 U.S. at 1019).
79. *Id.* at 2465.
80. 18 F.3d 1560 (Fed. Cir. 1994).
81. 28 F.3d 1171 (Fed. Cir. 1994).
82. *See id.* at 1173, 1179–82; *Florida Rock,* 18 F.3d at 1562, 1578–79.
83. *See Loveladies,* 28 F.3d at 1179–82; *Florida Rock,* 18 F.3d at 1568–69.
84. *See Loveladies,* 28 F.3d at 1180–81.
85. *See id.* at 1173–75, 1183.
86. 693 A.2d 114 (N.J. Super. Ct. App. Div 1997).
87. *See id.* at 124.
88. 208 F.3d 1374 (Fed. Cir. 2000).
89. *Id.* at 1381.

Unfortunately for Palazzolo, he did not raise the denominator issue in the state courts, and consequently, the Court declined to address this issue.[90] The Court, however, expressed a willingness to revisit the "entire parcel" rule established in *Penn Central,* when that issue was properly before the Court.[91]

D. *A* Penn Central *Taking*

1. PALAZZOLO'S CLAIM

Although unsuccessful in his total taking claim, the issue of whether the regulation effected a partial taking remained.[92] The Court, however, was unable to reach the merits of that claim, because the state courts had not engaged in the requisite factual inquiry.[93] Recall, the state courts simply declared that notice of an existing regulation precluded a partial taking claim.[94] Having rejected that rule, the Court remanded the case for further proceedings, consistent with its opinion, to address the partial taking issue.[95]

2. ADDRESSING THE PARTIAL TAKING CLAIM ON REMAND

A partial taking occurs whenever a land-use regulation deprives a landowner of sufficient use and value and goes beyond a 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.[96] Partial takings by regulation are far more common than total takings, and the standard is not so easy to apply.

In *Penn Central Transportation Co. v. New York City,*[97] the Court set

90. *Palazzolo,* 121 S. Ct. at 2465.

91. *Id.* In *Penn Central,* the Court held that the denominator included the entire value of the company's holdings in the area. 438 U.S. at 130–31. In *Lucas,* the Court expressed discomfort with this rule. 505 U.S. at 1016 n.7 ("For an extreme—and, we think, insupportable view of the relevant calculus, *see* Penn Central Co. v. New York City[.]"). Legal commentators have since echoed this comment. *See Palazzolo,* 121 S. Ct. at 2465.

92. *Palazzolo,* 121 S. Ct. at 2465. As discussed, the total taking rule is a per se rule, but a complete loss of economically viable use is required before a landowner may benefit from its application. *See, e.g., Lucas,* 505 U.S. at 1016–19. Where a regulation has merely diminished economic value or opportunity, no total taking has occurred, but it remains entirely possible that the regulation has effected a partial taking of property. *See, e.g., Penn Central,* 438 U.S. at 124. Consequently, courts generally analyze both claims. *See* Dodd v. Hood River County, 136 F.3d 1219 (9th Cir. 1998); District Intown Props. v. Dist. of Columbia, 198 F.3d 874 (D.C. Cir. 1999); Walcek v. United States, 44 Fed. Cl. 462 (Fed. Cl. 2000); Adams Outdoor Adver. v. City of E. Lansing, 614 N.W.2d 634 (Mich. 2000); K & K Construction, Inc. v. Dep't of Natural Res., 456 Mich. 570 (Mich. 1998); Alegria v. R.E. Keeney, 687 A.2d 1249 (R.I. 1997).

93. *Palazzolo,* 121 S. Ct. at 2465.

94. *Id.* at 2462.

95. *Id.* at 2465.

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

97. *Id.*

out the 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.[98] Penn Central claimed that the designation and the prohibition constituted both a facial and applied taking of its property under the Fifth and Fourteenth Amendments.[99] The Court disagreed and 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.[100] Before reaching the merits of the case, however, the Court discussed in some detail the standards that applied in partial takings cases.[101] The Court suggested "several factors" that have "particular significance" when it engages in "these essentially ad hoc, factual inquiries":[102]

> [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.
> [2.] So, too, is the character of the governmental action.
> [3.] 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.[103]

A number of cases pick up this theme of "investment-backed expectations," including the *Lucas* decision discussed above.[104] While largely devoted to answering the blistering barrage directed at the Court by the dissent (for example, the dissent's opening salvo is: "Today the Court launches a missile to kill a mouse,"[105]) the notes 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. For example, at footnote eight, the Court responds to a dissent criticism that compensation for regulatory taking of all economic use is not consistent with lack of compensation for regulatory taking of, say, 95 percent of economic use:

98. *Id.* at 115–16, 138.
99. *See id.* at 128–29.
100. *See id.* at 128–38.
101. *Penn Central,* 438 U.S. at 128–38.
102. *See id.* at 123–28.
103. *Id.* at 124 (citations omitted).
104. *See Lucas,* 505 U.S. at 1019 n.8; Adams Outdoor Adver. v. City of E. Lansing, 614 N.W.2d 634 (Mich. 2000); Walcek v. United States, 44 Fed. Cl. 462 (Fed. Cl. 2000); Dist. Intown Props. v. District of Columbia, 198 F.3d 874 (D.C. Cir. 1999); Dodd v. Hood River County, 136 F.3d 1219 (9th Cir. 1998); K & K Constr., Inc. v. Dep't of Natural Res., 575 N.W.2d 531 (Mich. 1998); Alegria v. R.E. Keeney, 687 A.2d 1249 (R.I. 1997).
105. *Lucas,* 505 U.S. at 1036 (Blackmun, J., dissenting).

> 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.[106]

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.[107] Moreover, in an earlier footnote, the Court had already alluded to the utility of the "reasonable 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. New York City,* 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.[108]

On remand, the state court must balance these *Penn Central* factors to determine whether denying all construction, save a single family home on an eighteen-acre parcel, is indeed a partial taking of property without compensation.

IV. Concurring Opinions

The concurring opinions foreshadowed an important issue, which is directly relevant to Palazzolo's partial taking claim and the *Penn Cen-*

106. *Id.* at 1019 n.8 (alteration in original) (quoting *Penn Central,* 438 U.S. 104, 124).

107. *Id.* at 1032–36. (Kennedy, J., Concurring).

108. *Id.* at 1016 n.7 (emphasis added) (majority opinion). 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).

tral test in general: what effect does the postregulation acquisition of property have on the claimant's "distinct investment-backed expectations"?

Before discussing that issue, it is critical to first observe that the investment-backed expectations rule of *Penn Central* has no applicability to the *Lucas* per se rule. One will search in vain for any such implication.[109] Indeed, the Federal Circuit so held in late 2000.[110] That court concluded:

> In sum, we conclude that, in accord with *Lucas,* and not inconsistent with any prior holdings 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.[111]

Thus a preacquisition regulation will save an otherwise total taking only if it is in fact a background principle of state law,[112] which is a very difficult case to make following *Palazzolo.*[113]

In analyzing a partial regulatory taking claim—governed by *Penn Central*—however, the claimant's investment-backed expectations remain a relevant inquiry.[114] A preacquisition regulation might therefore be viewed as shaping such expectations, which could then influence the determination of whether a taking has in fact occurred. That is the source of the schism between Justices Scalia and O'Connor.

According to Justice O'Connor,[115] the state court erred only in holding that "the preacquisition enactment of the use restriction *ipso facto*

109. The Court compared total taking to physical taking, where, of course, any investment-backed expectations, or lack thereof, are wholly irrelevant. *See Lucas,* 505 U.S. 1015–18; *see also* Palm Beach Isles Assocs. v. United States, 231 F.3d 1354, 1362 ("Had the Court intended to make analysis of a categorical regulatory taking different from the categorical physical taking, for example regarding the question of investment-backed expectations, surely somewhere in the opinion there would have been a hint of it. There is not.").

110. 208 F.3d 1374 (Fed. Cir. 2000).

111. *Palm Beach Isles Ass'n,* 231 F.3d at 1354, 1364; *see also* R.S. Radford & J. David Breemer, *Great Expectations: Will Palazzolo v. State Clarify the Supreme Court's Murky Doctrine of Investment-Backed Expectations in Regulatory Takings Law?* 9 N.Y.U. ENVTL. L.J. 449 (2001); Barry M. Hartman, Lucas v. South Carolina Coastal Council*: The Takings Test Turns a Corner,* 23 ENVTL. L. REP. 1003 (1993) ("[J]udicial inquiry is not limited to an assessment of the value of the land before and after the alleged taking occurs.").

112. *See, e.g., Lucas,* 505 U.S. at1003.

113. *See* R.S. Radford & J. David Breemer, *Great Expectations,* 9 N.Y.U. ENVTL. L.J. 449 (2001); David Callies, *Palazzolo and Background Principles of A State's Law of Property,* LAND USE L. & ZON. DIG. (Oct. 2001).

114. *See, e.g., Penn Central,* 438 U.S. at 124.

115. *See Palazzolo,* 121 S. Ct. at 2465–68. Justice O'Connor concurred with the majority opinion but wrote separately to express her understanding of the partial takings issue. (O'Connor, J., concurring).

defeats any takings claim based on that use restriction."[116] The proper view, Justice O'Connor concluded, is that the existence of a preacquisition regulation is merely a factor that will shape and define the claimant's investment-backed expectations,[117] and those expectations are in turn but one of three factors to be weighed when determining whether a partial taking has occurred.[118] To Justice O'Connor then, the "regulatory backdrop against which an owner takes title to property" remains relevant under *Penn Central,* but it is not the only consideration.[119]

Justice Scalia,[120] on the other hand, emphasized that the mere passage of time and title should not transform an unconstitutional regulatory taking into permissible state action.[121] Rather, Justice Scalia concluded,

> The "investment-backed expectations" that the law will take into account do not include the assumed validity of a restriction that in fact deprives property of so much of its value as to be unconstitutional. Which is to say that a *Penn Central* Taking, no less than a total taking, is not absolved by the transfer of title.[122]

Under this view, a regulation must be as constitutional to the last purchaser as it is to the first.

116. *Id.* at 2465.
117. *Id.* at 2465–66.
118. *Id.* at 2466.
119. *Id.* at 2467. In her concurring opinion, Justice O'Connor expressed her disagreement with Justice Scalia's concurring opinion. For example, Justice O'Connor stated, "Justice Scalia's inapt 'government-as-thief' simile is symptomatic of the larger failing of his opinion[.]" *Id.* This disagreement with Justice Scalia reflects her belief that there should be no bright-line rules for the Takings Clause; rather, she believes that the courts should carefully examine all circumstances and weigh the relevant considerations. *Id.* Justice Scalia, on the other hand, believes in bright-line rules as a means of preventing each decision from turning on the individual predilections of a particular court.
120. Justice Scalia concurred with the majority opinion but wrote separately "to make clear that [his] understanding of how [the partial takings issue] must be considered on remand is not Justice O'Connor's." *Palazzolo,* 121 S. Ct. at 2467 (Scalia, J., concurring).
121. *See id.* at 2468. Justice Scalia rejected the "windfall" argument posited by Justice O'Connor, stating that a perceptive—or simply lucky—developer, who realizes the unconstitutionality of a regulation, should not be forced to suffer under it merely because he took title after the restriction became effective. *See id.* at 2467–68.
122. *Id.* (internal citations omitted).